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The Finality of an Order Granting a Rule 60(B) Motion for Relief from Judgment: Some Footnotes to GTE Automatic Electric, Inc. v. Arc Industries, Inc.

J. Patrick Browne
THE FINALITY OF AN ORDER GRANTING A RULE 60(B) MOTION FOR RELIEF FROM JUDGMENT: SOME FOOTNOTES TO GTE AUTOMATIC ELECTRIC, INC. V. ARC INDUSTRIES, INC.

J. PATRICK BROWNE

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I. INTRODUCTION

Is an order granting a Rule 60(B) motion for relief from judgment a final order for the purpose of appeal? In GTE Automatic Electric, Inc. v. ARC Industries, Inc., the Ohio Supreme Court answered the question in the affirmative with respect to default judgments. However, because the court's answer contains some inherent ambiguities, because default judgments comprise only one type of judgment subject to a Rule 60(B) motion for relief from judgment, and because of the variety of relief that may be granted pursuant to such a motion, the question deserves further consideration. This article begins that consideration, examines some of the principal difficulties inherent in the supreme court's approach, and suggests a rather simple solution which avoids those difficulties. Before proceeding to the solution, however, it will be necessary to summarize the state of the art.

The summary must begin with a delineation of the various types of judgments likely to be encountered. The court in Matson v. Marks suggested the basic schema by dividing judgments into three broad classes:

1. Default judgments and voluntary and involuntary dismissals;
2. Cognovit judgments entered on a confession of judgment pursuant to a warrant of attorney; and
3. Judgments entered following an adversary hearing, which judgments include:
   a. Judgments entered after a "trial" on the merits,
   b. Judgments entered pursuant to a motion for summary judgment,

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1 47 Ohio St. 2d 146, 351 N.E.2d 113 (1976). The substance of the court's discussion is summed up in paragraph 1 of the syllabus: "An order setting aside a default judgment pursuant to Civ. R. 55(B) is a final appealable order, as provided in R. C. 2505.02. (Price v. McCoy Sales & Service, 2 Ohio St. 2d 131, 207 N.E.2d 236, followed.)"

Although this is the first definitive post-Rule decision on the finality of an order vacating a default judgment, the Ohio Supreme Court had addressed the question on at least two previous occasions. The first mention of the matter is found in Kennedy v. Chalfin, 38 Ohio St. 2d 85, 310 N.E.2d 233 (1974). In footnote 1, the court strongly hinted that such an order would be appealable, though it expressly noted that the question was not before it since no appeal had been taken on that point. Id. at 87, 310 N.E.2d at 234.

The second mention was less felicitous. In the last paragraph of Westmoreland v. Valley Homes Mut. Hous. Corp., 42 Ohio St. 2d 291, 294, 328 N.E.2d 406, 409 (1975), the court stated: "[unlike F.R.C.P. 60(b), Civ. R. 60(B) does not provide for the vacating of a default judgment." This statement is nothing less than remarkable in light of OHIO R. CIV. P. 55(B) which provides: "If a judgment by default has been entered, the court may set it aside in accordance with Rule 60(B)."

Although the word "default" was a slip of the pen; what the court intended to say was that unlike Federal Rule 60(b), Ohio's Rule 60(B) does not provide for the vacating of a void judgment. Even on this score, however, the court has not been consistent. In Zeisloft v. Hancock Cty. Bd. of Revision, 32 Ohio St. 2d 180, 291 N.E.2d 472 (1972), the court stated: "If a judgment by default has been entered, the court may set it aside in accordance with Rule 60(B)." However, when examined in context, it is clear that the use of the word "default" was a slip of the pen; what the court intended to say was that unlike Federal Rule 60(b), Ohio's Rule 60(B) does not provide for the vacating of a void judgment. Even on this score, however, the court has not been consistent.


3 Here the word "trial" is used in the technical sense found in OHIO REV. CODE ANN. § 2311.01 (Page 1954).
c. Judgments entered pursuant to some other motion, such as a motion to dismiss, a motion for judgment on the pleadings, or the like.

After the court's decision has been properly classified, it must be determined whether it is a true judgment or an interlocutory order. A Rule 60(B) motion for relief from judgment may only be directed to a judgment, and a judgment is defined as a judgment, decree, or order from which an appeal lies. Thus, the decision itself must be a final order before Rule 60(B) can come into play.

The determinants of finality for purposes of appeal are found in Ohio Revised Code section 2505.02, and may be summarized as follows:

An order is a final order for purposes of appeal if it is:

1. An order which
   a. Affects a substantial right in an action,
   b. In effect determines that action (terminates the action; brings it to a close; decides it for one side or the other),
   c. Prevents a judgment for the party against whom the order is made; or

2. An order affecting a substantial right made in a special proceeding, or

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4 Ohio R. Civ. P. 60(B) provides in pertinent part: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons...

5 Ohio R. Civ. P. 54(A) states: "'Judgment' as used in these rules includes a decree and any order from which an appeal lies."

6 In pertinent part, the statute reads:
   An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial.

OHIO REV. CODE ANN. § 2505.02 (Page 1954).

7 This concept of determining the action in the sense of ending it does not preclude the idea of reopening the action pursuant to an appropriate motion, such as a motion for a new trial, a motion for judgment notwithstanding the verdict, or a motion for judgment notwithstanding the jury's failure to agree. Thus, in the usual case, a judgment entered upon the jury's verdict after a trial on the merits determines the action, in the sense that "action" is used in OHIO REV. CODE ANN. § 2505.02 (Page 1954), even though one or more of the parties to the action may succeed in reopening the action by a timely motion for a new trial, etc. Since the making of a motion which reopens the action is discretionary with the parties, it may be said that the order which determines the action is the last order which the court must enter after the parties to the action (or the jury, in an action tried to a jury) have performed, or having had the opportunity to do so, failed to perform, the last mandatory act required of them by the Ohio Rules of Civil Procedure or any surviving statutes applicable to trial procedure.

8 This particular test for appellate finality has experienced a rather interesting development. In the text of OHIO REV. CODE ANN. § 2505.02 (Page 1954), the second and third tests for finality are run together thus: "an order affecting a substantial right made in a special proceeding or upon summary application in an action after judgment." This is the same wording that appears in the original Code of Civil Procedure enacted in 1853. See Code of Civil Procedure of the State of Ohio, § 512, 1853 Ohio Laws 57. Some of the early cases interpreting this language applied the modifying phrase "in an action after judgment" to both the second and third tests, so that if separated they would read:
3. An order affecting a substantial right made upon a summary application in an action after judgment has been entered in that action; or
4. An order
   a. Either
      (1) vacating, or
      (2) setting aside a judgment, and
   b. Ordering a new trial.

As a general rule, any decision, whether denominated "judgment," "decree," or "order," is technically a judgment and final for the purpose of appeal if it meets any one of these four tests.

There are some exceptions to this general rule. First of all, a decision which qualifies as a judgment in the technical sense by meeting

2. An order affecting a substantial right made in a special proceeding in an action after judgment has been entered in that action; or
3. An order affecting a substantial right made upon a summary application in an action after judgment has been entered in that action.

See Hettrick v. Wilson, 12 Ohio St. 136 (1861), and Taylor v. Fitch, 12 Ohio St. 169 (1861). The court noted in Hettrick:

There can be no doubt that the order of the court of common pleas which is sought to be reversed [an order setting aside an order dismissing plaintiff's action], is one "affecting a substantial right made in a special proceeding in an action after judgment," and is, therefore, the proper subject of review upon error. (Code, section 512.)

12 Ohio St. at 138.

In any event, the currently accepted reading of the second test is that given in the text, a reading which does not apply the modifying phrase "in an action after judgment." See, e.g., In re Estate of Wyckoff, 166 Ohio St. 354, 356, 142 N.E.2d 660, 663 (1957) (emphasis in original):

This brings us to a consideration of Section 2505.02, Revised Code, which so far as relevant reads: "An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding... is a final order which may be reviewed, affirmed, modified or reversed... ."

The term "judgment" is used here in the technical sense of a final order. The definition of "judgment" which was enacted contemporaneously with the test itself states that "a judgment is the final determination of the rights of the parties in an action." Code of Civil Procedure of the State of Ohio, § 370, 1853 Ohio Laws 57. This definition was codified in Ohio Rev. Code Ann. § 2323.01 (Page 1954) (repealed 1970) and remained the accepted definition until June 30, 1970 when it was superseded by Ohio R. Civ. P. 54(A). Law of June 5, 1970, § 1, 1969-70 Ohio Laws 3017. The result is the same, however, since Rule 54(A) states that, "'judgment' as used in these rules includes a decree and any order from which an appeal lies," and by the terms of Ohio Rev. Code Ann. § 2505.03 (Page 1954) (Repealed 1970), an appeal lies only from a final order. Therefore, a decision of a court is a "judgment" only if it qualifies as a final order; any decision not so qualifying is an interlocutory order even though it be denominated "judgment."

10 Again, the term "judgment" is used in the technical sense of a final order.

11 The precise meaning of the term "trial" is never very clear, because the term has both a traditional meaning and a technical meaning. Traditionally, it means an adversary proceeding which includes, at a minimum, opening statement by counsel, the presentation of evidence, closing argument by counsel, and the submission of the case for decision. If the action is tried to a jury, it also includes the impaneling of the jury, the instruction of the jury, and the receipt of the jury's verdict. Its technical meaning, as found in Ohio Rev. Code Ann. § 2311.01 (Page 1954), is broader than its traditional meaning: "A trial is a judicial examination of the issues, whether of law or of fact, in an action or proceeding."
one or more of the four tests for finality will not in fact be a judgment if: (1) the action in which it is rendered involves more than one claim, or more than one party plaintiff, and/or more than one party defendant; (2) it adjudicates fewer than all the claims, or the rights and liabilities of fewer than all the parties; and (3) the court's judgment entry does not contain an express finding that there is no just reason for delay in making the decision final. In the absence of such an express finding in the judgment entry, the decision is, and remains, an interlocutory order until the entry of a decision which adjudicates all the claims, rights, and liabilities of all the parties.12

Secondly, the finality of a judgment may be suspended by a timely motion for new trial, motion for judgment notwithstanding the verdict, or motion for judgment notwithstanding the jury's failure to agree.13 That finality remains suspended until the court makes an entry disposing of all such motions timely made.14 Suppose, for example, that a judgment is entered on August 1st, a motion for new trial is served on August 7th, and an order granting or denying the motion for new trial is entered on August 30th. The judgment is final during the period of August 2nd through August 6th, its finality is suspended during the period of August 7th through August 30th, and it becomes final again on August 31st.

Finally, whether a given judgment entry is a judgment or not may depend on the subjective intent of the judge, as reflected in the language of the entry.15 If the language is equivocal with respect to the indicia of finality, and suggests that a more formal entry is to follow, the judgment entry is not to be construed as a judgment.16

If a particular decision is not final under one or more of the fore-

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12 Ohio R. Civ. P. 54(B). For the application of this Rule in various circumstances, see State ex rel. Jacobs v. Municipal Court, 30 Ohio St. 2d 239, 284 N.E.2d 584 (1972); Whitaker-Merrell v. Guep Co., 29 Ohio St. 2d 184, 280 N.E.2d 922 (1972); Logue v. Wilson, 45 Ohio App. 2d 132, 341 N.E.2d 641 (1975); Fair v. School Employees Retirement Sys., 44 Ohio App. 2d 115, 355 N.E.2d 888 (1975); and Way v. Wallach, 30 Ohio App. 2d 180, 283 N.E.2d 823 (1972). However, Rule 54(B) apparently does not apply to a decision which adjudicates fewer than all of the issues involved in a single claim. Cannon v. Perk, 46 Ohio St. 2d 301, 348 N.E.2d 342 (1976).

13 Although the motion for judgment notwithstanding the verdict and the motion for judgment notwithstanding the jury's failure to agree are separate and distinct motions, both are included in Rule 50(B), and because that subdivision of Rule 50 is captioned "motion for judgment notwithstanding the verdict," the appellation "motion for judgment notwithstanding the verdict" is quite commonly used to refer to both motions. See, e.g., Kauder v. Kauder, 38 Ohio St. 2d 265, 313 N.E.2d 797 (1974).

14 Ohio R. App. P. 4(A). This rule of suspension is primarily applicable to the time for taking an appeal, Kauder v. Kauder, 38 Ohio St. 2d 265, 313 N.E.2d 797 (1974), but it may also have some relevance to the time for making a Rule 60(B) motion for relief from judgment. By the express terms of the Rule, a 60(B) motion may only be directed to a "final judgment." But if the finality of a judgment is suspended for the purpose of appeal, is it not suspended for all other purposes as well? A negative answer might unduly complicate the application of the "reasonable time" standard for making the Rule 60(B) motion. Although there is no clear-cut case authority on point, the better rule would seem to be that finality is also suspended for the purposes of Rule 60(B).


going tests, it is not a judgment; it is an interlocutory order.\textsuperscript{17} The proper vehicle for obtaining relief from an interlocutory order is a motion for reconsideration or rehearing,\textsuperscript{18} and not a Rule 60(B) motion for relief from judgment. If a motion for reconsideration or rehearing is properly directed to an interlocutory order, and granted, the order granting it is no more final than the order to which it was directed.\textsuperscript{19}

If a Rule 60(B) motion for relief from judgment is improperly directed to an interlocutory order,\textsuperscript{20} and granted as a Rule 60(B) motion, it can cause considerable confusion in the record and unduly complicate the appellate process. Accordingly, the proper response to such a misdirected motion is a motion to strike it from the files. For the sake of clarifying the record, the trial court should grant the motion to strike, and direct that the motion seeking relief from the order be refiled as a motion for reconsideration or rehearing, whichever is appropriate.\textsuperscript{21}

\textsuperscript{17} This point was made quite clearly by Code of Civil Procedure of the State of Ohio §§ 370, 509, 1853 Ohio Laws 57 (codified at Ohio REV. CODE ANN. § 2323.01 (Page 1954) (repealed 1970)): “A judgment is the final determination of the rights of the parties in an action. A direction of a court or judge, made or entered in writing and not included in a judgment, is an order.” Although this Section of the Revised Code is no longer in force, its substance is retained in OHIO R. Civ. P. 54(A).

\textsuperscript{18} The motion for reconsideration or rehearing (the two terms are frequently used interchangeably, albeit incorrectly, for they have distinct meanings) is not recognized by either the Ohio Rules of Civil Procedure or the Ohio Revised Code, but has long been recognized by local custom and usage. See, e.g., Kauder v. Kauder, 38 Ohio St. 2d 265, 313 N.E.2d 797 (1974), in which the Ohio Supreme Court describes the use of the motion as “an informal local practice.” LaBarbera v. Batsch, 117 Ohio App. 272, 182 N.E.2d 632, 634 (1962) is more precise in specifying the proper use of the motion: “The motion for reconsideration or rehearing (the two terms are frequently used interchangeably, albeit incorrectly, for they have distinct meanings) is not recognized by either the Ohio Rules of Civil Procedure or the Ohio Revised Code, but has long been recognized by local custom and usage. See, e.g., LaBarbera v. Batsch, 117 Ohio App. 272, 182 N.E.2d 632, 634 (1962).”

