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Counterclaims and Third-Party Practice under the North Dakota Rules

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COUNTERCLAIMS AND THIRD-PARTY PRACTICE UNDER THE NORTH DAKOTA RULES

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RULES 13 THROUGH 16

Among the most interesting innovations made by the new North Dakota Rules of Civil Procedure[1] are the new provisions regarding counterclaims and third-party practice. While these provisions are best understood when placed in the context of a number of other rules relating to joinder of parties and claims, they are themselves of sufficient importance to warrant close consideration.

Counterclaims are regulated by the provisions of Rule 13, which reads as follows:

RULE 13. COUNTERCLAIM AND CROSS-CLAIM[2]

(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.[3]

(b) *Permissive Counterclaims.* A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.[4]

(c) *Counterclaim Exceeding or Less Than Opposing Claim.*

(1) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.[5]

(2) In an action upon contract for the recovery of money only, when the defendant by his answer shall not deny the

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1. Previous papers in this series are Crum, *The Proposed North Dakota Rules of Civil Procedure*, 32 N.Dak.L.Rev. 88 (1956); *Ibid*, 33 N.Dak.L.Rev. 41 (1957); Crum, *Summary of the North Dakota Rules of Civil Procedure*, 33 N.Dak.L.Rev. 287 (1957) (a short and non-technical treatment of major provisions). Out-of-state readers are advised that the North Dakota Rules of Civil Procedure became effective by order of the Supreme Court of North Dakota on July 1, 1957.

2. This rule supersedes N.D. Rev. Code § 28-0714 (1943) (dealing with counterclaims). It is substantially identical with Fed.R.Civ.P. 13 with the exceptions noted in footnotes 6, 7, and 11.

3. This is identical with Fed.R.Civ.P. 13 (a).

4. This is identical with Fed.R.Civ.P. 13 (b).

5. This is identical with Fed.R.Civ.P. 13 (c) (1).

plaintiff's claim but shall set up a counterclaim amounting to less than the plaintiff's claim, the plaintiff may have judgment as upon default for the excess of his claim over such counterclaim. In such case, the plaintiff shall file with the clerk of the court a statement admitting such counterclaim, which statement shall become a part of the judgment roll.[6]

(d) *Counterclaim Against the State.* These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the State of North Dakota or an officer or agency thereof.[7]

(e) *Counterclaim Maturing or Acquired After Pleading.* A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.[8]

(f) *Omitted Counterclaim.* When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.[9]

(g) *Cross Claim Against Co-Party.* A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counter-claim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.[10]

(h) *Additional Parties May Be Brought In.* When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained.[11]

(i) *Separate Trials; Separate Judgments.* If the court orders separate trials as provided in Rule 42 (b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54 (b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.[12]

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6. This preserves N.D. Rev. Code § 28-0907 (1943). No comparable provision is found in the Federal Rules.

7. This is identical with Fed.R.Civ.P. 13 (d), with the exception that "State of North Dakota" has been substituted for "United States."

8. This is identical with Fed.R.Civ.P. 13 (e).

9. This is identical with Fed.R.Civ.P. 13 (f).

10. This is identical with Fed.R.Civ.P. 13 (g).

11. This is identical with Fed.R.Civ.P. 13 (h), except that it omits the following clause found at the end of the Federal Rule: "and their joinder will not deprive the court of jurisdiction of the action."

12. This is identical with Fed.R.Civ.P. 13(i).

RULE 13 PLACED IN CONTEXT

The significance of Rule 13 becomes most apparent when it is considered as part of a group of rules which includes Rules 14, 18, 19, 20, and 42.[13] These rules, which were warmly debated at the time of their inclusion in the federal procedure,[14] have the general effect of permitting a greatly increased flexibility in the joinder of claims and parties. Underlying their specific provisions, it is believed, are three general principles of modern procedural law.[15]

The first of these is that where a plaintiff and a defendant in a given civil action have more than a single dispute which requires adjustment, the resolution of all claims as between the parties ought to be permitted in a single proceeding at the option of either party. In pursuance of this principle, Rules 13 and 18 accordingly permit absolutely unlimited joinder of claims and counterclaims in complaint and answer. It should be added, however, that the right thus granted to unite claims in a *pleading* does not necessarily mean a union of such claims for trial in a single *hearing* follows automatically; Rule 42 makes this latter question one essentially for the sound judicial discretion of the court.[16]

The second principle is that of completeness of adjudication with regard to the subject matter of an action.[17] The rules imple-

13. These rules cover the topics of third-party practice, joinder of claims and remedies (Rule 18), Necessary and Permissive joinder of parties (Rules 19 and 20), and the consolidation or separation of actions for trial (Rule 42).

14. A majority of practitioners present at a well-known conference held in Cleveland in 1938 to discuss the newly-adopted Federal Rules actually voted against the principle of unlimited joinder of claims found in Rules 13 and 18. See *Tabulation of Questionnaires*, 13 U.Cin.L.Rev. 149 (1939). For the reported discussion, see Symposium, *New Federal Rules of Civil Procedure*, 13 U.Cin.L.Rev. 1, 57-59 (1939).

15. It is interesting to compare the principles said to underlie English judicial reforms. These have been summarized as follows:

"1. The principle of unified jurisdiction.
2. The principle of unified procedure.
3. The principle of judicial control over procedure.
4. The principle of completely settling the controversy in one proceeding:
   (1) Parties.
   (2) Causes of Action.
   (3) Counterclaims.
   (4) Third Parties.
5. The principle that the action shall proceed by short and direct steps." Blume, *Free Joinder of Parties, Claims, and Counterclaims*, 2 F.R.D. 250 (1953).

16. Rule 42 (b) permits a court to order a separate trial or hearing of any claim "in furtherance of convenience or to avoid prejudice." This provision was inserted for obvious reasons, primarily to obviate the danger the unlimited joinder principle be deemed to permit an unrestricted battle royal.

17. "The new rules of procedure are designed to enable the disposition of a whole controversy such as this at one time and in one action, provided all parties can be brought before the court and the matter decided without prejudicing the rights of any of the parties." United States v. American Surety Co., 25 F.Supp. 700, 701 (E.D.N.Y. 1938). "The compulsory counterclaim device is, of course, only a means of bringing all logically related claims into a single litigation, through the penalty of precluding the later assertion of omitted claims." Lesnik v. Public Industrial Corporation, 144 F.2d 968, 975 (2d Cir. 1944); see also Kuenzel v. Universal Carloading & Distributing Co., 29 F.Supp. 407

ment this principle by providing in effect that whenever a given transaction or occurrence, or series of transactions or occurrences, comes before a court for adjudication of claims arising as between the parties, all claims which exist between the parties to the action with regard to the happenings pleaded shall be resolved as completely as possible.[18] This means that when any portion of a transaction or occurrence is pleaded to the court as the basis of a claim, the *entire* transaction or occurrence is thereby automatically placed in issue as between the parties.[19]

The third principle is that whenever a transaction or occurrence, or series of transactions or occurrences, involving numerous parties comes before the court the claims of all parties involved should be resolvable in a single proceeding so far as it is possible to gain jurisdiction of all the parties. This principle explains the reason for the existence of numerous procedural devices embodied in the new Rules.[20]

The great justification for these principles is simply that they are convenient from the standpoint of the administration of justice.[21] Under the new rules it is often possible for one action to do the work which formerly required several, thereby saving both time and court costs to judges, attorneys, litigants and witnesses. The total effect of the Rules in this field has been summarized by one writer in the statement the rules abandon (1) all restrictions on joinder of actions and use of counterclaims where the parties are the same; (2) all restrictions on joinder of defenses; (3) all restrictions on joinder of actions and counterclaims which involve different parties except one, namely that they must all arise from the same transaction, occurrence, or series of transactions and occurrences and involve a common question of law or fact.[22]

(E.D.Pa. 1939); 1 Barron & Holtzoff, Federal Practice and Procedure 778, n. 10 (1950); 3 Moore's Federal Practice 27-36 (2d ed. 1948).

18. The question of what is comprehended within a single claim is often a knotty and difficult one. The subject is treated at length in Restatement, Judgments §§ 61-67 (1942).

19. It is to be noted that this means that issues tendered by pleadings under the new rules will often be much broader than the face of the pleadings themselves. The law is that a plaintiff who pleads only a part or portion of the claims he possesses arising from a given transaction or occurrence has split his cause of action and thereby waived the unpleaded aspects of his case. Buchanan v. General Motors Corporation, 158 F.2d 728 (2d Cir. 1947); Cleveland v. Higgins, 148 F.2d 722 (2d Cir. 1945). Similarly, a defendant is compelled to plead all of his claims arising from the transaction or occurrence which is the subject matter of the plaintiff's action under the terms of Rule 13 (a) under precisely the same penalty of waiver.

