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SUMMARY JUDGMENT IN VIRGINIA

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Introduction

"While it is true that every simile limps, the motion for summary judgment is not unlike the unveiling of a statue. The motion requires the opposition to remove the shielding cloak of formal allegations and demonstrate a genuine issue as to a material fact."[1]

The above quotation succintly states the underlying theory of the motion for summary judgment as conceived and adopted in a number of American states today and embodied in the Federal Rules of Civil Procedure. The material to follow will examine the historical reasons for the necessity of the summary judgment reform with emphasis upon the Virginia development and will attempt to compare Federal Rule 56 with Virginia Rule 3:20 on summary judgment. The purpose of the historical and comparative analysis is to arrive at conclusions as to the effectiveness of the Virginia summary judgment rule in achieving those goals which the procedure is designed to reach.

Historical Background

Summary judgment as a procedural reform is the product of two historical developments in the adjective law:

1. The dissatisfaction of the profession with the cumbersome technicalities of the common law forms of action and the injustice which often resulted from the strict requirements of those rules.

2. The simplification of pleadings, in order to correct the first situation above, resulted in the development of fact directed pleadings as distinguished from the common law requirement of an issue directed pleading system.

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[1] United States v. Dollar, 100 F. Supp. 881, 884 (D. Cal. 1951).

The second historical influence, which sought to correct the injustice of the first, brought with it new problems for the modern procedural systems. Fact pleading, while providing a framework for counsel to generate the issues in the case, did not force the issues as did the compelling methods of common law pleading. Therefore, as facts provided elasticity the pleader was not committed to a single theory of a cause of action or defense and hence the pleader could effectively cloud the issues and consequently could reach the trial stage of litigation without a meritorious claim or defense. Indeed, an important justification of fact pleading, as emphasized by the early drafters of code systems, was that the litigant often could not know what developments his evidence would produce and hence should not be committed in advance of trial.[2] As fact pleading developed in these jurisdictions it became evident that the desirable flexibility often worked a decided injustice on the adverse party. In some cases, the trial revealed that viewed from the pleading stage no possible turn of evidence could produce a victory for one party and yet he was successful in carrying his adversary to trial. Summary judgment is one method of imposing a duty upon a party to do more than simply allege a good cause of action or defense. He must show that he is entitled to a trial on a genuine issue of material fact, and materials other than pleadings are used in support of the motion.

Virginia took an early lead in recognizing the injustices produced by common law pleading and the authorities generally agree that a statute passed in 1732[3] is the forerunner to the motion for judgment procedure for commencing an action at law.[4] This statute, and several others passed before 1919, authorized the use of the motion for stating a claim in several selected types of cases. In 1919, the motion for judgment procedure was extended to all actions at law.[5] It is

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[2] *First Report*, Commissioners on Practice and Pleading, New York, 1848, p. 144. See Cark, *Code Pleading* (2nd ed., 1947) p. 225 for the attitude of the early code authors on fact pleading.

[3] Acts of May, 1732, 4 Va. Stat. (Hening) 352, Chp. 10 and 8.

[4] Chisholm v. Gilmer, 299 U. S. 99, 57 Sup. Ct. 65, 81 L. Ed. 63 (1936). Miller *Three American Ventures in Summary Civil Procedure*, 38 Yale L. J. 193 (1928). Clark and Samenow, *The Summary Judgment*, 38 Yale L. J. 423 (1929). Fowler, *Virginia Notice of Motion Procedure*, 24 Va. L. R. 711 (1938).

[5] Va. Code, (1919) sec. 6046.

significant to note, that the use of this procedure was frequently criticized by members of the bar at an early date,[6] and the seeds of modern day opposition to summary proceedings are apparent in their arguments. The holdings of the Virginia courts were not uniform during the early stage of this experiment in pleading reform,[7] and the modern authorities are not, as yet, in complete accord as to the real function of the motion for judgment.[8] For purposes of the present discussion, however, it is sufficient to point out that the motion for judgment procedure, as applied in the vast majority of Virginia courts today, is the realization of the second historical development mentioned above paving the way for the summary judgment.

Another historical influence in the adoption of summary judgment in Virginia is the simplified statutory procedure for recovery on contracts.[9] The purpose of this section, as stated in an early case, is:

> ". . . to prevent delay caused to plaintiffs by continuances upon dilatory pleas when no real defenses exist, and to simplify and shorten the proceedings."[10]

Prior to the abolishment of the plea of the general issue, this section denied defendant the opportunity of relying on a merely formal general issue entered to delay the hearing. The statute requires:

> " . . . plaintiff file with his motion for judgment an affidavit made by himself or his agent stating therein to the

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[6] John Marshall's argument in Graves v. Webb 1 Call 170 (1798), is an example of this early opposition to the motion for judgment. Pendleton, J. summed up Marshall's contention:

> ". . . That if it was a declaration, the variance would be fatal; and, certainly, it would not be pretended, that a notice, which was an innovation upon the common law, might be less definite than a declaration; or, that the judgment might vary from the declaration, in a suit at common law. That the notice should state the claim with as much precision as a declaration . . ."

[7] For a historical treatment of the cases during this period see Fowler, op. cit. supra note 4.

[8] Phelps, *Handbook of Virginia Rules of Procedure in Actions at Law.* (1959), p. 140.

[9] Va. Code, (1950) sec. 8-511.

[10] Gehl v. Baker, 121 Va. 23, 92 S. E. 852 (1917).

best of the affiant's belief the amount of the plaintiff's claim, that such amount is justly due and the time from which plaintiff claims interest . . . "

If defendant does not file a counter affidavit with his defense, the plaintiff is entitled to judgment for the amount of his claim.

