OHIO STATE LAW JOURNAL

VOLUME 19 WINTER 1958 NUMBER 1

SELECTED PROBLEMS OF OHIO LEGISLATIVE POLICY

A PROPOSED SUMMARY JUDGMENT STATUTE FOR OHIO

ROBERT L. WILLS*

It has long been established, both at common law and under the Field-type Codes of Civil Procedure, that the parties to a civil action have a right to a trial of the issues of fact raised by the pleadings. This is reinforced by the rule that both a demurrer and a motion for judgment on the pleadings are limited to the face of the pleadings which they attack; to put it differently, they "admit the truth of all well-pleaded facts" in those pleadings.[1] As a result of these rules, a contested civil action cannot be disposed of without trial, generally speaking, unless the pleadings show on their face, as a matter of law, that one party or the other is entitled to judgment. Thus, even though a plaintiff knows that it is almost certain that a verdict will be directed against him if the case goes to trial, the case must be set down for trial. And even though a defendant who has filed an answer containing a general denial knows that he will be unable to offer any substantial evidence at the trial to contradict the allegations of plaintiff's petition, the case must be set down for trial. If it is the plaintiff's case that is fatally weak, when the case does go to trial, a verdict will be directed against the plaintiff upon his opening statement or upon the evidence. When this happens, the time of the litigants, counsel, witnesses, court and jury has been wasted. Worse yet, a plaintiff with a weak case is often reluctant to go to trial, and the case is continued repeatedly before it is finally tried or dismissed for want of prosecution. If it is the defendant's case that is fatally weak, the defendant may settle on the eve of trial, or may even fail to appear at the trial. In this situation, the plaintiff has been required to wait weeks, months or years for justice, and usually to expend time and money in preparation for trial, which preparation ultimately turns out to be un-

*Professor of Law, Ohio State University; member of the Judicial Council of Ohio.

[1] "Since the petition has been challenged by demurrer, the facts pleaded therein are confessed to be true. . . ." State *ex rel.* Rudd v. Industrial Commission, 116 Ohio St. 67, 75, 156 N.E. 107, 110 (1927).

necessary. While such cases are, fortunately, the exception rather than the rule, it cannot be denied that they exist in substantial numbers and that they are a factor in the delay of the trial of cases and the cluttering of court dockets.

Is there any procedure under present Ohio law by which a party may go behind the face of his adversary's pleading, and establish that there is no genuine issue of fact between the parties, even though an issue of fact does appear upon the face of the pleadings? Many years ago, the Ohio Supreme Court held that there was such a procedure. In *White v. Calhoun*,[2] plaintiffs brought an action upon an account stated. Defendant filed an answer apparently consisting of a general denial. Plaintiffs filed a motion to strike the answer from the files for the reason that it was a sham and false answer, filed in bad faith and for the purpose of delay. On hearing, this motion was sustained and the answer ordered stricken from the files. The court thereupon found that defendant did owe the plaintiffs the amount demanded in the petition, and rendered judgment therefor, with costs. The judgment was affirmed by the Circuit Court and the Supreme Court. The Supreme Court stated, in part:

> It is not contended that the answer interposed by defendant was frivolous, or insufficient in form. Nor is any question made but that the answer tendered an issue and that, as the case stood on petition and answer, the issue thus tendered was a jury issue. A frivolous answer is one that contains no valid defense, one which is insufficient on its face. A sham answer is one good in form, but false in fact, and not pleaded in good faith. The complaint of plaintiff in error [defendant] is that, in such condition of the pleadings, the answer being perfect in form, the trial court was without power to strike it off, because the defendant had a constitutional right to have his case tried by a jury. And that presents the real question in the case.
>
> The printed record shows that the defendant took a bill of exceptions; that it was filed and notice issued. But such bill is not printed, and we do not find it among the original papers, even if its presence there were important, which it is not, because not printed. Nor is there any finding of facts. We are to presume, therefore, in support of the action of the trial court with respect to the motion and the final judgment rendered, that sufficient evidence was adduced to warrant the action of the court, provided there was power in the court to receive and act upon any evidence whatsoever. The striking off on motion of pleadings and papers from the files is recognized by section 5126, Revised Statutes,[3] and is familiar practice in

[2] 83 Ohio St. 401, 94 N.E. 743 (1911).

[3] Now OHIO REV. CODE §2309.70 (1953): "Motions to strike pleadings and papers from the files may be made with or without notice, as the court directs." [Author's footnote.]

this state. But the precise question involved in this record seems not to have been before this court in any case reported with opinion. . . . Our statute does not in terms provide, as is provided in the statutes of many states, for the striking off of sham answers. But the authorities cited . . . fully support the proposition that the power is inherent and has been exercised from time immemorial as a power existing at common law. And why should such power not exist and why, in a proper case, should it not be exercised? As defined in *Gostorfs v. Taafe,* 'it is a power simply to inquire whether there is in fact any question to be tried, and if there is not, but the defense is a plain fiction, to strike out the fictitious defense.' It is objected that the entertaining of such motion deprives defendant of his right to have his case tried by a jury in its regular order and is simply a short cut to a disposition of the case in advance of the other cases on the docket; that to sustain the judgments below would give encouragement to a vicious practice, one leading to vexatious and untimely interference with the due course of justice. . . . [The motion] demonstrates, if sustained, that there is no defense. In that situation what is there to try to a jury? Surely nothing, and as surely the defendant has lost no right, constitutional or other; on the contrary, a plain right of the plaintiff has been vindicated and the interests of justice have been subserved. It seems idle, in this day, when the efforts of lawyers, some of them at least of the highest class, are being strenuously exerted in the direction of securing a more speedy administration of justice, to talk about the right of a defendant to stand for months and perhaps years upon a sham defense, thus preventing judgment, a defense which will crumble at the first assault upon it when the case is reached. The very statement of the proposition condemns it. It is simply a bold proposition, the effect of which is to obstruct the due administration of justice.

This conclusion is strengthened when we consider the provisions of our statutes respecting interrogatories and the taking of testimony by deposition. . . . Having in mind these provisions for facilitating the administration of justice, how would their use affect a situation like one involved in the case at bar? Let us suppose that the plaintiffs had, after the filing of the answer, taken the deposition of defendant, and, under the fire of sharp examination, he had admitted, clearly and without question, that he did owe the debt just as alleged in the petition. . . . The deposition in due time would be filed with the other papers, and there it would lie as a companion to defendant's answer already filed. Now it is the proposition of the objectors that those two papers, the last in date absolutely destroying the effect in law of the former, must lie there on the files until the cause shall be reached in its regular order. Suppose that to be done, then what? To preserve intact that great constitutional right of the defendant to delay justice

> a jury is called. The plaintiff thereupon proceeds to offer and read the deposition of the defendant, and rests. The defendant has no proof to offer for the excellent reason that he dare not risk a prosecution for perjury by undertaking to deny his last sworn statement. The plaintiff thereupon asks a directed verdict. Why not? What is there for a jury to consider and decide? Absolutely nothing. The result reached is that, to preserve the defendant's great constitutional right of delay, the plaintiff has been kept out of his own, for a year more or less it may be, and the result otherwise is precisely the same as it would have been had the sham answer been assailed by a motion at any early state of the case. . . .
>
> Our conclusion is that a motion to strike off an answer believed to be a sham answer is proper practice, and that the trial court has power to entertain, hear and determine such motion. It may be proper to add, in order to prevent misunderstanding, that the discretion of the court in such case should be exercised wisely and with discrimination, and such motion sustained only upon such showing upon the part of the plaintiff as leaves no question whatever of the truth and conclusiveness of the plaintiff's evidence. A situation in which there is conflict of evidence upon any material point, or admitting of a rational doubt as to the proper order to be made, should result in the overruling of the motion.
>
> There is no error in the judgments below, and they will be affirmed.