20. It explains for example, why Rule 14 permits third party practice, why Rule 13 (g) permits a party to file a cross-claim against a co-party, why Rule 20 permits a joinder of plaintiffs and defendants both jointly, severally, and in the alternative, and why Rule 42 (a) permits the court to order the consolidation of actions involving common questions of law and fact.

21. Sunderland, *New Federal Rules of Civil Procedure,* 13 U.Cin.L.Rev. 58 (1939).

22. *Ibid.*

THE COMPULSORY COUNTERCLAIM

Rule 13 (a) is new to the procedure of this state and practitioners are advised to take careful note of it. The rule carries out the second principle of procedure enumerated in the preceding section by providing, in effect, that with certain exceptions whenever any portion of a transaction or occurrence is pleaded to a court in support of a claim, the adverse party *must* present to the court in his responsive pleading *all* claims which he possesses with regard to the same transaction or occurrence.[23] Failure to do so constitutes a waiver of the unpleaded claim and the right to bring a later action on it is thereby lost.[24]

The new rule is based on principles of res judicata.[25] Failure to plead a compulsory counterclaim is the equivalent of a judgment by the court adverse to the claim as it might have been presented.[26] In view of the sweeping character of the rule it has been wisely pointed out that if a practitioner is in any doubt concerning the nature of his counterclaim, i.e., whether permissive or compulsory, sound practice indicates the counterclaim should be pleaded in order to protect the client's interest.[27] It has been said that one test for determining whether a counterclaim is compulsory is whether the same evidence will support or refute the opposing claim,[28] but this statement appears very doubtful. The majority view seems to be that a counterclaim will be regarded as springing from the transaction or occurrence which is the subject matter of the opposing party's claim (and hence compulsory) if a "logical relationship" exists between them;[29] and it has been declared by

23. Gallahar v. George A. Rheman Co., 50 F.Supp. 655 (N.D.Ga. 1943); Pennsylvania Ry. v. Musante-Phillips, Inc., 42 F.Supp. 340 (N.D.Cal. 1941); Thierfeld v. Postman's Fifth Avenue Corporation, 37 F.Supp. 958 (S.D.N.Y. 1941).

24. Numerous cases announce this rule as dicta. Square holdings are Reconstruction Finance Corporation v. First National Bank, 17 F.R.D. 397 (D.Wyo. 1955) (plaintiff held barred from maintining action where opportunity to plead claim of fraud and conspiracy had not been utilized in prior action); Kreitmeyer v. Baldwin Drainage District, 2 F.Supp. 208 (S.D.Fla. 1932), *aff'd sub nom.*, 68 F.2d 785 (5th Cir. 1934) (Federal Equity Rule 30 applied to bar subsequent action on previously unpressed counterclaim). *Cf.* cases cited note 19, *supra*.

25. Restatement, Judgments § 58 (1942), and comment *f* thereto (Supp. 1948); 1 Barron & Holtzoff, Federal Practice and Procedure 794 (1950); 3 Moore's Federal Practice 28 (2d ed. 1948).

26. Hancock Oil Co. v. Universal Oil Products Co., 115 F.2d 45 (9th Cir. 1940); Gallahar v. George A. Rheman Co., 50 F.Supp. 655 (N.D.Ga. 1943); Pennsylvania Ry. v. Musante-Phillips, Inc., 42 F.Supp. 340 (N.D.Cal. 1941); Thierfeld v. Postman's Fifth Ave. Corp., 37 F.Supp. 958 (S.D.N.Y. 1941).

27. 3 Moore's Federal Practice 38 (2d ed. 1948).

28. Williams v. Robinson, 1 F.R.D. 211 (D.C. 1940).

29. Moore v. New York Cotton Exchange, 270 U.S. 593, 610 (1926). Examples of situations where a "logical relationship" has been found to exist include the leading case of Lesnik v. Public Industrial Corporation, 144 F.2d 968 (2d Cir. 1944) (in action on promissory note, counterclaim that plaintiff and additional parties had obtained note through fraudulent conspiracy was compulsory); John R. Alley & Co. v. Federal National Bank 124 F.2d 955 (10th Cir. 1942) (in action on promissory note, counterclaim for

the United States Supreme Court that a counterclaim may readily be compulsory even though it embraces additional allegations of fact, since the "facts relied upon by the plaintiff rarely, if ever, are in all particulars, the same as those constituting the defendant's counterclaim."[30]

The question of how close or direct this "logical relationship" between claim and counterclaim must be in order to require classification of the counterclaim as compulsory is one of degree. It must be determined by the practitioner in planning his case through the exercise of sound professional judgment as well as reliance upon precedent. In the federal courts it should be observed that there appears to be a distinct tendency to hold that a counterclaim is compulsory *once it has been pleaded,* and an equally distinct tendency amounting almost to reluctance to rule that *unpleaded* counterclaims are necessarily barred thereafter.[31] The explanation for this ambivalent tendency is found in the circumstance that an extraneous factor complicates the position of the federal courts. If a counterclaim is held to be permissive by the federal courts, then it automatically requires an independent ground of federal jurisdiction to support it or it must be dismissed.[32] On the other hand, if the federal court holds a counterclaim to be compulsory it is at once entitled to the protection of the rule that the federal courts automatically possess ancillary jurisdiction over compulsory counterclaims; hence it is not subject to dismissal for want of jurisdiction.[33] Thus, once a counterclaim has been pleaded in the federal courts, it serves the objective of obtaining completeness of adjudication for the court to rule it compulsory. The some-

usury is mandatory); Thierfeld v. Postman's Fifth Avenue Corporation, 37 F.Supp. 958 (S.D.N.Y. 1941) (action for trade-mark infringement; counterclaim for cancellation of trade-mark registration held compulsory). See note 31, *infra.*

30. Moore v. New York Cotton Exchange, 270 U.S. 593, 610 (1926).

31. Examination of the cases reveals that many of them contain dicta to the effect that an unpleaded compulsory counterclaim is barred thereafter, but only a limited number actually apply the rule to bar a subsequent action. The cases cited in note 24 are among the few actually applying the rule to defeat a later action. Compare such cases as Big Cola Corporation v. World Bottling Co., 134 F.2d 718 (6th Cir. 1943); Williams v. Robinson, 1 F.R.D. 211 (D.C. 1940), with such cases as Thierfeld v. Postman's Fifth Ave. Corp., 37 F.Supp. 958 (S.D.N.Y. 1941). The *Big Cola* case is a fine illustration of the reluctance of the federal courts to apply the compulsory counterclaim rule in such a fashion as to actually cut off a substantial right possessed by a party. The plaintiff sued to cancel a contract on grounds of lack of mutuality. Defendant, to refute this claim, introduced evidence showing that pursuant to the contract it had expended a great deal of money in promotion and advertising, but made no counterclaim for the reasonable value of these services to the plaintiff in the event the contract was held invalid. The court ruled that the counterclaim was not compulsory, holding in effect that a quasi-contract claim for the value of goods and services furnished under a contract is not a compulsory counterclaim to an action to declare the contract invalid. The precedents cited in support of this proposition were cases decided long before the adoption of the Federal Rules, and in the light of Rule 13 (a) the result seems almost indefensible.

32. 1 Barron & Holtzoff, Federal Practice and Procedure § 392 (1950).

33. Lesnik v. Public Industrial Corporation, 144 F.2d 968 (2d Cir. 1944).

times troublesome issue of jurisdiction is thereby removed from the case. But at the same time, to hold as a retroactive matter that a counterclaim not asserted in a previous action was compulsory—and thus barred by failure to plead it in time—prevents the court from attaining precisely this same objective of completeness in its disposition of the case. In such instances the party has lost a right to plead a claim through the operation of a purely technical rule.

Hence in the federal compulsory counterclaim cases the scope the courts afford Rule 13 (a) appears to vary somewhat in the context of the factual situation presented and the objective toward which the court is working. It is perhaps not too much to suggest that in state courts where the peculiar problems of federal jurisdiction are not present the compulsory counterclaim rule may receive a somewhat narrower interpretation than the federal courts, for thoroughly constructive purposes, have been inclined to give it.

PERMISSIVE COUNTERCLAIMS

Under the former Code provisions, permissive counterclaims were allowed in only two situations: (a) where a counterclaim arose from the transaction or contract set forth in the plaintiff's complaint or was connected with the subject of the action; (b) in cases where the plaintiff's cause of action was founded on contract, any other cause of action also stemming from contract and existing at the commencement of the action might be pleaded as a counterclaim.[34]

These restrictions have been eliminated entirely by Rule 13 (b), which allows a defendant to bring into an action all disputes of any character which exist between himself and an adverse party.[35] There is no requirement that a permissive counterclaim be related in any fashion, logically or otherwise, to any claim put forward by a plaintiff.[36] The right of a defendant to join counterclaims in an answer is thus precisely equivalent to the right of a plaintiff to join claims in a complaint.[37]

DISTINCTION BETWEEN COUNTER AND CROSS-CLAIMS

The essential distinction between counterclaims and cross-claims should be kept clearly in mind. Cross-claims arise solely between co-parties in a case, whereas counterclaims arise between parties

34. N.D. Rev. Code § 28-0714 (1943).

35. Following the principle of settling all causes in dispute between the parties in a single proceeding, it has even been held a plaintiff may file a counterclaim to a defendant's counterclaim. Warren v. Indian Refining Co., 30 F.Supp. 281 (N.D.Ind. 1939).