This statute is a direct application of the theory of summary judgment in a restricted type of action, and is an example of the type of provision which has led to the adoption of summary judgment in any type of suit. Statutes of the same tenor in other jurisdictions marked the beginnings of an appreciation of the injustice which was done when a party was allowed to prolong the inevitable judgment against him, and interpose defenses merely for delay.[11] Gradually, a tendency appeared to increase the scope of the summary judgment remedy, and the adoption of Federal Rule 56 which allowed summary judgment in all civil actions is the modern predecessor of the "all inclusive" type of procedure found in many jurisdictions today.[12] The Virginia statute mentioned above is particularly interesting in that affidavits are used to insure that the defendant is not merely delaying the action. On the other hand, Virginia Rule 3:20[13] extending summary judgment to include all types of actions makes no mention of affidavits as one of the materials which may be considered when the motion is deliberated by the court. Federal Rule 56 while not requiring a party to file an affidavit on moving for summary judgment, makes such a practice permissive and, in fact, the use of affidavits is an important phase of the Federal Rule. This particular point will be examined in detail subsequently.

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[11] Early statutes providing for summary judgment on restricted types of claims include: England—The Summary Procedure on Bills of Exchange Act, 18 & 19 Vict. c. 67 (1855) (actions upon bills of exchange and promissory notes).
New Jersey—N. J. Laws 1912, 380 (actions upon contracts, judgments for a stated sum, and upon a statute).
Michigan—3 Mich. Comp. Laws (Cahill, 1915) c. 234, and sections 12581 and 12572. (contracts and judgments).
For a complete discussion of these and other statutory materials see Clark and Samenow, op. cit. supra note 4.

[12] Federal Rule 56 was originally enacted in 1937 and substantially amended in 1946.

[13] Rule 3:20, Rule of Supreme Court of Appeals of Virginia, Va. Code, (1950).

The adoption of 3:20 in the Rules of Court of 1950 completed the process of evolution of the summary judgment. The Judicial Council for Virginia explained the operation of the proposed rule as follows:

> "The rule provides for summary judgment in those cases that cannot be reached by demurrer in which the only dispute concerns a pure question of law. It applies only to cases in which no trial is necessary because no evidence could affect the result. If, for example, at a pretrial conference it appears that one party is relying exclusively on evidence inadmissable under the parol evidence rule, the judges decision on that point of law would dispose of the case."[14]

In 1957 the rule was amended changing the wording from "the admissions, if any, in a deposition" to "admissions, if any, in the proceedings" and providing for summary judgment on sustaining a motion to strike the evidence. This amendment introduced in the Virginia Rule a possibility which distinguished that rule from the accepted theory of summary judgment elsewhere. In Virginia, it is possible to move the court for summary judgment after the case has reached the trial stage. This unique feature of the Virginia Rule is discussed in the next section of this article.

A Comparison of the Virginia and Federal Rules on Summary Judgment

The Virginia Summary Judgment Rule and the Federal Rule differ in several important particulars. Since the Virginia Rule is relatively new it is impossible to predict at this early date to what extent the difference in terminology will actually result in a difference in practical application. The Supreme Court of Appeals had discussed Rule 3:20 on eight occasions, and only one of these decisions followed the important 1957 amendment of the rule. In spite of this lack of primary authority on which to base an analytical comparison of the two rules there are some problems which are certain to arise

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[14] Judicial Council for Virginia, *Proposed Modifications of Practice and Procedure* (1949), p. 29.

due to the integration of summary judgment into the present rules of practice in Virginia. The Federal Rules are a comprehensive expression of methods of modern pleading; the Virginia Rules retain traditional ideas which are not based upon the so-called modern "code" approach.[15] Since the two procedural systems are, to a certain degree, different it is logical that the adoption of the summary judgment rule in Virginia be geared to the background of Virginia procedure and not the wholesale adoption of the letter of the Federal Rules. The theoretical difficulty in maintaining such a position is that the success of summary judgment in achieving those ends which it is designed to achieve is closely related to the existence of other "code" procedures of discovery, pretrial practices, and related provisions similar to those in the Federal Rules. To the extent that the basic assumptions underlying the use of summary judgment are dependent upon procedures which are not available in Virginia, the reason for the rule fails and confusion is the result. The analysis which follows seeks to examine the extent Virginia can hope to realize the advantages of the summary judgment rule and still retain certain traditional ideas of Virginia procedure. The two rules are here set out in full for reference purposes:

Virginia Rule of the Supreme Court of Appeals (as amended)

Rule 3:20 Summary Judgment

> Either party may make a motion for summary judgment at any time after the parties are at issue. If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, or, upon sustaining a motion to strike the evidence, that the moving party is entitled to judgment, the court shall enter judgment in his favor. Summary judgment shall not be entered if the amount of damages or any other material fact is genuinely in dispute.

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[15] Professor Charles Wright remarks:

> "Virginia procedure, as thus prescribed, is an unsual mixture of old and new concepts. The distinction between law and equity is preserved, though administered by a single judge, and discovery, though possible, is quite limited." Wright, *Procedural Reform in the States*, 24 F. R. D. 118 (1959).

Federal Rules of Civil Procedure (as amended)

Rule 56 Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and

directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for 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 depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

A. Who May Make The Motion

Under both the Virginia Rule and the Federal Rule either plaintiff or defendant may move for summary judgment.[16]

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[16] See Virginia Rule 3:20, and Federal Rule 56(a) and (b), supra.

B. When May The Motion Be Made

Virginia Rule 3:20 states that the motion may be made "at any time after the parties are at issue." Under Virginia Rule 3:12, the parties are at issue when the pleadings required to be filed have been filed, or the time for filing them has expired. This precludes consideration by the court of a motion for summary judgment by either plaintiff or defendant prior to the defendant's filing of his responsive pleadings.[17] Under Rule 3:5 defendant is allowed 21 days after service upon him of the notice of motion for judgment to file a responsive pleading, and under Rule 3:7 in the event he enters a plea in abatement or demurrer which is subsequently overruled, the time may be longer.[18]

Federal Rule 56(b) has always allowed defendant to make his motion at any time after the institution of the action against him. That is, he could file his motion before pleading to plaintiff's claim.[19] Defendant, therefore, is able to put in issue the validity of plaintiff's claim immediately and in making such a motion he is requesting an adjudication on the merits rather than testing the technical sufficiency of plaintiff's pleading alone. If defendant affirmatively demonstrates that no material issue of fact exists and shows that he is entitled to judgment as a matter of law, the court will enter summary judgment in his favor.

