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The Proposed North Dakota Rules of Civil Procedure

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THE PROPOSED NORTH DAKOTA RULES OF CIVIL PROCEDURE

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PART TWO: RULES 5 THROUGH 12

This paper continues the analysis of the proposed rules of civil procedure for the district courts of North Dakota which commenced in a preceding issue of the *North Dakota Law Review*.[1]

Rule 5 deals with the service and filing of pleadings and other papers. As is true in the case of Rule 4, it incorporates a few changes in the law of this state. The text of the first three sections of the rule is as follows:

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) *Service: When Required.* Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written appearance, demand, offer of judgment,[2] and similar paper shall be served upon each of the parties,[3] but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.[4]

(b) *Same: How Made.* Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has

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1. Crum, *The Proposed North Dakota Rules of Civil Procedure*, 32 N. Dak. L. Rev. 88 (1956). For a more generalized appraisal, see Holtzoff, *New Civil Procedure in North Dakota*, 32 N. Dak. L. Rev. 81 (1956).

2. Fed. R. Civ. P. 5(a), from which this rule is derived, inserts the words "designation of record on appeal" at this point.

3. Fed. R. Civ. P. 5(a) inserts the words "affected thereby" at this point, and the same phrase was included in the original draft of the North Dakota rules. It was deleted from the proposed rules by the amendents of June 17, 1955, filed with the Supreme Court by the rules committee.

4. The superseded statutory provisions are N. D. Rev. Code §§ 28-2810, 28-2819 28-2821 and 31-0510 (1943). Except as indicated in notes 2 and 3, *supra*, the language of this provision is identical with Fed. R. Civ. P. 5(a).

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no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.[5]

(c) *Same: Numerous Defendants.* In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants, and that any cross-claim, counter-claim, or matter constituting an avoidance or affirmative defense therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.[6]

A. *Comparison with Federal Rules.* While these sections of Rule 5 follow the comparable provisions in the Federal Rules of Civil Procedure very closely, there is one significant difference. Federal Rule 5(a) only requires service of documents upon parties "affected thereby."[7] This qualification has been omitted from the North Dakota rule. The question posed by the omission is whether failure to make service of an order, notice, or other document upon a party not affected by it would constitute reversible error. On balance it would seem it should not,[8] but the risk of reversal plainly rests upon a party who fails to comply fully with the rule.

B. *Contrast with Rule 4.* Rule 5 furnishes an interesting contrast with Rule 4, which provides for the contents and service of process. Whereas Rule 4 has for its objective the attainment of jurisdiction by service of the jurisdictional documents upon the parties to the litigation, the objective of Rule 5 is to channel service of all other papers toward the attorney rather than the client, once the cause has been properly launched. In this it seems workmanlike and lawyerly. While methods of serving such papers upon the litigants in person are necessarily prescribed by it, the rule is described by commentators as mandatory[9] in providing that where a party has counsel the papers in the case flow to the counselor rather than the client.[10]

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5. The superseded statutory provisions are N. D. Rev. Code §§ 28-2811, 28-2814, 28-2812, 28-2813 and 28-2830 (1943). N. D. R. Civ. P. 5(b) is identical with Fed. R. Civ. P. 5(b).

6. This rule is taken verbatim from the Federal Rules and no provision dealing with the same subject matter is found in the North Dakota Revised Code of 1943.

7. See note 3, *supra*.

8. See N. D. R. Civ. P. 1, and comment thereon in Crum, *supra* note 1, at 95-96.

9. 1 Barron and Holtzoff, Federal Practice and Procedure § 203 (Rules Ed. 1950).

10. The North Dakota statutes are, in their terms, not quite as clear as the language of Rule 5. Compare the language of N. D. Rev. Code § 28-2810 (1943), which "permits" service of documents on attorneys, with N. D. Rev. Code § 28-2814 (1943), which "re-

C. *Papers Covered by Rule 5.* No all-inclusive enumeration of the types of papers covered by the rule is possible. It plainly governs service of pleadings subsequent to the complaint, notices,[11] most orders, appearances, demands, offers of judgment and motions. North Dakota precedent indicates it might not be considered to govern the entry of an order for judgment.[12]

D. *Service on Attorney.* The provision of Rule 5 requiring service upon the attorney is somewhat broader than the statutes the rule supersedes. This means that in some instances papers which would have been served on the client will now be received by the lawyer. To illustrate, under N. D. Rev. Code § 28-2821 (1943) service of any paper to bring a party into contempt was necessarily made upon the party individually. Under the new rules it would appear that such documents — *e.g.*, an order to show cause why a party should not be held in contempt — are to go to the attorney in the case.[13]

Similarily it was held in *Commercial Credit Co. v. Braseth*[14] that the statutory permission of the Code to serve papers upon the attorney applied "only to those papers which relate to matters which can be attended to by the attorneys and which do not require a party to do, or not to do, something personally."[15] Holdings under the Federal Rules of Civil Procedure have observed no such distinction. The difference in practice is clearest in the case of orders for pre-trial examination of adverse parties. Present North Dakota practice is to issue a subpoena.[16] The federal practice is to issue notice to counsel, a subpoena being considered unnecessary in the case of a litigant.[17]

Under the provisions of Rule 5(b), service on an attorney may

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quires" it. It should be pointed out that Rule 5(b) permits the court to order service on the party himself if this proves to be desirable. Barron and Holtzoff cite cases wherein federal courts, without advance permission, have upheld service on a party instead of the attorney. See note 9. *supra.*

11. Including the notice of appeal, Gouler and Goer v. Eidsness, 18 N. D. 338, 121 N.W. 83 (1909), and notice of change of venue, DeMars v. Gardner, 27 N. D. 60, 145 N.W. 129 (1914).

12. Gould v. Duluth and Dakota Elevator Co., 3 N. D. 96, 54 N.W. 316 (1893). The case turns on the construction of N. D. Rev. Code § 28-001 (1943), which is superseded by N. D. R. Civ. P. 58 but appears consistent with the language of that rule.

13. N. L. R. B. v. Hopwood Retinning Co., 104 F.2d 302 (2d Cir. 1939); Tilgham v. Tilgham, 57 F. Supp. 417 (D. C. 1944).

14. 61 N. D. 180, 237 N.W. 699 (1931).

15. *Id.* at 183, 237 N.W. at 700. Compare Larson v. Larson, 9 S. D. 1, 67 N.W. 842 (1896); Hennessy v. Nicol, 105 Cal. 138, 38 Pac. 649 (1894) (both cases involving orders for temporary alimony); State *ex rel.* Hammer v. Downing, 40 Ore. 309, 66 Pac. 917 (1901) (contempt proceedings against evasive judgment debtor).

16. Commercial Credit Co. v. Braseth, *supra.*

17. Collins v. Wayland, 139 F.2d 677 (9th Cir.), *cert. denied,* 322 U. S. 744 (1944); French v. Zalstem-Zalessky, 1 F. R. D. 240 (S. D. N. Y. 1940); Spaeth v. Warner Bros. Pictures, 1 F. R. D. 729 (S. D. N. Y. 1941). But see N. D. Rev. Code § 31-0203 (1943).

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be made in either of two fashions: personally or by mail. Personal service is accomplished by delivery, which may be made by simply handing the document to the attorney in person or depositing it at his house[18] or office under the conditions specified in the rule. The law which the Supreme Court of North Dakota has developed about personal delivery to the lawyer seems little affected by the language of the rule. The delivery must, under present precedent, be made to the attorney of record *in person* rather than to associate counsel who lacks a special authority to receive the document or admit service thereof.[19] It has, however, been held that service of a notice of appeal — the document involved in most of the litigated cases — is valid where it is addressed to the firm of the attorney of record instead of to the attorney of record by his personal name.[20] It goes without saying that under the provisions of this rule an attorney has no power to accept service of a summons for his client in the absence of a special authorization so to do.[21]

In the case of service by mail the language of Rule 5(b) appears to iron out a technical wrinkle in the law. This is illustrated by *Garske v. Hann*,[22] wherein attorney *A* served notice of appeal by mail upon attorney *B*, a resident of the same city, only to find that the service was invalid because the Code[23] authorizes service by mail only when the server and the served reside in different places. The new rules impose no such requirement. In its stipulation that service by mail is complete upon mailing, Rule 5(b) merely restates existing case law.[24] It is not necessary that the notice or other document be actually received.[25]

18. The rule speaks of leaving the document at the attorney's "dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." This seems to suggest a way around the problem of McKenzie v. Boynton, 19 N. D. 531, 125 N.W. 1059 (1910), involving residence in a hotel.

19. McKenzie v. Bismarck Water Co., 6 N. D. 361, 71 N.W. 608 (1897).

20. Bank of Commerce v. Pick, 13 N. D. 74, 99 N.W. 63 (1904). While service by firm name is thus good, what about service by reference to official position? In Ross v. City of Kenmare, 27 N. D. 487, 146 N.W. 897 (1914), it was held that service of notice of entry of judgement by mail on "The City Attorney, Kenmare, N. Dak." was not valid so as to set the time for appeal running. The same thing is true *a fortiori* where the record fails to designate an attorney at all and service is made upon one not so listed. American Loan & Investment Co. v. Dalen, 49 N. D. 323, 191 N.W. 490 (1922). The cases in this note and in note 19 above all involve situations werein services on the attorney was relied upon as starting the time for appeal to running. The court is inclined to be extremely technical about this. "The right of appeal is in the highest degree valuable to the litigant, and there is abundance of authority holding that where a party seeks to restrict or limit such right by the service of notice or papers of any description he will be held to strict and technical exactness of practice." McKenzie v. Bismarck Water Co., 6 N. D. 361, 371-72, 71 N.W. 608, 611 (1897).

21. Taylor v. Oulie, 55 N. D. 253, 212 N.W. 931 (1927).

22. 48 N. D. 42, 182 N.W. 933 (1921).

23. N. D. Rev. Code § 28-2812 (1943).

24. Fargo Silo Co. v. Pioneer Stock Co., 42 N. D. 48, 171 N.W. 849 (1919); Cedar Rapids Nat. Bank v. Coffey, 25 N. D. 457, 141 N.W. 997 (1913); see Clyde v. Johnson, 4 N. D. 92, 95, 58 N.W. 512, 513 (1894).

25. Cedar Rapids Nat. Bank v. Coffey, *supra* note 24; Clyde v. Johnson, *supra* note 24.

E. *Effect of Default.* Rule 5(a) provides that no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them must be served pursuant to Rule 4. The limitation that the default must consist of failure to appear, rather than failure to plead in time, should be carefully noticed. Where the default is merely technical, as where a party has a procedural motion pending but fails to submit an answer in time,[26] all the protection of Rule 5 is available.

The text of the two remaining portions of Rule 5 is as follows:

(d) *Filing.*

(1) All pleadings, affidavits, bonds, and other papers in an action shall be filed with the clerk, unless otherwise provided by statute or by order of the court, at or prior to the time of the filing of the note of issue, or at or prior to the pre-trial conference, if one is held.[27]

(2) All affidavits, notices and other papers designed to be used upon the hearing of a motion or order to show cause shall be filed prior to the hearing unless otherwise directed by the court.[28]

(3) If a party fails to comply with this subdivision, the Court, on motion of any party or of its own motion may order the papers to be filed forthwith and if the order is not obeyed, the Court may order them to be regarded as stricken and their service to be of no effect.[29]

(e) *Removal of Pleadings for Service.* Upon the request of the party filing the same, any original pleading or paper in any civil action or proceeding, which by law is required to be filed in the office of the clerk of the court in which such action or proceeding is pending, may be removed from the files for the purpose of serving the same either within or without the state, but shall be returned thereto without delay.[30]

A. *Filing.* Rule 5(d) diverges sharply from the comparable provision in the Federal Rules of Civil Procedure, which provides merely that "all papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter." It may be suggested that despite the considerable particularity with which the North Dakota

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26. A situation illustrated by Naderhoff v. Geo. Benz & Sons, 25 N. D. 165, 141 N.W. 501 (1913). Where the motion goes to the merits even a technical default is not present.

27. The superseded statutory provisions are N. D. Rev. Code §§ 28-0511, 28-3005 (1943).

28. This provision is new, being found neither in the Federal Rules of Civil Procedure nor in the Code.

29. This provision is new, being found neither in the Federal Rules of Civil Procedure nor in the Code, though it shows traces of origin in N. D. Rev. Code § 28-0511 (1943).

30. This supersedes N. D. Rev. Code § 28-0630 (1943).

rules deal with the subject, they are to be regarded primarily as directory rather than mandatory. This is indicated by the language of Rule 5(d) (1), which imposes, it will be noticed, two deadlines instead of one for filing papers: either prior to the filing of the note of issue[31] or prior to the pre-trial conference. Undoubtedly the more detailed provisions of the North Dakota rules were inspired by occasional instances of delay in filing.[32]

B. *Removal of Pleadings for Service.* Rule 5(e) merely restates the provisions of N. D. Rev. Code § 28-0630 (1943), with the addition of a requirement that when papers are removed from the files for service they must be returned promptly.

RULE 6. TIME

(a) *Computation.* In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When the period of time prescribed or allowed is less than seven days, intermediate Sundays and holidays shall be excluded in the computation.[33]

(b) *Enlargement.* When by these rules or a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 4(g) (8), 50(b), 52(b), 59(c), (i) and (j), and 60(b), except to the extent and under the conditions stated in them.[34]

(c) *Unaffected by Expiration of Term.* The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or ex-

31. The form, contents, and purpose of the note of issue are set forth in N. D. Rev. Code § 28-1208 (1943).

32. See Burke v. Minekota Elevator Co., 48 N. D. 795, 186 N.W. 948 (1922).

33. This is taken verbatim from Fed. R. Civ. P. 6(a), but omits the last sentence of that rule, which provides that "A half holiday shall be considered as other days and not as a holiday." N. D. R. Civ. P. 6(a) is not listed by the joint committee as superseding any North Dakota statute.

