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# Summary Judgments in Nebraska

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# SUMMARY JUDGMENTS IN NEBRASKA

## I. INTRODUCTION

In 1951, the Nebraska Legislature enacted a summary judgment procedure for the state, patterned after Rule 56 of the Federal Rules of Civil Procedure.[1] This article will examine the grounds for application of the procedure, discuss its relationship with the other pre-trial motions presently available, and analyze the relative success of summary judgment as a pre-trial procedure in Nebraska in the thirteen years since its inception.[2]

The primary purpose of summary judgment is the elimination of delay caused by sham pleadings. It is a method by which a party can pierce, or go beyond, the pleadings of the opponent to show that there is not a genuine issue, and therefore no reason why the litigation should proceed to a lengthy and costly trial.[3] Once it is established that no reason for trial exists, the court is empowered to grant summary judgment to the moving party without trial. The procedure discourages those who might be inclined to use the threat of trial as a means of forcing settlement.

There was a further important practical consideration favoring adoption of the procedure in Nebraska. In certain areas of the state the district court's jurisdiction extends to several counties, and the district judge must therefore move from county to county. When pre-trial procedure was limited to the traditional motions, such as motion to strike, motion to make more definite and certain, and demurrer, each motion was considered by the judge when he was sitting in that county, and upon disposal of the motion, one of the parties had an opportunity to amend. At the next sitting in that county, there would be additional pre-trial motions, with their attendant disposal and leave to amend. Under these circumstances, the litigation could be delayed almost indefinitely by

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[1] NEB. REV. STAT. §§ 25-1330 to -1336 (Reissue 1956). For history of the procedure generally, see Clark & Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1929). For more recent developments, see Asbill & Snell, *Summary Judgment Under the Federal Rules—When an Issue of Fact Is Presented*, 51 MICH. L. REV. 1143 (1953). See also Bauman, *A Rationale of Summary Judgment*, 33 IND. L.J. 467 (1958); Bauman, *The Evolution of the Summary Judgment Procedure*, 31 IND. L.J. 329 (1956); Clark, *The Summary Judgment*, 36 MINN. L. REV. 567 (1952).

[2] It is believed that all Nebraska cases dealing with summary judgment and its propriety have been collected in this article. See appendix.

[3] Miller v. Aitken, 160 Neb. 97, 69 N.W.2d 290 (1955).

either party. The purpose of summary judgment was to alleviate these obstructions to the administration of justice in the state courts by providing a means to effectively combat dilatory pleadings.[4]

These are noteworthy goals, particularly in the age of crowded court dockets. Yet summary judgment is a delicate mechanism, for if improperly used it will not only fail in its primary mission of simplicity, but will actually add to the problems of delay and complexity by reversal on appeal and remand for a jury trial. In addition, it must be realized that the procedure was not intended to be, nor should it ever be, a substitute for a jury trial.[5] There is a place in the judicial process for both trial by jury and summary judgment, and so long as each is confined to the scope for which it was intended, there is no conflict with the basic precepts of jurisprudence embodied in trial by jury.[6] With these basic policies in mind, the grounds for invoking summary judgment, and the means of obtaining its relief, will be examined.

## II. GROUNDS FOR SUMMARY JUDGMENT

Generally stated, there are two requirements which must be met before a movant is entitled to summary judgment. First, there must exist no genuine issue as to any material fact in the case; second, the movant must be entitled to judgment as a matter of law.[7]

Whether an issue of fact is present, while simple in statement, becomes complex in application. The basic problem is that the term defies objective definition, for the various possibilities are as limitless as factual situations themselves. In analyzing the problem, fact can be placed in one of two categories. The first is an evidentiary fact. Suppose, for example, that *X* and *Y* are drivers

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[4] *Hearing Before the Committee on the Judiciary on L.B. 144,* pp. 149-51 (1951).

[5] Clark, *The Summary Judgment,* 36 MINN. L. REV. 567, 579 (1952): "What is needed is the application of common sense, good judgment, and decisive action, on the one hand, not to shut a deserving litigant from his trial and, on the other, not to allow harassment of an equally deserving suitor for immediate relief by a long and worthless trial."

[6] The constitutionality of the summary judgment was tested early, and upheld in Dwan v. Messarene, 199 App. Div. 872, 192 N.Y. Supp. 577 (1st Dep't 1922), on the ground that it did not infringe on the right to trial by jury. See also Hanna v. Mitchell, 202 App. Div. 504, 196 N.Y. Supp. 43 (1st Dep't 1922); CLARK, CODE PLEADING 564 (2d ed. 1947).

[7] NEB. REV. STAT. § 25-1332 (Reissue 1956). See Illian v. McManaman, 156 Neb. 12, 54 N.W.2d 244 (1952).

involved in an automobile accident. *X* brings suit, claiming *Y's* negligence in driving in excess of the speed limit was the proximate cause of the collision. *Y* denies this, stating that he was traveling below the speed limit. There are no other witnesses, and no means of determining *Y's* speed other than by the testimony of *X* and *Y*. In such a case, the question as to which driver's version is most accurate must be decided by the trier of fact. There is no possibility of a summary judgment under such circumstances, for there is a genuine issue of fact.

The second type of fact is an inference of fact drawn from the evidentiary facts. Here the propriety of a summary judgment begins to approach the so-called "gray zone." Suppose, in the negligence case, that it is agreed that *Y* was driving at the posted speed limit, yet the road at the time was slippery or icy so as to make the speed unreasonable. Here the first requirement of summary judgment has been met, for both parties agree as to the speed, the evidentiary fact. The analysis now turns to the second requirement, and the question of whether *X* is entitled to judgment as a matter of law. Only if this question is answered affirmatively is there a valid basis for summary judgment. Much of the confusion as to just what constitutes an issue of fact originates at this point, for instead of viewing the question in terms of the "matter of law" requirement, the courts hold that there is an issue of fact. Apparently they mean that there is an issue as to *inferences of fact*, which in effect is the same as saying that the movant is not entitled to judgment as a matter of law. But by abbreviating to the bare statement that there is an issue of fact, inference of fact is confused with evidentiary fact, and the second requirement for summary judgment becomes mere surplusage. For the purposes of clarity, when there is an inference of fact question involved, it should be analyzed in terms of the "matter of law" requirement for summary judgment.

The two types of fact and their comparison with the requirements for summary judgment, lead to three basic situations, and each can be illustrated by Nebraska case law. In the first place, summary judgment is not appropriate where there is a dispute as to a material evidentiary fact. *Youngs v. Wagner*[8] was a tort action by a guest against the host driver for injuries received in an automobile accident. The accident occurred when the defendant's

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[8] 172 Neb. 735, 111 N.W.2d 629 (1961). For contract action in this category, see Clearwater Elevator Co. v. Hales, 167 Neb. 584, 94 N.W.2d 7 (1959) (whether materials furnished by subcontractor, for purposes of lien, were in performance of the original contract).

car turned a corner at the intersection of two highways. The affidavits of the plaintiff, defendant, and a third person passenger differed as to speed and as to warning by the defendant. The trial court sustained the defendant's motion for summary judgment, but the Nebraska Supreme Court reversed, holding that the factual disputes were relevant in determining whether there had been gross negligence, and that a genuine issue was thereby raised. Only the trier of fact could resolve the question.

Where there is no dispute as to evidentiary facts, but the inferences do not establish that there should be judgment as a matter of law, summary judgment is inappropriate. This situation is illustrated by *City of Omaha v. Lewis & Smith Drug Co.*,[9] an action brought for declaratory judgment to determine whether the defendant was violating a Sunday-closing ordinance by selling groceries. In reversing a summary judgment for the defendant, the court stated that the question of what items were within the language of "articles sold from a grocery store" was one of fact and precluded summary judgment. In effect, the court held that while there was no issue of evidentiary fact, the movant was not entitled to judgment as a matter of law. Both parties agreed as to the specific items the defendant was selling, but disagreed as to whether such items fell within the statutory language. This disagreement could not be settled as a matter of law, and required a jury to determine the result.

The final situation is one in which there is no dispute as to evidentiary facts, and the facts so established lead to a certain conclusion as a matter of law. Under these circumstances, summary judgment is applicable. In *Miller v. Aitken*,[10] plaintiff

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[9] 156 Neb. 650, 57 N.W.2d 269 (1953). For tort actions in this category, see Johnson v. Metropolitan Util. Dist., 176 Neb. 276, 125 N.W.2d 708 (1964) (whether original negligence of placing obstruction on highway was proximate cause of injuries received in automobile accident); Dennis v. Berens, 156 Neb. 41, 54 N.W.2d 259 (1952) (whether pedestrian crossing street could have concluded he could avoid injury).

