NORTH CAROLINA LAW REVIEW

Volume 25 | Number 3 Article 1

4-1-1947

A Plea for Adoption by North Carolina of the Federal Joinder Rules

Henry Brandis Jr.

A PLEA FOR ADOPTION BY NORTH CAROLINA OF THE FEDERAL JOINDER RULES

HENRY BRANDIS, JR.*

By far the best way for North Carolina to go about reform of civil procedure would be to endow the Supreme Court with the rule-making power. At least it is to be hoped that a thorough-going re-examination of the whole procedural system would ensue and that we would emerge with a system closely resembling that provided by the Federal Rules.

However, since the General Assembly has not yet manifested a desire to take this step, it is apparently still in order to consider specific phases of procedure in the hope that improvement can be made, even though it be recognized that such tinkering is not likely to be as successful as an integrated revision of the system.

One such phase of civil procedure encompasses the rules governing permissive joinder of causes and parties. The existing rules have been examined at some length in a prior article.[1] It was there concluded that the record of the North Carolina Supreme Court in interpreting the joinder statutes shows more cases of liberal than literal construction; but that the statutes are themselves too restrictive.

While no attempt will be made here to summarize the rules discussed in the prior article, a few examples will serve to show the incongruous results inherent in the present law. Though *A* may, in one action, sue *B* for breach of two entirely independent contracts,[2] he may not, in one action, sue *B*, his employer, for: (1) negligent injury and (2) wrongful discharge arising from *A*'s refusal to sign a release of the negligence claim.[3] A plaintiff may, in one action involving corporate mismanagement, join officers and directors as defendants, though the alleged mismanagement covers a period of seven years and though it seems probable that not all defendants served as officers or directors throughout that period.[4] But plaintiff may not join: (1) a cause against *B* for slander and (2) a cause against *B* and three others for subsequent publication of the same defamation.[5]

* Associate Professor of Law, University of North Carolina.

[1] Brandis, *Permissive Joinder of Parties and Causes in North Carolina* (1946) 25 N. C. L. REV. 1.

[2] N. C. GEN. STAT. (1943) §1-123(2). Followed in: Lyon v. A. C. L. R. R., 165 N. C. 143, 81 S. E. 1 (1914); Robertson v. A. C. L. R. R., 148 N. C. 323, 62 S. E. 413 (1908); State *ex rel.* Maggett v. Roberts, 108 N. C. 174, 12 S. E. 890 (1891); Sutton v. McMillan, 72 N. C. 102 (1875).

[3] Pressley v. Great A. & P. Tea Co., 226 N. C. 518, 39 S. E. (2d) 382 (1946).

[4] Branch Banking & Trust Co. v. Peirce, 195 N. C. 717, 143 S. E. 524 (1928).

[5] Gattis v. Kilgo, 125 N. C. 133, 34 S. E. 246 (1899).

It is obvious from these illustrations that the North Carolina statutes do not draw lines based on any principle of trial convenience, though it is equally obvious that that principle should be the controlling one in the joinder rules. This is further illustrated by the fact that the following sequence of events would be possible under the North Carolina rules. *A* and *B*, riding in the same automobile, are injured by the same negligent act of *C*. They join as plaintiffs. Upon demurrer, the action is dismissed for misjoinder.[6] They then start separate actions. Over the defendant's protest the actions are consolidated for trial and this is a proper order[7].

Fortunately, the Federal Rules, which treat joinder primarily as a matter of trial convenience, are available as a working model for modernization of our statutes. While they cannot be adopted *verbatim*, as they would not fit into the remainder of our statutory system, we can borrow the principles they embody. While absolute conformity to the Rules may not be necessary, substantial conformity is desirable; and, assuming we are going to make fundamental changes in our joinder statutes, we should be satisfied there is sound reason for any lack of uniformity remaining in the final product.

The remainder of this article is devoted to discussion of the changes in the State rules which this would entail.

The Case Involving a Single Plaintiff and Single Defendant

Under G. S. 1-123, when *A* sues *B* he may join any number of causes for injury to person or property, however unrelated they may be; or he may join any number of causes for breach of contract (including cases in which a tort theory is waived in favor of implied contract),[8] however large a number of independent transactions are involved. However, he may not join a contract cause with a tort cause unless they "arise out of the same transaction or transaction connected with the same subject of action." And this clause, always of uncertain meaning, is sometimes narrowly construed.

The principle of enumerating classes of actions and insisting that all joined causes fall within one class has neither logic nor convenience to recommend it. At the time G. S. 1-123 was adopted it represented a step forward from the common law rules, but it was nevertheless influenced by the common law background of attempting to compress joinder within the framework of the old forms of action. However,

[6] Though the court was passing on a different question, this is plainly stated to be the law in *Montgomery v. Blades*, 217 N. C. 654, 9 S. E. (2d) 397 (1940). It is also a necessary result of the decision in *Thigpen v. Kinston Cotton Mills*, 151 N. C. 97, 65 S. E. 750 (1909).

[7] Robinson v. Standard Transportation Co., 214 N. C. 489, 199 S. E. 725 (1938).

[8] Logan v. Wallis, 76 N. C. 416 (1887).

our years of experience with the one form of civil action leave little ground for argument that, while contract and contract or tort and tort are compatible in a pleading or trial, contract and tort are not.

The possibility of prejudice arising from free joinder is a bugaboo much more frequently feared than encountered; but adequate protection against possible prejudice can be provided by giving the court power to order separate trials of the causes originally joined. Certainly adequate protection cannot be given simply by looking at the theories on which the respective causes are based, and hence G. S. 1-123 currently furnishes no real protection against the one substantial danger apprehended.

Further, it is common knowledge that a sizeable percentage of cases never get beyond the pleading stage. If a case is settled before trial, what difference does it make how many causes it embraced or on what theories they were grounded?

The federal provisions place no restriction on joinder of causes when multiple parties are not involved. Under Rule 18(a) a plaintiff "may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party." To provide the desirable escape valve, for this and related situations, it is provided in Rule 42(b) that "the court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues." These provisions should clearly be written into the North Carolina law.[9]

Inconsistency

Federal Rule 8(e)(2), in addition to allowing the pleading of causes in the alternative, allows a party to "state as many separate claims . . . as he has regardless of consistency."[10] This, also, should be followed in the North Carolina statutes.[11]

Perhaps this would work no major change in the State situation as, while the question is not altogether free from doubt, there are cases indicating that causes, though to some extent inconsistent, can be joined at the pleading stage.[12] But no harm can come from making the provision

[9] See sections 3 and 12 of the proposed statute, *infra* note 107.

[10] See Reconstruction Finance Corp. v. Goldberg, 143 F. (2d) 752 (C. C. A. 7th, 1944), *cert. den.* 323 U. S. 770 (1944), *rehearing den.* 323 U. S. 817 (1944); Israel v. Alexander, 50 F. Supp. 1007 (S. D. N. Y. 1942); Cary v. Hardy, 1 F. R. D. 355 (E. D. Tenn. 1940); Crim v. Lumbermen's Mutual Casualty Co., 26 F. Supp. 715 (D. D. C. 1939); Kraus v. General Motors Corp., 27 F. Supp. 537 (S. D. N. Y. 1939); Michelson v. Shell Union Oil Corp., 26 F. Supp. 594 (D. Mass. 1938); Shell Petroleum Corp. v. Stueve, 25 F. Supp. 879 (D. Minn. 1938).

[11] See section 3 of the proposed statute, *infra* note 107.

[12] Graham v. Hoke, 219 N. C. 755, 14 S. E. (2d) 490 (1941); Shuford v. Yarborough, 198 N. C. 5, 150 S. E. 618 (1929); Worth v. Knickerbocker Trust

explicit. It might minimize any tendency to force an election between causes at the trial,[13] as such action obviously takes away much of the advantage conferred by the pleading privilege; but the ultimate decision as to this would be left to the court.[14] To the court would also be left the decision as to the effect, if any, of the new provision on the doctrine of election of remedies.[15] That doctrine, since it involves much more than a mere question of pleading, could conceivably survive the new provision unscathed.

Adoption of the change would strengthen the chance for effective use of the alternative joinder provisions already existing;[16] and it would also be in line with the prevailing North Carolina rule that a defendant may plead inconsistent defences.[17]

The Common Question of Law or Fact Rule

When multiple plaintiffs or defendants are involved, the greatest single stumbling block to free joinder under the present North Carolina statutes is the requirement of G. S. 1-123 that all causes must affect all parties. For example, it prevents an infant and his parent from joining as plaintiffs to enforce their respective rights arising from negligent injury to the infant, and likewise prevents *A* and *B*, riding in the same car and injured by the same act of *C*, from joining as plaintiffs. Common sense clearly dictates that such joinder should be permitted as is indicated by the power given the trial court to enforce consolidation for trial.[18]

Co., 152 N. C. 242, 67 S. E. 590 (1910). See also Goodson v. Lehmon, 225 N. C. 514, 35 S. E. (2d) 623 (1945); Peitzman v. Town of Zebulon, 219 N. C. 473, 14 S. E. (2d) 416 (1941).

[13] See Brandis, *supra* note 1, pp. 9-10, 13-14.

[14] See Reconstruction Finance Corp. v. Goldberg, Crim v. Lumbermen's Mutual Casualty Co., and Kraus v. General Motors Corp., all cited *supra* note 10, as indicating that federal courts ordinarily will not require election. To the same effect as to inconsistent defenses, see Fidelity & Deposit Co. of Md. v. Krout, 146 F. (2d) 531 (C. C. A. 2d, 1945).

[15] See Brandis, *supra* note 1, cases cited in note 51.

[16] See Brandis, *supra* note 1, pp. 4-5, 43-49.

[17] Hight v. Harris, 188 N. C. 328, 124 S. E. 623 (1924); Dixon v. Green, 178 N. C. 205, 100 S. E. 262 (1919) (court said both defenses should go to jury); Johnson v. Eversole Lumber Co., 147 N. C. 249, 60 S. E. 1129 (1908); McLamb v. McPhail, 126 N. C. 218, 35 S. E. 426 (1900). See also Mull v. Walker, 100 N. C. 46, 6 S. E. 685 (1888), and the cases cited *infra* note 82, as to contingent pleading of theoretically inconsistent defenses in the tort-feasor cases. There is language in several cases which, taken literally, seems a denial of the right to plead *and rely on* defenses which, though possibly inconsistent in legal theory, can as a practical matter co-exist or can, in good conscience, be relied on *seriatim*. See Gorham v. Pacific Mutual Life Ins. Co., 214 N. C. 526, 200 S. E. 5 (1938), *petition to rehear dismissed and cert. den.* 215 N. C. 195, 1 S. E. (2d) 569 (1939); Higson v. North River Lumber Co., 152 N. C. 206, 67 S. E. 509 (1910); Fayetteville Waterworks Co. v. Tillinghast, 119 N. C. 343, 25 S. E. 960 (1896). The *Tillinghast* case may actually stand for such a proposition, though it seems doubtful; but the other two are probably to be taken only as presenting situations in which a defendant has, by his extra-judicial conduct, lost the right to use a defense through waiver or estoppel.