36. "All restrictions on the right to plead counterclaims have been removed." 3 Moore's Federal Practice 50 (2d ed. 1948).

37. N.D.R.Civ.P. 18 (a).

on opposing sides. Thus, if A sues B and C as joint defendants in a tort action, B's claim against A for damages arising from the tort is a counterclaim. B's claim against C for contribution on the theory C is a joint tort-feasor with him is a cross-claim. It is to be noted that whereas a permissive counterclaim may tender to the court matters which are completely unrelated to the plaintiff's case, cross-claims are limited to those claims arising out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.[38]

VENUE PROBLEMS

A serious problem, so far unsettled, which deserves thoughtful consideration in connection with Rule 13 is that of venue. The North Dakota Rules provide that they are not to be construed to "extend or limit the jurisdiction of the district court of North Dakota or the venue of actions therein,"[39] thereby adopting for use in this state a similar provision found in the Federal Rules.[40]

This means that prior Code provisions relating to venue are left completely untouched by the new Rules.[41] But since the Code provisions were framed to apply to a judicial system wherein the right to bring counterclaims was far more restricted than is now the case, it creates a distinct question of the applicability of existing statutes regarding venue to cases arising under the Rules.

To illustrate the difficulty is simple. Assume that A sues B in the district court of Grand Forks County to recover damages for a breach of contract to convey land—a transitory action. B, in turn, files a counterclaim against A seeking to recover damages for an injury to the real property in question, the property being located in Burleigh county. The Code provides that actions to recover for injuries to real property must be brought in the county wherein the property is situated.[42] Is A entitled to insist that B's counterclaim be dismissed on the ground it can only be adjudicated by the district court in Burleigh county? If B's counterclaim is treated as compulsory it will be observed that the Rules oblige him to plead it on penalty of waiver; a holding by the court that the counterclaim is nevertheless not maintainable presents a distinct anomaly. If B's counterclaim is treated as permissive, however,

38. N.D.R.Civ.P. 13 (g).
39. N.D.R.Civ.P. 82.
40. Fed.R.Civ.P. 82.
41. The general chapter dealing with venue is N.D. Rev. Code c. 28-04 (1943).
42. N.D. Rev. Code § 28-0401 (1943).

and if a permissive counterclaim is regarded as being substantially an independent action, then the argument that the venue statutes are applicable to it possesses a very considerable degree of force.[43] This is particularly true in the light of the recent holding of the North Dakota Supreme Court in *Johnson v. Johnson*[44] to the effect that the statutory restrictions as to place of trial of actions involving real property pertain not merely to *venue* but also to the *jurisdiction* of the court.

Similar questions exist with regard to other provisions of the venue statutes. Could a counterclaim for partition of real property or the foreclosure of a mortgage on real property be brought outside the county where the land is located in the face of the provisions of N.D. Rev. Code § 28-0401 (1943)?[45] Could a counterclaim to recover on an insurance policy covering damage to property be brought outside the county where the property was located at the time of loss or damage in the face of N.D. Rev. Code § 28-0402 (1943)?[46] In view of the provisions of § 28-0403 of the Revised Code of 1943, could a counterclaim for recovery of a penalty imposed by statute be adjudicated outside the county where the cause arose?[47] What about counterclaims against the Bank of North Dakota?[48]

Problems of this identical character have been much discussed in writings involving the Federal Rules.[49] In general, however,

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43. See Farmer v. Dakin, 28 N.D. 452, 149 N.W. 354 (1914) (in action on promissory note, counterclaim for ejectment, trespass to realty, and forcible entry and detainer with respect to land situated in Minnesota would not lie). See 28 N.Dak.L.Rev. 320 (1952), strongly criticizing the rule that the venue of actions to recover for trespass to realty is local on the ground the "practical result of the rule . . . allows the defendant to escape liability for his tortious conduct merely by crossing a state line." The rule was strongly criticized as early as 1811 by Justice Marshall in the well-known case of Livingston v. Jefferson, Fed.Cas. 4,811 (1811), an action of trespass q.c.f. brought against Thomas Jefferson; but Marshall felt himself bound to follow precedent and accordingly enforced the rule in such a fashion as to defeat the action.

44. Not yet reported, opinion filed December 9, 1957.

45. N.D. Rev. Code § 28-0401 (1943): "An action for any one of the following causes must be brought in the county in which the subject matter . . . is situated . . . (3) For the partition of real property; and (4) For the foreclosure of a mortgage upon real property."

46. N.D. Rev. Code § 28-0402 (1943): "An action for any one of the following causes shall be tried in the county in which the subject of the action . . . is situated . . . (2) For recovery on a policy of insurance for loss or damage to the property insured, and such property at the time of its loss or damage shall be deemed the subject matter of such action."

47. N.D. Rev. Code § 28-0403 (1943): "An action for any one of the following causes shall be tried in the county where the cause . . . arose . . . (1) For the recovery of a penalty or forfeiture imposed by statute . . ."

48. N.D. Rev. Code § 6-0927 (1943): "Such action shall be brought . . . in the county where the Bank of North Dakota shall have its principal place of business, except as provided in sections 28-0401, 28-0402, 28-0403, 28-0404, and 28-0406." Note the provision of Rule 13 (d) in connection with this question.

49. See Holtzoff, *Some Problems Under Federal Third-Party Practice*, 3 La.L.Rev. 408, 416-19 (1943) (taking view that questions of venue are substantially settled when the action is brought); Willis, *Five Years of Federal Third-Party Practice*, 29 Va.L.Rev. 981, 1005-09 (1943) (taking opposite view); Gregory, *Joinder of Claims, Counterclaims, and*

despite the limiting provisions of Rule 82, the federal courts have proceeded in most instances upon the theory that if the venue of the action as brought by the plaintiff in the first instance is proper, the requirements of the venue provisions of the Judicial Code are satisfied; and thereafter a plaintiff cannot object on grounds of improper venue to a permissive counterclaim,[50] or to a compulsory counterclaim even though it brings in new parties.[51] Professor Moore states that a third-party plaintiff cannot object on grounds of venue to a counterclaim interposed by a third-party defendant, but adds that the original plaintiff may have ground for objection because "he has not hailed the third-party defendant into court." He adds, however, that on balance even this objection should not be valid because the cross-claim or counterclaim of the third-party defendant must be related to the claim originally made by the plaintiff.[52]

On the assumption that the adoption of the Federal Rules in North Dakota also implied an adoption of the construction the federal courts have placed on these rules, it is probably to be expected that the court will ultimately hold that if the venue of an action is properly laid in the first instance the requirements of the venue statute have been satisfied;[53] but this statement can be made only reservedly in the case of the real, as opposed to transitory, actions.

Somewhat different considerations apply to venue in connection with Rule 14 (third-party practice) and it is discussed hereinafter.[54]

COUNTERCLAIMS IN ACTIONS WITHIN FAMILY UNIT

Passing mention should also be made of the problems posed by actions between husbands and wives and parents and children.

Cross-Claims as Affected by Venue Statutes of Kentucky, 43 Ky.L.J. 275 (1954); Ohlinger, *Jurisdiction, Venue and Process as to Counterclaims and Third-Party Claims*, 6 Fed.Bar J. 420 (1945); Ohlinger, *Problems of Jurisdiction and Venue*, 26 Corn.L.Q. 240 (1941); and see Willis, *supra*, at n. 82 of his discussion for a listing of many other writings.

50. "The setting up of a counterclaim against one already in a court of his own choosing is very different, in respect to venue, from hailing him into that court." General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932).

51. Lesnik v. Public Industrial Corp., 144 F.2d 968 (2d Cir. 1944). This decision has been sharply criticized. See Ohlinger, *Jurisdiction, Venue and Process as to Counterclaims and Third-Party Claims*, 6 Fed.Bar.J. 420, 428, n. 52 (1945).

52. 3 Moore's Federal Practice § 1332 (2d ed. 1948).