Federal Rule 56(a) originally provided that plaintiff could not file a motion for summary judgment until after defendant filed his responsive pleading. However, largely through the efforts of Judge Charles Clark, this section of the rule was amended in 1946 and plaintiff was permitted to move for summary judgment:

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[17] Carwile v. Richmond Newspapers, Inc., 196 Va. 1, 82 S. E. 2d 588 (1954).

[18] "When the court has entered its order overruling all pleas in abatement, demurrers and other pleas filed by a defendant, such defendant shall, unless he has already done so, file his grounds of defense within such time as the court may prescribe." Rule 3:7, Rule of Supreme Court of Appeals of Virginia, Va. Code, (1950).

[19] Hartmann v. Time, Inc., 166 F. 2d 127, 1 A. L. R. 2d 370 (3rd Cir. 1947), certiorari denied 334 U. S. 838, 68 Sup. Ct. 1495, 92 L. Ed. 1763 (1948).

> "at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party".

By thus stating a time limitation in terms of days, the defendant is given adequate time to prepare his course of defense and yet pre-pleading motions which he may interpose will not bar plaintiff from asserting his motion and offering his material in support of it. Thus, Federal Rule 56 strikes at the heart of all possible delaying tactics and, in doing so, follows the spirit of summary judgment.

Returning to Virginia Rule 3:20, in the case where defendant's demurrer is overruled and the court in the exercise of its discretion permits defendant additional time to file his grounds for defense, it is clear that formal objections tend to postpone plaintiff's right to move for summary judgment. Judge Clark criticized exactly this situation prior to the amendment of the Federal Rules in his dissenting opinion in *United States* v. *Adler's Creamery:*

> "Under the circumstances no reason of substance barred a final judgment below, and it is unfortunate that mere limitations of procedure may have done so. Amendment of Rule 56(a) eliminating this restriction on the valuable remedy of the summary judgment appears to the writer hereof to be highly desirable in the interest of preventing the protraction of litigation."[20]

As a practical matter, the time which the court grants defendant after overruling his demurrer before he must file his grounds of defense may be a matter of only a few days. In that situation, plaintiff's wait may not constitute any serious burden upon him. The important point, however, is the theoretical objection which Judge Clark emphasizes in the *Adler's Creamery* case. Procedural delays are inconsistant with the underlying theory of the summary judgment reform.

C. Materials Which May Be Used In Support Of The Motion

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[20] United States v. Adler's Creamery, 107 F. 2d 987, 992 (2nd Cir. 1939).

1. Pleadings. Both Virginia Rule 3:20 and Federal Rule 56(c) expressly mention pleadings as one of the materials which the court will consider on the disposition of the summary judgment motion. Since pleadings, under both systems, are designed to give the opposite party fair notice of the nature of the claim or defense and summary judgment is an adjudication on the merits, a consideration of pleadings alone will normally not produce a summary judgment. Under the Virginia Rules, the demurrer is the proper method of raising the question of the legal sufficiency of the pleadings.[21] Under the Federal Rules, a motion to dismiss for failure to state a claim upon which relief can be granted[22] is the proper method. The distinction between these objections to the legal sufficiency of pleadings and a motion for summary judgment on the merits, is vital. Several of the few Virginia cases on summary judgment expressly recognize this distinction. In *Carwile* v. *Richmond Newspapers*,[23] the court said:

> "It will be observed that the motion for summary judgment in the instant case is in many respects similar to a demurrer; however when a demurrer is sustained there is not necessarily a finality to the case since the pleading may be amended, while sustaining a motion for summary judgment is a final disposition of the case."

As previously noticed, the Federal Rule permits defendant to file his motion for summary judgment at any time after the claim is filed. If the moving party bases his motion solely on the basis of his opponent's pleading, his motion is actually equivalent to a motion for judgment on the pleadings under

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[21] Anderson v. Patterson, 189 Va. 793, 55 S. E. 2d 1 (1949).
Burks, *Pleading and Practice* (Boyd 4th ed. 1952) sec. 208.
Phelps, op. cit. supra note 8, p. 184 ff
In Virginia, if the pleadings fail to inform the opposite party of the true nature of the claim or defense in sufficient detail a motion for a bill of particulars may be ordered. See Phelps, *The Bill of Particulars in Virginia*, 39 Va. L. R. 989 (1953).

[22] Federal Rules of Civil Procedure, Rule 12(b).

[23] See note 17, supra.

Federal Rule 12(c)[24] or 12(b), a motion to dismiss for failure to state a claim upon which relief can be given. Rule 12(b) as amended in 1946 covers the situation where the defendant "tags" his motion as one for dismissal for failure to state a claim, but succeeds in demonstrating that no genuine issue of fact exists and hence qualifies for summary judgment:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleadings to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Here, again, the Federal Rules do not allow an opportunity for a final judgment on the merits to escape due to the wording of the motion by movant. This should be compared with the situation which may well arise under the Virginia Rules. There is no time limit as to the filing of a demurrer in Virginia.[25] Therefore, after the parties are at issue a demurrer may be interposed at any time before the final determination of the factual issues by court or jury. Applying the theory of the Federal Rules, the court would be at liberty to consider such a motion as a motion for summary judgment and, upon a proper showing, award movant final judgment.

Is it necessary to specifically provide the court with this alternative by amending the rules of court as has been done in the Federal Rules? The answer is not available in Virginia, today, and there was a conflict of authority in the Federal

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[24] "We find no merit in appellant's contention that the court should not have entered 'judgments on the pleadings and a summary judgment at the same time' . . . the better authority appears to hold that where a party presents both a motion for judgment on the pleadings and a motion for summary judgment, no distinction need be drawn between them, and the court is justified in relying on all appropriate grounds disclosed by any or all papers of record in the case." Pope v. Continental Insurance Co. of New York, 161 F. 2d 912, 915 (7th Cir. 1947) certiorari denied 332 U. S. 824, 68 Sup. Ct. 164, 92 L. Ed. 399 (1947).