\textsuperscript{19} OHIO R. Civ. P. 54(B) is one of the principal causes of such error, because it is so easy to overlook. Suppose, for example, that a plaintiff brings an action against defendants Doe and Roe. Service by certified mail is obtained on both, but by some mischance, defendant Doe never actually receives the summons and complaint. (Certified mail service is effective upon certified delivery even if the party to be served never receives actual notice of the service. Castellano v. Kosydar, 42 Ohio St. 2d 107, 326 N.E.2d 686 (1975).) As a consequence, defendant Doe fails to enter an appearance in the action and fails to plead or otherwise defend. In due time, plaintiff moves for a default judgment against defendant Doe, which is entered by the court. But the judgment entry does not state that there is no just reason for delay in making the judgment final. When Doe’s attorney learns of the default, he searches the Rules to see how it may be set aside. In OHIO R. Civ. P. 55(B), he finds the following: “If a judgment by default has been entered, the court may set it aside in accordance with rule 60(B).” Accordingly, Doe’s attorney serves and files a Rule 60(B) motion for relief from judgment. But despite what appears in Rule 55(B), that motion does not lie in this instance because according to Rule 54(B), the default judgment is not a final judgment; it does not adjudicate the liability of all the defendants, and the judgment entry does not contain an express determination that there is no just reason for delay. Thus, in this instance, the proper vehicle for setting aside the default judgment is a motion for reconsideration or rehearing, and not a Rule 60(B) motion for relief from judgment.

\textsuperscript{20} If the moving party simply seeks a reevaluation of the decision on the basis of...
The court need not do so, however. It may treat the Rule 60(B) motion as a motion for reconsideration or rehearing, and grant or deny it as such. The parties should take pains in such an instance to insure that the court's judgment entry reflects precisely what the court has done; otherwise, the record will remain in a confused state.

Assuming that we have a judgment, and assuming that a Rule 60(B) motion for relief from judgment has been timely and properly the evidence already in the record, a motion for reconsideration is the proper motion. But if the moving party wishes to present evidence for the first time, or to present new or additional evidence, and has good reason for doing so, a motion for rehearing is proper. A motion for rehearing is roughly analogous to a motion for a new trial, while the motion for reconsideration is roughly analogous to the motion for judgment notwithstanding the verdict or, in the federal system, the motion to alter or amend a judgment. See FED. R. Civ. P. 59(e).

It is now well-settled that an improper motion for reconsideration may be treated as a Rule 60(B) motion for relief from judgment. Kauder v. Kauder, 38 Ohio St. 2d 265, 313 N.E.2d 797 (1974); Taray v. Sadoff, 71 Ohio Op. 2d 203, 331 N.E.2d 448, (Ct. App. 1974); Heller v. Heller, No. 34381 (Ohio Ct. App. 8th Dist., filed Jan. 15, 1976). See Browne, The Fatal Pause — Summary Judgment and the Motion for Reconsideration, 44 CLEV. B.J. 7 (1972). There is no apparent reason why the reverse should not be true, and an improper motion for relief from judgment can be treated as a motion for reconsideration or rehearing. OHIO R. Civ. P. 1(B) declares that “These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.” Accordingly, it has been held that a motion is to be treated for what it is in substance rather than for what it is designated. Zeisloft v. Hancock Cty. Bd. of Revision, 32 Ohio St. 2d 180, 291 N.E.2d 472 (1972); North Royalton Educ. Ass'n v. Board of Educ., 41 Ohio App. 2d 209, 325 N.E.2d 901 (1974); Heller v. Heller, No. 34381 (Ohio Ct. App. 8th Dist., filed Jan. 15, 1976).

To be timely, the motion for relief from judgment must be made within a reasonable time after the judgment has been entered. However, with respect to the grounds listed in Rule 60(B)(1) through (3), the motion cannot be made more than one year after the judgment has been entered. OHIO R. Civ. P. 60(B) provides in part: “The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.” Unfortunately, it is not yet clear when the motion is “made” for the purposes of Rule 60. On the general question of when a motion is “made,” the federal courts are divided; some opt for the date of service, while others hold to the date the motion is filed with the clerk of court. Compare Keohane v. Swarco, Inc., 320 F.2d 429 (6th Cir. 1963) with McConnell v. United States, 50 F.R.D. 499 (E.D. Tenn. 1970). No reported Ohio decision has directly addressed the question, but a number of cases contain dicta which indicate that the date of filing is the controlling date. For example, the court held in Adomeit v. Baltimore, 39 Ohio App. 2d 97, 102, 316 N.E.2d 469, 474 (1974) (emphasis added): “The motion must be filed within a reasonable time and for reasons stated in Civil Rule 60(B)(1), (2) and (3) not more than one year after judgment, order or proceeding was entered or taken.” For a summary of the various views on this point see Browne, The Metaphysics of Motion Practice: When is a Motion “Made” for the Purposes of the Rules of Civil Procedure, 50 OHIO BAR 925 (1977).

As the reported cases indicate, many motions for relief from judgment are overruled because the movant has not observed the correct procedure. See, e.g., Tom McSteen Contr. Co. v. Thomas Maloney & Sons, 39 Ohio App. 2d 31, 314 N.E.2d 392 (1974). Both GTE Automatic Elec., Inc. v. ARC Indus., Inc., 47 Ohio St. 2d 146, 351 N.E.2d 113 (1976), and Adomeit v. Baltimore, 39 Ohio App. 2d 97, 316 N.E.2d 469 (1974) specify how the motion is properly made. Of the two, Adomeit is the more detailed in its explanation of the procedure, and should be consulted carefully. See also Brenner v. Shore, 34 Ohio
directed to that judgment, we may now take note of the grounds for relief from judgment and the types of relief which the court may grant.

Rule 60(B) contains 12 separate grounds for relief from judgment, divided into five groupings, as follows:

**Rule 60(B)(1):**
1. Mistake.
2. Inadvertance.
3. Surprise.
4. Excusable neglect.

**Rule 60(B)(2):**
5. Newly discovered evidence which by diligence could not have been discovered in time to move for a new trial.

**Rule 60(B)(3):**
6. Fraud of an adverse party.
7. Misrepresentation of an adverse party.
8. Other misconduct of an adverse party.

**Rule 60(B)(4):**
9. The judgment has been satisfied, released, or discharged.
10. A prior judgment upon which the judgment is based has been reversed or otherwise vacated.
11. It is no longer equitable that the judgment should have prospective application.

**Rule 60(B)(5):**
12. Any other reason justifying relief from judgment.

One or more of these grounds may apply in a given case. In general, however, the first four and the twelfth are the grounds most frequently used, and the relief most often sought is the vacation of the judgment and an opportunity for an adversary hearing or a new adversary hearing. In some cases, however, the relief granted is the suspension of the judgment and an adversary hearing. When the fifth ground is urged in support of the motion, the relief sought is almost always the vacation of the judgment and the grant of a new adversary hearing. On the other hand, grounds 9 and 10 generally lead to the simple vacation of the judgment, while ground 11 may lead to its vacation or modification. Grounds 6 through 8 may justify any of the types of relief previously mentioned, or they may warrant the vacation of the judgment and entry of judgment for the moving party.

What is said above is merely a general observation and not a fixed rule. The relief which a court may grant pursuant to Rule 60(B), upon a finding of the existence of one or more of these grounds, is limited only by the concepts of justice and abuse of discretion. Neverthe-
less, the relief which courts do grant tends to fall into certain well-defined categories, which may be summarized as follows:

1. Vacation or setting aside of the judgment.26
2. Vacation of the judgment and re-entry of the same judgment as of a later date.27
3. Vacation of the judgment and entry of judgment for the moving party.28
4. Vacation of the judgment and reinstatement of the action at the point where it had been terminated by the judgment.29
5. Vacation of the judgment and the grant of an original adversary hearing.30
6. Vacation of the judgment and the grant of a new adversary hearing.31

may relieve a party . . . from a final judgment, order or proceeding. . . ." (emphasis added). Almost any of the reported cases dealing with Rule 60(B) can be cited for the proposition that the grant or denial of the motion is within the sound discretion of the trial court, but Adomeit v. Baltimore, 39 Ohio App. 2d 97, 103, 316 N.E.2d 469, 475 (1974) put it best: "It is discretionary with the trial court whether the motion will be granted and in the absence of a clear showing of abuse of discretion the decision of the trial court will not be disturbed on appeal."

26 See, e.g., Kauder v. Kauder, 38 Ohio St. 2d 265, 313 N.E.2d 797 (1974); Buckman v. Goldblatt, 39 Ohio App. 2d 1, 314 N.E.2d 189 (1974); Laughlin v. Hibbard, 70 Ohio Op. 194, 328 N.E.2d 327 (Ct. App. 1974); In re Cowgill, 37 Ohio App. 2d 121, 307 N.E.2d 919 (1973); Mid-Continent Refrig. Co. v. Whitterson, 32 Ohio App. 2d 227, 289 N.E.2d 379 (1972); and German Village Prods. v. Miller, 32 Ohio App. 2d 288, 290 N.E.2d 355 (1972). Of course, something more than the mere vacation of the judgment is normally required, or the action itself would be left in limbo. Accordingly, when vacation is granted, the entry will also include some disposition of the case, such as a dismissal of the plaintiff's action, or the striking of the plaintiff's complaint from the files.

27 This form of relief was unsuccessfully attempted in Town & Country Drive-In Shopping Centers, Inc. v. Abraham, 46 Ohio App. 2d 262, 348 N.E.2d 741 (1975), and Bosco v. City of Euclid, 38 Ohio App. 2d 40, 311 N.E.2d 870 (1974). Generally, when the sole motivation behind seeking such relief is the extension of the time for taking an appeal, the relief will be denied.


However, this may also be the type of relief sought after the dismissal of the plaintiff's action. If, for example, the plaintiff's action was involuntarily dismissed for failure to prosecute (Rule 41(B)(1)), the plaintiff's motion for relief from that judgment would seek vacation and the grant of an original adversary hearing. The same can be true of a voluntary dismissal under the provisions of Rule 41(A) if the dismissal occurs before the beginning of the adversary hearing. See, e.g., Tom McSteen Contr. Co. v. Thomas Maloney & Sons, 39 Ohio App. 2d 31, 314 N.E.2d 392 (1974).

7. Suspension of the judgment and the grant of an original adversary hearing.\textsuperscript{32}
8. Modification of the judgment.\textsuperscript{33}

No doubt there are other categories of relief which may be granted, but these eight are the principle variations found in the reported cases.

Having laid the groundwork, we are now in a position to analyze the application of the tests for finality in light of the type of original judgment entered and the category of relief granted. The analysis need not inquire whether or not the court was correct in granting relief; indeed, we may presuppose that it was in error, and that the error is the basis for attempting an appeal. Our sole interest here is whether the order granting relief from judgment is a final order for the purpose of taking that appeal. The \textit{ARC Industries} case\textsuperscript{34} provides a convenient starting point, since that is the only reported post-Rule decision in which the Ohio Supreme Court articulated its reasons for holding the order final for the purpose of appeal.

\section*{II. THE FIRST AND FOURTH TESTS FOR FINALITY}

A. Default Judgments

Default judgments may be divided into two basic types: default judgments on the merits, which are controlled by Rule 55, and default judgments which are entered as a penalty against a party from whom a judgment for affirmative relief is sought. By and large, these penalty

\textsuperscript{32} Although there does not appear to be any reported post-Rule Ohio case which actually considers this type of relief, it is mentioned in Brenner v. Shore, 34 Ohio App. 2d 209, 297 N.E.2d 550 (1973), as a form of relief which may be granted in default judgment cases, and there is pre-Rule authority for the proposition that such relief is appropriate in cases involving cognovit judgments entered on confession of judgment pursuant to a warrant of attorney. Canal Winchester Bank v. Exline, 61 Ohio App. 253, 22 N.E.2d 528 (1938). Indeed, there is ample pre-Rule authority for the proposition that when the grant of relief from judgment depends upon the movant's demonstrating a defense to the judgment creditor's action, the court must determine the existence of grounds for relief and the prima facie validity of the defense tendered. If it finds in favor of the movant on both points, then the only immediate relief which it may grant is the suspension of the judgment until such time as the tendered defense has been tried on the merits, and it is error for the court to vacate or set aside the judgment prior to the trial of the defense on the merits. The only apparent exception to this rule of suspension rather than vacation is that the court may vacate rather than suspend the judgment if reasonable minds could not differ on the existence of the defense, that the defense is legally valid, and that the defense would completely defeat the judgment creditor's action. See Livingstone v. Rebman, 169 Ohio St. 109, 158 N.E.2d 366 (1959), and cases cited therein. As Livingstone notes, the purpose of suspension rather than vacation is to preserve the liens and priorities of the original judgment in case a similar judgment should be rendered after a trial on the merits. Since the post-Rule procedure is the same as the pre-Rule procedure with respect to the need to tender a defense, this rule of suspension may still be valid. See Adomeit v. Baltimore, 39 Ohio App. 2d 97, 316 N.E.2d 469 (1974). It should be noted, however, that this point was not raised in GTE Automatic Elec., Inc. v. ARC Indus., Inc., 47 Ohio St. 2d 146, 351 N.E.2d 113 (1976), although it would have been appropriate for the court to have done so.

\textsuperscript{33} See, e.g., Luscre v. Luscre, 45 Ohio Misc. 9, 340 N.E.2d 854 (C.P. 1974); Green v. Green, 31 Ohio Misc. 69, 286 N.E.2d 328 (C.P. 1972).

\textsuperscript{34} GTE Automatic Elec., Inc. v. ARC Indus., Inc., 47 Ohio St. 2d 146, 351 N.E.2d 113 (1976).
defaults are controlled by Rule 37. To distinguish the two, the former will be referred to as Rule 55 defaults, and the latter as penalty defaults. Since ARC Industries involves a default on the merits, the analysis shall begin with Rule 55 defaults.

1. Defaults on the Merits (Rule 55)

On November 30, 1973, GTE Automatic Electric, Inc. (GTE) filed suit against ARC Industries, Inc. (ARC), based upon the failure of ARC to pay an account allegedly due GTE. ARC failed to plead or otherwise defend, and on January 10, 1974 GTE took a default judgment against ARC in the amount of $11,187.49. On May 14, 1974, after its bank account had been attached, ARC made a motion to vacate the default judgment under the provisions of Rule 60(B)(1) and 60(B)(5).