53. *Cf.* Dillage v. Lincoln Nat.L.Ins. Co., 54 N.D. 312, 209 N.W. 656 (1926). In Lesnik v. Public Industrial Corp., 144 F.2d 968, 977 (2d Cir. 1944), Judge Clark stated with reference to the problem of venue as to counterclaims and cross-claims: "In this status of the precedents, we think that the problem is new and not controlled by precedents, which may not be held to do more than emphasize the necessity of a very close interrelationship of the original and the ancillary proceedings. We are, therefore, justified in relying *on the literal terms of the venue statute*, which in effect emphasizes the same thing by applying only to a civil suit commenced by original process." (Emphasis supplied).

54. See pp. 26 *et seq.*

At common law, of course, the legal unity of husband and wife resulted in a disability which prevented suits against one another.[55] In *FitzMaurice v. FitzMaurice*,[56] after examining the North Dakota statutes,[57] the Supreme Court held that a wife might maintain an action against her husband in this state for injuries caused by his negligence. The question whether the husband might sue the wife, however, was expressly left open.[58] This might well lead to a unique situation sometimes encountered in other jurisdictions: in the event a wife sued her husband, it is possible, though scarcely probable, that the court might rule that the husband was unable to file a permissive or even a compulsory counterclaim, the common law disabilities of coverture still persisting in his case.[59] Note that this result would also preclude a cross-claim between a husband and wife suing or being sued as co-parties.

Of course it is always possible the court might rule that a wife has waived her immunity from legal action on the part of her spouse by bringing an action against him, and sustain a counterclaim on that basis,[60] though ordinarily the incidents of the marital status are beyond waiver. But the best solution for the entire problem is plainly to be found in either a square holding that a hus-husband's right to sue his wife is equal to the wife's right to sue him or in a legislative amendment to the statute setting the doubt at rest.[61]

55. McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940 (1943).

56. 62 N.D. 191, 242 N.W. 526 (1932).

57. The statute involved was N.D. Rev. Code § 14-0705 (1943): "The wife after marriage has with respect to property, contracts, and torts the same capacity and rights and is subject to the same liabilities as before marriage . . ." Note that the statute, read in literal terms, does nothing with regard to the disabilities coverture imposed upon a *husband* at common law.

58. The court stated that the statute recognizes the wife's "legal individuality and preserves for her every right that she had prior to her marriage. As to whether it does likewise for her husband we are not now required to and do not decide." FitzMaurice v. FitzMaurice, 62 N.D. 191, 201, 242 N.W. 526, 529 (1932).

59. In Scholtens v. Scholtens, 230 N.C. 149, 52 S.E.2d 350 (1949), the North Carolina court ruled a husband could not sue his wife under the local statutes even though in Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920), it had been held a wife might sue her husband. In Waite v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926), the Wisconsin court held a wife might sue her husband; but in Fehr v. General Accident Fire & L. Ins. Co., 246 Wis. 228, 16 N.W.2d 787 (1944), a husband's action against his wife's insurer (under a Wisconsin "direct action" statute) to recover for injuries caused by her negligence was held barred by the common law disabilities of coverture. The statutes in both cases bore a marked resemblance to those of this state.

60. This is the theory often used with regard to a plaintiff's attempt to assert a venue statute in regard to a defendant's counterclaim. See the material on venue in the preceding section.

61. Of course there are insurance aspects lurking in the background of most actions for negligent injury as between spouses, as the case of Fehr v. General Accident Fire & Life Ins. Co., 246 Wis. 228, 16 N.W.2d 787 (1944), makes manifest. It is nevertheless submitted that logically the statutory provisions permitting a husband and wife to make contracts with one another, N.D. Rev. Code § 14-0706 (1943), as well as N.D. Rev. Code § 14-0705 (1943), almost compel the conclusion the husband may sue the wife; for otherwise the husband would be given a right without remedy. See N.D. Const. Art. I, § 22.

What has been said about suits between husbands and wives also applies to actions between parents and children. These were not permitted at common law as a matter of preserving harmony in the family. No statute or holding appears to confer a right of action between parent and child in this jurisdiction, so far as the writer's research has disclosed; and the implications of this in the field of counterclaims and cross-claims should be manifest.

RULE 14. THIRD-PARTY PRACTICE[62]

(a) *When Defendant May Bring in Third Party.* At any time after commencement of the action a defendant as a third-party plaintiff may cause to be served a summons and complaint upon a person not a party to the action who is or may be liable to such third-party plaintiff for all or part of the plaintiff's claim against him. The person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject-matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject-matter of the plaintiff's claim against the third-party plaintiff and the third-party defendant shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move for severance, separate trial, or dismissal of the third-party claim; and the court may direct a final judgment upon either the original claim or the third-party claim alone in accordance with the provisions of Rule 54 (b). A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) *When Plaintiff May Bring in Third Party.* When a counterclaim is asserted against a plaintiff, he may cause a third-party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) *Service.* A copy of the third-party summons and complaint shall be served upon all parties or their attorneys.

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62. This rule supersedes no North Dakota statute.

DIFFERENCES BETWEEN FEDERAL AND NORTH DAKOTA RULE

While Rule 14 is basically patterned after the Federal model, it nevertheless contains one or two differences of minor character. Whereas the impleading of a third-party defendant in a federal proceeding is permissible only if the court in its discretion grants leave to do so,[63] third-party defendants may be impleaded under the language of the North Dakota Rules as a matter of right.[64] Moreover, although in the Federal Courts the right to implead a third-party defendant may be lost by unreasonable delay,[65] the North Dakota Rules provide that the impleader may occur "at any time."

Although the element of judicial discretion in connection with third-party practice is accordingly somewhat more limited than it is in the Federal courts, a substantial amount of discretion would seem to persist because of the provisions of Rule 42, which is plainly applicable to third-party proceedings and authorizes the court to hold separate trials of third-party proceedings "in furtherance of convenience or to avoid prejudice."[66]

OPERATION AND PURPOSE OF THE RULE

The framers of the Federal Rules derived Rule 14 from English procedures.[67] It is admittedly an innovation of sorts, though analogies have been drawn between proceedings under the Rule and early common law practice.[68] The situations wherein Rule 14 permits a third-party defendant to be impleaded normally arise in cases where A sues B, who in turn asserts that C is liable to him, B, on a theory of either (a) contribution,[69] (b) indemnity,[70] or

63. General Taxicab Ass'n v. O'Shea, 109 F.2d 671 (D.C.App. 1940); Baltimore & O. Ry. v. Saunders, 159 F.2d 481 (4th Cir. 1947).

64. Proposals to make impleader a matter of right in the federal courts have been made from time to time, e.g., Holtzoff, *supra* note 49, at 413, but have never been accepted.

65. Union Nat. Bank v. Superior Steel Corp., 9 F.R.D. 128 (W.D.Pa. 1949) (two-year delay); United States v. Shuman, 1 F.R.D. 251 (N.D. W.Va. 1940) (eight months after answer filed); Hessian Hills Corp. v. Union Cent. Life Ins. Co., 1 F.R.D. 743 (S.D.N.Y. 1941) (delay of "many months" held laches barring right of impleader).

66. Thus, where unreasonable delay in impleading a third-party defendant has occurred, there seems no reason why a court might not simply order a separate trial of the third-party proceeding as a matter of convenience under Rule 42 (b).

67. See Notes of Advisory Committee on Federal Rules to Rule 14.

68. Thus, Professor Moore compares it with the early common law practice of "vouching to warranty." 3 Moore's Federal Practice § 14.02 (2d ed. 1948).

69. Burris v. American Chicle Co., 120 F.2d 218 (2d Cir. 1941); Rappa v. Pittston Stevedoring Corp., 48 F.Supp. 911 (E.D.N.Y. 1943); Crum v. Appalachian Electric Power Co., 29 F.Supp. 90 (S.D.W.Va. 1939).

70. Brady v. Black Diamond Steamship Co., 45 F.Supp. 338 (S.D.N.Y. 1941); Watkins v. Baltimore & O. Ry. 29 F.Supp. 700 (W.D.Pa. 1939).

(c) reimbursement.[71] These three headings comprehend numerous types of fact situations,[72] and some idea of what is possible may be gleaned from the following outline by a noted commentator:

> Under (Rule 14) a surety may bring in his principal, a lessee sued by a lessor on a covenant may bring in his sublessee; a covenantor, sued for breach of warranty of title may bring in his own covenantor; a city sued for injury caused by a defective sidewalk may bring in an abutting owner, a contractor sued for a wrongful act of a sub-contractor may bring in the latter; a joint obligor who owes contribution may be brought in, and a joint tort feasor may be brought in if there is contribution.[73]

It is fundamental under the rule that a defendant who wishes as a third-party plaintiff to implead a third-party defendant must base his third-party claim upon the plaintiff's original claim, in effect carrying it forward and restating it on his own behalf against the third-party defendant.[74] Where the third-party claim is not predicated upon the plaintiff's original claim, it is not maintainable.[75] To illustrate, it has been held that a surety who has been sued by a creditor of his principal cannot implead all other creditors of the principal as third-party defendants and require them to file all of their claims against the surety in a single action, since the third-party defendants in such a case are manifestly not liable to the defendant for any part of the original plaintiff's claim.[76]

The fact a change in the legal characteristics and nature of the claim asserted by the plaintiff occurs when it is restated against a third-party defendant does not mean that the Rule becomes inapplicable. For example, an acceleration of liability may occur without preventing the application of the rule, as in a case where a contract of reimbursement provides that reimbursement is to be made only after rendition of a judgment against the person to be reimbursed; in such situations, the person obligated to make reimbursement may

71. Hubshman v. Radco, Inc., 71 F.Supp. 601 (S.D.N.Y. 1947); Balcoff v. Teagarden, 36 F.Supp. 225 (S.D.N.Y. 1940); Saunders v. Goldstein, 30 F.Supp. 150 (D.C. 1939); Yap v. Ferguson, 8 F.R.D. 166 (S.D.N.Y. 1948); U.S. v. Jollimore, 2 F.R.D. 148 (D.Mass. 1941).