[25] Burke, op. cit. supra note 21, p. 339.
Phelps, op. cit. supra note 8, p. 185.

courts prior to the amendment.[26] The arguments will center around the old prohibitions against "speaking demurrers" and the extent to which summary judgment is intrinsically, a modification of this rule.

2. Pretrial Conference Orders-Partial Summary Judgment. Under both Federal Rule 56 and Virginia Rule 3:20 if a pretrial conference is held as provided for in Federal Rule 16 or Virginia Rule 4:1 and the results indicate there is no material issue of fact, the party entitled to judgment as a matter of law may be granted summary judgment without the necessity of a trial. The pretrial conference is simply one means of discovering that no issue of material fact exists and where the pleadings tentatively indicate an issue of fact, the conference may reveal that the issue is one of law only, making the case ripe for summary judgment.[27] Frequently, however, an issue of material fact may exit as to a portion of a single claim or as to one claim of several which a party advocates. For example, the results of the pretrial conference may be that the issue of liability in a negligence case is not genuinely in dispute but the issue of damages is an issue of material fact which is properly addressed to the trier of facts. In such cases, Federal Rule 56(c) provides for partial summary adjudication of the issue of liability while the last sentence of Virginia Rule 3:20 declares:

> "Summary judgment shall not be entered if the amount of damages or any other material fact is genuinely in dispute."

This express denial of the concept of partial summary judgment in the Virginia Rule is important whether or not a pretrial conference is held but it is convenient to discuss the principles involved under this section since one of the objects of a pretrial conference is to determine what portion of the case presents a real fact issue.

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[26] The following cases held the motion to dismiss was limited to matters appearing on the face of the complaint: Kohler v. Jacobs, 138 F. 2d 440 (5th Cir., 1943). United States v. Association of American Railroads, 4 F. R. D. 510 (D. Neb. 1945). *Contra*, holding that the motion to dismiss could be accompanied by other materials: United States ex rel. Benjamin v. Hendrick, 52 F. Supp. 60 (S. D. N. Y. 1943). Samara v. United States, 129 F. 2d 594 (2d Cir. 1940).

[27] Broderick Wood Products Co. v. United States, 195 F. 2d 433 (10th Cir. 1952).

Federal Rule 56 does not refer to Federal Rule 16, on the use of pretrial conferences. The reason for this absence of specific reference is probably due to the desire of the drafters of the Federal Rules to avoid confusion between the discretionary characteristics of Federal Rule 16, and the right of a party to invoke the operation of Federal Rule 56 on summary judgment. The use of a pretrial conference is discretionary with the District Court,[28] but in order to "salvage some results from the judicial effort involved in the denial of motion for summary judgment"[29] subsection (d) of Federal Rule 56 creates a duty on the District Court to

> ". . . if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

Judge Clark points out that the net result of Federal Rule 56(d) and that of Federal Rule 16 is the same:

> "(Federal Rule 56(d)) is in substance a pretrial order of the same form as that provided for in the pretrial rule, itself, Rule 16. This workable procedure demonstrates how closely this rule is tied in spirit and in fact to the other pretrial devices."[30]

The provisions of Federal Rule 56(d) are consistent with the other sections of that Rule, which clearly provide for summary judgment as to "all or any part"[31] of a claim. In

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[28] Federal Rules of Civil Procedure, Rule 16.
3 Moore, Federal Practice (2nd ed. 1953) sec. 16.06.

[29] Yale Transport Corp. v. Yellow Truck and Coach Manufacturing Company, 3 F.R.D. 440 (S.D.N.Y. 1944).

[30] Clark, *The Summary Judgment*, 36 Minn. L.R. 572.

[31] See Federal Rule 56 (a), (b) and (c)

other words, when a party moves for summary judgment under Rule 56 he may demonstrate that certain factual issues posed by his adversary are not genuine. Still, other factual issues which must necessarily be determined in his favor before he is entitled to final judgment may be genuinely in dispute. Under Rule 56, this party is entitled to a summary adjudication of a portion of his claim, less than the whole thereof, and the trial court is required to issue an order, similar to an order resulting from a pretrial conference, stipulating those factual issues which remain undetermined as a result of the consideration of the motion for summary judgment. The term "partial summary judgment" relates to this process of elimination, and actually is not a final judgment in the strict sense of the term. It has been suggested that the term "partial summary adjudication" be used [32] to avoid confusion between "a summary judgment, interlocutory in character"[33] and summary judgment which is res judicata and subject to appeal. The trial court retains control over its interlocutory determination that as to a portion of the claim no issue of material fact exists. In the ordinary case this determination will become final upon the entry of final judgment consistent with the verdict of the jury (or decision of the court) on those issues of fact which are found to be genuinely in dispute. There are cases, however, which demonstrate the trial court may subsequently alter its interlocutory determination after a showing at trial that justice required that this be done. In *Coffman* v. *Federal Laboratories Inc.*, plaintiff contended on appeal that a pretrial order under 56(d) had the effect of res judicata and precluded reconsideration by the trial court at a later stage of the litigation. In rejecting this contention, the court said:

> "Subsection (d) (of Rule 56) simply provides for a method whereby the trial judge with the aid of counsel can point up the controverted issues. It is, moreover, similar to the pretrial procedure provided for in Rule 16 and the matters determined in the issues so framed are not foreclosed in the sense that the judge cannot alter his conclusions. The action of interpreting the orders,

[32] 6 Moore's, *Federal Practice*, (2nd ed. 1953) sec. 56.20.

[33] This is the terminology used in Federal Rule 56(c).