Thus the Ohio Supreme Court established clearly and unequivocally that a trial court has the power to strike a sham pleading from the files and enter judgment against the party who filed the sham pleading. However, in spite of the Ohio Supreme Court's ruling in *White v. Calhoun*, the power to strike sham pleadings has been exercised very sparingly by the Ohio courts. There are several reasons for this. First of all, in *White v. Calhoun* itself, although the trial court granted plaintiff's motion to strike defendant's answer from the files and entered final judgment for plaintiff, the defendant did not file a proper bill of exceptions in connection with his error proceedings. Therefore, although defendant prosecuted error to the old Circuit Court and thence to the Supreme Court, the appellate courts did not have before them the evidence upon which the trial court based its finding that defendant's answer was a sham. All that was before the Supreme Court was the original record of the trial court, showing merely that the trial court had sustained plaintiffs' motion to strike defendant's answer as a sham (and presumably for judgment in his favor). Therefore the Supreme Court concerned itself principally with the question of the power of the trial court to strike a sham pleading. It did not discuss comprehensively the all-important question of the kinds of evidence which may properly be considered by a trial court in determining whether a pleading is a sham. The Supreme Court did, by way of illustration, state that a

deposition of the party against whom the motion is made might properly be considered by the trial court. Although it did not limit the trial court to such a deposition,[4] it did not discuss other kinds of evidence which might properly be considered. Therefore, *White v. Calhoun* did not lay down a satisfactory guide to the trial courts of Ohio as to the materials which might properly be considered in connection with motions to strike sham pleadings. Later reported decisions have not clarified this matter to any extent.[5] Consequently, Ohio lawyers and trial courts have been sailing on uncharted waters so far as motions to strike sham pleadings are concerned, and trial courts have been understandably reluctant to grant such motions. It is probably correct to say that most Ohio lawyers feel that it is useless to file a motion to strike a sham pleading, except perhaps in the case of a clear cut admission by the adverse party in a deposition or in answers to interrogatories. There is insufficient judicial authority in Ohio for the use of affidavits in connection with motions to strike sham pleadings. As will be explained *infra*, the writer believes that the use of affidavits is absolutely essential to a workable and effective procedure for piercing the allegations of pleadings.

Other jurisdictions had similar difficulties with the motion to strike sham pleadings. These difficulties led to the enactment of statutes providing for summary judgment procedure.

Historical Development of Summary Judgment Procedure

Although there were some early and limited beginnings in the United States,[6] the development of summary judgment procedure really began with the enactment by the English Parliament of the Summary Procedure on Bills of Exchange Act[7] in 1855. As the title indicates, the Act was limited to actions on bills of exchange and promissory notes. The English summary procedure was later extended to various other kinds of actions, and the procedure was improved.[8]

---

[4] The opinion strongly implies that the answers of a party to interrogatories might also be considered by the trial court.

[5] The problem is discussed in Metzenbaum v. Lyman, 65 Ohio L. Abs. 90, 49 Ohio Op. 167, 108 N.E. 2d 869 (1952), decided by the Common Pleas Court of Cuyahoga County, and in the Note on that case in 14 Ohio St. L.J. 342 (1952). The *Metzenbaum* opinion states: ". . . the means available for determining whether or not an answer presents a sham defense are: (a) the pleadings themselves, (b) affidavits, (c) exhibits, (d) depositions and (e) evidence introduced by the parties upon hearing of the motion to strike." Approval of these views by the Supreme Court of Ohio would increase the effectiveness of motions to strike sham pleadings.

[6] Millar, *Three American Ventures in Summary Civil Procedure*, 38 Yale L.J. 193 (1928) (South Carolina, Kentucky and Virginia).

[7] 18 & 19 Vict., c. 67 (1855).

[8] An extensive discussion of the development of the English summary procedure may be found in Bauman, *The Evolution of the Summary Judgment Procedure*, 31 Indiana L.J. 329 (1956).

As experience under the English summary procedure was highly satisfactory, various American jurisdictions enacted legislation patterned to a considerable extent on the English legislation.[9] There was, however, considerable variation in the legislation of the various states.[10]

Thus, by 1938, summary judgment procedure had ceased to be a novelty. A very considerable body of experience had developed in the American states having the procedure, and comparison of the advantages of the various types of statutes was possible. Therefore, in the preparation of the proposed Federal Rules of Civil Procedure, the Advisory Committee included a provision for summary judgment procedure (Rule 56). The Advisory Committee, in drafting Rule 56, utilized the experience of the different states under their varying provisions for summary judgment.

Experience under Federal Rule 56 has been satisfactory. It is true that in the first few years under the Federal Rules, some federal courts were too liberal in granting motions for summary judgment. This was no doubt due to unfamiliarity with the procedure. As the federal bench and bar became more familiar with summary judgment procedure, there were fewer instances of the improper granting of motions for summary judgment. Although in recent years there has been criticism of other Federal Rules, the writer knows of no basic opposition to Rule 56. There have been, it is true, suggestions for minor improvements in Rule 56, some of which will be discussed *infra*. Since 1938, several states have adopted summary judgment procedures following Federal Rule 56 more or less closely.[11]

The Proposed Ohio Summary Judgment Statute

In Ohio, bills authorizing summary judgment procedure have been introduced in several sessions of the General Assembly. So far, all have failed of passage.

In 1956, the Judicial Council of Ohio approved the principle of

[9] Among these were New Jersey (1912), Michigan (1915), New York (1921), Connecticut (1928), Massachusetts (1929), Rhode Island (1929), Wisconsin (1931), Illinois (1933), and California (1933).

[10] Clark and Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1929), discusses the early American summary judgment statutes and rules, quoting many of them in full. Excellent general discussions of the historical development of summary judgment procedure may be found in MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE (1952), Chap. XVI, "Motions for Summary Disposition on the Merits," and in CLARK, CODE PLEADING §88 (2nd ed. 1947).

