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FORGOTTEN IDEAS ABOUT MOTIONS

LEONARD H. BUCKLIN*

The average lawyer may spend more time arguing motions before a judge than he spends in trial before a jury. That same average lawyer will spend much time reading about "trial tactics". Yet that lawyer spends little time increasing his knowledge about motions.

The thoughts expressed in this paper are simply intended to present some theories and ideas which often are forgotten by a lawyer a few years after he is out of law school. This is not intended to be a complete discussion of motions. The discussion is eclectic and incomplete; many types of motions and many ideas about motions are not even mentioned. The discussion is intended to be thought-provoking and not comprehensive.

I. WHO MAY MAKE A MOTION

Every lawyer knows that a party may make a motion in his own case. We do not need to discuss that basic and unforgettable idea. Instead, we should briefly consider the person who is not a party to the action and who wishes to protect a real or imagined interest in the case.

Any person interested in a lawsuit may make a motion with reference to his interest in the suit. This is true whether or not he is legally and technically a "party".[1]

The most common instance of a motion made by a person not a party to the action is a motion for intervention. It is common enough to be the subject of a special federal and state rule of procedure; namely, Rule 24.[2] A person may intervene when he needs to protect his interests. The Rule 24 motion is an example—not a limitation—of a basic right to make a motion even though the person making the motion is not a party to the action.

Motions may be made by persons not parties in many other situations. For example, a purchaser at a judicial sale may be

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1. *E.g.*, Leslie v. Gibson, 80 Kan. 504, 103 P. 115, 26 L.R.A. (NS) 1063, 1033 Am. St. R. 219 (1909) (grantee may move to reopen case of grantor); State v. Werder, 200 Minn. 148, 273 N.W. 714 (1937) (interested adjoinng property owner may move to prohibit payment of condemnation settlement); and 37 AM. JUR. MOTIONS § 7 (1938).

2. FED. R. CIV. P. 24; N.D. R. CIV. P. 24.

allowed to proceed by motion in the principal case that led to the judicial sale.[3] This illustrates the basic principle: If you are interested, you can make a motion (whether the court will admit you into the suit or grant your motion is a separate question).

Sometimes a person may make a motion even though it is not technically made to protect his own interests. The motion to appear as *amicus curia* is well known, and is such a motion.

It is the theory utilized by the *amicus curia* which really explains why persons who are not parties to the lawsuit may make motions. The object of a lawsuit is to do justice. If someone who is a party—or someone who is not a party—raises a point which will afford better justice or avoid an injustice, there is no reason why the court should not at least consider the motion.[4]

II. WHAT A MOTION IS

Perhaps the best we can do to define a motion is to say: A motion is an application made to a court for the purpose of getting something done.

A motion is usually a proceeding incidental to some other action, but often it may be a wholly distinct or independent proceeding that is called a motion. An example is the North Dakota proceeding for amercement of a sheriff. Under the North Dakota statutes, this amercement is to be done as a motion rather than as an independent action.[5]

However, as a general matter, motions are appropriate and available only in the absence of remedies by regular pleadings and only after a suit has been started with a pleading and process. It has been said that a motion generally relates to procedure.[6] But it is more accurate to say only that many motions ask for procedural items, and not for substantive relief.

As a practical matter, motions often dispose of a trial of the merits. Sometimes, by using a motion one may stop the lawsuit altogether. For examples, consider the motions for dismissal for lack of proper service of process or for keeping out of a trial a critical piece of evidence. And often substantive relief is requested to obviate a trial, as in a motion to dissolve an attachment made by the true owner of property when he is not the defendant, or in a motion for summary judgment.

No discussion of motions is complete without a reference to dilatory motions. The need to discuss them arises because of the

3. Burner v. Hevener, 34 W. Va. 774, 12 S.E. 861, Am. St. R. 948 (1891).
4. This is not to say that there must be consideration of prolonged argument. *See* the remarks about dilatory motions in text at pages 190-1.
5. N.D. CENT. CODE 28-21-19 (Supp. 1969).
6. 37 AM. JUR. *Motions* § 3 (1938).

way courts deal with them. Although courts often talk about dilatory motions, they rarely do anything effective to prevent them from arising in future cases.

The usual discussion of dilatory motions in a text book solemnly intones that a dilatory motion is defined as a motion interposed for the mere purpose of delay. The text then goes on to say that these motions are not proper. Such discussion is not helpful; it merely states the obvious. The real question is whether a dilatory motion is useful to a client in some situation.