[18] Consolidation is not an adequate substitute for joinder because: (1) It

How far should the privilege of free joinder extend? Assuming that it is desirable in these cases, does it follow that two plaintiffs should be able to unite against one defendant on completely unrelated causes? Or that a plaintiff should be able to join several defendants and make completely unrelated claims against them? It is quite unnecessary to extend the privilege so far, as there is nothing to be gained by doing so.

Federal Rule 20(a) provides two basic criteria: (1) claims of all plaintiffs, and claims against all defendants, must be "in respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences"; and (2) as to the plaintiffs or defendants so joined, a "question of law or fact common to all" must be presented.[19] That the claims of different plaintiffs or the claims against different defendants embrace different causes of action is no stumbling block under Rule 18(a), so long as these two requirements are satisfied. Any inference that all causes must affect all parties is negatived by the provision of Rule 20(a) that "a plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded."[20]

All of these provisions should be incorporated into the State law.[21] Together they give a much more more realistic answer than do the present State statutes to the question: How much can conveniently be dealt with in the trial of a single law suit? The North Carolina Supreme Court has, in effect, recognized that a common question of law or fact

places the emphasis on separate suits with a possibility of a single trial, instead of on single suits with a possibility of separate trials; whereas the single suit and trial are desirable, in situations involving common questions, more often than not. (2) Costs are greater under the consolidation procedure, without regard to the situation on appeal. (3) It is possible that separate appeals are necessary in the consolidated cases. The court once made it clear that if actions, though consolidated for trial, are such as could not have been joined in a single action originally, they remain technically separate cases and separate records on appeal are necessary. Osborne v. Town of Canton, 219 N. C. 139, 13 S. E. (2d) 265 (1941); Williams v. C. & N. R. R., 144 N. C. 498, 57 S. E. 216 (1907). However, in *Conley v. Pearce-Young-Angel Co.*, 224 N. C. 211, 29 S. E. (2d) 740 (1944), the court said only one record was required. The opinion refers neither to prior cases nor to Supreme Court Rule 19(2), dealing with multiple appeals in one action. In this state of the cases it is very difficult to say what the law is, though the *Conley* case represents the preferable rule.

[19] For discussion of the background of this rule, including the experience in England and in the states adopting the English rule, see MOORE'S FEDERAL PRACTICE (1938) §§20.01-20.03. Similar discussions of the background of the other rules dealt with in this article will be found in the appropriate sections of the same work. The subject is beyond the scope of this article, as is discussion of the extent to which the Federal Rules have influenced state practice in other states.

[20] See MOORE'S FEDERAL PRACTICE (1938) §§20.04, 20.05.

[21] See sections 1 and 2 of the proposed statute, *infra* note 107. The proposed revision retains, as an alternative to the transaction clause, the present provision of G. S. 1-68 permitting joinder of plaintiffs having an interest in the subject of action, and applies that provision to defendants, also. In cases involving property this should permit joinder when common questions of law or fact are presented but it might nevertheless be difficult to justify the joinder under the transaction clause. Compare the proposed amendment to Federal Rule 13(g), discussed in the text and *infra* note 79.

is a legitimate basis for joinder.[22] It cannot be made a controlling principle so long as G. S. 1-123 requires that all causes affect all parties; but recognition by the court of its practicality helps lay the groundwork for the change.

These provisions would hardly deny joinder in any case in which it has been permitted under existing State rules. For instance, the creditors' bill cases which, as a class, probably represent the extreme limit to which the North Carolina court has gone in permitting joinder,[23] would still be decided the same way. If *A* and *B* sue to recover independent claims against *C*, joining *D* upon allegations that a deed from *C* to *D* was fraudulent and demanding that it be set aside, the alleged fraudulent conveyance presents both: (1) a common transaction in respect to which *A* and *B* make claims; and (2) common questions of law or fact, or both. It is true that the basic claims of *A* and *B* may present no common transaction or common question, but the rule would seem to be satisfied, anyway. A court which has found justification for this type of joinder under statutes much more restrictive than those proposed, should have no great difficulty in continuing the practice.[24]

The proposal would permit joinder in those cases, such as the parent-child and automobile cases where it is highly desirable but not permitted by the present State law.[25] It would not, however, open the way for

[22] Balfour Quarry Co. v. West Construction Co., 151 N. C. 345, 66 S. E. 217 (1909); State *ex rel.* Cook v. Smith, 119 N. C. 350, 25 S. E. 958 (1896); Pretzfelder v. Merchants Ins. Co., 116 N. C. 491, 21 S. E. 302 (1895). The presence of common questions has also been used to justify consolidation. Abbitt v. Gregory, 201 N. C. 577, 160 S. E. 896 (1931).

[23] See Brandis, *supra* note 1, pp. 19-22.

[24] Federal Rule 18(b) expressly authorizes joinder of a demand for money judgment with a demand to set aside a fraudulent conveyance. This is unnecessary in North Carolina as the right is already recognized. Rule 18(b) is broader than this, but its most important application is to the fraudulent conveyance cases. See MOORE'S FEDERAL PRACTICE (1938) §18.03. The broader language of the rule raises questions as to joinder of insurers, indemnitors, and persons guaranteeing to pay in case a judgment remains unpaid. See Grier v. Tri-State Transit Co., 36 F. Supp. 26 (W. D. La. 1940); Pitcairn v. Rumsey, 32 F. Supp. 146 (W. D. Mich. 1940); Jennings v. Beach, 1 F. R. D. 442 (D. Mass 1940). The rule has not been incorporated in the proposed North Carolina statute, *infra* note 107.

[25] See, *e.g.*, Sporia v. Pennsylvania Greyhound Lines, Inc., 143 F. (2d) 105 (C. C. A. 3rd, 1944) (car owner and passenger join for damage to car and personal injuries, respectively); Lansburgh & Bro. v. Clark, 127 F. (2d) 331 (App. D. C. 1942) (husband and wife join for negligent injury to wife); Doyle v. Stanolind Oil & Gas Co., 123 F. (2d) 900 (C. C. A. 5th, 1941) (plaintiffs severally owning different, though adjoining, land tracts, join in suit for title and possession); Thomson v. United Glazing Co., Inc., 36 F. Supp. 527 (W. D. N. Y. 1941) (car driver and passenger join for respective injuries); Farmers Co-Op Oil Co. v. Socony-Vacuum Oil Co., 133 F. (2d) 101 (C. C. A. 8th, 1942), and Alabama Independent Service Station Ass'n., Inc. v. Shell Petroleum Corp., 28 F. Supp. 386 (N. D. Ala. 1939) (both allowing plaintiffs to join in suing for separate damages caused by violation of anti-trust laws). On the defendants' side, see Psaroumbas v. United Greek Shipowners Corp., 5 F. R. D. 398 (S. D. N. Y. 1946) (joinder of action against *A* under Jones Act with action against *B* for common law negligence). *Cf.* Ginsburg v. Standard Oil Co., 5 F. R. D. 48 (S. D. N. Y. 1945); Wilson v. Massagee, 224 N. C. 705, 32 S. E. (2d) 335, 156 A. L. R. 922 (1944).

trial in one action of completely unrelated cases. For example, the following have been held not to satisfy the same transaction and common question requirements under the Federal rules: (1) suit by single plaintiff against three defendants on a note and against two of the defendants on a completely unrelated note;[26] (2) suit by multiple plaintiffs against multiple defendants involving ten tracts of land;[27] (3) suit against (a) *C* for making and selling a device infringing plaintiff's patent and *M* for selling same; and (b) *C* for unfair competition in using deceptive advertising and in selling at low prices to destroy plaintiff's business.[28]

To avoid genuine prejudice or hardship arising from enlargement of the joinder privilege, the provision allowing separate trials provides an adequate escape valve.

The Venue Provisions

The present mandate of G. S. 1-123 that joined causes shall not require different places of trial seems not to have presented a troublesome problem.[29] However, in revising the section, some disposition must be made of it. The soundest provision would seem to be one stating that if causes which require different places of trial are joined, the court shall, upon proper application as provided by the venue statutes, divide the action and transfer the respective parts to the proper counties.[30]

Modification of the Dismissal Rule

While there are a number of cases which are apparent exceptions to them, the basic North Carolina rules on the consequences of misjoinder are: (1) Misjoinder of parties only is not demurrable. When the question is raised, the improperly joined party may either be let out of the case or, though retained, treated as a surplus party whose presence is thereafter of importance only when costs are assessed.[31] (2) Misjoinder of causes only is demurrable, but results only in division of the action.[32] (3) Misjoinder of both causes and parties is demurrable and results in dismissal of the action.[33]

This last is a harsh rule and its harshness is accentuated by the rule that after a demurrer for dual misjoinder has been sustained there can

[26] Federal Housing Administrator v. Christianson, 26 F. Supp. 419 (D. Conn. 1929).

[27] Gerard v. Mercer, 62 F. Supp. 28 (D. Mont. 1945).

[28] Man-Sew Pinking Attachment Corp. v. Chandler Mach. Co., 29 F. Supp. 480 (D. Mass. 1939). *Cf.* Kerr v. Enoch Pratt Free Library, 54 F. Supp. 514 (D. Md. 1944), *reversed on grounds not involving joinder,* 149 F. (2d) 212 (C. C. A. 4th, 1945), *cert. den.,* 326 U. S. 721 (1945).

[29] See Brandis, *supra* note 1, pp. 14-15.

[30] See section 3 of the proposed statute, *infra* note 7. That this is probably the existing law is indicated by *Richmond Cedar Works v. J. L. Roper Lumber Co.,* 161 N. C. 604, 77 S. E. 784 (1913).

[31] See Brandis, *supra* note 1, pp. 5-7.

[32] See Brandis, *supra* note 1, pp. 15-16.

[33] See Brandis, *supra* note 1, pp. 49-53.

be no amendment to eliminate the misjoinder, but dismissal follows automatically.[34] The rule lends itself to purely technical use, offering dismissal as a reward for successful objection, without regard to whether the joinder attempted would actually be prejudicial.

This rule, since it is one of long standing, is likely to carry over to the revised provisions suggested above. The new rules would say, in effect: (1) joinder of any and all causes is proper if the party provisions are satisfied; and (2) joinder of parties is proper if the same transaction and common question requirements are met. Because of this express interdependency of the two, there is adequate basis for saying that violation of the party provisions would constitute a violation of both. Hence, without further changes in the statutes dismissal would still follow unless other new provisions prevent it.