72. "If one will scratch the surface of the simple language of Rule 14 . . . and push down to the cluster of brain-twisting combinations and variations which lie beneath, he will find, I believe, a power to perplex nowhere surpassed in the whole body of the Rules." Poteat, *Third-Party Practice Under the New Rules*, 25 A.B.A.J. 858 (1939).

73. Professor Sunderland, quoted in Dobie, *The Federal Rules of Civil Procedure*, 25 Va.L.Rev. 261, 268 (1939).

74. This is implicit in the language of the Rule itself. In the first sentence of Rule 14 it is stipulated a third-party defendant is a person who is or may be liable to the third-party plaintiff "for all or part of the plaintiff's claim against him."

75. John N. Price & Sons v. Maryland Casualty Co., 2 F.R.D. 408 (D.N.J. 1942); Carbola Chemical Co. v. Trundle, 3 F.R.D. 502 (1943).

76. John N. Price & Sons v. Maryland Casualty Co., *supra* note 75.

usually be joined as a third-party defendant. Nor does the fact the plaintiff's claim undergoes a transmutation when restated, and rests upon a different theory of liability, prevent the rule from becoming applicable. In *Balcoff v. Teagarden*[77] a suit was brought by A against B for infringement of copyright in performing a song written by A without authority to do so. B impleaded C, who was A's sister, alleging she had asked him to perform the song and represented she had authority to permit him to do so. It was held that a translation of A's claim for copyright infringement into a claim for damages for breach of warranty of authority by B against C was perfectly permissible. Similarly, a claim for negligence against a retailer for selling a foodstuff containing a foreign substance which caused personal injury may become a third-party claim by the retailer against the wholesaler for breach of contract of warranty that the food was fit for human consumption.[78]

Since the third-party claim must be based upon the claim of the plaintiff, the question naturally arises: Does a defendant, by impleading a third-party defendant, admit the validity of the plaintiff's claim? The answer is emphatically in the negative. A defendant may both deny absolutely any liability and at the same time implead a third-party defendant, claiming a right of reimbursement, indemnity, or contribution if he is held liable.[79] But it is not grounds for impleading a third-party defendant that it is contended that the third-party defendant alone is responsible for the injury of which the plaintiff complains. The defendant cannot tender an alternative defendant to the plaintiff against his will, and such a contention must be raised simply as a defense to the plaintiff's action.[80]

CONTRIBUTION

Rule 14 is procedural. Accordingly, if a right to reimbursement, indemnity, or contribution does not exist pursuant to substantive law, Rule 14 will not supply it.[81] Thus, in a state where the right

77. 36 F.Supp. 225 (S.D.N.Y. 1940).

78. Saunders v. Goldstein, 30 F.Supp. 150 (D.C. 1939). *But cf.* United States v. Jollimore, 2 F.R.D. 148 (D.Mass. 1941), which seems erroneous.

79. Brown v. Cranston, 132 F.2d 631 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943); Crum v. Appalachian Electric Power Co., 29 F.Supp. 90 (S.D.W.Va. 1939).

80. Brady v. Black Diamond Steamship Co., 45 F.Supp. 338, 339 (S.D.N.Y. 1941): "The defendant cannot implead the third-party defendant on the ground that the third-party defendant alone, and not the third-party plaintiff, is liable to the plaintiff. This presupposes that plaintiff has sued the wrong defendant, which, properly speaking, is a defense, as plaintiff cannot recover a judgment against a third-party defendant whom he has not sued."

81. Bache v. Dixie Ohio Express Co., 8 F.R.D. 159 (N.D. Ga. 1948); Vaughn v. Guenther, 8 F.R.D. 157 (N.D. Ga. 1948); Brown v. Cranston, 132 F.2d 631 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943); Carbola Chemical Co. v. Trundle, 3 F.R.D. 502 (S.D.N.Y. 1943).

of contribution exists only among tortfeasors who have been sued jointly by a plaintiff, a joint tort-feasor who has not been named as a defendant in the plaintiff's original action cannot be joined as a third-party defendant.[82] Since the right of contribution between joint tort-feasors in North Dakota does not depend on the existence of a joint judgment,[83] it is plain a joint tort-feasor in this state may be impleaded as a third-party defendant. Somewhat less clear under the law of this state, and undoubtedly still to be resolved by the Court, are two other situations involving contributions among tort-feasors.

The first of these situations involves employer-employee relationships and may be best illustrated by posing a hypothetical case. A is employed by C dairy as a helper on a milk truck, the truck being driven by X, also an employee of C. While making its normal rounds, the truck is involved in a collision with a vehicle driven by B. A suffers personal injuries and brings an action for damages against B in the amount of $100,000. Under Rule 14 (a), B seeks to implead C dairy as a third-party defendant, alleging that C's agent X was guilty of negligence in driving the milk truck and that C should accordingly make contribution to B as a joint-feasor. C moves to dismiss the third-party complaint on the ground that under § 65-0108 of the North Dakota Revised Code (Supp. 1953), the liability of an employer to a workman injured in the course of his employment arises solely under the terms of the Workmen's Compensation Act, that C is accordingly not liable to A in tort, and that a right of contribution therefore does not exist.

The New York Court of Appeals and the California Supreme Court have both imposed a liability upon the employer to make contribution in situations of this sort.[84] Despite these impressive authorities, however, it seems likely that no right to hold the employer as a third-party defendant exists in this state. The Revised Uniform Contribution Among Tortfeasors Act[85] specifies

82. Brown v. Cranston, note 81 *supra;* Vaughn v. Guenther, note 81 *supra.*

83. N.D. Laws 1957, c. 223, § 3 (a).

84. Westchester Lighting Co. v. Westchester County Small Estates Corporation, 278 N.Y. 175, 15 N.E.2d 567 (1938); Baugh v. Rogers, 24 Cal.2d 200, 148 P.2d 633 (1944). *Accord,* Burris v. American Chicle Co., 120 F.2d 218 (2d Cir. 1941); Rappa v. Pittston Stevedoring Corp., 48 F.Supp. 911 (E.D.N.Y. 1943). *Contra,* Kittleson v. American Dist. Tel. Co., 81 F. Supp. 25 (N.D.Iowa 1948); Maio v. Fahs, 339 Pa. 180, 14 A.2d 105 (1940). In Baugh v. Rogers, *supra,* it was held that the amount of an employer's contribution to a joint tort-feasor would be reduced *by* the amount paid to the employee under the Workmen's Compensation Act for the injury. In Maio v. Fahs, *supra,* it was held that the amount of the employer's contribution would be reduced *to* the amount paid the employee under the Act.

85. N.D. Laws 1957, c. 223, § 1 (a).

that the right of contribution exists only where "two or more persons become jointly or severally liable *in tort* . . ." and the Comment of the National Conference of Commissioners on Uniform State Laws to this section declares that "The language used has been adequate to exclude cases where the person from whom contribution is sought was not liable to the injured person."[86]

The second situation involves liability between husbands and wives. As previously noted,[87] the North Dakota Court has ruled that a wife may sue a husband, but has left open the question of whether a husband may sue a wife. Assume that W is driving an automobile in which H, her husband, is riding as a passenger. A collision with a vehicle driven by X occurs and H sues X for personal injuries arising from the accident. Assuming the Court rules that a husband may sue a wife, X may join W as a third-party defendant and recover contribution from her if it can be shown her negligence was a factor contributing to the accident sufficiently to make her a joint tort-feasor. On the other hand, if the Court holds that the common law disabilities of coverture have been removed only from wives and not from husbands, it is clear no right of contribution would exist.[88] Presumably the same situation would exist regarding parent and child, since no local statute authorizes parent or child to sue the other and no case conferring such a right has been found.[89]

INDEMNITY

Another question sometimes posed with regard to Rule 14 is whether an insurance company can be joined as a third-party defendant. On principle the answer would seem to be in the affirmative; Rule 14 was designed to apply to situations where a defendant has a right to indemnity from a party not joined in the action, and an insurance company is plainly an indemnitor.[90] Moreover, impleader in such a case is consistent with the purpose of Rule 14, which is to save time and costs of duplicating evidence, as well as to obtain consistent results from similar evidence.[91] But whether such a

86. See Comment to Section 1 (a), Revised Uniform Contribution Among Tortfeasors Act, 9 Uniform Laws Annotated (Supp. 1958).

