PROCEDURE UNDER THE OHIO SUMMARY JUDGMENT STATUTE

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Ohio Revised Code, Section 2311.041,[1] effective November 9, 1959, authorizes summary judgment procedure in the Ohio courts. It will be applicable to actions commenced on or after its effective date.[2] Senate Bill 58, 103rd General Assembly, which enacts this statute, was sponsored in the Senate by Senator Thomas F. O'Shaughnessy of Franklin County and in the House by Representative John E. Kissner of Defiance County.

In a previous article,[3] the writer discussed a similar bill in the previous (102nd) General Assembly which failed of passage. To avoid repetition, reference will be made herein to portions of the previous article. The only substantial change made in the bill set forth in the previous article[4] was the addition of a provision expressly requiring notice of the hearing on the motion. There were also some changes in phraseology.

With the enactment of Ohio Revised Code, Section 2311.041, a useful procedure becomes available in the Ohio courts.[5] There will inevitably be a period of adjustment to the summary judgment procedure, as there is in the case of any change in court procedure. Although the Ohio statute is more explicit in several respects than summary judgment statutes and rules in other jurisdictions, it does not attempt to cover every problem which may conceivably arise. Such an attempt would have made the statute unduly complicated.

Fortunately, the difficulties of adjustment to the Ohio statute are lessened by the fact that other jurisdictions have had many years of experience with summary judgment procedure. Therefore, national encyclopedias, digests, and form books deal with summary judgment procedure. The topic is classified under various headings, such as "Federal Civil Procedure," "Judgments," and "Pleading."

As summary judgment procedure has been available in the federal courts since the adoption of the Federal Rules of Civil Procedure in 1938, and as Federal Rule 56 was used as a starting point in the drafting of the Ohio statute,[6] treatises on federal procedure may be particularly helpful.

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[1] 128 LAWS OF OHIO S. 58.

[2] OHIO REV. CODE § 1.20 (1953).

[3] Wills, *A Proposed Summary Judgment Statute for Ohio,* 19 OHIO ST. L. J. 1 (1958).

[4] 19 OHIO ST. L. J. 7-9.

[5] It is available in municipal courts, as well as in courts of common pleas, by virtue of OHIO REV. CODE § 1901.21, in the municipal court chapter, which provides in part: "In any civil case or proceeding if no special provision is made in sections 1901.01 to 1901.38, inclusive, of the Revised Code, the practice and procedure shall be the same as in courts of common pleas."

[6] 19 OHIO ST. L. J. 9.

TYPES OF ACTION IN WHICH SUMMARY JUDGMENT PROCEDURE MAY BE UTILIZED

Under the Ohio statute, summary judgment may be granted in any civil action, without any restriction as to the nature or kind of action. This spares the Ohio courts and lawyers the task of interpretation faced in other states in which, especially under early forms of summary judgment statutes, summary judgment was available only in specified types of action.[7]

However, it should be recognized that, while the Ohio statute contains no limitation as to the kind of civil action in which summary judgment should be granted, it may properly be granted in any particular action only when, although an issue of fact is presented by the pleadings, the issue is not a *genuine* issue. Obviously, such cases are in a minority. In most cases in which issues are raised by the pleadings, such issues are genuine; that is, the parties have evidence to support their respective pleadings, and the conflict between the evidence of the parties must be resolved at the trial by the trier of the facts, *i. e.*, the jury or a judge sitting without a jury. In cases in which it is apparent that there is such a genuine issue, it is a waste of time for a party to file a motion for summary judgment. However, if counsel for one party has reason to believe that the adverse party has no evidence to support his pleadings, and that the issue presented by the pleadings is therefore not a *genuine* issue, consideration may be given to the possibility of filing a motion for summary judgment.