[11] Several states have adopted the Federal Rules almost in their entirety. Others have borrowed heavily from them. A recent survey of the various current summary judgment procedures is contained in Korn and Paley, *Survey of Summary Judgment, Judgment on the Pleadings and Related Pre-trial Procedures*, 42 CORNELL L.Q. 483 (1957). This article is adapted from the study prepared for the Advisory Committee on Practice and Procedure of the New York State Temporary Commission on the Courts.

summary judgment procedure, and prepared a proposed bill embodying its recommendation.[12] In 1957, Senate Bill No. 214, which was in conformity with the Judicial Council's recommendation, was introduced in the 102nd Ohio General Assembly by Senators Simpson and Morgan. The bill was approved in principle by the Judicial Administration and Legal Reform Committee of the Ohio State Bar Association. In the Senate, the bill was referred to the Code Revision Committee, and, with some changes, was recommended by that Committee for passage. However, it died in the Rules Committee of the Senate. Subsequently, the Ohio Judicial Council voted to continue to recommend the enactment of summary judgment legislation. Likewise, the Judicial Administration and Legal Reform Committee of the Ohio State Bar Association voted to continue consideration of the subject of summary judgments.[13] In view of this interest in the subject of summary judgments, the writer is hopeful that there will be further discussion of the subject by Ohio lawyers and judges, and that summary judgment legislation will eventually be enacted by the Ohio General Assembly.

The following is the text of a proposed Ohio summary judgment statute. It follows closely Senate Bill 214 of the 102nd Ohio General Assembly as recommended by the Code Revision Committee of the Senate, with certain changes therefrom which will be discussed *infra*.

A BILL

To enact section 2311.041 of the Revised Code to authorize the entering of summary judgments in cases where there is no genuine issue as to any material fact, and a party is entitled to judgment as a matter of law.

SECTION 1. That section 2311.041 of the Revised Code be enacted to read as follows:

Sec. 2311.041. Summary judgment may be granted in a civil action as provided in this section.

(A) A party seeking to recover upon a cause of action or counterclaim or to obtain a declaratory judgment, or a party against whom a cause of action or counterclaim is asserted or a declaratory judgment is sought, may, at any time after the action is at at issue, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(B) The motion for summary judgment shall be filed at least ten days before the time fixed for the hearing thereon.

---

12 THIRTEENTH REPORT OF THE JUDICIAL COUNCIL OF OHIO, 17 (1957).

13 *Report of Judicial Administration and Legal Reform Committee*, 30 OHIO BAR 337, 340-1 (April 29, 1957).

The adverse party prior to the day of hearing may file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions of the genuineness of papers or documents, and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The test for determining the existence of a genuine issue as to a material fact shall be the same as the test for the determination of a motion for a directed verdict at the trial; summary judgment shall not be rendered unless it appears from the pleadings, depositions, answers to interrogatories, admissions of the genuineness of papers or documents, and affidavits, if any, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made; the party against whom the motion for summary judgment is made is entitled to have such depositions, answers to interrogatories, admissions of the genuineness of papers or documents, and affidavits construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(C) If on motion under this section summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order on its journal specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(D) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise

provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(E) Should it appear from the affidavits of a party opposing the motion for summary judgment that he cannot for sufficient reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

The remainder of this article will consist of a point by point discussion of this proposed statute.

Relationship of Proposed Ohio Statute to Federal Rule 56

In the preparation of the proposed Ohio statute, Federal Rule 56 was taken as a starting point. However, the proposed statute is by no means a mere copy of Federal Rule 56. In addition to verbal changes which were necessary to conform to the nomenclature of Ohio practice, various substantial changes were made. These changes will be discussed under subsequent headings.

Verbal Changes from Federal Rule 56

The framers of the Federal Rules of Civil Procedure studiously avoided the phrase "cause of action," substituting for it the word "claim."[14] The phrase "cause of action" is more familiar in Ohio practice, and is therefore used in place of "claim" throughout the proposed Ohio statute.

The word "cross-claim" is used in the Federal Rules to describe a claim by a party against a co-party. In Ohio practice, the word "cross-claim" is not used; the term "counterclaim" includes a claim by a defendant against a co-defendant.[15]

Throughout the Federal Rules, emphasis is placed upon the *service* of various papers, rather than upon their *filing*. In general, Ohio practice still puts the emphasis upon filing, and therefore the word "filing" is substituted for the word "service" throughout the proposed Ohio statute.

As the proposed statute, if enacted, would become a section of the Revised Code of Ohio, the word "section" is substituted throughout for the word "rule."

Throughout the Federal Rules, paragraph headings are used. This is done in Rule 56. Corresponding paragraph headings in Senate Bill No. 214 were deleted to conform to Ohio legislative style requirements.

---

[14] Clark, Code Pleading, 146 (2d ed. 1947).

[15] Ohio Rev. Code §2309.16 (1953).

DISCIPLINARY PROVISIONS OF FEDERAL RULE 56 ELIMINATED

Paragraph (g) of Federal Rule 56 permits the court to impose cost penalties for the filing of affidavits in bad faith or for the purpose of delay, and also provides that any offending party or attorney may be adjudged guilty of contempt. Such provisions were thought to be too drastic for inclusion in the proposed Ohio statute, and were accordingly eliminated completely.

WHEN MOTION FOR SUMMARY JUDGMENT MAY BE FILED

Paragraph (A) of the proposed Ohio statute provides that a motion for summary judgment may be filed at any time after the action is at issue. Although Federal Rule 56 provides that the motion may be made at an earlier point,[16] serious delay will rarely result from postponing the motion for summary judgment until the action is at issue. Postponing the motion until this point will give the parties full opportunity to narrow the issues by the pleadings as much as possible.[17]

EITHER PARTY MAY MOVE FOR SUMMARY JUDGMENT

Although the 1855 English statute[18] authorized only the plaintiff to move for summary judgment, New York, in 1933, broadened its summary judgment rule (Rule 113) to make the motion available to the defendant as well. Other states followed suit,[19] and when the Federal Rules became effective in 1938, Rule 56 made the motion available to any party. While it is probably true that plaintiffs will have more frequent occasion than will defendants to move for summary judgment, the remedy should be made available to both parties. Paragraph (A) of the proposed Ohio statute is so drawn, making it available to "a party against whom a cause of action or counterclaim is asserted or a declaratory judgment is sought," as well as to "a party seeking to recover upon a cause of action or counterclaim or to obtain a declaratory judgment." Thus, under the proposed Ohio statute, either a plaintiff or a defendant may move for summary judgment upon a cause of action asserted by a plaintiff against a defendant, either plaintiff or defendant may move for summary judgment upon a counterclaim by a defendant against a plaintiff, and either of two co-defendants may move for summary judgment upon a counterclaim asserted by one such co-defendant against the other.

[16] Paragraph (a) of Federal Rule 56 permits a party seeking to recover upon a claim to move for summary judgment at any time after the expiration of 20 days from the commencement of the action. Paragraph (b) permits a party against whom a claim is asserted to make such a motion at any time.