[10] 160 Neb. 97, 69 N.W.2d 290 (1955). See also Bishop Cafeteria Co. v. Ford, 177 Neb. 600, 129 N.W.2d 581 (1964) (construction of contract as a matter of law); Knoll v. Knoll, 173 Neb. 602, 114 N.W.2d 40 (1962) (payment under settlement agreement satisfaction in full); State v. Kidder, 173 Neb. 130, 112 N.W.2d 759 (1962) (jurisdiction of school land and lease thereunder); County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N.W.2d 719 (1961) (old folks home not within statutory tax exemption); Anderson v. Carlson, 171 Neb. 741, 107 N.W.2d 535 (1961) (tax uncontitutional); Fidelity & Deposit Co. v. Bodenstedt, 170 Neb. 799, 104 N.W.2d 292 (1960) (no forgery as a matter of law); Anderson v. Moser, 169 Neb. 134, 98 N.W.2d 703 (1959) (defendant not guilty of negligence as a matter of law); Eden v. Klaas, 165 Neb. 323,

brought an action for personal injuries and property damage sustained in an automobile accident. The accident occurred at an intersection which the plaintiff knew to be dangerous. Plaintiff's view was obscured by shrubbery, and as a result he failed to see the defendant's car approaching to his right on the other road. The front of the plaintiff's car collided with the left rear wheel of the defendant's car. Defendant's motion for summary judgment was sustained by the trial court and affirmed by the Nebraska Supreme Court on the ground that the plaintiff was guilty of contributory negligence as a matter of law on the facts contained in his own deposition, and there was nothing to be tried.

At the outset, the question of whether there was, in a given case, a genuine issue of fact, appeared to be relatively simple. But as the foregoing analysis illustrates, its complexity lies in application. Once it is determined that the circumstances of the case merit the application of summary judgment, there must be a proper presentation of the motion to the court. The movant must pierce the allegations of the opposition's pleadings. It is now necessary to consider how a movant shows that the summary judgment procedure is applicable to his cause; and, on the other side, the manner in which an opponent can raise a genuine issue of fact so as to defeat the movant's motion for summary judgment.[11]

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85 N.W.2d 643 (1957) (plaintiff guilty of contributory negligence as a matter of law); Hoke v. Welsh, 162 Neb. 831, 77 N.W.2d 659 (1956) (breach of covenants of warranty and seizin); Lesoing v. Dirks, 157 Neb. 183, 59 N.W.2d 164 (1953) (filing belated claim against estate); Rimmer v. Chadron Printing Co., 156 Neb. 533, 56 N.W.2d 806 (1953) (newspaper article libel *per se*). Although propriety of application was not discussed, for further illustration see Muller v. Nebraska Methodist Hosp., 160 Neb. 279, 70 N.W.2d 86 (1955) (charitable immunities doctrine upheld), and related cases: Cheatham v. Bishop Clarkson Memorial Hosp., 160 Neb. 297, 70 N.W.2d 96 (1955); Parks v. Holy Angels Church, 160 Neb. 299, 70 N.W.2d 97 (1955).

11 There has been, since the adoption of the federal summary judgment procedure, a certain amount of controversy as to whether the pleadings of the opposing party, when viewed with the affidavits and papers of the movant, can raise an issue of fact so as to preclude summary judgment. Success of the procedure depends on a negative answer to the above question, for the main purpose of summary judgment is to go *beyond* the pleadings. For the most part, the federal system adhered to the proper view that the pleadings could not raise an issue so as to prevent summary judgment. The Third Circuit, however, long advocated the view that the pleadings could raise an issue of fact. Reynolds Metals Co. v. Metals Disintegrating Co., 176 F.2d 90 (3d Cir. 1949). The problem has been conclusively settled by a 1963 amendment to Rule 56(e) which prevents the pleadings of the opposing party from raising an issue so as to preclude summary judgment. See 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1235.1 (Supp. 1963).

## III. HOW THE COURT DECIDES WHETHER THERE IS AN ISSUE

### A. The Movant's Position

Once a party decides to move for summary judgment, he must comply with certain procedural requirements. The motion must be in writing.[12] If the movant is the plaintiff, he may file his motion any time after the filing of the answer by the defendant or after the defendant has moved for summary judgment.[13] If the movant is the defendant, he may file his motion at any time after the petition is filed.[14] The motion is not available to either party after the trial has commenced.[15] The motion must be served at least ten days before the hearing,[16] and may be filed with or without supporting affidavits.[17] All affidavits must be made on per-

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The Nebraska Supreme Court has not ruled on this question specifically. Assuming that adoption of Federal Rule 56 in Nebraska was legislative approval of its purposes, the Nebraska statute should be amended to conform with the Federal Rule as it now stands.

12 This conclusion finds support in Walkenhorst v. Apolius, 172 Neb. 830, 112 N.W.2d 31 (1961), where the lower court's granting of a summary judgment to the defendant was reversed on the ground that there was an abuse of judicial discretion in refusing to permit an amendment to the plaintiff's consent to dismiss part of the action. In a preliminary discussion of the defendant's oral motion, the court stated: "We do take occasion to note . . . that the summary judgment procedure is purely statutory. A motion for summary judgment does require compliance with all statutory requirements, and this compliance would preclude an oral motion." *Id.* at 836-37, 112 N.W.2d at 35.

13 Neb. Rev. Stat. § 25-1330 (Reissue 1956). For the applicable form, see 3 Lightner, Nebraska Forms Annotated §§ 4341-43 (Supp. 1964).

14 Neb. Rev. Stat. § 25-1331 (Reissue 1956). In this regard, it is not essential that the defendant file responsive pleading before filing a motion for summary judgment. See Arla Cattle Co. v. Knight, 174 Neb. 360, 118 N.W.2d 1 (1962).

15 In Illian v. McManaman, 156 Neb. 12, 20, 54 N.W.2d 244, 249 (1952), the court stated: "Obviously a motion for summary judgment is not a substitute for a directed verdict or for error proceedings taken after full trial."

16 Neb. Rev. Stat. § 25-1332 (Reissue 1956). For the applicable form, see 3 Lightner, Nebraska Forms Annotated § 4344 (Supp. 1964).

17 Neb. Rev. Stat. §§ 25-1330 to -31 (Reissue 1956). For a general discussion on the materials on which the motion may be heard in the federal system, see 6 Moore, Federal Practice ¶ 56.11 (2d ed. 1953).

In addition to the pleadings, the court may consider, in disposal of the motion, affidavits, depositions, and admissions by the express language of Neb. Rev. Stat. § 25-1332 (Reissue 1956). Answers to interrogatories were inadvertently omitted from the original Federal Rules, and it was that form of Rule 56(c) which was adopted in Ne-

sonal knowledge,[18] must set forth only those facts which meet normal admissibility requirements, and must affirmatively show that the affiant is competent to testify on the matters with which the document deals.[19] It should be noted at this point that statutory discovery procedures can be an extremely useful device to the movant.[20] The movant now has his motion before the opposing party and before the court.[21] If the affidavits and papers presented in this manner by the movant would, if uncontroverted, justify summary judgment in his favor, the opposing party must

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braska. The question arose under the federal system as to whether answers to interrogatories could be considered by the court on a motion for summary judgment. While not expressly sanctioned by Rule 56(c), most of the federal courts held they were admissible. See, *e.g.*, American Airlines, Inc. v. Ulen, 186 F.2d 529 (D.C. Cir. 1949); Dulansky v. Iowa-Illinois Gas & Elec. Co., 10 F.R.D. 566 (S.D. Iowa 1950); 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1236 (rules ed. 1958). Any problems in this respect were removed in 1963 by addition of the phrase "answers to interrogatories" to Federal Rule 56(c) and (e). See 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (Supp. 1963, at 45). Because it was the intention of the Nebraska Legislature to adopt a summary judgment procedure in conformity with the Federal Rules, and because interrogatories are consonant with its purposes, the Nebraska statute should be amended to include interrogatories in NEB. REV. STAT. § 25-1332 (Reissue 1956).

For a general discussion on the admissibility of interrogatories, see Annot., 74 A.L.R.2d 984 (1960).