Experience in other jurisdictions indicates that one of the most frequent types of cases in which summary judgment is granted is a suit for the purchase price of goods sold and delivered, in which the defendant files an answer consisting of a general denial.[8]

Summary judgment is frequently granted in suits on promissory notes and other negotiable instruments.[9] In Ohio, the motion for summary judgment would probably be employed in suits on promissory notes only when the instrument does not contain a cognovit clause, or when the cognovit clause for some reason is not effective. Ordinarily, when a note sued upon contains a cognovit clause, the plaintiff will prefer to take a cognovit judgment on the note. However, if a cognovit judgment is vacated, and defendant given leave to answer, either party might thereafter give consideration to the possibility of moving for summary judgment.

In mortgage foreclosure cases, the defendant is sometimes tempted to file an answer consisting of a general denial, in order to stave off judgment and thereby remain in possession for a substantial period of time. In such cases, summary judgment is frequently effective.[10]

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[7] 19 OHIO ST. L. J. 11.

[8] A hypothetical case of this kind, showing the operation of summary judgment procedure, is set forth in 19 OHIO ST. L. J. 21.

[9] The original English summary judgment statute was limited to bills of exchange and promissory notes. 19 OHIO ST. L. J. 5.

[10] A hypothetical case of this kind, showing the operation of summary judg-

Negligence cases in which summary judgment may properly be granted are exceptional. In most negligence cases, there are genuine issues of fact. The parties themselves are often witnesses, and their testimony, as well as the testimony of non-party witnesses, is frequently in sharp conflict. In such cases, the affidavits and other evidentiary materials submitted in support of and in opposition to a motion for summary judgment would clearly establish the existence of a genuine issue of fact, and the motion would therefore be denied. Thus, in many intersection cases, plaintiff and his witnesses testify that the traffic light facing the defendant was red when defendant entered the intersection, whereas defendant and his witnesses testify that the traffic light was green. In such cases, it is useless for either party to move for summary judgment, as the affidavit in opposition which will undoubtedly be filed by the adverse party will prevent the granting of the motion.

There are occasional negligence cases, however, in which summary judgment may be granted, because of the absence of any genuine issue as to negligence or contributory negligence.[11]

Furthermore, a decisive defense in a negligence action, such as the statute of limitations, may be the basis for a summary judgment in favor of the defendant. Such defenses will be discussed *infra*.

Statute of Limitations

Regardless of the merits of plaintiff's cause of action, the statute of limitations may be a complete bar. When this decisive defense is asserted by the defendant, efficient judicial administration calls for the adjudication of this issue prior to the trial of the other issues, if possible. If this issue is determined in favor of the defendant, it is unnecessary to try the other issues. In cases of this kind, the defendant will often attempt to obtain an adjudication of this issue before trial, but the plaintiff will sometimes prefer to avoid this if possible. In the past, the procedure available in Ohio to the defendant for obtaining an early adjudication of this issue has not been completely satisfactory.

If it appears from the face of plaintiff's petition that the action was not brought within the time limited for the commencement of such actions, the defendant may raise the defense of the statute of limitations by a special demurrer, under Ohio Revised Code, section 2309.08(I). This may result in judgment for the defendant on the demurrer, thus avoiding a pointless trial. On the other hand, if the defense of the statute of limi-

ment procedure, is set forth in 19 Ohio St. L. J. 21.

[11] An actual Federal Employers' Liability Act case, Wilkinson v. Powell, 149 F.2d 335 (5th Cir. 1945), in which defendant's motion for summary judgment was granted, is discussed in 19 Ohio St. L. J. 21-22.