34. The superseded statutory provisions are N. D. Rev. Code §§ 28-0739, 28-2818, 28-2902, 28-2903 and 28-3006 (1943). The text of this provision follows the language of Fed. R. Civ. P. 6(b) verbatim, with the exception that the rules excepted from the operation of Rule 6(b) by its text differ somewhat from those listed in the Federal Rules. This is a matter discussed in the text, *infra*.

piration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.[35]

(d) *For Motions — Affidavits.* A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.[36]

(e) *Additional Time After Service by Mail.* Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.[37]

A. *General Appraisal.* Rule 6 follows the federal pattern very closely, diverging from the language of the Federal Rules in only a few minor particulars. Despite the fact it is cut from a bolt of federal cloth, its provisions harmonize smoothly in most instances with existing practice and statutory provisions in this state. Most of its provisions are concerned primarily with problems of a virtually mechanical nature — how to compute time and the like — and accordingly require little comment. However, the section of the rule dealing with the enlargement of time does present some questions of larger interest.

B. *Enlargement of Time.* Most of the situations which arise when a lawyer finds himself pressed for time in the preparation of a pleading or the taking of some necessary step in litigation are settled by agreement beforehand among the counsel involved in the case. There exists in this respect a very considerable professional courtesy among practitioners.

This attitude among the members of the Bar has been reflected for many years in the statutory provisions relating to enlargement

35. Rule 6(c) does not supersede any North Dakota statutory provision, though it embodies a principle already accepted in the law of this state. See text discussion, *infra*.

36. This is taken verbatim from Fed. R. Civ P. 6(d). The superseded statutory provisions are N. D. Rev. Code §§ 28-2803, 28-2815, 28-2817 and 28-2818 (1943).

37. This is taken verbatim from Fed. R. Civ. P. 6(e). The superseded statutory provision is N. D. Rev. Code § 28-2816 (1943).

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of time found in the present Code.[38] It was said in one early case[39] that the powers given the North Dakota trial courts to enlarge the time within which steps in litigation might be taken indicated a broader discretion than was vested in the courts of almost any other state. Rule 6(b), which supersedes the present statutes relating to extensions of time, quite plainly continues this policy of liberality, and it may be presumed that the course of decision in those cases where an enlargement of time is requested will continue to be much what it has been in the past. Neither Rule 6(b) nor the existing statutes, of course, countenance unreasonable delay, and the discretion of the judges unquestionably has been exercised in past cases in the direction of expediting lawsuits as far as reasonably possible. But the chief element in the cases has been precisely this element of discretion on the part of the trial court,[40] the discretion being, it should be added, a "judicial discretion"[41] reviewable as such, directed toward the technical question of practice rather than the merits,[42] and based on a showing of good cause.[43] To illustrate the character of the discretion involved, a few holdings may be set forth. It has been held that a showing that papers and files necessary for settling the statement of the case were in possession of the district judge during the time set for making up the statement was not sufficient to justify an extension of time, where there was no additional showing that the attorney involved had made any effort to obtain such papers from the judge.[44] Confusion existing between two firms of attorneys employed by a single litigant, whereby each firm thought the other was attending to a matter in litigation, did not justify an extension of time.[45] Con-

38. These are listed in note 34, *supra*.

39. Smith v. Hoff, 20 N. D. 419, 424, 127 N.W. 1047, 1049 (1910). See also Sharon Milling Co. v. Galde, 54 N. D. 817, 211 N.W. 589 (1926), which states that the statute relating to extension of time is remedial and is to be liberally construed.

40. Brey v. Tvedt, 74 N. D. 192, 21 N.W.2d 49 (1945); Millers & Traders State Bank v. National Fire Insurance Co., 55 N. D. 149, 212 N.W. 834 (1927); Sharon Milling Co. v. Galde, 54 N. D. 817, 211 N.W. 589 (1926).

41. Sharon Milling Co. v. Galde, 54 N. D. 817, 211 N.W. 589 (1926).

42. Tuttle v. Pollock, 19 N. D. 308, 123 N.W. 399 (1909). It is said in Sharon Milling Co. v. Galde, *supra* note 41, that the discretion which the court exercises "is as to the 'good cause' shown for the delay, not as to the merits." 54 N. D. at 819, 211 N.W. at 590.

43. Where the delay which necessitates an extension of time relates to the filing of some document other than a pleading, such as a proposed statement of the case for appeal, the showing of good cause has customarily been made by filing an affidavit of merit. The same requirement exists in connection with an application extending the time in which to file an answer after a default has occurred, but proper practice is said to require the submission of a proposed answer, verfied, and setting up a defense which is valid on its face; though this latter requirement has sometimes been dispensed with. Braseth v. County of Bottineau, 13 N. D. 344, 100 N.W. 1082 (1904); Wheeler v. Castor, 11 N. D. 347, 92 N.W. 381 (1902).

44. Folsom v. Norton, 19 N. D. 722, 125 N.W. 310 (1910).

45. Sharon Milling Co. v. Galde, 54 N. D. 817, 211 N.W. 589 (1926).

versely, an honest mistake concerning the date a pleading was required to avoid default,[46] the existence of other proceedings affecting the cause at issue,[47] and the necessity of a technical amendment to the pleadings to allow the issues in the case to be fully explored,[48] have been held sufficient to justify enlargements of time.

By its terms the time for doing certain actions may not be extended under Rule 6(b). The time limit of 10 days after verdict applicable to motions for judgment *non obstante verdicto* established by Rule 50(b) cannot be extended under Rule 6(b). A motion to amend or make additional findings of fact under Rule 52(b) must be made not later than ten days after entry of judgment[49] and cannot be made later under Rule 6(b). The time limits applicable to a motion for a new trial established by Rule 59(c) are likewise hard and fast, as is the time limit on the right of the court to order a new trial *sua sponte* conferred by Rule 59(i). Equally, the ten-day time limit on motions to alter or amend a judgment established by Rule 59(j) is incapable of enlargement; and the same thing is true of the three-year time limit applicable to the right of a defendant served with summons by publication to open up a default judgment under Rule 4(g) (8).

Are there any limitations on the power of enlargement of time under the Rules other than those listed above? As of this writing, the answer appears to be in the negative; the existence in Rule 6(b) itself of these specific exceptions to its operation would seem to exclude the idea there are others.[50] On the basis of the text of the rules available to the writer, this raises the question whether Rule 6(b) would permit an extension of the time for taking an appeal. In terms the provisions of Rule 6(b) do not forbid this.[51]

46. Braseth v. County of Bottineau, 13 N. D. 344, 100 N.W. 1082 (1904).

47. Smith v. Hoff, 20 N. D. 419, 127 N.W. 1047 (1910).

48. Brey v. Tvedt, 74 N. D. 192, 21 N.W.2d 49 (1945).

49. This is a rough proposition if it means precisely what it says. It would seem to the writer that Rule 52(b) ought to be amended to provide that a motion to amend or make additional findings of fact must be made not later than ten days *after service of the notice* of entry of judgment. See the amendment to the same effect made in Rule 59(j) by the Supplement Report of the Joint Committee to the Supreme Court on June 17, 1955.

50. The federal cases have developed a few holdings which ought to be mentioned with respect to Rule 6(b). The argument has been made in at least one case that since a statute of limitations was procedural in its nature, the time for bringing an action barred by the statute of limitations could be extended under Fed. R. Civ. P. 6(b). This extreme view was naturally rejected. Lusk v. Lyon, 9 F. R. D. 250 (Mo. 1949). In Anderson v. Yungkau, 329 U. S. 482 (1947), a notable case, the Supreme Court of the United States ruled that a two-year time limit provided by Fed. R. Civ. P. 25(a) for the substitution of a personal representative of a deceased party to a lawsuit could not be extended under Rule 6(b) because of the disruption which might be caused in probate proceedings as a consequence. N. D. R. Civ. P. 25(a) follows the lead of the federal advisory committee on rules and deletes the time limitation involved just the same.

51. N. D. Rev. Code § 28-2902 (1943), which Rule 6(b) supersedes, provides that the power of enlargement does not extend to the time for taking an appeal. As originally drafted, Fed. R. Civ. P. 6(b) contained a similar provision, but this was stricken in 1948

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But the philosophy behind the hard-and-fast time limits the rule imposes on motions for judgment notwithstanding the verdict, motions to amend or make additional findings of fact, and motions for a new trial is plainly one of promoting finality of judgments.[52] It is to be expected that as finally adopted the Rules will impose a similarly inflexible limit on the time for appealing, probably in the sections devoted to appeals.[53]

C. *Terms of Court.* In the federal system, the adoption of Rule 6(c) — which divorces questions of time from the continuance or expiration of a term of court — constituted a major reform. North Dakota has had the principle of Rule 6(c) embodied in its law for many years.[54]

D. *Notice of Motion.* Rule 6(d) shortens the period of notice required prior to the hearing of a motion from eight days, as prescribed by N. D. Rev. Code § 28-2815 (1943), to five. Eight days' notice is, of course, still required where service of the notice of hearing with respect to the motion is made by mail.[55] This time may be shortened in the discretion of the court where cause exists.[56]

E. *Service by Mail.*[57] Under N. D. Rev. Code § 28-2816 (1943)

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by amendment to allow the matter of time for appeal to be more fully regulated by another section of the Federal Rules. See Note of the Advisory Committee on Amendment to Rule 6, set forth at length in 1 Barron & Holtzoff, Federal Practice and Procedure § 211, n. 2 (Rules Ed. 1950). At present the time for taking an appeal under the Federal Rules is strictly limited and cannot be extended under Fed. R. Civ. P. 6(b). 1 Barron & Holtzoff, *op cit. supra,* at 379.

52. See Note of the Advisory Committee on Amendment to Rule 6, 1 Barron & Holtzoff, *op cit. supra* note 51.

53. The section of the North Dakota Rules relating to appeals has not been fully completed at the time of this writing. To look briefly to the merits of the question, what considerations require making the time limit for appeal a hard and fast one? If one assumes a case wherein an attorney suddenly dies the day before an appeal must be completed, thereby causing a defeated litigant to lose the right to appeal from an improper decision, the argument for existence of a power of enlargement becomes a rather attractive one. The argument on the other side is that the inflexible time limit on the right of appeal promotes finality of judgment and certainty of rights, with advantage to the public in general. As to the present law of appeal in North Dakota, see Neff, *The Reviewable Orders Statute of North Dakota,* 28 N. Dak. L. Rev. 186 (1952); Newton, *Appellate Practice and Procedure in North Dakota,* 27 N. Dak. L. Rev. 155 (1951).

54. Martinson v. Marzolf, 14 N. D. 301, 309-10, 103 N.W. 937, 940 (1905). See also N. D. Rev. Code § 27-0507 (1943).

55. N. D. R. Civ. P. 6(e).

56. State v. Movius Land & Loan Co., 53 N. D. 656, 207 N.W. 492 (1926). But it would appear the time can't be shortened too much. In Bratberg v. Advance-Rumely Thresher Co., 61 N. D. 452, 238 N.W. 552 (1931), a motion was noticed for hearing on the same day it was made. The Court unhesitatingly held it a mere nullity. When is a motion made? When it is served on the opposing party, not when it is filed with the clerk of court. Schaff v. Kennelly, 61 N.W.2d 538 (N. D. 1953).

57. *Errata.* Attention is called to an error which crept into the first installment of this paper. On page 103 of 32 N. Dak. L. Rev. the writer inadvertently made a reference to Rule 6(e) as doubling the stated period when service is made by mail. The statement was made in reliance upon the printed text of the proposed rules appearing in the pamphlet "Proposed Rules of Civil Procedure for the District Courts of North Dakota" published by the West Publishing Company, and overlooked the fact that Rule 6(e) had been amended by the supplemental report amending the proposed rules filed with the Supreme Court of North Dakota on June 17, 1955.

when service of a pleading or other document is made by mail, the time limit for the necessary response is automatically doubled. Rule 6(e) shortens the extension of time resulting from service by mail, allowing merely an additional three days for such response. The time of service by mail is the date of mailing.[58] It is complete when the letter, properly addressed, is placed in the mails, even though the letter may never be received by the person to whom it is addressed.[59]

III. PLEADINGS AND MOTIONS

RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS

(a) *Pleadings.* There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.[60]

(b) *Motions and Other Papers.*

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.[61]

(2) The rules applicable to captions,[62] signing,[63] and other matters of form of pleadings apply to all motion and other papers provided for by these rules.[64]

(3) A motion to vacate or modify a provisional remedy shall have preference over all other motions.[65]

(c) *Demurrers, Pleas, Etc., Abolished.* Demurrers, pleas,

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58. Fargo Silo Co. v. Pioneer Stock Co., 42 N. D. 48, 171 N.W. 849 (1919); Clyde v. Johnson, 4 N. D. 92, 58 N.W. 512 (1894). Fargo Silo Co. v. Pioneer Stock Co., *supra*, adds the point that it is the actual date of the mailing, not the date of the postmark, which is determinative.

59. Cedar Rapids Nat. Bank v. Coffey, 25 N. D. 457, 141 N.W. 997 (1913); see Clyde v. Johnson, 4 N. D. 92, 95, 58 N.W. 512, 513 (1894) (dictum to same effect).

60. The text of Rule 7(a) is identical with Fed. R. Civ. P. 7(a) as given in 1 Barron & Holtzoff, Federal Practice and Procedure § 241, n. 2.1 (Supp. 1956). The superseded statutory provisions are N. D. Rev. Code §§ 28-0702, 28-0704, 28-0716 and 28-0717 (1943).

61. This is identical with Fed. R. Civ. P. 7(b)(1). The superseded statutory provisions are N. D. Rev. Code §§ 28-2801, 28-2802, 28-2803 and 28-0810 (1943).