In essence, ARC stated that upon receipt of the suit papers it turned them over to its attorney, that the attorney informed it that there was nothing to worry about, and that after the default judgment had been taken, the attorney denied that he had been given the original papers. The defense tendered was to the effect that the goods underlying the account sued upon were purchased by another corporation, not ARC, and that ARC had not assumed the liabilities of the other corporation.

The motion to vacate was heard by a referee, who found that the neglect of the attorney should not be imputed to ARC, and that as a consequence relief could be granted on the ground of excusable neglect. The trial court adopted the report of the referee and vacated the default judgment. The court of appeals reversed, holding that the attorney’s neglect should be imputed to ARC. Finding its decision in conflict with Antonopoulos v. Eisner, however, the court certified the record of the case to the Ohio Supreme Court.

The Ohio Supreme Court affirmed the court of appeals. In doing

35 Ohio R. Civ. P. 60(B)(1). Neither the trial court, the court of appeals, nor the supreme court found Rule 60(B)(5) applicable. As the supreme court noted:

The facts of this case make it clear that if relief is be [sic.] granted at all, it must be under Civ. R. 60(B)(1). Although appellant urges that 60(B)(5) also be considered, there are no facts presented here that justify the use of the “any other reason” clause.

36 Under the rule of Livingstone v. Rebman, 169 Ohio St. 109, 158 N.E. 2d 366 (1959), see note 32 supra, should not the default judgment merely be suspended until after the trial of ARC’s defense on the merits? Apparently this point was not raised by the litigants, or by the three courts which considered the case.

In any event, we may assume that the trial court not only vacated the default judgment but also set the case down for an adversary hearing on the merits, although this does not explicitly appear from the report of the case. This, of course, precludes the application of the first test for finality. Since either GTE Automatic Electric, the plaintiff, or ARC Industries, the defendant, had an opportunity to prevail at the adversary hearing, the order vacating the default judgment and setting the case for “trial” neither determined the action nor prevented a judgment.


38 In substance, the supreme court held that the movant’s motion was timely and the defense tendered was meritorious, but there was no ground for granting relief because the attorney’s neglect had to be imputed to the party:

This court agrees and adopts the general rule that the neglect of a party’s attorney will be imputed to the party for the purposes of Civ. R. 60(B)(1). . . .
so, it discussed the question of finality, a question which it apparently raised on its own motion. It is important to note the precise language used by the court:

Initially, however, the court must first determine that an order vacating a default judgment is a final order and, therefore, appealable. Section 3(B)(2), Article IV of the Ohio Constitution.

In the second paragraph of the syllabus in *Chandler & Taylor Co. v. Southern Pacific Co.* (1922), 104 Ohio St. 188, 135 N.E. 620, this court held: "An order vacating a default judgment upon motion of the defendant, filed at the same term, but more than three days after its rendition, is not a final determination of the rights of the parties and is not reviewable unless the court abuses its discretion in making it."

Although *Chandler* has not been expressly overruled by this court, much has changed since it was decided. Insofar as *Chandler* may have implied that an otherwise interlocutory order can be made final and appealable by an abuse of discretion in the making of that order, that notion was laid to rest in *Klein v. Bendix Westinghouse Co.* (1968), 13 Ohio St. 2d 85, 235 N.E.2d 587. In addition, the constitutional provisions relating to the jurisdiction of the Court of Appeals, as well as the interpretations given those provisions by this court, have changed since *Chandler* was decided. Writing for a unanimous court in *Klein, supra*, Justice Paul W. Brown appropriately noted, at page 86, that "[o]nly since Price v. McCoy Sales & Service, Inc. [2 Ohio St. 2d 131, 207 N.E. 2d 236 (1965)] . . . has Section 2505.02, Revised Code, been an accurate legislative restatement of this Court's definition of a final order." *Price* represents the culmination of a long and difficult series of decisions in which this court attempted to define a final order in terms of the jurisdictional provisions of the Ohio Constitution. While difficulties still remain in this area, the present case can be resolved by looking to R.C. 2505.32.

R.C. 2505.02 defines a final order as: "An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial." [Emphasis by the court.]

Regardless of whatever else may be said of a default judgment, it is a judgment. It is as good as any other judgment. It is a final determination of the rights of the parties. Therefore, an order of the trial court pursuant to Civil R. 60(B), setting aside
a default judgment, is clearly within the express language of R.C. 2505.02. It is a final, appealable order.\(^39\)

From the reference to *Price v. McCoy Sales & Service, Inc.*, and from the italicized portion of the text, it is clear that the supreme court relied upon Ohio Revised Code section 2505.02's fourth test for finality. Indeed, the court took pains to distinguish away *Chandler & Taylor Co. v. Southern Pacific Co.* because that case, in part, turned upon the applicability of section 2505.02's first test for finality. Since either party may prevail at the adversary hearing, the order vacating the default judgment and setting the case down for the adversary hearing neither determines the action nor prevents a judgment. Thus, it is clear that the first test for finality would not apply.

The court's reliance on the fourth test presents the initial difficulty. In order for the fourth test to apply, two things must conjoin: the vacation or setting aside of the default judgment, and the grant of a *new* trial. The term "new trial", however, presupposes the existence of an "old trial" or an "original trial," and in the case of a default judgment under the provisions of Rule 55, there has never been an "original trial." At first blush, then, it would appear that the supreme court has arbitrarily ignored the second element of the fourth test in order to find some ground which would justify the conclusion that the trial court's order is final and appealable.

This may or may not be true. The court did not italicize this second requirement as it did the first, and this suggests the court's embarrassment with it and, perhaps, an attempt to divert attention from it. In any event, the court did not explain how there can be a "new trial" when there has never been an "old" one, and may simply have winked at the word "new." But there is an alternative explanation which does not require the imputation of deviousness to the court.

The alternative explanation is found in the distinction between the traditional and technical meaning of the word "trial."\(^40\) Technically, "[a] trial is a judicial examination of the issues, whether of law or of fact, in an action or proceeding."\(^41\) In theory, at least, the default judgment proceeding meets this test. When a motion for default judgment is properly made, the trial court must, at the least, examine the movant's pleadings to determine whether they state a claim upon which relief can be granted. Thus, at a minimum, there is a judicial examina-

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\(^{39}\) 47 Ohio St. 2d at 148-50, 351 N.E.2d at 114-15 (1976).

\(^{40}\) See note 11 supra.

\(^{41}\) *Ohio Rev. Code Ann.* § 2311.01 (Page 1954).
tion of issues of law in the action, and by definition, that is a "trial." In many default proceedings, however, there will be, in addition a hearing for the purpose of assessing damages. In such cases, then, there will be not only a judicial examination of issues of law, but also a judicial examination of issues of fact. Accordingly, the default proceedings in response to the motion for default judgment are themselves a "trial" — the original trial — and the order setting down those issues for re-examination after the default judgment had been vacated would be an order granting a "new" trial.

Unfortunately, insofar as Rule 55 default judgments are concerned, there is a fatal flaw in this argument. The "issues, whether of law or of fact," mentioned in Ohio Revised Code section 2311.01 are defined in

42 Ohio R. Civ. P. 55(A) provides:
If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties.

But see Automobile Club Ins. Co. v. Davis, 28 Ohio Misc. 37, 266 N.E.2d 606 (Mun. Ct. 1970), in which a motion for summary judgment supported by an affidavit stating the extent of damages, cost of repairs, and the subrogation agreement with the plaintiff's insurance company was substituted for the "assessment of damages" hearing. Such a procedure presents problems since it has been held that summary judgment proceedings are not a "trial." Thus, in Morris v. First Nat'l Bank & Trust Co., 15 Ohio St. 2d 184, 185, 239 N.E.2d 94, 95 (1968), the court stated: "It is important to remember that a summary judgment proceeding is not a trial, but a hearing upon a motion." This result also follows by necessary implication from the decision in Standard Oil Co. v. Grice, 46 Ohio App. 2d 97, 345 N.E.2d 458 (1975). For a summary of other cases to the same effect, see Browne, The Fatal Pause—Summary Judgment and the Motion for Reconsideration, 44 CLEV. B.J. 7 (1972).

Law of June 28, 1945, Sec. I, § 11570, 1945-46 Ohio Laws 366 (codified at Ohio Rev. Code Ann. § 2321.17 (Page 1954) (repealed 1970)) defined a new trial as a "re-examination, in the same court, of the issues after a final order, judgment, or decree by the court." Clearly this has application to the situation described in the text; the "issues" of law and/or fact examined in the default judgment proceeding are the same "issues" which will be re-examined when the default judgment is vacated and the action set down for further proceedings. This definition was repealed due to its conflict with Ohio R. Civ. P. 59, but that repeal is not necessarily absolute. The Act that repealed section 2321.17 of the Ohio Revised Code stated:

[T]he sections of the Revised Code to be repealed . . . are in conflict with [the Civil Rules] and shall have no further force or effect, . . . unless a court shall determine that one of such sections, or some part thereof, has clearly not been superseded by such rules and that in the absence of such section or part thereof being effective, there would be no applicable standard of procedure prescribed by either statutory law or rule of court.


It is at least arguable that the definition of "new trial" contained in former Ohio Rev. Code Ann. § 2321.17 (Page 1954) (repealed 1970) falls within this " savings clause" found in Law of June 5, 1970, § 3, 1969-70 Ohio Laws 3017. Without that definition, there is neither a statutory nor Civil Rule definition of the term " new trial," and thus, in the broadest sense, "no applicable standard of procedure." Although the author is not aware of any express judicial determination that this definition has survived the repeal of section 2321.17, there is a footnote to Heller v. Heller, No. 34381 (Ohio Ct. App. 8th Dist., filed Feb. 4, 1976), in which the Court of Appeals for Cuyahoga County stated: "R.C. 2321.17, though containing what we consider to be an accurate definition of a new trial, has been repealed." This hints at the "determination" required by the " savings clause" in Law of June 5, 1970, § 3, 1969-70 Ohio Laws 3017, and it indicates that the definition of " new trial" found in former section 2321.17 is still an accurate statement of Ohio law.
Ohio Revised Code section 2311.02 as follows: “Issues arise on the pleadings where a fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds: (A) Issues of law; (B) Issues of fact.” Under Rule 55, however, a default judgment may only be rendered: “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by [the Ohio Rules of Civil Procedure],” and, if that party fails “to plead or otherwise defend,” he has not “controverted” a “fact or conclusion of law” maintained in the pleadings of the party who is seeking the judgment for affirmative relief. Therefore, in Rule 55 default cases no issues of law or issues of fact “arise on the pleadings,” and there are no “issues, whether of law or of fact” which are subject to “judicial examination.” Accordingly, Rule 55 default judgment proceedings cannot be a “trial” as that term is defined in section 2311.01. Thus, since there has been no “old” trial, the order vacating the default judgment and setting the case for trial cannot be an order vacating or setting aside a judgment and granting a “new” trial. That being so, the order is not a final appealable order under the fourth test for finality, and the supreme court is incorrect in holding that it is. In the language of Railway Co. v. Thurstin, the default judgment proceeding is not a “trial,” but a “summary proceeding” upon which the disposition of the action may depend.

The situation is further aggravated in the case of Rule 55 defaults when, pursuant to a motion for relief from judgment, the default judgment is merely suspended pending an adversary hearing on the merits of the claim and the tendered defense. In such an event, neither re-

\[44\] As the court noted in Railway Co. v. Thurstin, 44 Ohio St. 525, 528-29, 9 N.E. 232, 233-34 (1886):

We are in full accord with counsel for plaintiff in error when they say in argument: “The word trial in this section is of course used in the sense of the general definition given to it by the Revised Statutes, section 5127 [now Ohio Rev. Code Ann. § 2311.01 (Page 1954)], which declares that “a trial is a judicial examination of the issues, whether of law or fact, in an action or proceeding.”

What are “issues,” as that word is here employed? The court is unanimously of the opinion that this question is satisfactorily and conclusively answered by the four succeeding sections, in the light of which it seems reasonable to construe this word “issues.” They are here given in full.

“Sec. 5128 [now Ohio Rev. Code Ann. § 2311.02 (Page 1954)]. Issues arise on the pleadings where a fact, or conclusion of law, is maintained by one party and controverted by the other. They are of two kinds. 1. Of law. 2. Of fact.”

It seems clear that the issues here referred to are those which arise upon the pleadings and do not relate to controversies involved in summary proceedings like the one now under consideration [i.e., motion to dismiss for failure to timely commence proceedings in error], although the pendency of the action in which it is involved depends upon the disposition of it by the court.

\[45\] Since there has been no initial judicial examination of the “issues” which arise upon the pleadings, there can be no re-examination of those issues. The “trial” granted by the order vacating the default judgment and setting the matter down for trial will not be “a reexamination, in the same court, of the issues after a final order, judgment, or decree by the court,” but will be, rather, “a judicial examination of the issues, whether of law or of fact, in an action or proceeding.” In other words, the “trial” which follows on the vacation of the default judgment will be the trial; the first trial, not a “new” trial.

\[46\] 44 Ohio St. 525, 9 N.E. 232 (1886). See note 44 supra.
quirement of the fourth test for finality is met. The default judgment is neither vacated nor set aside; rather, it remains as a valid judgment for the purpose of preserving the liens and priorities which it confers upon the judgment creditor. If, after an adversary hearing on the merits the tendered defense is found wanting, the original default judgment is affirmed; but if the tendered defense prevails, it is vacated, and judgment is entered for the former judgment debtor.\(^{47}\) Thus, the order granting the motion for relief from judgment neither vacates nor sets aside the judgment nor grants a new trial; it grants relief from the judgment by suspending its force and effect, and grants an original trial on the issues which arise on the pleadings.\(^{48}\)

Of course, not every order granting relief from a Rule 55 default judgment will necessarily include the grant of an adversary hearing. In any given case, the ground for relief may be one of the grounds found in Rule 60(B)(4). That is, the judgment debtor may seek relief from the default judgment on the grounds that it has been satisfied, released, or discharged, or that a prior judgment upon which the judgment is based has been reversed or otherwise vacated, or that it is no longer equitable that the judgment should have prospective application. Ordinarily, if the motion for relief from judgment is sustained on one or more of these grounds, the default judgment will simply be vacated or set aside. Likewise, the grounds in Rule 60(B)(3) may be the operative grounds, and it is possible that the default judgment will simply be vacated or set aside if the motion for relief from that judgment is sustained on the ground that the default judgment was obtained through the fraud, misrepresentation, or other misconduct of the judgment creditor. By no stretch of the imagination can such an order be a final appealable order under the fourth test for finality because there is no grant of a "new" trial, even if that term is given its most liberal meaning.

