SMU | Dedman School of Law

SMU Law Review

Volume 8 | Issue 4 Article 1

January 1954

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SOUTHWESTERN LAW JOURNAL

VOLUME VIII FALL, 1954 NUMBER 4

TEXAS COURT RULE AMENDMENTS WHICH WILL BECOME EFFECTIVE JANUARY 1, 1955*

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SEVERAL important rule amendments have been promulgated by the Texas Supreme Court to become effective January 1, 1955. The present discussion is in regard to these rule amendments.

PART ONE

Rule changes other than those dealing with motions for new trial.

I

Rule 86.[1] PLEA OF PRIVILEGE

This rule has been amended to provide for service of the plea of privilege on plaintiff or his attorney of record by actual delivery or by registered mail. Prior to this amendment there was no express requirement that a copy of a plea of privilege be served upon plaintiff. It is true that Rule 72 which requires that a copy of each instrument filed in a cause be served upon the adverse party is broad enough to cover a plea of privilege. This rule, however, has proved inadequate in several respects. The principal objection to Rule 72 is that it has been held to be non-jurisdictional. In other words, a failure to comply with Rule 72 is of small comfort to a plaintiff who finds out too late to file a con-

*This article is part of a lecture delivered by Professor Masterson before the Dallas Bar Association. The lecture will soon be published in DALLAS BAR SPEAKS.

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[1] TEX. RULES CIV. PROC. (VERNON, 1942) Rule 86. References hereinafter made to various "Rules" will be understood as relating to the Texas Rules of Civil Procedure.

troverting plea that a plea of privilege has been filed. Rule 86 does not set forth whether it is jurisdictional in the sense that the court has no power to act upon the plea until the notice provision therein has been complied with, or waived. However, a similar requirement for service of a controverting plea in Rule 87 was held jurisdictional in *Tunstill v. Scott.*[2] There is every reason to hope that the same holding will be applied to the requirement for notice in Rule 86. Unless this requirement is held to be jurisdictional the amendment will fall far short of remedying the situation to which it is addressed.

II

Rule 113. CITATION BY PUBLICATION IN ACTIONS AGAINST UNKNOWN OWNERS OR CLAIMANTS OF INTEREST IN LAND

As the amendment to this rule effects only a clerical change it will not be discussed.

III

Rule 119. ACCEPTANCE OF SERVICE

The only change to this rule by the new amendment is that in every divorce action in which a memorandum accepting service is involved, such memorandum in addition to the present requisites thereof shall also include defendant's mailing address.

IV

Rule 119-a. COPIES OF DECREE

This is a new rule and provides that the district court shall mail a certified copy of the final divorce decree or order of dismissal to the party signing a memorandum waiving process.

[2] 160 S.W. 2d 65, Tex. Comm. App. 1942, *adopted.*

V

Rule 209. Submission to Witness: Changes, Signing

The first paragraph of this rule has been changed by providing that where the deposition is that of a party to the suit the deponent's attorney shall be advised by registered mail when the deposition is ready. If the witness does not appear and examine, read, and sign his deposition within twenty days after the mailing of such notice the deposition shall be returned as provided for unsigned depositions.

VI

Rule 237. Appearance Day

In order to conform with the present federal rules applicable to removal of a case to the federal court the last paragraph of Rule 237 has been eliminated.

VII

Rule 237-a. Cases Remanded from Federal Court

This is a new rule. It provides that where a case is remanded from a federal court to a state court the plaintiff shall file a certified copy of the order with the clerk of the state court and shall give written notice of such filing to the attorneys of record for an adverse party, who shall have fifteen days from receipt of such notice within which to file an answer.

The purpose of this rule is to avoid judgments based upon lack of answers on the merits after remand of a case to a state court and before the defendant is aware of such remand. In order to serve its purpose, the provision for notice should be held to be jurisdictional and it is hoped that the courts will so hold.