62. N. D. R. Civ. P. 10(a).

63. N. D. R. Civ. P. 11.

64. This is identical with Fed. R. Civ. P. 7(b)(2). The superseded statute is N. D. Rev. Code § 28-2810 (1943).

65. This is new matter introduced by the North Dakota committee. It is based on the provisions of N. D. Rev. Code § 28-2806 (1943), which it supersedes.

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and exceptions for insufficiency of a pleading shall not be used.[66]

A. *Permissible Pleadings.* In terms Rule 7(a) merely performs the function of enumerating the permissible pleadings in a civil action without prescribing their content. Commentators on the federal rules, comparing its effect on the law of pleading with that of the vastly more important Rule 8, have regarded it primarily as a sort of housekeeping or administrative provision and have had comparatively little to say about it.[67]

The specific pleadings it prescribes are more appropriately taken up under other headings. Thus, as to the complaint, see the discussion under Rule 8(a). As to the answer, see the discussion following Rules 8(b) and (c).[68]

B. *Replies.* There is, however, one pleading appropriately discussed here. This is the reply. While it has been said that the basic effect of Rule 7(a) is to prescribe a two-stage rather than three-stage system of pleading,[69] Rule 7(a) nevertheless requires a reply where the answer contains a counterclaim specifically pleaded as such[70] and also gives the court a discretionary power to order a reply where it seems advisable.[71] Under the existing law of this state, practice is very similar. A reply is required where an answer states a counterclaim[72] and may be required in the discretion of the court where the answer asserts new matter, *i. e.*, sets up a plea in confession and avoidance.[73] If the construction placed on Rule

66. This is identical with Fed. R. Civ. P. 7(c). It supersedes N. D. Rev. Code §§ 28-0718, 28-0704, 28-0705, 28-0706, 28-0707, 28-0708, 28-0709, 28-0734, 28-0716 (1943).

67. Thus, Judge Charles E. Clark refers to it as one of a group of rules which "could be modified and some perhaps omitted without substantially affecting the result." Clark, *Simplified Pleading*, 2 F. R. D. 456, 464 (1943).

68. Discussion of third-party pleadings as a separate topic is omitted here, on the view that the principles applicable to the more conventional pleadings indicate what is proper in this connection.

69. Blume, *The Scope of a Civil Action*, 42 Mich. L. Rev. 257, 277 (1943).

70. Rule 7(a) also requires, it will be noted, "an answer to a cross-claim, if the answer contains a cross-claim." As to the distinction between a counter-claim and a cross-claim, see the discussion under N. D. R. Civ. P. 13(g) in the next installment of this paper.

71. Columbia Pictures Corp. v. Rogers, 81 F. Supp. 580 (S. D. W. Va. 1949); United States v. Hole, 38 F. Supp. 600 (D. Mont. 1941); Leimer v. State Mutual Life Assurance Co., 1 F. R. D. 386 (W. D. Mo. 1940), *app. dismissed*, 127 F.2d 862 (8th Cir. 1942).

72. N. D. Rev. Code § 28-0716 (1943) provides that "When the answer contains new matter constituting a counterclaim, the plaintiff within thirty ways may reply to such new matter . . ." While this statute in terms provides only that the plaintiff *may* reply, it is clear that the requirement is actually mandatory, Christofferson v. Wee, 24 N. D. 306, 139 N.W. 689 (1913); N. D. Rev. Code § 28-0740 (1943), though a party may, by proceeding at the trial on the assumption the allegations of the counterclaim are at issue, waive the requirement. Power v. Bowdle, 3 N. D. 107, 54 N.W. 404 (1893).

73. N. D. Rev. Code § 28-0717 (1943). Under the present procedure, it may be added, it would normally seem advisable for a pleader who has set forth new matter in his answer and is not certain what contentions will be advanced in response to ask that the court direct the adverse party to reply. Otherwise, under N. D. Rev. Code § 28-0740 (1943), evidence in denial or in confession and avoidance of the new matter may come in

7(a) by the federal courts is followed here, there is ample warrant for the statement that the existing practice as to replies will not be substantially[74] changed.[75]

C. *Philosophy of Pleadings.* It is nevertheless true that Rule 7(a) was designed to discourage the use of pleadings bringing in new averments after the complaint and answer have come into the case.[76] In this respect it exemplifies in practice the entire philosophy of pleading inherent in the new rules. The philosophy commences with the assumption, persuasively supported by Judge Clark,[77] that as a normal matter it is useless to attempt to require a pleader to particularize his case too definitely prior to the commencement of proceedings. It follows from the assumption stated that the pleadings should be limited in function to the accomplishment of a few severely limited objectives: the giving of notice of the general nature of the claim asserted,[78] the sufficient delineation of the fact situation involved to permit the application of the doctrine of res judicata after the trial,[79] and the indication to the court of the type of case presented so that it may be assigned the proper form of trial.[80] The pleader is not required to set forth the issues

at the trial, to the pleader's surprise and undoing. A number of cases illustrate the consequences of this trap for the unwary. To controvert new matter contained in an answer, in the absence of a reply limiting the scope of the issues which he can raise, a plaintiff may show waiver and estoppel, Weber v. United Hardware and Implement Mutuals Co., 75 N. D. 581, 31 N.W.2d 456 (1948); Baird v. Kottke, 58 N. D. 846, 228 N.W. 214 (1929); the statute of frauds, Wilson Co. v. Knowles, 52 N. D. 886, 204 N.W. 663 (1925); fraud, Moores v. Tomlinson, 33 N. D. 638, 157 N.W. 685 (1916), and a written contract to refute defendant's plea of breach of oral warranties, American Case & Register Co. v. Walton & Davis Co., 22 N. D. 187, 133 N.W. 309 (1911). See N. D. R. Civ. P. 8(d), *infra*, and discussion thereto.

74. In some cases, it may be added, the plaintiff finds it desirable to make a reply without being required to do so; and then it seems to be the consensus of opinion among counsel that leave of the court must be obtained beforehand. Porter v. Theo. J. Ely Mfg. Co., 5 F. R. D. 317 (W. D. Pa. 1946); *contra*, Leimer v. State Mutual Life Assurance Co., 1 F. R. D. 386 (W. D. Mo. 1940), *app. dismissed*, 127 F.2d 862 (8th Cir. 1942). Compare N. D. R. Civ. P. 15 (Amended and Supplemental Pleadings).

75. Rule 7(a) has some other implications which deserve at least passing mention. "The time of the closing of the pleadings becomes important not only in determining whether further pleadings should be filed but in deciding whether a demand for a jury trial should be filed, whether an adversary has waived his right to a jury trial by failing to make a timely demand, whether a motion for judgment on the pleadings is in order, or whether the case is at issue for trial." 1 Barron & Holtzoff, Federal Practice and Procedure § 243 (Rules Ed. 1950).

76. Clark, *Simplified Pleading*, 2 F. R. D. 456, 456-57 (1943).

77. *Ibid.*

78. "While pleadings are not and should not be an end in and of themselves, they serve the important purpose of informing the adverse parties of the nature of the claim or demand asserted and the relief demanded." 1 Barron & Holtzoff, Federal Practice and Procedure § 241 (Rules Ed. 1950). "The function of the complaint is to inform defendant of the nature of plaintiff's demand so that he may not be misled in the preparation of his defense." Weber v. Lewis, 19 N. D. 473, 479, 126 N.W. 105, 107 (1910).

79. "As probably all will concede, there is a certain minimum which can be expected of pleadings. They must sufficiently differentiate the situation of fact which is being litigated . . . to allow of the application of the doctrine of res judicata . . ." Clark, *Simplified Pleading*, 2 F. R. D. 456 (1943). See also Clark, *Code Pleading and Practice Today*, in Field Centenary Essays 55, 66 (1949), for a further discussion of Federal Rules pleading in relation to Field Code pleading.

80. Clark, *Simplified Pleading*, 2 F. R .D. 456, 457 (1943).

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and facts of the case in detailed form. For the formulation of issues and the discovery and examination of the facts in the case on a detailed basis, the Rules furnish the practitioner instead with far more effective tools, the discovery, deposition, and pre-trial procedures prescribed therein.[81]

D. *Motions.* Rule 7(b) expresses in succinct form a good deal of law relating to orders and motions. Presumably it is to be read in the light of the statutes it supersedes, which contain definitions specifying precisely what actions on the part of the court constitute "orders"[82] and what constitutes a "motion."[83] At times the question of when an order has been made can become important in determining the time limit for appeal.[84] Similarly the question of when an order is interlocutory or final in character can become important in determining whether a right of appeal exists. This last question has recently received extensive treatment.[85]

Motions, of course, are of great importance under the new Rules, since they will hereafter perform the functions heretofore accomplished through use of the demurrer,[86] and may be used at the option of the pleader as an alternative to the answer for the purpose of

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81. "The pleading system adopted by the federal rules is designed to avoid to a great extent the terrors of pleading by relegating the formal pleadings to the function of giving notice of the matters in controversy and providing the improved procedures of deposition and discovery, requests for admissions, summary judgment and pre-trial hearings to perform the functions of fact-revelation and issue-formulation." 1 Barron & Holtzoff, Federal Practice and Procedue § 251 (Rules Ed. 1950). It would be unfair not to add one further citation. For a rip-roaring and scholarly dissent from all of this, see McCaskill, *Easy Pleading*, 35 Ill. L. Rev. 28 (1940).

82. N. D. Rev. Code § 28-2801 (1943) provides that "Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order."

83. "An application for an order is a motion." N. D. Rev. Code § 28-2802 (1943).

84. In State v. Lindeman, 64 N. D. 518, 254 N.W. 276 (1934), it was held that an oral order by a judge granting or denying a new trial was not complete for purposes of starting the time for appeal to running until it had been reduced to writing, signed by the judge, and filed with the clerk of court. In State v. Wicks, 68 N. D. 1 276 N.W. 690 (1937), the Lindeman decision was supplemented by a further holding that mere entry of the oral statement by the court upon the minutes of the court by the clerk does not complete the order for this purpose. Thus, where a judge orally sustained a demurrer to a criminal information on June 11, and signed the written order on September 16, the time for appeal began running from September 16 even though the oral decision was entered on the minutes by the clerk on June 11. These cases both involved criminal matters, but the court utilized provisions of the Code of Civil Procedure in its decisions on the ground they were of a general nature and applied to criminal as well as civil matters.

85. Schaff v. Kennelly, 69 N.W.2d 777 (N. D. 1955), discussing the reviewable orders statute, N. D. Rev. Code § 28-0702 (1943). It should be noted that in some situations even a paper denominated a "judgment" is in reality only an order. In Universal Motors v. Coman, 73 N. D. 337, 15 N.W.2d 73 (1944), a district court granted a motion to dismiss an appeal from justice court on the ground the appellant had not posted an appeal bond. Thereafter the court reversed itself without notice to either party and vacated its own order dismissing the appeal, entering a "judgment" reinstating the appeal. It was held the party adversely affected could not appeal. The judgment was really an order, and to perfect his right to appeal from it the party adversely affected should have moved to vacate it, obtained a hearing on the motion, and appealed from the order entered after hearing. The authority cited was N. D. Rev. Code § 28-0702 (7) (1943).

86. N. D. R. Civ. P. 7(c) and discussion thereto, *infra*.

raising a number of procedural objections.[87] Rules 7(b) (1) and 7(b) (2) relate primarily to form so far as motions are concerned; for discussion of the substantive law surrounding individual types of motions permitted by the new Rules the reader is referred to the portions of this paper wherein the applicable sections of the Rules are analyzed.[88]

Rule 7(b) (3) continues the rule of a statutory provision which has been little analyzed. Provisional remedies under the new Rules include situations wherein the person of a litigant is seized or detained,[89] injunctions,[90] and attachment, garnishment, and similar remedies. Rule 7(b) (3) indicates that matters involving such remedies are quite properly to be given priority by the courts. In this it is consistent with the statute relating to appeals, which allows immediate appeals from orders granting, refusing, continuing, or modifying provisional remedies and injunctions before a final judgment has been entered,[91] thus indicating a similar policy of priority at the appellate level.

E. *Abolition of Demurrers, Etc.* Rule 7(c) works the first of the great changes in the law of pleading accomplished by the new rules. It abolishes demurrers to complaints and answers, long a familiar feature of Field Code and common law procedures, and replaces them with the more convenient and flexible remedy of the motion.

Under the Code there are six grounds upon which a defendant may demur to a complaint. These are (1) lack of jurisdiction over the person of the defendant, (2) lack of jurisdiction over the subject of the action, (3) lack of capacity on the part of the plaintiff to sue, (4) that another action is pending between the parties involving the same cause, (5) that there has been improper joinder of causes of action, and (6) that the complaint fails to state a cause of action.[92]

These various grounds are treated in the new rules as follows: (1) lack of jurisdiction over the person of the defendant or over the subject matter of the action may be either pleaded in the answer or raised by motion at the option of the pleader;[93] (2) lack

87. N. D. R. Civ P. 12(b) and discussion thereto, *infra*.
88. See discussion *infra* relating to N. D. R. Civ. P. 7(c), 12(b) (c) (e) and (f), etc.
89. N. D. R. Civ. P. 64.
90. N. D. R. Civ. P. 65.
91. N. D. Rev. Code § 28-0702 (3) (1943). See discussion in Note, 28 N. Dak. L. Rev. 186, 194-95 (1952).
92. N. D. Rev. Code § 28-0706 (1943).
93. N. D. Civ. P. 12(b).