However, unless the order vacating the judgment is premised on the ground that the judgment has been satisfied, released, or discharged, such an order is probably final under the first test for finality. Such an order affects a substantial right (the judgment creditor's right to enforce the judgment), determines the action (the court and the parties have performed the last mandatory act required of them by the Ohio Rules of Civil Procedure and the surviving procedural sections of the Ohio Revised Code), and prevents a judgment (the judgment creditor has no further opportunity to obtain a judgment in his favor on that particular claim).

The applicability of the first test for finality is a close question if the motion for relief from the default judgment is grounded on the


\(^{48}\)In such a case, issues do "arise on the pleadings" because, as part of the motion for relief from judgment, the judgment debtor must tender a pleading that is responsive to the judgment creditor's statement of claim. As the supreme court held in Livingstone v. Rebman, 169 Ohio St. 109, 115, 158 N.E.2d 366, 371 (1959): "The accepted practice in setting forth the defense is to tender an answer as to the original proceeding." See also GTE Automatic Elec., Inc. v. ARC Indus., Inc., 47 Ohio St. 2d 146, 351 N.E.2d 113 (1976); Brennan v. Shoetec, 44 Ohio App. 2d 598, 297 N.E.2d 550 (1973).
theory that the judgment has been satisfied, released, or discharged. In such a case the court need not vacate or set aside the original judgment. Rule 60(B) provides for relief from a judgment, and that relief is not necessarily confined to the vacation or setting aside of the judgment. In this situation, appropriate relief may take the form of an order to the effect that the judgment has been satisfied, or that it has been released or discharged. In essence, such an order holds that the judgment creditor has had his judgment, and the judgment has been satisfied. Thus, it can be argued that while such an order affects a substantial right and determines the action, it does not prevent a judgment in the judgment creditor’s favor. Rather, if anything, it affirms the judgment. On the other hand, if the judgment creditor resists the motion, he will argue that the judgment has not been fully satisfied, and that the order prevents complete satisfaction of the judgment. Thus, the question is this: Is a judgment “prevented” within the meaning of the first test for finality if it cannot be fully satisfied? The answer is uncertain.

Much may depend upon the definition of the word “prevent,” but in the abstract, not even that definition will solve the problem. In Webster's Third New International Dictionary of the English Language Unabridged, we find a definition that is a full half-column in length. The most applicable definition contained therein is the fourth, which reads: “To keep from happening or existing esp. by precautionary measures: hinder the progress, appearance, or fulfillment of: make impossible through advance provisions.” Depending upon which part of this definition a court would choose to follow, it could answer the question either way. If the court concentrates on the first or third clause, it will hold that the judgment is not prevented, since it has not been kept from existence or made impossible. On the other hand, if the court adopts the second clause, it could hold that the judgment has been prevented because the order sustaining the motion for relief from judgment hinders the fulfillment of the judgment.

Thus, we are left with inherent ambiguity. One thing is certain, however. Since such an order neither vacates the judgment nor orders an adversary hearing, it cannot possibly be a final order under the fourth test for finality.

2. Penalty Defaults (Rule 37)

The flaw in the “new trial” argument which made the fourth test for finality inapplicable to most Rule 55 defaults is the same flaw which defeats the test in the case of penalty defaults. Most, if not all, penalty defaults are imposed for failure to comply with discovery orders or to respond to discovery requests.49 The pertinent Rules are Ohio...
Rules 37(B)(2)(c), 37(B)(2)(e), and 37(D). Of these, Rule 37(B)(2)(c) is the key Rule, since it is incorporated by reference into the other two.

As with Rule 55 defaults, the default proceedings are initiated by motion. But the issues "judicially examined" in the Rule 37 proceeding typical of the first instance is Local Rule 31.03 of the Rules of the Court of Common Pleas for Franklin County, which provides:

It shall be the duty of counsel to do the following at such pretrial and failure to be prepared may result . . . in a default judgment or such other action to enforce compliance as the trial judge deems appropriate: 1. All parties shall have filed "Pretrial Statements" in accordance with Rules 29.02 and 29.04. 2. Each counsel shall come to the pretrial fully prepared and authorized to negotiate toward settlement of the case.

Local Rule 18 of the Rules of the Court of Common Pleas for Hamilton County exemplifies the second instance: "If a cause is called for trial and . . . the defendant fails to respond, either in person or by his trial attorney, the Court may proceed as on default, provided the notice requirements of Civil Rule 55(A) are met."

Both of these local rules, and similar rules such as Local Rule 21, Part I(A) of the Rules of the Court of Common Pleas of Cuyahoga County and Local Rule 15(B)(3) of the Rules of the Court of Common Pleas for Hamilton County, are probably invalid.

Defaults are authorized only under Ohio R. Civ. P. 37 and 55. By its express terms, however, Rule 37 is limited to failure to respond to the discovery techniques listed in Rules 26 through 36, or to failure to comply with an order to provide or permit discovery sought pursuant to one of the discovery techniques listed in those Rules. Thus, it does not extend to pretrial proceedings. As for Rule 55, it may only be used if a party has failed to plead or otherwise defend. Coulas v. Smith, 96 Ariz. 325, 395 P.2d 527 (1964); Westmoreland v. Valley Homes Mut. Hous. Corp., 42 Ohio St. 2d 291, 328 N.E.2d 406 (1975). If a party has served and filed a responsive pleading, that party is not in default unless it can be said that his failure to comply with the pretrial rules, or to appear at trial, is a failure to "otherwise defend as provided by these rules." Ohio R. Civ. P. 55(A). As the Fifth Circuit held in Bass v. Hoagland, 172 F.2d 205, 210 (5th Cir. 1949), cert. denied, 338 U.S. 816 (1949), such failures are not failures to "otherwise defend":

[Federal] Rule 55(a) authorizes the clerk to enter a default "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules." This does not require that to escape default the defendant must only file a sufficient answer to the merits, but must also have a lawyer or be present in court when the case is called for a trial. The words "otherwise defend" refer to attacks on the service, or motions to dismiss, or for better particulars, and the like, which may prevent default without presently pleading to the merits. When Bass by his attorney filed a denial of the plaintiff's case neither the clerk nor the judge could enter a default against him. The burden of proof was put on the plaintiff in any trial. When neither Bass nor his attorney appeared at the trial, no default was generated; the case was not confessed. The plaintiff might proceed, but he would have to prove his case.

More acceptable penalties for failure to comply with pretrial rules or for failure to appear at the trial are those found in Local Rule 21, Part II(G)(2) of the Rules of the Court of Common Pleas of Cuyahoga County, and Local Rule 13.04 of the Rules of the Court of Common Pleas for Stark County. The Cuyahoga County Rule provides:

Any judge presiding at a pretrial conference or trial shall have the authority: . . .

2. To order the plaintiff to proceed with the case and to decide and determine all matters ex parte upon failure of the defendant to appear in person or by counsel at any pretrial conference or trial as required in (H)(2) of this Rule.

And the Stark County Rule states: "If a defendant, either in person or by counsel, fails to appear for trial, and the party seeking affirmative relief does appear, the court shall order such party to proceed with the case and decide and determine all matters ex parte."

The Cuyahoga County Rule has received the approval of the Court of Appeals for Cuyahoga County. See Repp v. Horton, 44 Ohio App. 2d 63, 335 N.E.2d 722 (1974) (syllabus at ¶2): "A local court rule which permits the trial judge to proceed ex parte if a defendant fails to appear as provided by the local rules is not unconstitutional." Presumably, this would apply to the Stark County Rule as well.

In pertinent part, Ohio R. Civ. P. 37(B)(2)(e) reads: "If any party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: (e) an order rendering a judgment by default against the disobedient party. . . ."
are collateral issues regarding discovery and are not the issues which "arise on the pleadings." Accordingly, the penalty default proceeding is a "summary proceeding" and not a "trial," and an order vacating the penalty default judgment and reinstating the action at the point where it had been terminated is not an order vacating or setting aside a judgment and ordering a new trial. Likewise, it is not an order which determines the action or prevents a judgment, since either party to the action may prevail in the reinstated action. Thus, such an order meets neither the fourth nor first test for finality.

To summarize: when a motion for relief from a default judgment is granted, the relief will generally be one of three types: (1) the vacation or setting aside of the default judgment, (2) the vacation or setting aside of the default judgment and the setting down of the case for an adversary hearing on the merits, or the reinstatement of the action at the point at which it was terminated by the default judgment with the intent that an adversary hearing on the merits will occur in due course, or (3) the suspension of the default judgment and the setting down of the case for an adversary hearing on the merits.

Since the default proceedings will normally take place prior to the commencement of trial, and since the default proceedings are themselves "summary proceedings" and not "trials," an order granting any of the above three types of relief will not be a final order under the fourth test for finality because such an order will not order a new trial. Additionally, an order granting the third type of relief will not qualify under the fourth test because the order does not vacate or set aside the original judgment.

However, an order granting the first type of relief will be, in most cases, a final order under the first test for finality. It will affect a substantial right, determine the action, and prevent a judgment for the original judgment creditor. The one exception to this rule may be an order premised on the ground that the original judgment has been satisfied, released, or discharged; such an order may not "prevent" a judgment for the original judgment creditor, though it may, in the eyes of that party, prevent full satisfaction of the judgment.

An order granting the second or third type of relief will not meet the requirements of the first test for finality, since either party has an opportunity to prevail in the adversary hearing which will follow. Thus, such an order will neither determine the action (because the action continues) nor prevent a judgment (since either party may yet obtain a judgment).

In short, default judgments present something of a mixed bag. In most cases an order granting a Rule 60(B) motion for relief from such judgments will not be a final order under the first or fourth tests for finality, despite what the Ohio Supreme Court has said in ARC Industries. Whether it is a final order under the second and third tests for finality is a matter which will be discussed at the conclusion of this analysis.

51 Kennedy v. Chalfin, 38 Ohio St. 2d 85, 310 N.E.2d 233 (1974).
B. DISMISSALS

Much the same can be said with respect to dismissals. Dismissals are of two basic types, voluntary and involuntary. Voluntary dismissals may be further divided into three categories: dismissals by notice, dismissals by stipulation, and dismissals by court order. Involuntary dismissals may be categorized as penalty dismissals and dismissals "on the merits." 54

1. Voluntary Dismissals (Rule 41(A))

In the right circumstances, a motion for relief from judgment may be directed to a voluntary dismissal. 55 If the motion is sustained, the

52 See Ohio R. Civ. P. 41(A)(1), (2).
53 There are several sub-categories of penalty dismissals. Ohio R. Civ. P. 37(B)(2)(c), (e), and 37(D) authorize penalty dismissals for failure to respond to discovery requests and for failure to comply with discovery orders. As with penalty defaults, the key is Ohio R. Civ. P. 37(B)(2)(c) which provides in pertinent part: "If any party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: . . . (c) an order . . . dismissing the action or proceeding or any part thereof . . . ."
This provision is incorporated by reference into Ohio R. Civ. P. 37(B)(2)(e) and 37(D).
In addition, Ohio R. Civ. P. 41(B)(1) provides for penalty dismissals in the following circumstances: "Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff’s counsel, dismiss an action or claim.

54 Here, the term "on the merits" is used to differentiate this type of involuntary dismissal from involuntary penalty dismissals. It has nothing to do with the concept of "on the merits" as that term is used in the "savings statute," Ohio Rev. Code Ann. § 2305.19 (Page 1954). Thus, as far as the "savings statute" is concerned, either type of involuntary dismissal may be "on the merits" or "otherwise than upon the merits," depending upon the circumstances. See Ohio R. Civ. P. 41(B)(3), (4).

55 See, e.g., Tom McSteen Constr. Co. v. Thomas Maloney, Inc., 39 Ohio App. 2d 31, 314 N.E.2d 392 (1974), in which the plaintiff voluntarily dismissed the action by stipulation, then later moved to have the dismissal vacated and the case reinstated on the ground that the voluntary dismissal had been procured by the defendant's misrepresentation and non-disclosure.
If a voluntary dismissal takes place after the statute of limitations has run, a new action may not be commenced under the provisions of Ohio Rev. Code Ann. § 2305.19 (Page 1954) ("savings statute") even though the action has been dismissed without prejudice. This appears to be true whether the action has been voluntarily dismissed by notice, by stipulation, or by court order. Keefer v. Franks, No. 7595 (Ohio Ct. App. 9th Dist., filed Mar. 5, 1975); Manos v. Jackson, 42 Ohio App. 2d 53, 328 N.E.2d 414 (1974); Brookman v. Northern Trading Co., 33 Ohio App. 2d 250, 294 N.E.2d 912 (1972); Howard v. Allen, 28 Ohio App. 2d 275, 277 N.E.2d 239 (1971). See also Kent, Refiling After a Voluntary Dismissal, 47 Clev. B. J. 229, 231 (1976); Reinhard, Pitfalls Associated with the Ohio Saving Statute, 36 Ohio St. L. J. 876, 877-83 (1975). But see Browne, Voluntary Dismissals and the Savings Statute: Has Rule 41(A) Changed the Law?, 23 Clev. St. L. Rev. 215, 221-30 (1974); Lucey, On Dismissing a Case After the Statute Has Run, 45 Clev. B. J. 296 (1974). Despite all of the cases and articles on the point, a substantial number of attorneys are not aware of this rule, and do voluntarily dismiss after the statute of limitations has run. When these attorneys later discover that they cannot commence a new action under the "savings statute," they may move for relief from the dismissal on the ground of mistake, inadvertence or excusable neglect. Generally, such motions should fail, for as it is said in GTE Automatic Elec., Inc. v. ARC Indus., Inc., 47 Ohio St. 2d 146, 351 N.E.2d 113 (1976) (syllabus at ¶ 4): "As a general rule, the neglect of a party's attorney will be imputed to the party for the purposes of Civ. R. 60(B)(1). (Link v. Wabash R.R. Co., 370 U.S. 626, followed.)"
Kent, supra at 231, suggests that the opposing attorney may, in some cases, be estopped
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relief most likely to be granted will be the vacation of the dismissal and the setting down of the action for an adversary hearing, or the reinstatement of the action at the point where it was terminated by the judgment of dismissal, with the adversary hearing to follow in due course. This, of course, defeats the first test for finality, since such an order neither determines the action nor prevents a judgment. We shall postpone a consideration of the second and third tests for finality until later in this article. This leaves the fourth test; the one upon which the supreme court relied in the similar circumstances found in ARC Industries.

from pleading the statute of limitations when the attorney who has voluntarily dismissed attempts to commence the new action. He states:

Second, it will often happen that an entry of voluntary dismissal "without prejudice" and/or "otherwise than upon the merits" will be filed carrying the approval of both counsel. Does this create an estoppel on the ground that the defendant in effect agreed to the refiling (or, more to the point, tacitly agreed not to raise the defense of the statute of limitations) so that the plaintiff changed his position to his prejudice in reliance on the defendant's complaisance? Is it fairplay for the defendant to append his signature to an entry of this sort and then, when the action is refiled, interpose a motion to dismiss?