[17] Michigan permits the motion for summary judgment by the plaintiff "at any time after any cause arising upon contract or judgment, or statute shall be at issue. . . ." MICH. STAT. ANN. §27.989 (1938).

[18] *Supra* note 7.

[19] Wisconsin (1934) and California (1939). MILLAR, *op. cit. supra* note 10, at 246.

SUMMARY JUDGMENT NOT LIMITED TO ANY PARTICULAR TYPE OF CIVIL ACTION

The 1855 English summary procedure statute was limited to actions on bills of exchange and promissory notes.[20] The original New Jersey summary judgment statutes and rules were limited to actions to recover a debt or liquidated demand arising upon a contract, judgment or statute.[21] The original Michigan summary judgment statute was limited to actions arising out of contract or judgment.[22] The first New York summary judgment provisions were limited to actions arising on contract or on a judgment for a stated sum.[23] In 1932, the New York summary judgment rules were broadened to include several other types of action. Experience under such limited provisions demonstrated that much judicial energy was wasted in deciding whether a particular action came within the scope of the statute or rule.[24] By the time the Federal Rules of Civil Procedure were formulated, in the Thirties, it had become apparent that it was unnecessary and unwise to limit arbitrarily the kinds of action in which summary judgment may be granted. Courts should have the power to grant summary judgment in any type of civil action, even though it is inevitable that it will be granted relatively infrequently in some kinds of actions.[25] Accordingly, Federal Rule 56 authorized summary judgment procedure in any type of civil action. Most of the states which have adopted summary judgment procedure since 1938 have made it available in any type of civil action.[26] Likewise, the proposed Ohio summary judgment statute begins by stating, "Summary judgment may be granted *in a civil action* as provided in this section." Thus it

---

[20] *Supra* note 7.

[21] N.J. Laws 1912, 380; 2 N.J. COMP. STAT. §§291, 292 (Supp. 1915); Rules 57-60, N.J. Laws 1912, 394-395.

[22] 3 MICH. COMP. LAWS (Cahill, 1915) c. 234, §§12581, 12582.

[23] N.Y. Civil Practice Rules 113 and 114, effective in 1921.

[24] See, for example, the many cases in Annot., *What amounts to "debt," "liquidated demand," "contract," etc., within contemplation of summary or expedited judgment statutes,* 107 A.L.R. 1221 (1937).

[25] "The modern tendency in drafting is to move away from the specification of restricted types of suits in which summary judgments are allowed toward a broad provision applying to all actions." CLARK, CODE PLEADING 557 (2d ed. 1947).

"In short, a false denial in an answer is without merit regardless of the kind of action in which it is interposed." Ritter and Magnuson, *The Motion for Summary Judgment and its Extension to All Classes of Actions,* 21 MARQUETTE L. REV. 33, 47 (1936).

[26] Wisconsin's original summary judgment rule, WIS. STAT. §270.635 (1931), adopted in 1929, patterned after Rule 113 of the New York Civil Practice Act, was narrowly limited as to types of action. The Wisconsin rule was subsequently broadened to include certain other types of action, and finally, in 1941, Wisconsin dropped all such restrictions, making summary judgment procedure available "in any civil action or special proceeding." WIS. STAT. §270.635 (1951).

would make summary judgment procedure available in any civil action, without restriction as to type.[27]

THE TEST FOR SUMMARY JUDGMENT THE SAME AS THE TEST FOR A DIRECTED VERDICT

The test for the granting or denial of a motion for summary judgment was not explicitly stated in Federal Rule 56. The Rule states that:

> The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

However, Rule 56 does not explicitly state any test by which the trial court is to determine whether there is a "genuine issue as to any material fact." Partly because of this, perhaps, there was some initial confusion in the consideration of motions for summary judgment in the federal courts under Rule 56. By now, the close analogy between the summary judgment and the directed verdict has been clearly recognized.[28] It seems desirable to reduce the possibility of similar initial confusion in Ohio by including in the legislation an explicit statement of the test which the Ohio courts should apply in passing on a motion for summary judgment. This has been done in the proposed Ohio statute by including in paragraph (B) the following sentence:

---

[27] Paragraph (A) of the proposed Ohio statute states specifically that summary judgment procedure is available in actions for declaratory judgments. This may be thought to be unnecessary. The reference to declaratory judgments is inserted as a matter of precaution, following the example of Federal Rule 56 in this respect.

[28] "But functionally the theory underlying a motion for summary judgment is essentially the same as the theory underlying a motion for directed verdict. The crux of both theories is that there is no genuine issue of material fact to be determined by the trier of the facts, and that on the law applicable to the established facts the movant is entitled to judgment." 6 MOORE, FEDERAL PRACTICE 2020 (2d ed. 1953).

"A summary disposition . . . should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party." Sartor v. Arkansas Natural Gas Co., 321 U.S. 620, 624 (1944).

"With all that in mind, we cannot now say—as we think we must say to sustain a summary judgment—that at the close of a trial the judge could properly direct a verdict." Arnstein v. Porter, 154 F. 2d 464, 470 (C.C.A. 2, 1946).

"Only when the evidence is such that it is clear the jury would have none to go on, though they believed that unfavorable to the movant for summary judgment, can the motion [for summary judgment] be sustained and a jury trial denied." Firemen's Mutual Ins. Co. v. Aponaug Mfg. Co., 149 F. 2d 359, 363 (C.C.A. 5, 1945).

"To support summary judgment the situation must justify a directed verdict insofar as the facts are concerned." Dewey v. Clark, 180 F. 2d 766, 772 (C.A. District of Columbia 1950).

"According to judicial pronouncements, the test for determing whether summary judgment should be granted is whether a motion for directed verdict

> The test for determining the existence of a genuine issue as to a material fact shall be the same as the test for the determination of a motion for a directed verdict at the trial; summary judgment shall not be rendered unless it appears from the pleadings, depositions, answers to interrogatories, admissions of the genuineness of papers or documents, and affidavits, if any, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made; the party against whom the motion for summary judgment is made is entitled to have such depositions, answers to interrogatories, admissions of the genuineness of papers or documents, and affidavits construed most strongly in his favor.[29]

This sentence is derived directly from some of the leading Ohio cases on directed verdicts since the old "scintilla rule" was abandoned and the "reasonable minds" test adopted in 1934.[30] The explicit inclusion of the directed verdict test in the proposed Ohio summary judgment statute should make it clear that the proposed statute would not clothe the trial judge with arbitrary power to deprive litigants of their right to trial by jury. It is no more an invasion of the right of trial by jury to grant a motion for a summary judgment than to direct a verdict upon the opening statements or upon the evidence.[31]

---

should be granted if the same state of facts existed at the conclusion of plaintiff's case." Orvis v. Brickman, 95 F. Supp. 605 (D.C. District of Columbia 1951).