[18] NEB. REV. STAT. § 25-1334 (Reissue 1956). This is subject to the "exclusive knowledge" exception. See text accompanying note 35 *infra*. Statements in supporting or opposing affidavits as to opinion, belief, and conclusions are of no effect. See also text accompanying note 33 *infra*. An attorney's affidavits are usually insufficient unless he has personal knowledge of the facts. See 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1237, at 166 (rules ed. 1958).

[19] NEB. REV. STAT. § 25-1334 (Reissue 1956). For applicable forms, see 3 LIGHTNER, NEBRASKA FORMS ANNOTATED § 434.5 (Supp. 1962).

[20] See NEB. REV. STAT. §§ 25-1267.01 to -1269 (Reissue 1956). In Kissinger v. School Dist. No. 49, 163 Neb. 33, 77 N.W.2d 767 (1956), plaintiff taxpayer brought an action to recover taxes alleged to have been excessively levied by the school district. The plaintiff properly served a request for admissions of relevant matters of fact pursuant to the statutory provision. The answers filed by the defendant were equivocal and constituted an admission of the facts sought within the meaning of the statute. Since all the pertinent facts stood admitted, summary judgment was granted by the trial court and affirmed by the Nebraska Supreme Court. See also Mueller v. Shacklett, 156 Neb. 881, 58 N.W.2d 344 (1953). Refusal to answer interrogatories is governed by other sanctions. See NEB. REV. STAT. § 25-1267.44(2) (Supp. 1961).

[21] The manner in which it is presented may be of vital importance on appeal. See notes 49-52 *infra*, and the accompanying text.

come forward to show that there is a genuine issue of fact.[22] If the affidavits would not, if uncontroverted, justify summary judgment, the opposing party need not come forward with counter-affidavits, for the requirement that the movant be entitled to judgment as a matter of law has not been met. At the hearing on the motion, the opposing party will have an opportunity to present his arguments to show that the movant is not entitled to judgment as a matter of law.

B. Opposing Party's Position

At this point in the summary judgment procedure, the opposing party has one of several alternatives available. The first is the one most commonly employed to raise an issue of fact. The opposing party comes forward with counter-affidavits and papers to refute those presented by the movant. The court then has before it the supporting and opposing affidavits of the respective parties. In determining whether the movant has pierced the allegations of the opposing party's pleadings, and if he has, whether the opposing party has come forth with sufficient support to raise an issue of fact, it is the universal rule of construction that the papers will be viewed from a standpoint most favorable to the opposing party, giving him the benefit of any reasonable doubt.[23] An extra-judicial admission[24] or pleadings[25] inconsistent with either party's affidavits will not preclude support of or opposition to the motion. These factors may, however, be of evidentiary value.

On the other hand, the opposing party may decide to do nothing. This decision could be predicated on the theory that, as a matter of law, the movant is not entitled to judgment. By filing

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22 Anderson v. Moser, 169 Neb. 134, 98 N.W.2d 703 (1959).

23 In Illian v. McManaman, 156 Neb. 12, 18, 54 N.W.2d 244, 248 (1952), the first case arising in Nebraska after adoption of the Summary Judgments Act, the court quoted approvingly the federal rule of construction set forth in Ramsouer v. Midland Valley R.R., 135 F.2d 101, 106 (8th Cir. 1943): "In considering such a motion [for summary judgment] . . . the court should take that view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits."

24 Illian v. McManaman, 156 Neb. 12, 54 N.W.2d 244 (1952).

25 Walkenhorst v. Apolius, 172 Neb. 830, 112 N.W.2d 31 (1961); Kleinknecht v. McNulty, 169 Neb. 470, 100 N.W.2d 77 (1959). In the normal case, the party whose pleadings are inconsistent moves to strike or to amend. This, then, becomes a question of trial court discretion, governed by Neb. Rev. Stat. § 25-852 (Reissue 1956).

no counter-affidavits, the opposing party is in effect requesting that the court determine the outcome as a matter of law through the summary judgment procedure.[26] This does not mean, however, that the case will be decided on the motion, for its facts may preclude application of the procedure, and a trial is required. This is illustrated by *Miller*,[27] the action for negligence which arose from an intersection accident. In moving for summary judgment, the defendant submitted his own affidavit together with the plaintiff's deposition. There were no opposing affidavits or papers filed by the plaintiff, so that the papers supporting the defendant's motion were uncontroverted. The court held the plaintiff was guilty of contributory negligence as a matter of law, and judgment was rendered for the defendant. If, however, under different circumstances, it had been found by the court that the plaintiff was not guilty of contributory negligence as a matter of law, the case would have had to be determined by the trier of fact. It should also be remembered that the opposing party must comply with statutory discovery procedures.[28]

A third alternative available to the opposing party is to move for summary judgment himself. This does not, in and of itself, mean that the granting of the motion for one of the parties necessarily follows.[29] Under the issue of fact analysis, if there is a dispute as to evidentiary facts,[30] or if the inferences do not lead to judgment as a matter of law,[31] the case is not a proper one for

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[26] The question might arise as to whether a hearing is mandatory. In support of the argument that it is a requirement, analogy can be drawn to the requirement that the motion be in writing. See note 12 *supra*. On the other hand, there is authority for the proposition that the right to a hearing might be waived by inaction of one of the parties. See Bagby v. United States, 199 F.2d 233 (8th Cir. 1952).

[27] 160 Neb. 97, 69 N.W.2d 290 (1955).

[28] On discovery procedures, see note 20 *supra*.

[29] Mutual motions for summary judgment, however, are at least some evidence that there is no dispute as to facts. In County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N.W.2d 719 (1961), an action to determine the tax liability of an old folks home, both parties moved for summary judgment below. On appeal, in discussing issue of fact, the court stated: "The controlling facts in this case are not in dispute. There is a tacit agreement on this proposition, since the plaintiffs have moved for summary judgment in their favor, and the defendant has likewise moved, on the basis of the same record." Such evidence is, of course, by no means conclusive on the question of whether there is a genuine issue of fact.

[30] See Hall v. Hadley, 173 Neb. 675, 114 N.W.2d 590 (1962).

[31] In City of Omaha v. Lewis & Smith Drug Co., 156 Neb. 650, 57 N.W.2d 269 (1953), a declaratory judgment action was brought by the city to

summary judgment. Conversely, if the accepted facts establish one conclusion as a matter of law, summary judgment is appropriate.[32] Mutual motions for summary judgment, then, are handled by conventional analysis.

The fourth alternative available to the opposing party is a bare *statement that the facts are contrary* to those stated by the movant. This must be carefully distinguished from the first alternative discussed, namely that of *stating facts contrary* to those stated by the movant. In the former, he is merely denying by an unsubstantiated statement, while in the latter he is coming forward to substantiate his denial with affirmative evidence. The Nebraska rule, a construction of section 25-1334 of the Summary Judgments Act, is that statements in supporting or opposing affidavits as to opinion, belief, conclusions, summaries of facts or arguments, or inadmissible evidentiary matter are of no effect.[33] If unsubstantiated denials were sufficient to defeat the motion, they could be used for dilatory purposes just as sham pleadings were formerly used. Summary judgment was adopted to prevent these dilatory tactics. Situations will arise in which the affiant has personal knowledge that the facts are to the contrary, but is unable, for some reason, to present concrete facts to controvert the movant's statements. It would obviously be unjust to emphatically rule that such an unsubstantiated denial is insufficient, but it would seem reasonable to require that the affiant state all that he knows and further explain why he can state no more. The Nebraska Summary Judgments Act expressly so provides, giving discretion to the trial judge to deny the application for summary

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determine whether the defendant was violating a Sunday-closing ordinance. Each party made a motion for summary judgment. The defendant's motion was sustained. In reversing, the court held that the classification of articles sold by defendant within the ordinance language presented a genuine issue of fact. The evidentiary facts (goods sold by defendant) were accepted, but the inference to be drawn from them (application of the ordinance) could not be determined as a matter of law.

[32] Disposition of the case on appeal, in this instance, will depend on the correctness of the lower court's ruling on the point of law. If the lower court was correct, the decision will be affirmed. See County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N.W.2d 719 (1961); Hoke v. Welsh, 162 Neb. 831, 77 N.W.2d 659 (1956). If the lower court was incorrect, the supreme court will reverse and remand with instructions to enter summary judgment for the other party. See Fidelity & Deposit Co. v. Bodenstedt, 170 Neb. 799, 104 N.W.2d 292 (1960); Lesoing v. Dirks, 157 Neb. 183, 59 N.W.2d 164 (1953).

