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Summary of North Dakota Rules of Civil Procedure

Charles Liebert Crum

SUMMARY OF NORTH DAKOTA RULES OF CIVIL PROCEDURE

CHARLES LIEBERT CRUM*

OUTLINE[1]

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* Associate Professor of Law, University of North Dakota.

1. This summary is reprinted from the Sectional Assemblies Booklet issued in connection with the 1957 Convention of the State Bar Association in order to provide practioners with a general guide to the new rules in condensed form.

24. Depositions.
25. Same; Benefits of Deposition Procedures.
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§ 1. *Introductory; Effective Date; Rules Not Substantive.* — On July 1, 1957, an entirely new system of procedure modeled upon the rules in force in the federal district courts went into effect in the State of North Dakota by order of the Supreme Court. Hereafter, except for certain special proceedings specifically excluded from their coverage by Rule 81, the new rules will regulate the procedure used in the conduct of all civil actions in the district courts, the county courts of increased jurisdiction, and—to some extent—the justice courts.

The rules are entirely procedural in character and do not alter the substantive law of the state, since the statutory power to promulgate rules vested in the Supreme Court extends only to procedural matters. They are applicable to causes of action arising prior to their effective date on the ground that a change in procedure by the courts does not prejudice vested substantive rights. The background of the new rules is familiar to most members of the profession and need not be repeated here. They are the product of an able committee composed of many of the most distinguished members of the North Dakota judiciary and bar. They also represent a distinct achievement not only on the part of that committee but also on the part of the Supreme Court of North Dakota itself, since their adoption represents the first thorough and systematic modernization of the remedial law of this jurisdiction since the days of territorial status.

Many reasons furnished cause for the replacement of the Field Code of Civil Procedure, the former ground-rules for civil actions in North Dakota, with the present rules. Probably these reasons may best be summed up in the statement that the new rules give promise of making it possible for the legal profession to offer a better service to the public. They are simply better suited to modern conditions than the Field Code.

While many alterations are made by the new rules, this summary takes up only the major changes which appear under four headings:

(a) Process and Jurisdiction; (b) Joinder of Parties and Claims; (c) Pleadings; (d) Depositions and Discovery.

A. PROCESS AND JURISDICTION

§ 2. *Extended Scope of Process.* — The first noteworthy changes in practice made by the new rules are found in Rule 4, since Rules 1, 2, and 3 merely continue unchanged principles already embodied in the law of North Dakota. Thus, Rules 1 and 2, read jointly, preserve the two great reforms of the Field Code over the system of common law pleading: the union of law and equity and the abolition of forms of action. Rule 3 likewise merely preserves former practice, though it diverges from the Federal Rules to do so by providing that service of a summons rather than the filing of a complaint represent the starting point of an action.

Rule 4, however, introduces some new material. The longest and most complex single enactment of the rules, it deals with the subject of process—and thus, necessarily, with the extremely important subject of jurisdiction over parties. Rule 4 retains, it should be emphasized, most of the features of prior practice. The form and contents of the summons are not changed, most methods of service permissible under the old law continue to be valid, and in many instances the rule merely adopts the former provisions of the Field code verbatim. Nevertheless, it is obvious that the rules committee, in drafting Rule 4, took advantage of the opportunity to substantially extend the reach of the summons and thus make it easier to acquire jurisdiction over parties to an action. There are four changes which deserve mention.

§ 3. *Out-of-State Service on Domiciliaries.* — The first of these changes is found in Rule 4 (e) (1), which allows service of a summons in a civil action to be made upon a domiciliary of North Dakota even though the person served is absent from the state. This adopts the rule of the well-known case of *Milliken v. Meyer,* 311 U. S. 457 (1940), wherein the Supreme Court of the United States ruled that a state could constitutionally require its domiciliaries to respond to its process while outside the boundaries of the state.

Illustration:

A and B are residents of North Dakota. They become jointly and severaly liable upon a promissory note made out to the order of C. A departs for California for an extended vacation. B remains in the state. C, desiring to bring action on the note,

causes a copy of the summons to be personally delivered to B in this state. He also mails a copy of the summons to a California attorney, who hands it to A in Los Angeles. Both A and B are now equally subject to the in personam jurisdiction of the North Dakota district court and must appear and defend in the action. A judgment against A will be entitled to full faith and credit in California.

§ 4. *Service on Non-Residents Doing Business through Agents.* — The committee also inserted a provision designed to allow the district courts of this state to acquire in personam jurisdiction over individuals residing in other states who are engaged in business in North Dakota through agents, in situations where the legal dispute involved arises from such business. This provision—Rule 4 (e) (2) —substantially adopts the rule of *Henry L. Doherty & Co. v. Goodman,* 294 U. S. 623 (1935), and derives its constitutional justification from the holding of that case.

