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Comments on the Rules of Civil Procedure

Dicta Editorial Board

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Recently many questions regarding the Rules of Civil Procedure and the new divorce statute have been brought to the attention of members of the Rules Committee, which prompts the following comments.

A.
NOMENCLATURE

The continued use by attorneys and the courts of old terms which were proper under the code, but which are obsolete under the rules, creates confusion in court procedure. Here are a few of the changes which the rules made in pleadings, which many judges and lawyers may have overlooked:

1. *"Cause of Action"* is improper as a heading or as descriptive of a claim. The correct term is *"Claim."* Instead of saying *"First Cause of Action"* we should say *"First Claim."* Rule 8 (a). The phrase "Cause of Action" was purposely omitted from the federal rules which are followed in the present Colorado practice.

2. *"Counts."* Under Rule 8 (e) 2, a party may set forth two or more statements of a claim or defense either alternately or hypothetically in one count or in separate counts or defenses. Separate counts which are based upon the same transaction or occurrence, although different or inconsistent relief is sought under each, should not be referred to as "Cause of Action" but as "First Count," "Second Count," etc.

3. *"Replication"* is an obsolete term. The correct word is "Reply," which is filed to a *"Counterclaim,"* or, on order of court, to an answer. Rule 7 (a).

4. *"Counterclaim."* This is the term to use when relief is sought against *any opposing party.* Rule 7 (a); Rule 13 (a) and (b).

5. *"Cross-claim."* This is the caption when relief is sought against a co-party. Rule 13 (g). An answer is filed to a "cross-claim." Rule 7 (a).

Under 4 and 5 above, it is improper to refer to a pleading as a *cross bill* or a *cross-complaint.* It is either a *counterclaim* if filed against an opposing party or a *cross-claim* if filed against a co-party.

6. *"Cross-complaint"* was proper in divorce proceedings under Sec. 7, Chapter 56, C. S. A., but this has been changed by the 1945 legislature. *"Counterclaim"* is now the proper term in divorce.

7. *"Demurrer"* is abolished. Rule 7 (c). This rule states: *"Demurrers,* pleas and exceptions for insufficiency of a pleading shall not be used."

8. The legal sufficiency of a pleading is raised by a motion to dismiss:

(a) As to the *complaint, counterclaim, cross-claim,* or *third-party claim,* as the case may be: That it fails "to state a *claim* upon which relief can be granted." Rule 12 (b) and (h).

(b) As to *answer* or *reply:* That it fails "to state a legal defense to the *claim,*" *counterclaim, cross-claim,* or *third-party claim,* as the case may be. Rule 12 (h).

9. Or by motion to strike:

As to a *responsive pleading* (i. e., answer to a complaint, to a cross-claim or to a third-party complaint): A *motion to strike* the entire pleading or a separate defense therein may be filed on the ground that such responsive pleading or separate defense therein "fails to state a legal defense." Rule 12 (f).

10. *"Motion for Judgment on the Pleadings"* under Rule 12 (c) should be so captioned and referred to.

11. *"Motion for Summary Judgment"* under Rule 56 should be so captioned and referred to.

Numbers 8 and 9 should not be referred to as being *"a demurrer"* or *"in the nature of a demurrer."*

B.

RULE 14—THIRD PARTY PRACTICE

This is new procedure in this state, and the committee would like to hear from the bench and bar as to how it has worked in practice.

There are many instances in which the court undoubtedly should exercise its right to order a separate trial of the third-party issues under Rules 20 (b) and 42 (b). Under these two rules it is not only proper but desirable to order separate trials if the determination of the third-party issues will unduly embarrass, delay, or put the plaintiff to expense, in all cases where the plaintiff seeks nothing from the third-party defendant and the latter seeks nothing from the plaintiff.

We believe that the proper application of these rules 20 (b) and 42 (b) has been overlooked, hence this notation.

C.

NEW 1945 DIVORCE PROCEDURE

Rule 81 (b) makes the rules inapplicable where inconsistent or in conflict with the statutes in divorce or separate maintenance actions. On April 4, 1945, the 1945 law became effective adopting the process, practice and procedure of the rules in divorce, separate maintenance and annulment proceedings.

The pertinent provisions of that statute are:

Section 1. Except as herein otherwise expressly provided, the process, the service thereof and the practice and procedure in actions for divorce, separate maintenance and annulment, shall be as may be now or at any time hereafter provided for by the Rules of Civil Procedure of the State of Colorado for civil actions.

Section 2. No trial of an action for divorce, separate maintenance or annulment shall be had until after the expiration of thirty days from the filing of the Complaint with the Clerk of the Court; and unless Plaintiff be personally present, or in lieu thereof permission of the Court be granted to present Plaintiff's testimony by deposition at said trial.

Section 3. This leaves Sec. 13, Chapter 56, C. S. A. intact on entry of decree in 48 hours and interlocutory and final decree.

Section 4. Jury trial waived as provided in rules.

Section 5. Secs. 4, 5, 9, 10 and 12 of Chapter 56 repealed.

Hence the same form of summons can be used in divorce as in the ordinary case, and the summons is served in the same manner.

The Rules Committee of the Supreme Court

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