In American Airlines v. Ulen, 186 F.2d 529 (D.C. Cir. 1949), an action for damages for personal injuries resulting from the alleged negligence of the defendant, the district court granted plaintiff's motion for summary judgment, and submitted the question of damages to a jury. The resulting judgment for plaintiff was affirmed by the court of appeals.

tations does not appear on the face of the petition, the proper method of raising the defense is by answer.[12] However, if the defendant raises the defense by answer, the plaintiff may file a reply raising an issue of fact with respect to the statute of limitations. Even if the issue is not genuine, it has, in the past, prevented the disposition of the case before trial. Therefore, it is not surprising that in this situation Ohio defendants have experimented with the motion to dismiss, which is without statutory authorization. Sometimes the motion to dismiss has been effective, and has resulted in a judgment for the defendant without trial. In one case, the Ohio Supreme Court gave a qualified approval to the use of the motion to dismiss to raise the defense of the statute of limitations.[13] In another case, decided a few months earlier, the same court held a motion to dismiss ineffectual, in the particular situation, to raise the defense of the statute of limitations.[14] With the enactment of the Ohio summary judgment statute, a clear cut procedure, specifically authorized by statute, is now available to the defendant who is unable to raise the defense of the statute of limitations by special demurrer. The defendant may now raise that defense by answer, along with his other defenses, and if the plaintiff by reply raises a factual issue with respect to the statute of limitations which is not genuine, the defendant may move for summary judgment. There is no longer any need to use the dubious motion to dismiss for the purpose of raising the defense of the statute of limitations.

Other Defenses

In addition to the statute of limitations, there are other defenses which may be decisive in a particular case, furnishing a possible basis for summary judgment in favor of the defendant. Examples of such defenses are the statute of frauds, res judicata, release, and failure to present a claim to an administrator of the estate of a decedent within the required time.

Distinction Between Summary Judgment and Judgment on the Pleadings

The Ohio motion for judgment on the pleadings, like the Ohio demurrer, always has been and still is limited to the pleadings; that is, the court in passing on such a motion may consider only facts appearing on the face of the pleadings. If a demurrer or a motion for judgment on the pleadings improperly attempts to raise factual issues which do not appear on the face of the pleadings, it is a "speaking demurrer," or a "speaking motion," and the court, in passing on the demurrer or motion, must disregard the factual issues thus improperly raised. This rule is not changed by the Ohio summary judgment statute. Rule 12(c) of the Federal Rules

[12] Atkinson, *Pleading the Statute of Limitations,* 36 Yale L. J. 914 (1927); Atkinson, *Re-examination of the Procedural Aspects of the Statute of Limitations,* 16 Ohio St. L. J. 157 (1955).

[13] Wentz v. Richardson, 165 Ohio St. 558, 138 N.E.2d 675 (1956).

[14] Russell v. Drake, 164 Ohio St. 520, 132 N.E.2d 467 (1956).

of Civil Procedure provides that

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

However, there is no such provision in the Ohio statutes. Therefore, if a party to an action in an Ohio state court moves only for judgment on the pleadings, it would presumably still be improper for the court to consider matters not appearing on the face of the pleadings.

On the other hand, a motion for summary judgment under Section 2311.041, Ohio Revised Code, is a *legitimate* "speaking motion." By the terms of the statute, an Ohio court, in passing on a motion for summary judgment, is expressly authorized to consider the evidential materials enumerated in the statute. Therefore, if an Ohio lawyer wishes to invoke facts not appearing on the face of the pleadings, he should so word his motion as to make it clear that it is a motion for summary judgment, rather than for judgment on the pleadings.

Furthermore, the court may grant a motion for summary judgment solely on the basis of the pleadings.[15] In other words, a motion for summary judgment will accomplish as much as a motion for judgment on the pleadings. However, as explained above, the converse is not true; a motion for judgment on the pleadings will not accomplish as much as a motion for summary judgment. Thus in Ohio the two motions are not interchangeable, as they are to a considerable extent in federal practice.

Distinction Between Motion for Summary Judgment and Motion to Strike Sham Pleading

Although, from the historical viewpoint, the motion for summary judgment may be said to have developed from the motion to strike a sham pleading,[16] the uncertainties as to the scope of the motion to strike a sham pleading, and as to the power of the court when passing on such a motion, led to the enactment of the summary judgment statute. With the availability of summary judgment procedure, there would seem to be no reason why an Ohio lawyer should have any occasion to file a motion to strike a pleading as a sham. Furthermore, in drafting a motion for summary judgment, the inclusion of an application to strike an opposing pleading as a sham would appear to be redundant, and perhaps confusing.