As a matter of analysis, the best thing to say about dilatory motions is that any motion can be a dilatory motion, but no motion should be a dilatory motion. Dilatory motions exist, and are useful to some clients, simply because judges and attorneys are too timid to throw dilatory motions out summarily.

A common use of a dilatory motion is the one made under the guise of a motion for a more definite statement of the complaint. Often such a motion is really used to delay answering so as to delay the plaintiff from getting the matter on to an upcoming trial calendar. In many of these instances, the judge could—and should—examine the situation, order a hearing in the next 12 or 24 hours, deny the dilatory motion and assess against the clearly offending and dilatory attorney full and adequate costs (including full attorney's fees) to reimburse the plaintiff for the cost of getting rid of the dilatory motion.[7] Out of tender concern for incompetent counsel, judges rarely do this. Instead judges ordinarily give five days notice to counsel before hearing the motion and although they deny the dilatory motion,[8] they also customarily deny the wronged party any reimbursement of attorney's fees. This disposal of the motion rewards the maker of the dilatory motion (who has gained time and paid no money penalty).

Until judges become champions of right to the extent of penalizing the incompetent attorney or the attorney who intentionally uses a dilatory motion for his client, the dilatory motion will be available to those attorneys who wish to use it.

Some attorneys may protest that although the dilatory motion is an evil, it is a necessary evil in order to gain a reasonable time to defend against a well prepared adversary who has surprised you. For example, it may be said that a dilatory motion may be

7. Assessment against an attorney may be done by the court with its power to control its own attorneys in their practice before the court. *See* N.D. CENT. CODE §§ 27-05-06 (3) and 27-10-03 (1) (1960). It may also be done under the Rule 11 sanctions which are made applicable to motions by N.D.R. CIV. P. 7(b).

8. Judges *do* deny a dilatory motion (a motion interposed for mere purposes of delay). The exceptions to this categorical statement are not numerically important. My point is that by the time the motion is denied, its purpose has been accomplished, and the dilatory party has suffered no loss by the use of the motion to gain delay.

needed to prevent a case from being put at issue and on a trial calendar before defense counsel can be reasonably well prepared. The remedy for such a situation is not a dilatory motion which holds up progress—regardless of the merits of the argument for more time. The remedy is a motion for continuance of the case over the court term on the honest ground that defense counsel is entitled to adequate time to prepare and has not yet had such a reasonable time. The trial court has a wide discretion to grant or deny motions for continuance,[9] but its duty is to grant a continuance if substantial justice will be more nearly attained.[10]

III. WHERE A MOTION CAN BE HEARD

A motion may be *made* any place in the state. Nevertheless, it can only be *heard* within the district of the venue of the case.

As a general statement, it is true that district judges, being judges of a court of general jurisdiction in the state, can generally act any place in the state. Nevertheless, the North Dakota Constitution has set up certain restrictions on the powers of judges. The Constitution specifies that district judges can act in districts other than their own only under the authority of statute.[11] The North Dakota Legislature has enacted the statutory rules under which district judges can act outside their district.[12] These statutes provide that if a contested motion is being heard by a judge of the district in which the action is pending, then the motion can be heard only in such district.[13] (However, if the motion is properly being heard by a judge of a different district, it can be heard either in the trial district or in an adjoining judicial district.)[14]

A lawyer could not safely advise his client that a motion could be heard outside of the district even if the parties agreed to waive the statutory limitation. This is because it can be argued later by an adversary that the matter is one of jurisdiction of the district court, and that the jurisdiction over the subject matter cannot be conferred by the consent of the parties. Furthermore, a North Dakota statute specifically states that an order given contrary to the limitations regarding the place of hearing of a motion shall be voidable.[15] The distinction between a voidable judgment and a void one is important since actions taken under a voidable order are proper until the order is made void by appropriate action. Since the statute provides for the appropriate action by which to

9. *In re* Smith's Estate, 69 N.D. 437, 288 N.W. 235 (1939).
10. Brady v. Malone, 4 Iowa (4 Cole) 146 (1857).
11. N.D. CONST. § 116.
12. N.D. CENT. CODE § 27-05-22 (1960).
13. N.D. CENT. CODE § 27-05-22(5) (1960).
14. N.D. CENT. CODE § 27-05-22(5) (1960).
15. *See* N.D. CENT. CODE § 27-05-23 (1960).

assert the voidability,[16] a failure to assert the voidability and to make void the order in the timely and direct way prescribed will make the order valid.[17]

It will also be noted that a judge's power allows him to hear a contested motion any place in the judicial district. The judge's power is not limited to the county where the action is brought or tried.