An extended discussion of the use of the directed verdict test in connection with motions for summary judgment is contained in Comment, *Summary Judgment —Rule 56,* 51 NORTHWESTERN U.L. REV. 370 (1956). The Comment points out that the directed verdict test should not be applied so as to prevent summary judgment in favor of the party having the burden of proof. To so apply the test would be clearly improper; from the beginning of the development of summary judgment procedure, it has been available to plaintiffs.

Even a literal application of the directed verdict test to a motion for summary judgment should not cause trouble on this point in Ohio, in view of the interpretation of the "reasonable minds" test for a directed verdict by the Ohio courts, which interpretation apparently permits a directed verdict in favor of the party having the burden of proof. Any doubt on this point should be removed by the inclusion of the last two sentences in paragraph (D) of the proposed Ohio statute, which are discussed *infra,* in the text following note 47.

[29] The quoted test was broken down into three sentences in Senate Bill No. 214. However, as it purports to be a single comprehensive statement of the Ohio test for a directed verdict, it is probably desirable from a drafting standpoint to state the test in a single sentence.

[30] Wilkeson v. Erskine & Son, 145 Ohio St. 218, 61 N.E. 2d 201 (1945); Durbin v. Humphrey Co., 133 Ohio St. 367, 14 N.E. 2d 5 (1938); Hamden Lodge, I.O.O.F. v. Ohio Fuel Gas Co., 127 Ohio St. 469, 189 N.E. 246 (1934).

[31] The question of the constitutionality of summary judgment legislation has long since been settled. The constitutionality of the New York summary judgment rule was upheld in General Investment Co. v. Interborough Rapid Transit Co., 235 N.Y. 133, 139 N.E. 216 (1923). The New York court stated, in its opinion: "The argument that rule 113 infringes upon the right of trial by jury guaranteed by the Constitution cannot be sustained. The rule in question is simply one regu-

THE USE OF AFFIDAVITS IN SUMMARY JUDGMENT PROCEDURE

The key feature of summary judgment procedure is the use of affidavits. Summary judgment procedure without affidavits would be like a ham sandwich without ham. Without the use of affidavits, a motion for summary judgment would be as unsatisfactory as the present Ohio motion to strike sham pleadings. However, it is unfortunately true that most of the opposition to summary judgment legislation is directed toward the affidavit feature. Much of this opposition apparently results from a basic misunderstanding of the function of the affidavits in summary judgment procedure.

It cannot be emphasized too strongly that the enactment of the proposed summary judgment statute would not alter the long established Ohio policy that affidavits[32] are generally inadmissible in evidence[33] except to obtain a provisional remedy, or upon a motion, and certain other purposes specified by statute.[34]

In summary judgment procedure, affidavits are *not* used as evidence to determine disputed questions of fact. "These [summary judgment] affidavits stand on a different footing from those in cases where the trial judge is simply deciding a question of fact upon affidavits."[35] Thus, in passing upon a motion to quash the service of summons, an Ohio judge

---

lating and prescribing procedure, whereby the court may summarily determine whether or not a bona fide issue exists between the parties to the action. A determination by the court that such issue is presented requires the denial of an application for summary judgment and trial of the issue by jury at the election of either party. On the other hand, if the pleadings and affidavits of plaintiff disclose that no defense exists to the cause of action, and a defendant, as in the instant case, fails to controvert such evidence and establish by affidavit or proof that it has a real defense and should be permitted to defend, the court may determine that no issue triable by jury exists between the parties and grant a summary judgment."

The constitutionality of summary judgment procedure in the District of Columbia was upheld by the United States Supreme Court in Fidelity & Deposit Co. v. United States, 187 U.S. 315, 320 (1902), wherein the Court stated: "If it were true that the rule deprived the plaintiff in error of the *right* of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses and to defeat attempts to use formal pleading as means to delay the recovery of just demands."

Other cases upholding the constitutionality of summary judgment procedure may be found in CLARK, CODE PLEADING, 564 (2d ed. 1947) and in Annot., *Constitutionality of statute or rule of court providing for summary judgment unless affidavit of merits is filed,* 69 A.L.R. 1031 (1930), 120 A.L.R. 1400 (1939).

[32] An affidavit is defined in OHIO REV. CODE, §2319.02 (1953) as "a written declaration under oath, made without notice to the adverse party."

[33] State *ex rel.* Copeland v. Medical Board, 107 Ohio St. 20, 140 N.E. 660 (1923); Robinson v. Harrison, 7 Ohio N.P. 273, 9 Ohio Dec. N.P. 701 (1898).

[34] OHIO REV. CODE §2319.03 (1953).

[35] Rugg, C. J., in Norwood Morris Plan Co. v. McCathy, 295 Mass. 597, 603-4, 4 N.E. 2d 450, 454 (1936).

might properly consider conflicting affidavits in deciding a disputed question of fact; in such a case, he is "simply deciding a question of fact upon affidavits." However, in passing on a motion for summary judgment, a judge merely looks to the affidavits (and other evidentiary materials) for the purpose of determining whether there is a genuine issue of fact between the parties. If the affidavits of the opposing parties show that there is a genuine issue of fact between the parties, the judge simply denies the motion for summary judgment; he does not attempt to weigh the opposing affidavits.[36]

Thus it will be seen that summary judgment affidavits perform a function quite similar to one function of the pleadings—that of disclosing the matters in dispute between the parties. Summary judgment affidavits are, in a very real sense, merely an extension of the pleadings. Summary judgment affidavits perform this pleading-type function in the evidential area. The pleadings themselves are excluded from this area. It is a fundamental rule that pleadings may not properly include matters of evidence, that is, they may not properly contain allegations of probative facts from which ultimate facts may be inferred.[37] And even if an allegation (even though it is not an allegation of a strictly probative fact) is unduly specific, it may be held to violate the rule against pleading evidence.[38] The defendant's answer is usually even more general than the plaintiff's petition, by reason of the use of denials in the answer. A denial in an answer not only puts the plaintiff on proof of the allegations denied, but also creates in the defendant a privilege to offer any proper evidence at the trial which will tend to disprove the allegations denied. Thus the denial will give the plaintiff no real notice as to the actual position which the defendant will take at the trial with respect to

---

36 "Let us assume that in an action for damages for personal injuries allegedly caused by defendant's negligence, arising from the collision of two automobiles, plaintiff contends [in an affidavit] that defendant entered the intersection where the accident occurred without stopping for a stop sign; defendant contends [in an affidavit] that he did stop. Assuming that this fact is material to the question of liability, it is clear that there is here such an issue of fact as will prevent summary judgment; the trier of fact will have to decide on the basis of the conflicting evidence which party is correct." Asbill and Snell, *Summary Judgment under the Federal Rules—When an Issue of Fact is Presented,* 51 MICH. L. REV. 1143, 1145 (1953).