Supporting and Opposing Affidavits

The provisions for the use of affidavits are the heart of the summary judgment statute. Without the use of affidavits, summary judgment procedure would be no more effective than the motion to strike sham plead-

[15] Reynolds v. Needle, 132 F.2d 161 (D.C. Cir. 1942).

[16] 19 Ohio St. L. J. 2-5.

ings. Nevertheless, summary judgment procedure has been criticized as "trial by affidavit." Much of this criticism results from the mistaken belief of the critics that a judge, in passing on a motion for summary judgment, decides issues of fact. As previously pointed out, this is incorrect.[17] In passing on a motion for summary judgment, the court merely determines whether there are genuine issues of fact. If it determines that there are not, it sustains the motion and enters summary judgment. However, if it determines that there are genuine issues of fact, it simply overrules the motion for summary judgment. It does not determine the issues of fact on the motion; the parties have a right to try these issues in open court, before a jury or a judge, as the case may be.

The requirements for the summary judgment affidavits are set forth in the first sentence of paragraph (D) of the statute:

> 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.

Thus the affidavits differ from pleadings in at least four respects:

(1) They shall be made on personal knowledge.

(2) They must be sworn to positively.[18]

(3) They shall set forth such facts as would be admissible in evidence. Hearsay, conclusions, ultimate facts, and so on, are not permissible in affidavits.

(4) They shall show affirmatively that the affiant is competent to testify to the matters stated therein.

With reference to the requirement that the affidavits shall set forth such facts as would be admissible in evidence, it should be particularly noted that the language of the affidavits is considerably more specific than that of pleadings. A pleading states ultimate facts, but a summary judgment affidavit states evidence. It has been said that an affidavit on a motion for summary judgment should be phrased similarly to the testimony of the witness in narrative form, that is, it should be phrased as specifically as if the witness were testifying orally in narrative form. As a New York judge put it:

> "Let the affidavit follow substantially the same form as though the affiant were testifying in court."[19]

Legal argument should be set forth in memoranda; it has no place in an affidavit.[20]

Examples of the phraseology employed in summary judgment affidavits may be found in form books.[21].

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[17] 19 OHIO ST. L. J. 14-17.

[18] OHIO REV. CODE § 2309.49 provides that the verification of a pleading "shall be sufficient if it states that the affiant believes the facts stated in the pleading to be true."

[19] SHIENTAG, SUMMARY JUDGMENT 49 (1941).

[20] Porter v. American Tobacco Co., 7 F.R.D. 106 (S.D.N.Y. 1946).

[21] See, *e.g.*, 4 WEST, FEDERAL FORMS §§ 4727, 4728, and 4729 (1952), and 4

If an affidavit contains some inadmissible evidence, the court may disregard it, or, if no objection is made, the court may apparently regard the objection as waived, and consider the evidence in passing on the motion. In view of the latter possibility, it would appear to be good practice for a party to file a motion to strike the inadmissible evidence, if he wishes to have it excluded.[22] The Ohio statute, like Federal Rule 56, does not deal expressly with this problem.[23]

Moving for Summary Judgment

The preparation of a motion for summary judgment ordinarily presents few problems.[24] The wording of the motion should indicate clearly that it is a motion for summary judgment, and not for judgment on the pleadings or to strike the opponent's pleading as a sham. Reference in the motion to Ohio Revised Code, Section 2311.041 may also be desirable. Reference in the motion to the specific affidavits and other evidentiary materials offered in support of the motion may be desirable. Such supporting materials should be filed at the same time as the motion.

Notice of the filing and the date of the hearing must be given to the adverse party or his counsel at least five days prior to the hearing, unless such notice is waived.