Furthermore, if the motion is heard *ex parte* it can be heard any place in the state that a judge can be found.[18]

Neither the presence of the clerk of court nor any other official is necessary for the judge to hear a motion.[19] Since the power of the district court resides in the judge and not in the courthouse it is not necessary to go to the courthouse to have a hearing if the parties are otherwise before the judge.

IV. WHEN A MOTION CAN BE HEARD

A motion can be made at any time; that is, before trial, during trial, or after trial. However, the scope of this writing is intentionally limited to comments pertinent to motions before trial.

Statute or court rule generally prescribes when motions may be made. In North Dakota, Rule 6(d) provides that a written motion (except for those that are heard *ex parte*) and notice of the hearing must be served not later than five days before the time specified for hearing.[20]

The procedural concept that is labeled "an order to show cause" in a civil case is usually nothing more than a motion under a different name. By using the different name for a motion, certain time limitations are dispensed with. In other words, by calling it an order to show cause, one need not make a separate application, directed to the court, requesting a shortening of the time for notice of the hearing of a motion.

For the psychological and "public-relations" reasons noted below, courts should normally refuse to issue an "order to show cause" when a "motion" would work just as well. Unfortunately, courts do not normally refuse to sign the papers presented to them when they are cast in the form of an order to show cause instead of an application for a motion on shortened time.

There is a very good reason for the moving party to cast a motion in the form of an "order to show cause". This is because

16. *Id.*
17. Smith v. King, 58 N.D. 680, 227 N.W. 228 (1929); Missouri Slope Land & Inv. Co. v. Halstead, 27 N.D. 591, 147 N.W. 643 (1914).
18. N.D. CENT. CODE § 27-05-24 (1960).
19. N.D.R. CIV. P. 77 (b).
20. N.D.R. CIV. P. 6(d).

the form is confusing enough to laymen, and to educated laymen such as judges and attorneys, that the burden of proof often is thrown on the defending party's shoulders.

An order to show cause specifically "orders" a person to come forth and show cause why something should not be done. Psychologically, therefore, everyone looks to the defendant party to prove "that he isn't guilty." This, of course, is not the correct legal principle. *Legally,* it is still up to the moving party to show that he is entitled to relief. But *psychologically,* the burden is shifted.

Not only is there a shift of the "psychological" burden of proof in an order to show cause, but also the person served with such an order feels that the court is already taking sides (against him). Legally, this is not true, but a layman who is ordered to show cause why he should not be restrained from beating his wife, cannot help but feel that the judge already believes the husband intends to beat his wife. Unless there is a reason why a paper entitled "motion" will not suffice, therefore, the courts should avoid "orders to show cause" because of the unfortunate public-relations result and because of the confusion in "psychological" burden of proof.

It may be noted that our Rule 6(d) states that an order to shorten the time for service of a motion before the hearing may be made by *ex parte* application to the court.[21] There is nothing that requires the application to be made in writing. Therefore, there is no reason why the court's own order is not enough of a record. Presumably (although, of course, it is unfortunately not always true) the court has determined that there is a need for a shortened period before issuing the order shortening the time.

A point that is not followed in practice is that when a motion is made and served by mail, notice of hearing should be served not later than *eight* days before the time specified for the hearing. This is because Rule 6(d) states that the responding party shall have at least five days notice,[22] and Rule 6(e) provides that if the notice is served by mail, three days shall be added to the time that a party has as a matter of right before the hearing.[23]

V. HOW A MOTION IS HEARD

Historically, motions generally have been heard on the basis of the affidavits presented to the court together with the pleadings.

> [T]here has never been any doubt but that affidavits are proper, and indeed in such cases the court can weigh the

21. *Id.*
22. *Id.*
23. N.D.R. CIV. P. 6(e).

> affidavits and resolve the fact issues on the basis of them, in accord with the historic practice of the courts . . . .[24]

Our North Dakota statutes specifically provide that testimony of witnesses may be taken by affidavits[25] and affidavits may be used upon a motion.[26]

In addition to affidavits, live witnesses may be used at a motion hearing. In North Dakota, our Rules provide:

> When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, *but the court may direct that the matter be heard wholly or partly on oral testimony* or depositions.[27] [emphasis added].