37 CLARK, CODE PLEADING, 225 (2d ed. 1947).

38 "Similarly, in an action for . . . negligently injuring the plaintiff by the operation of an automobile, the 'operative' or 'ultimate' facts proved at the trial will always be specific. It will appear that the defendant was driving a particular kind of automobile at some particular rate of speed, etc., etc. If now a plaintiff were to state the facts thus specifically in his complaint he would doubtless be told by the average court that he had 'pleaded his evidence' and not the 'facts constituting the cause of action.' This would of course be erroneous. What is according to accepted notions the proper way to plead is merely a mode of stating the facts generically rather than specifically." Cook, *Statements of Fact in Pleading under the Codes,* 21 COL. L. REV. 416, 418-419 (1921).

the facts. In Ohio, denials in an answer may be either general or specific;[39] in practice, the general denial is used almost exclusively. The general denial is tempting to the defendant who really has no basis for disputing the allegations of plaintiff's petition. An answer consisting of a general denial is easy to prepare, and the defendant who files such an answer may rationalize it on the questionable basis that there is nothing improper about "making the plaintiff prove his case." Furthermore, allegations in an answer of facts which are inconsistent with the allegations of plaintiff's petition, and are therefore admissible under a denial, are said to be "argumentative denials,"[40] and are subject to a motion to strike. Thus it will be seen the rules of pleading not only permit but actually require a very considerable degree of generality in the pleadings.[41] As a result of this generality of the pleadings, they often indicate, on their face, broad issues of fact between the parties.[42] In many cases, however, although the pleadings have thus indicated broad issues between the parties, the actual conflict between the witnesses at the trial is much narrower. Sometimes the conflict is so slight that a verdict is directed for a party; sometimes one party fails to present any evidence whatever, or even to appear at the trial.

If the proposed summary judgment procedure were available, either party might move for summary judgment, filing in support thereof positively sworn affidavits, which would usually be considerably more specific than the pleadings of the moving party. The opposing party would then have a full opportunity to file specific opposing affidavits for the purpose of controverting the statements in the affidavits of the moving party. If the opposing party fails to file such affidavits, or if, even though he files affidavits, they are insufficient, *assuming their truth,* to controvert the affidavits of the moving party, then the *uncontroverted* facts in the affidavits of the moving party are regarded as not being in issue (even though the pleadings indicated that they were in issue), and summary judgment is granted for the moving party, provided of course that the *uncontroverted* facts in his affidavits are sufficient to entitle him to judg-

---

39 OHIO REV. CODE, §2309.13 (1953). The rules of some Ohio Municipal Courts purport to require that all denials shall be specific. So far as the writer has been able to determine, these rules have been more honored in the breach than in the observance.

40 CLARK, CODE PLEADING, 591 (2d ed., 1947).

41 Although the pleadings in Ohio are somewhat more specific than under the Federal Rules of Civil Procedure, they nevertheless have a high degree of generality. It would be most unwise to attempt to require more specific pleading in Ohio; this would subvert the basic functions of pleading. The proposed summary judgment statute would leave the pleadings as they are, but would supplement them by the more specific affidavits.

42 The verification of a pleading is sufficient if it states that the affiant believes the facts stated in the pleading to be true. OHIO REV. CODE, §2309.49 (1953). This fact, coupled with the generality of pleadings, makes the danger of a perjury prosecution for a false verification almost nonexistent.

ment. But if facts in the moving party's affidavits are controverted by the opposing party's affidavits, *assuming their truth,* then such facts in the moving party's affidavits are regarded as still being in issue.[43] *The court does not attempt to pass upon the truth of conflicting affidavits.*[44] Thus it will be seen that the court, in passing on the motion for summary judgment, is not acting as a trier of the facts, and the affidavits filed in support of and in opposition to the motion for summary judgment are not being considered as evidence. It is entirely incorrect to say that the motion for summary judgment results in "trial by affidavit." The summary judgment affidavits are, as previously stated, merely an extension of the pleadings; they pick up where the pleadings stop. They offer an effective means of *narrowing* the issues of fact between the parties, but they cannot be used to *decide* the issues of fact which actually exist.

A few federal cases, particularly in the Third Circuit, have mistakenly held that "a mere allegation in the pleading is sufficient to create a genuine issue as to a material fact, and thus prevent summary judgment, even though the pleader has made no attempt to controvert affidavits and other evidentiary matter presented by his opponent."[45] Such holdings show a basic misunderstanding of Federal Rule 56, and, if followed, would virtually destroy the utility of the summary judgment procedure. Fortunately, there are many decisions to the contrary.[46]

[43] Occasionally, the affidavits of the opposing party may contain facts which impeach, rather than contradict, the affidavits of the moving party. Such impeaching affidavits might also be sufficient to cause the denial of summary judgment to the moving party.

Furthermore, paragraph (E) of the proposed Ohio summary judgment statute provides for the exceptional case where the opposing party, although genuinely disputing the allegations of the moving party, is unable for some particular reason to file an opposing affidavit.

[44] Just as a court does not pass upon the truth of conflicting testimony in considering a motion for a directed verdict. See note 28, *supra.*

"The judge is not to weigh affidavits, is not to determine which affidavit is right and which is wrong. He is simply to see whether, upon the affidavits, there is a real issue of fact between the parties. Chief Justice Rugg of Massachusetts has said with regard to this procedure, 'A substitution of trial by affidavits for trial on evidence clearly is not intended. The duty of the trial judge is to determine whether there is a substantial issue of fact and not to try such issues if found to exist (citing many cases). Questions of credibility of affidavits or evidence do not concern the trial court. If the affidavit of defense shows a substantial issue of fact, summary judgment should not be ordered even though the affidavit be disbelieved. If the affidavits on the one side and on the other are directly opposed as to the facts shown, the case must go to trial.' Norwood Morris Plan Co. v. McCarthy, 295 Mass. 597, 603-4, 4 N.E. 2d 450, 454 (1936)." Remarks of Mr. Robert G. Dodge of Boston, member of the U.S. Supreme Court Advisory Committee, in PROCEEDINGS OF THE WASHINGTON INSTITUTE ON FEDERAL RULES, 176 (1939).

[45] REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, 57 (October, 1955).

[46] See Asbill and Snell, *supra* note 36, and Note, 99 U. OF PA. L. REV. 212, 214-215 (1950), both citing many contrary authorities.

However, in order to remove any possible doubt on this point, and to prevent the spread of the erroneous viewpoint in the federal courts, the Advisory Committee on Rules for Civil Procedure recommended the amendment of Federal Rule 56 by adding the following language at the end of Paragraph (e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.[47]

In order to reduce the possibility of a similar misunderstanding in Ohio, the proposed Ohio summary judgment statute includes a similar provision. This provision constitutes the last two sentences in paragraph (D). Such a provision was also included in Senate Bill No. 214. However, the Code Revision Committee of the Ohio Senate deleted this provision, apparently for the reason that it was still only a recommendation of the U. S. Supreme Court Advisory Committee, and had not yet been made a part of Federal Rule 56. It is the opinion of the writer that the provision should be all means be included in the Ohio statute. The provision is a concise expression of the fundamental principle of summary judgment procedure. It would greatly reduce the possibility of misinterpretation of the proposed Ohio statute on this vital point. While it is to be hoped that the Ohio courts would correctly interpret and apply the proposed Ohio statute even without the inclusion of the provision in question, the experience under Federal Rule 56 demonstrates the danger of misinterpretation, and the consequent desirability of including an explicit provision of this kind.