Federal Rule 21 provides that misjoinder of parties is not ground for dismissal. Under it a party may be dropped or added or there may be a severance as to any claim against a party. The Rules contain no specific provision regarding the consequences of misjoinder of causes. One would be inclined to assume that this is a deliberate omission; that there can be no misjoinder of causes unless violation of the party provisions is regarded as dual misjoinder; and that the severance and separate trial provisions of Rules 20(b), 21 and 42(b) were designed to furnish the answer to any type of misjoinder or confusion of issues. However, the federal courts apparently retain the right to dismiss for misjoinder of causes (probably meaning, in North Carolina parlance, misjoinder of causes and parties), though they regard dismissal as warranted only in an extraordinary case, with severance being the normal solution.[35] While this may be satisfactory for federal purposes, it is

[34] Grady v. Warren, 202 N. C. 638, 163 S. E. 679 (1932). The statute (G. S. 1-131), which expressly allows application for leave to amend after demurrer has been sustained, does not expressly exclude demurrers for misjoinder from its purview. Compare the early cases in which the court, of its own motion, gave plaintiff an opportunity to amend. Mitchell v. Mitchell, 96 N. C. 14, 1 S. E. 620 (1887); Logan v. Wallis, 76 N. C. 416 (1877). *Contra:* Cromartie v. Parker, 121 N. C. 198, 28 S. E. 297 (1897). In the *Grady* case the order sustaining the demurrer also dismissed. However, it apparently is not permissible for the lower court to sustain the demurrer and allow opportunity to amend before dismissing. Wingler v. Miller, 221 N. C. 137, 19 S. E. (2d) 247 (1942) (precise point was not involved, but rule announced would cover it). A misjoinder can be cured by amendment made after the objection is raised but before the demurrer has been sustained. Walker v. Standard Oil Co., 222 N. C. 607, 24 S. E. (2d) 254 (1943).

[35] Man-Sew Pinking Attachment Corp. v. Chandler Mach. Co., cited *supra* note 28; Alabama Independent Service Station Ass'n., Inc. v. Shell Petroleum Corp., cited *supra* note 25; Federal Housing Administrator v. Christianson, cited *supra* note 26. Compare the statement in MOORE'S FEDERAL PRACTICE (1938) §21.01, "This rule on multiple parties is the only restriction upon what would otherwise be unlimited joinder of actions and parties," with the statement in §18.02, "Rule 21 and Rule 42(b) . . . give the court such a broad discretion in shaping the action for trial, that a court should rarely dismiss for misjoinder of actions." And see Atlantic Lumber Corp. v. Southern Pacific Co., 2 F. R. D. 313, 314 (D.

doubtful, because of the long history of the dismissal rule in North Carolina, that a similar attitude can be achieved in the State practice without express statutory provisions.

The revised State statutes should provide that, if a demurrer for misjoinder of causes and parties is sustained, the court shall either divide the action or order the offending pleader to do so. In the latter event, if the division effected fails to eliminate the misjoinder, the court may, in its discretion, either further divide or dismiss.[36] All reference to misjoinder of causes alone can be eliminated, because there will be no provision of the statute which creates a misjoinder of causes unless multiple parties are involved. But if, in some unexpected case, the court should find a misjoinder of causes without a misjoinder of parties, it should not be difficult to reach the conclusion that division, and not dismissal, is the maximum penalty. Like the present statute, the revision will make no reference to misjoinder of parties alone.

Counterclaims

As a corollary to the liberalization of the joinder privileges accorded plaintiffs there should be a revision of the provisions governing counterclaims.

In dealing with counterclaims there are two basic questions: (1) What counterclaims *must* be pleaded? (2) What additional counterclaims *may* be pleaded? The present North Carolina statute, G. S. 1-137, though it divides counterclaims into two classes, does not in terms make either of them compulsory. The statutory classes are: (a) claims arising out of the contract or transaction set forth in the complaint, or connected with the subject of the action; and (b) in an action on contract, any claim arising also on contract.

It is manifest that counterclaims authorized only by clause (b) are not compulsory; and if North Carolina has any compulsory counterclaims, they are to be found within class (a). The effect of our decisions is to make some class (a) claims compulsory, this result being reached by allowing plaintiff in the first suit, when made defendant in the second suit, to plead the prior action as a bar, if it has gone to judgment, or, if still pending, as valid ground for dismissal.

For example, when a surgeon has recovered from his patient for the reasonable value of his services, the recovery is a bar to a subsequent action by the patient for malpractice involving the same course of treat-

Ore. 1941): "Where the claims are against the same defendant, certainly, there can be no misjoinder of claims in a civil action."

Where division would not suffice because plaintiff has joined a defendant against whom he cannot proceed, that defendant will be dismissed, but not the entire action. Jennings v. Beach, cited *supra* note 24.

[36] For these changes see sections 4 and 5 of the proposed statute, *infra* note 107.

ment.[37] Similarly, when *A* sues *B* for breach of contract and, while that action is pending, *B* sues *A* for breach of the same contract, the latter action will usually be dismissed.[38] And where *A* sues *B* for damages arising from an automobile collision and, while that action is pending, *B* sues *A* for damages arising from the same collision, *B*'s suit will be dismissed.[39] In these cases the court believes that the two claims involve virtually identical questions.

In such cases it will work no change in the North Carolina law to adopt Federal Rule 13(a), classifying as compulsory a counterclaim which "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." However, the North Carolina court has placed considerable emphasis on the general permissive character of counterclaims, and adoption of this rule would result in shifting some cases from the permissive to the compulsory category.[40] But, since such cases will normally involve at least one common issue as between complaint and counterclaim, and that issue could not be reliti-

[37] Garrett v. Kendrick, 201 N. C. 388, 160 S. E. 349 (1931).

[38] J. A. Jones Construction Co. v. Hamlet Ice Co., 190 N. C. 580, 130 S. E. 165 (1925). See also Fletcher Lumber Co. v. Wilson, 222 N. C. 87, 21 S. E. (2d) 893 (1942); Savage v. McGlawhorn, 199 N. C. 427, 154 S. E. 673 (1930); Bell v. Mutual Machine Co., 150 N. C. 111, 63 S. E. 680 (1909).

[39] Johnson v. Smith, 215 N. C. 322, 1 S. E. (2d) 834 (1939) (potential counterclaim was for wrongful death); Morrison v. Lewis, 197 N. C. 79, 147 S. E. 729 (1929); Allen v. Salley, 179 N. C. 147, 101 S. E. 545 (1919).

[40] See, *e.g.*, Union Trust Co. v. McKinne, 179 N. C. 328, 102 S. E. 385 (1920). *A* owned notes on which *B* was surety. *A* sued the makers, omitting *B* from the suit at his request. In return, *B* gave a written guarantee that he would pay the notes if judgment against the makers remained unpaid for ten days. The judgment was not paid. Thereupon *B* sued *A* requesting discharge from liability on the notes, alleging payment and unwarranted extension of time. Thereafter *A* sued *B* on the written guarantee. Pendency of the prior action was pleaded, but the court held that use of the claim as a counterclaim was optional. It is difficult to see how a final decision could be reached in either of these actions without going over much of the ground involved in the other See Cohoon v. Cooper, 186 N. C. 26, 118 S. E. 834 (1923) for a flat statement that a transaction clause counterclaim is optional. And for other cases holding optional counterclaims which were closely related to the subject of plaintiff's action, see Taylor v. Schaub, 225 N. C. 134, 33 S. E. (2d) 658 (1945); Thompson v. Herring, 203 N. C. 112, 164 S. E. 619 (1932); Brown v. Polk, 201 N. C. 375, 160 S. E. 357 (1931); Mauney v. Hamilton, 132 N. C. 303, 43 S. E. 903 (1903). Compare: Wadford v. Davis, 192 N. C. 484, 135 S. E. 353 (1926); Emry v. Chappell, 148 N. C. 327, 62 S. E. 411 (1908); Alexander v. Norwood, 118 N. C. 381, 24 S. E. 119 (1896).

In *Woody v. Jordan*, 69 N. C. 189 (1873), the court held that a defendant in a replevin action did not have to counterclaim for wrongful taking of the property in that action, but could proceed by independent action. This result might be preserved, even under the Federal Rules, by holding that the claim for wrongful taking does not arise out of the original transaction which is the basis of the plaintiff's cause. See cases cited *infra* note 50. A defendant in claim and delivery is permitted to use such a claim as a counterclaim, without regard to its nonexistence at the commencement of plaintiff's action, by virtue of G. S. 1-230. In fact, he can probably recover his damages without formal counterclaim. Ludwick v. Penny, 158 N. C. 104, 73 S. E. 228 (1911). For defendant's rights in similar situations involved in attachment, injunction, and arrest and bail proceedings, see McIntosh, North Carolina Practice and Procedure in Civil Cases (1929) §467.

gated even if separate suits were allowed, it is better to settle the whole matter in one action.[41] Concededly, it may be difficult to determine in advance in all cases whether a counterclaim is a compulsory one. That, however, is equally true under the present law. Defense attorneys under either rule must resolve doubts in favor of pleading the counterclaim.[42]

In concluding the subject of compulsory counterclaims, two things should be noted: (1) Federal Rule 13(a) does not make a counterclaim compulsory if it requires for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. Cases involving application of this will be rare, and the result could easily be reached without the express provision, but its inclusion can do no harm. (2) For State purposes a further provision is needed to the effect that a counterclaim is not compulsory if the relief sought would not be within the jurisdistion of the court in which the action is pending. This would take care of the problem, already inherent in the present law, which arises from the limited jurisdiction of inferior courts, notably the courts of justices of the peace.[43]

As for permissive counterclaims, under the North Carolina law there can be no tort counterclaim to either a tort or contract action unless the transaction clause is satisfied. In view of the fact that even under the present version of G. S. 1-123 a plaintiff may join independent tort claims against a single defendant, it is obvious that trial convenience

[41] The suggested provision as to compulsory counterclaims is in section 7 (subsec. 1 of revised G. S. 1-137) of the proposed statute, *infra* note 107. The wording departs from that of the current version of Federal Rule 13(a) in dealing with the exception for claims which are already the subject of a pending action. The change is made, as a matter of clarification, in the Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States (U. S. Gov't. Printing Office, June, 1946), prepared by the Advisory Committee on Rules for Civil Procedure. The Report's Note to Rule 13 fully explains why the clarification is desirable. The changes recommended by the Report have not yet become operative, but are currently pending before Congress. See 6 F. R. D. 229 (1947).

[42] For federal cases dealing with compulsory counterclaims, see Moore v. New York Cotton Exchange, 270 U. S. 593 (1926); Hancock Oil Co. v. Universal Oil Products Co., 115 F. (2d) 45 (C. C. A. 9th, 1940); King v. Edward B. Marks Music Corp., 56 F. Supp. 446 (S. D. N. Y. 1944); Pennsylvania R. R. v. Musante-Phillips, Inc., 42 F. Supp. 340 (N. D. Calif. 1941).

[43] See McIntosh, *op. cit. supra* note 40, §469. See also Leonard v. Coble, 222 N. C. 552, 23 S. E. (2d) 841 (1943); Perry v. Pulley, 206 N. C. 701, 175 S. E. 89 (1934); Stacey Cheese Co. v. Pipkin, 155 N. C. 394, 71 S. E. 442 (1911); W. C. Heyser & Co. v. Gunter, 118 N. C. 964, 24 S. E. 712 (1896); Ijames v. McClamroch, 92 N. C. 362 (1885). The suggested provision is in section 7 (subsec. 1 of revised G. S. 1-137) of the proposed statute, *infra* note 107. A strong argument can be made that it does not go far enough and that, as applied to counterclaims in cases appealed to superior court for trial *de novo*, the doctrine of derivative jurisdiction should be scrapped and defendant allowed to plead any counterclaim he could have used had the action been commenced in superior court.