In many states, the practice of using live witnesses at a motion hearing is quite common. It is rather unusual in North Dakota practice, but there is no reason why it should not be resorted to. I have never had a judge refuse my request to have a witness who is present in the courtroom testify on a motion.

The use of live witnesses is a psychological advantage which is frequently overlooked by attorneys. A lawyer who would never try a case to a jury by reading depositions to the jury should realize the advantage of a live witness testifying on a motion.

Of course, the disadvantages of using a live witness are that the witness may become confused and he may be cross-examined. On the other hand, an affidavit can be drawn up at leisure (using the attorney's well-chosen words), and the affiant is not cross-examined.[28]

It should be noted that affidavits to be used by the moving party with a motion are required to be served with the motion.[29] However, this should be interpreted to mean that they may be served at any time up to the time limit set forth by the Rules for the service of the notice of motion. In other words, there seems to be no prejudice in having the notice of motion served in advance and then the affidavits served in the minimum required time of five[30] or eight days[31] before the hearing. Regarding the opposition's affidavits, opposing affidavits may be served up until one day before the hearing.[32]

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24. W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 346, at 293 (1960).
25. N.D. CENT. CODE § 31-04-01 (1960).
26. N.D. CENT. CODE § 31-04-05(6) (1960).
27. N.D.R. CIV. P. 43(e).
28. Meyer v. Wright, 234 Iowa 1158, 15 N.W.2d 268 (1944).
29. N.D.R. CIV. P. 6(d).
30. *Id.*
31. Three days are added if service is by mail, N.D.R. CIV. P. 6(e).
32. N.D.R. CIV. P. 6(d).

Unfortunately, many attorneys come to the hearing armed with their affidavits and present them to the opposing counsel at that time only, even though the attorney has had ample time to serve the affidavits before the hearing. Traditionally, the judges allow this loose and unfair practice, and judges may do so under their general powers.[33] However, it would seem that if a party wishes to object to late service of an affidavit which could reasonably have been served earlier, the court should ordinarily, and without further showing of necessity: (1) grant a continuance of the hearing in order to allow the objecting party time to consider the affidavit and to prepare any opposing affidavits or new arguments; and (2)—this is most important—allow reasonable attorney's fees against the offending attorney for the time involved in a second appearance.

A motion should ordinarily be made in writing. This is provided for by Rule 7(b).[34] There are certain advantages of judicial administration in making the motion in writing. First of all, it is the most practical way of giving proper notice of the motion. Secondly, the written motion makes a precise record of what the court acted upon.

It is frequently overlooked that in 1963 the North Dakota Supreme Court issued further rules of court for the district courts. These are not contained in the well organized and numbered Rules of Civil Procedure, but are contained in a separate code of rules. It may be argued that certain provisions in Rule V of the rules of court adopted in 1963 affect motion practice. For example, it is stated in Rule V that all motions with supporting instruments "*shall*" be filed three days before the date of the hearing and all returns "*shall*" be filed at least one day before the date of hearing.[35] The penalty for failing to comply with these provisions is that the court may vacate the motion or supporting document.[36]

VI. SUCCESS IN THE MOTIONS—COSTS

An order granting or denying a motion should briefly state upon its face the documents or evidence upon which the order was made. The common way to do this is to simply state that it was made upon the entire record and all proceedings. This is often an

33. This situation is rather common. The judge allows the practice not because of the failure of objection but because most judges take the position that if prejudice is not shown, there can be no violation of the Rules. In theory this sounds fine but in practice it puts the burden upon the objecting party to show damage to himself and ordinarily this cannot be shown. The judge customarily asks the question such as: "Are you surprised by this new material?" The attorney usually has to state that he is not surprised by the general nature of the affidavit, although he is with the particulars contained therein.

34. N.D.R. CIV. P. 7(b).

35. N.D.R. DIST. CT. V.

36. N.D.R. DIST. CT. V(a).

inaccurate description of what the judge looked at or listened to.

An order which is otherwise appealable may not be appealable if the order does not describe the papers or evidence upon which the order was made.[37] The appellate court has discretion to dismiss an appeal on such an order.