> therefore, did not become final for the purposes of appeal and it did not have the effect of a final judgment. The court retained full power to make one complete adjudication of all aspects of the case when the proper time arrived. That time was when the judgment in the whole proceeding was entered. Therefore, even if we accept plaintiff's contention as to what was determined by the motion the court was still free to alter its view as to interpretation of the orders at a later stage of the proceedings. Res judicata was not and is not applicable."[34]

Under the Virginia Rules, there can be no partial summary adjudication, in the sense that is required under Federal Rule 56(d). If the trial court does not utilize the pretrial conference provided for by Rule 4:1 all issues must go to trial, and consequently, there is no advantage gained from the judicial effort of considering and denying a motion for summary judgment on the whole of movant's case. The result would seem to be that only in the most simple cases, where movant can conclusively demonstrate that no genuine fact issue can arise on any portion of the case, will the summary judgment rule be of any value in Virginia. This deprives the procedure of a great deal of its intrinsic value and may discourage serious consideration of these motions by the trial courts. Since movant is required to meet a strict standard in showing that a genuine issue does not exist and all inferences of fact offered by him at the hearing on the motion will be drawn in favor of the party opposing the motion,[35] his motion may be given little more than a cursory examination. Judge Clark feels that provisions for a partial adjudication is a fundamental part of any effective summary judgment rule for these reasons.[36]

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[34] Coffman v. Federal Laboratories, Inc., 171 F. 2d 94, 98, (3rd Cir., 1948) certiorari denied 336 U. S. 913, 69 Sup. Ct. 603, 93 L. Ed. 1076.

[35] The Federal courts have frequently referred to movant's burden on a motion for summary judgment in these terms. See for example: Pogue v. Great Atlantic and Pacific Tea Co., 242 F. 2d 575 (5th Cir. 1957).
Griffith v. Utah Power and Light Company, 226 F. 2d 661 (9th Cir. 1955).
Cochran v. United States, 123 F. Supp. 362 (D. Conn., 1954).
And see the Virginia statement of the rule in Sanford v. Mosier,—Va.—, 111 S.E. 2d 283 (1959)

[36] Clark, op. cit. supra note 2, p. 562.

The Virginia Rule does prohibit a trial court pretrying a case when it is not its policy to utilize the pretrial conference[37] and this is probably the most that can be said for the absence of any provision for partial summary judgment similar to Federal Rule 56(d). If the trial court does inaugurate a pretrial system, an order conforming to the outline specified in Rule 4:1 will achieve the same results as a partial summary adjudication of the case. However, the extent to which the trial courts and the Bar will subscribe to the pretrial system in the future is doubtful in the face of Virginia's long standing endorsement of the strict "adversary system" of the practice of law.[38]

3. Evidentiary Materials. Federal Rule 56 (c) enumerates several classes of evidentiary materials which may be considered by the trial court in passing upon a motion for summary judgment: depositions, admissions on file, and affidavits. In addition to those classes specifically provided for in 56 (c), interrogatories and answers under Federal Rule 33[39] and other materials that would be admissable in evidence or otherwise usable at trial have been held to be proper materials for consideration upon a motion for summary judgment.[40] The purpose in including these materials within the scope of the motion is to provide movant with a means of demonstrating that issues apparent on the face of the pleadings are not genuine issues of fact at all by affirmatively showing that he can produce certain evidence on trial. This aspect of Federal Rule 56 has resulted in considerable controversy. The following quotations from the authorities indicate the area of disagreement:

> "The purpose of the rule is to enable District Courts through frank and complete disclosure by all parties to determine what, if any, issues of fact there may

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[37] 6 Moore, op. cit. supra note 32, sec. 56.20(3).

[38] For an example of the types of arguments against the use of pretrial procedures, see Kuykendall, *Pretrial Conference: A Dissent from the Bar*, 45 Va. L. R.147 (1959).

[39] Ulen v. American Airlines, 7 F. R. D. 371 (D. D. C., 1947).

[40] For a listing of materials which fall under this classification see 6 Moore, op. cit. supra note 32, sec. 56.11(1).

be for a jury to determine, and one party may not on motion for summary judgment withhold proof which he intends to use on trial."[41]

The author of a leading treatise on Federal Procedure comments on the above decision:

". . . it is sometimes held that on a motion for summary judgment both parties should fully disclose what the evidence will be on the issue involved, and a party may not withhold evidence which he intends to use at the trial. It seems doubtful, however, whether the parties need go quite that far. It should be enough to disclose merely sufficient evidence by affidavits or by use of discovery methods to demonstrate that there is a material issue of fact to be submitted for decision by the trier of facts."[42]

Judge Frank of the Second Circuit, dissenting in a 1945 case expressed his view as follows:

"The gravamen of this theory of summary judgment is that to resist the motion a party need not produce his evidence, but need only indicate that it is possible that such evidence may be available."[43]

Judge Clark speaking for the majority in the same case said:

"Here the analogy suggested . . . of evidence which 'would require a directed verdict for the moving party' is useful. But care should be taken to make the analogy as exact as the circumstances permit; the ruling is to be made on the record the parties have actually presented, not on one potentially possible. Hence the case here is as though plaintiff had then rested, with no contra-

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[41] Simmons v. Charbonnier, 56 F. Supp. 512 (D. C. Ga. 1944).

[42] 3 Barron and Holtzoff, *Federal Practice and Procedure*, (1951) p. 141.

[43] Madeirense Do Brasil, S/A v. Stulman-Emrick Lumber Co., 147 F. 2d 399 (2d Cir. 1945) certriorari denied 325 U. S. 861, 65 Sup. Ct. 1201, 89 L. Ed. 1982 (1945) noted in 45 Col. L. R. 946 (1945).

diction or rebuttal of any kind, and had made its own motion for a directed verdict or preemptory instruction."[44]

These competing views struggle with a basic problem and Judge Clark, is the leading exponent of the minority view. He has championed summary judgment from its inception and in the procedure field no single name carries more respect. It remains to be seen whether he will succeed in establishing his view in the Federal courts.