The converse of this situation is not troublesome, as a defendant in action brought in superior court may plead a counterclaim which, if made the subject of an independent action, would have to be brought in a justice of the peace court. Singer Sewing Machine Co. v. Burger, 181 N. C. 241, 107 S. E. 14 (1921).

does not require that the counterclaim privilege be so restricted. This discrimination against defendants would be even greater if the plaintiff's joinder privileges were enlarged without revision of the permissive counterclaim provisions.

The question of how much can conveniently be packaged in one suit will not be sensibly answered by making the answer turn on whether tort or contract theories are involved, especially since in some cases either could be used.[44] The practical answer is to follow Federal Rule 13(b), which permits a defendant to plead any claim he has against the plaintiff.[45] The provision allowing the court to order separate trials again furnishes such safeguard as is necessary.

One further problem in connection with counterclaims needs to be considered. At present, G. S. 1-137 requires, as to contract clause counterclaims, that they be in existence at the commencement of the action. In the case of *Smith v. French*,[46] the court, expressly departing from any contrary implication in prior cases, ruled that a transaction clause counterclaim does not have to be in existence at the commencement of plaintiff's action. Though at least one subsequent case states a flatly contradictory view,[47] and though one recent case expresses doubt about the rule,[48] the cases which clearly involve such counterclaims have followed *Smith v. French*.[49] The cases casting doubt on the rule are primarily those in which the counterclaim is grounded on something done *in the pending action,* and they have thus not been treated as true transaction clause counterclaims.[50] They are distinguishable and should

[44] It has been held that if the complaint is grounded on a tort theory a contract counterclaim not under the transaction clause cannot be pleaded, even though the facts alleged in the complaint would also justify use of a contract theory. Smith v. Young Bros., 109 N. C. 224, 13 S. E. 735 (1891). If, on the other hand, the complaint is in contract, a defendant having a counterclaim which could be grounded in tort may make it proper by waiving the tort and proceeding on a contract theory. Shell v. Aiken, 155 N. C. 212, 71 S. E. 230 (1911).

[45] See section 7 (subsec. 2 of revised G. S. 1-137) of the proposed statute, *infra* note 107. An action is not *res judicata* of a claim which could have been used as a permissive counterclaim therein, but was not. Mercoid Corp. v. Mid-Continent Investment Co., 320 U. S. 661 (1944), *rehearing den.*, 321 U. S. 802 (1944), *motion to clarify and correct the opinion and mandates den.*, 323 U. S. 672 (1944).

[46] 141 N. C. 1, 53 S. E. 435 (1906).

[47] Cohoon v. Cooper, cited *supra* note 40. The point was not actually involved in the case.

[48] Manufacturers and Jobbers Finance Corp. v. Lane, 221 N. C. 189, 19 S. E. (2d) 849 (1942).

[49] Johnson v. Smith, cited *supra* note 39 (where, in an accident case, *A* sued *B* and, while that action was pending, *B* died and his administratrix was substituted, action by administratrix against *A* for wrongful death was *required* to be by counterclaim); Gatewood v. Fry, 183 N. C. 415, 111 S. E. 712 (1922) (court said since counterclaim was under transaction clause, damages could be allowed to time of trial); Slaughter v. Standard Machine Co., 148 N. C. 471, 62 S. E. 599 (1908) (counterclaim not maturing until after action begun allowed). *Cf.* Nassaney v. Cutler, 224 N. C. 323, 30 S. E. (2d) 226 (1944), permitting plaintiff to introduce allegations concerning events related to original cause of action but occurring after action brought. See also N. C. GEN. STAT (1943) §1-167.

[50] See, *e.g.*, Manufacturers and Jobbers Finance Corp. v. Lane, cited *supra* note

not be allowed to break down the well-considered rule of *Smith v. French.*

The strongest reason advanced for the requirement that a counterclaim exist at the commencement of the action is that it is bad policy to permit a defendant to offset plaintiff's claim by purchasing claims after the action is brought.[51] This obviously has little, if any bearing on claims arising out of the transaction or occurrence set forth in the complaint. As to these, Federal Rule 13(a) seems clearly correct in treating those coming into existence at any time before the answer is filed[52] on the same basis as those existing at the commencement of the action. Further, there is no sound policy objection to allowing such a counterclaim to be interposed by supplemental pleading, with the permission of the court, though it arises after the answer is filed. This is the provision of Federal Rule 13(e) and it should be followed in the State practice, though occasions for its used as to this type of counterclaim will obviously be rare.[53]

Even as to counterclaims of the permissive type, it is rather questionable to require that they be in existence at the commencement of the action. If the provision operates to shut off claims, as on notes, which do not mature until after the commencement of the action,[54] even though acquired before that time, it obviously shuts off claims not within the supposed reason for the policy. Similarly if, after action commenced, plaintiff breaches a contract with defendant (not involved in the plaintiff's action but in existence at the commencement thereof), should defendant not be permitted to use it as a counterclaim?

Certainly the wisdom of the present policy is sufficiently open to question to indicate that it should not be retained at the expense of conformity with the Federal Rules. Accordingly, the federal provision, allowing use of claims acquired before answer filed, should be written

48 (counterclaim based on plaintiff's wrongful prosecution of the pending action—*i.e.*, either abuse of process or malicious prosecution, probably the latter); Godwin v. Kennedy, 196 N. C. 244, 145 S. E. 229 (1928) (counterclaim for assault and false arrest by officer who served claim and delivery papers in pending action). In *Smith v. French,* cited *supra* note 46, the counterclaim involved seizure of property in the pending action, but under the particular circumstances the court held it to be a transaction clause counterclaim. See also citations *supra* note 40, as to special situations involved in claim and delivery, attachment, injunction, and arrest and bail proceedings.

[51] Smith v. French, cited *supra* note 46.

[52] An amendment to this provision, proposed by the report cited *supra* note 41, would make the *serving* rather than the *filing* of the answer the determinative time. This is to harmonize the provision with the rest of the Rules. Since in State practice, under G. S. 1-240, failure to serve simply excuses plaintiff from replying, the time of filing is more appropriate.

[53] See section 7 (subsec. 1 of revised G. S. 1-137) of the proposed statute, *infra* note 107. *Smith v. French,* cited *supra* note 46, recognizes that a transaction clause counterclaim may be pleaded even though not coming into existence until after the original answer is filed.

[54] See McIntosh, *op. cit. supra* note 40, §467.

into the North Carolina law[55] as should the further provision of Rule 13(e) that "a claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading."[56] The effect is to treat compulsory and permissive counterclaims on the same basis for this purpose. It should be kept in mind that these changes are procedural and would not affect such matters of substantive law as the rules governing the right of set-off when one of the parties is insolvent.

Counterclaim in Reply

Federal Rules 13(a) and 13(b) are so drawn that they apparently apply the same rule to replies as to answers and Rule 18(a) refers to "a reply setting forth a counterclaim." Thus a reply to a counterclaim might itself contain either a compulsory or a permissive counterclaim.[57] By contrast, the State statutes do not expressly deal with the matter; and it has been held that there can be no counterclaim in a reply.[58] However, there may be more form than substance involved, as the court will

[55] The adoption of this rule would not open the way to pleading of a claim which could not arise until plaintiff's action has terminated—for example, a counterclaim for malicious prosecution of the pending action. See Manufacturers and Jobbers Finance Corp. v. Lane, cited *supra* note 48. And see, denying right to counterclaim in comparable situations under the Federal Rules, Park Bridge Corp. v. Elias, 3 F. R. D. 94 (S. D. N. Y. 1943) (malicious prosecution); Mennen Co. v. Krauss Co., 37 F. Supp. 161 (E. D. La. 1941), *rev. on other grounds*, 134 F. (2d) 348 (C. C. A. 5th, 1943) (libel in complaint); Goodyear Tire & Rubber Co. v. Marbo Corp., 32 F. Supp. 279 (D. Del. 1940) (damages from preliminary injunction still in force).

[56] This provision will be found in section 7 (subsec. 2 of revised G. S. 1-137) of the proposed statute, *infra* note 107, though filing has been substituted for serving for the reasons set forth in note 52. Omitted from the proposed statute are the provisions of Federal Rule 13(f) to the effect that the court may allow amendment to plead a counterclaim not originally pleaded through oversight, inadvertence, or excusable neglect, or when justice so requires. It is believed that the existing amendment power in North Carolina is adequate to permit this. See N. C. Gen. Stat. (1943) §§1-161, 1-163. The court has construed the amendment power very broadly.

[57] Moore's Federal Practice (1938) §13.01, expresses a belief that plaintiff has no right to plead, in his reply, a counterclaim unrelated to the claims already in the case. However, the language of the rules is certainly broad enough to permit it, and several cases seem to have recognized the right. Bethlehem Fabricators, Inc. v. John Bown Co., 1 F. R. D. 274 (D. Mass. 1940); Warren v. Indian Refining Co., 30 F. Supp. 281 (N. D. Ind. 1939). *Contra:* Cornell v. Chase Brass & Copper Co., 48 F. Supp. 979 (S. D. N. Y. 1943), *aff'd. without reference to this point*, 142 F. (2d) 157 (C. C. A. 2d, 1944) (though, under circumstances, counterclaim in reply was treated as amendment to complaint).

[58] Boyett v. Vaughan, 85 N. C. 363 (1881). This decision, by a unanimous court, came on rehearing after the court, in a three to two decision, had held to the contrary. It is cited with approval in the concurring opinion of two justices, who apparently believed the other justices were not following it, in *W. C. Heyser & Co. v. Gunter*, cited *supra* note 43. In *Scott v. Bryan*, 96 N. C. 289, 3 S. E. 235 (1887), the court recognized the rule but refused to apply it because the reply had been pending a long time before the objection was made. On the general topic of counterclaims in replies, see Note (1926) 42 A. L. R. 564.

apparently allow the same result to be reached by amendment to the complaint.[59]

The main reason given for denying the right to counterclaim to a counterclaim is that the process might go on forever.[60] Presumably, if the matter is handled by amendment, this unhappy result can be avoided because the court can deny permission to amend. However, compulsory counterclaims should be included in replies without the necessity of asking permission to amend. They could not bring on interminable pleadings. Suppose, as is possible under the present law, *A* sues *B* on a note and *B* counterclaims for breach by *A* of an independent contract. If *B* had sued separately on the contract and *A* wished to assert a claim for breach of the same contract by *B*, he would have to do so by counterclaim.[61] Presumably the same doctrine applies when *B* elects to proceed by counterclaim. In such a case it is hardly feasible to apply the usual rule that amendments to the complaint after answer filed are discretionary with the court,[62] and if discretion is not to be exercised the application for leave to amend is a useless formality. Accordingly, it seems advisable to follow the Federal Rules in so far as compulsory counterclaims in replies are concerned.[63] A responsive pleading to such a counterclaim in a reply need be required only if ordered by the court,[64] as responsive pleadings to this type of counterclaim often do little to sharpen the issues, being composed primarily of denials and repetitions of allegations contained in former pleadings.