Use of Materials other than Affidavits

Although, as stated under the preceding heading, the key feature of the summary judgment procedure is the use of affidavits, the proposed Ohio statute is not limited to affidavits. Paragraph (B) of the proposed statute provides in part that:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions of the genuineness of papers or documents, and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Pleadings. The delineation of the issues in a civil action must begin with the pleadings. Therefore, if an issue is not made by the pleadings, it is simply not in the case; it thus presents no problems in connection

---

[47] See note 45, *supra.* Wright, *Rule 56 (e): A Case Study on the Need for Amending the Federal Rules,* 69 HARV. L. REV. 839 (1956), makes a convincing case for the proposed amendment.

with a motion for summary judgment. On the other hand, even though the pleadings do raise a given issue, it is of the essence of summary judgment procedure that the other materials (i.e., affidavits, depositions, etc.) may eliminate that issue by piercing the allegations of the pleadings.[48] Thus, in connection with a motion for summary judgment, the pleadings perform only the preliminary function of initially defining the issues. Once the pleadings have performed this preliminary function, the court, in passing on a motion for summary judgment, then turns to the affidavits, depositions, etc., to determine whether the issues initially defined by the pleadings have been eliminated by the more specific materials. The utility of summary judgment procedure would obviously be destroyed if the sentence in the proposed statute which has just been quoted were misinterpreted by an erroneous holding that summary judgment should be denied simply because an issue was raised by the pleadings, even though the more specific materials showed clearly that the purported issue was not a genuine issue. As stated *supra*,[49] a few federal courts have actually misinterpreted Federal Rule 56 in this manner. This would indicate the desirability of including the last two sentences in paragraph (D) of the proposed Ohio statute, which have been discussed supra.[50] It might be possible to redraft paragraph (B) itself to make this fundamental point clearer; however, the inclusion of the last two sentences in paragraph (D) is simpler, and should remove any possible question.

Depositions. It is obviously desirable that the court consider depositions on file in passing on a motion for summary judgment. The Supreme Court of Ohio expressly approved their use in connection with motions to strike sham pleadings.[51]

Answers to interrogatories. As in the case of depositions, it is obviously desirable that the court consider answers by a party to interrogatories[52] in passing on a motion for summary judgment.

Admissions of the genuineness of papers or documents. Federal Rule 56, paragraph (c), refers simply to "admissions." This reference is to admissions of fact and admissions of genuineness of documents obtained pursuant to Federal Rule 36. The latter Rule provides for a "written requests for the admission . . . of the genuineness of any relevant documents . . . or of the truth of any relevant matter of fact

[48] "The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine or substantial, so that only the latter may subject a suitor to the burden of a trial." Per Judge, later Justice, Cardozo in Richard v. Credit Suisse, 242 N.Y. 346, 350, 152 N.E. 110, 111, (1926).

[49] See text accompanying note 45, *supra*.

[50] See text following note 47, *supra*.

[51] See text accompanying note 4, *supra*.

[52] Either interrogatories annexed to pleadings, pursuant to OHIO REV. CODE §2309.43 (1953) or interrogatories filed in the action pursuant to OHIO REV. CODE §2317.07 (1953).

set forth in the request." There is no such general provision for requests for admissions in Ohio practice. There is, however, a limited provision in Ohio for requests for the admission of the genuineness of papers or documents. This is contained in Ohio Revised Code, Section 2317.31. Therefore, paragraph (B) of the proposed Ohio summary judgment statute is correspondingly limited, to conform to Section 2317.31.[53]

Oral testimony. There is no provision in the proposed Ohio summary judgment statute for the consideration of oral testimony on the motion for summary judgment. Some federal courts have heard and considered oral testimony on motion for summary judgment, although Federal Rule 56 contains no reference to oral testimony.[54] It is quite probable that oral testimony could in some cases be used to good advantage on a motion for summary judgment, and it could therefore be argued that paragraph (B) of the proposed Ohio statute should include a reference to oral testimony. As against this, the inclusion in the statute of a reference to oral testimony might give the erroneous impression that a hearing on the motion for summary judgment was to be a "little trial," preparatory to the actual trial. Such a "little trial" might consume as much time and effort as the actual trial, thus defeating the purpose of summary judgment procedure.[55] Normally, if the issues between the parties cannot be eliminated by affidavits, etc., without resort to oral testimony, this is a strong indication that the court should simply deny the motion for summary judgment.

Stipulations. The parties may narrow the issues between them by stipulation for the purpose of a summary judgment, just as they may do so for the purpose of the trial. Federal courts have considered stipulations in passing on motions for summary judgment, although Federal Rule 56 contains no reference to stipulations. It seems unnecessary to include an explicit reference to stipulations in the proposed Ohio summary judgment statute.[56]

ILLUSTRATIONS OF THE OPERATION OF SUMMARY JUDGMENT PROCEDURE

The following illustrations will give a general indication of the

[53] Paragraph (B) of Senate Bill No. 214 did not include the reference to "admissions of the genuineness of papers or documents." OHIO REV. CODE §2317.31 is probably not widely used. However, the reference to admissions of the genuineness of papers or documents should be included in the proposed summary judgment statute, for completeness.

[54] 6 MOORE, FEDERAL PRACTICE, 2084 (2d ed. 1953). Federal Rule 43 (e) permits the court to hear oral testimony at a hearing on a motion. Ohio practice is similar.

[55] ". . . courts should avoid a lengthy 'trial' for the purpose of establishing that an actual trial is necessary." *Id.* at 2060.

[56] The use by the federal courts of materials other than those enumerated in Federal Rule 56 is discussed *id.* at 2062, and in Comment, *Summary Judgment—Rule 56,* 51 NORTHWESTERN U.L. REV. 370 (1956).

operation of the proposed Ohio summary judgment statute, if it should be enacted into law.