[33] Eden v. Klaas, 165 Neb. 323, 85 N.W.2d 643 (1957). See also Knoll v. Knoll, 173 Neb. 602, 114 N.W.2d 40 (1962).

judgment where the opposing party has personal knowledge that the facts are to the contrary, but no means to substantiate them, and where he gives reasons for such inability.[34]

The final alternative presents the situation where the evidence necessary to defeat the motion is exclusively in the possession of the movant. It is analogous to the preceding alternative in that the opposing party is faced with a possible summary judgment against him, yet he is unable to adequately oppose the motion. This situation is also expressly provided for in the Nebraska statute, which gives the trial judge discretion: (1) to deny the motion; or (2) to order a continuance to permit the utilization of affidavits, depositions, and discovery procedures.[35] An illustration of this situation is presented by *Healy v. Metropolitan Util. Dist.*,[36] an action by a resident taxpayer and user of the gas and water facilities of defendant to recover attorney's fees paid to one Van Dusen in excess of the maximum permitted by law. In moving for summary judgment, the defendants set forth the written contract for the statutory limit, and claimed that any excess payments were made for services by Van Dusen as vice-general manager and assistant secretary. The plaintiff claimed, in resisting the defendant's motion, that the written agreements were a sham to circumvent the statute, that Van Dusen devoted his whole time to the position of legal counsel, and that the evidence was wholly within the possession of the defendants and could be obtained only by cross-examination. The trial court sustained the defendants' motion, but the Nebraska Supreme Court reversed, holding that when the party resisting a motion for summary judgment intends to dispute facts by impeaching or otherwise attacking the credibility of the movant's witnesses,[37] indicating a basis for such at-

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[34] NEB. REV. STAT. § 25-1335 (Reissue 1956). A mere statement of intention to show conflicting facts at the trial should be insufficient to defeat the motion. The duty to come forward has shifted to the opposing party, and while the construction rule requires the court to view the documents in the light most favorable to the opposing party, he must nevertheless show that there *is* a genuine issue of fact. This duty on the part of the opposing party, however, does not require that he reveal in detail the evidence he expects to produce at trial. See Berg v. Rasmuss, 176 Neb. 340, 125 N.W.2d 905 (1964).

[35] NEB. REV. STAT. § 25-1335 (Reissue 1956).

[36] 158 Neb. 151, 62 N.W.2d 543 (1954).

[37] The question of credibility itself has been the subject of rather extensive controversy in the federal system. See Asbill & Snell, *Summary Judgment Under the Federal Rules—When An Issue of Fact Is Presented,* 51 MICH. L. REV. 1143, 1148-55 (1953). The restricted view on the qu stion of credibility found its inception in Arnstein v. Porter, 154 F.2d

tack, no doubt exists that there is an issue of fact which requires a trial. This is particularly the case when the facts are peculiarly within the knowledge of the party moving for summary judgment. The court did not mention the provision in the Summary Judgments Act specifically, but a recognition of its practical value seems implicit in the ruling.

C. THE COURT'S POSITION

Upon hearing, the district judge must determine whether there is a genuine issue. If he concludes that there is a triable issue of fact, he goes no further.[38] The existence of a genuine issue stops the machinery of summary judgment immediately. In

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464 (2d Cir. 1946), a case involving alleged infringement by Cole Porter of certain songs written by the plaintiff. After deciding that there was a genuine issue of fact concerning access presented by the plaintiff's affidavits, Judge Frank of the Second Circuit further stated: "If, after hearing both parties testify, the jury disbelieves defendant's denials, it can, from such facts, reasonably infer access. It follows that, as credibility is unavoidably involved, a genuine issue of material fact presents itself. With credibility a vital factor, plaintiff is entitled to a trial where the jury can observe the witnesses while testifying. Plaintiff must not be deprived of the invaluable privilege of cross-examining the defendant—the 'crucial test of credibility'—in the presence of the jury." 154 F.2d at 469. In effect, Judge Frank found, in addition to the genuine issue of access, an issue of credibility. It becomes evident that, if the issue of fact analysis is so restricted, almost all evidence presented by affidavits will raise an issue as to their credibility, and that under such a rule the very means of establishing the propriety of summary judgment is rendered inoperative. At first, it appeared that Nebraska had adopted this restricted view, for in Illian v. McManaman, 156 Neb. 12, 54 N.W.2d 244 (1952), the Nebraska Supreme Court quoted the above language from *Arnstein*. Subsequent cases, however, appear to discard the *Arnstein* doctrine. In Healy v. Metropolitan Util. Dist., 158 Neb. 151, 155, 62 N.W.2d 543, 546 (1954), the court stated: "Ordinarily the credibility of the witnesses who give evidence by affidavit or deposition does not seem to be material for the reason that, unless a genuine issue of fact is presented, credibility would play no part in the result. *Unless there is a dispute of a material fact, no reason exists for attacking their credibility.* But if the party resisting a summary judgment intends to *dispute facts* by impeaching or otherwise attacking the credibility of the witness of the movant, indicating the basis for such attack, no doubt exists that there is an issue of fact which requires a trial." (Emphasis added.) The Nebraska Supreme Court has thus adopted the rule more consonant with the letter and spirit of summary judgment procedure.

38 Johnson v. Metropolitan Util. Dist., 176 Neb. 276, 125 N.W.2d 708 (1964); City of Omaha v. Lewis & Smith Drug Co., 156 Neb. 650, 57 N.W.2d 269 (1953); Dennis v. Berens, 156 Neb. 41, 54 N.W.2d 259 (1952); Illian v. McManaman, 156 Neb. 12, 54 N.W.2d 244 (1952).

determining that there is a genuine issue, the court does not determine that the evidence presented on hearing or at the trial will necessarily present a jury question. In other words, a directed verdict after trial is not precluded by denial of the motion. Denial determines only that for purposes of summary judgment, the requirement of a conclusive showing that there is no issue of fact has not been met.[39]

D. THE PARTIAL SUMMARY JUDGMENT

To implement the use of summary judgment procedure, the Nebraska Summary Judgments Act expressly authorizes the use of a supplemental order commonly called a partial summary judgment.[40] If, when a motion for summary judgment is before the court, it appears that certain aspects of the case are without dispute, the court may grant a partial summary judgment on those particular points and direct further proceedings with respect to those points genuinely in controversy. The provision has found little use in Nebraska, but can be illustrated by the early case of *Rimmer v. Chadron Printing Co.*,[41] an action for libel. The defendant published a news item concerning the plaintiff which was, by state law, libel *per se*. There was, however, a genuine issue as to the amount of damages. The lower court granted a partial summary judgment on the question of liability for libel, and submitted the case to a jury on the question of damages. On appeal, the Nebraska Supreme Court held that the granting of the partial summary judgment was proper, but reversed on other grounds. Only the amount of damages question was before the jury. The liability question was eliminated before trial, and the litigation thereby simplified to an appreciable extent.[42]

The liability-damages illustration presented by *Rimmer* is but one example of its potential use. Partial summary judgment has been employed where there is more than one claim for relief by granting judgment on some of the claims and leaving others for

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39 Johnson v. Metropolitan Util. Dist., 176 Neb. 276, 125 N.W.2d 708 (1964).

40 NEB. REV. STAT. § 25-1333 (Reissue 1956).

41 156 Neb. 533, 56 N.W.2d 806 (1953).

42 When there is a genuine issue as to damages, total summary judgment is not appropriate. This issue, like any other, precludes its application. The partial summary judgment was precisely intended to deal with this situation. See 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1241, at 194 (rules ed. 1958); 6 MOORE, FEDERAL PRACTICE ¶ 56.20(3), at 2304 (2d ed. 1953).

trial.[43] The court may give judgment for one of two defendants,[44] or enter a summary judgment for plaintiff against defendant, leaving for trial the third party plaintiff against a third party defendant.[45] It would appear that a more extended use of partial summary judgment would implement the policy behind the complete summary judgment. Like the complete summary judgment, it is designed to simplify litigation and decrease the length and cost of complex trials. The partial summary judgment also provides an opportunity to make use of the evidence derived from the hearing on the motion for complete summary judgment, even though the complete motion is inappropriate and therefore denied. By this time in the proceedings, the judge hearing the motion is familiar with the case, and is in an excellent position to determine the genuine issues involved. This familiarity should be utilized to simplify the trial which will follow. If properly used, the partial summary judgment can strengthen the efficient operation of the summary judgment approach to pre-trial procedure.