On the other hand, if plaintiff wishes to introduce a permissive counterclaim, since he voluntarily passed up an opportunity to include it in his original complaint, and since the pending action cannot prejudice his right to proceed on it independently, there is no injustice in requiring him to secure the court's permission to plead it by amendment, as distinguished from introducing it in his reply as a matter of right. The revised North Carolina rules would, therefore, at most differ from the Federal Rules in requiring court approval before plaintiff could introduce a new claim after answer has been filed.[65] As between a rule of right and a rule of discretion the latter seems definitely preferable.

[59] Bundy v. Commercial Credit Co., 198 N. C. 339, 151 S. E. 626 (1930); W. C. Heyser & Co., cited *supra* notes 43 and 58 (concurring opinion); Scott v. Bryan, cited *supra* note 58.

[60] Boyett v. Vaughan, cited *supra* note 58.

[61] J. A. Jones Construction Co. v. Hamlet Ice Co., cited *supra* note 38.

[62] N. C. GEN. STAT. (1943) §§1-161, 1-163; MCINTOSH, *op. cit. supra* note 40, §§484, 485.

[63] See section 9 of the proposed statute, *infra* note 107.

[64] See section 10 of the proposed statute, *infra* note 107. The Federal Rules contain no express provision authorizing such a pleading to be ordered, but it seems desirable to give the court this discretion, as it may be useful in unusual cases.

[65] This proposed State rule would conform to the belief expressed in MOORE'S FEDERAL PRACTICE (1938) §13.01, as to what federal practice ought to be. *Accord:*

CROSS-CLAIMS

While the North Carolina Supreme Court has long recognized the right to cross-claim against a co-party, under proper circumstances, the pleading aspects of the matter are nowhere spelled out in the statute. The only general provision is found in G. S. 1-222, to the effect that a "judgment . . . may determine the ultimate rights of the parties on each side, as between themselves."

Under this and the cases it is reasonably clear that if *A* sues *B* and *C*, alleging that both are liable to him, and, under the substantive law, *B* would have a claim against *C* for all or part of any amount he is compelled to pay *A*, he may cross-claim against *C* for such amount (on a contingent basis if he so desires) and have the whole matter settled in one action. Thus, where *A* sues *B* and *C*, tort-feasors, and both might be liable to *A*, but as between themselves their liability is primary *(C)* and secondary *(B)*, *B* may cross-claim for the full amount which *A* may recover against him.[66] Presumably the same rule would apply to permit a surety to cross-claim against a co-defendant principal;[67] and possibly to allow the maker of a note, sued jointly with the endorser, to cross-claim on allegations that he made a payment to the endorser, while the latter held the note, which was not credited by the endorser prior to his negotiation of the note to the plaintiff.[68]

Cornell v. Chase Brass & Copper Co., cited *supra* note 57. Bethlehem Fabricators, Inc. v. John Bowen Co., cited *supra* note 57, expresses a preference for this procedure.

[66] Williams v. Charles Stores Co., Inc., 209 N. C. 591, 184 S. E. 496 (1936); Johnson v. City of Asheville, 196 N. C. 550, 146 S. E. 229 (1929); Bowman v. City of Greensboro, 190 N. C. 611, 130 S. E. 502 (1925); Guthrie v. City of Durham, 168 N. C. 573, 84 S. E. 859 (1915); Gregg v. City of Wilmington, 155 N. C. 18, 70 S. E. 1070 (1911). The opinion in the *Gregg* case indicates that the rule would extend to master-servant cases.

[67] Saieed v. Abeyounis, 217 N. C. 644, 9 S. E. (2d) 399 (1940), indicates that a surety paying a judgment against him and his principal is entitled to have the judgment assigned to a trustee under G. S. 1-240 and proceed on it against the principal; though if he allows the judgment to be satisfied he becomes a simple contract creditor of the principal. *Cf.* G. S. 26-11, providing that a surety may have a judgment cancelled as to him without it operating as cancellation against a co-defendant principal or surety. Strict adherence to the G. S. 1-240 procedure would seem to give the surety adequate protection, without a cross-claim, except: (1) under *Smith v. Kappas*, cited *infra* note 69, it will not prevent plaintiff from taking a voluntary nonsuit against the principal prior to verdict; and (2) it will not settle an existing dispute between defendants as to whether either of them is a surety instead of a principal. Under G. S. 26-1 and 26-2 an issue can be submitted to determine which defendants are principals and which sureties, but this is simply a basis for requiring that execution first issue against the principals. See also G. S. 26-3 (summary proceeding by surety against principal) and 26-5 (actions for contribution among sureties). Wherever there is an argument over the status of a defendant as principal or surety, a formal cross-claim by the self-styled surety is the best way to dispose of all phases of the case at one trial. This would seem to be permitted by *Parrish v. Graham*, 129 N. C. 230, 39 S. E. 825 (1901), where the court reversed the trial judge for refusing to submit an issue as to whether one defendant was a supplemental surety to another defendant. The ruling was justified by general equity powers and what is now G. S. 1-222.

[68] Hulbert v. Douglas, 94 N. C. 128 (1886), involved these facts, but, as the

Where two defendants originally joined as such by plaintiff, are true joint tort-feasors, entitled to contribution as between themselves, either may cross-claim for contribution under G. S. 1-240, though the cross-claim is ordinarily unnecessary because the section provides a procedure by which one paying a disproportionate share of the judgment may have it assigned to a trustee and enforce contribution without having made a formal cross-claim. (A formal cross-claim in such a case will, however, prevent the plaintiff from letting the co-defendant out of the case by taking a voluntary nonsuit against him.)[69] This assignment procedure of G. S. 1-240 also applies to joint obligors.[70]

In the case of joint tort-feasors, joint obligors, or defendants who as between themselves are primarily and secondarily liable to plaintiff, a cross-claim seeking to adjust the rights of the defendants is clearly "germane" to plaintiff's cause of action—*i.e.*, the cross-claim is in reference to the claim made by plaintiff and based upon an adjustment of that claim. Any other cross-claim, to be allowable, must also satisfy that requirement, as it is a general one enforced by our court.[71]

Some of the cases have not enforced the rule literally. Thus, where the surety of an administrator, who had been compelled to pay part of a judgment against the administrator, was suing distributees to recover his payment, and it appeared that one of the defendants was also a surety who had paid part of the judgment, the court gave the latter a judgment against his co-defendants.[72] And where a junior mortgagee had foreclosed and applied the excess sale price to the senior mortgage,

propriety of the cross-claim did not have to be passed upon, the opinion is inconclusive.

[69] Smith v. Kappas, 218 N. C. 758, 12 S. E. (2d) 693 (1941), *same case on rehearing*, 219 N. C. 850, 15 S. E. (2d) 375 (1941). See also Perry v. Sikes, 215 N. C. 39, 200 S. E. 923 (1939).

[70] See Fowle v. McLean, 168 N. C. 537, 84 S. E. 852 (1915). *Cf.* Hughes v. Boone, 81 N. C. 204 (1879). See also N. C. GEN. STAT. (1943) §26-5.

[71] Schnepp v. Richardson, 222 N. C. 228, 22 S. E. (2d) 555 (1942); Bost v. Metcalfe, 219 N. C. 607, 14 S. E. (2d) 548 (1941); Montgomery v. Blades, 217 N. C. 654, 9 S. E. (2d) 397 (1940); Coulter v. Wilson, 171 N. C. 537, 88 S. E. 857 (1916); Gibson v. Barbour, 100 N. C. 192, 6 S. E. 766 (1888); Hulbert v. Douglas, cited *supra* note 68. The *Schnepp* and *Bost* cases also stand for the proposition that cross-claims, or cross-claims combined with counterclaims, must satisfy the requirement of G. S. 1-123 that all causes affect all parties. To the same effect are Beam v. Wright, 222 N. C. 174, 22 S. E. (2d) 270 (1942); Wingler v. Miller, cited *supra* note 34; Shemwell v. Lethco, 198 N. C. 346, 151 S. E. 729 (1930); Citizens National Bank v. Angelo Brothers, 193 N. C. 576, 137 S. E. 705 (1927); Rose v. Fremont Warehouse and Improvement Co., 182 N. C. 107, 108 S. E. 389 (1921). *Cf.*, holding the requirement satisfied, Taylor v. Postal Life Ins. Co., 182 N. C. 120, 108 S. E. 502 (1921). This latter rule would become obsolete if the changes already suggested in this article are adopted, as the controlling provision of G. S. 1-123 would be eliminated. However, that, standing alone, probably would not change the "germane" rule, because, while the court has sometimes dealt with the two rules as if they amounted to the same thing, some of the cases enforce the "germane" rule without reference to G. S. 1-123.

[72] Clark v. Williams, 70 N. C. 679 (1874). *Cf.* Davis v. Industrial Manufacturing Co., 114 N. C. 321, 19 S. E. 371 (1894).

when the purchaser sued for possession, and the mortgagor had the junior mortgagee joined as a defendant, the court in giving judgment for plaintiff, also gave the mortgagor a judgment against the junior mortgagee for the excess of the sale price over the amount of the junior mortgage.[73] The first of these cases hardly satisfies the requirement stressed in later cases that the cross-claim be an adjustment of liabilities stemming from plaintiff's claim. The second, from the practical if not from the technical standpoint, possibly does satisfy it.[74]

On the other hand, when *A* sues *B* and *C* for negligent injury in an automobile accident, our court, when *B* objected, has denied *C* the right to cross-claim against *B* for *C*'s personal injuries suffered in the same accident.[75] In a prior case, when *A* sued *B* alone, and *B* had *C* brought in as a potential joint tort-feasor, *C* was allowed, over *B*'s protest, to make such a cross-claim.[76] The later case distinguished this solely on the basis that *B*, having brought *C* in, was responsible for his predicament and could not object. It is obvious that there is no difference between the two cases with respect either to trial convenience or to whether *C*'s claim is germane to plaintiff's cause of action. It is problematical, therefore, whether both results will continue to be accepted, even in the absence of statutory change. It seems particularly likely that the court might reject the cross-claim, even when the cross-claimant is brought in by the original defendant, if the objection comes from the plaintiff.

By comparison, Federal Rule 13(g) provides: "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."[77]

[73] Bobbitt v. Stanton, 120 N. C. 253, 26 S. E. 817 (1897). *Cf.* Gurganus v. McLawhorn, 212 N. C. 397, 193 S. E. 844 (1937) (in proceeding by creditors to compel executor to sell land, widow and devisees cross-claim against executor, alleging personalty sufficient if properly administered).