Illustration 1. Suit on account (hypothetical case). Henry Merchant sues John Customer on an account, using the "short form of pleading" under Ohio Revised Code Section 2309.32. Defendant files an answer consisting simply of a general denial. Plaintiff moves for summary judgment, filing in support of his motion a positively sworn affidavit in which he states specifically that he sold and delivered certain described merchandise to Defendant at a certain time and place, and for a specified price, but that Defendant has paid no part of the purchase price, attaching to his affidavit any documentary proof available. Notwithstanding the fact that Defendant has filed a general denial, if he fails to file an opposing affidavit specifically controverting an essential element of Plaintiff's case, judgment will be entered in favor of Plaintiff. However, if Defendant files a positively sworn opposing affidavit in which he specifically denies that the merchandise was sold to him, Plaintiff's motion for summary judgment will be denied; *the court will not attempt to pass upon the truth of the conflicting affidavits.*[57]

Illustration 2. Suit for foreclosure of mortgage (hypothetical case). Lewis Lender sues Bill Borrower for the foreclosure of a real estate mortgage, making the usual allegations employed in such actions. Defendant files an answer consisting of a general denial. Plaintiff moves for summary judgment, filing in support of his motion a positively sworn affidavit in which he states specifically the facts concerning the creation of the indebtedness and the execution of the mortgage, and the exact dates and amounts of all payments on the mortgage by Defendant. The facts stated in the affidavit clearly indicate that Defendant is in default and that Plaintiff is entitled to a decree of foreclosure. Notwithstanding Defendant's general denial, if he fails to file an affidavit setting forth specific facts indicating that Plaintiff is not entitled to foreclosure, judgment will be entered in favor of Plaintiff. However, if Defendant files an opposing affidavit, positively sworn to, in which he sets forth specific facts indicating that Plaintiff is not entitled to foreclosure, Plaintiff's motion for summary judgment will be denied; *the court will not attempt to pass upon the truth of the conflicting affidavits.*[58]

Illustration 3. Suit under Federal Employers' Liability Act (actual case[59]*).* Plaintiff Wilkinson alleged in his complaint that Defendants (as receivers of the Seaboard Airline Railway) were operating a train in interstate commerce; that he was employed by Defendants to operate the train and was negligently put to work on or about the train where the roadbed and right-of-way, due to the negligence of Defendants, was

---

[57] Just as a court does not pass upon the truth of conflicting testimony in considering a motion for a directed verdict. See notes 28 and 44, *supra.*

[58] See notes 28 and 44, *supra.*

[59] Wilkinson v. Powell, 149 F. 2d 335 (C.C.A. 5, 1945).

unsafe; and that while so working he suffered injuries and burns on and about his feet, legs, thighs, and body. He prayed for judgment in the sum of $10,000 and costs. Defendants in their answer denied the allegation of negligence. Defendants moved for summary judgment under Federal Rule 56, attaching certain affidavits to the motion. Defendants' affidavits stated these facts: Plaintiff was the conductor of a freight train. After instructing his crew with regard to switching cars, Plaintiff sat down by a fire that had been built by an employee of the Southern Kraft Paper Company some forty feet from the track upon which Plaintiff's train was standing. While sitting by the fire Plaintiff had a spell, as a result of which he fell into the fire and received burns about his left leg and other parts of his body. This fire was not on the premises of the Defendants nor upon the tracks, roadbeds, or right-of-way controlled or maintained by them. At the hearing on Defendants' motion for summary judgment, Plaintiff offered no counter-affidavits and no testimony. In due course, the District Court granted Defendants' motion and entered summary judgment for the Defendants. Upon appeal, the Circuit Court of Appeals affirmed, stating in part:

> . . . . upon the trial of appellees' motion, appellant's failure to offer in evidence counter-affidavits or testimony of some kind to offset the affidavits filed by appellees warranted the court below in finding that no genuine issue of a material fact existed.

CONCLUSION

At a time when the delay in the trial of cases and the congestion of court dockets is a major problem, careful consideration should be given to any improvement in procedure which will make a contribution toward the solution of this problem. Summary judgment procedure will assuredly make such a contribution. The operation of summary judgment procedure in New York has been thus described by a New York judge:

> In its actual working, Rule 113[60] has resulted in none of the threatened evils. It has not given rise to abuses that were once feared, that is, to the exclusion of arguable defenses or claims or to the improper use of the motion to anticipate an opponent's line of proof. It has reduced delay and congestion in our calendars. It has tended to minimize the expense of litigation. It has fostered public confidence in the administration of justice.[61]

An Ohio lawyer recently referred to summary judgment as "a procedural tool, that, when properly and effectively utilized, can contribute

---

[60] The New York summary judgment Rule, adopted in 1921 [author's footnote].

[61] SHIENTAG, SUMMARY JUDGMENT, 105 (1941). This book contains a detailed discussion of the actual operation of summary judgment procedure in New York, written from the viewpoint of a trial judge.

much to the speedy administration of justice."[62]

Summary judgment procedure is long overdue in Ohio, the fifth most populous State in the Union. It is merely an extension and modernization of the motion to strike sham pleadings. The use of such a motion was approved by the Supreme Court of Ohio in 1911,[63] but it has been of only limited effectiveness. Some twenty-six states now have summary judgment procedure.[64] The federal courts have been utilizing it since 1938.

It is to be hoped that Ohio will adopt this thoroughly tried and tested procedure in the near future.

---

[62] "Some Comparisons of the Ohio Civil Practice and the Federal Rules of Civil Procedure," an address by Mr. William E. Knepper of Columbus before the Ohio Common Pleas Judges Association, December 3, 1957, 31 OHIO BAR 17, 21 (January 13, 1958).

[63] See note 2, *supra.*

[64] The following tabulation of state summary judgment provisions is taken principally from Korn and Paley, *supra,* note 11.
ARIZONA REV. STAT. ANN., Rules of Civil Proc., Rule 56 (1956); ARK. STAT. ANN. §§29-201 to 29-210, (1947); CALIF. CODE CIV. PROC. §437c (West, 1954); Colo. Rev. St. Ann. R. Civ. P. 56; 13 Del. Code Ann., Ct. Rule 56 (1953); D.C. Fed. R.C.P. Rule 56; D.C. Mun. Ct. Rule 16; ILL. ANN. STAT., *c.* 110 §57 (Smith-Hurd Civ. Proc. Supp. 1956); 58 Iowa Code Ann., R. Civ. P. 237 (1951); Ky. Prac. and Serv. R. Civ. P. 56, (Baldwin's 1956); 3 Md. Ann. Code 4873, General Rules Prac. & Proc. Summary Judgment Rule 1 (1951); MASSACHUSETTS ANN. LAWS, c. 231, §59B (1956); MICH. STAT. ANN. §27.989 (1938); Minn. R. Civ. P. 56, 232 Minn. Rep. (1952); NEBR. REV. STAT. §25-1330 to 1336 (1956 Reissue); 1 Nev. Rev. Stat. Rule Civ. P. 56 (1956); N.J.R. Civ. P. 4:58 (1953); N.M. STAT. ANN., §21-1-1 (56) (1953); N.Y. Rules of Civ. P., Rule 113 (1956); N.D. Rev. Code §28-0911 (1943); Gen. L. of R.I. §9-7-1 (1956); Tex. Ann. Rules, R.C.P. 166A (1955); 9 Utah Code Ann., R. Civ. P. 56 (1953); 2 Va. Code Ann. Rules of S. Ct. of App., Rule 3:20 (Supp. '56); Wash. Rev. Code, Rules of Pleading, Prac. & Proc., Rule 19 ('56 Supp.); W. VA. CODE ANN. §5524 (1955); WIS. STAT. §270.635 (1955).