Illustration:

A is a cattle broker residing in Montana and maintains a North Dakota office under the supervision of B, an employee. B, on A's behalf, purchases a herd of cattle from C in the State of North Dakota. A fails to pay. C may commence an action against A in a North Dakota district court by causing a summons naming A as a defendant to be delivered to B, the agent, and sending a copy of the summons together with a notice that service has been made upon the agent to A in Montana by registered mail. Upon making proof of such service, C will have perfected an in personam jurisdiction over A in North Dakota district court. A money judgment in favor of C againt A will be entitled to full faith and credit in Montana even though A refuses to respond to the summons.

What happens if A is a partnership? The same procedure holds valid under the terms of Rule 4 (d) (4).

§ 5. *Service on Foreign Corporations.* — Rule 4 (d) (4) embodies the third of the major changes made by Rule 4, and brings up to date statutory provisions relating to service upon foreign corporations which developments in the case law had rendered slightly out of date. While the change is less sweeping than the innovations already mentioned, it nevertheless should be noted.

The rule provides that service of process upon a foreign corporation may be made by delivering a copy of the summons to an "officer, director, superintendent or managing or general agent."

However, it also adds that service may be made upon *"any other agent"* who is "authorized by appointment *or by law*" to receive service of process.

The scope of this language deserves notice. When, exactly, is an agent "authorized by law" to receive service of process upon an out-of-state corporation? The answer is supplied by *International Shoe Company v. State of Washington,* 326 U. S. 310 (1945). That case holds that a state may exercise jurisdiction over a foreign corporation whenever the corporation carries on activities within its borders of such a character as to make it "reasonable and just, according to our traditional conception of fair play and substantial justice" to require the corporation to respond to the state's process. No "mechanical" or "quantitative" test (e.g., "systematic solicitation" or solicitation "plus") is determinative, though undoubtedly if a corporation has been carrying on a systematic solicitation within a state that fact will be highly persuasive.

Rule 4 (d) (4) plainly embodies the rule of the *International Shoe* case in the law of this state, and allows jurisdiction to be acquired by service of process upon an agent (e.g., a salesman) in any case where it is "reasonable and just" to hold the corporation.

§ 6. *Service by Publication.* — For the most part, Rule 4 continues without change previous statutory provisions relating to service of process by publication. It should be noted, however, that the rule omits the previous requirement that the complaint be *verified* before service by publication is permitted.

B. JOINDER OF CLAIMS AND PARTIES

§ 7. *Principles of Joinder Based on Concept of Convenience.* — It is undoubtedly in connection with the provisions relating to joinder of claims and parties that the new rules make their most radical departure from prior law. Joinder of causes of action under the Field Code depended upon the provisions of NDRC 1943 § 28-0703, a thoroughly antiquated and unscientific statute which subdivided or classified causes of action into various categories and would not permit a cause of action falling in one category to be joined with a cause of action falling in another unless they happened to arise from the same transaction or were connected with the same subject of action.

Thus, under the old statute, if a plaintiff had a cause of action sounding in contract against a defendant, and also had a cause of action sounding in tort, two separate lawsuits were ordinarily re-

quired to dispose of them. This was a situation resulting in needless loss of time and disproportionate expense to litigants. Similarly, the former statutory provisions often failed to permit joinder of parties in situations where it was desirable. Thus, parties could not be joined as alternative defendants or plaintiffs.

This situation has been sharply altered. Rules 13, 14, 18, 19, 20 and 42 — the significant provisions — revise the entire field of joinder. The objective of this group of rules may be summed up in the single word convenience. The basic idea is that joinder of claims and parties should be permitted in any situation where it gives promise of saving time, trouble and expense for the litigants, attorneys, and courts. For this reason, the rules are designed to make it possible for *all* claims of *all* parties to a transaction or occurrence, or series of transactions or occurrences involving common questions of law and fact, to be resolved in one proceeding. Thus, under the new rules it will be possible to obtain results in a single proceeding which would often have required two or three separate lawsuits under the Code.

Illustration:

A owns Blackacre. B, a neighbor, commits a trespass upon A's land. Some weeks later, B accuses A falsely of stealing his cattle. Under the former code provision, A would have to bring two actions: one for trespass and another for defamation. Under Rule 20, A can gain redress for both claims in a single proceeding, thereby saving money and time, unless under Rule 42 the Court determines that it would be more convenient or just to require the claims to be tried separately.

In order to accomplish this basic objective of convenience, the rules have been built around three underlying principles. An examination of these principles will indicate the manner in which the rules are intended to operate.

In the first place, the framers of the Federal Rules commenced with the premise that every "claim" or cause of action arises from a factual happening — a transaction or occurrence of some sort. Thus, a claim for damages for personal injuries always arises from some type of tort, e.g., an automobile accident, an assault, a battery, and the like. Such an accident, assault, or battery constitutes a "transaction" or "occurrence" within the purview of the rules. The determination of when a happening constitutes a transaction or occurrence is made on the basis of common sense. If an event or happening creates a set of facts from which claims arise appro-

priate for judicial resolution, it constitutes a transaction or occurrence within the meaning of the rules.