[74] Another case satisfying it is *Williams v. Dixie Chevrolet Co.*, 209 N. C. 29, 182 S. E. 719 (1935). When the purchaser of an automobile sued his vendor, the vendor's dealer, and the manufacturer, the court held that, if the car was unfit for the purpose for which intended, the purchaser could recover from the vendor, and the latter could recover over against the dealer "or" manufacturer, without reference to the breach of warranty theory on which the vendor had been given judgment on his cross-claim below. *Cf.* Aldridge Motors, Inc. v. Alexander, 217 N. C. 750, 9 S. E. (2d) 469 (1940). In any case in which, under the principle of *Winders v. Southerland*, 174 N. C. 235, 93 S. E. 726 (1917), plaintiff could join as defendants successive warrantors in a chain of title, it would seem appropriate to allow a defendant to cross-claim against co-defendants whose warranties antedate his for any substantive rights he may have against them by virtue of plaintiff's action.

[75] Montgomery v. Blades, cited *supra* note 71.

[76] Powell v. Smith, 216 N. C. 242, 4 S. E. (2d) 524 (1939).

[77] See John R. Alley & Co., Inc. v. Federal National Bank, 124 F. (2d) 995 (C. C. A. 10th, 1942).

The pending amendments to the Federal Rules will expand this to permit a cross-claim "relating to any property that is the subject matter of the original action." This is "to care for a situation such as where a second mortgagee is made defendant in a foreclosure proceeding and wishes to file a cross-complaint against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien. A claim of this sort by the second mortgagee may not necessarily arise out of the transaction or occurrence that is the subject matter of the original action under the terms of Rule 13(g)."[78] The desirability of permitting this type of cross-claim is obvious.[79] The substance of the Federal Rule, including the pending amendment, should be adopted in North Carolina.[80]

THIRD-PARTY PRACTICE

Of course, North Carolina permits new parties to be brought into a case, and in some respects its practice is very liberal.[81] Under the express provisions of G. S. 1-240 a defendant may bring in one he alleges is a joint tort-feasor with him and liable to him for contribution.[82] But even before enactment of that provision (prior to which

[78] Report, cited *supra* note 41, Rule 13(g) and note thereto.

[79] It is probable that North Carolina would now permit the cross-claim by the second mortgagee in the example given in the quotation. Mortgage foreclosure actions are expressly excepted from the requirement of G. S. 1-123 that all causes must affect all parties, and several mortgagees may join as plaintiffs to foreclose. MCINTOSH, *op. cit. supra* note 40, §233. *Cf.* Bobbitt v. Stanton, cited *supra* note 73, where the cross-claim allowed would fit the language of the revised Rule, though it was not for foreclosure. In Johnston County v. Ellis, 226 N. C. 268, 38 S. E. (2d) 31 (1946), the court held void a judgment foreclosing a mortgage in favor of a defendant who had intervened in a tax foreclosure action. However, in addition to being a tax case, the case contained numerous other complications. *Cf.* Holt v. Lynch, 201 N. C. 404, 160 S. E. 469 (1931).

[80] See section 7 (subsec. 3 of revised G. S. 1-137) of the proposed statute, *infra* note 107. In the interest of standardization of terminology, this provision, like the discussion in this article, uses the term "cross-claim" as used in the Federal Rules, though "cross-action" and "cross-complaint" have been more frequently used in the North Carolina cases (where they are also applied, at times, to counterclaims).

[81] See N. C. GEN. STAT. (1943) §§1-73, 1-163; MCINTOSH, *op. cit. supra* note 40, §259.

[82] Statutory procedure followed in: Godfrey v. Tidewater Power Co., 223 N. C. 647, 27 S. E. (2d) 736, 149 A. L. R. 1183 (1943) (also holding that the new defendant can be brought in by the original defendant in a wrongful death action, even though more than a year had elapsed from date of death and any action plaintiff might have maintained against the new defendant had lapsed); Lackey v. Southern Ry., 219 N. C. 195, 13 S. E. (2d) 234 (1941); Freeman v. Thompson, 216 N. C. 484, 5 S. E. (2d) 434 (1939); Mangum v. Southern Ry., 210 N. C. 134, 185 S. E. 644 (1936). These cases show it customary to make the claim on a contingent basis—*i.e.*, the original defendant: (1) denies his negligence; (2) alleges plaintiff's injury was caused solely by the negligence of *X;* (3) alleges that, if defendant is found liable to plaintiff, *X*'s negligence concurred with his in producing plaintiff's injury and he is entitled to judgment against *X* for contribution.

If the allegation fails to show that original and prospective defendants could be joint tort-feasors, the latter cannot be brought in by the former. Bost v. Metcalfe, cited *supra* note 71. Nor can he be brought in when the prospective defendant's negligence would be attributable to plaintiff and bar plaintiff's action, Evans v. Johnson, 225 N. C. 238, 34 S. E. (2d) 73 (1945); or when there is no

there was no contribution between joint tort-feasors), the court had permitted a defendant tort-feasor to bring in another tort-feasor alleged to be primarily liable and demand judgment over against him for the full amount recovered by plaintiff against the original defendant.[83] The same principle should authorize a defendant in a contract suit, believing himself to be only secondarily liable, to bring in one he alleges is primarily liable.[84] And, while G. S. 1-240 does not expressly authorize a defendant obligor to bring in his joint obligor, there would seem to be no valid objection to allowing a principal debtor to bring in his co-principal or a surety his co-surety, as a basis for a demand for contribution.[85]

In all these situations the third-party defendant is one who could be liable to plaintiff if plaintiff chose to make a timely assertion of rights against him, and plaintiff could have joined him as an original defendant. There is thus no question but that the cross-claim is "germane" to plaintiff's cause.[86]

right of contribution because: original defendant's liability arises under the State wrongful death statute and that of the prospective defendant under the Federal Employers' Liability Act, Wilson v. Massagee, cited *supra* note 25; or the Workmens' Compensation remedy against the prospective defendant is exclusive, Brown v. Southern Ry., 202 N. C. 256, 162 S. E. 613 (1932); or the law of the state where the accident occurred gives no right of contribution, Charnock v. Taylor, 223 N. C. 360, 26 S. E. (2d) 911, 148 A. L. R. 1126 (1943).

[83] Bowman v. City of Greensboro and Guthrie v. City of Durham, both cited *supra* note 66. The risk involved in waiting to proceed by independent action is illustrated by City of Charlotte v. Cole, 223 N. C. 106, 25 S. E. (2d) 407 (1943), commented on in (1944) 22 N. C. L. REV. 167. In both primary-secondary liability and contribution cases the court has treated the bringing in of the new party as a matter of right. Bowman v. City of Greensboro, *supra;* Freeman v. Thompson, cited *supra* note 82. The usual North Carolina rule is that bringing in of a proper, as distinguished from a necessary party, is within the court's discretion. McINTOSH, *op. cit. supra* note 40, §259. This rule of discretion is also the federal rule as to third-party defendants. MOORE'S FEDERAL PRACTICE (1938) §14.02. Further, a refusal to join a third-party defendant is not a final judgment and hence is not subject to immediate appeal in federal court. B. & O. R. R. v. United Fuel Gas Co., 154 F. (2d) 545 (C. C. A. 4th, 1946).

[84] See, however, National Bank of Virginia v. Carr, 121 N. C. 113, 28 S. E. 186 (1897), where the court, in a suit on a note, refused to bring in the maker and co-endorser at the request of defendant endorser. However, it does not appear that moving defendant demanded any relief against them, the motion apparently having been grounded on the argument that they were necessary parties. Under G. S. 1-71 and 1-72, it is plain that ordinarily they are not. *Cf.* Castelberry v. Sasser, 210 N. C. 576, 187 S. E. 761 (1936).

[85] See Gill v. Young, 82 N. C. 273 (1880), holding, under the particular circumstances, that in an action by creditors against principal and surety, the administrator of deceased co-surety was a necessary party. *Cf.* cases cited *supra* note 84.

[86] Compare Sutton v. Franklin Fire Ins. Co., 209 N. C. 826, 184 S. E. 821 (1936). Plaintiff, having two fire policies issued by different companies on the same property, sued on one and recovered. After judgment, defendant had the other company brought in, asking for recovery of one-half the judgment. The third-party defendant demurred to the merits and thus waived objection to the procedure followed. See also Joyner v. Champion Fibre Co., 178 N. C. 634, 101 S. E. 373 (1919). In this type of case, from the standpoint of trial convenience, there is usually little to be gained by bringing in the third party after judgment, as he is not bound by the judgment and any new trial required will differ little from one in an independent action. Had the second company been brought in before judgment, it probably would have been proper procedure. See Pretzfelder v. Merchants Ins. Co., cited *supra* note 22.

On the other hand, when plaintiff property owner sued defendant building contractor, alleging that defendant used defective lumber and fraudently concealed such use, the court denied the defendant the right to bring in his vendor on allegations that, if the lumber was defective, the vendor fraudulently concealed it from defendant.[87] The result of this case is probably correct if it be assumed that plaintiff (who had probably accepted the building after inspection) could recover from the contractor only by proving fraudulent concealment. In that event, the only theory on which the contractor could lose would be one which would preclude his recovery on the cross-claim, at least on the theory alleged therein, because it would show such knowledge on his part as to indicate there was no concealment from him. However, the decision was not rested on that ground, but on lack of privity between plaintiff and vendor,[88] and on the fact that contractor and vendor could not be joint tort-feasors.

In another case plaintiff was suing a bank to recover money paid by the bank on plaintiff's check after notice to stop payment. The bank had the payee made a party, but plaintiff refused to make a claim against him and he was dismissed. The appeal from this ruling was also dismissed, the opinion rather indicating that it would never be proper to make a third-party claim in this situation.[89] If it does mean this it seems to take a more narrow viewpoint than some of the other cases, at least if it be assumed that plaintiff may have had rights against the third-party defendant had he chosen to assert them.

In general the North Carolina cases make it very doubtful that a third-party defendant can be brought in, over proper objection, on a

[87] Board of Education v. Deitrick, 221 N. C. 38, 18 S. E. (2d) 704 (1942). *Cf.* Beam v. Wright and Citizens National Bank v. Angelo Brothers, both cited *supra* note 71.

[88] See also Rose v. Fremont Warehouse and Improvement Co., cited *supra* note 71; Lamson Co., Inc. v. Morehead, 199 N. C. 164, 154 S. E. 50 (1930). In the *Rose* case a contractor sued the owner for the balance of the contract price of a building. The owner brought in the architect and counterclaimed and cross-claimed, alleging that the contractor's construction was defective or the architect's plans were defective, or both. This was held to be a misjoinder of causes and parties, involving separate claims on separate contracts, there being no privity or community of interest between contractor and architect. If the changes proposed in this article are adopted, the result of this case would probably be changed.