Of the materials mentioned above, the use of ex parte affidavits to demonstrate the absence of an issue of fact is the least effective method. Since the affiant is not subject to cross examination and his demeanor is not observable by the trier of facts, the objection that affiant's credibility is not properly tested is often raised.[45] Affidavits submitted under Rule 56 are required, however, to meet the requirements of facts which would be admissible in evidence if offered at trial and be based upon personal knowledge.[46] Subsections (f) and (g) of Federal Rule 56 further provide for the situation where the party opposing the motion, for a sufficient reason, is unable to present by affidavits, facts to justify his opposition to the motion and for affidavits submitted in bad faith. In cases where no issue of credibility is involved, and that is conclusively demonstrated to the satisfaction of the trial court, affidavits can be the sole material upon which the motion for summary judgment is granted. The party opposing the motion for summary judgment is not entitled to hold back his evidence until trial hoping for developments which will generate an issue of fact.[47] He is required to come forward with something of probative value to meet the affidavits offered by movant.[48] To allow the party opposing the motion to refuse to do less and still allow him to reach trial would be to emasculate the summary judgment rule.

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[44] Madeirense Do Brasil, S/A v. Stulman-Emrick Lumber Co., op. cit. supra note 43, 405.

[45] Bowers v. E. J. Rose Mfg. Co., 149 F. 2d 612 (9th Cir., 1945).

[46] Federal Rule 56(e).

[47] Orvis v. Brickman, 196 F. 2d 762 (C. D. C. 1952).
Surkin v. Chateris, 197 F. 2d 77 (5th Cir., 1952).

[48] Unless, of course, the provisions of Federal Rule 56(e) and (f) apply.

Depositions, on the other hand, provide a better means for movant to justify his motion for summary judgment since the deponent is subject to cross examination.[49] But, like affidavits, the court is still unable to observe the deameanor of the deponent.[50] It was in a case where defendant insurer sought to use depositions in invoking summary judgment that Judge Clark made a classic reference to the summary judgment rule:

> "(If plaintiff) may thus reserve one's evidence when faced with a motion for summary judgment there would be little opportunity to 'pierce the allegations of fact in the pleadings' or to determine that the issues formally raised were in fact sham or otherwise unsubstantial. It is hard to see why a litigant could not then generally avail himself of the means of delaying presentation of his case until the trial. So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions."[51]

Admissions are obviously a valuable material for use in deciding a motion for summary judgment. Federal Rule 36 is a distinct aid in procuring admissions from the adverse party and will often materially aid movant and the court with reference to a motion under Rule 56.[52] Again, however, it is important not to enter the bailiwick of the trier of facts and regard a permissive inference, which is available to the trier of facts, as an admission.[53]

The evidentiary materials described above is another example of the efforts of the drafters of the Federal Rules to insist upon a genuine issue of fact existing before going to trial.

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[49] Federal Rules of Civil Procedure, Rule 30.

[50] 6 Moore, op. cit. supra note 32, sec. 56.11(4).

[51] Engl v. Aetna Life Insurance Co., 139 F. 2d 469, 471 (2d Cir., 1943).

[52] Federal Rule 36, reads in part:
"(a) Request for admission. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request . . ."

[53] See Madeirense Do Brasil, S/A v. Stulman-Emrick Lumber Co., op. cit. supra note 43.

Counsel is not permitted to conceal or avoid issues which will require consideration by the trier of facts. The purpose of summary judgment is well expressed when these rules are correctly applied and there is clearly no infringment of the right to trial by jury when there is no fact issue to be decided.[54]

The Virginia Summary Judgment Rule avoids specific reference to such evidentiary materials as have been discussed in connection with the Federal Rule. In fact, the only materials which seem to be available under Virginia Rule 3:20 before actual entry into the trial stage are the pleadings and pretrial conference orders, previously discussed, and "the admissions, if any, in the proceedings". This seems to indicate that Virginia does not subscribe to the use of such evidentiary materials before trial for the purposes of deciding a motion for summary judgment in the absense of a pretrial conference. This course is not inconsistent with long established Virginia ideas on the importance of the adversary system of administering the law,[55] and the conclusion is unavoidable that the drafters of the rules intended to eliminate these materials completely from the operation of the summary judgment rule. This, perhaps more than any other single feature of Rule 3:20 violates the spirit of the summary judgment procedural reform. If the court is required to pass upon a motion for summary judgment without benefit of indications as to what is susceptible of proof at the trial, movants burden of clearly showing no genuine fact issue

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[54] The Court of Appeals of New York upheld the constitutionality of the New York summary judgment statute in General Investment Co. v. Interborough Rapid Transit Co., 235 N. Y. 133, 139 N. E. 216 (1923).

Also see Fidelity and Deposit Co. of Maryland v. United States 187 U. S. 315, 23 Sup. Ct. 120, 47 L. Ed. 194 (1902) upholding the constitutionality of a summary judgment rule in the District Court for the District of Columbia.

[55] Professor Phelps, suggests that:

"The direct use of summary judgment for the obvious purpose of discovery would probably not be permitted by the courts in Virginia." op. cit. supra note 8, p. 257.

It is interesting to note, in this connection, than an early commentary on the Rules of the Supreme Court of 1950 dealing with the discovery process in Virginia anticipated a desirable interrelationship between summary judgment and the discovery rule based upon federal precedents:

"Of the adopted rules of practice and procedure, Rule 3:20 provides a potential source of discovery aid in the form of summary judgment. This procedure, testing the genuineness of issue, forces the party against whom it is requested to produce sufficient proof to demonstrate that there is a genuine dispute. This will in most instances enable the petitioning party to obtain a clearer understanding of his opponent's case." Chappell, *The Discovery Process in Virginia*, 37 Va. L. R. 151, 160 (1951).

exists will often be impossible of achievement. The court will be forced to assume that the party opposing the motion can demonstrate all fact issues that are possible under the pleadings, unless a pretrial conference is held or an admission is obtained.