Kent, Refiling After a Voluntary Dismissal, 47 CLEV. B.J. 229, 231 (1976).

In a word, the answer to Kent's second question is "yes." Our adversary system does not impose an obligation on the defense attorney to instruct the plaintiff's attorney on the legal consequence of his or her actions. If the defense attorney has not actively misrepresented the situation, or actively induced the dismissal with an express promise not to raise the defense, the defense attorney may, with a good conscience, take advantage of the opposing attorney's malpractice. As the Ohio Supreme Court said in ARC Industries: "And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." 47 Ohio St. at 132, 351 N.E. at 117 (quoting Link v. Wabash R.R., 370 U.S. 626, 634 (1962)).

In any event, the mere approval of a judgment entry of dismissal hardly qualifies as conduct which gives rise to an estoppel. The court of appeals stated in Markese v. Ellis, 11 Ohio App. 2d 160, 229 N.E.2d 70 (1967) (syllabus):

[An] estoppel to the operation of a statute of limitations does not arise in an action for damages through personal injury when the facts show: (1) no fiduciary or trust relationship between the parties; (2) no fraud, misrepresentation, or false statement by the defendant; (3) no concealment of material facts; (4) no request by the defendant to withhold legal action pending negotiations for settlement; (5) no promise or agreement of the defendant not to plead the statute of limitations; (6) no promise by the defendant to pay the plaintiff's damages; (7) no conduct of the defendant showing, or tending to show, that plaintiff was induced by defendant's promises and conduct to believe that he did not need an attorney, or that he refrained from conferring with counsel and was kept from bringing an action within the two-year limitation because of the defendant's inducement. And in Standard Oil Co. v. Grice, 46 Ohio App. 2d 97, 101, 345 N.E.2d 458, 461 (1975), see note 57 infra, the court noted that Ohio has a traditional policy of encouraging voluntary terminations.

The mere approval of the judgment entry, therefore, does not meet any of the requirements of estoppel even if the defense attorney suspects that the plaintiff's counsel is making a mistake. Plaintiff's counsel is presumed to know the law, and defense counsel may properly assume that he does. Defense counsel is not obliged to explore the motives of his opponent when the opponent's actions are in accord with the state's public policy. To argue that defense counsel's failure to object to an opponent's voluntary dismissal after the statute has run amounts to a promise not to raise the defense of the statute because defense counsel should know that the opponent is making an error of law, is to argue that defense counsel must object to every legal error made by opposing counsel or forfeit the right to base a defense on that error. Such an approach gives the opposing party two attorneys rather than one. The Ohio Supreme Court has therefore given the correct answer to Kent's second question; the plaintiff's remedy is against his or her attorney in a suit for malpractice.
a. Voluntary Dismissals by Notice (Rule 41(A)(1)(a))

If the voluntary dismissal is to be accomplished by notice, the notice of dismissal must be filed with the court prior to "the commencement of trial." Since that is done, however, the dismissal is automatic. The only thing the court need do, and this for the sake of the record, is enter a judgment entry of dismissal. In such circumstances there has been no judicial examination of the issues at all, let alone a judicial examination of the issues which arise on the pleadings. It necessarily follows that an order vacating the dismissal and setting the case for adversary hearing is not an order granting a "new" trial, but an order granting an "original" trial. Accordingly, the second element of the fourth test for finality is not met, and the order granting relief from judgment is not final under that test.

b. Voluntary Dismissals by Stipulation (Rule 41(A)(1)(b))

From all that appears in the Rule, this dismissal is automatic, and becomes effective upon the filing of the stipulation. No affirmative action is required of the court, save to note the fact of dismissal in a judgment entry. The Rule, however, does not require the stipulation to be filed before the commencement of trial. Thus, in theory at least, the stipulation for dismissal may be filed after the trial has commenced, but before the judgment has been entered.

56 Ohio R. Civ. P. 41(A)(1)(a) provides in pertinent part: "[A]n action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by the defendant. . . ." Thus, a notice of dismissal filed after the court has granted the defendant's motion for summary judgment, but before that decision has been journalized, is timely because it has been filed "before the commencement of trial." The hearing on the motion for summary judgment is a "hearing," not a "trial." Morris v. First Nat'l Bank & Trust Co., 15 Ohio St. 2d 184, 185, 239 N.E.2d 94, 95 (1968); Standard Oil Co. v. Grice, 46 Ohio App. 2d 97, 101, 345 N.E.2d 458, 461 (1975).

57 In Standard Oil Co. v. Grice, 46 Ohio App. 2d 97, 100-01, 345 N.E. 2d 458, 461 (1975), the court stated:
The language of Civil Rule 41(A)(1) and (C) requires no construction. It gives either party an absolute right, regardless of motives, to voluntarily terminate its cause of action at any time prior to the actual commencement of the trial. There is no exception to the rule for any possible circumstances that would justify a court in refusing to permit the withdrawal of a cause prior to the commencement of trial. This is the traditional Ohio policy of encouraging voluntary terminations.

58 Ohio R. Civ. P. 41(A)(1)(b) provides in pertinent part: "[A]n action may be dismissed by the plaintiff without order of court . . . (b) by filing a stipulation of dismissal signed by all parties who have appeared in the action."

59 This may be inferred from what is said in Standard Oil Co. v. Grice, 46 Ohio App. 2d 97, 100-01, 345 N.E.2d 458, 461 (1975). Although Grice dealt with a voluntary dismissal by notice rather than a voluntary dismissal by stipulation, it is clear from the decision that the court envisioned the entry of judgment as the "cut-off" point beyond which a voluntary dismissal by notice or stipulation could not be taken. This is in accord with the doctrine of res judicata which deems a claim to be barred by a judgment against the claimant. Until judgment is entered, the claim is still in existence and, if the Rules permit, may be withdrawn from adjudication.
(1) Stipulation Filed before Adversary Hearing

If the stipulation is filed before the commencement of the adversary hearing, the order granting relief from the dismissal will not be a final order under the fourth test for finality for the same reasons which preclude the application of that test in the case of a voluntary dismissal by notice — there has never been an original trial, so the order granting relief cannot order a "new" trial.

(2) Stipulation Filed after Commencement of Adversary Hearing

It is another matter entirely if the stipulation is filed after the commencement of the adversary hearing. Very broadly, two situations are possible: (a) the stipulation is filed after the commencement of trial but before the jury returns its verdict or, in a case tried without a jury, before the court announces its decision (hereinafter, for convenience this will be referred to by the short-hand term of "before verdict"), or (b) the stipulation is filed after the receipt of the verdict or after the announcement of the court's decision, but before entry of the judgment (hereinafter referred to as "after verdict").

(a) Stipulation Filed before Verdict. Here, the stipulation is filed at some point during the adversary hearing, and the essential question is this: How much of the adversary hearing must take place before the hearing becomes a "trial?" The answer is found in the statutory definition of a trial. A trial is a judicial examination of the issues of law or fact which arise on the pleadings. Thus, an adversary hearing becomes a "trial" when the court first examines those issues.

In a jury trial, the court examines the issues when it is called upon to decide whether the action should go forward or be withheld from the jury, or when it must decide which issues are to be sent to the jury with instructions and which are to be decided by the court. Essentially, there are two points in time when the court may be called upon to examine the issues, and one point in time when it must examine the issues. The first of the two optional points in time is at the close of the plaintiff's opening statement. At that point, the defendant may move for a directed verdict, and if he does so, the court must examine the issues which arise on the pleadings to determine whether the case should go forward. The second optional time point is at the close of the plaintiff's evidence, when the defense may again move for a directed verdict. The third and mandatory time point is at the close of all the evidence. Here again, the defense may move for a directed verdict, but even if it does not, the court must still examine the issues to see which of them are to be submitted to the jury for its de-

60 Ohio R. Civ. P. 50(A)(1) provides: "A motion for a directed verdict may be made on the opening statement of the opponent, at the close of the opponent's evidence or at the close of all the evidence."
61 Id.
62 Id.

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termination and which, if any, are to be decided by the court, and to determine what instructions are to be given to the jury.

In a case tried to the court, the court examines the issues which arise on the pleadings when it is called upon to decide the case. This may be as early as the close of the plaintiff's evidence, or as late as the close of all of the evidence.

Thus, in either type of case, a "trial", in the technical sense of a judicial examination of the issues of law or of fact which arise on the pleadings, may or may not occur prior to the close of the adversary hearing. Accordingly, the applicability of the fourth test for finality will depend upon both circumstances and timing. If the stipulation is filed before the close of the adversary hearing, before the close of all the evidence for example, and also before a motion for directed verdict or motion to dismiss has been made, the dismissal will occur before there has been an original trial, and an order vacating the dismissal and setting the case down for a new or further adversary hearing will not be an order granting a "new" trial. If the stipulation is filed after the close of the adversary hearing, on the other hand, but after a motion for directed verdict or motion to dismiss has been made, the dismissal will occur after a trial has been held, and the order vacating the dismissal will be an order which grants a "new" trial. Likewise, if the stipulation is filed after the close of the adversary hearing, but before the jury returns with its verdict or before the court announces its decision, the dismissal will occur after a trial, and the order vacating the dismissal will properly order a "new" trial.

63 Ohio Rev. Code Ann. § 2311.04 (Page Supp. 1976) provides:
Issues of law must be tried by the court, unless referred as provided in the Rules of Civil Procedure. Issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or unless all parties consent to a reference under the Rules of Civil Procedure.

All other issues of fact shall be tried by the court, subject to its power to order any issue to be tried by a jury, or referred.

Also, Ohio R. Civ. P. 39 provides:
(A) When a trial by jury has been demanded as provided in Rule 38 . . . , The trial of all issues so demanded shall be by jury, unless . . . (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist.
(B) Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court . . .

64 Ohio R. Civ. P. 51(A) provides: "[T]he court shall instruct the jury after the arguments are completed."

65 Ohio R. Civ. P. 41(B)(2) provides:
After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

66 This point is not expressly made by the Ohio Rules of Civil Procedure since it is dictated by common sense, but if authority for the proposition is deemed necessary, it may be inferred from the language of Rule 41(B)(2)(quoted in note 65 supra), as well as from the language of Ohio R. Civ. P. 52 ("When questions of fact are tried by the court without
(b) Stipulation Filed after Verdict. If the stipulation is filed after the verdict has been received or after the court has announced its decision, but before judgment has been entered, it is clear that the stipulation has been filed after the original trial, and an order vacating the dismissal and setting the case down for a new adversary hearing will be an order granting a "new" trial. Thus, in this situation, the fourth test for finality clearly applies.

c. Voluntary Dismissals by Court Order (Rule 41(A)(2))

If a voluntary dismissal cannot be taken by notice or stipulation, it can only be accomplished with the court's consent, which consent is manifested in an order of dismissal upon such terms and conditions as the court deems proper. Such an order must be obtained by a motion for dismissal. Since the order, if granted, must be granted "upon such terms and conditions as the court deems proper," the court is obliged to judicially examine the issues raised by the motion. In most cases, these "issues" will relate to the independence of a counterclaim, whether the dismissal should be granted "without prejudice," or to whether the dismissing plaintiff should pay the costs of

a jury, judgment may be general for the prevailing party, . . . " and 58 ("[U]pon a decision announced, the court shall promptly cause the judgment to be prepared. . . . ").

67 See Latimer v. Morris, 27 Ohio App. 2d 66, 272 N.E.2d 494 (1971), in which it was held that a motion for a new trial may be served after receipt of the verdict but before entry of the judgment.

68 Ohio R. Civ. P. 41(A)(2), which provides in pertinent part: "Except as provided in subsection (1) [i.e., the subsection providing for voluntary dismissals by notice or stipulation] an action shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper."

69 Manos v. Jackson, 42 Ohio App. 2d 53, 328 N.E.2d 414 (1974). See also Ohio R. Civ. P. 7(B)(1) which stipulates: "An application to the court for an order shall be by motion which, unless made during a hearing or a trial, shall be made in writing."

70 See note 68 supra.

71 Ohio R. Civ. P. 41(A)(2) further provides: "If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court."

A counterclaim can remain pending for independent adjudication by the court if the court has jurisdiction of the parties and of the controversy. Abbyshire Co. v. Civil Rights Comm'n, 39 Ohio App. 2d 125, 316 N.E.2d 893 (1974). Unless an attempt has been made to bring in new parties to the counterclaim, the court will almost always have jurisdiction of the parties. Likewise, unless the action is in a municipal court or a county court, the court will almost always have jurisdiction of the controversy. However, even a common pleas court has some limits on its jurisdiction. A claim for less than $500.00, for example, is not within the subject matter jurisdiction of a common pleas court. Sterling Fin. Co. v. Thornhill, 25 Ohio Misc. 213, 263 N.E.2d 925 (Mun. Ct. 1970). Thus, if such a counterclaim can be asserted at all in a common pleas court (and it probably can under the concept of "ancillary jurisdiction," Kacian v. Illes Constr. Co., 24 Ohio App. 2d 43, 263 N.E.2d 680 (1970)), it cannot remain pending for independent adjudication if the principal claim is dismissed. Accordingly, there will be occasions, albeit rarely, when the independence of a counterclaim is an issue which the court must judicially examine.

72 Ohio R. Civ. P. 41(A)(2) provides: "Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice." Thus, in every case, the court must determine whether or not the dismissal should be with or without prejudice so that it may properly draft the judgment entry of dismissal. As the Rules Advisory Committee Staff Note to Rule 41 puts it: "Under Rule 41(A)(2) the court order granting the dismissal will be upon
the action to date,\textsuperscript{73} and therefore will not directly relate to the issues which arise on the pleadings. Thus, in the majority of cases the motion proceeding will not in itself be a "trial"\textsuperscript{74} as that term is defined in Ohio Revised Code section 2311.01, but will be a "summary proceeding" or, as the Rules put it, a "hearing."\textsuperscript{75}

such terms as the court deems just. Hence, depending upon the circumstances the court will exercise its sound discretion to determine whether the action may be dismissed without prejudice.”

\textsuperscript{73} See \textit{Ohio} R. Civ. P. 41(D), which states:

If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Although, by its terms, this Rule has direct application to the second action, the Rules Advisory Committee Staff Note to Rule 41 indicates that it comes into play only if the court's order of dismissal in the first action did not settle the question of costs. As the Staff Note states: "Rule 41(D) provides for the assessment of costs in the previous action dismissed without prejudice if costs were not settled at the time of dismissal and plaintiff files the action a second time.”