The principles of joinder embodied in the rules are based on this idea, and consist of the following:

§ 8. *Unlimited Joinder of Claims.* — The first principle is simply that a party who claims injury as a result of the acts of another may join in one action as many claims as he possesses against the adverse party. *The new rules permit absolutely unlimited joinder of claims in a single complaint.* This provision, found in Rule 18, is supplemented by another found in Rule 13 (b): *the rules equally permit unlimited joinder of counterclaims in a single answer.*

Illustration:

> A and B are husband and wife. A, the wife, sues B. In her complaint she is entitled, under the terms of Rule 18, to join claims for divorce, assault and battery, conversion of property, breach of contract, and trespass to realty. In his anwer, B is entitled under Rule 13 (b) to set forth counterclaims for annulment, replevin, trover, to quiet title to realty, and defamation.

There is, of course, an obvious danger that so many issues will be raised in cases of this sort that the court will be confronted with a sort of legal pot-pourri. But the rules provide a safeguard against precisely this sort of danger. Rule 42 provides that the court, "in furtherance of convenience or to avoid prejudice," may order a separate trial for different claims in its discretion. This makes it possible to sort out the different aspects of the case and pass upon them in a logical and orderly fashion whenever a cause shows signs of becoming too complicated to be readily handled.

Illustration:

> In the hypothetical case set forth above, on application of the attorney for either party, or of its own volition, the Court might appropriately order the annulment and divorce claims to be tried separately, the claims involving rights to property to be tried separately, and the claims involving personal torts to be tried separately, if it appeared this was desirable in the interests of convenience or to avoid prejudice. This would be a permissible and logical application of the court's discretionary powers under Rule 42.

It is, of course, the normal situation that claims presented in a civil action have their origin in a single transaction or occurrence. However, joinder does not depend on this fact. A plaintiff may join as many claims as he has against a defendant, and a defendant may

join as many counterclaims as he has against a plaintiff, whether the claims spring from a single event or from a series of transactions or occurrences.

The principle of unlimited joinder may seem at first glance a striking one. Indeed, when the Federal Rules of Civil Procedure were first adopted, the principle drew criticism from many practitioners in the federal courts. However, Rule 18 has stood the test of time and has proven in most instances distinctly superior to the procedure it superseded.

§9. *Completeness of Adjudication; Compulsory Counterclaims.* — The second principle underlying the various rules which relate to joinder of claims and parties is that whenever a transaction or occurrence is pleaded as a basis of a claim, all other claims of the parties arising from that transaction or occurence should also be adjudicated. *Thus, when any portion of a transaction or occurrence is pleaded to a court in stating a claim, the entire transaction or occurrence is automatically placed in issue.*

This principle explains the meaning and operation of Rule 13 (a), dealing with compulsory counterclaims. Under the rules, counterclaims are divided into two categories, permissive and compulsory. Permissive counterclaims are those which *may* be pleaded under the principle of unlimited joinder set forth above. Compulsory counterclaims are counterclaims which *must* be pleaded because they arise from the transaction or occurrence which is the basis of the plaintiff's claim.

Illustration:

> A and B are involved in an automobile accident. A sues B for damages. B fails to file a counterclaim. Under the *old* statutes, B could initiate a suit against A arising out of the accident after A's suit had been disposed of. Restatement, Judgments §58 (1942). Under the *new* rules, B's failure to file a counterclaim to A's suit waives forever his right to seek relief from the courts so far as the accident is concerned, since the counterclaim was compulsory under Rule 13 (b) as arising from the transaction or occurrence which was the basis of A's claim.

The result set forth in the preceding illustration obviously stems from principles of res judicata. Under the rules, a court's decision of a case becomes res judicata as between the parties as to all aspects of the transaction or occurrence which is the basis of the suit. Failure to file a counterclaim which is compulsory under the rules

is thus equivalent to a judgment against the counterclaim as it might have been presented.

The thinking underlying this principle is founded once again upon the idea of convenience, since it is obviously far more beneficial to all parties concerned in terms of saving time and money if the court passes upon all aspects of a given happening at one time than if the court must adjudicate the controversy by piecemeal stages. However, one warning should be given about the operation of Rule 13 (b). Quite plainly, there will be many instances in which a defense attorney will be in doubt as to whether a sufficient logical relationship exists between a claim and a counterclaim to make the counterclaim compulsory. *If a defendant's attorney is in any doubt as to the nature of a counterclaim his client possesses, careful practice indicates that the counterclaim should be pleaded in order to protect the client.*

§ 10. *Flexibility of Joinder of Parties.* — The third basic principle underlying the rules relating to joinder of parties and claims is that whenever a transaction or occurrence, or series of transactions or occurrences involving common questions of law and fact, comes before the court, the claims of all parties involved should be resolvable in a single proceeding so far as possible. *Thus, the rules provide mechanisms whereby — assuming jurisdiction can be obtained — all parties involved in a transaction or occurrence, or series of transactions or occurrences involving common questions of law and fact, can be joined as co-plaintiffs, co-defendants, or third-party defendants.*

The foregoing principle furnishes the explanation for Rule 14 (third-party practice) and also explains why Rule 13 (g) permits a defendant's answer to set forth a cross-claim against a co-defendant. It also explains why Rule 20 permits joinder of both plaintiffs and defendants jointly, severally, or in the alternative, and why Rule 42 (a) permits the court to order the consolidation of actions involving common questions of law and fact.