VIII

Rule 327. For Misconduct

The general harmless error rule is 434. In effect it provides that a case shall not be reversed for error unless it appears that said error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. This rule carries forward the old harmless error rule which was Rule 62-a. As to both rules, it became established that they were not applicable to some types of error. One type was jury misconduct, the courts reasoning that public policy is sufficiently involved that jury misconduct in a case in which the verdict is essential to judgment requires reversal. To change this practice, Rule 327 was promulgated which rule expressly requires a showing of probable injury where jury misconduct is established. The new amendment expands the rule by making it also applicable to erroneous and incorrect answers on voir dire examination.

IX

Rule 355. Party Unable to Give Cost Bond

The only change in this rule is that the notice of the filing of an affidavit of inability to pay costs of appeal is now given by the appellant or his attorney.

X

Rule 389-a. Statement of Facts: Duty of Clerk Receiving

This new rule carries forward the necessity of filing the statement of facts in the trial court in certain instances; however, it modifies Rule 381 by providing in effect that it is unnecessary to file the statement of facts in the trial court where the appellee agrees to the statement of facts or where the trial judge approves said statement.

XI

Rule 474. ORIGINAL PROCEEDINGS

That part of Rule 474 which referred to mandamus based upon a conflict between a court of civil appeals opinion and other opinions has been eliminated. The reasons for this action are set forth under the next subdivision hereof.

XII

Rule 475. ORIGINAL PROCEEDINGS: PETITION FOR MANDAMUS TO COMPEL CERTIFICATION

This rule has been repealed. The reason is because Article 1728[3] has been amended to provide for presentation by application for writ of error of a contention that a court of civil appeals' opinion is in conflict with some other opinion. Thus, no longer is the procedure of mandamus applicable to such a contention.

XIII

Rule 483. ORDER OR APPLICATION FOR WRIT OF ERROR

This rule has been amended to conform with Article 1728 as amended in 1953,[4] said amendment having been discussed under the preceding subdivision hereof.

XIV

Rule 485. BOND

As the amendment to this rule is purely clerical, it will not be discussed.

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[3] TEX. REV. CIV. STAT. (VERNON, 1948) art. 1728.
[4] *Ibid.*

XV

Rule 758. Where Defendant Is Unknown or Residence Is Unknown

This rule provides for citation by publication in certain instances in partition suits. The most important change made by the new amendment is the addition of the last section to Rule 758. Citation by publication while sometimes a necessary evil is at best a very poor substitute for actual notice to a defendant. Justice requires that every effort be made to advise a defendant that he has been sued in such a way that he will have a reasonable opportunity to appear and defend himself. The change above indicated makes it the duty of the court to inquire into the sufficiency of the diligence used by the party seeking to rely upon publication. It is to be hoped that courts will make liberal use of this change and will allow citation by publication only when the judge in a given case is convinced that actual notice is impossible.

Part Two

Rule changes dealing with motions for new trial.

Historically term time was very important as to the power of a trial court to act. Thus, if a term ended while a trial was in progress everything that happened during said trial became a complete nullity. The importance of term time was even more accentuated where a final judgment, that is, one disposing of all of the subject matter and all of the parties, was rendered during one term of court, and this was the situation when the next term of court began. Regardless of how erroneous said judgment might have been, or for that matter regardless of whether the judgment was a complete nullity, the trial judge lost all power over that judgment in the suit in which the judgment was rendered with the end of the term at which it was rendered. To remedy these,

as well as other objections to a system wherein there were vacations of substance between terms, in the early nineteen twenties a movement was started to make terms of court in Texas district courts continuous. The original statute providing for continuous terms in some courts was enacted in 1923, being Article 2092.[5] This statute provided in effect that it should be applicable to district courts having successive terms throughout the year without more than two days intervening between any of such terms. The statute fixing the terms of the various district courts is Article 119.[6] Thus, it is necessary as to any district court to ascertain its terms from the provisions of Article 119. Once it is determined that a given court has continuous terms and otherwise complies with Rule 330, the successor to Article 2092, then by virtue of said Rule 330 times are substitutes for court terms in measuring the power of the court to continue a trial into a subsequent term, and, until rule 329-b becomes effective, to file motions and amended motions for new trial, and to dispose of such motions.