[89] Spruill v. Bank of Plymouth, 163 N. C. 43, 79 S. E. 262 (1913). It is not stated that a formal cross-claim was made, though probably there was; and the bank's theory was pretty clearly one of recovery over in case of loss to plaintiff. If there was no demand for relief, the third-party defendant could not be held in the case, under the rule of the cases cited *infra* note 99. However, the decision was not rested on this, but on the fact that he was, at most, a proper party and hence the ruling below was discretionary and not reviewable; and, besides, the appeal was premature. *Cf.* the cases cited *supra* note 83. The court said also that it was doubtful if he was a proper party, because the bank could recover from him only if it had paid the check wrongfully, which it denied in its answer. As to this, there is no more reason here for denying the right to cross-claim on a contingent basis than there is in the tort-feasor cases, in which it is clearly allowed. See note 82 *supra*.

claim of liability to the third-party plaintiff, unless the plaintiff could, by timely action, have asserted rights against him. Possibly, though that factor is lacking, he may be brought in if he is directly connected with the transaction on which plaintiff's cause is grounded.[90]

Against this background, the Federal Rules can be examined. Rule 14(a) provides that a defendant may move for leave, as a third-party plaintiff, to bring in a person "who is or may be liable to him . . . for all or part of the plaintiff's claim against him. . . ."[91] The Rule does not repeat the provision of Rule 13(g), dealing with cross-claims between original defendants, that any claim is proper if it arises out of the transaction or occurrence that is the subject matter of the complaint. A distinction is thus drawn between the two situations. For example, when *A* sues *B* and *C* for negligent injury, *B* may cross-claim against *C* for *B*'s injuries sustained in the same accident; but if *A* sues *B* alone, *B* may not have *C* brought in for the sole purpose of asserting *B*'s personal injury claim against him.[92]

Thus, the third-party practice is deliberately more limited in scope. It is not required, however, that the third-party defendant's liability to the third-party plaintiff be grounded upon the same theory as the latter's liability to the plaintiff.[93]

The basic provisions of Federal Rule 14 should be adopted in North Carolina, including the provision of Rule 14(b) that a plaintiff against whom a counterclaim is asserted can bring in a new party under circumstances which would entitle a defendant to do so.[94]

[90] See Smith v. Johnson, 209 N. C. 729, 184 S. E. 486 (1946). In an action to establish a disputed boundary, defendant alleged that if the boundary was as plaintiff contended, there had been a mutual mistake by defendant, plaintiff, and their common grantor, who had given their deeds simultaneously after making representations to both. Defendant had the common grantor brought in and asked that the mistake be corrected and that, if plaintiff was successful, defendant recover damages from the grantor for false representations. The court held that the common grantor should be brought in for determination of the mistake issue, but the opinion is silent as to the propriety of the damage claim.

[91] As to third-party practice generally under the rule, see Note (1944) 148 A. L. R. 1182.

[92] However, it seems possible that if *B* brings in *C* on contingent allegations that *C* is a joint tort-feasor liable for contribution to *B*, he might then add a claim for his own injuries. The third-party defendant, under the terms of Rule 14(a), may assert such a claim against a third-party plaintiff.

[93] O'Neill v. American Export Lines, Inc., 5 F. R. D. 182 (S. D. N. Y. 1946) (in suit for personal injuries caused by defective ladder, defendant brings in *X* for breach of contract in furnishing defective ladder, and *X*, in turn, brings in *Y* for breach of contract in furnishing defective chain for ladder); Jeub v. B/G Foods, Inc., 2 F. R. D. 238 (D. Minn. 1942) (restaurant owner, sued for damages for selling contaminated food, brings in his vendor); Saunders v. Southern Dairies, Inc., 30 F. Supp. 150 (D. D. C. 1939) (candy manufacturer, sued for negligence, brings in vendor who sold him the nuts containing the stone which caused the injury). In some cases in which third-party defendants are impleaded as indemnitors, the court will stay execution on the judgment against third-party defendant until third-party plaintiff has paid the judgment of plaintiff against him. Burris v. American Chicle Co., 120 F. (2d) 218 (C. C. A. 2d, 1941); Jeub v. B/G Foods, Inc., *supra*.

[94] See section 7 (subsec. 5 of revised G. S. 1-137) of the proposed statute, *infra*

The substance of Rule 14's provisions governing the pleading rights of the third-party defendant once brought in, should likewise be adopted.[95] However, several changes from the present version of the Rule should be made.

(1) In deference to long-established North Carolina practice in accident cases, a proviso should be added to the effect that the new provisions do not enlarge the right of an insured to make his insurer a third-party defendant.[96]

(2) In drafting the proposed statute, the model has been Rule 14(a) as it will appear if the amendments now pending become operative, rather than the rule as it currently appears. The changes are primarily clarifications, rather than changes of fundamental character,[97] and in only one respect is discussion called for here. The present rule purports to authorize an original defendant to bring in a third-party defendant on allegations that the latter is or may be liable to *plaintiff*. Thus it ostensibly authorizes joinder of a party against whom neither plaintiff nor defendant is demanding relief. The federal courts have not been inclined to hold the third-party defendant in the case under such circumstances,[98] and the amendments would eliminate the provision. A similar result has been reached in the tort-feasor cases in North Carolina. Our court has held that to hold the third-party defendant in the case the third-party plaintiff must ask for judgment against him; it is insufficient to allege simply that he is liable to the plaintiff.[99]

---

note 107. Under present North Carolina practice the rights of a plaintiff are probably co-extensive with those of a defendant in this respect. See, for instance, Bost v. Metcalfe, cited *supra* note 71, where third-party defendant was brought in by plaintiff in connection with the latter's answer to a counterclaim. He was dismissed, but only because he and plaintiff could not be joint tort-feasors; and the court did not suggest there was any impropriety in the procedure followed.

[95] See sections 7 (subsec. 5 of revised G. S. 1-137) and 9 of the proposed statute, *infra* note 107. One feature is that a third-party defendant can become a third-party plaintiff and bring in a second third-party defendant. Followed in O'Neill v. American Export Lines, Inc., cited *supra* note 93.

[96] See section 7 (subsec. 6 of revised G. S. 1-137) of the proposed statute, *infra* note 107. While the matter may be subject to some uncertainty, the language of Rule 14(a), permitting joinder of a third-party defendant who "may be" liable to third-party plaintiff, seems broad enough to authorize an insured to bring in his insurer, at least unless the federal court feels obligated to follow contrary state policy. See Jordan v. Stephens, 9 Fed. Rules Serv. 14a.221, Case No. 1 (D. C. Mo., 1945); Tullgren v. Jasper, 27 F. Supp. 413 (D. Md., 1939). *Cf.* Pitcairn v. Rumsey and Jennings v. Beach, both cited *supra* note 24. The power to bring in an indemnitor has been recognized. Burris v. American Chicle Co., cited *supra* note 93. *Cf.* Lackey v. Southern Ry., cited *supra* note 82, indicating that the North Carolina rule is to the contrary as to contracts of strict indemnity, as there is no breach of the contract prior to recovery against the indemnitee.

[97] They are explained in the report cited *supra* note 41, note to Rule 14.

[98] Report cited *supra* note 41, cases cited in note to Rule 14. "The committee's reasoning and understanding of the weight of authority upon the present rule appear to this court to be unassailable." Bull v. Santa Fe Trail Transp. Co., 6 F. R. D. 7, 10 (D. Neb., 1946).

[99] Walker v. Loyall, 210 N. C. 466, 187 S. E. 565 (1936); Bargeon v. Seashore Transportation Co., 196 N. C. 776, 147 S. E. 299 (1929). See also Perry v. Sikes,

Finally, with reference to cross-claims and third-party claims, if attempting to settle them at the same time as plaintiff's claim is settled would actually prejudice the plaintiff, the court will have ample power to order separate trials.[100]

OTHER NEW PARTIES TO COUNTERCLAIMS OR CROSS-CLAIMS

Federal Rule 13(h) provides: "When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants . . . if jurisdiction of them can be obtained. . . ."[101] Very possibly the object of this rule could be accomplished without any change in the North Carolina statutes, as G. S. 1-73 provides: "when a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in." The use of "controversy," instead of "plaintiff's cause of action," is broad enough to include claims made by a defendant; and a defendant has been allowed to bring in a new party on a counterclaim.[102] However, since the proposed changes would broaden the defendant's counterclaim and cross-claim priviliges, it can do no harm to include the substance of Rule 13(h) in our statute, so that the legislative purpose in this respect will be clear.[103]

MISCELLANEOUS

In effecting the changes already proposed a few implementing changes are necessary. These have to do with the filing of replies and

cited *supra* note 69; Coulter v. Wilson, cited *supra* note 71; Lamson Co., Inc. v. Morehead, cited *supra* note 88. Presumably, if the third-party defendant is actually brought in and the plaintiff amends to state a cause of action against him, he will be retained, though no claim for relief is made by the third-party plaintiff. Allowance of such an amendment would probably be discretionary. See Speas v. City of Greensboro, 204 N. C. 239, 167 S. E. 807 (1933).

[100] See section 12 of the proposed statute, *infra* note 107.

[101] Followed in: Lesnik v. Public Industrials Corp., 144 F. (2d) 968 (C. C. A. 2d, 1944) ("co-conspirators" of plaintiff brought in); U. S. v. Skilken, 53 F. Supp. 14 (N. D. Ohio 1943) (plaintiff's bondsman). A subsequent appeal in the *Lesnik* case, 153 F. (2d) 783 (1946), indicates that it is sufficient if the new parties are joint tort-feasors with plaintiff, actual conspiracy being unnecessary. See also MOORE'S FEDERAL PRACTICE (1938) §13.09.

[102] Owen v. Salvation Army, Inc., 198 N. C. 610, 152 S. E. 800 (1930). Plaintiff's surety was brought in on a counterclaim. Decision dealt with whether counterclaim stated cause of action, rather than propriety of the procedure, which was apparently assumed. *Cf.* Griffin & Vose, Inc. v. Non-Metallic Minerals Corp., 225 N. C. 434, 35 S. E. (2d) 247 (1945); State *ex rel.* Jones v. Griggs, 219 N. C. 700, 14 S. E. (2d) 836 (1941); Hood v. Burrus, 207 N. C. 560, 178 S. E. 362 (1935); Rose v. Fremont Warehouse and Improvement Co., cited *supra* notes 71 and 88; Maxwell v. Barringer, 110 N. C. 76, 14 S. E. 516 (1892); State *ex rel.* Carr v. Askew, 94 N. C. 194 (1886) (where what the court did was tantamount to making plaintiff administratrix a party in her individual capacity for determination of a "retainer in the nature of set-off" pleaded by defendant); McKesson v. Mendenhall, 64 N. C. 286 (1870).

[103] See section 7 (subsec. 4 of revised G. S. 1-137) of the proposed statute, *infra* note 107.

of answers to cross-claims,[104] with demurrers to various pleadings,[105] and with clarification, in the light of the pleadings which will be permissible, of the rules as to when responsive pleadings are required and when allegations not denied are deemed admitted.[106] Detailed discussion of these changes is unnecessary.