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of capacity to sue must be specially pleaded in the answer;[94] (3) the defense that another action is pending would seem to be appropriately taken by answer, motion for judgment on the pleadings, or motion for summary judgment;[95] (4) the defense of improper joinder of causes of action is no longer permitted;[96] and (5) the objection that the complaint fails to state a cause of action may now be raised by motion to dismiss for failure to state a claim on which relief can be granted,[97] motion for judgment on the pleadings,[98] motion for summary judgment,[99] or by objection to the admission of evidence at the trial.[99a]

While the motion to dismiss for failure to state a claim upon which relief can be granted is also discussed under Rule 12(b), some attention might well be paid to it at this point, since it illustrates very effectively the flexibility of the new rules.

In the normal case, this motion performs precisely the same function as the demurrer.[100] It tests the legal sufficiency of the complaint by accepting the allegations made in the complaint at face value and then raising the issue whether the complaint sufficiently sets forth a breach of duty and a resulting right to relief in the complainant.[101]

But there are numerous cases in which the complaint may be technically sufficient and yet factually insufficient. Under the Code procedure a demurrer which attempted to assert the existence of this situation by setting up matter outside the complaint was considered bad on its face. The so-called "speaking" demurrer was not permitted.[102] When the Federal Rules were first adopted, some of the federal judges showed a strong tendency to apply precisely the same restriction to the motion to dismiss for failure to state a claim.[103] Subsequent amendments to the rules, however, made it abundantly clear that a motion to dismiss for failure to state a claim upon which relief can be granted may be supported by matters

94. N. D. R. Civ. P. 9(a).
95. Equally, of course, the other action might be consolidated with the action wherein the objection is raised.
96. N. D. R. Civ. P. 18(a).
97. N. D. R. Civ. P. 12(b).
98. N. D. R. Civ. P. 12(c).
99. N. D. R. Civ. P. 56.
99a. See N. D. R. Civ. P. 12(h), and discussion thereto, *infra*, note 243.
100. 1 Barron & Holtzoff, Federal Practice and Procedure § 246 (Rules Ed. 1950).
101. Tahir Erk v. Glenn L. Martin Co., 116 F.2d 865 (4th Cir. 1941); Leimer v. State Mutual Life Assurance Co., 108 F.2d 302 (8th Cir. 1940); Smith v. Blackwell, 34 F. Supp. 989 (E. D. S. C. 1940).
102. Union Trust Co. v. Wilson, 182 N. C. 166, 108 S.E. 500 (1921).
103. 1 Barron & Holtzoff, Federal Practice and Procedure § 246 (Rules Ed. 1950).

outside the pleading, such as affidavits.[104] When this is done, the motion is treated as having been transformed into one for summary judgment under Rule 56 and the parties are given a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56."[105] It is plain, therefore, that the motion to dismiss for failure to state a claim upon which relief can be granted can readily be used as a sort of "speaking" demurrer, whenever it becomes desirable from a procedural standpoint.

RULE 8. GENERAL RULES OF PLEADING

(a) *Claims for Relief.* 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.[106]

A. *The Complaint.* At first glance, Rule 8(a) would appear to work a radical and sweeping change in the pleading law of North Dakota regarding complaints and similar pleadings. The Code presently provides that a complaint shall contain a "plain and concise statement of the *facts* constituting the *cause of action.*"[107] Both the italicized provisions are conspicuous by their absence from Rule 8(a), having been deliberately omitted. On their face these alterations would seem to cut extremely deep, leaving the pleader adrift on a sea of uncertainty as to what his complaint should contain.

It becames instantly obvious, however, when one undertakes to investigate the matter, that the change is in most respects more ap-

104. Thus, Fed. R. Civ. P. 12(b) was amended to provide as follows: "If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." This provision is incorporated in the North Dakota Rules.

105. See not 104, *supra.*

106. This is taken verbatim from Fed. R. Civ. P. 8(a). The superseded statutory provisions are N. D. Rev. Code §§ 28-0702, 28-0731, 28-0729 and 28-0701 (1943). The text of N. D. Rev. Code § 28-0702 (1943) may well be set forth here for purposes of comparison. It reads as follows:

"*Complaints; What to Contain.* The first pleadings on the part of the plaintiff is the complaint. The complaint shall contain:

1. The title of the cause, specifying the name of the court and county in which the action is brought, and the names of the parties to the action, plaintiff and defendant;
2. A plain concise statement of the facts constituting the cause of action without unnecessary repetition; and
3. A demand for the relief to which the plaintiff claims to be entitled. If the recovery of money is demanded, the amount thereof shall be stated."

107. See note 106, *supra.*

parent than real. Further, it is equally obvious that the change is emphatically one for the better. As the sample complaints set forth in the appendix to the rules illustrate, the end result of Rule 8(a) is a system of rules regarding complaints as simple, modern, advanced, and free from useless technicalities as any that has yet been devised.

B. *Status of Fact Pleading.* It is probably simplest to commence by directing attention to the effects of the elimination of the requirement that only facts may be set forth in the complaint. As noted above, the Code makes this requirement in express terms. The case law interpreting this requirement of fact pleading has amplified it into the statement that the complaint should contain the "ultimate facts" of the case as distinguished from "evidentiary facts" on the one hand[108] and "conclusions of law"[109] on the other.

This is familiar law in all Code states. However, when the rule is examined in the light of the cases, it is evident that its application is tempered by other considerations, chief among which are procedural effectiveness and simplicity. The North Dakota Court has a fine history of having interpreted the fact pleading requirement to achieve precisely these ends.

Thus, an obvious point, it has long used the fact pleading requirement for the purpose of overruling objections to pleadings based on the proposition that a specific legal theory should be stated in them. If the facts pleaded show any basis of recovery, the court has uniformly upheld the pleading as sufficient to bring that theory into the case.[110] On occasion the court has gone even further, sustaining complaints which scarcely did more than notify the adverse party of the general transaction from which the claim of the plaintiff arose,[111] a result plainly anticipating the Federal Rules.

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108. It is, of course, much less serious to plead too much in the way of facts than to plead too little. Where the court has been willing to uphold a complaint as pleading the ultimate facts, it has usually stated that additional averments of fact in the complaint would have merely been "evideniary." Golly v. Kiner, 50 N. D. 800, 804, 197 N.W. 883, 885 (1924); Seckerson v. Sinclair, 24 N. D. 625, 627, 140 N.W. 239, 241 (1913).

109. Hart v. Hone, 57 N. D. 590, 223 N.W. 346 (1929); Security National Bank v. Dougherty, 63 N. D. 1, 204 N.W. 847 (1925); Bergen Township v. Nelson County, 33 N. D. 247, 156 N.W. 559 (1916); Houghton Implement Co. v. Vavorosky, 15 N. D. 308, 109 N.W. 1024 (1906); Van Dyke v. Doherty, 6 N. D. 263, 69 N.W. 200 (1896). In all the foregoing cases, pleadings were held bad as alleging mere conclusions of law.

110. Thus, see Rott v. Goehring, 33 N. D. 413, 157 N.W. 294 (1916) (complaint in action for alienation of affections held sufficient to permit plaintiff to recover for criminal conversation); Logan v. Freerks, 14 N. D. 127, 103 N.W. 426 (1905) (action for conversion of money, complaint held sufficient to state cause of action for money had and received); Miller v. National Elevator Co., 32 N. D. 352, 155 N.W. 871 (1915) (complaint failing to state cause of action in trover was valid as pleading cause of action for trespass on the case).

111. Peterson v. Swanson, 39 N. D. 301, 167 N.W. 389 (1918); Weber v. Lewis, 19 N. D. 473, 126 N.W. 105 (1910).

Thus, in *Weber v. Lewis*[112] it upheld a complaint which alleged merely, after some preliminary recitations, "that by reason of the rental of the said land, and the work performed by this defendant, and the use of this plaintiff's machinery, and the sale of cattle belonging to this plaintiff and the defendant jointly, by the defendant, and the storing of grain of defendant by plaintiff, and for the furnishing of twine, this defendant is indebted to this plaintiff in the sum of $454.40 . . ." The court ruled that the complaint was sustainable as constituting a common count in indebitatus assumpsit at common law,[113] and added some extremely modern views on the subject of pleading: "The function of the complaint is to inform defendant of the nature of plaintiff's demand so that he may not be misled in the preparation of his defense. If the complaint does this in a general way, it is sufficient as against an attack by demurrer, although inartifically drawn."[114]

It is quite plain that the spirit of the new rules is precisely to the same effect. Thus, in contract cases, the forms prescribed by the new rules follow the general pattern of the complaint in *Weber v. Lewis* in an even more simple fashion. Form 3, for example, alleges merely that "Defendant owes plaintiff one thousand dollars according to the account hereto annexed as Exhibit 1." Form 4 states simply that "Defendant owes plaintiff one thousand dollars for goods sold and delivered by plaintiff to defendant between June 1, 1953, and December 1, 1953," and yet is sufficient to state a claim for goods sold and delivered. Form 5, a complaint for money lent, alleges simply that "Defendant owes plaintiff one thousand dollars for money lent by plaintiff to defendant on June 1, 1953." Striking though the simplicity of these sample complaints may be, they nevertheless are merely advanced versions of what the North Dakota Court has already upheld.

What is true in contract cases is equally true in tort cases, where the same spirit of allowing broadly-phrased allegations has pre-

112. 19 N. D. 473, 126 N.W. 105 (1910).

113. As to the propriety of the holding in Weber v. Lewis, *supra*, and Jones v. Great Northern Ry., cited *infra* in the text, note the following language in Clark, *Code Pleading and Practice Today*, Field Centenary Essays 55 66 (1949): "With respect to pleading proper, the federal system now emphasizes the statement of the party's claim without stress upon the facts as such. Thus it serves to bring the Field Code down to date by doing away with the required allegation of a mass of detail as to the occasion for suit. True, the Field Code did in form require the pleading of facts; but in its concurrent requirement of simplicity and conciseness, and its acceptance — as most courts generally agreed — of the customary general allegations of the common law as to negligence in trespass on the case and contract and debt claims in the common counts in assumpsit show that no such fine spinning of details was originally intended as developed in many codes."

114. Weber v. Lewis, 19 N. D. 473, 479, 126 N.W. 105, 107 (1910). In this case, incidentally, a strong dissenting opinion argued that the complaint did not plead facts but legal conclusions, and hence was invalid.

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vailed. In *Jones v. Great Northern Ry.*[115] the Court held sufficient a complaint which alleged that the defendant, in operating a train, "negligently and carelessly and wrongfully struck and killed a certain heifer then and there the property of plaintiffs, of the value," etc., against an attack based on the proposition the circumstances constituting negligence should have been fully set forth. Stating that the allegation was sufficient as a statement of mixed law and fact, the Court added that "Some latitude must be given the term 'facts' when used in a rule of pleading."[116] The Joint Committee has annexed to the text of the rules a sample complaint for negligence utilizing precisely this same principle:

FORM 8. COMPLAINT FOR NEGLIGENCE

"1. On June 1, 1953, in a public highway called Thayer Avenue, in Bismarck, North Dakota, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

"2. As a result, plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

"Wherefore plaintiff demands judgment against defendant in the sum of ten thousand dollars and costs."

This complaint actually ought to be sufficient under the present rule as illustrated by *Jones v. Great Northern Ry., supra.* Yet it should be emphasized that by allowing such simple and direct allegations, the Rules in no way detract from the protection afforded to defendants. As pointed out previously, the discovery procedures under the new rules furnish the defendants in such actions with even more effective tools than they possessed in the past for the purpose of examining the basis of the case against them.

115. 12 N. D. 343, 97 N.W. 353 (1903). *Cf.* Seckerson v. Sinclair, 24 N. D. 625, 140 N.W. 239 (1913).

116. "It is, of course, an elementary rule of pleading, that facts, and not mere conclusions of law, are to be pleaded. But this rule does not limit the pleader to the statement of pure matters of fact, unmixed with any matter of law. When a pleader alleges title to or ownership of property, or the execution of a deed in the usual form, these are not statements of pure fact. They are all conclusions from certain probative or evidential facts not stated. They are in part conclusions of law and in part statements of facts, or, rather, the ultimate facts drawn from these probative or evidential facts not stated; yet these forms are universally held to be good pleading. Some latitude must therefore be given to the term 'facts,' when used in a rule of pleading. It must of necessity include many allegations which are mixed conclusions of law and statements of fact; otherwise pleadings would become intolerably prolix, and mere statements of the evidence. Hence it has become a rule of pleading that while it is not allowable to allege a mere conclusion of law, containing no element of fact, yet it is proper not only to plead the ultimate fact inferable from certain other facts, but also to plead anything which according to the common and ordinary use of language amounts to a mixed statement of fact and a legal conclusion." Jones v. Great Northern Ry., 12 N. D. 343, 346-47, 97 N.W. 535, 536 (1903).

One could go on to cite instances where the Court has given a thoroughly relaxed and reasonable interpretation of the requirement of fact pleading at some length. Thus it has often cheerfully disregarded allegations in a complaint inconsistent with the claim the plaintiff actually advanced at the trial of the cause. In *Johnson Farm Investment Co. v. Huff*,[117] it treated as surplusage an allegation that the plaintiff had declared due the unpaid balance on a contract for the purchase of land where the general tenor of the complaint clearly indicated the objective of the action was to cancel the contract rather than affirm it and claim relief thereunder. In *Logan v. Freerks*[118] where a complaint alleged that the defendants had received money, and "converted the same to their own use," it was held that the plaintiff could recover on a theory of quasi-contract, the allegation as to conversion being mere surplusage. But there is little to be gained from such an enumeration. While there are, of course, instances in which the Court has rejected complaints as legally insufficient for failure to plead the ultimate facts in a case,[119] it is plain that as a general matter the requirement of fact pleading has been given a distinctly pragmatic and effective treatment in this jurisdiction. The "fine spinning of details"[120] so greatly objected to in many Code jurisdictions has not ordinarily been demanded of pleaders here.