Article 119 has been the subject of many amendments since 1923. Some of these amendments are, to say the least, ambiguous as to whether the term of a given district court is made continuous thereby. The result has been that in some instances the bench and bar in a judicial district have considered themselves as controlled by the laws applicable to a court with vacations, said laws being often referred to as the General Practice Act, whereas actually the court in question was controlled by Rule 330. Amid the confusion which has arisen by having some courts controlled by the continuous term rules, many times referred to as the Special Practice Act, and others controlled by the General Practice Act, have been questions of filing motions for new trial, amended motions for new trial, and other matters essential in effecting an appeal from the final judgment of a trial court. Thus, a litigant

[5] TEX. REV. CIV. STAT. (VERNON, 1948) art. 2092.
[6] TEX. REV. CIV. STAT. (VERNON, 1948) art. 119.

might think himself under the General Practice Act and might secure extension of the term of court as to his case thinking that as long as the term continues the court retains power to entertain amended motions, which the litigant intends to file after preparation of the statement of facts. However, if the court in question is controlled by the Special Practice Act continuing the term in session has nothing to do with the power of the court to act. Thus, under the Special Practice Act an amended motion for a new trial must be filed within twenty days after the original motion is filed; otherwise, it cannot be filed at all. Mr. A. E. Collier has written a splendid article discussing at length the confusion above mentioned and also setting forth the rules applicable under each of the two systems.[7]

A casual reading of Mr. Collier's article is enough in itself to convince anyone that justice requires that we abolish completely the present two system practice. The amended rules on motions for new trials take long strides in that direction, although some things remain to be done.

The remainder of this article will be devoted primarily to a consideration of the effect of the new amendments upon motions for new trial under the General Practice Act.

Rule 320 is the general rule governing motions for new trial under the General Practice Act. Prior to the amendments being considered this rule provided that the original motion should be made within two days after rendition of judgment if the term of court was still in effect at that time. By the new rule the time for motion for a new trial in a district court is ten days after judgment. Because of provisions in the amended rules presently to be discussed, subdivisions A and D of Rule 320 have been eliminated. The rule as amended simply provides that new trials may be granted and that motions therefore shall be in writing, specifying each ground relied upon, and shall be signed.

[7] *The Special Practice Act in Texas*, 6 Sw. L. J. 193.

Rule 324 lists points which must be raised by motion for new trial by the one who becomes appellant, and also those which need not be so raised, as a predicate for complaint on appeal. This rule has been completely rewritten. As rewritten, the rule requires a motion for new trial in every jury case, except as to the following matters: (1) where a peremptory instruction is given, or the case is withdrawn from the jury and judgment is rendered by the court without a jury; (2) a judgment is rendered, or denied, non obstante veredicto; (3) a judgment is rendered, or denied, notwithstanding the finding of the jury on one or more special issues; (4) a motion for judgment on the verdict is made by the party who becomes appellant and is overruled; (5) the judgment appealed from is rendered by a county court within less than five full days before the term of court ends.

It is interesting to note that the above rule expressly covers a situation where a judge instead of instructing a verdict in a case in which he is of the opinion that there are no jury issues, dismisses the jury and renders judgment without the formality of a verdict.[8]

The amended rule carries forward intact the procedure whereby an appellee asserts points on appeal, and also the requirements as to a motion for new trial as a prerequisite to complaining of some matters in a non-jury case, those requirements being set forth in Rule 325, which is referred to in amended Rule 324.

Rule 329-a carries forward the present requirement that in a county court case, the time for filing a motion for new trial is within two days after final judgment, unless the term of court has less than five full days to run.

The most important new rule amendment is Rule 329-b. This new rule abolishes the difference between the times for filing and disposing of motions and amended motions for new trial under

[8] Slay v. Burnett Trust, 143 Tex. 621, 187 S.W. 2d 379 (1945).

the General Practice Act and those applicable under the Special Practice Act.