Thus, where multiple parties are involved in a lawsuit, the rules permit — indeed require — all claims as between all parties to be presented for adjudication.

Illustration:

A is riding as the guest of B in an automobile which is involved in a three-car collision with vehicles driven by C and D. A sustains serious injuries. All three vehicles are damaged.

1. Under Rule 20, A and B may join as co-plaintiffs in an action

against C and D even though A is seeking damages for personal injuries and B is seeking damages for injury to property. This is because Rule 20 provides that a plaintiff need not be interested in obtaining all the relief demanded, and further provides that all persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all of them will arise in the action.

2. Under Rule 20, A may join B, C, and D as defendants on the theory that if C and D are not liable to him, B is. This is because Rule 20 permits joinder of defendants if joint, several, or alternative liability is asserted against them.

3. Assuming that A sues only C and D, he may contend that if C is not liable to him, D is, and vice versa, on the same theory set forth in the preceding paragraph.

4. Assuming that A sues B, C, and D as co-defendants, B, C, and D are entitled to assert cross-claims against one another in their answers, either for contribution as joint tort-feasors or on the theory that the other parties are solely liable or both. See Rule 13 (g).

5. Assuming that A sues only C and D, C and D may cause a third-party summons and complaint to be served upon B and thereby bring him into the action as a third-party defendant. This is because Rule 14 provides that "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."

As the illustration above indicates, the tendency of the rules is to bring before the court every claim of every party to a transaction or occurrence so that they may be adjusted in one proceeding.

§ 11. *Summary of Joinder.* — To sum up, the new rules abandon the following:

(1) All restrictions on joinder of claims and 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 the common questions of law or fact.

The underlying theory of joinder is one of convenience to litigants and the court. Joinder is practically unlimited save that the court may order separate trial of claims where it appears desirable as a practical matter. Consolidation of cases may be had where it appears desirable. The complete adjudication of all issues in one proceeding is encouraged and in fact required as far as possible. The rules attempt to make it possible to bring all persons concerned in a given transaction or occurrence as parties — assuming jurisdiction can be obtained of them — so that complete resolution of all issues between all parties can be had whenever practical.

C. PLEADINGS

§ 12. *Purpose of Pleading Under New Rules.* — In comparison to the changes made in the law of joinder, the alterations the new rules make in the law regulating pleadings are somewhat less sweeping. Nevertheless, the changes are distinctive enough; and they deserve careful study.

Briefly put, the effort of the new rules with regard to pleadings is to establish a system of pleading which is as simple and non-technical as possible. Under the rules, pleadings are limited to the accomplishment of a few minimal purposes: (1) the giving notice of the general nature of the claim asserted; (2) the sufficient delineation of the nature of the transaction or occurrence involved in the case to permit the subsequent application of res judicata when the case has been decided; and (3) the indication of the nature of the case being presented so that the court may assign it the proper method of trial, e.g., as a law or equity matter.

The formulation of the issues in the case on a detailed basis is no longer the function of the pleadings. Instead, the development of facts and issues is accomplished through the use of other procedures established by the rules: the use of deposition procedures, written interrogatories, discovery procedures, and pre-trial conferences.

Since the importance of the pleadings has thus been downgraded, considerable effort has been devoted to framing the rules in such a fashion as to avoid needless sparring over their technical sufficiency. Thus, Rule 15 establishes a liberal policy of allowing a pleader to amend when he decides there may be uncertainty over the sufficiency of his pleading. Rule 7 (c) goes even further in this

direction by providing that demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used. And the former requirement that the pleadings set forth the "ulitmate facts" of the case is conspicuous by its absence.

§13. *Preliminary Attacks on Pleadings.* — The foregoing does not mean, of course, that every pleading must automatically be accepted as setting forth the basis of a valid case. If a defendant's attorney is convinced that his opponent's complaint pleads a weak or insubstantial case, the rules give him the opportunity to attack immediately and in force. Indeed, while the demurrer has been abolished, the procedures for disposing of a case prior to trial furnished by the rules give the practitioner a group of far more effective weapons for his arsenal. Three motions may be classified as being, in effect, substitutes for the old demurrer. They are:

1. The motion to dismiss for failure to state a claim upon which relief can be granted. Rule 12 (b).
2. The motion for judgment on the pleadings. Rule 12 (c).
3. The motion for summary judgment. Rule 56.