The simple allegations permitted in contract actions are perhaps the most dramatic illustrations of the permissible simplicity in pleading under the new rules. They represent, of course, essentially a modernization of the old common count pleading permitted under the pre-Code and Code procedures, wherein the pleader basically did little more than tender an issue. In terms of the tort cases and most other areas, somewhat greater detail as to the case is required, as illustrated by the sample complaint for negligence set forth above. As to cases of this sort, what the new rules require may be accurately termed a "modified" sort of fact pleading.[121] One must still indicate in a general way the facts involved in the case; the idea that the rules provide for pure and simple "notice" pleading is

117. 52 N. D. 589, 204 N.W. 333 (1925).
118. 14 N. D. 127, 103 N.W. 426 (1905).
119. Eberlien v. Guarantee Fund Life Association, 58 N. D. 617, 226 N.W. 810 (1929) (complaint in action on life insurance contract held insufficient for failure to state provision of contract upon which plaintiff's right depended).
120. Clark, *supra*, note 113.
121. "This theory of notice pleading, while it has not been rejected, has been modified to the extent that pleading under the Rules constitutes something more than mere notice and yet something less than fact pleading." Note, *The Complaint Under the Federal Rules of Procedure*, 10 Fordham L. Rev. 252, 257, n. 34 (1941).

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somewhat too sweeping to be accurate.[122] The improvement in the new rules lies not in switching from fact to notice pleading but in the elimination of arguments over what is an "ultimate fact" and what is a "conclusion of law."[123] Under the new rules it makes very little difference how one views a particular allegation. If the whole pleading sufficiently indicates a fact situation in which a breach of a duty owed the plaintiff appears, with a resulting claim to relief which seems legally justified, then it passes the test of the new rules whether some of its allegations amount to conclusions or not. In terms of the requirement of fact pleading, this is the extent of the change contemplated by the new rules. In the end a residual averment of facts, however loosely and generally expressed, must be present.[124]

Generally speaking it may be said that any pleading sufficient under the Code will be sufficient under the new rules. What is good craftsmanship under the one is good craftsmanship under the other.

C. *The "Claim" Compared to the "Cause of Action."* Despite the fact they are closely related, the "claim" under the new rules and the "cause of action" under the Code are not formally identical concepts. The framers of the Federal Rules used the term "claim" in place of "cause of action" advisedly, meaning thereby to achieve a definite result.

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122. The following extracts from Church, *Federal Rules of Civil Procedure Pleadings, Motions, Parties and Pre-Trial Procedure*, 1 F. R. D. 315, 316-17 (1940), indicates the true situation:

"In the course of his address at Cleveland, Judge Clark . . . was asked this question: 'Isn't a distinction as to pleading only the ultimate facts to be perpetuated under the new rules?' to which he replied: 'Not in the sense of making the judge formally decide that the pleading states only ultimate facts and that everything else is erroneous. In the sense that good pleading would call for you to state those more general facts, yes.'

"At the Washington Institute he was asked: 'Do you consider that Rule 7 abolishes the rule that, in considering motions to strike a pleading for insufficiency to state a cause of action, allegations of legal conclusions shall be disregarded?' to which he replied: 'Well, on that I know there is a lot of opinion about the difference between legal conclusions and something else. There is supposed to be a difference between legal conclusions and ultimate facts and evidential facts. I never could see much difference, except one of degree. I suppose the way to answer your question is to say that 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. When I say sound rules of pleading, however I am thinking more of such pleading as was allowed in trespass on the caes or assumpsit than of involved and detailed allegations. Yes, we disregard legal conclusions within some limits, if they are legal conclusions, I suppose. I don't believe there is as much chance to quibble over these things as there was, but you would have to have at least some allegations of fact." See also the same discussion at 1 F. R. D. 317-18.

123. As indicating how much time can be spent, and how involved the arguments can get, over the difference (if any) between allegations of ultimate facts and assertions of conclusions of law, see Cook, *Statements of Fact in Pleading Under the Codes*, 21 Col. L. Rev. 416 (1921); Wheaton, *Manner of Stating a Cause of Action*, 20 Corn. L. Q. 185 (1935) (disagreeing with Professor Cook's conclusion that it is impossible to distinguish between the two, but agreeing that to require the distinction to be drawn in pleadings is a waste of time and effort); Gavit, *Legal Conclusions*, 9 Ind. L. J. 109 (1933).

124. See note 122, *supra*.

The framers of the Federal Rules were, of course, establishing a procedure for use in courts throughout the United States. A factor influencing them in their decision not to use the term "cause of action" was that the term had been subjected to varying interpretations from state to state and hence meant different things to practitioners in different jurisdictions.

Judge Clark listed three separate interpretations of the phrase in his text on Code Pleading. In substance, these were that a cause action was (1) the equivalent of a legal right of action; (2) that it was the factual transaction out of which the right of action arose, but nevertheless limited by such right or rights of action; and (3) that it was the factual transaction itself, the occurrence involved in the suit, viewed as a unit of facts and differentiated from other events or occurrences pretty much as a layman might differentiate one happening from another.[125] There are substantial differences in result following from these different interpretations, as will be very apparent in the material immediately following, but it should be added here that in all probability the three definitions listed above may be accurately reduced to two. This is for the reason that courts utilizing the second view above normally reach results achieved under the third view, and the difference between them seems to be essentially semantic rather than substantive.

Differences in result appear instantly when one considers these divergent points of view in the context of particular situations. To illustrate, assume a case where *A* and *B* are involved in an automobile accident wherein *A's* vehicle is badly damaged and *A* himself sustains serious personal injuries. *A* plainly has a *right* of action for damage to his property and also a *right* of action for damages to his person. Does he have one or two *causes* of action? In a jurisdiction following the first view mentioned above, *A* may bring two separate and successive suits against *B*, one for injury to property and another for injury to person. In a jurisdiction following the third view, *A* must present both claims to the court in the same proceeding. This is on the ground that the accident itself constituted a single *cause* of action which necessarily must be vindicated in a single proceeding; to allow *A* to maintain two suits would be to allow him to split one cause of action into two lawsuits.[126]

125. Clark, Code Pleading 310-31 (2d ed. 1947).

126. Compare King v. Chicago, M. & St. P. Ry., 80 Minn. 83, 82 N.W. 1113 (1900), with Ochs v. Public Service Ry., 81 N. J. Law 661, 80 Atl. 495 (1911), squarely presenting the divergent points of view. For discussion, see Hinton, *Splitting Causes of Action for Injuries to Person and Property Resulting From Same Act*, 21 Ill. L. Rev. 506 (1927); Rossman, *Joinder of Causes of Action*, 2 Ore. L. Rev. 106 (1922); Note, 2 Wash. L.

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The difference between these interpretations of the term "cause of action" is also reflected in the formal organization of the pleadings, since causes of action must be separately stated. To illustrate, in a jurisdiction following the first view stated above, if *A* and *B* engage in an altercation where *B* both assaults *A* physically and slanders him, *A's* complaint will contain two separate counts, one for battery and another for defamation. In a jurisdiction following the third view, *A's* complaint ought to contain only a single count, since only a single cause of action is present.[127]

Still another area where the divergence in interpretation of the term is important is in the law surrounding joinder of causes of action in a single complaint. Jurisdictions taking the first view of what constitutes a cause of action tend to take a narrow view of what constitutes a "transaction" for purposes of joinder.[128] Hence it has actually been held in at least one jurisdiction that a cause of action for battery and a cause of action for defamation could not be joined in a single complaint because they did not rise out of the same transaction, even though the defamation and the battery occurred at the same time.[129] Of course, by virtue of the broad provisions of the new rules relating to joinder of claims, this last question will soon be academic.

In any event, it was the intention of the framers of the Federal Rules to adopt, in substance, the third view as to the "cause of action."[130] Consequently this view will also become the rule for the North Dakota courts. Fortunately, the cases indicate that the North Dakota Supreme Court has already been proceeding on substantially this interpretation. In *Pipan v. Aetna Insurance Co.*[131] it used language equating the concept of "cause of action" with the term

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Rev. 48 (1926). The nearest the North Dakota Court has come to deciding this precise question seems to be Anderson v. Jacobson, 42 N. D. 87, 172 N.W. 64 (1919), citing the *Knig* case, *supra*, in inconclusive fashion.

127. Pipan v. Aetna Insurance Co., 58 N. D. 435, 226 N.W. 498 (1929).

128. The Code allows joinder of causes of action arising out "the same transaction." N. D. Rev. Code § 28-0703 (1943). This language, of course, implies that a cause of action is something other than the transaction from which it arises. Converesly, the Code also refers to the "facts constituting the cause of action," N. D. Rev. Code § 28-0702 (1943), a phrase equating the cause of action with the factual transaction on which the suit is based. The inconsistency between these two provisions has been the subject of much debate among writers on the subject. It is not proposed to explore that debate here.

129. De Wolfe v. Abraham, 151 N. Y. 186, 45 N.E. 455 (1896); *contra*, Harris v. Avery, 5 Kan. 146 (1869).

130. 1 Barron & Holtzoff, Federal Practice and Procedure § 255 (Rules Ed. 1950); Clark, J., concurring in Collins v. Metro-Goldwyn Pictures Corp., 106 F.2d 83 (2d Cir. 1939).

131. 58 N. D. 435, 226 N.W. 498 (1929).

"transaction"[132] for the purpose of determining whether it was proper to have one or two counts in a complaint. In *Meske v. Melicher*[133] it treated the factual transaction between the parties as equivalent to the cause of action for the purpose of applying the rule against splitting causes of action. And every case wherein it has held that a complaint defective on one theory was nevertheless good on another may be cited for the implicit proposition that the cause of action is the factual event or transaction in issue, rather than the various legal rights arising out of that transaction.[134] The shift from pleadings asserting causes of action to pleadings asserting claims will therefore cause little difficulty in this state.

D. *The Prayer for Relief.* So far as the prayer for relief is concerned, the present law of North Dakota may be summarily stated. The prayer for relief does not constitute a part of the substantive cause of action set forth in the complaint and its averments in no way limit the pleader in his proof of the cause of action or in the theory of the case adopted at the trial.[135] The same thing is true under the new rules.[136]

> (b) *Defenses: Form of Denials.* A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualfication of an aver-

132. "The two causes of action set forth in plaintiff's complaint are founded upon the same transaction. Instead of being a statement of two separate causes of action, it is a statement of a single cause of action in different forms. There is but one primary right involved — the right to recover on an alleged single contract of insurance." *Id.* at 441, 226 N.W. at 500.

133. 49 N. D. 1160, 194 N.W. 737 (1923).

134. *E. g.*, Johnson Farm Investment Co. v. Huff, 52 N. D. 589, 204 N.W. 333 (1925); Rott v. Goehring, 33 N. D. 413, 157 N.W. 294 (1916); Miller v. National Elevator Co., 32 N. D. 352, 155 N.W. 871 (1915); Logan v. Freerks, 14 N. D. 127, 103 N.W. 426 (1905). Redlinger & Hanson v. Parker, 62 N. D. 483, 243 N.W. 792 (1932), was a situation wherein the Supreme Court upheld the action of a trial court requiring a plaintiff to choose between a count pleading an express contract and a count pleading a claim in quantum meruit for the reasonable value of labor and services rendered in erecting a building. Clearly the court did not feel it was compelling the plaintiff to sacrifice a cause of action; it treated the cause of action as distinctly separate from the legal rights of recovery asserted.

135. State *ex rel.* Coan v. Plaza Equity Elevator Co., 65 N. D. 658, 261 N.W. 46 (1935); Jacobson v. Horner, 49 N. D. 741, 193 N.W. 327 (1923); State Bank v. Nelson, 48 N. D. 702, 186 N.W. 766 (1922); Guild v. More, 32 N. D. 432, 155 N.W. (1915). See also N. D. Rev. Code § 28-2004 (1943): "The relief granted to the plaintiff, if there is no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him relief consistent with the case made by the complaint and embraced within the issue." To entitle a plaintiff to an injunction *pendente lite* restraining the defendant, it must appear from the facts stated in the complaint that plaintiff is entitled to injunctive relief, and it must be demanded in the prayer for relief. Forman v. Healey, 11 N. D. 563, 93 N.W. 866 (1903).

136. 1 Barron & Holtzoff, Federal Practice and Procedure § 276 (Rules Ed. 1950).

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ment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.[137]

(c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmative 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, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.[138]

(d) *Effect of Failure to Deny.* Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.[139]

(e) *Pleading to be Concise and Direct; Consistency.*

(1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required.[140]

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.[141]

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137. This is taken without change from the Federal Rules. The superseded statutory provisions are N. D. Rev. Code §§ 28-0710 (1), 28-0715, 28-0732 and 28-0733 (1943).

138. This is taken without change from the Federal Rules. The superseded statutory provisions are N. D. Rev. Code §§ 28-0710 (2), and 28-0729 (1943).

139. This is taken without change from the Federal Rules. The superseded statutory provision is N. D. Rev. Code § 28-0740 (1943).

140. This is taken directly from the Federal Rules. The superseded statutory provision is N. D. Rev. Code § 28-0702 (1943).

141. This is taken without change from the Federal Rules. It constitutes new matter in North Dakota law and is not listed by the Joint Committee as superseding any North Dakota statutory provisions.

(f) *Construction of Pleadings.* All pleadings shall be so construed as to do substantial justice.[142]

A. *The Answer Under the New Rules.* Most of the provisions of Rule 8 subsequent to paragraph 8(a) deal with the answer. For that reason, consideration of convenience have indicated that they be considered together. In the commentary to Rule 8(a), the general rules applicable to the complaint were briefly explored. The answer plainly merits a similar treatment.

In general it may be said that the answer known and used under the Field Code survives with only minor changes under the new rules. The strict requirement of fact pleading has, of course, been relaxed in precisely the same fashion with regard to the answer as with regard to the complaint.[143] Placing that change — essentially a difference of degree — to one side, the major differences between the Code and the Rules with regard to the answer are two: (1) the Rules are more detailed; (2) they permit alternative and hypothetical averments in the answer, as they also do in the complaint.