The times now applicable to motions and amended motions for new trial under the Special Practice Act (Rule 330) are under Rule 329-b now applicable in all district courts in the State of Texas, with one exception, and that is with reference to the matter of presenting the motion. Under the amended rule, applicable to all state district courts, the trial court has discretion to allow presentation of a motion or amended motion more than thirty days after it is filed; however, there is no discretion to extend the time in which the motion must be acted upon.

Mr. Collier's article, above referred to, has a complete discussion of the time periods for motions and amended motions for new trial which were at the time of said article applicable to district courts with continuous terms. That discussion is now applicable to all Texas district courts, except for the change above mentioned with reference to presentation of a motion. Reference is therefore again made to that article.

Briefly, the rules applicable in all Texas district courts are as follows:

The party desiring to file a motion for new trial must do so within ten days after the final judgment. It is here important to keep in mind that a motion for new trial frequently serves two alternative purposes. It looks back, in the sense that its purpose is to have the judgment set aside; it looks forward in the sense that if it is overruled, it becomes one of the steps in perfecting an appeal. The district court retains inherent power over a final judgment for thirty days after its rendition; thus, if a motion for a new trial is filed more than ten days after judgment, and is granted within thirty days after judgment, the order granting the motion is valid and unappealable. On the other hand if such a motion is overruled, the motion is a nullity and the appealing

party is in exactly the same position as if no motion was filed. This is because Rule 5 makes the time specified for filing a motion for new trial jurisdictional.[9] One might argue, "How can you hold that a court can grant a late motion, but that if he overrules it, it is no motion at all?" The answer is that the court does not even need a motion as a basis for exercising its inherent power, which lasts for thirty days, to set aside a judgment. The only importance of a late motion is that it calls attention to the movant's contentions. For appeal purposes there simply is no such thing as a late motion. The motion must be filed within the ten-day period or it is no motion at all. This means that the paper which is filed late cannot be used as a basis for points on appeal; it also means that in counting the times in which the various steps of an appeal must be taken, as filing the appeal bond, and the statement of facts and transcript, such times begin from the judgment.

It follows from what has been said that the importance of timely filing a motion for new trial cannot be overemphasized.

If a timely motion is filed, then movant has twenty days thereafter in which to file an amended motion. If an amended motion is not filed within that time, it cannot be filed. The same fate awaits a late amended motion as awaits a late original motion, above discussed.

The movant has thirty days from the filing of a timely original or amended motion in which to present it, unless the court in its discretion allows late presentation. The motion must be disposed of within forty-five days after it is filed, unless the parties by a written agreement filed in the case, agree otherwise. If it is not expressly disposed of within that time, it is automatically overruled by operation of law with the ending of said period, and this is true even if the judge refuses to allow late presentation.

After a motion for new trial is overruled, the court retains

[9] Jones & Sons v. Republic Supply Co., 151 Tex. 90, 246 S.W. 2d 853 (1952); see also Mr. Collier's article in 6 Sw. L. J. 193, 211.

inherent power for another thirty days over said order. While this allows a trial court an additional time to change its ruling, it has nothing to do with the times applicable in perfecting an appeal.

In conclusion, some of the matters to keep in mind under the amended rules are:

(1) The basic changes are limited to district courts.

(2) There is now but one system for filing and disposing of motions for new trials, and that is, except for presentation, the system now applicable to courts with continuous terms.

(3) The amendments, unless they do so by implication, do not dispense with the necessity of having the term of a district court without continuous terms, extended where a trial is in progress at the time when the term will expire unless extended.

(4) Reference is again made to Mr. Collier's article in 6 *Southwestern Law Journal* 193 for a discussion of many of the matters referred to herein and for some difficulties which were with us before the amendments, and which are still here. These include the matter of a trial going into a third term in courts with continuous terms.

(5) Two important rules which continue applicable in connection with the amended rules are Rule 5, making time provisions in perfecting an appeal jurisdictional, and Rule 306-a, which covers situations wherein there is a time lapse between the rendition of judgment, and the time same is reduced to writing and signed.