As noted earlier a Virginia statute provides for summary judgment on accounts and contracts[56] and expressly provides for the use of affidavits in connection with a claim under the statute. The Supreme Court of Appeals has said of this section of the Code:

> "This section was intended to prevent delay caused to plaintiff's by continuances upon dilatory pleas when no real defenses exist, and to simplify and shorten the proceedings."[57]

This endorsement of the basic theory of the use of affidavits to achieve the goals of the summary judgment is, at least, a recognition of the value of such a procedure in a limited group of claims. Here, the object is to require defendant to present some indication that he has a meritorious defense. If no defensive pleading and affidavit is filed by the defendant, the plaintiff, on motion made in open court, shall be entitled to judgment for the amount claimed in the affidavit and no further proof of the plaintiff's claim is necessary.[58] Such a provision when limited to simple accounts and contracts certainly requires truth in the pleadings.[59] Note that the statute creates an affirmative duty on defendant to come forward with more than his pleadings in order to gain a trial. He must respond to the merits of the controversy without delay and plaintiff's right in these contract actions is thereby extended to include the right to proceed without such delays. Under the Federal Rule this right is basic to summary judgment in all types of actions. Under Virginia Rule 3:20 plaintiff's right is not deemed of sufficient value to outweigh the necessity of requiring defendant to present evidence before trial.

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[56] Va. Code, (1950) sec. 8-511.

[57] Carpenter v. Gray, 113 Va. 518, 75 S. E. 300 (1912).

[58] Va. Code, (1950) sec. 8-511.

[59] Courts have frequently recognized inherent powers to strike sham and frivolous pleadings. See Clark op. cit. supra note 2, p. 254.
Also for rules of court expressing this power, see Rule 1:12, Rules of Supreme Court of Appeals of Virginia, Va. Code, (1950).
Federal Rules of Civil Procedure, Rule 11.

D. The Granting of Summary Judgment on Sustaining a Motion to Strike the Evidence

Virginia Rule 3:20 provides that the court "upon sustaining a motion to strike the evidence" may enter summary judgment for the movant. This provision in the rule is, perhaps, the most interesting and distinctive phase of the Virginia Rule and it represents a departure from the general accepted utilization of summary judgment in other jurisdictions. The ordinary justification for summary judgment is to relieve the litigant of the burden of going to trial when there is no issue of fact to be decided by the trier of facts.[60] The statement of the Virginia Rule given above contemplates the use of summary judgment upon the trial stage of the litigation and hence would seem to ignore the basic summary judgment theory. The key to this situation is to be found in the general development of the Virginia law on the motion to strike and the decision in a recent case decided by the Supreme Court of Appeals. By way of anticipating the material to follow, the use of summary judgment at the trial stage is not a flagrant departure from accepted theories of the adjective law. This is so because of the theoretical similarities between summary judgment and the direction of a verdict after the introduction of evidence at the trial. In both cases, no issue of fact is presented which must be determined by the trier of facts and hence, as a matter of law, one party is entitled to judgment.

Prior to a 1957 amendment, a Virginia statute prohibited a directed verdict.[61] This statutory denial of a practice which is employed in the great majority of states today and in the Federal Courts,[62] accounts for the use of the motion to strike out the evidence in Virginia. The possibility of using the motion to strike in cases where a different verdict could not have been properly rendered by the jury, was recognized at an early date.[63]

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[60] "The very object of a motion for summary judgment is to separate what is formal, or pretended in denial or averment from what is genuine and substantial so that only the latter may subject a suitor to the burden of a trial." Cardozo, J. in Richard v. Credit Suisse 242 N. Y. 346. Also see Whelan v. New Mexico Oil and Gas Co., 226 F. 2d. 156 (10th Cir., 1955).

[61] Va. Code (1950) sec. 8-218.

[62] Federal Rules of Civil Procedure, Rule 50.

[63] For a concise history of the development of the motion to strike out the evidence, see Burke, op. cit. supra note 21, sec. 284.

Thereafter (although it was frequently argued the practice violated the spirit of the statute prohibiting a directed verdict),[64] the motion to strike grew in popularity with the members of the bar and was accepted by the courts. The motion to strike was found to be less demanding administratively to the movant than the common law demurrer to the evidence and, most importantly, the courts held that unlike the demurrer to the evidence, movant did not lose his right to the jury if his motion failed.[65]

After the adoption of the summary judgment rule in 1950, a case arose before the Supreme Court of Appeals which resulted in the amendment of the rule in 1957, and involved the motion to strike.[66] Plaintiff sought to recover for personal injuries sustained in an accident involving her automobile and another operated by defendant wife with defendant husband riding therein as a passenger. Plaintiff sought relief as against both husband and wife, arguing a principal-agent relationship existed and hence the husband must respond for the alleged negligence of the wife. At the conclusion of plaintiff's evidence defendant husband moved to strike on grounds that plaintiff had presented no evidence sufficient to support a jury verdict on the agency issue. The court sustained defendant husband's motion but the jury verdict made no mention of the husband, returning a verdict for the wife on the issue of negligence and certain other claims presented to them. On appeal, plaintiff argued that under the doctrine developed in *Heath* v. *Mooers*[67] there was no basis for the trial court's entry of judgment for defendant husband, there being no jury verdict to support the judgment. The Supreme Court of Appeals was thus faced with the possibility of requiring defendant to endure prolonged litigation involving additional expense in a case where defendant was clearly entitled to prevail as a matter of law. In *Heath* v. *Mooers* the court had held that the granting of the motion to strike did not dispense with the necessity of the jury verdict as the judgment of the court could not be substituted for that of the jury in the absence of waiver. Defendant husband's counsel

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[64] Barksdale v. Southern Railway Co., 152 Va. 604, 148 S. E. 683 (1929). Note, 17 Va. L. R. 299 (1931).

[65] Burke, op. cit. supra note 21, sec. 284.

[66] Clark v. Kimnach, 198 Va. 737, 96 S. E. 2d 780 (1957).

[67] Heath v. Mooers, 171 Va. 397, 199 S. E. 519 (1938).

provided the court with the mechanism for avoiding the implications of this result. Virginia Rule 3:20 had changed the law in this respect argued counsel, for the parties were "at issue" and there were no genuine issue of material fact in dispute. Therefore, the court below properly interpreted defendant's motion to strike as a motion for summary judgment and under Rule 3:20 was empowered to enter judgment in defendant's favor without the rendition of a jury verdict.