## IV. APPEAL

In Nebraska, an order granting summary judgment below is appealable, while denial below, being interlocutory in nature, is not.[46] This is consistent with the general rule in other states with a summary judgment procedure.[47] There is, however, one situation in which a denial below is appealable. If both parties move for summary judgment in the trial court, and the court grants a summary judgment to one of them, the losing party may prosecute an appeal. His appeal concerns the granting of the motion below, and if this were the only aspect of the case which could be reviewed, there would be no exception to the rule against appeal of a denial. But the scope of review is broader under

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[43] Lorentz v. R.K.O. Radio Pictures, 155 F.2d 84 (5th Cir. 1946); Velsicol Corp. v. Hyman, 103 F. Supp. 363 (D. Colo. 1952); Larson v. General Motors Corp., 2 F.R.D. 294 (S.D.N.Y. 1941). See generally, 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1241 (rules ed. 1958).

[44] Steinberg v. Adams, 90 F. Supp. 604 (S.D.N.Y. 1950); Lund v. Johnson, Drake & Piper, Inc., 64 F. Supp. 456 (D. Minn. 1945).

[45] Axton-Fisher Tobacco Co. v. Ziffrin Truck Lines, Inc., 36 F. Supp. 777 (W.D. Ky. 1941), *aff'd*, 126 F.2d 476 (6th Cir. 1942).

[46] Otteman v. Interstate Fire & Cas. Co., 171 Neb. 148, 105 N.W.2d 583 (1960). See also Pressey v. State, 173 Neb. 652, 114 N.W.2d 518 (1962); Rehn v. Bingaman, 157 Neb. 467, 59 N.W.2d 614 (1953). This rule is consistent with statutory provisions dealing with appeal; see NEB. REV. STAT. § 25-1902 (Reissue 1956) (appeal from final order); NEB. REV. STAT. § 25-1315.03 (Reissue 1956) (appeal from motion for new trial).

[47] CLARK, CODE PLEADING 564 (2d ed. 1947).

these circumstances than in the case of the sustaining of a single motion below, and the supreme court may reverse *and* direct entry of summary judgment for the party prosecuting the appeal.[48]

As a practical matter, it should be noted that appeal on summary judgment is subject to the statutory rules concerning bills of exceptions.[49] The absence of a bill of exceptions leads to a presumption that the trial court was correct in its ruling on the motion,[50] and the supreme court will only look to the pleadings. When there is no bill of exceptions, an affidavit filed in the office of the clerk of the district court and made part of the transcript is not effective as a substitute for the requirement.[51] All evidentiary matter should be offered in evidence at the hearing, for there is danger that it will otherwise not be considered on appeal.[52]

A partial summary judgment, whether granted or denied below, is interlocutory in nature, and therefore not appealable in and of itself.[53] The question has not arisen in Nebraska, although the court dealt with a partial summary judgment in the *Rimmer* case.[54] The ruling was not reviewed until after final adjudication on the remaining question of damages.

## V. OTHER PRE-TRIAL PROCEDURES AVAILABLE, AND THEIR RELATION TO SUMMARY JUDGMENT

There seems to be some confusion in Nebraska concerning the

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48 Fidelity & Deposit Co. v. Bodenstedt, 170 Neb. 799, 104 N.W.2d 292 (1960); Lesoing v. Dirks, 157 Neb. 183, 59 N.W.2d 164 (1953). For discussion of mutual motions for summary judgment, see notes 29 & 30 *supra.*

49 NEB. REV. STAT. §§ 25-1138 to -1140.8 (Reissue 1956) (required procedure for obtaining; contents; etc.); NEB. REV. STAT. §§ 25-1921 to -1924 (Reissue 1956) (appeal to Nebraska Supreme Court); NEB. REV. STAT. § 25-1134 (Reissue 1956) (trial by referee).

50 Ehlers v. Pound, 176 Neb. 673, 126 N.W.2d 893 (1964); Arla Cattle Co. v. Knight, 174 Neb. 360, 118 N.W.2d 1 (1962); Lange v. Kansas Hide & Wool Co., 168 Neb. 601, 97 N.W.2d 246 (1959); Peterson v. George, 168 Neb. 571, 96 N.W.2d 627 (1959); Oak v. Griggs, 167 Neb. 239, 92 N.W.2d 551 (1958); Spidel Farm Supply, Inc. v. Line, 165 Neb. 665, 86 N.W.2d 789 (1957); Palmer v. Capitol Life Ins. Co., 157 Neb. 760, 61 N.W.2d 396 (1953).

51 Peterson v. George, 168 Neb. 571, 96 N.W.2d 627 (1959).

52 Lange v. Kansas Hide & Wool Co., 168 Neb. 601, 97 N.W.2d 246 (1959). See also Underwriters Acceptance Corp. v. Dunkin, 152 Neb. 550, 41 N.W.2d 855 (1950).

53 See 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1241 (rules ed. 1958); CLARK, CODE PLEADING § 88, at 562 (2d ed. 1947).

54 Rimmer v. Chadron Printing Co., 156 Neb. 533, 56 N.W.2d 806 (1953).

relationship between summary judgment and other pre-trial motions. In *Healy* the court stated:

> We point out here that a motion for a summary judgment was not intended to be, and is not, a substitute for a motion to dismiss, a demurrer, or a motion for a judgment on the pleadings. In this respect we differ with the practice in the federal courts. There a petition need not state a cause of action and the demurrer no longer is recognized. But in this jurisdiction a petition must state a cause of action or it may be properly attacked by demurrer. The retention of this practice at the time of the adoption of the summary judgment act requires us to take a somewhat different view of the act than that taken by the federal courts. . . . [W]here a defense is strictly a legal one, summary judgment may not be substituted for a motion to dismiss, a demurrer, or a motion for judgment on the pleadings.[55]

The Nebraska Supreme Court has thus attempted to distinguish and separate the various pre-trial motions. To determine whether such distinction is justified, the grounds for each will be examined, along with their effect in terms of legal consequence.

A. Motion To Dismiss

The Nebraska dismissal statute[56] provides that the plaintiff may request dismissal. This may be done as a matter of right at any time before final submission.[57] No grounds need be established. In addition, the court may dismiss the action: (1) when the plaintiff fails to appear at trial; (2) where necessary parties are missing; (3) on motion by the defendant because the plaintiff has failed to diligently prosecute others; or (4) where the plaintiff does not comply with a court order concerning the proceedings.[58] The motion to dismiss is an attack on procedural defect, rather than substantive defect, and it is not res judicata in a subsequent action by the same parties dealing with the same subject matter.[59] Because it is a final order, granting of the motion is appealable.[60]

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55 158 Neb. 151, 156, 62 N.W.2d 543, 546 (1954).

56 Neb. Rev. Stat. § 25-601 (Reissue 1956). Under the statute, dismissal can come anytime before final submission. It is assumed that the court in *Healy* was referring to a motion to dismiss before trial. It should be noted, however, that a motion to dismiss may be a proper substitute for a motion for directed verdict. See Akins v. Chamberlain, 164 Neb. 428, 432-33, 82 N.W.2d 632, 636 (1957).

57 Reams v. Sinclair, 97 Neb. 542, 150 N.W. 826 (1915).

58 Neb. Rev. Stat. § 25.601 (Reissue 1956).

59 Morris v. Linton, 74 Neb. 411, 104 N.W. 927 (1905).

60 While this point has not been specifically ruled on in Nebraska, it is firmly established by implication, for the court regularly reviews, on their merits, cases disposed of by the motion to dismiss. See, *e.g.*, State

Subject to the Nebraska statute allowing amendments in the furtherance of justice,[61] there can be no amendment after a motion to dismiss has been sustained.[62]

There is no conflict between this motion and the motion for summary judgment. As indicated, dismissal is intended to remedy procedural defects, and deals with matters beyond the scope of summary judgment. In effect, it disposes of the case before the question of whether there is an issue of fact arises. Other than the differences in res judicata effect, based on the procedural-substantive distinction, the procedures are similar as to their legal consequences. Both are appealable, and both practically eliminate amendment.