Rule 37 (also enacted by the Legislature as a general enactment of the court rules) of the Rules of Civil Procedure provides for motion costs in full amounts, including attorney's fees, which may be assessed against a losing party in certain instances.[38]

Moreover, the North Dakota Century Code provides that upon any motion the court has discretion to allow motion costs of up to $25.00.[39] Both statute and case law to be discussed later therefore indicate that in any case the court can award motion costs to the prevailing party.

A good argument can be made that the dollar limit specified by the Legislature does not bind the courts.

First of all, it may be argued that Section 27-02-09 of the North Dakota Century Code[40] provides that all statutes relating to practice and procedure shall have force and effect only until otherwise altered by rules promulgated by the North Dakota Supreme Court. The Supreme Court, of course, in fact has promulgated Rule 83 of the Rules of Civil Procedure which broadly authorizes the district courts to regulate their practice in any manner not inconsistent with the Rules of Civil Procedure.[41] The regulation of motion practice would seem to include the awarding of motion costs. Therefore, it can be argued that any statutory limit on costs to be awarded as a matter of controlling motion practice is superseded by the legislative authorization to courts to negate "practice" statutes, and the court's action in regulating its own practice in the matter before the court.

Furthermore, it can be said that the judicial power which the courts receive through the Constitution includes the power to do all acts necessary to do justice and administer their own proceedings. In many cases this power could logically include the power to assess costs of a motion in an actual and full amount. The legislature cannot remove any constitutional judicial power.

The statutory statement that the district courts have:

> All the powers, according to the usages of courts of law

37. N.D. CENT. CODE § 28-27-02.1 (1960).
38. N.D.R. CIV. P. 37(a).
39. N.D. CENT. CODE § 28-26-18 (1960).
40. N.D. CENT. CODE § 27-02-09 (1960).
41. N.D.R. CIV. P. 83.

> and equity, necessary to . . . the full and complete administration of justice . . . [42]

is a statement of existing constitutional law and not a grant or limitation.

Clearly, if motion costs are not within the power of the court to award, the court is without power to completely administer justice or to adequately control its procedure (for example, to prevent dilatory motions).

The equity power of the courts has historically included the power to award actual attorney fees to a prevailing party where it is thought necessary for equitable reasons.[43]

> Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts. The suits 'in equity' of which these courts were given 'cognizance' ever since the first Judiciary Act, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery. . . . The sources bearing on eighteenth-century English practice . . . uniformly support the power not only to give a fixed allowance for the various steps in a suit, what are known as costs 'between party and party,' but also as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit, technically known as costs 'as between solicitor and client. . . .' Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation.[44]

It is not necessary for the trial court to receive evidence as to what is a reasonable attorney's fee in order to award an attorney's fee on a motion. Our court has said:

> The court is an expert on what is a reasonable fee. . . . The trial judge before whom the action was tried had knowledge of the character of the litigation, the preparation and skill of the presentation, and the results obtained, and could make appraisal of the reasonable value of services rendered with or without the aid of additional testimony. It may consider its own knowledge and experience in making an appraisal of the reasonable value of the services rendered.[45]

In spite of the constitutional law argument that the courts have inherent power to award costs, courts have sometimes indicated

42. N.D. CENT. CODE § 27-05-06(3) (1960).
43. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939).
44. *Id.* at 164-66.
45. Morton County Bd. of Park Comm'rs v. Wetsch, 142 N.W.2d 751 (N.D. 1966).

they do not possess this power.[46] Even our North Dakota Supreme Court has sometimes indicated this. Thus, in *Sjol v. Sjol*,[47] our court said that the limitation of $25.00 provided in Section 28-26-18 of the North Dakota Century Code "applies to motions generally."[48]

However, in the *Sjol* case, the court then went on to allow higher motion fees by pointing out that in divorce actions either party may be required to pay the money to prosecute or defend the action. The court then stated that under the divorce statutes[49] there is authority for the court to require payment of larger motion costs than $25.00.

The same situation—the court finding a broad exception which allows assessment of substantial costs—occurred in *Swallow v. First State Bank*.[50] There the court first said that it is well settled that costs are creatures of, and can be awarded only when authorized by statute. Nevertheless, the court went on to state, when a motion is granted "within the sound discretion of the trial court"[51] the court may require payment of larger sums as a condition precedent to the court acting in favor of the party against whom the costs are imposed. Thus the court said (dicta) that when a new trial is awarded on the basis of the discretion of the trial court (and not on the basis of the party being entitled to a new trial as a matter of right) then the court may require the moving party to pay the entire cost of the former trial as a condition precedent to a new trial.