It is probably true that the answer must be, inherently and by the very nature of its function, a somewhat more complex instrument than the complaint. The writer has previously undertaken some discussion of the common-law background and historical development which led to the enactment of the present Code provisions,[144] and no repetition of what has already been said will be attempted here. But considering the instrument in terms of its function, it is fundamental that the answer must respond to an instrument showing a *prima facie* case in the adverse party by establishing an equally valid *prima facie* case in favor of the defendant; and this it must necessarily do in one or more of several different fashions.

Any defense pleaded in an answer necessarily falls into one of two broad general categories. It is either a plea in bar, striking at the *substantive* foundation of the plaintiff's case, or a plea in abatement striking at the *procedural* right to maintain the action by objecting to the time when it is brought,[145] or the particular forum,[146]

142. This is taken verbatim from the Federal Rules. Superseded statutory provisions are N. D. Rev. Code §§ 28-0741 and 28-0742 (1943).

143. See comment to Rule 8(a), *supra.*

144. Crum, *Scope of the General Denial,* 27 N. Dak. L. Rev. 1 (1951).

145. *E. g.,* one takes advantage of the fact that the complaint in a divorce action has not been a bona fide resident of the state for one year by plea in abatement. Dutcher v. Dutcher, 39 Wis. 651 (1876).

146. A good illustration would be an allegation that an action brought in a county court of increased jurisdiction in this state should have been commenced in the district court.

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or the plaintiff's capacity to sue,[147] or similar matters of the same general type.

The process of categorization does not stop there. When a given defense is classiffied as sounding in abatement, the consequence follows that it must be set up specially.[148] It cannot be proved under some form of plea in bar — notably the general denial in most cases — for the reason that to permit it to be proved under such a substantive plea would make the subsequent judgment res judicata on the merits when no substantive defense had in fact been established.[149] Equally, when a given defense is classified as a plea in bar, the conventional usage — sanctioned in the new rules — assigns it to one of two further broad general classes. The resulting dichotomy may be expressed substantially as follows:

A plea in bar either

1. *Denies* that the plaintiff ever had a claim or cause of action and for the purpose of substantiating the plea

(a) entitles the pleader to directly disprove the allegations of the opposing complaint, or

(b) entitles the pleader to indirectly disprove the allegations of the opposing complaint by proving that other facts inconsistent with those allegations are true, or

2. *Confesses* that the plaintiff once had a claim or cause of action *and avoids* the effect of the admission by setting forth additional matter to show that the claim or cause of action no longer exists.[150]

The foregoing views as to the distinction between matter in denial and matter in confession and avoidance are sanctioned by many North Dakota decisions,[151] and would appear to be continued

147. Such as the plea that the plaintiff is not a corporation. Stange v. Price, 191 Ky. 734, 231 S.W. 532 (1921). Note that this sort of plea must also be set out specially by express provision of the new rules. N. D. R. Civ. P. 9(a).

148. Dutcher v. Dutcher, 39 Wis. 651 (1876); Pomeroy, Remedies and Remedial Rights § 698 (2n ed. 1883).

149. "A general denial is a plea in bar, not broader at least than the general denial at common law, and cannot raise any defense by way of abatement . . . Judgment for the defendant upon a general denial is a general judgment: a bar to all future actions upon the same cause. And it would be a cruel abuse that it should go upon a defense in abatement, concealed *in germio*. The code intended no such perversion of justice." Dutcher v. Dutcher, *supra*. note 148. This is the accepted reasoning. It no longer seems particularly valid in a day when it is relatively easy to look behind the face of the judgment to ascertain on what basis a court acted; but the law seems established.

150. Compare with this classification the material in Pomeroy, *supra*. note 148, at § 644; Thyson, *The General Denial in Missouri*, 26 Wash. U. L. Q. 298 (1941).

151. *E. g.*, Vallancey v. Hunt, 20 N. D. 579, 129 N.W. 455 (1910); First State Bank v. Radke, 51 N. D. 246, 199 N.W. 930 (1924); Hansboro State Bank v. Imperial Elevator Co., 46 N. D. 363, 179 N.W. 669 (1920); Anderson Mercantile Co. v. Anderson, 22 N. D. 441, 134 N.W. 36 (1911); Hogen v. Klabo, 13 N. D. 319, 100 N.W. 847 (1904). See also discussion in the article cited in footnote 144, *supra*. Vallancey v. Hunt, *supra*, should be considered in the light of Plano Mfg. Co. v. Daly, 6 N. D. 330, 70 N.W. 277 (1897).

without change in the new rules. It would be noted that a very considerable possibility of confusion exists between those types of defenses admissible as tending to show that a plaintiff never had a cause of action under praragraph 1(b) of the foregoing dichotomy and those defenses which confess and avoid. This is because evidence of the sort contemplated in paragraph 1(b), above, is in one sense affirmative and nevertheless tends ultimately only to prove that the plaintiff never had a cause of action.[152] The practical consequences are illustrated by such cases as *Hogen v. Klabo*,[153] and *Anderson Mercantile Co. v. Anderson*,[154] in both of which the Court allowed a defendant to disprove an allegation he was liable on a specific contract by submitting affirmative evidence to show that a different contract having different terms was in fact made by the parties.

Rule 8(c) simplifies the law surrounding defenses in confession and avoidance rather considerably by specifically enumerating nineteen separate affirmative defenses which must be specially pleaded. So far as this writer's research has disclosed, the North Dakota court has reached substantially the same result with regard to most of the defenses listed. A possible exception is *Hughes v. Wachter*,[155] dealing with the defense of payment. In that case the Court held that where the complaint alleged non-payment of an obligation, the defense of payment was provable under a denial, on the ground that the issue of payment was formally in the case by reason of the allegation and the traverse.[156] Apparently the intent of the new rules is in the other direction, and it will be interesting to observe what disposition the Court makes of the next case raising the point.[157]

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152. "Evidence in its nature affirmative is often confounded with defenses which are essentially affirmative and in avoidance of the plaintiff's cause of action, and is therefore mistakenly regarded as new matter requiring to be specially pleaded, although its effect upon the issues is strictly negative, and it is entirely admissible under an answer of denial. In other words, in order that evidence may be proved under a denial, it need not be in its own nature negative; affirmative evidence may often be used to contradict an allegation in the complaint, and may therefore be proved to maintain the negative issue raised by the defendant's denials." Pomeroy, Remedies and Remedial Rights § 671 (2d ed. 1883).

153. 13 N. D. 319, 100 N.W. 847 (1904).

154. 22 N. D. 441, 314 N.W. 36 (1911).

155. 61 N. D. 513, 238 N.W. 776 (1931). Accord, Tolerton & W. Co. v. Sult, 33 N. D. 283, 156 N.W. 838 (1916). But see Robertson Lumber Co. v. State Bank of Edinburg, 14 N. D. 511, 516, 105 N.W. 719, 720 (1905); Gans v. Beasley, 4 N. D. 140, 155, 59 N.W. 714, 719 (1894).

156. The decision is criticized in 31 Mich. L. Rev. 132 (1932); but see Reppy, *The Anomaly of Payment as an Affirmative Defense*, 10 Corn. L. Q. 269 (1925).

15. Equally, it will be interesting to observe whether the court will allow fraud in the the execution of an instrument, as distinguished from fraud in the inducement or treaty, to be raised under a denial in the face of Rule 8(c), which states simply that "fraud" must be affirmatively set forth. Proof of one sort of fraud is really proof that an instrumen was never executed at all. Proof of the other sort confesses and avoids the instru-

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B. *Effect of Failure to Deny.* Rule 8(d) continues in force a well-established rule of pleading in this state, since its statement that averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages,[158] are admitted when not denied in the responsive pleading is almost a paraphrase of the existing statute.[159] The second sentence of the rule — "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided" — also accords with existing law;[160] but the attention of the reader is directed to the fact that this seemingly innocuous provision in reality allows matter in confession and avoidance to be, at times, introduced into a case without being pleaded beforehand, a situation which has at times proved disastrous for unwary defendants.[161]

C. *Alternative, Hypothetical, and Inconsistent Allegations.* Rule 8(e)(2) allows a pleader to set up either alternative, hypothetical or inconsistent allegations in his complaint or answer, subject to an ethical obligation of good faith imposed by Rule 11. As to inconsistent allegations in an answer, this is already the law of North Dakota, established by a firm, broadly-phrased, and square holding.[162] In other respects the rule is new. It is, of course, designed to allow the pleader to meet the situation where he cannot be completely certain what the proof will show — a situation not unfamiliar to many advocates. The rule of the Code is otherwise, but this provision of the new rules must nevertheless be regarded as an important improvement and a distinct convenience.[163] Does it, in any way, handicap the opposing pleader? The answer is in the negative. So long as the pleading gives fair notice of the general situation to be litigated, it serves its purpose.[164]

RULE 9. PLEADING SPECIAL MATTERS

(a) *Capacity.* It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a

ment. See Clark, Code Pleading 617 (2d ed. 1947). But the answer would seem to be indicated by Rule 9(b), *infra*.

158. In accord as to the clause on damages, see cases cited *supra* note 135, and text thereto.

159. N. D. Rev. Code § 28-0740 (1943).

160. N. D. Rev. Code § 28-0740 (1943).

161. See discussion in note 73, *supra*. The writer considers this situation one that a pleader should be very careful to explore beforehand, either by way of discovery procedure under Rule 33 or by motion to require a reply.

162. J. R. Watkins Medical Co. v. Payne, 47 N. D. 100, 180 N.W. 968 (1920).

163. See discussion in Clark, Code Pleading 253-58 (2n ed. 1947); Hankin, *Alternative and Hypothetical Pleadings*, 33 Yale L. J. 365 (1924).

164. Clark, Code Pleading 353-54 (2d ed. 1947).

party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averments, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.[165]

(b) *Fraud, Mistake, Condition of the Mind.* In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.[166]

(c) *Conditions Precedent.* In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denal of performance or occurrence shall be made specifically and with particularity.[167]

(d) *Official Document or Act.* In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law; and in pleading any ordinance or regulation of a county, city, village, or other political subdivision, or any special, local or private statute or any right derived therefrom, or the laws of another jurisdiction, it is sufficient to refer to the ordinance, regulation, statute, or law by its title and date of its approval or in some other manner with convenient certainty.[168]

(e) *Judgment.* In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.[169]

(f) *Time and Place.* For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of special matter.[170]

(g) *Special Damage.* When items of special damage are claimed, they shall be specifically stated.[171]

(h) *Name of Party.* When the pleader shall be ignorant of the name of a party, such party may be designated in any pleading or proceeding by any name and when the true name

165. This is taken verbatim from Fed. R. Civ. P. 9(a). The superseded statutory provision listed by the Joint Committee is N. D. Rev. Code § 10-1401 (1943). Probably N. D Rev. Code § 28-0706 (2) (1943), should also be listed as superseded.

166. This is taken verbatim from Fed. R. Civ. P. 9(b) and is not listed as superseding any North Dakota statute.

167. This is taken verbatim from Fed. R. Civ. P. 9(c) and supersedes N. D. Rev. Code § 28-0728 (1943).

168. This is adapted from Fed. R. Civ. P. 9(d) with some alterations and additions. It supersedes N. D. Rev. Code § 28-0726 (1943).

169. This is taken verbatim from Fed. R. Civ. P. 9(e) and supersedes N. D. Rev. Code § 28-0726 (1943).

170. This is taken verbatim from Fed. R. Civ. P. 9(f) and is not listed as superseding any North Dakota statute.

171. This is taken verbatim from Fed. R. Civ. P. 9(g) and is not listed as superseding any North Dakota statute.

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shall be discovered, the pleading or proceeding may be amended accordingly.[172]

A. *General Comment; Rule 9(a).* Rule 9 may virtually be read as a supplement to the discussion of Rules 7 and 8. It contains a number of miscellaneous provisions referring to matters which experience has indicated ought to be set forth specially in the pleadings. Rule 9(a) has reference to such matters as insanity, minority, guardianship, lack of corporate existence and the like, which normally abate an action. Under present procedure, such questions are raised by demurrer.[173] Rule 9(a) requires them to be set forth in the answer and consequently changes practice in this respect. The Joint Committee also lists Rule 9(a) as superseding § 10-1401 of the Code, which requires allegations of corporate status in the complaint in all actions by or against a corporation.[174] This will apparently be unnecessary in the future unless a party sees some point in raising the issue of corporate status specially.[175] This is not normally the case and in most actions the allegation as to corporate status presently required in the complaint may be classed as a useless formality. In cases where Rule 9(a) is applicable a cross-reference to Rule 17 should normally be made.

B. *Fraud, Mistake, Condition of the Mind.* The present law of North Dakota is that where an answer pleads fraud as a defense, in general terms and without setting forth the fraudulent conduct in terms of factual averments, it merely sets forth a conclusion of law and is insufficient.[176] Rule 9(b) appears to strengthen this rule and carry it further than existing local precedent, quite possibly requiring some allegation which would normally be considered evidentiary rather than ultimate facts.[177] The research of the writer has disclosed no case dealing with pleading mistake in the North Dakota reports.[178] The second sentence of Rule 9(b), allowing

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172. This provision is not found in the Federal Rules. It supersedes N. D. Rev. Code § 28-0723 (1943).

173. N. D. Rev. Code § 28-0706 (2) (1943).

174. See McConnon & Co. v. Laursen, 22 N. D. 604, 135 N.W. 213 (1912).

175. See 1 Barron & Holtzoff, Federal Practice and Procedure § 301 (Rules Ed. 1950); Montgomery, *Changes in Federal Practice Resulting From the Adoption of the New Federal Rules of Civil Procedure*, 1 F. R. D. 337, 340 (1940).