87. See comment to Rule 13, *ante* pp. 16-17.

88. Schroeder v. Longenecker, 7 F.R.D. 9 (E.D.Mo. 1947); Baltimore Transit Co. v. State to Use of Schriefer, 183 Md. 674, 39 A.2d 674 (1944). See note 86, *supra*.

89. See 4 Vernier, American Family Laws 480-84 (1936). Vernier expresses dissatisfaction with the rule on the ground it creates "obvious hardship" to an aggrieved child. Since under a recent statute, N.D. Laws 1957, c. 224, a parent is responsible in an amount of not more than $300 for any wilful or malicious act of his child resulting in the destruction of property, it would seem only just to permit the parent an action over, in the event the child has assets.

90. Zeigler v. Ryan, 63 S.D. 607, 262 N.W. 200, 202 (1935).

91. 1 Barron & Holtzoff, Federal Practice and Procedure § 422 (1950).

right of impleader exists or not would appear to be immaterial from the point of view of a plaintiff in most situations, for the reason that even where the defendant's right to implead his insurer is conceded it is nevertheless the normal result that the insurer is entitled to a separate hearing under Rule 42 (b)[92] as well as the benefit of the rule excluding mention of insurance in the presence of the jury.[93]

Somewhat more intriguing from a plaintiff's standpoint is the possibility of joining an insurance company as an outright co-defendant. The Code of this state provides that "One who indemnifies another person against an act to be done by the latter is liable *jointly* with the person indemnified and *separately* to every person injured by such an act."[94] The precise scope and meaning of this provision have never been judicially defined in this jurisdiction. In *James v. Young*,[95] the Supreme Court ruled in an opinion by Mr. Justice Grimson that the statute permitted joinder of an insurance company as a co-defendant in a situation where a taxicab company had obtained insurance under the terms of a municipal ordinance requiring such companies to obtain insurance "indemnifying those using such taxicab line and the public in general against loss to person or property." This holding, however, appears limited to cases of compulsory insurance.[96]

Read literally, of course, the statute would virtually appear to create a right of direct action against an insurer; and this interpretation has in fact been given to it by at least one court. In *Moore v. Los Angeles Iron & Steel Co.*,[97] it was held that "the section . . . makes the policy of assurance inure directly to the benefit of the injured person, and in addition thereto, allows such person to proceed against the indemnitor separately, or jointly with the indemnitee. There is nothing in the section which invites or allows a narrower construction than the one indicated."[98] The *Moore* case has, however, enjoyed but little acceptance; the courts of California, Montana, and South Dakota, where similar statutes are found, have construed the statute to be merely a restatement

92. Tullgren v. Jasper, 27 F.Supp. 413, 416 (D.Md. 1939); 3 Moore's Federal Practice § 14.12 (2d ed. 1948).

93. North Dakota cases on this rule include Smith v. Knutson, 78 N.D. 43, 47 N.W.2d 537 (1951); James v. Young, 77 N.D. 451, 43 N.W.2d 692 (1950); Jacobs v. Nelson, 67 N.D. 27, 268 N.W. 873 (1936); Beardsley v. Ewing, 40 N.D. 373, 168 N.W. 791 (1918); and Stephenson v. Steinhauer, 188 F.2d 432 (8th Cir. 1951). See also N.D. Rev. Code § 49-1833 (1943), and § 39-1611 (Supp. 1953).

94. N.D. Rev. Code § 22-0206 (1943) (emphasis supplied).

95. 77 N.D. 451, 43 N.W.2d 692 (1950), 27 N.Dak.L.Rev. 53 (1951).

96. See Note, 20 A.L.R.2d 1097 (1951).

97. 89 Fed. 73 (S.D.Cal. 1898).

98. *Id.* at 76.

of a common law rule to the effect that where an indemnitor specifically requests or demands or requires a specific act to be done,[99] the indemnitor becomes a joint tort-feasor with the person doing the act in the event the act proves tortious.[100] As so limited, the statute would not allow joinder of an insurance company as a codefendant in those cases where the policy of insurance runs directly to and is for the benefit of the policy-holder.[101]

Whether the *Moore* case or the opposing interpretation constitutes the law of this jurisdiction was not settled by *James v. Young*. The opinion merely stated that even under the restrictive interpretation of the statute "the right of allowing at least some indemnitors to be included as defendants with the indemnitees has long been recognized in our laws."[102] In practice, however, attempts to join insurance companies as co-defendants have not often been made in this state; *James v. Young* appears to be the only case wherein the question has been considered.

By its terms, Rule 14 is permissive rather than compulsory in most of its aspects. A defendant is not required to implead a third-party defendant if he does not wish to do so, a plaintiff need not set up a claim against a third-party defendant even though the third-party defendant could have been named a co-defendant in the original action, and the third-party defendant is under no obligation to set up any claims he might have as against the plaintiff, though he is required to set up compulsory counterclaims against the third-party plaintiff. However, where the parties find

99. The classic situation in which an indemnitor is liable jointly with an indemnitee is where a sheriff, on demand of a plaintiff, attaches or levies execution upon property allegedly belonging to a defendant which in fact belongs to someone else. The plaintiff is normally obliged to give a bond to indemnify the sheriff against the contingency that the property involved may not belong to the defendant, and when this occurs the plaintiff is normally a joint tort-feasor with the sheriff and liable with him in an action of conversion. See Title Guaranty & Surety Co. v. Duarte, 54 Cal.App. 260, 201 Pac. 790 (1921), and cases cited therein. Compare Ravely v. Isensee, 57 N.D. 286, 221 N.W. 38 (1928).

100. The leading case opposed to the interpretation placed on the statute in the *Moore* case, *supra*, is Northam v. Casualty Co. of America, 177 Fed. 981 (D.Mont. 1909), in which a right of direct action by the heirs of a workman killed in the course of employment against the employer's insurer was denied on the ground the statute merely re-enacted the common law rule of liability mentioned in the text. *Accord*, Severns v. California Highway Indemnity Exchange, 100 Cal.App. 384, 280 Pac. 213 (1929); Treloar v. Keil & Hannon, 36 Cal.App. 159, 171 Pac. 823 (1918); Conley v. United States Fidelity & Guaranty Co., 98 Mont. 31, 37 P.2d 565 (1934); Cummings v. Reins Copper Co., 40 Mont. 621, 107 Pac. 904 (1910); Zeigler v. Ryan, 63 S.D. 607, 262 N.W. 200 (1935). *But cf.* Bryan v. Banks, 98 Cal.App. 748, 277 Pac. 1075 (1929). It is to be noted that in the *Northam* case, above, considerable reliance was placed upon a Montana Statute providing that "The provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof and not as new enactments." No such statute exists in North Dakota, where N.D. Rev. Code § 1-0106 (1943) declares that "In this state there is no common law in any case where the law is declared by the code."

101. Cases cited note 100, *supra*.

102. James v. Young, 77 N.D. 451, 460, 43 N.W.2d 692, 698 (1950). On the general topic of direct action against insurers, see 29 N.Dak.L.Rev. 182 (1953).

it desirable to come to direct grips with one another, Rule 14 contains provisions designed to enable them to do so. The plaintiff may amend his complaint to state a claim against the third-party defendant if he wishes to do so, thereby making the third-party defendant in effect a co-defendant. Equally, the third-party defendant may assert against the plaintiff any claim he possesses arising out of the transaction or occurrence which constitutes the subject matter of the plaintiff's claim. Where either of these last two contingencies occur Rule 13 (a) is applicable.

VENUE

There has been substantial disagreement among the federal courts over the application of venue statutes to third-party proceedings under Rule 14. The problem may be illustrated as follows: *A* sues *B* a resident of Grand Forks County in the district court of the First Judicial District. B asserts a right of contribution from *C*, a resident of Williston, and accordingly causes a third-party complaint and summons to be served on *C* at his home. If *B's* action were an independent one, it is plain that the venue of the action against *C* would lie in the district court of the Fifth Judicial District. Does the fact that *B* is suing *C* in a third-party proceeding make the bringing of the action in the First Judicial District proper?