### B. The Code Demurrer

A demurrer[63] by the defendant is proper when it appears on the face of the petition: (1) that the court has no jurisdiction over the defendant or the subject matter; (2) that the plaintiff lacks legal capacity; (3) that another action is pending between the same parties for the same cause; (4) that there is a defect of parties, plaintiff or defendant; (5) that there is improper joinder of causes of action; or (6) that the petition does not state facts sufficient to constitute a cause of action. Demurrer is also available to the plaintiff.[64] A motion under the first five grounds is classified a special demurrer.[65] If the grounds are based on the sixth category, or are not specified, it is considered a general demurrer.[66] A judgment on a demurrer going to the merits (*i.e.*, a general demurrer) is generally res judicata; on the other hand, if based on a technical defect of pleading, a lack of jurisdiction, or the like (*i.e.*, a special demurrer), the doctrine of res judicata is inapplicable.[67] Until judgment, an order sustaining or overruling a

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*ex rel.* Johnson v. Consumers Pub. Power Dist., 142 Neb. 114, 5 N.W.2d 202 (1942).

61 Neb. Rev. Stat. § 25-852 (Reissue 1956).

62 State *ex rel.* Johnson v. Consumers Pub. Power Dist., 142 Neb. 114, 120, 5 N.W.2d 202, 205 (1942).

63 Neb. Rev. Stat. § 25-806 (Reissue 1956).

64 Neb. Rev. Stat. § 25-820 (Reissue 1956).

65 Neb. Rev. Stat. § 25-807 (Reissue 1956).

66 *Ibid.*

67 Trainor v. Maverick Loan & Trust Co., 92 Neb. 821, 139 N.W. 666 (1913); State *ex rel.* Woodruff-Dunlap Printing Co. v. Cornell, 52 Neb. 25, 71 N.W. 961 (1897). Note, however, that a recent decision casts doubt on the long established doctrine that judgment on a demurrer based on

demurrer is not appealable.[68]

The amendment provisions for a demurrer are liberal. In addition to the furtherance of justice provision,[69] a party may answer or reply after his demurrer has been overruled if the court is satisfied he has meritorious grounds and the amendment is not utilized for delay.[70] When the demurrer is sustained, the adverse party can amend if the defect can be remedied.[71] And finally, the adverse party can amend before a ruling on the demurrer if he does so within ten days after the demurrer is filed.[72]

When comparing summary judgment to the pre-trial motions, the demurrer presents a more difficult problem than did the motion to dismiss. The practical value of the demurrer has been questioned by many of the writers,[73] and many states have followed the lead of the Federal Rules in abolishing it altogether.[74] The demurrer is, however, still authorized by statute in Nebraska, and if it is to be discarded as an outmoded procedure, it must be done by the legislature.[75]

As previously discussed, one of the primary reasons for adoption of the summary judgment in Nebraska was to defeat dilatory pleadings. Traditionally, one of the most effective means of delay available to the practicing attorney has been the demurrer. Technically, the procedures are distinguishable.

Summary judgment differs from a special demurrer in that the former is substantive, the latter procedural. Furthermore, the former is appealable, while a ruling on the latter is not. And finally, the former eliminates amendment, while the latter is accompanied by liberal amendment provisions. The mere fact that the procedures can be distinguished, however, is not justification for doing so if no functional purpose is served thereby.

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technical defect is not res judicata. See Knapp v. City of Omaha, 175 Neb. 576, 122 N.W.2d 513 (1963).

68 Larson v. Sloan, 77 Neb. 438, 109 N.W. 752 (1906).

69 NEB. REV. STAT. § 25-852 (Reissue 1956).

70 NEB. REV. STAT. § 25-851 (Reissue 1956).

71 NEB. REV. STAT. § 25-854 (Reissue 1956).

72 NEB. REV. STAT. § 25-850 (Reissue 1956).

73 See, *e.g.*, CLARK, CODE PLEADING 65, 68, 502, 535-45 (2d ed. 1947); MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 170 (1952).

74 See CLARK, CODE PLEADING 536 n.128 (2d ed. 1947).

75 See text accompanying note 55 *supra*, where the court stated in effect that, since the legislature left in the demurrer when adopting summary judgment, it must be the one to take it out.

Summary judgment has, despite the "no substitute" rule of *Healy,* invaded the domain of the demurrer. *Mueller v. Shacklett*[76] was an action against a defendant administrator to recover damages for the death of plaintiff's son in an automobile accident alleged to have been caused by the negligence of the deceased. Defendant moved to dismiss and demurred on the ground of lack of original jurisdiction for such a claim against an estate. *Both were overruled.* Defendant then answered, denying generally and praying for dismissal. Plaintiff's motion to strike was overruled, and defendant filed requests for admissions. After hearing on the issues raised by defendant's request and plaintiff's objections, the court ordered plaintiff to admit or deny every provision of defendant's request for admissions. Plaintiff refused to comply, and defendant moved for summary judgment, which was sustained by the lower court and affirmed on appeal. In effect, because the proceedings *went beyond the pleadings,* summary judgment was substituted for a demurrer. It served the same function as the demurrer, but without the attendant delay. *Healy* was decided subsequent to *Mueller,* and although *Mueller* is cited,[77] it is only for the general proposition that summary judgment is allowed where the allegations of the pleadings are pierced. Nor would *Mueller* appear to be impliedly overruled, for cases subsequent to *Healy* have also substituted summary judgment for special demurrer.[78]

There is no reason to retain the special demurrer as a procedural device. A possible solution would be to include all of the grounds for the present special demurrer in a revised type of motion to dismiss, eliminating the means of delay, yet accomplishing the worthwhile purposes of the special demurrer. In such form, the revised motion to dismiss could serve as a procedural counterpart to the substantive summary judgment. Some of the grounds for the present special demurrer in Nebraska are included in the federal motion to dismiss under Federal Rule 12(b).[79]

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[76] 156 Neb. 881, 58 N.W.2d 344 (1953).

[77] 158 Neb. 151, 62 N.W.2d 543 (1954).

[78] State v. Kidder, 173 Neb. 130, 112 N.W.2d 759 (1962) (jurisdiction question in action concerning school lands); Oak v. Griggs, 167 Neb. 239, 92 N.W.2d 551 (1958) (jurisdiction question in action against estate); First Nat'l Bank v. Gross Real Estate Co., 162 Neb. 343, 75 N.W.2d 704 (1956) (necessary parties not joined in action).

[79] *E.g.,* lack of jurisdiction over the defendant or the subject matter, and defect of parties, plaintiff or defendant (*i.e.,* failure to join an indispensable party). There appears to be no reason why the other Nebraska grounds for a special demurrer could not be incorporated in a general dismissal procedure.

Summary judgment is not as easily distinguishable from a general demurrer. Both challenge substantive defect and both are res judicata in a subsequent action by the same parties dealing with the same subject matter. The line of departure, *in legal consequence,* is freedom of amendment. The line of departure, *in application,* is the existence of a cause of action in the petition. On the basis of *Healy,* when the petition fails to state a cause of action, the demurrer must be used.[80] If a valid cause of action is stated, then summary judgment may be employed to attack it. This distinction must stand until the demurrer is abolished in Nebraska. The court has no other choice. As stated in *Healy,* the fact that the legislature retained the demurrer when adopting summary judgment, by conventional statutory interpretation, means that it intended to give effect to both procedures. No Nebraska case has been reversed on the basis of this distinction, notwithstanding the language in *Healy.* In no case has the court stated that use of summary judgment, when there is no cause of action stated, instead of a demurrer, requires reversal. In *Healy* and other cases stating the "no substitute" rule, reversal has been on the ground that there was a genuine issue of material fact. Under these circumstances, the "no substitute" rule is meaningless in practical effect.

The question still remains, however, whether these distinctions based on freedom of amendment and existence of a cause of action in the petition, are justified as a matter of policy. For, as in the case of the special demurrer, if there is no justification, then there is mere surplusage in procedures available, and modern procedural reform dictates simplification. It is submitted that there is no practical reason for retention of the demurrer in view of the purpose and effect of summary judgment. If it is accepted that by motion for summary judgment either party can go beyond the pleadings by way of affidavits, and adoption of the procedure indicates legislative acceptance of that premise, it would appear

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[80] Even this distinction, in at least one case, has been of no effect. In Arla Cattle Co. v. Knight, 174 Neb. 360, 118 N.W.2d 1 (1962), an action to have a warranty deed declared a mortgage, the defendants filed a motion for summary judgment without filing an answer to the plaintiff's petition. The motion was sustained by the trial court and affirmed by the Nebraska Supreme Court. The court stated: "The plaintiffs' petition as amended reflects that there is no evidence whatsoever, let alone clear, convincing, or satisfactory evidence, to support the existence of any right to obtain a reconveyance of the real estate . . . ." *Id.* at 370, 118 N.W.2d at 7. In effect, the court held that plaintiff had no cause of action, and summary judgment was successfully substituted for a general demurrer.

that technical failure to state a cause of action should be irrelevant. To illustrate, suppose the plaintiff fails to state a cause of action in his petition. If the demurrer were not available as a pre-trial procedure in Nebraska, the defendant would instead move for summary judgment. If the plaintiff does in fact have a valid cause of action, mere technical omission will not preclude his coming forth with counter-affidavits to establish a genuine issue of fact. The purpose of the demurrer is served *without the delay of amendment.* If, on the other hand, the plaintiff's cause is in fact invalid, he will not be able to establish a genuine issue, and the case will be disposed of summarily, *without delay.* In either case, the administration of justice has been accelerated without prejudice to either party. The purposes of the demurrer have been fulfilled, yet its attendant disadvantages have been eliminated.