176. Bergen Township v. Nelson County, 33 N. D. 247, 156 N.W. 559 (1916); Van Dyke v. Doherty, 6 N. D. 263, 69 N.W. 200 (1896).

177. The elements of fraud are a false representation of a material fact, knowingly made, with the intent that it be acted upon, reliance upon the truth of the representation by the party to whom it was made, and resultant damage. It has been said that the phrase "circumstances constituting fraud" means allegations including the time, place, and contents of the false representations, the facts misrepresented, and an identification of what has been obtained. United States v. Hartmann, 2 F. R. D. 477 (E. D. Pa. 1942).

178. The writer assures the profession this doesn't necessarily mean someone else might not be able to dig one up!

general averments of malice, intent, knowledge and other conditions of the mind seems to accord with present law.[179]

C. *Conditions Precedent.* In *Sifton v. Sifton*,[180] the Court upheld an allegation in a complaint "that the said plaintiff has fully performed all the conditions of said instrument on her part," stating that it duly alleged performance of the condition precedent in the contract, and citing a specific code provision.[181] It is plain that Rule 9(c) retains the meaning of the code provision in question and the same result will be reached under the new rules.[182] It is equally plain that a breach of a condition subsequent must be specially pleaded.[183] In *McDowell v. Fireman's Fund Insurance Company*,[184] the Court ruled in the syllabus that "it is the duty of an insurance company to affirmatively plead breaches of conditions contained in a policy."[185]

Who has the burden of proving performance of conditions? Where the condition is a condition precedent, it is quite plain that the plaintiff bears the burden of proof notwithstanding the provision that the defendant must make his denial with particularity, since the plaintiff must make at least a general allegation of performance.[186] Where the condition is subsequent, a plea setting up the non-fulfillment of a condition subsequent would seem to confess and avoid; and consequently the burden of proof would rest on the defendant.[187]

D. *Official Document or Act.* The law of pleading with regard to official documents and acts is inextricably intertwined with the law of evidence as it relates to the subject of judicial notice. Con-

179. Roethke v. North Dakota Taxpayers Association, 72 N. D. 658, 10 N.W.2d 738 (1943).

180. 5 N. D. 187, 65 N.W. 670 (1895).

181. N. D. Rev. Code § 28-0728 (1943).

182. This is another one of the many "circular" situations involved in the adoption of the new rules. N. D. Rev. Code § 28-0728 (1943) was originally adopted as a reform of the common law rules of pleading, which required performance of conditions precedent to be alleged meticulously. The Federal Rules, in turn, adopted the reform of the Field Code. Now the Field Code states are generally adopting the Federal Rules. The result is the survival of a Field Code provision completely unchanged.

183. Ceauchamp v. Retail Merchant's Association, 38 N. D. 483, 165 N.W. 545 (1917); Ennis v. Retail Merchants Association M. F. Ins. Co., 33 N. D. 20, 156 N.W. 234 (1916).

184. 49 N. D. 176, 191 N.W. 350 (1922).

185. In view of the rule that a party required to plead something normally bears the burden of proof with respect to it, this is pretty strong medicine for insurance companies if it means what it says. Undoubtedly the holding is entitled to a rousing cheer from every plaintiff's lawyer! However, the opinion cites, in support of the proposition announced in the syllabus, the cases listed in footnote 183, *supra*, dealing with conditions subsequent. Possibly this means that despite the broad language in the syllabus, the rule of the case will be considered applicable to only such conditions. Query: if the syllabus means exactly what it says, are insurance companies enjoying the "equal protection of the laws" required under the Constitution? They bear a burden of proof not imposed on anybody else.

186. Sifton v. Sifton, *supra*.

187. Cases cited in footnote 183, *supra*.

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sequently the reader is referred, in conection with the problems dealt with in Rule 9(d), to the excellent treatment of this subject by the writer's colleague, Professor Leo H. Whinery, in the present issue of the *North Dakota Law Review*.[188]

E. *Judgments.* Rule 9(e) is plainly a continuation of the rule embodied in the statute it supersedes.[189]

F. *Time and Place.* Rule 9(f) was incorporated in the Federal Rules of Civil Procedure for the purpose of abolishing a former practice in the federal courts under which it was possible to allege any date or place and not be bound by it in proof because such facts were not considered material.[190] It is of some importance with regard to the defense of the statute of limitations. Rule 8(c) provides that the statute of limitations must be affirmaively pleaded. Assuming that a complaint, in compliance with Rule 9(f), alleges a date which makes it apparent on the face of the complaint that the action is barred by the statute of limitations, may the statute of limitations be applied by making a motion to dismiss? The federal cases are in conflict.[191] The present law of North Dakota is that the defense of the statute of limitations must be raised by the answer,[192] is not available on demurrer,[193] and cannot be the basis of a ruling by the court until the answer is actually submitted.[194] In view of the fact that the rule rests on statute here, this will presumably continue to be the law.

G. *Special Damage.* Rule 9(g) is in accord with existing law in this state.[195]

H. *Name of Party.* Rule 9(h) simply continues the rule of the statute it supersedes.[196]

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188. See *ante* this issue, pp. 29-30.
189. N. D. Rev. Code § 28-0726 (1943).
190. 1 Barron & Holtzoff, Federal Practice and Procedure § 307 (Rules Ed. 1950).
191. *Id.*, § 281.
192. N. D. Rev. Code § 28-0139 (1943).
193. Gilbertson v. Volden, 71 N. D. 192, 299 N.W. 250 (1941); Shane v. Peoples, 25 N. D. 188, 141 N.W. 737 (1913). In Chicago & N. W. Ry. v. Nepstad, 49 N. D. 221, 190 N.W. 1009 (1922), it was similarly held that the statute of limitations could not be invoked at the trial by objecting to the admission of any evidence on the ground the complaint did not state a cause of action. In Gilbertson v. Volden, *supra*, the Court ruled that a defendant could not call a failure to prosecute a case within the time prescribed by statute an instance of laches, and thereby raise the issue on demurrer.
194. Hagen v. Altman, 79 N.W.2d 53 (N. D. 1956) is the latest case on the point. In that case a pre-trial examination of a party indicated his action was barred by the statute of limitations, and the district court so ruled on the basis of the testimony, before an answer was put in. It was held this was premature.
195. The provisions of Rule 9(g) will be most sharply applicable in actions of defamation. See Ellsworth v. Martindale-Hubbell Law Directory, 66 N. D. 578, 588-90, 268 N.W. 400, 406-07 (1936); Meyerle v. Pioneer Publishing Co., 45 N. D. 568, 178 N.W. 792 (1920), for discussion of the law surrounding special damages, so far as it relates to pleading.
196. N. D. Rev. Code § 28-0723 (1943).

RULE 10. FORM OF PLEADINGS

(a) *Caption; Names of Parties.* Every pleading shall contain a caption setting forth the name of the court and the county in which the action is brought, the title of the action, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.[197]

(b) *Paragraphs; Separate Statements.* All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.[198]

(c) *Adoption by Reference; Exhibits.* Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. An exhibit annexed to a pleading is a part thereof for all purposes.[199]

RULE 11. SIGNING OF PLEADINGS

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavits. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.[200]

Little comment is required with regard to the two foregoing rules. Rule 10 deals essentially with formal matters only, though

197. This is taken verbatim from Fed. R. Civ. P. 10(a) and supersedes N. D. Rev. Code §§ 28-0701 and 28-0702 (1) (1943).

198. This is taken verbatim from Fed. R. Civ. P. 10(b) and supersedes N. D. Rev. Code § 28-0715 (1943).

199. This is taken verbatim from Fed. R. Civ. P. 19(c) and is not listed as superseding any North Dakota statute.

200. This is taken verbatim from Fed. R. Civ. P. 11 and supersedes N. D. Rev. Code §§ 28-0720 and 28-3001 (1943).

Rule 10(b) with its provision referring to "each claim founded upon a separate transaction or occurrence" serves to indicate the nature of the claim under the new rules.[201] Rule 11, of course, has already so commended itself to the profession through its requirement of good faith and honesty in pleading that it was long ago incorporated into the law of this state verbatim;[202] and pleading in this state under Field Code procedure is presently regulated by it.

Verification

One important technical point should be raised in connection with Rule 11. It will be noted that the Rule provides distinctly that "except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavits." Under previous Code procedure it was necessary to file a *verified* complaint before service by publication was permitted.[203] Under the new rules this is not required.[204]

RULE 12. DEFENSES AND OBJECTIONS — WHEN AND HOW PRESENTED — BY PLEADING OR MOTION — FOR JUDGMENT ON PLEADINGS

(a) *When Presented.* A defendant shall serve his answer within 20 days after the service of the summons[205] upon him, unless the court directs otherwise when service of process is made pursuant to Rule 4(f); (or) if a copy of the complaint be not served with the summons, and demand therefor is made pursuant to Rule 4(b), within 20 days after the service of the complaint. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more

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201. See discussion of the "claim" versus the "cause of action" following Rule 8(a), *supra*.

202. N. D. Rev. Code § 28-0720 (1943) was inserted in the 1943 revision of the code by the revisors and, of course, copies Rule 11 word for word.

203. N. D. Rev. Code § 28-0621 (1943).

204. N. D. R. Civ. P. 4(g) (2).

205. Fed. R. Civ. P. 12(a) inserts the words "and complaint" at this point.

definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.[206]

The foregoing rule has been redrafted from Fed.R.Civ.P. 12(a) to reflect the difference between the method of commencing an action in the federal courts and the method of commencing an action in this state.[207] It likewise omits provisions in the Federal Rule relating to actions against the United States. Its most notable alteration in existing procedure is found in the fact that it shortens the time for answering from 30 to 20 days for the purpose of expediting suits; in conection with this matter the reader is referred to the discussion of Rule 6(b), *supra*.[208]

(b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (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, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.[209]

A. *General Comment.* It should be noted that Rule 12(b) does not impose a *requirement* upon the pleader. It merely gives him an

206. This is adapted from Fed. R. Civ. P. 12(a) with changes discussed in the text. It supersedes N. D. Rev. Code §§ 28-0504, 28-0704 and 28-0716 (1943).

207. See discussion of N. D. R. Civ. P. 3 in the first installment of this paper, 32 N. Dak. L. Rev. 88, 98 *et. seq.* (1956). Since a federal action is commenced by filing a complaint with the court rather than by service of a summons upon the adverse party, Fed. R. Civ. P. 12(a) uses a first sentence which is somewhat simpler than the North Dakota version: "A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, unless the court directs otherwise when service of process is made pursuant to Rule 4(e)."

208. *Ante*, pp. 46.

209. This is taken verbatim from Fed. R. Civ. P. 12(b). The superseded statutory provisions are N. D. Rev. Code §§ 28-0706 (When Defendant May Demur), 28-0707 (Requisites of Demurrer), 28-0708 (Grounds for Demurring Taken by Answer, When), 28-0709 (Grounds for Demurrer Waived Unless Objection Taken by Demurrer or Answer; Exception), 28-0718 (Demurrer to Reply), and 28-1606 (Judgment Upon Issue of Law) (1943).

option to assert the enumerated defenses by way of motion rather than answer, if he chooses to do so. Rule 12(d), below, indicates that in the normal situation a motion raising one or more of the seven specified defenses will be heard and determined before the action itself is brought to trial. In a fine analysis of Rule 12 appearing some time ago in the *North Dakota Law Review*, Professor John Baumann points out that Judge Clark opposed this provision, arguing in favor of a rule based on the English pattern which allows such hearings only where the judge believes the hearing will substantially dispose of the case.[210] But the provisions of Rule 12(d) finally adopted quite plainly permit a trial judge to adopt precisely such a policy if he desires.

In most cases, procedure under Rule 12(b) will be analogous to the present procedure dealing with demurrers. In a broad sense, a motion under this rule is the equivalent of a demurrer and serves the same general function. But such a motion is not limited as already pointed out,[211] to the role of the demurrer at common law and under the Code. At one time there was very considerable controversy about this matter among the federal judges. In the end this resulted in a series of amendments to Rule 12, bringing it to its present form, which definitely settled the question. Accordingly it is now well established that a party presenting a motion to dismiss for failure of the complaint to state a claim upon which relief can be granted may support it by matter outside the pleadings, such as depositions and affidavits, showing that the plaintiff does not have a claim *in fact* rather than *in law*.[212] In such situations, however, Rule 12(b) ceases to be the basis of the motion. The motion is automatically transformed into one for summary judgment under Rule 56, which lays down a definite procedure for its disposition. There seems to the writer, despite the fact that Rule 56 in terms does not provide for the taking of oral testimony, no reason why a proceeding under that Rule could not be combined with an examination of an adverse party under N. D. Rev. Code § 31-0203 (1943), if the judge before whom the case was being tried was of opinion that this would be helpful.[213] But this is a matter on which an answer lies eventually with the North Dakota Supreme Court.

210. Baumann, *The Amendments to Rule 12 of the Federal Rules of Civil Procedure*, 26 N. D. Bar Briefs 235 (1950).

211. See discussion of N.D.R.Civ.P. 7(c) and also discussion of N.D.R.Civ.P. 12(b), *supra*.

212. Note 211, *supra*.

213. This section provides that the examination of an adverse party provided for by N. D. Rev. Code § 31-0202 (1943), which occurs at the trial of the case, may instead be held at the option of the party claiming the right to preliminary examination "at any time

B. *Defenses Relating to Lack of Jurisdiction.* The first two defenses which Rule 12(b) stipulates may be raised by motion rather than answer relate to jurisdiction over the subject matter of the action and jurisdiction over the person. In federal proceedings, of course, questions relating to jurisdiction are much more numerous and usually more complex than in the state courts; and this provision is consequently a good deal more meaningful in the federal than in the state context. Nevertheless, there are plenty of situations in which problems of jurisdiction over the subject matter can arise in North Dakota. A party may, for instance, object to the jurisdiction of the court in a divorce action because the plaintiff is not domiciled here[214] or has not met the requiremnet of residence for one year.[215] Equally, a party may object to the jurisdiction of the district court to deal with a matter allegedly reserved by the Constitution to the disposition of the county court.[216] These examples are illustrative rather than exhaustive, but indicate quite clearly that despite the fact the District Courts are courts of general jurisdiction they are at times faced with serious problems in this regard.