\textsuperscript{74} In Abbyshire Co. v. Civil Rights Comm'n, 39 Ohio App. 2d 125, 316 N.E.2d 893 (1974), the plaintiff commenced an action in the Common Pleas Court of Cuyahoga County for review of an order of the Ohio Civil Rights Commission. The Ohio Civil Rights Commission counterclaimed for a declaratory judgment that its findings underlying the order were supported by the evidence and for enforcement of the order. At a pretrial conference, Abbyshire moved for an order dismissing the action. The court granted the dismissal without prejudice, and also dismissed the counterclaim. The Ohio Civil Rights Commission appealed from the dismissal of the counterclaim, and asked the appellate court to enter final judgment enforcing the order. The Court of Appeals for Cuyahoga County agreed that the dismissal of the counterclaim was error since the counterclaim could remain pending for independent adjudication, but refused to concede that it had jurisdiction to order enforcement of the Commission's order, saying: "There was no trial on the merits below and this indeed is the error assigned to this Court. Therefore we must reverse the final judgment and remand to the Common Pleas Court for further proceedings on appellant's counterclaim consistent with this opinion.” \textit{Id.} at 130, 315 N.E.2d at 897. Thus, although the dismissal proceeding required a judicial examination of issues of law or fact, those issues were not the issues which arose on the pleadings, and therefore the proceeding was not a trial.

\textsuperscript{75} Both \textit{Ohio} R. Civ. P. 7(B) and 56 distinguish between a "trial" and a "hearing," and the implication from the language used in those Rules is clear: A "hearing" is the judicial examination of the issues which arise in a summary proceeding—that is, the issues raised by a motion—while a "trial" is the judicial examination of the issues which arise on the pleadings.

At first blush, \textit{Ohio} R. Civ. P. 12(D) appears to be an exception to this rule: The defenses specifically enumerated (1) to (7) in subdivision (B) of this rule [lack of jurisdiction over the subject matter, lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, failure to state a claim upon which relief can be granted, and failure to join a necessary or indispensable party], whether made in a pleading or by motion . . . shall be heard and determined before trial on application of any party.

If these defenses are contained in a pleading, however, as they may be under Rule 12(B), does not a motion for a preliminary hearing call for a judicial examination of issues which arise on the pleadings; and should not the proceeding in which the court examines these issues be called a "trial" rather than a "hearing?" The Ohio State Supreme Court gave the answer in Wagner v. State, 42 Ohio St. 537 (1885) (syllabus at ¶ 3):

"Trial," in the sense of this limitation, has reference to a trial upon a plea in bar, and does not extend to a hearing on a motion to quash, or trial upon a plea in abatement; it commences, at least, when the jury is sworn, and embraces questions as to the admissibility of evidence, refusals to charge and the charge given, and the like; and it ends with the rendition of the verdict.

A trial, therefore, is a judicial examination of the issues raised by pleas in bar, and not
The motion for dismissal may be made before the adversary hearing begins, during the adversary hearing, after the adversary hearing but before judgment, after judgment, or during appellate review.

a judicial examination of the issues raised by motions or by pleas in abatement. Now, of pleas in bar, it is said:

It follows from the nature and object of the plea in bar that it must generally deny all or some essential part of the averments of fact in the declaration, or, admitting them to be true, allege new facts which obviate or repel their legal effect. In the first case, the defendant is said to traverse the matter of the declaration; in the latter, to confess and avoid it. Pleas in bar are consequently divided into pleas by way of traverse and pleas by way of confession and avoidance.

B. Shipman, HANDBOOK OF COMMON-LAW PLEADING, 30 (3d ed. 1923). See also J. Koffler & A. Reppy, HANDBOOK OF COMMON LAW PLEADING, 434 (1969). Since these Rule 12(B) defenses neither deny the allegations of the complaint nor confess and avoid them, they are not pleas in bar; rather, they are dilatory pleas in the nature of pleas in abatement. B. Shipman, supra, at 29, and J. Koffler & A. Reppy, supra at 410-32. Accordingly, when these defenses are raised in a pleading rather than by motion, they present issues which arise in a pleading, but not issues which arise on the pleadings, and the Rule 12(D) preliminary proceeding in which they are determined is a "hearing" or "summary proceeding," and not a "trial." Thus, Rule 12(D) is not an exception to the rule that a "trial" is the judicial examination of the issues that arise on the pleadings.

For the most part, OHIO R. Civ. P. 41(A) gives the plaintiff a choice as to the method of voluntarily dismissing an action, and dismissal by court order need only be employed if a dismissal by notice or by stipulation cannot be obtained. Normally, if the dismissal is to take place before the commencement of the adversary hearing, dismissal by notice is the method chosen, since it requires neither the consent of the court nor the consent of the other parties to the action. Standard Oil Co. v. Grice, 46 Ohio App. 2d 97, 345 N.E.2d 458 (1975), quoted in note 57 supra. However, as a practical matter, the "two-dismissal" rule will preclude a dismissal by notice if the plaintiff has previously dismissed the same claim. The "two-dismissal" rule is stated in Rule 41(A)(1): "[A] notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court, an action based on or including the same claim." While this rule does not absolutely preclude the use of a notice for the purpose of dismissing the claim for the second time, it will preclude the commencement of a third action on that claim, and thereby frustrate the principal purpose of the dismissal.

Likewise, if the plaintiff cannot obtain the consent of all parties to the action, a dismissal by stipulation will not be available as an option. Thus, in some cases, the only way in which a claim may be voluntarily dismissed prior to the commencement of the adversary hearing is by court order.

Since the adversary hearing will normally qualify as a "trial," and since the notice of dismissal must be filed "before the commencement of trial," see note 56 supra, dismissal by notice is not available. Dismissal by stipulation is theoretically available, but may be precluded by another party's failure to consent, or by that party's insistence on a dismissal with prejudice. Accordingly, dismissal by court order may again be the only method of voluntary dismissal available.

As stated in note 59 supra, a claim is not barred until judgment is entered against the claimant. Thus, if the court consents, the dismissal may be had before judgment is entered.

The use of the motion in this circumstance appears to be limited to those instances in which the defense has moved for judgment notwithstanding the verdict. FED. R. Civ. P. 50(b) specifies that after a timely motion for judgment notwithstanding the verdict has been made, "[T]he court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed." Although this Rule makes no mention of the grant of a voluntary dismissal pursuant to FED. R. Civ. P. 41(a)(2), the Supreme Court of the United States has noted that that option is also available. In Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 217 (1947), the Court stated:

In this case had respondents made a timely motion for judgment notwithstanding the verdict, the petitioner could have either presented reasons to show why he should have a new trial, or at least asked the court for permission to dismiss. If satisfied from the knowledge acquired from the trial and because of the reasons urged that the ends of justice would best be served by allowing petitioner another chance, the judge could have so provided in his discretion.
Motion Made before Adversary Hearing

Since the summary proceeding on the motion for dismissal is not itself a trial, and since the dismissal is granted before the adversary hearing commences, an order vacating dismissal and reinstating the action for an adversary hearing will not be a final order under the fourth test for finality because it will not order a "new" trial.

Ohio R. Civ. P. 50(B) is essentially the same as the Federal Rule. Thus, it may be assumed that the Ohio courts will follow the federal lead, and recognize the dismissal as a possible alternative to a judgment notwithstanding the verdict or a new trial.

In the federal system, however, the dismissal may be granted as an alternative only if the trial court considers the motion for judgment notwithstanding the verdict well-taken, and reopen the judgment pursuant to that motion. If the motion for judgment notwithstanding the verdict is properly denied, the court has neither power nor authority to grant dismissal as an alternative form of relief. See Jackson v. Wilson Trucking Corp., 243 F.2d 212 (D.C. Cir. 1957) in which the circuit court denied the trial court the authority to grant a new trial when a motion for a new trial had not been made and when the grant of the motion for judgment notwithstanding the verdict would not have been warranted. This conclusion necessarily follows from the concept of res judicata mentioned in notes 59 and 78 supra, since in effect the judgment extinguishes the claim and bars any further action on it. If the judgment remains in effect, the claim no longer exists, and there is nothing to dismiss. Thus, a dismissal is possible only if the judgment is properly reopened pursuant to a well-taken motion for judgment notwithstanding the verdict. Theoretically, a timely motion for new trial could also serve as the vehicle for obtaining a voluntary dismissal by court order. Since the new trial accomplishes all that a voluntary dismissal could accomplish, however, and in some cases accomplishes much more when the commencement of a new action on the claim would be barred by the running of the statute of limitations, it is pointless to consider a voluntary dismissal by court order as a real alternative to the grant of a new trial.

There is at least one Ohio decision, however, which fails to note the res judicata bar of an unopened judgment. In Ruse v. Ruddy, 30 Ohio App. 2d 171, 283 N.E.2d 818 (1972), the Court of Appeals for Cuyahoga County held that a trial court had the power to grant a new trial even though no motion therefor had been made, and the timely made motion for judgment notwithstanding the verdict had been denied. Whether other Ohio courts will follow this erroneous decision, and whether they will apply the same rationale to the grant of a voluntary dismissal remains to be seen.

Again, the circumstances in which a plaintiff may obtain a voluntary dismissal from the court of appeals appear to be limited. The Supreme Court stated the rule in Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 328 (1967):

A plaintiff whose jury verdict is set aside by the trial court on defendant's motion for judgment n.o.v. may ask the trial judge to grant a voluntary nonsuit to give plaintiff another chance to fill a gap in his proof. Cone v. West Virginia Pulp & Paper Co., 330 U.S., at 217. The plaintiff-appellee should have this same opportunity when his verdict is set aside on appeal. Undoubtedly, in many cases this question will call for an exercise of the trial court's discretion. However, there is no substantial reason why the appellee should not present the matter to the court of appeals, which can if necessary remand the case to permit initial consideration by the district court.

Thus, when the defendant has appealed from the denial of his or her motion for judgment notwithstanding the verdict, and the court of appeals has reversed that denial and set aside the verdict, the plaintiff may ask the court of appeals to grant a voluntary dismissal in lieu of entering judgment for the defendant. Having equated the request for a voluntary dismissal with the plaintiff's request for a new trial, the United States Supreme Court indicated that there are several occasions on which the request may be made:

Moreover, the appellee can choose for his own convenience when to make his case for a new trial: he may bring his grounds for new trial to the trial judge's attention when defendant first makes an n.o.v. motion, he may argue this question in his brief to the court of appeals, or he may in suitable situations seek rehearing from the court of appeals after his judgment has been reversed.
(2) Motion Made during the Adversary Hearing

Here we encounter the same problems that arise when a stipulation for dismissal is filed during the course of the adversary hearing. Again, the applicability of the fourth test for finality will be controlled by the timing of the motion and the circumstances surrounding it. If the motion is made and granted before the close of all the evidence and before a motion for directed verdict or involuntary dismissal has been made, the dismissal will occur before there has been an original trial, and an order vacating dismissal and reinstating the case will not be an order ordering a "new" trial. But if the motion is made and granted before the close of all of the evidence but after a motion for a directed verdict or involuntary dismissal, or if the motion is made and granted after the close of all the evidence but before the jury returns with its verdict or before the court announces its decision, the dismissal will occur after a trial has been held, and the order vacating dismissal and reinstating the action will be an order which grants a "new" trial.

(3) Motion Made after Hearing but before Judgment

If the motion is made and granted after verdict or decision but before judgment has been entered, it is clear that the dismissal occurs after there has been a trial. Accordingly, an order vacating dismissal and setting the case for a new adversary hearing is an order which grants a "new" trial, and the elements of the fourth test are met.

(4) Motion Made after Judgment

If the motion is made and granted after judgment has been entered and after a motion for judgment notwithstanding the verdict has been granted, the dismissal follows an original trial, and the order vacating the dismissal and ordering a new adversary hearing would be a final order under the fourth test. Under the rule of Ruse v. Ruddy, this may also be true if the motion for judgment notwithstanding the verdict has been denied. Ruse v. Ruddy is wrongly decided, however, and in theory the motion for dismissal should only lie in this circumstance if the motion for judgment notwithstanding the verdict is well-taken, and the judgment is opened up pursuant to that motion.

res judicata, the plaintiff's claim has become merged with the judgment, and having been merged, it is extinguished as a claim and passes out of existence as such. Accordingly, the court of appeals may grant a voluntary dismissal only if it vacates or sets aside the original judgment in the plaintiff's favor. That the court may only grant the dismissal after it has set aside the judgment does not, however, preclude the plaintiff from requesting this as an alternative form of relief in his brief on appeal. Thus, the plaintiff-appellee may, with foresight, raise the question in the appellate brief, or may, as an afterthought, raise it by a petition for rehearing, Fed. R. App. P. 40, or by a motion for reconsideration, Ohio R. App. P. 26.

83 See note 79 supra.
84 In Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 328 (1967) (emphasis added), the Supreme Court stated that "[A] plaintiff whose jury verdict is set aside by the trial court
(5) Motion Made during Appellate Review

If the motion is made during or after appellate review, and granted after the court of appeals has set aside the movant's verdict or judgment because of insufficient evidence to send the case to the jury, the dismissal occurs after an original trial; and the order vacating dismissal and setting the case for a new adversary hearing would be an order granting a "new" trial, and final under the fourth test for finality.

An order vacating the dismissal might not be readily obtainable in every case, however. When the motion for dismissal is favorably entertained by the appellate court, the court will generally take one of three possible courses of action: remand the case to permit initial consideration of the motion by the trial court, grant the motion and remand the case to the trial court with a mandate that the trial court should enter an order of dismissal, or grant the motion and order the case dismissed.

(a) Remand for Consideration. If the case is remanded to the trial court for its consideration of the motion to dismiss, the decision to grant the motion and dismiss the claim is the decision of the trial court, subject to review by the appellate court which ordered the remand. If the decision survives appellate review, or if no appeal is taken, it would seem that the trial court has full authority to vacate its dismissal upon a timely and properly grounded motion for relief from judgment.

(b) Remand for Dismissal. On the other hand, if the case is remanded solely for the purpose of having the trial court enter the order

\[\text{on defendant's motion for judgment n.o.v. may ask the trial judge to grant a voluntary nonsuit to give plaintiff another chance to fill a gap in his proof.}\]


55 See note 80 supra.

56 From what is said in Neely v. Martin K. Eby Constr. Co., 396 U.S. 317, 328 (1967) (quoted in note 80 supra), it is obvious that this is the approach favored by the Supreme Court of the United States. In the Ohio system, this procedure is authorized by Ohio R. App. P. 12(D), which provides: "In all other cases where the court of appeals finds error prejudicial to the appellant, the judgment or final order of the trial court shall be reversed and the cause shall be remanded to the trial court for further proceedings."