### C. Motion for Judgment on the Pleadings

One form of judgment on the pleadings was expressly authorized by statute until 1947.[81] This form was used in connection with judgment notwithstanding the verdict. Until 1947, only the pleadings could be considered by the court in determining whether judgment notwithstanding the verdict could be granted.[82] The 1947 change added evidence adduced at trial to the materials which could be considered. Presumably, however, the court may still consider the pleadings in determining the propriety of a motion for judgment notwithstanding the verdict. This form of judgment on the pleadings does not conflict with summary judgment, for each serves a separate and useful purpose, the former in post-trial procedure, the latter in pre-trial procedure.

Another form of judgment on the pleadings is available. This form pertains to pre-trial procedure, and while never specifically authorized by statute, it has been consistently recognized by the court. It will lie only when, from the face of the pleadings, the moving party is entitled to judgment as a matter of law.[83] It attacks pleadings for deficiency of substance and presents a ques-

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[81] The former statute, Neb. Rev. Stat. § 25-1315 (1943), provided: "Where upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." In 1947, this statute was replaced by Neb. Rev. Stat. §§ 25-1315.01 to -.03 (Reissue 1956), which provided more liberal grounds for judgment notwithstanding the verdict.

[82] Hamaker v. Patrick, 123 Neb. 809, 244 N.W. 420 (1932).

[83] Nebraska State Bar Ass'n v. Mathew, 169 Neb. 194, 98 N.W.2d 865 (1959).

tion of law, admitting the truth of all well-pleaded facts in the pleadings of the opposing party and reasonable inferences therefrom.[84] It is in the nature of a demurrer and is in substance both a motion and a demurrer.[85] A sustaining of the motion would appear to be res judicata in a subsequent action involving the same parties and subject matter.[86] Granting of the motion would also appear to be appealable, as it goes to substance.[87] Subject, as always, to the furtherance of justice amendment provision,[88] granting of the motion precludes amendment.[89]

This pre-trial motion for judgment on the pleadings is nothing more than a summary judgment limited to the pleadings. In other words, if there is no *formal* issue of fact in the pleadings, and the movant is entitled to judgment as a matter of law, motion for judgment on the pleadings is appropriate. The formal issue, to be ascertained from the pleadings alone, is the analogue to the genuine issue question involved in summary judgment, to be ascertained from extrinsic evidence. The procedures are very similar, if not identical, in legal consequences. Both are appealable orders, both are res judicata in a subsequent action, and both severely restrict amendment.

Because the motions serve separate purposes, and supplement each other, both are justified in present Nebraska procedure.

### D. The Federal System Procedures and Their Relation to Nebraska

It may be presumed that the Nebraska Legislature, by adopting the federal summary judgment procedure, had in mind the type of procedural reform exemplified by the Federal Rules. The Federal Rules were designed to function as a whole. Their primary purpose was the elimination of highly technical, yet practically inefficient procedures in the administration of justice. The first step was abolition of the demurrer,[90] and consolidation of pre-trial motions. At present there are three motions available—

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84 Workman v. Workman, 167 Neb. 857, 95 N.W.2d 186 (1959).

85 Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 149 Neb. 507, 509, 31 N.W.2d 477, 480 (1948), *aff'd*, 335 U.S. 525 (1949).

86 There are no Nebraska cases on this point. But since the sustaining of the motion is a final adjudication on the merits, it would appear to come within normal res judicata construction.

87 Workman v. Workman, 167 Neb. 857, 95 N.W.2d 186 (1959).

88 Neb. Rev. Stat. § 25-852 (Reissue 1956).

89 Stansbury v. Storer, 70 Neb. 603, 97 N.W. 805 (1903).

90 Fed. R. Civ. P. 7(c).

two dealing only with the pleadings, and the third going beyond the pleadings.[91] If, on either a motion to dismiss or a motion for judgment on the pleadings, matters outside the pleadings are presented to the court, and are admissible, the motion will be treated as one for summary judgment. It is therefore evident that the Federal Rules have established a concise, yet integral procedure, providing ample protection for all parties concerned, yet emphasizing simplicity and expediency in the administration of justice.

By adopting only part of the federal scheme in Nebraska, much of the reform envisioned by adoption of summary judgment was nullified. The Nebraska procedures now available were enacted at different times, and no attempt has been made to integrate them. The result is confusion providing frustrating means of delay.

### E. Possible Solutions to the Nebraska Dilemma

Nebraska pre-trial procedure needs uniformity. The functional should replace the technical. The problem could be approached in one of two ways.

The first possibility is adoption of the procedure outlined in the Federal Rules of Civil Procedure. Such an approach would be a large step toward attainment of the goals envisioned at the time of adoption of summary judgment in 1951.[92]

The second possibility is to enlarge the scope of the present motion to dismiss by including within it those grounds which are presently under the special demurrer. This should be accompanied by abolition of what is now known as the general demurrer. Because judgment on the pleadings serves a separate useful purpose, its existence would seem justified. There is no danger of confusion, for summary judgment and judgment on the pleadings supplement each other. Under this approach, then, there would be three procedures available for pre-trial disposal of a case—the revised motion to dismiss, judgment on the pleadings, and summary judgment. There would be a minimum of overlapping, and an integrated scheme for pre-trial procedure would replace the

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[91] Fed. R. Civ. P. 12(b), 12(c), 56.

[92] This could be approached in one of two ways. The first possibility would be a legislative grant of rule-making power to the Nebraska Supreme Court. The propriety of this approach is outside the scope of this article, but for a more detailed discussion, see Annot., 110 A.L.R. 22 (1937).

A second method would be enactment of the Federal Rules by the legislature itself, with resultant elimination of inconsistent procedures now in effect.

present "patchwork" system. Confusion would be eliminated, and, most importantly, dilatory tactics would be dealt a fatal blow.

## VI. CONCLUSION

Summary judgment has been available in Nebraska for thirteen years. During this period of time, forty-nine cases dealing with the propriety of summary judgment rulings below have been before the Nebraska Supreme Court.[93] Because the sampling is rather limited, a numerical analysis of the results is by no means conclusive, but it does tend to indicate the relative success of the procedure to this point.[94]

Any discussion of the statistics must be preceded by a note of caution. The summary judgment procedure is but one means of combatting delay in litigation. To be used effectively, its practical limits should be recognized by the trial attorney.[95] Certain types of action are by their very nature more appropriate for application of the procedure. Where there is written evidence of a transaction, the issue of fact analysis is simplified and it becomes easier to ascertain whether the case is a proper one for summary judgment. The same holds true for cases involving a constitutional question. At the other end of the scale are tort cases. Whenever a "reasonable man" standard is required, as it is almost invariably in the negligence area, its resolution, as a general rule, must be left to the trier of fact. But this does not mean that *all* tort cases are inappropriate from a summary judgment standpoint.[96] It merely indicates probabilities of success. The type of case involved should be the first consideration of the attorney in determining whether or not to move for summary judgment.[97]

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[93] See appendix.

[94] There is no practical means of determining how many cases have been disposed of, without appeal, in the district courts by summary judgment, for records of this type are not maintained. The survey must therefore be limited to cases appealed to the Nebraska Supreme Court.

[95] See Guiher, *Summary Judgments—Tactical Problem of the Trial Lawyer*, 48 VA. L. REV. 1263 (1962), for a discussion of the practical problems which must be taken into consideration by the trial attorney in arriving at a decision on whether to move for summary judgment.

[96] See, *e.g.*, Miller v. Aitken, 160 Neb. 97, 69 N.W.2d 290 (1955). See also 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1232.1 (rules ed. 1958); Comment, 25 ALBANY L. REV. 278 (1961).