If opposing affidavits are filed by the non-moving party, counsel for the moving party may consider filing a motion to strike inadmissible matter from such affidavits.[25]

Normally, affidavits in support of the motion which merely impeach the witnesses of the non-moving party are ineffective, as they merely raise issues of credibility, which cannot be determined by the court in passing on a motion for summary judgment.[26]

Oral or written argument or both should be presented to the court in support of the motion, in accordance with the method of hearing employed by the court.

Opposing a Motion for Summary Judgment

When a motion for summary judgment is made by a party, the first task of counsel for the adverse party is to determine whether the affidavits or other evidential materials filed in support of the motion, if unopposed, are sufficient to support the motion and authorize the grant of summary judgment in favor of the moving party. If the affidavits submitted by the

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Winslow, Forms of Pleading and Practice §§ 5592, 5593, and 5594 (3d ed. 1934).

[22] The opinion by the late Judge Nevin in Ernst Seidelman Corp. v. Mollison, 14 Fed. Rules Service 56e.1, Case 4, 10 F.R.D. 426 (S. D. Ohio, 1950), is a ruling on such a motion.

[23] This problem is discussed in 6 Moore, Federal Practice 2334-2336 (2d ed. 1953).

[24] 15 Am. Jur. Pleading and Practice Forms Number 15:1558 (1958) is a general form of motion for summary judgment.

[25] See note 22, *supra*, and accompanying text.

[26] 6 Moore, Federal Practice 2332 (2d ed. 1953).

moving party are clearly insufficient, counsel for the adverse party would not be required to file opposing affidavits, and would only file a motion to strike the affidavits, or portions thereof (if appropriate), and oppose the motion by oral or written argument or both.

Usually, however, it would be dangerous for the adverse party to make the assumption that the affidavits submitted by the moving party are insufficient. If they are in fact sufficient, the burden of going forward is cast upon the adverse party. This is the fundamental principle of summary judgment procedure. It is explicitly formulated in the last two sentences of paragraph (D) of the Ohio statute:

> 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.

Therefore, in most cases, counsel for the adverse party should, if possible, file opposing affidavits or other evidentiary materials contradicting the affidavits filed in support of the motion. The adverse party's affidavits may also properly impeach as well as contradict the moving party's affidavits, as impeaching affidavits may raise a genuine issue of fact which would require the court to overrule the motion for summary judgment.[27] Counsel for the adverse party may consider filing a motion to strike inadmissible matter from the affidavits filed in support of the motion.[28]

There are situations where it would be unjust to render summary judgment even though the adverse party fails to oppose the motion with adequate affidavits or other evidentiary materials. Paragraph (E) is designed to meet these situations:

> (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.

Thus, if the facts are exclusively within the knowledge of the moving party, or if the adverse party has been unable to ascertain the identity or location of a witness, or has been unable to obtain an affidavit from him, or if the adverse party can present the evidence adequately only by examining the witness in open court, where his demeanor may be observed, the court may grant the relief authorized by paragraph (E). It should be noted, however, that the adverse party must show affirmatively by his own affidavits that he is entitled to the relief authorized by paragraph (E).

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[27] See note 26, *supra.*

[28] See note 25, *supra,* and accompanying text.

It should also be noted that affidavits under paragraph (E) perform a function entirely distinct from that performed by affidavits under paragraph (D).

> Affidavits referred to in rule 56 (f) [corresponding to paragraph (E) of the Ohio statute] are not evidentiary but are in the nature of an excuse setting forth reasons why the opposing party is presently unable to produce evidentiary affidavits essential to justify his position.[29]

In some cases, counsel for the adverse party may believe that not only should the motion of the moving party be overruled, but that summary judgment should be rendered in favor of his client. While some courts have held that the court, in passing on a motion for summary judgment, has power to render summary judgment *against* the moving party, without any cross motion by the adverse party, there is authority to the contrary,[30] and safe practice would dictate the filing of a cross motion for summary judgment by the adverse party.[31]

Order Specifying Facts That are Without Controversy, When Motion for Summary Judgment Denied

Even when a motion for summary judgment is denied, it may be possible for the court, under paragraph (C), to ascertain that there is no controversy as to certain material facts, and accordingly to make an order on its journal specifying the facts that are without controversy. Thus, even though a trial is necessary, the issues may be considerably narrowed.