CONCLUSION

Adoption of these changes, which are incorporated in the amending statute herewith submitted, would ground North Carolina's joinder provisions on the realistic basis of trial convenience, and, in this respect, would place the State in line with the modern trend of procedural reform. Obviously, cases dealing with joinder would not be eliminated, as questions of interpretation lurk in every statute. But it is reasonable to suppose that, after an initial burst of cases designed to ascertain the court's attitude toward the new provisions, the number of joinder cases reaching the Supreme Court would decline. This would be true because the new provisions would eliminate current restrictions which are illogical and arbitrary. Thus, by comparison to the present law, they would clearly permit joinder in a much higher percentage of the cases where common sense renders it desirable and attorneys, therefore, seek to secure it. At the same time, the power to order separate trials would stand as a continuing safeguard against real prejudice, against unwarranted confusion, and against unreasonable delay of decision as to any phase of a case warranting preference as to time of trial.

Further, the new provisions, and particularly the modification of the rule requiring dismissal for misjoinder of causes and parties would tend to eliminate some of the present delays. Attorneys would be more likely to confine attacks on joinder to cases in which real prejudice is feared, since the prize of dismissal ceases to be an automatic reward. Thus another step would be taken toward elimination of those unfortunate technicalities which, however much they may appeal to an individual layman in the case he wins, are the basis for the soundest and most persistent lay criticisms of court procedure.[107]

[104] See sections 8 and 9 of the proposed statute, *infra* note 107.
[105] See section 10 of the proposed statute, *infra* note 107.
[106] See sections 8 and 11 of the proposed statute, *infra* note 107.
[107] A Bill to be Entitled an Act to Revise the Statutes Governing the Permissive Joinder of Parties and Causes of Action in Civil Cases.

The General Assembly of North Carolina do enact:

Sec. 1. Section 1-68 of the General Statutes of North Carolina is hereby stricken out and the following substituted therefor: "Sec. 1-68. *Who may be plaintiffs.* All persons may join in one action as plaintiffs if they assert any right to relief, jointly, severally, or in the alternative, in respect of or arising out of the same subject of action or the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all of them will arise in the action. A plaintiff need not be interested in obtaining all the relief demanded."

Sec. 2. Section 1-69 of the General Statutes of North Carolina is hereby stricken

out and the following substituted therefor: "Sec. 1-69. *Who may be defendants.* 1. All persons may be joined in one action as defendants if there is asserted against them, jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same subject of action or the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all of them will arise in the action. A defendant need not be interested in defending against all the relief demanded.

"2. In an action to recover the possession of real estate, the landlord and tenant may be joined as defendants. Any person claiming title or right of possession to real estate may be made a party plaintiff or defendant, as the case requires, in such action."

Sec. 3. Section 1-123 of the General Statutes of North Carolina is hereby amended by striking out all of said section except the last paragraph thereof and substituting for the part so stricken out the following: "Sec. 1-123. *What causes of action may be joined.* The plaintiff in his complaint may join, either as independent or alternate claims, and whether consistent or inconsistent, as many causes of action either legal or equitable or both as he may have against a defendant. There may be a like joinder of causes of action where there are multiple parties if the requirements of sections 1-68 and 1-69 are satisfied. Causes of action so joined should be separately stated.

"If causes of action which require different places of trial are joined, the court shall, upon demand by the defendant at the time and in the manner prescribed by section 1-83, divide the action and transfer such parts thereof as may require trial elsewhere to the proper county or counties."

Sec. 4. Section 1-127 of the General Statutes of North Carolina, which enumerates the grounds for demurrer, is hereby amended by striking out the following: "5. Several causes of action have been improperly united; or," and substituting therefor the following: "5. There is a misjoinder of both parties and causes of action; or,"

Sec. 5. Section 1-132 of the General Statutes of North Carolina is hereby stricken out and the following substituted therefor: "Sec. 1-132. *Division of actions for misjoinder.* If the demurrer is sustained because of misjoinder of parties and causes of action, the judge shall, upon such terms as are just, divide the action or order the offending pleader to do so. If the division made by a pleader fails to correct the misjoinder, or if, within the time limited by the judge, the pleader fails to effect a division, the judge may, in his discretion, divide or dismiss such part of the action as still involves a misjoinder of parties and causes of action."

Sec. 6. Section 1-135 of the General Statutes of North Carolina, dealing with the contents of answers, is hereby amended by striking out the last paragraph thereof and substituting therefor the following: "2. A statement, in ordinary and concise language, without repetition, of any new matter constituting a defense, counterclaim, cross-claim, or third-party claim."

Sec. 7. Section 1-137 of the General Statutes of North Carolina is hereby stricken out and the following substituted therefor: "Sec. 1-137. *Counterclaims, cross-claims, and Third-Party Claims.* 1. *Compulsory counterclaims.* The answer shall state as a counterclaim any claim which, at the time the answer is filed, the defendant has against a plaintiff, if it arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim, unless: (a) it requires for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; or (b) the court in which the action is pending would not have jurisdiction to grant the full relief which could be sought by the counterclaim; or (c) the claim, at the time plaintiff's action was commenced, was the subject of another pending action. Any such claim which does not mature or exist in defendant's favor until after the answer is filed may, with the permission of the court, be set forth as a counterclaim in a supplemental answer.

"2. *Permissive counterclaims.* The answer may state as a counterclaim any claim which, at the time the answer is filed, the defendant has against a plaintiff, not arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim. Any such claim acquired or maturing after answer is filed may, with the permission of the court, be set forth as a counterclaim in a supplemental answer.

"3. *Cross-claims.* The answer may state as a cross-claim any claim against a

co-defendant arising out of a transaction or occurrence that is the subject matter of the original action or of a counterclaim therein or relating to the subject matter of the original action; or a claim that the co-defendant is or may be liable to the cross-claimant for all or part of a claim asserted against the cross-claimant by another party to the action. There may be similar cross-claims between plaintiffs.

"4. *New parties on counterclaim or cross-claim.* When the presence of additional parties is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants if jurisdiction of them can be acquired.

"5. *Third-party claims.* Before the filing of his answer a defendant may move *ex parte* or, after the filing of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to bring in a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted, such person, hereinafter called the third-party defendant, shall be served with summons, the complaint, and defendant's answer containing the third-party claim. The third-party defendant shall demur or answer and assert as a counterclaim any claim which, at the time the third-party answer is filed, he has against the third-party plaintiff, arising out of the transaction or occurrence that is the subject matter of the third-party claim, in the manner and within the time prescribed for defendant's pleading to complaints; and he may, in his answer, cross-claim against other third-party defendants in the manner prescribed for cross-claims between defendants. He may in his answer assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim; and may also assert against the plaintiff, as a counterclaim in his answer, any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may, by amendment to the complaint, assert against the third-party defendant any claims arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant shall thereupon assert in his answer his defenses, counterclaims and cross-claims in the same manner as if he had been an original defendant. A third-party defendant may proceed under this subsection against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against him.

"When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this subsection would entitle a defendant to do so.

"6. *Insured and insurer.* Nothing in this section shall be construed to enlarge the right of an insured to have his insurer made a party to an action."

Sec. 8. Section 1-140 of the General Statutes of North Carolina is hereby stricken out and the following substituted therefor: "Sec. 1-140. *Replies to counterclaims and answers to cross-claims.* If an answer or third-party answer contains a counterclaim or cross-claim it shall be served upon the party or parties against whom relief is sought or upon their attorneys of record. A party so served shall have twenty (20) days after service within which to demur or reply to such counterclaim or demur or answer to such cross-claim: Provided, for good cause shown the clerk or judge may extend the time for filing such reply or answer to a day certain. If the pleading containing the counterclaim or cross-claim is not served as above provided, such counterclaim or cross-claim shall, in the absence of a reply or answer thereto voluntarily filed, be deemed fully denied or avoided, as the case may require."

Sec. 9. Section 1-141 of the General Statutes of North Carolina is hereby stricken out and the following substituted therefor: "Sec. 1-141. *Contents of replies and of answers to cross-claims and third-party claims.* A reply, or an answer to a cross-claim or third-party claim, shall contain admissions, denials and affirmative defenses in accordance with the rules prescribed for answers to complaints. A reply to a counterclaim in an answer or third-party answer shall also plead as a counterclaim any claim which, at the time of filing such reply, the pleader has against the opposing pleader, arising out of the transaction or occurrence that is the subject matter of the counterclaim to which the reply is made, subject to the rules prescribed for compulsory counterclaims to complaints. Counterclaims in third-party answers are to be pleaded in accordance with the provisions of subsection 5 of section 1-137."

Sec. 10. Section 1-142 of the General Statutes of North Carolina is hereby stricken

out and the following substituted therefor: "Sec. 1-142. *Pleadings required and allowed; demurrers to pleadings other than complaints.* 1. There shall be a complaint; an answer; an answer to a cross-claim or third-party claim properly served; and a reply to a counterclaim contained in an answer or third-party answer properly served. There may be a voluntary answer to a cross-claim or third-party claim not properly served, or a voluntary reply to an answer, to a third-party answer, to an answer to a cross-claim, or to a counterclaim in a reply, but it shall not be permitted to delay trial of the action. Upon motion, in his discretion, the judge may order a reply to an affirmative defense in an answer or third-party answer or answer to a cross-claim, or may order a reply to a counterclaim in a reply; and such order shall state the time within which the reply is to be filed. No other pleadings shall be allowed.

"2. A plaintiff may demur to an answer containing new matter when, upon its face, it does not constitute a counterclaim or defense; and he may demur to one or more of such counterclaims or defenses and reply to the residue. In like manner, the party against whom it is directed may demur to a cross-claim, a third-party claim, a reply, a third-party answer, or an answer to a cross-claim. Such demurrers shall specifically state the grounds therefor and shall be heard and determined as prescribed for demurrers to complaints."

Sec. 11. Section 1-159 of the General Statutes of North Carolina is hereby stricken out and the following substituted therefor: "Sec. 1-159. *Allegations deemed admitted or controverted.* Every material allegation of any part of a pleading to which a responsive pleading is required, or to which a responsive pleading is filed, not controverted by such responsive pleading is, for purposes of the action, taken as true. Material allegations in any part of a pleading to which no responsive pleading is required, and to which no responsive pleading is filed, shall be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require."

Sec. 12. Section 1-179 of the General Statutes of North Carolina, dealing with separate trials, is hereby amended by adding at the end thereof the following: "The court in furtherance of convenience or to avoid prejudice or unnecessary expense or delay to any party, or to avoid confusion of issues, may order a separate trial of any cause of action, counterclaim, cross-claim, third-party claim, or issue, or of any number of causes of action, counterclaims, cross-claims, third-party claims, or issues, or may make such other orders as justice may require."

Sec. 13. Section 1-124 of the General Statutes of North Carolina, dealing with defendants' pleadings, is hereby amended by inserting at the beginning thereof, to become a part of the first sentence, the following: "Except as provided in sections 1-140, 1-141 and 1-142."

Sec. 14. All laws and clauses of laws in conflict with the provisions of this act are hereby repealed.

Sec. 15. This act shall take effect on ————————: Provided, that if, in the opinion of the court, its application to any particular action then pending would not be feasible or would work injustice, it shall not apply to that action, which shall then be governed by the procedure theretofore existing.

NOTE: The foregoing bill was introduced in the 1947 legislature by Senator William C. Medford of Haywood as Senate Bill 133. It was referred to the Committee on Judiciary No. 2, where it died.