In the normal case, the motion to dismiss for failure to state a claim upon which relief can be granted and the motion for judgment on the pleadings tend to perform substantially the function of the demurrer. However, they differ from it in at least one major respect. A pleader who makes a motion to dimiss for failure to state a claim or a motion for judgment on the pleadings is not limited — as he would be on general demurrer — to merely attacking the face of the opposing pleading as insufficient. He may instead go behind the allegations made in the pleadings, striking at defects in the factual heart of the opposing case. For this purpose, the rules provide that affidavits and depositions showing that the formal allegations of the opposing pleading are unsupported by the facts may be tendered in aid of such motions. When this occurs, however, a motion to dismiss for failure to state a claim or a motion for judgment on the pleadings is treated by the rules as equivalent to a motion for summary judgment. Consequently, Rule 56, relating to motions for summary judgment, becomes applicable:

Illustration:

A sues B, alleging that he loaned B $1000 and that B has failed to pay. Under the *old* law, such a complaint would not be demurrable for failing to state a cause of action. Under the ***rules***, B may move to dismiss for failure to state a claim on which relief may be granted. He may then tender in support of the

motion affidavits and depositions showing clearly that he has in fact repaid the money. The motion to dimiss will be treated as a motion for summary judgment, and if the court finds that the affiidavits and depositions eliminate the issues in the case, judgment may be rendered for B on the merits of the controversy.

The policy underlying the rules in this regard is two-fold in character. First, the rules seek to avoid the sort of argument over the pleadings which amounts to obstruction for obstruction's sake, such as an argument over whether a pleading states "conclusion," "ultimate facts." or "evidentiary facts." Second, the rules are designed to make it possible to dispose of weak or unfounded cases before the parties have reached the trial stage by permitting substantial and serious weaknesses in a party's case to be presented to the court early in the proceedings.

§ 14. *Permissible Pleadings.* — The permissible pleadings under the new rules are a *complaint,* an *answer,* a *reply* under some conditions (see § 16, infra), an *answer to* a *cross-claim,* a *third-party complaint,* and a *third-party answer.* It is possible that a *motion under Rule* 12 may also be classified as a pleading in some cases, since it may be used to raise issues which may also be raised in the answer.

§ 15. *Complaints.* — Rule 8 (a) states that a "pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

The rule makes two changes with regard to the complaint when compared to the former statutes. First, instead of requiring the complaint to set forth the "facts constituting the cause of action" as under the former practice, Rule 8 (a) requires a complaint merely to state a "claim showing that the pleader is entitled to relief." Second, instead of requiring a pleader to set forth the "ultimate facts," the rule permits a pleader to state his claim in what may be called a system of modified fact pleading. Evidentiary facts and in some cases pure conclusions of law may be set forth in the complaint without detracting from its sufficiency. What has been established comes very close to being a system of pure notice pleading. However, it is settled that a complaint must nevertheless contain

sufficient averments of fact to establish a basis for relief. As Judge Charles E. Clark has put it, "In general, sound rules of pleading are not greatly changed, and so far as you haven't stated any basis of facts at all, you wouldn't get any relief."

A reading of the illustrative forms appended to the rules will furnish far more information on this subject than many pages of text discussion. In contract cases, the rules permit extremely terse complaints, comparable in nature to the "common counts" permitted under the common law system of pleading. Thus, Form 3, a complaint on an account, consists solely of one sentence — "Defendant owes plaintiff one thousand dollars according to the account hereto annexed as Exhibit 1" — followed by a demand for judgment. Form 5 is equally simple: "Defendant owes plaintiff one thousand dollars for money lent by plaintiff to defendant on June 1, 1953." Complaints in other types of causes — e.g., tort actions — require somewhat more detailed allegations. However, as the writer has pointed out in discussing this subject in the *North Dakota Law Review*, the change worked out by the new rules has been foreshadowed by many decisions of the North Dakota court sanctioning forms of pleading almost equally simple. Thus, common count pleading has been permitted here in the past. And extremely broad and general allegations of negligent conduct have been often upheld in tort cases.

§ 16. *Answers.* — As is true of the complaint, the answer survives under the new rules with only relatively minor changes. However, the pleader is permitted to do some things not allowed under the code. Thus, an answer may state a cross-claim against a co-defendant, e.g., asking contribution from a joint tort-feasor or demanding damages. Similarly, the issue of jurisdiction may be tendered in an answer which also pleads to the merits of the case without waiving the right to question jurisdiction — a provision which has the effect of making much learning regarding special appearances obsolete.