The defense of lack of jurisdiction over the person of a defendant is closely related to the defenses of insufficiency of process or insufficiency of service of process. These have been considered in connection with Rule 4 and the reader is referred to the previous installment of this paper for such discussion.[217] It should be said, however, that issues as to jurisdiction over a person may arise independently of the question whether the process was technically valid or served in technically proper manner. To illustrate, where jurisdiction is asserted under Rule 4(e)(2), which allows extraterritorial service of process upon North Dakota domiciliaries, it is plain a defendant may raise the argument he is not domiciled in this state by way of motion under Rule 12(b).

Special and General Appearances

It should be specially noted that Rule 12(b) has the incidental effect of making much of the former learning regarding special and general appearances immaterial. Under Code practice, an objection

before the trial before a judge of the court in which the action is pending or before a referee appointed for that purpose by a judge of such court."

214. Graham v. Graham, 9 N. D. 88, 81 N.W. 44 (1899); Smith v. Smith, 7 N. D. 404, 74 N.W. 783 (1898).

215. Schillerstrom v. Schillerstrom, 75 N. D. 667, 32 N.W.2d 106 (1948). See note, 25 N. D. Bar Briefs 262 (1949).

216. Hoffman v. Hoffman Heirs, 73 N. D. 637, 17 N.W.2d 903 (1945).

217. Crum, *The Proposed North Dakota Rules of Civil Procedure*, 32 N.Dak.L.Rev. 88, 101 *et seq.* (1956).

to jurisdiction over the person had to be taken by way of demurrer before any other step was taken in the proceeding, or the objection was waived. The new rules, however, permit a defendant to question jurisdiction over his person at the same time that he files, for example, a general denial of the allegations of the plaintiff's complaint. Indeed, the assertion that the court lacks jurisdiction over the person of the defendant may be made in an answer whereby a defendant also pleads to the merits of the case without the slightest risk of waiver.[218]

C. *Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted.* The intent of the rules with regard to the motion to dismiss for failure to state a claim upon which relief can be granted has already been set forth in preceding portions of this paper,[219] and only brief additional treatment need be given the motion here. In some situations, it should be observed, technically nice questions of the application of the rules are presented when a pleader attempts to raise by this motion a defense of the sort specified in Rule 8(c). Thus, where a pleader observes on the face of the opposing pleading a disclosure of the applicability of such a defense as illegality, the statute of frauds, contributory negligence, laches and the like, must he answer or is he permitted to assert such defense by way of motion to dismiss for failure to state a claim? The scope of the motion is such that some courts have permitted the application of the motion procedure on the common-sense ground that it makes no difference which way one goes in requiring the pleader to set up such an attack, since the end result is the same anyhow.[220] Nevertheless there may be advantages resulting to one side or the other from a construction of the rules one way or the other,[221] and the problem clearly deserves mention.

D. *Failure to Join an Indispensable Party.* Professor Baumann comments that the "tendency to treat non-joinder of an indispensable party as a jurisdictional error is fallacious, since clearly a person cannot legally be affected by a judgment in an *in personam* suit to which he has not been made a party."[222] "Nevertheless," he

218. Untersinger v. United States, 172 F.2d 298 (2d Cir. 1949); Orange Theatre Corp. v. Amusement Corp., 139 F.2d 871 (3d Cir. 1944); 1 Barron & Holtzoff, Federal Practice and Procedure 759 *et seq.* (Rules ed. 1950).

219. See comment to Rule 7(c), *supra.*

220. See 1 Barron & Holtzoff, Federal Practice and Procedure § 349 (Rules Ed. 1950), for discussion.

221. At least, in Hagen v. Altman, 79 N.W.2d 53 (N. D. 1956), a very recent decision, a party took the trouble to go to the Supreme Court on an issue of this sort.

222. Baumann, *supra* note 210, at 243.

adds, "by Rule 12(b) and 12(h), this approach seems established in the Federal Rules."[223]

Who is an indispensable party? There is a distinction between a *necessary* and *indispensable* party.[224] Barron and Holtzoff define indispensable parties as "persons who have an interest in the controversy of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."[225] The leading case on the question is *Shields v. Barrow*,[226] in which the Supreme Court of the United States discussed and applied the distinction for the purpose of holding that a complainant could not prosecute to judgment a bill to rescind a contract of compromise and hold the adverse parties to their original liability in a situation where the trial court had jurisdiction of only two of the six parties to the contract.

A joint obligor on a promissory note is not an indispensable party in an action to recover on the note.[227] The insured person under an automobile liability insurance contract is indispensable in an action for declaratory judgment by the insurance company to have the contract declared void for breach of a condition.[228] The state is an indispensable party in actions to concel, change, or alter leases of public school lands.[229] These examples illustrate, but do not exhaust, the rules surrounding the indispensable party. It seems safe to predict that the Supreme Court will eventually have to fix the precise interpretation of this provision in this state independently; though it is clear it will be generally in line with the materials here presented.

(c) *Motion for Judgment on the Pleadings.* After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a

223. *Ibid.*

224. "The court here points out three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversey, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." Shields v. Barrow, 17 How. 129 (U. S. 1854).

225. 1 Barron & Holtzoff, Federal Practice and Procedure § 357 (Rules Ed. 1950).

226. 17 How. 129 (U. S. 1854).

227. Greenleaf v. Safeway Trails, Inc., 140 F.2d 889 (2d Cir.), *cert. denied*, 322 U. S. 736 (1944).

228. Auto Mut. Indemnity Co. v. Dupont, 21 F. Supp. 606 (Del. 1937).

229. De Grazier v. Panell Oil Corp., 109 S.W.2d 1109 (Tex. Civ. App. 1937).

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> motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.[230]

The motion for judgment on the pleadings allowed by Rule 12(c) is very similar in effect and operation to the motion to dismiss an action for failure of the complaint to state a claim upon which relief can be granted. This is manifest from the fact that, precisely as in the case of the motion to dismiss for failure to state a claim, the motion for judgment on the pleadings translates into a motion for summary judgment under Rule 56 in the event that matter outside the face of the pleadings is tendered in support of it.

In theory it would seem a difference between the motion for judgment on the pleadings and motion to dismiss for failure to state a claim ought to exist, at least where the motions strike only to the face of the pleadings. Logically the motion to dismiss for failure to state a claim ought merely, if granted, to abate the action. Normally, leave to plead over ought to be granted in such situations. Attention is called, however, to the fact that in some situations the federal courts have ruled that a dismissal of this sort constitutes matter in bar rather than matter in abatement.[231] This line of holdings makes the difference between the two motions under discussion merely one of time: the motion to dismiss for failure to state a claim may be tendered before the pleadings are closed, the motion for judgment on the pleadings normally comes afterward. It is clear in any event that the motion for judgment on the pleadings, if granted, amounts to a substantive adjudication. This is true whether the motion is granted on the face of the pleadings or also after a consideration of additional matter from affidavits, depositions, and the like.[232]

> (d) *Preliminary Hearings.* The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.[233]

230. This is taken verbatim from Fed. R. Civ. P. 12(c). The superseded statutes are N. D. Rev. Code §§ 28-1104 (2) and 28-1606 (1943).

231. Mullen v. Fitz Simons & Connell Dredge & Dock Co., 172 F.2d 601 (7th Cir. 1948); Topping v. Fry, 147 F.2d 715 (7th Cir. 1945); 1 Barron and Holtzoff, Federal Practice and Procedure § 356 (Rules Ed. 1950).

232. Noel v. Olds, 149 F.2d 13 (D. C. App. 1945).

233. This is taken verbatim from Fed R. Civ. P. 12(d) and supersedes N. D. Rev. Code § 28-1104 (1) (1943).

(e) *Motion for More Definite Statement.* If a pleading to which a responsive pleading is permitted is so vague or ambigous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.[234]

(f) *Motion to Strike.* Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.[235]

The provisions of Rule 12(d) are plainly directory rather than mandatory, and indicate an area of considerable discretion vested in the trial judge. A similar comment may be made with regard to Rules 12(e) and 12(f). Commentators have suggested that to some extent Rule 12(e) is inconsistent with the general philosophy of pleading embodied in the rules and constitutes an invitation to counsel to seek unnecessary particularization.[236] Equally, an expansive and generous application of Rule 12(e) has been warmly advocated.[237] To the writer, the proper application of the rule would appear to depend on purely pragmatic considerations of trial convenience varying from case to case.

(g) *Consolidation of Defenses.* A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. 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, except as provided in subdivision (h) of this rule.[238]

(h) *Waiver of Defenses.* A party waives all defenses and

234. This is taken verbatim from Fed. R. Civ. P. 12(e) and supersedes N. D. Rev. Code §§ 28-0724 and 28-0725 (1943).

235. This is taken verbatim from Fed. R. Civ. P. 12(f) and supersedes N. D. Rev. Code §§ 28-0713, 28-0722, and 28-0910 (1943).

236. Baumann, *supra* note 210, at 240; Clark, *Simplified Pleadings*, 2 F. R. D. 456, 466 (1943).

237. Caskey and Young, *The Bill of Particlars — A Brief For the Defendant*, 27 Va. L. Rev. 472 (1941). This article argues that a "defendant is entitled to know the extent of the plaintiff's claim before the commencemen tof the trial and the feats upon which it is based," and is entitled to a bill of particulars for the purpose in cases where the trouble and expense of pre-trial examination are bothersome.

238. This is taken verbatim from Fed. R. Civ. P. 12(g) and supersedes no North Dakota statute.

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> objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial of the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise, that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.[239]

A. *Comment on Rule 12(g).* The meaning of Rule 12(g) must be ascertained by looking to its history. Under the original version of the Federal Rules of Civil Procedure, a defendant could set up his defenses in three stages. He could first make a motion setting up one or more of the defenses listed in Rule 12(b) and numbered (1) to (5) — *e. g.* a motion testing jurisdiction. Losing on this motion, he could then file a second motion setting up the defense that the complaint failed to state a cause of action and asking for a more definite statement, or asking the court to strike a portion of the complaint. Lastly, he filed an answer.[240]

Rule 12(g) allows defenses to come in only by two stages, a preliminary motion and an answer. If a pleader files a motion under Rule 12(b), for instance, he must join in that motion any requests for the application of Rules 12(e) and 12(f). With that single preliminary motion before the court, he must then plead to the substance of the case in his answer. This has been criticized on the ground a pleader ought to be able to file a motion for more definite statement and then raise objections to a complaint finally put in proper form by a subsequent motion under Rule 12(b). The argument is in substance that a pleader ought to have before him a complaint which he finds intelligible prior to the time he is required to assert defenses to it.[241] There seems no reason, however, why the trial court, in a proper case, might not in a proper case give relief to a pleader in this position by an order enlarging the time for answering or making a motion under Rule 12(b).[242] As a

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239. This is taken verbatim from Fed. R. Civ. P. 12(h) and supersedes N. D. Rev. Code § 28-0709 (1943).

240. See discussion in Baumann, *supra* note 210, at 241-42.

241. Armstrong, Report of Advisory Committee, 5 F. R. D. 339, 344 (1946), suggests that a "Motion for a more definite statement should be permitted to be made without operating as a waiver of the right to make subsequent motions."

242. See discussion of Rule 6(b), *supra*. Note also that Rule 1 declares that the rules

general proposition, the idea that expedition in the trial of a case requires all preliminary objections to be raised at one time seems a sound one.

B. *Comment on Rule 12(h).* The penalty for failure to comply with the provisions of Rule 12(g) is indicated by Rule 12(h), which provides that a party who fails to present an objection to a preceding pleading either by motion or answer thereby waives it, with certain specified exceptions. It will be noted that the Rule under discussion continues the present rule of this state that an objection to a pleading as failing to state a valid cause of action or defense may be made at the trial, notwithstanding that this ground of objection is not taken in the pleadings.[243] This procedure, while legitimate, is regarded with disfavor by the court under present procedure.[244] Under the new rules the policy against this type of trial tactic is continued, since Rule 15(b) provides for an extremely liberal policy with regard to permitting amendments to meet such objections.

(i) *Offer of Fixed Damages; Service.* In an action arising on contract, the defendant with his answer may serve upon the plaintiff an offer in writing that if he fails in his defense the damages be assessed at a special sum, and if the plaintiff signifies his acceptance thereof in writing with or before the notice of trial and on the trial has a verdict, the damages must be assessed accordingly.[245]

(j) *Effect If Offer of Fixed Damages Rejected.* If the plaintiff does not accept an offer of fixed damages, he must prove his damages as if it had not been made and shall not be permitted to introduce such offer in evidence. If the damages in his favor do not exceed the sum mentioned in the offer, the defendant shall recover his costs incurred in consequence of any necessary preparations or defense in respect to the question of damages.[246]

The foregoing provisions are not found in the Federal Rules. They merely continue unchanged the provisions of two North Dakota statutes relating to practice which do not appear to have been construed by the North Dakota Supreme Court.

TO BE CONTINUED

"shall be construed to secure the just, speedy, and inexpensive determination of every action."

243. Guild v. More, 32 N. D. 432, 155 N.W. 44 (1915).

244. *Ibid.*

245. Rule 12(i) is new material not found in the federal rules and continues the provisions of N. D. Rev. Code § 28-0711 (1943.

246. Rule 12(j) is new material not found in the federal rules and continues the provisions of N. D. Rev. Code § 28-0712 (1943).