A hint as to what might now occur in our present court is found in *Aune v. City of Mandan*.[52] The court without discussion merely awarded $75.00 as motion costs for a motion in the Supreme Court. It would seem that if the Supreme Court is entitled to award motion costs in excess of an alleged statutory limit that the trial court should have the same power. Both the Supreme Court and the trial court have the constitutional power and the duty to see that justice is done through the courts' procedure concerning motions.

In the *Aune* case the Supreme Court phrased the award of motion costs in terms of a condition to its denial of a motion. Hence, it could be said that the decision comes within the theory enunciated in *Swallow v. First State Bank*.[53] This theory is, of course, that costs may be awarded as a condition of the court

46. *E.g.*, Redfield v. Davis, 42 S.D. 556, 176 N.W. 512 (1920).
47. 76 N.D. 336, 35 N.W.2d 797 (1949); *see also* Torgrinson v. Norwich School Dist., 14 N.D. 10, 103 N.W. 414 (1904).
48. Sjol v. Sjol, 76 N.D. 336, 35 N.W.2d 797, 799 (1949).
49. N.D. CENT. CODE § 14-05-23 (1960).
50. 35 N.D. 323, 160 N.W. 137 (1916).
51. *Id.* at 328, 160 N.W. at 139.
52. 166 N.W.2d 559 (N.D. 1969).
53. 35 N.D. 323, 160 N.W. 137 (1916).

exercising its discretion in favor of the person against whom the costs are awarded. Such a theory, however, is bottomed on the idea that the court has an inherent power to do justice.

Since the court has held that full costs in motion practice may be awarded against an offending party who is granted relief by the court, it would also seem just—and equally as rational—that costs may also be awarded even though the offending party does not obtain relief by paying for it. A wrongdoer who clearly is not entitled to relief (i.e., to discretion in his favor) should not be treated better than one whose lapse is not so serious. Either our courts have the power to adequately and equitably control motion practice or they do not. Adequate and equitable control rests on the power to financially penalize the party who misuses motion procedure and to prevent financial loss to the party who has been wronged. I would hope that in an appropriate case the North Dakota Supreme Court would take the opportunity to adequately research the constitutional, equitable, and administrative principles involved and clearly state that trial courts do have the power to award full motion costs when necessary to penalize an offending party and to control motion practice.

The arguments regarding the granting of costs on a motion may be summarized as follows:

1. It is clear that a court has discretion to allow motion costs in any case. Whether there is any limit short of actual costs the amount that a court may award is a matter of dispute.

2. In some instances a specific rule of civil procedure will apply to the situation and will provide for motion costs without limitation as to amount, *e.g.*, Rule 37.

3. In some instances a specific statute will be authority for granting costs without limitation as to amount, *e.g.*, divorce statutes authorizing payment of attorney fees by either party.

4. Motion costs may be assessed without limitation as to amount against a party who is being given something by the exercise of the court's discretion.

5. There is considerable authority for the proposition that the awarding of costs in most situations is limited to an award not exceeding the $25 authorized by the legislature through Section 28-26-18 of the North Dakota Century Code.

6. It can be argued that the awarding of motion costs is a matter of practice which the courts by statutory authorization may regulate themselves; Section 27-02-09 of

the North Dakota Century Code and Rule 83 of the Rules of Civil Procedure combine to overcome the $25 limitation of Section 28-26-18 of the North Dakota Century Code.

7. The practice of equity courts has allowed awarding of full motion costs and statutes grant the court all the powers, according to the customary equity practice, to do full justice.

8. The policing of motion practice through motion costs is necessary for the administration of justice; therefore, the courts have the constitutional power to assess and award full motion costs and that constitutional judicial power cannot be restricted by the legislature.

My personal experience in the trial courts of this state is that the trial courts recognize that they have the power to assess adequate costs in motion proceedings, even though the costs exceed $25.00. This has been done either on the theory that the trial court has statutory and Supreme Court authorization to regulate effectively its own practice in motions or on the theory that it is a part of the constitutional power of the court to do justice.

Very simply, as mentioned before, if full motion costs are not within the power of the court to award, the court is without power to completely administer justice or to adequately control its procedure. The court is not without power; and the court does have authority to award motion costs to do equity and control procedure. It is not only the court's power and authority; it is the court's duty.