Illustration:

A brings an action against B for breach of contract. B files a motion to make the allegations of the complaint more definite and certain. The motion is granted. B now files an answer in which he (1) denies that the court has jurisdiction over him; (2) denies the allegations of the complaint; (3) pleads the affirmative defense of accord and satisfaction. A contends that by making his motion and pleading to the merits, B has submitted to the jurisdiction of the court. The holding of the court under the rules should

be otherwise. (See 1 Barron & Holtzoff, Federal Practice and Procedure, 759 et seq.)

The answer under the new rules retains the distinction familiar to practitioners between matter in denial and new matter in confession and avoidance, e.g., between pleas which traverse the allegations of the complaint and pleas which are affirmative in character. Rule 8 (c), however, goes further than previous law in defining affirmative defenses and contains a listing of about 20 affirmative defenses which must be specifically pleaded. A general denial is permitted under the rules as under the Code. Subject to an ethical obligation of good faith imposed by Rule 11.

The rules continue former practice in permitting inconsistent defenses to be pleaded in an answer. They also allow alternative and hypothetical allegations — see Rule 8 (d) — which have not formerly been used here.

As noted in the preceding section, the rules make an important change with regard to counterclaims, dividing them into two classes: *permissive* and *compulsory*. A defendant *may* plead in his answer *any* counterclaim which he has against a plaintiff as a permissive counterclaim. He *must* plead as compulsory counterclaims any claims against the adverse party stemming from a transaction or occurrence set forth in the opposing pleading, on pain of waiver.

§ 17. *Replies.* — In most cases, unless numerous parties are involved, pleadings under the new rules will consist solely of a complaint and answer, since the rules are intended to establish a two-stage system of pleading. However, under Rule 7 (a), replies will be used under the new rules in two situations: (1) a reply must be filed to a counterclaim; (2) a reply must be filed to an answer where the court, in its discretion, deems it advisable so to require. Practice as to replies is not greatly changed by the new rules.

§ 18. *Third-Party Pleadings.* — These pleadings are governed substantially by rules applicable to pleadings already discussed. See § 10, supra.

§ 19. *Motions.* — Rule 12 governs most motions made in connection with pleadings. Thus, Rule 12 (b) allows a defendant to set forth seven types of defenses by motion rather than answer. These are (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, and (7) failure to

join an indispensable party. It should be noted that this rule furnishes an option instead of imposing a requirement, since each of the foregoing defenses may be set forth with equal effect in the answer. Rule 12 (c) permits a motion for judgment on the pleadings, Rule 12 (e) permits a motion for more definite statement, and Rule 12 (f) permits a motion to strike.

§ 20. *Same; Motion Practice Generally.* — The rules contain an important provision regarding motions which is designed to expedite the trial of a case by eliminating dilatory motions. This is the provision found in Rules 12 (g) and (h) to the effect that a party who makes a motion must include in it all defenses and objections available to him which Rule 12 permits to be made by motion, upon penalty of waiving such defenses and objections. The practical effect of this rule is to limit a party to one preliminary motion before trial.

Illustration:

> A brings an action against B for negligence. B files a motion to dismiss for failure to state a claim upon which reilef can be granted. The court holds a preliminary hearing upon this motion as specified in Rule 12 (d) and overrules the motion. B now files a motion for more definite statement of A's claim. This should be denied as out of order, since B could have requested such relief in his previous motion and Rule 12 (g) provides that "if a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted . . ."

The rule set forth above is designed to avoid a situation wherein a defendant may, by making successive preliminary motions — e.g., a motion for change of venue followed by a motion to dismiss for failure to state a claim followed by a motion to strike — greatly delay the trial of a case.

§ 21. *Matters Which Must Be Specially Pleaded.* — Both Rule 8 (c) and Rule 9 contain a listing of matters which must be specially pleaded or are subject to special rules of pleading. Rule 8 (c) requires an answer to plead specifically any affirmative defense, and lists these as including accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release,

res judicata, statute of frauds, statute of limitations and waiver. Rule 9 requires a pleader to set forth with particularity such matters as lack of capacity, fraud, mistake and special damages. However, it permits general allegations of such matters as condition of the mind (malice, intent, knowledge), the performance of conditions precedent, and the validity of a judgment.

D. DEPOSITIONS AND DISCOVERY

§ 22. *Purpose of Discovery Procedures.* — The importance and the effect of the pre-trial, deposition, and discovery procedures embodied in the new rules has been well summarized by Mr. Justice Murphy of the United States Supreme Court in *Hickman v. Taylor,* 329 U. S. 495, 501 (1947):

> "The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation, and fact revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with the vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties and (2) as a device for ascertaining the facts or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need to be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial . . ."

Further in the opinion it was said:

> "The deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise." 329 U. S. at 507.

These observations are applicable to the North Dakota rules.

§ 23. *Pre-Trial Conferences.* — Most practitioners in this state are familiar with the use of pre-trial conferences, which have been

employed in this state since 1943. The practice is summarized extremely well in Grimson, *Progress Report on Pre-Trial Conferences in North Dakota,* 30 N. Dak. L. Rev. 85 (1954). Rule 16 continues without change the former provision.