[97] It should be noted that summary judgment can be an appropriate remedy where injunctive relief is sought. See Anderson v. Carlson, 171 Neb. 741, 107 N.W.2d 535 (1961) (action to enjoin collection of tax).

Statistically, the Nebraska venture in summary judgment has not been a startling success.[98] This, however, should not lead to the conclusion that the procedure is a failure and will not work. In the first place, efficient use of the procedure depends, to a large extent, on realization of its limitations by those who use it. For example, the number of reversals is reduced considerably when the tort cases are discounted. Tort is the largest area of reversal in Nebraska, as it should be, for it is least suited to the summary judgment procedure. On the other hand, in those actions where there is some type of written document, the Nebraska experience has been relatively successful. Secondly, it is entirely possible that the confusion now existing with respect to the pre-trial procedures available has prevented summary judgment from attaining its potential. And finally, the success of summary judgment, to a large extent, is in the hands of the district judges. Because denial of a summary judgment is not appealable, theirs is an almost plenary power. If they are opposed to the basic policies behind the procedure, or if they are advocates of trial by jury at all costs, then effectiveness of the procedure is seriously threatened.[99]

In 1951, the Nebraska Legislature took a long step toward reform in the area of pre-trial procedure. That step should now be implemented by simplification and/or elimination of the other pre-trial motions.

*Kenneth P. Keene* '65

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[98] See appendix.

[99] On judicial attitudes concerning the handling of summary judgment procedure, and their relationship to the relative success of the procedure, see Steckler, *Motions Prior to Trial,* 29 F.R.D. 299, 306 (1962).

APPENDIX

| TYPE OF ACTION | Affirming S/J Below for: Plaintiff | Defendant | Reversing S/J Below for: Plaintiff | Defendant |
|---|---|---|---|---|
| A. TORT | | | | |
| 1. Personal injury | 1(a) | 3(b) | 1(c) | 10(d) |
| 2. Use of trade name | | | | 1(e) |
| 3. Replevin | 1(f) | | | |
| 4. Fraud | | | 1(g) | 1(h) |
| 5. Libel | 1(i) | | | |
| 6. Negligent misrepresentation | | 1(j) | | |
| B. CONTRACT | 3(k) | 6(l) | 3(m) | 2(n) |
| C. CONSTITUTIONAL ISSUE | 1(o) | 3(p) | | |
| D. STATUTE & ORDINANCE | | | | |
| 1. Whether within | | | | 2(q) |
| 2. Taxation | 2(r) | | | |
| 3. Officers: duties and powers | 1(s) | 1(t) | | |
| 4. Statutory remedy | | 1(u) | | |
| E. GUARDIANSHIP | | | 1(v) | |
| F. ORIGINAL PROCEEDING: 1 (summary judgment denied) (w) | | | | |
| G. DENIAL NOT APPEALABLE RULE: 4(x) | | | | |

a. Miller v. Aitken, 160 Neb. 97, 69 N.W.2d 290 (1955).
b. Anderson v. Moser, 169 Neb. 134, 98 N.W.2d 703 (1959).
Eden v. Klaas, 165 Neb. 323, 85 N.W.2d 643 (1957).
Mueller v. Shacklett, 156 Neb. 881, 58 N.W.2d 344 (1953).
c. Lesoing v. Dirks, 157 Neb. 183, 59 N.W.2d 164 (1953).
d. Berg v. Rasmuss, 176 Neb. 340, 125 N.W.2d 95 (1964).
Johnson v. Metropolitan Util. Dist., 176 Neb. 276, 125 N.W.2d 708 (1964).
Hall v. Hadley, 173 Neb. 675, 114 N.W.2d 590 (1962).
Youngs v. Wagner, 172 Neb. 735, 111 N.W.2d 629 (1961).
Collett v. Hendrickson, 172 Neb. 571, 110 N.W.2d 851 (1961).
Schlines v. Ekberg, 172 Neb. 510, 110 N.W.2d 49 (1961).
Ingersoll v. Montgomery Ward & Co., 171 Neb. 297, 106 N.W.2d 197 (1960).
Kleinknecht v. McNulty, 169 Neb. 470, 100 N.W.2d 77 (1959).
Dennis v. Berens, 156 Neb. 41, 54 N.W.2d 259 (1952).
Illian v. McManaman, 156 Neb. 12, 54 N.W.2d 244 (1952).
e. Ransdell v. Sixth St. Food Store, Inc., 174 Neb. 875, 120 N.W.2d 290 (1963).
f. Spidel Farm Supply, Inc. v. Line, 165 Neb. 664, 86 N.W.2d 789 (1957).
g. Fidelity & Deposit Co. v. Bodenstedt, 170 Neb. 799, 104 N.W.2d 292 (1960).
h. Workman v. Workman, 167 Neb. 857, 95 N.W.2d 186 (1959).
i. Rimmer v. Chadron Printing Co., 156 Neb. 533, 56 N.W.2d 806 (1953), *rev'd on other grounds.*
j. Ehlers v. Pound, 176 Neb. 673, 126 N.W.2d 893 (1964).

k. Bishop Cafeteria Co. v. Ford, 177 Neb. 600, 129 N.W.2d 581 (1964).
Hoke v. Welsh, 162 Neb. 831, 77 N.W.2d 659 (1956).
Mecham v. Colby, 156 Neb. 386, 56 N.W.2d 299 (1952).
l. Arla Cattle Co. v. Knight, 174 Neb. 360, 118 N.W.2d 1 (1962).
Knoll v. Knoll, 173 Neb. 602, 114 N.W.2d 40 (1962).
Lange v. Kansas Hide & Wool Co., 168 Neb. 601, 97 N.W.2d 246 (1959).
Oak v. Griggs, 167 Neb. 239, 92 N.W.2d 551 (1958).
First Nat'l Bank v. Gross Real Estate Co., 162 Neb. 343, 75 N.W.2d 704 (1956).
Palmer v. Capitol Life Ins. Co., 157 Neb. 760, 61 N.W.2d 396 (1953).
m. Walkenhorst v. Apolius, 172 Neb. 830, 112 N.W.2d 31 (1961), *rev'd on other grounds.*
Wolf v. Tastee Freez Corp., 172 Neb. 430, 109 N.W.2d 733 (1961).
Johns v. Carr, 167 Neb. 545, 93 N.W.2d 831 (1958).
n. Fay Smith & Associates, Inc. v. Consumers Pub. Power Dist., 172 Neb. 681, 111 N.W.2d 451 (1961).
Clearwater Elevator Co. v. Hales, 167 Neb. 584, 94 N.W.2d 7 (1959).
o. Anderson v. Carlson, 171 Neb. 741, 107 N.W.2d 535 (1961).
p. Muller v. Nebraska Methodist Hosp., 160 Neb. 279, 70 N.W.2d 86 (1955).
Cheatham v. Bishop Clarkson Memorial Hosp., 160 Neb. 297, 70 N.W.2d 96 (1955).
Parks v. Holy Angels Church, 160 Neb. 299, 70 N.W.2d 97 (1955).
q. Healy v. Metropolitan Util. Dist., 158 Neb. 151, 62 N.W.2d 543 (1954).
City of Omaha v. Lewis & Smith Drug Co., 156 Neb. 650, 57 N.W.2d 269 (1953).
r. County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N.W.2d 719 (1961).
Kissinger v. School Dist. No. 49, 163 Neb. 33, 77 N.W.2d 767 (1956).
s. State v. Kidder, 173 Neb. 130, 112 N.W.2d 759 (1962).
t. Peterson v. George, 168 Neb. 571, 96 N.W.2d 627 (1959).
u. Kidder v. Wright, 177 Neb. 222, 128 N.W.2d 683 (1964).
v. Finn v. Whitten, 172 Neb. 282, 109 N.W.2d 376 (1961).
w. State *ex rel.* Nebraska State Bar Ass'n v. Jensen, 171 Neb. 1, 105 N.W.2d 459 (1960).
x. Pressey v. State, 173 Neb. 652, 114 N.W.2d 518 (1962).
Otteman v. Interstate Fire & Cas. Co., 171 Neb. 148, 105 N.W.2d 583 (1960).
Johnson v. School Dist. No. 3, 168 Neb. 547, 96 N.W.2d 623 (1959).
Rehn v. Bingaman, 157 Neb. 467, 59 N.W.2d 614 (1953).