57 Since the grant of the motion to dismiss must be preceded by a reversal of the verdict and judgment in plaintiff's favor and/or by a reversal of the trial court's order denying the defendant's motion for judgment notwithstanding the verdict, it falls within the purview of Ohio Rev. Code Ann. § 2505.37 (Page 1954), which states: "When a judgment or final order is reversed, in whole or in part, in the court of common pleas, court of appeals, or supreme court, the reviewing court shall render such judgment as the court below should have rendered, or remand the cause to that court for such judgment." To some extent, this section of the Ohio Revised Code has been affected by the provisions of Ohio R. App. P. 12. However, none of those provisions (save, perhaps, the provisions of Ohio R. App. P. 12(D), quoted in note 86 supra) appear to be directly applicable to this particular situation, so it may be concluded that the statutory language applies without modification by the Ohio Appellate Rules.

58 This procedure is authorized both by Ohio Rev. Code Ann. § 2505.37 (Page 1954) (quoted in note 87 supra) and by Ohio R. App. P. 12(B), which provides in pertinent part:

In all other cases [i.e., cases other than those in which the appellee is entitled to have his or her judgment affirmed as a matter of law, or cases in which the appellant is entitled to have judgment rendered in his favor as a matter of law] where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly.
of dismissal, it would seem that the trial court cannot take any action inconsistent with the appellate court's mandate without the appellate court's consent and approval.\(^8\) Thus, upon remand, the trial court must dismiss the case.

However, when the "cause"\(^9\) is remanded to the trial court for entry of the judgment ordered by the appellate court, the appellate court divests itself of jurisdiction and reinvests jurisdiction in the trial court.\(^9\) Does the trial court have jurisdiction later to vacate the judgment mandated by the appellate court? The answer is far from clear. Perhaps *Townley v. A.C. Miller Co.*\(^9\) is closest on point. The issue was framed in the following terms:

Where the Court of Appeals has reversed a judgment of the Court of Common Pleas entered on a general verdict for the plaintiff, has held this judgment for naught, has entered the judgment which the trial court should have entered dismissing plaintiff's petition, and has sent a special mandate to the lower court to carry this judgment into effect, has the trial court jurisdiction thereafter to entertain a petition of the plaintiff to vacate the original verdict and grant a new trial after term on the ground of newly discovered evidence.\(^9\)

The supreme court answered this question in the affirmative. In doing so it emphasized that under the statutes then in force\(^9\) it was the verdict that was vacated when a new trial was sought, and only the


\(^9^\) See Ohio Rev. Code Ann. § 2505.37 (Page 1954), quoted in note 87 *supra*, which specifies that the "cause" may be remanded to the trial court for entry of the judgment rendered by the appellate court.

\(^9^1\) New York Central Rd. Co. v. Francis, 109 Ohio St. 481, 486, 143 N.E. 187, 189 (1924), in which it is said:

[W]hen the "cause" was remanded then the "cause" was again within the jurisdiction of the court of common pleas. . . . But jurisdiction could not be in both courts at the same time. It would seem, therefore, that, after further proceedings in the latter court, the Court of Appeals could again obtain jurisdiction only through and by virtue of the methods provided by statute.

\(^9^2\) 139 Ohio St. 153, 38 N.E.2d 578 (1941).

\(^9^3\) Townley v. A. C. Miller Co., 139 Ohio St. 153, 156, 38 N.E.2d 578, 580 (1941) (emphasis added).

\(^9^4\) See General Code § 11576 (original version in Code of Civil Procedure of the State of Ohio § 297, 1852 Ohio Laws 57) (subsequent version codified at Ohio Rev. Code Ann. § 2321.17 (Page 1954) (repealed 1970)): A former verdict, report, or decision, shall be vacated, and a new trial granted by the trial court on the application of a party aggrieved, for any of the following causes affecting materially his substantial rights: . . . 7. Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at the trial . . .

And see General Code § 11580 (original version in Code of Civil Procedure of the State of Ohio § 301, 1853 Ohio Laws 57) (subsequent version codified at Ohio Rev. Code Ann. § 2321.21 (Page 1954) (repealed 1970)): When with reasonable diligence, the grounds for a new trial could not be discovered before, but are discovered after the term at which the verdict, report, or decision was rendered or made, the application may be by petition, filed not later than one year after final judgment was rendered, on which a summons must issue, be returnable and served, or publication made, as in other cases.
trial court had jurisdiction to vacate the verdict. In the words of the court:\textsuperscript{95}

It may be asked what becomes of the judgment of the Court of Appeals under a holding that, despite this judgment, the trial court has jurisdiction to vacate the verdict and grant a new trial under Sections 11576 and 11580, General Code [\textit{Ohio Rev. Code Ann. §§ 2321.17, .21}]. . . . We are of the opinion that, even without any specific reference to any judgment which may have been predicated on the old verdict — whether this be a judgment of the trial court, or a judgment of an appellate court affirming, or, upon a reversal, substituting its for that of the trial court — such a judgment must fall of its own weight when the verdict upon which it rests has been set aside. As the Supreme Court of California has said, "While the proceeding for a new trial attacks the verdict or findings rather than the judgment, and is, in a sense, collateral to the judgment . . . it will, if successful, vacate the judgment, and that is, in fact, its ultimate purpose." \textit{Bond v. United Railroads of San Francisco}, 169 Cal., 273, 276, 146 P. 688.

We conclude that any conflict between the finality of the judgment which the Court of Appeals is empowered to render under Section 12223-38, General Code [now \textit{Ohio Rev. Code Ann. 2505.37}], and the power of a trial court to grant a new trial under Section 11576 et seq. must be resolved by recognizing that the judgment is not final in the sense that it is immune from disturbance through the exercise by the trial court of its plenary power to vacate the verdict on which the judgment is founded.

But Rule 60(B) has wholly replaced the former statutes,\textsuperscript{96} and its thrust is directed toward the judgment\textsuperscript{97} rather than the verdict. Thus, the question remains, but without the \textit{Townley} solution.

Most probably, the \textit{Townley} answer, but not the \textit{Townley} rationale, will remain the accepted rule. In \textit{Townley}, the supreme court concentrated on the verdict because that was the question put before it,\textsuperscript{98}:

\begin{quote}
\textsuperscript{95} Townley v. A. C. Miller Co., 139 Ohio St. 153, 165, 38 N.E.2d 578, 583-84 (1941).
\textsuperscript{96} \textit{Ohio} R. Civ. P. 60 (B) provides: "The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules."
\textsuperscript{97} \textit{Ohio} R. Civ. P. 60 is captioned "Relief from judgment or order," and subsection (B) begins with these words: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding . . . ." The same subsection closes with the following sentence: "The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules."
\textsuperscript{98} The only Rule which provides for the vacation of a verdict is \textit{Ohio R. Civ. P. 50(B)}, which provides in material part: "Whether or not a motion to direct a verdict has been made or overruled and not later than fourteen days after entry of judgment, a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion. . . . ." This Rule, however, has no application to the situation described in the text, since the court of appeals has already set aside the verdict and judgment.
\end{quote}

\textsuperscript{98} Thus, the \textit{Townley} court stated:

\textit{Plaintiff, on the other hand, insists that what he sought from the Court of Common
but in passing it noted with apparent approval one of its own prior decisions which inferentially approved the trial court's vacation of a judgment that had been affirmed on appeal.\textsuperscript{99} Thus, since the power to vacate a judgment remains with the trial court under the Rules,\textsuperscript{100} it may be concluded, at least until the supreme court clearly states otherwise, that in appropriate circumstances the trial court may vacate a judgment which an appellate court has ordered it to enter if the appellate court has remanded the case to the trial court.

99 Ohio St. 153, 158, 38 N.E.2d 578, 581 (1941) (emphasis in original).

100 See Ohio R. Civ. P. 50(B) (motion for judgment notwithstanding the verdict), 59 (motion for new trial), and 60(B) (motion for relief from judgment).

Pleas was the vacation, not of a judgment under Section 11631 [Ohio Rev. Code Ann § 2325.01 (Page 1954) (repealed 1970)], but of a verdict under Section 11576 [Ohio Rev. Code Ann. § 2321.17 (Page 1954) (repealed 1970)], and that there is therefore no occasion to consider the alleged jurisdictional difficulty resulting from the fact that under Section 11631 the Court of Common Pleas and the Court of Appeals are each given power to set aside only "its own judgment or order." Although the prayer of plaintiff's amended petition was that "the verdict returned by the jurors in said cause No. 12648 and the report of the jurors of their special findings, Nos. 1 and 5 returned into court with said verdict and the judgment based upon the report of such special findings be vacated and set aside" (italics ours), the journal entry of the trial court provides only "that the verdict . . . be . . . vacated," with no mention of the judgment. Since it is the propriety of this order which is here being challenged, we believe that the plaintiff is correct in his contention that the only question at issue is whether the trial court had jurisdiction to enter such an order vacating a verdict and granting a new trial in the circumstances presented.

139 Ohio St. 153, 158, 38 N.E.2d 578, 581 (1941) (emphasis in original).

The facts of Krieger's Cleaners & Dyers, Inc. v. Benner, [123 Ohio St. 482, 175 N.E. 857 (1931)], show that this court inferentially there approved a procedure by which a trial court, acting under Section 11580 [Ohio Rev. Code Ann. § 2321.21 (Page 1954) (repealed 1970)], not only vacated a verdict and granted a new trial, but also expressly vacated the judgment in the parent case which had previously been affirmed on appeal.

139 Ohio St. 153, 165, 38 N.E.2d 578, 583 (1941).

In contrast, the power of the Ohio Courts of Appeals to vacate their own judgments is quite different. Formerly, Ohio law provided that: "[t]he court of common pleas or the court of appeals may vacate or modify its own final order, judgment, or decree after the term at which it was made." Ohio Rev. Code Ann. § 2321.21 (Page 1954) (repealed 1970) (original version in Act of April 19, 1913, Sec. 1, § 11631, 1913 Ohio Laws 405) (emphasis added).

Presently, Ohio R. App. P. 26 authorizes a motion for reconsideration in the court of appeals, and that motion may sometimes be made after judgment. The Rule provides:

Application for reconsideration of any cause or motion submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is later.

In some cases, the tenth day after the announcement of the court's decision may fall later than the filing of the judgment with the clerk for journalization. In such a case, if the motion for reconsideration is granted, the court of appeals may be required to vacate its original judgment. Apart from Appellate Rule 26, however, nothing appears to authorize the Ohio courts of appeals to vacate their own judgments.

There is, of course, the common law tradition that a court retains complete control over its judgments during the term of court in which they were entered. This tradition, if still followed, would permit an appellate court to vacate its judgment during term even in the absence of specific statutory or Rules authority. There is reason to believe, however, that this tradition is no longer applicable in the Ohio appellate courts. In this regard, Ohio R. Civ. P. 6(C) provides: "The existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action consistent with these rules." This Rule has the effect of abrogating the common law tradition in the trial.
It would appear, however, that the trial court’s jurisdiction to vacate a judgment is somewhat limited. From what is said in *Kesting v. East Side Bank Co.*,\(^{101}\) and from what is said of *Kesting in Townley*,\(^{102}\) one would suppose that the trial court could only vacate a judgment on grounds not available to the party seeking the vacation at the time that party was in the court of appeals. In other words, the grounds in support of the motion for relief from judgment must be grounds that were discovered, or came into existence, after the appellate court ordered the dismissal of the action and remanded. If those grounds could have been presented to the appellate court before remand, but were not, they may not be raised in the trial court after remand.\(^{103}\)

101 *Ohio C.C. (n.s.)* 529, *aff’d mem.*, 76 Ohio St. 591, 81 N.E. 1188 (1907). In *Kesting* the defendant had prosecuted an initial proceeding in error in the circuit court during a previous term. He then petitioned the lower court in a subsequent term to vacate its prior judgment upon grounds previously known, but not raised in the circuit court proceeding. In a second proceeding in error, the circuit court held that the defendant was barred from the relief sought due to his election to bring the prior proceeding in error, rather than to petition the trial court initially to vacate its judgment. The rule of the case is reported as follows:

> An action to vacate a judgment after term will not lie where it appears that the petitioner had previously and without success prosecuted error to the same judgment, without then alleging as ground for a new trial the matters of complaint of which he was then aware and on which he now relies.

> 14 Ohio C.C. (n.s.) at 529 (syllabus).

102 *Townley v. A. C. Miller Co.*, 139 Ohio St. 153, 162-63, 38 N.E.2d 578, 582-83 (1941):

> In the *Scharbogilll case* [Scharbogilll v. Dahl, 211 Wis. 436, 248 N.W. 438 (1933)], the Wisconsin court recognized that the trial court had jurisdiction to grant a new trial for newly discovered evidence even after the Supreme Court had reversed the judgment in the parent case and directed the entry of a contrary judgment. It was held, however, that under the particular circumstances there, the trial court had abused its discretion, though not exceeded its jurisdiction, in granting a new trial, because the plaintiff had pursued his appeal in the parent case at a time when he already knew of the newly discovered evidence. This same argument, that plaintiff by perfecting an appeal to an appellate court at a time when he already knew of the new evidence has precluded himself from seeking a new trial by a conclusive election of remedies from seeking a new trial, was raised in the case at bar before it reached this court. It was made the basis of a specific assignment of error in the Court of Appeals, and there squarely decided against the defendant. But, despite the pertinence of the *Scharbogilll case*, supra, and *Kesting v. East Side Bank Co.*, 14 C.C. (N.S.), 529, 23 C.D., 77, affirmed without opinion, *Kesting v. East Side Bank Co.*, 76 Ohio St. 591, 81 N.E. 1188, as authority in favor of the defendant, the point has not been raised here. Since the record as certified to us does not contain a transcript of evidence which would show that the plaintiff did know of the new evidence at the time he perfected his original appeal to this court in the parent case, and since no assignment of error thereof is made in this court, we do not pass on this question of conclusive election.

103 See also *Bosco v. City of Euclid*, 38 Ohio App. 2d 40, 311 N.E.2d 870 (1974). Although *Bosco* presents a somewhat different issue, and is not directly on point, the principle...
(c) **Dismissal without Remand.** It is even less certain whether the trial court has jurisdiction to vacate a judgment of dismissal if the judgment has been entered by the appellate court and the case is not remanded. Dictum in *Townley* suggests that the trial court has such jurisdiction whether the case is remanded or not, but other decisions appear to hold that in the absence of a remand, the trial court has no jurisdiction over the judgment entered by the court of appeals.

On principle, the better position appears to be that espoused by *Townley*. As noted in both the appellate court and the supreme court decisions, the statutes (now Rule 60(B)) grant a right to the relief sought if the proper conditions are met, but do not make any provision for obtaining that relief from the court of appeals. Thus, if the trial court does not have jurisdiction to grant that relief without a remand, the relief itself is foreclosed, and this appears contrary to the spirit and intent of the Rules.