§ 24. *Depositions.* — The provisions of the new rules relating to depositions form one of their most significant features. These are found in Rules 26 thru 32, and when read in connection with Rule 33 (Written Interrogatories to Parties), Rule 34 (Discovery and Production of Documents and Things for Inspection, Copying, or Photographing), Rule 35 (Physical and Mental Examination of Persons) and Rule 36 (Requests for admission of Facts and of Genuineness of Documents) form a comprehensive system for the development of evidence and the formulation of issues in a case.

Under the rules a deposition may be taken either *before* or *after* an action has been formally commenced. Rule 27 provides that a person who expects to be a party to a litigation in the future and finds it desirable to perpetuate or establish testimony for purposes of that action may petition the court for an order authorizing him to take depositions from persons named in the petition. Upon notice to adverse parties and a finding by the court that the perpetuation of the testimony is desirable, an order authorizing such depositions will be granted.

Rule 26 deals with the more common situation where an action has been formally commenced and depositions are desired. It permits any party to "take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes." It may be noted that Rule 26 (a) authorizes a defendant to commence taking depositions immediately after the action has been commenced, but requires the plaintiff to obtain leave of court (with or without notice to the other side) if he desires to begin taking depositions prior to 20 days after commencement of the action. NDRC 1943 § 31-0502, the superseded statute, authorized either party to commence taking depositions immediately after service of process. It would appear that such permission to a plaintiff would ordinarily be granted almost *pro forma.*

§ 25. *Same; Benefits of Deposition Procedure.* — Litigation under the Federal Rules has been marked by extensive use of the deposition procedure. This characteristic has been so marked, in fact, that some commentators have warned there is a danger of abuse in the view of the expense often involved. This danger, however, has not

materialized in the past in this state, although extremely liberal deposition procedures were formerly provided by the Code. The benefits to be derived from taking the testimony of witnesses and parties in this fashion have been listed by Professor Moore as follows:

1. It is of great assistance in ascertaining the truth and in checking and preventing perjury, for the following reasons:

(a) The deponent is examined while his memory is fresh.

(b) The deponent is generally not coached in preparation for a pre-trial oral examination with the result that his testimony is likely to be more spontaneous.

(c) A party or witness whose deposition has been taken at an early stage in the litigation cannot, at a later date, readily manufacture testimony in contradiction of his deposition.

(d) Testimony is preserved so that if a witness dies or becomes unavailable at the trial his deposition is available.

2. It is an effective means of detecting and exposing false, fraudulent, and sham claims and defenses.

3. It makes available in a simple, convenient, and often inexpensive way facts which otherwise could not have been proved, except with the greatest difficulty and sometimes not at all.

4. It educates the parties in advance of the trial as to the real value of their claims and defenses, thereby encouraging settlements out of court.

5. It expedites the disposal of litigation, saves the time of the courts, and clears the docket of many cases by settlements and dismissals which would otherwise have to be tried.

6. It safeguards against surprise at the trial, prevents delays, and narrows and simplifies the issues to be tried, thereby expediting the trial.

7. It facilitates both the preparation and the trial of cases.

§ 26 *Same; Scope of Examination.* — The examination which may be made of an adverse party or witness upon deposition is an extremely broad one, being limited only by two factors. Rule 26 (b) provides that the examination (1) can extend only to *relevant* matters and (2) cannot inquire into matters which are surrounded by a *privilege*. It is specifically provided that "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

A party does not, by taking the deposition of a person, make that

person his witness. Consequently he is not bound by the deponent's testimony. Indeed, one fundamental purpose of the deposition procedure is to enable a party to obtain material which he may later use in impeaching a deponent if there later occurs a change in testimony. Rule 27 (f), however, provides that if a party introduces a deposition into evidence for any purpose other than contradicting or impeaching a witness, he thereby makes the deponent his witness in most instances. The effect of this is mitigated by the last sentence of the rule: "At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party."

The requirement that the examination be confined to relevant matters is plainly very general, particularly since in many instances depositions may be taken before the formal issues in the case have been established by the pleadings. In this situation the standard by which relevancy must be judged is very difficult to define clearly. The cases and writings of commentators indicate that when this occurs the requirement of relevancy is given a broad interpretation.

Another limitation upon the scope of the examination which deserves mention is found in Rule 30 (d). This rule provides that upon a showing that an examination is being conducted in bad faith or "in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party," the court (*not* the officer before whom the examination is being conducted) may order the taking of the deposition terminated or may limit the scope and manner of taking the deposition.

Cross-examination, of course, is perfectly permissible.

§ 27. *Procedure of Taking Depositions.* — Depositions may be taken in either of two ways, orally or by written interrogatories. Rule 28 (a) provides that they may be taken anywhere in the United States, territories, or insular possessions before an officer authorized to administer oaths or by any person appointed by the court wherein the action is pending. This would include a notary public.