An order specifying the facts that are without controversy has sometimes been referred to as a "partial summary judgment." This term is a misnomer, as the order is not a judgment at all. It is not immediately reviewable.

Discretion of the Court

As stated *supra*, the summary judgment statute does not attempt to cover every conceivable problem which may arise. Necessarily, some matters must be left to the discretion of the court. Thus, while paragraph (B) requires at least five days notice of the hearing, a court might require a longer time.

"The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits." Paragraph (D). Continuances may be necessary when this is done.

Paragraph (E) gives the court considerable discretion in handling the situations referred to in that paragraph. Such discretion is necessary, due to the variety of the situations of this kind which may arise.

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[29] Note, *Civil Procedure—Summary Judgment Under the Federal Rules—Moving Party with all the Information*, 41 Iowa L. Rev. 453, 455 (1956).

[30] Annot., *Court's power, on motion for summary judgment, to enter judgment against movant*, 48 A.L.R.2d 1188 (1956).

[31] Annot., *Proper procedure and course of action by trial court, where both parties move for summary judgment*, 36 A.L.R.2d 881 (1954).

APPEAL

In Ohio, only judgments and final orders are reviewable by the Court of Appeals.[32] A summary judgment, like any other judgment, is appealable.[33] Hundreds of summary judgments in the federal district courts have been reviewed as final judgments.[34] However, an order overruling a motion for summary judgment seems clearly not to be a final order, and is therefore not appealable.[35]

A summary judgment in favor of the plaintiff on the issue of liability alone, under the last sentence of paragraph (B) of the statute, is expressly stated to be interlocutory in character. Therefore, it would not be immediately reviewable. If, however, after trial of the issue of damages, final judgment was entered in favor of the plaintiff, an appellate court, in reviewing such final judgment, might reverse for error in the entry of the interlocutory summary judgment in favor of the plaintiff.

Likewise, if a court in passing on a motion for summary judgment does not render a summary judgment on the whole case, but does, pursuant to paragraph (C) of the statute, make an order specifying the facts that are without controversy, such an order is not a final order, and therefore is not immediately reviewable.[36] If, however, after trial, a final judgment is entered, an appellate court, in reviewing such final judgment, undoubtedly has the power to reverse for error in the entry of the order specifying the facts that are without controversy.

If an appeal from a summary judgment is contemplated, separate findings of fact and conclusions of law, under Ohio Revised Code, Section 2315.22, are not appropriate, as the court does not determine issues of fact in passing on a motion for summary judgment.

In taking an appeal on questions of law from a summary judgment, safe practice dictates filing a bill of exceptions pursuant to Ohio Revised Code, section 2321.05, containing all the affidavits and other evidentiary materials submitted to the court on the motion for summary judgment. It could not safely be assumed that such papers, even if filed with the Clerk, constitute "original papers" within the meaning of Ohio Revised Code, Section 2505.08, in view of the previous holdings of the Ohio courts that many kinds of affidavits are not "original papers."[37]

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[32] OHIO CONST. art. IV, § 6.

[33] 6 MOORE, FEDERAL PRACTICE 2315 (2d ed. 1953).

[34] There was no general provision for the review of interlocutory orders in the federal courts until the Interlocutory Appeals Act of 1958. 28 U.S.C. § 1292 (b), 72 Stat. 1770 (1958).

[35] Marcus Breir Sons, Inc., v. Marvlo Fabrics, Inc., 173 F.2d 29 (2d Cir. 1949).

[36] Leonard v. Socony-Vacuum Oil Co., Inc., 130 F.2d 535 (7th Cir. 1942).

[37] See, *e.g.*, Willett. Admr., v. New York Central R. R., 73 Ohio App. 59, 54 N.E.2d 317 (1943).