The commentators have split upon this question[103] and so have the federal courts.[104] The most authoritative single decision on the question in the federal system is probably *United States v. Acord*,[105] an action for personal injuries in which an impleaded third-party defendant raised the objection that the venue of the third-party proceedings was improper as to him. While expressing the thought that the question was not free from doubt, the Tenth Circuit Court of Appeals ruled that venue in third-party proceedings was to be determined by the venue of the main action. The Court added, however, the comment that since the granting of a right to impleader was discretionary with the federal courts, permission to maintain a third-party proceeding should be denied to a defendant where "great inconvenience" would be caused to the third-party defendant.[106]

103. See note 49, *supra*.

104. Among cases holding that venue statutes may be invoked by a third-party defendant are Lewis v. United Air Lines Transport Corporation, 29 F.Supp. 112 (D.Conn. 1939); King v. Shepherd, 26 F.Supp. 357 (W.D.Ark. 1938); Manley v. Standard Oil Co. of Texas, 8 F.R.D. 354 (E.D.Texas 1948). *Contra*, United States v. Acord, 209 F.2d 709 (10th Cir. 1954), *cert. denied*, 347 U.S. 975 (1954); Dickey v. Turner, 49 F.2d 998 (6th Cir. 1931); Morrell v. United Air Lines Transport Corporations, 29 F.Supp. 757 (S.D.N.Y. 1939); *cf.* Lesnik v. Public Industrial Corporation, 144 F.2d 968 (2d Cir. 1944).

105. 209 F.2d 709 (10th Cir. 1954), *cert. denied*, 347 U.S. 975 (1954).

106. 209 F.2d at 714.

It has already been pointed out that the committee which framed the North Dakota Rules altered Rule 14 to make impleader a matter of right in this state. Since the two rules differ on this point, the North Dakota Court would appear to be free to rule on the question without feeling any particular compulsion to follow the federal precedent. However, two reasons exist for believing that the North Dakota Court will eventually arrive at a conclusion substantially following the *Acord* decision: (1) such a result was reached even prior to the adoption of the new rules in *Dillage v. Lincoln Nat. L. Ins. Co.*,[107] an impleader case involving a fact situation analogous to third-party proceedings; (2) a discretionary power to change the venue of third-party proceedings where "great inconvenience" would otherwise be caused to a third-party defendant appears to exist under the present venue statutes.[108]

One possible exception should be noted, however. As already mentioned in the discussion of venue in regard to counterclaims, the syllabus in the extremely recent case of *Johnson v. Johnson*[109] would appear to suggest that the Court may reach a different result in the case of the so-called real actions: ejectment, trespass, quiet title, partition, and mortgage foreclosure. In the *Johnson* decision the Court stated that the Code provision laying the venue of these actions in the county where the land is located pertains to the jurisdiction of the court over the subject-matter, and neither acquiescence, personal appearance, nor participation in such an action when brought in the wrong court will cure the defect.

Although the decision certainly creates an obstacle to the attainment of complete unitary venue in proceedings under the new rules, it does not necessarily end all prospects of it. Plainly analogous situations arising in the federal courts have not heretofore prevented those courts from achieving a unitary venue of third-party proceedings by using the concept of ancillary jurisdiction. Thus, it has been held that lack of diversity of citizenship will not

107. 54 N.D. 312, 209 N.W. 656 (1926).

108. "The court may change the place of trial . . . (3) When the convenience of witnesses and the ends of justice would be promoted by the change. . ." N.D. Rev. Code § 28-0407 (1943).

109. Not yet reported. The syllabus, which is the only portion of the case available to the author as this is written, states: (1) The requirement of § 28-0401, N.D. Rev. Code (1943) that an action for certain enumerated causes affecting real property must be brought in the county in which the subject matter of the action or some part thereof is situated subject to the power of the court to change the place of trial upon agreement of counsel or in other cases provided by statute pertains to the jurisdiction of the court rather than the venue of the action and the court has no jurisdiction of an action which is brought in a county other than that prescribed by this section. (2) Acquiescence, personal appearance or participation in an action pertaining to real property brought in the wrong county in violation of § 28-0401, N.D. Rev. Code (1943) does not confer jurisdiction of the subject matter upon the court.

defeat the jurisdiction of a court over third-party proceedings, i.e., where *A*, a citizen of Forum 1, sues *B*, a citizen of Forum 2, in the federal district court of Forum 2, *B* may implead *C*, also a citizen of Forum 2, as a third-party defendant without fear of going beyond the limits of the court's jurisdiction.[110] Since this is a situation involving jurisdiction over the *persons* of the parties rather than over the *subject-matter of the action*, precedents of this type are not squarely applicable to the sort of problem presented by the *Johnson* decision. But the federal courts also extended the concept of ancillary jurisdiction to deal with the problem of lack of jurisdiction over the subject matter, as well. Thus, in the federal district courts, where *A* sues *B* on the basis of diversity-of-citizenship jurisdiction, *B* may join *C* as a third-party defendant even though *B's* claim against *C* does not involve the requisite jurisdictional amount to support an independent action.[111] And where jurisdiction in the main action is based on the presence of a federal question, the right of a defendant to implead a third-party defendant is not defeated by the fact the third-party claim involves a non-federal question.[112] This last situation is manifestly one in which ancillary jurisdiction over third-party proceedings has been used by the federal courts to cure what would otherwise be a palpable lack of jurisdiction over the subject-matter of a claim.

Even though the *Johnson* case thus does not necessarily predetermine the result, however, it well may be that the Court may consider it advisable to maintain the policy of the venue statute relating to real actions as a matter of judicial administration. It seems clear enough that under Rule 42 (b) a separate hearing could be ordered for a third-party claim involving land as its subject-matter; and there seems no reason to doubt that a change of venue to the county where the land is located could be ordered under the North Dakota statute if the court felt that the "convenience of witnesses and the ends of justice"[113] made it desirable.

To sum up: It is to be expected that the court will hold in most instances that the venue of third-party proceedings is determined by the venue of the main action. The prospects for this result in the case of real actions are somewhat less bright but not to be entirely discounted. There seems no reason why a change of venue

110. Morrell v. United Air Lines Transport Corp., 29 F.Supp. 757 (S.D.N.Y. 1939); Schram v. Roney, 30 F.Supp. 458 (E.D. Mich. 1939); 3 Moore, Federal Practice 496 (2d ed. 1948). Arguing for an opposite result is Willis, *Five Years of Federal Third-Party Practice*, 29 Va.L.Rev. 981, 1001 (1943).

111. Schram v. Roney, 30 F.Supp. 458 (E.D. Mich. 1939).

112. 3 Moore's Federal Practice 499 (2d ed. 1948).

113. N.D. Rev. Code § 28-0407 (3) (1943).

as to third-party proceedings should not be ordered in an appropriate case.

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.[114]

(b) *Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.[115]

(c) *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.[116]

(d) *Supplemental Pleadings.*

(1) Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a

114. This follows, with minor changes, the language of Fed.R.Civ.P. 14 (a). It supersedes N.D. Rev. Code § § 28-0735, 28-0736, 28-0737 and 28-0738 (1943).

115. This supersedes N.D. Rev. Code § § 28-0737(4), 28-0732, 28-0744, and 28-0745 (1943).

116. This is identical with Fed.R.Civ.P. 15(c) and supersedes no North Dakota statute.

claim for relief. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.[117]

(2) When during the pendency of an action, a judgment upon the plaintiff's claim is rendered in another action, the plaintiff, by supplemental complaint, may allege the recovery of such judgment in aid of his original action and shall not be required to dismiss such action and commence a new suit upon such judgment nor shall the recovery of such judgment constitute any bar to the further prosecution of such action but such action thereafter shall proceed in all respects the same as if originally instituted upon such judgment.[118]

The courts possess the power to permit the amendment of pleadings as an inherent attribute regardless of statute.[119] Rule 15 is accordingly no more than a restatement of a power the North Dakota courts would possess in any event. A tradition of liberality in allowing amendments is well established in the state,[120] and this rule plainly continues it. Prior North Dakota precedents involving amendments would therefor appear to retain a very considerable authority. It is clear under those precedents that the allowance of an amendment (excluding, of course, the case where an amendment is made as of right under the terms of the Rule) will remain substantially a matter within the discretion of the court, though the discretion is, it goes virtually without saying, a judicial rather than an arbitrary discretion.[121]

It will be noted that Rule 15 relates entirely to amendments of the *pleadings.* It does not govern the amendment of *process,* which is permitted under the terms of Rule 4 (h).[122] Nor does it govern situations where a pleader desires to change the name of

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117. This follows Fed.R.Civ.P. 15(d) and supersedes N.D. Rev. Code § 28-0719 (1943).

118. This is new material not found in the Federal Rules and continues the rule of N.D. Rev. Code § 28-0727 (1943) without change.

119. Morgridge & Merrick v. Stoeffer, 14 N.D. 430, 104 N.W. 1112 (1905); Leach v. Nelson, 48 N.D. 1046, 189 N.W. 251 (1922).