In 1957, the summary judgment rule was amended to expressly endorse the theory of this case, and summary judgment became a means for producing reform in the Virginia procedural system in a unique manner. Summary judgment as applied in other procedural systems is merely a means of avoiding the necessity of convening the trial where the court would be required to direct a verdict if the litigation should reach that stage. In Virginia the summary judgment rule itself was used to combat the necessity of a jury verdict when no genuine issue of fact is presented. This "cart before the horse" situation may be a lesson worth serious consideration for advocates of sweeping changes in Virginia procedure. If direct attacks upon vested ideas produce no results, the introduction of piecemeal reform may have a cumulative effect. At least, the expressions of the courts will generate discussions and arguments involving the reasons for these reforms and this is worth something.

The similarity between the tests upon the motion for summary judgment and the motion for a directed verdict has been recognized by the Federal courts, Professor Moore, after noting that the time for the two motions are different under the Federal Rules says:

> "But functionally the theory underlying a motion for summary judgment is essentially the same as the theory underlying a motion for a directed verdict. The crux of both theories is that there is no genuine issue of material fact to be determined by the trier of facts, and that on the law applicable to the established facts the movant is entitled to judgment."[68]

[68] 6 Moore, op. cit. supra note 32, sec. 56.02 (10).
Also see: Sartor v. Arkansas Natural Gas Corp., 321 U. S. 620, 64 Sup. Ct. 724, 88 L. Ed. 967 (1944).
Meyers v. District of Columbia, 17 F. R. D. 216 (D. D. C., 1955).
Appolonio v. Baxter, 217 F. 2d 267 (6th Cir., 1954).

Although a few cases have chosen to emphasize the difference between determining whether an issue of fact exists before the introduction of evidence and the "determination" of an issue of fact after the introduction evidence,[69] this would seem to go only to the materials available to the court in deciding whether an issue of law, only, is involved. Under the Federal Rule the anticipation of evidence through the use of affidavits and other evidentiary materials would seem to nullify any basic theoretical distinction between the two procedures. Is there, then, any disadvantage in the use of summary judgment in connection with the motion to strike in Virginia to achieve the results of a directed verdict? Certainly, the terminology will cause some confusion. As the summary judgment rule is exercised, counsel will search for precedents in connection with Federal Rule 56 and similar rules in other jurisdictions. In the absence of an understanding of the development of the Virginia law on the motion to strike, it will be difficult to reconcile the essential pretrial nature of these discussions with a motion which is an important trial weapon in Virginia. Also, any tendency to extend the summary judgment rule in Virginia to include the use of evidentiary materials as a pretrial device would seem to be discouraged by a provision for summary judgment at the trial. If the procedure is available to movant before the case goes to the jury, the real purpose of avoiding an unnecessary trial becomes intermingled with the idea of an unnecessary verdict and the distinct advantages of each are blurred. The result may be that no further attempts to improve the rule in achieving its basic purpose are seriously attempted.

In 1958, the Virginia statute referred to above prohibiting the direction of a verdict was amended and now permits the trial judge, who has sustained a motion to strike the evidence for either plaintiff or defendant, to direct the jury's verdict in accordance with his ruling on the motion to strike.[70] It has been suggested that this amendment was designed to meet the infrequent case where plantiff has prevailed on his motion to strike and the issue of damages is still genuinely in dispute

[69] Kirkpatrick v. Consolidated Underwriters, 227 F. 2d 228 (8th Cir., 1955).
Rowland et al. v. Miller's Adm'r, Ky., 307 S. W. 2d 3 (1956).
Farrall v. District of Columbia Amateur Ath. Union, 153 F. 2d 647 (D. D. C., 1946).

[70] Va. Code (Supp. 1958), sec. 8-218.

thus eliminating the use of summary judgment in the manner outlined above.[71] But, the amendment is expressly applicable to defendant's motion as well so there is no longer any real justification for the continued use of summary judgment as applicable upon the granting of the motion to strike. Therefore, summary judgment should be returned to its proper context where it is more likely to receive recognition as a procedure eliminating the necessity for trial. As a matter of fact, if no other changes in the rule can be effectively advocated, a return to the wording existing before the 1957 amendment would seem to be a desirable interim step.

Conclusion

Virginia Rule 3:20 is an extremely limited version of the concept of summary judgment. Thus far, the success of the rule in achieving procedural reform has, surprisingly enough, been in the trial stage of litigation. Although this result was desirable, the confusion of summary judgment with the favorable aspects of permitting a court to direct a verdict has resulted in a mistaken emphasis as to the purpose of summary judgment. The use of the procedure in connection with the granting of a motion to strike tends to distract from its real purpose, that of eliminating a trial in the absence of an issue of material fact. If the rule is recognized as method of achieving this goal, it should become clear that the absence of provisions for partial summary adjudication of a portion less than the whole of plaintiff's claim and the denial of the discovery aspect of the present Virginia rule are detrimental to any effective utilization of summary judgment in Virginia. When it becomes clear that the rule is not accomplishing its primary reason for existence, the bench and the bar will be required to reflect upon the traditional Virginia procedural blockades preventing the wholesale endorsement of modern code systems. The alternatives involved will take definite shape and the choice of a strict adversary system of administering the law will be seen to involve a definite price.

Federal Rule 56 is an intriguing example of a successful method of reaping the possible benefits of summary judgment.

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[71] Boyd, *Annual Survey of Virginia Law*, Pleading and Practice, 44 Va. L. R. 1388 (1958).

It is submitted that no better long-term goal exists than the eventual complete adoption of that rule in Virginia. However, before this is conceivable, some long existing values must be put to rest. The problem must be recognized first, as suggested above. For the present, then, it is recommended that the rule be amended to read as it did when originally adopted in 1950 with the hope that the future brings a clear understanding of its purpose.