Oral depositions may be taken by any party by giving reasonable notice of the time and place for the examination to the deponent and to every other party to the action. What is a reasonable notice? This is a matter left to the discretion of the court, which may grant relief under Rule 30 (b) where the time or place specified in the notice appear prejudicial.

What happens when an examination departs from permissible

limits by becoming irrelevant or touching upon privileged matter? The prejudiced party may object to the line the examination is taking and the objection must be noted by the officer presiding at the examination. Irrelevant questions must nevertheless be answered, since Rule 30 (b) declares that "Evidence objected to shall be taken subject to the objections." The proper remedy consists in thereafter excluding the irrelevant matter by calling the attention of the court to it at the trial by objection or otherwise.

A question touching upon a privileged matter calls for a different procedure. The deponent need not answer such questions. The examiner must then apply to the court for an order requiring the deponent to answer, and the court will pass upon the question whether the claimed privilege is applicable. The procedure is set forth in Rule 37. The question of when privilege is present is discussed in section 29 of this paper.

Rule 31 sets forth the procedure for taking depositions by interrogatory, a convenient procedure where the deponent is located so far away that personal examination would be unduly expensive or difficult.

When the deposition is completed, it must be certified by the officer before whom it was taken and filed with the court. It must also be signed by the deponent, though if the deponent refuses to sign all that happens is that the presiding officer must certify that fact, together with the reason for the refusal if it is given.

§ 28. *When Deposition May Be Used.* — Rule 26 (d) (3) provides that the deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (1) that the witness is dead; (2) that the witness is at a greater distance than 100 miles from the place of trial or hearing,or is out of the state, unless the absence of the witness was procured by the party tendering the deposition; (3) that the witness is unable to testify because of age, sickness, infirmity or imprisonment; (4) that the witness cannot be brought to the court by subpoena; (5) that exceptional circumstances make it desirable in the interests of justice. Rule 26 (d) (1) permits use of a deposition for contradiction or impeachment.

§ 29. *Privileged Matters; Written Interrogatories.* — The law of evidence which governs the actual trial also governs at the examination of a witness or party by deposition or by written interrogatories. Rule 26 (b) specifically provides that a deponent need not disclose privileged material.

Most of the cases under Federal Rules involving questions of privilege have arisen in connection with the use of written interrogatories. This is because Rule 33 allows written interrogatories a scope quite as broad as the oral examination of a deponent. Procedure in connection with written interrogatories is extremely simple. Any party may serve such interrogatories upon any other party. They must be answered separately and fully in writing under oath within 15 days unless the party being interrogated serves written objections to them, in which case answers may be deferred until the objections are determined.

The leading case on the question of privilege is *Hickman v. Taylor*, 329 U. S. 495 (1947). A seaman died when a tug capsized. His widow brought action and submitted written interrogatories to the defendant. One of them read:

> "State whether any statements of the members of the crews of the tugs 'J. M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the car float and the sinking of the tug 'J. M. Taylor'. Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports."

The defendant objected on the ground this interrogatory called for the production of privileged documents. The objection was overruled in the trial court, but held to be well taken in an opinion by the Supreme Court of the United States.

The Court ruled that memoranda, statements and mental impressions of counsel prepared or obtained from interviews with witnesses in preparation for litigation after a claim has arisen are *not* within the attorney-client privilege and not protected from discovery on that basis. 329 U. S. 508. This was on the theory that the attorney-client privilege relates to confidential communications made by the client to the attorney, not to statements obtained from third parties or witnesses. However, the court felt that it ought to pursue nevertheless a general policy "against invading the privacy of the attorney's course of preparation for litigation." Consequently while it stated that where "relevant and non-privileged facts remain hidden in the attorney's file and where production of these facts is essential to the preparation of one's case, discovery may properly be had," it was nevertheless held that the burden of showing cause why such materials should be produced rested upon the party who was seeking discovery. Since no showing had been made in the

case, the defendant's action in refusing to respond to the interrogatory was upheld.

Other questions of privilege will doubtless suggest themselves to the reader, e.g., questions involving the doctor-client privilege, confidential communications between husband and wife, statements made by employees of a corporation to the corporation's legal counsel, statements to insurers, questions of incriminating character, and the like. Detailed discussion of these is impractical in a summary of this character; they can only be mentioned in passing.

§ 30. *Physical Examinations.* — One aspect of the problem which nevertheless deserves mention is Rule 35. This provides that in an action in which the mental or physical condition or the blood relationship of a party, or of an agent, or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical, mental, or blood examination by a physician or to produce for such examination his agent or the person in his custody or legal control.

This rule does not violate any substantive right or privilege of personal privacy. It is nevertheless provided that such examination may be made only on motion for cause shown. When such an examination is made, however, the practical effect will normally be to cause a complete waiver of the doctor-patient privilege. This is because Rule 35 (b) (2) provides that "By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition."

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