120. So far is the policy carried that under some conditions a pleading may actually be amended in the Supreme Court of North Dakota. Patterson Land Co. v. Lynn, 44 N.D. 25, 175 N.W. 211 (1919). This result was reached in a case involving trial de novo on appeal. See Morris, *A Memorandum on Appellate Practice,* 29 N.Dak.L.Rev. 219, 222 (1953). Holding that great liberality is allowed as to amendment of pleadings are Holler v. Amodt, 31 N.D. 11, 153 N.W. 465 (1915); Sheimo v. Norqual, 31 N.D. 343, 153 N.W. 470 (1915); Kurtz v. Paulson, 33 N.D. 400, 157 N.W. 305 (1916). "An amendment should be allowed if in the interests of justice and (if) it does not change substantially the claim or defense." Northwestern Mut. Sav. & L. Ass'n v. White, 31 N.D. 348, 359, 153 N.W. 972, 974 (1915).

121. For a statement of considerations to be considered by the court in the exercise of its discretion, see Continental Supply Co. v. Syndicate Trust Co., 52 N.D. 209, 217, 202 N.W. 404, 407 (1924).

122. See the discussion of Rule 4, 32 N.Dak.L.Rev. 101 *et seq.* (1956).

a party,[123] or by amendment to add or drop a party to an action.[124]

Proper practice under the Rule is undoubtedly indicated by the case of *Satterlund v. Beal,*[125] an early case in which the Court laid it down that when a party has received permission to amend a pleading, the pleading must be *actually rewritten,* so that as amended it constitutes a complete instrument. The normal consequence of the practice, sometimes followed, of making a motion for leave to amend and upon the granting of the motion thereafter treating the pleading as actually having been amended, is to cause the abandonment of the amendment.[126] But this is not always true; the adverse party, by acquiescing in this procedure and failing to insist upon the actual redrawing of the instrument, may be deemed to have waived the error.[127] Where a complaint is amended there is no need to serve a new note of issue or notice of trial.[128]

Of interest in connection with the subject of amendments is the case of *LaPlante v. Implement Dealers Mutual Fire Ins. Co.,*[129] which declares that the making of a pre-trial order does not deprive the court of its discretion to allow or disallow amendments to the pleadings. One question posed by that decision deserves special mention. Suppose a court, in a pre-trial order, permits or disallows an amendment of a pleading which involves the merits of the action? Under the *LaPlante* holding it would seem the order could not be appealed; but in *Hermes v. Markham*[130] the Court stated specifically that if a proposed amended answer raises a defense involving the merits of the action, the order denying it is appealable.[131]

123. N.D.R.Civ.P. 9 (h). See Ulledalen v. United States Fire Insurance Co., 74 N.D. 589, 23 N.W.2d 856 (1946) (a party plaintiff may be added by amendment); Derek v. Elder, 63 N.D. 635, 249 N.W. 724 (1933) (a party defendant cannot be substituted after trial for the person actually sued, e.g., where plaintiff sued defendant as an individual plaintiff could not during the course of the trial amend his complaint to substitute a corporation of which defendant was president as the party defendant against which relief was sought); Hart v. Rigler, 70 N.D. 407, 295 N.W. 308 (1940) (where A sued B Hide and Fur Company, which made a general appearance, A could amend to show that R, an individual doing business under the name of B Hide and Fur Company, was the real party defendant).

124. This is covered by Rules 13 (h) and 21. See cases cited in note 123, *supra.*

125. 12 N.D. 122, 95 N.W. 518 (1903).

126. Satterlund v. Beal, 12 N.D. 122, 95 N.W. 518 (1903).

127. Jacobson v. Forbragd, 42 N.D. 1, 171 N.W. 624 (1919).

128. Kerr v. Grand Forks, 15 N.D. 294, 107 N.W. 197 (1906). See N.D.R.Civ.P. 40 (b).

129. 73 N.D. 159, 12 N.W.2d 630 (1944).

130. 78 N.D. 268, 49 N.W.2d 239 (1951). *Accord,* LaDuke v. E. W. Wylie Co., 77 N.D. 592, 44 N.W.2d 204 (1950); Stimson v. Stimson, 30 N.D. 78, 152 N.W. 132 (1915); Bolton v. Donovan, 9 N.D. 575, 84 N.W. 357 (1900).

131. When does an order "involve the merits of the action"? It has been said that the statute governing appealability, N.D. Rev. Code § 28-2702 (1943), "impliedly contains a distinction between those orders which affect a substantive right of the parties to an action, and those orders which affect a right which is merely procedural in character." Note, 28 N.Dak.L.Rev. 186, 199 (1952). The former class of orders involves the merits and is appealable; the latter are not appealable.

RULE 16. PRE-TRIAL PROCEDURE; FORMULATING ISSUES

In any action after issue is joined, the court in its discretion may, and upon written request of a party shall, direct the attorneys for the parties to appear before it for a conference in advance of trial to consider

(1) The simplification of the issues;
(2) The necessity or desirability of amendments to the pleadings;
(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
(4) The limitation of the number of expert witnesses;
(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions. Upon failure of counsel to appear, the court shall have authority to grant a motion for dismissal or to proceed with the conference, as may be appropriate.[132]

A. *General Comment.* — Rule 16 deals with a subject matter familiar to the practitioner in this state, since the federal practice as to pre-trial conferences was incorporated into the procedure of this state when the Revised Code of 1943 was enacted.[133] Practice in the North Dakota district courts has been explored with great thoroughness by Chief Justice Grimson in the NORTH DAKOTA LAW REVIEW several years ago[134] and reference should be made to that discussion for an indication of what may be expected in the various district courts. Another excellent discussion is Kincaid, *A Judge's Handbook of Pre-Trial Procedure*, 17 F.R.D. 437 (1955), which summarizes the results of much experience in the federal courts.

132. This is derived from Fed.R.Civ.P. 16 without substantial change and continues the provisions of N.D. Rev. Code c. 28-11 (1943) with only minor alterations mentioned in the text.
133. N.D. Rev. Code c. 28-11 (1943).
134. Grimson, *A Progress Report on Pre-Trial Conferences in North Dakota*, 30 N.Dak.L.Rev. 85 (1954).

Rule 16 does not differ in any substantial degree from its predecessor statute in the Revised Code of 1943. It does, however, omit a requirement formerly found that a copy of the petition for a pre-trial conference and a notice of the time of the conference be served upon opposing counsel at least ten days prior to the conference.[135] The logical procedure probably is to treat a request for a pre-trial conference as the equivalent of a motion under Rule 6 (d) thus entitling the adverse party to at least five days notice. There are, in addition, differences in the matters which are listed for consideration by the court. These are appended in the margin.[136] In view of the thoroughly flexible procedure customarily employed in proceedings under Rule 16, it is not believed that these variations in language should lead to any substantial variations in results.

A pre-trial order issued under the terms of Rule 16 is not appealable.[137] It should be noted, as well, that a pre-trial order may sometimes have greater breadth than the practitioner expects. Thus, in *Audi Vision Inc. v. RCA Mfg. Co.*, [138] the action of a court in rendering summary judgment against both a plaintiff's claim and a defendant's second counterclaim was held to be merely a pre-trial order, and hence non-appealable, where the defendant's first counterclaim remained yet to be tried.

Rule 16 also has an important bearing on the question of taxation of costs. Costs which could reasonably have been avoided by appropriate action at a pre-trial conference may not be taxed to a losing party in the federal courts.[139] While N.D.R.Civ.P. 54 (e) declares that costs and disbursements "shall be allowed as provided by statute," it would appear highly probable that the federal rule in this matter will be applicable in this jurisdiction.[140]

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135. N.D. Rev. Code § 28-1103 (1943).

136. Thus, the code provision, N.D. Rev. Code § 28-1101 (1943) listed among matters to be considered "In personal injury cases, the arrangement for physical examination of either the plaintiff or defendant if required, a stipulation of maps or charts of the location involved and such other facts as measurements, widths of streets, distances, dates, time, and weather conditions." This does not appear in Rule 16, but is plainly comprehended by the language of Rule 16 (6). Equally, the provision of Rule 16 (5) did not appear in the Code.

137. LaPlante v. Implement Dealers Mutual Fire Insurance Co., 73 N.D. 159, 12 N.W.2d 630 (1944). For discussion of appealability, see Note, 28 N.Dak.L.Rev. 186 (1952).

138. 136 F.2d 621 (2d Cir. 1943). See N.D.R.Civ.P. 56(d).

139. 1 Barron & Holtzoff, Federal Practice and Procedure 966 (1950).

140. N.D. Rev. Code § 28-2606 (1943) provides that the clerk must tax "as a part of the judgment in favor of the prevailing party his disbursements as follows: (2) The *necessary* expenses of taking depositions and of procuring evidence *necessarily* used or obtained for use on the trial . . ." (Emphasis supplied).

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