This is subject to the *Kesting* caveat noted above — the grounds for enunciated therein is fully applicable to the situation described in the text — the Rule 60(B) motion may not be used as a device for obtaining a review of issues which could have been decided in the court of appeals; it may not be used as a substitute for an appeal.

104 *Townley* v. A. C. Miller Co., 139 Ohio St. 153, 162, 36 N.E.2d 578, 582 (1941):

But in our opinion, the jurisdiction of the trial court to grant a new trial should not be denied merely because the reviewing court is itself empowered to enter final judgment after reversal instead of having to command the trial court to do so. Whether, under Section 12233-38, General Code [now Ohio Rev. Code Ann. § 2505.37 (Page 1954)], the Court of Appeals itself renders the judgment that the court below should have rendered, or adopts the alternative procedure of remanding the cause to the court below to render this judgment, we believe that the new judgment is substituted in the court below for the old judgment that has been held for naught, just as though the lower court had itself voluntarily vacated its own judgment and entered the new one.

105 See *Ellis* v. Ohio Turnpike Comm'n, 100 Ohio App. 10, 122 N.E.2d 713 (1954), *appeal dismissed*, 163 Ohio St. 157, 125 N.E.2d 880 (1955); C. E. McCune Co. v. Warendorf, 55 Ohio App. 279, 9 N.E.2d 709 (1936); *State ex rel. Skelmuth* v. Johns, 10 Ohio L. Abs. 392 (Ct. App. 1931). The court in *Skelmuth* held:

> By opinion of this court, as filed on the 5th day of February, 1931, said cause was not remanded to the Court of Common Pleas, and therefore, the Court of Common Pleas was without jurisdiction to hear and determine any new matter upon the question of newly discovered evidence, or upon any other issue pertaining to the case.

10 Ohio L. Abs. at 393. This proposition is inferentially supported by *State ex rel. Hughes v. Cramer*, 138 Ohio St. 267, 34 N.E.2d 772 (1941), but appears to have been rejected and overruled by *Townley* v. A. C. Miller Co., 70 Ohio App. 219, 45 N.E.2d 786, aff'd, 139 Ohio St. 153, 38 N.E.2d 578 (1941).

106 *Townley* v. A. C. Miller Co., 70 Ohio App. 219, 228-29, 45 N.E.2d 786, 790 (1941):

It is also claimed that the pleadings should have been filed in this court and not in the trial court. This court has no jurisdiction to entertain such an application and to hear evidence in support thereof, even though it has jurisdiction in certain cases to remand a cause for new trial. Constitutional provisions prescribe this court's jurisdiction, while that of the Common Pleas Court rests upon statute, and the statutes under consideration confer that power upon the trial courts and not courts of review.


It is to be noted that the express specification in Section 11576 [Ohio Rev. Code Ann. § 2321.17 (Page 1954) (repealed 1970)] that the new trial shall be granted "by the trial court" is peculiar to our Ohio statute. . . . This insertion of the phrase "by the trial court" indicates, we believe, that the Legislature had a clear idea of what court it desired to have charge of granting new trials.
relief from the judgment must be grounds which came into existence, or were discovered, after the appellate proceedings. Were it otherwise, the trial court could nullify the decision of the appellate court, and make a mockery of the appellate proceedings.  

2. Involuntary Dismissals

Involuntary dismissals are more likely to be subject to a Rule 60(B) motion for relief from judgment than voluntary dismissals, but apart from that, there is little meaningful difference between the two. Normally, the order granting such a motion will vacate the judgment of dismissal and reinstate the case at the point where it was dismissed, or set the case down for an adversary hearing if the adversary hearing had not commenced prior to the dismissal. Since either party may prevail at the hearing, such an order will neither determine the action nor prevent a judgment, and will not be a final order under the first test of finality. Thus, the order must be final, if at all, under the second, third, or fourth tests. Once again, we shall reserve treatment of the second and third tests until later in this article, and will concentrate here on the fourth test.

a. Involuntary Penalty Dismissals

Involuntary penalty dismissals may be subdivided into two broad categories: Rule 37 penalty dismissals, and Rule 41(B)(1) penalty dismissals.

(1) Rule 37 Penalty Dismissals

As with penalty defaults, the applicable Rules are Rules 37(B)(2)(c), 37(B)(2)(e), and 37(D). Of these, Rule 37(B)(2)(c) is the most pertinent, since it is incorporated by reference into the other two and provides their principal thrust. In substance, these Rules provide that if a party fails to respond to a discovery request, or fails to comply with a discovery order, the court may punish such conduct by dismissing all or any part of that party's action or proceeding.  

Since almost all discovery will take place prior to the commencement of the adversary hearing, almost all Rule 37 penalty dismissals will likewise take place prior to that point. Normally, the sanctions

108 Townley v. A. C. Miller Co., 70 Ohio App. 219, 224, 45 N.E.2d 786, 788 (1941): At first blush, the thought comes, that the trial court by its act of vacation of the verdict has arbitrarily nullified the judgment of this court, and that thereby an inferior court after a reversal has been entered has imposed its will upon its superior. It seems as if this should never be permitted.  

109 See notes 49 and 53 supra.  

110 See, e.g., Ohio R. Civ. P. 16, which provides: "A court may adopt rules concerning pretrial procedure to accomplish the following objectives . . . (8) The imposition of sanctions as authorized by Rule 37."  

Some courts have stretched this grant of authority to its limits, if not beyond, by including the pretrial statement within those discovery devices subject to Ohio R. Civ. P. 37. For example, Local Rule 15(B)(3) of the Rules of the Court of Common Pleas for Hamilton County provides: "Upon the failure of any party to the action or his trial attorney either to serve and file with the judge the Pretrial Statement . . . or to attend the formal pre-
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contained in Rule 37 will be invoked by the motion of an adverse party. Since the issues raised by this motion are collateral issues,111 and not issues which arise on the pleadings, the motion proceeding will be a "summary proceeding" or a "hearing," and not a "trial."112 Thus, in the usual case, the judgment of dismissal will be entered before there has been an original trial. It follows, therefore, that an order vacating the judgment of dismissal and setting the case down for adversary hearing is not an order which orders a "new" trial, and the fourth test for finality will not apply.

Occasionally, a Rule 37 involuntary penalty dismissal proceeding will be initiated on the court's own motion.113 This should make no difference in result, since the issues considered in that proceeding will still be collateral rather than issues which arise on the pleadings, and since that proceeding will take place prior to the adversary hearing. Accordingly, there will not have been an original "trial" at the time of the dismissal, and there cannot be an order of a "new" trial.

(2) Rule 41(B)(1) Penalty Dismissals

Under Rule 41(B)(1), involuntary penalty dismissals may be ordered for one of three reasons: a plaintiff's failure to prosecute, a plaintiff's failure to comply with the Ohio Rules of Civil Procedure, or a plaintiff's failure to comply with any court order.114 This sanction of dismissal trial conference . . . the Court may impose sanctions as authorized by Civil Rule 37(B).” Also, Local Rule 21, Part I(A) of the Rules of the Court of Common Pleas for Cuyahoga County states:

At least one week prior to the scheduled pretrial hearing, the judge shall require counsel for both sides to completely execute and file a separate Pretrial Statement . . . on behalf of their respective clients. Before the submission of such statements counsel must confer with each other and the statements must reflect the results of their conference. In the event of any unnecessary delay or failure to cooperate as required herein the judge shall invoke the sanctions authorized under Ohio Civil Rule 37.

It is doubtful if Rule 37 "authorizes" any sanctions under the circumstances mentioned in the above-quoted local rules, except to the extent that the pretrial proceeding directly involves the discovery authorized by Rules 26 through 36. See Societe Internationale Pour Participations Industrielles v. Rogers, 357 U.S. 197 (1958). To some extent, the pretrial statement might qualify as a discovery device subject to Rule 37, but it is obvious that attendance at the pretrial hearing, or the discussion of settlement before the pretrial hearing, do not. As for these, it would appear that the only Ohio Rule which "authorizes" sanctions is Rule 41(B)(1). Local rules of court, such as those quoted, can be construed as standing orders of the court. Thus, a failure to comply with those rules is tantamount to a failure to comply with a court order, and is punishable by dismissal under Rule 41(B)(1). 5 MOORE'S FEDERAL PRACTICE, ¶ 41.11 [2], at 1121 n. 11 (2d ed. 1948 & Supp. 1976). Some additional support for the proposition that local rules of court are the equivalent of court orders can be found in White v. White, 50 Ohio App. 2d 263, 362 N.E.2d 1013 (1977), and Berry v. Berry, 50 Ohio App. 2d 137, 361 N.E.2d 1095 (1977). In Hersch v. Chrysler Motors Corp., 31 Ohio Misc. 278, 287 N.E.2d 853 (Mun. Ct. 1972), the court's order of dismissal was expressly based upon failure to prosecute, but the language of the decision suggests that the court viewed its local rules as court orders.


112 See note 75 supra.

113 This appears to be the thrust of those local rules concerning pretrial statements which were discussed in note 110 supra.

114 Ohio R. Civ. P. 41(B)(1) states: "Where the plaintiff fails to prosecute, or comply
may be invoked by motion of the adverse party or by the court's own motion. In the latter case, however, the court must give notice to the plaintiff's counsel before entering the dismissal, and the requirement that notice be given implies the requirement that counsel be given an opportunity to be heard. Thus, in either case, the Rule contemplates a proceeding prior to the entry of the dismissal. But this proceeding will be a "hearing" or "summary proceeding" rather than a "trial" since the issues examined in the course of the proceeding will be collateral issues respecting the plaintiff's failure to prosecute or failure to comply, and not the issues which arise on the pleadings. Therefore, the proceeding itself will not qualify as an original trial.

(a) Failure to Prosecute. Any number of reasons may warrant a dismissal for failure to prosecute. The most common are a lengthy period of inactivity in an action after it has been commenced, failure to attend a pretrial hearing or to comply with the local rules concerning pretrial hearings, and failure to appear at the adversary hearing or to proceed with the adversary hearing. A dismissal for any of these reasons

with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim.

Fed. R. Civ. P. 41(b) differs from the Ohio Rule in this respect. It provides: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." Nevertheless, it has been held that the court has the inherent power to dismiss for this reason on its own motion, and if it does so it need not give plaintiff's counsel notice of its proposed action nor an opportunity to be heard. Link v. Wabash R.R., 370 U.S. 626, 629-32 (1962).

See, e.g., Local Rule 18 of the Rules of the Court of Common Pleas for Cuyahoga County:

At least once each six (6) months the court shall review all the actions on the civil docket, except cases awaiting trial assignment, pending and undisposed of in which no pretrial statements shall have been submitted or no steps or proceedings appear to have been taken within six (6) months.

Notice of calls of the docket shall be given to all attorneys of record in each case to be called. If none of the parties or their attorneys appear at the time and place stated for the call and make answer when an action is called, the court shall enter an order dismissing the action for want of prosecution.

See also Local Rule 45.01 of the Rules of the Court of Common Pleas for Franklin County and Local Rule 15 of the Rules of the Court of Common Pleas for Stark County.

Local Rule 31.03 of the Rules of the Court of Common Pleas for Franklin County is illustrative:

It shall be the duty of counsel to do the following at such pretrial and failure to be prepared may result in dismissal of the case for want of prosecution or in a default judgment or such other action to enforce compliance as the trial judge deems appropriate: 1. All parties shall have filed "Pretrial Statements" in accordance with Rules 29.02 and 29.04. 2. Each Counsel shall come to the pretrial fully prepared and authorized to negotiate toward settlement of the case.

And Local Rule 21, Part II (G)(1) of the Rules of the Court of Common Pleas for Cuyahoga County states: "Any judge presiding at a pretrial conference or trial shall have the authority: 1. To dismiss an action for want of prosecution on motion of plaintiff and/or his counsel to appear in person at any pretrial conference or trial." It would appear, however, that a dismissal under local rules such as these may only be entered if the omission or absence was willful. Bognar v. Cleveland Quarries Co., 7 Ohio App. 2d 187, 219 N.E.2d 827 (1966).

Local Rules 13.04 and 13.05 of the Rules of the Common Pleas Court for Stark County capture the point in a nutshell. Local Rule 13.04 provides: "If a party seeking affirmative relief, either in person or by counsel, fails to appear for trial, the judge shall enter an order dismissing the claim for relief for want of prosecution." For the application of a rule similar to this when neither plaintiff nor plaintiff's counsel appeared at
sons will occur prior to the commencement of the adversary hearing, and it may be said as a general rule that most, if not all, dismissals for failure to prosecute will occur before there has been an original trial. Accordingly, when the order of dismissal is vacated and the action reinstated, that order will not be one which orders a "new" trial, and the fourth test for finality will be inapplicable.

(b) Failure to Comply. Theoretically, a dismissal for failure to comply with the Ohio Rules of Civil Procedure or a court order can occur at any time between commencement of the action and the entry of judgment. It would be unusual, however, for such a dismissal to be entered after verdict or decision but before judgment, and if the reported cases are a true guide, it will also be a rare case in which a dismissal for these

the time of trial because counsel was engaged in a proceeding in another court, see Hersch v. Chrysler Motors Corp., 31 Ohio Misc. 278, 287 N.E.2d 853 (Mun. Ct. 1972). Under the circumstances of the case, it was held that the entry of the dismissal without prejudice was proper. But it would be an abuse of discretion to dismiss under such a rule if the plaintiff's counsel is present at the trial and prepared to go forward, even though the plaintiff is absent. Brown v. Best, 44 Ohio App. 2d 82, 335 N.E.2d 734 (1974).

Local Rule 13.05 of the Rules of the Common Pleas Court for Stark County takes the next step: "If a party or counsel appears for trial but indicates he is not ready for trial without showing good cause for his unreasonableness, the court, if such party is one seeking affirmative relief, shall enter an order dismissing the claim for want of prosecution. . . ." The Ohio Supreme Court's approval of this provision, and others like it, may be inferred from Cherry v. Baltimore & O. R.R., 29 Ohio St. 2d 158, 280 N.E.2d 380 (1972).

The precise reach of failure to "comply with these rules" is unclear. The use of the word "these" appears to limit the defense to a failure to comply with the Rules, and precludes its application to breaches of local rules of court. See 5 Moore's Federal Practice, ¶ 41.12, at 1137 (2d ed. 1948 & Supp. 1976). As far as can be ascertained, there is no reported Ohio decision which expressly cites this portion of Ohio Rule 41(B)(1) as authority for the entry of an order of dismissal. But from the tone of Hersch v. Chrysler Motors Corp., 31 Ohio Misc. 278, 287 N.E.2d 853 (Mun. Ct. 1972) and from the language used, it may reasonably be inferred that the court had "failure to comply with a court order" in mind when it overruled the plaintiff's motion to vacate the dismissal, even though the original order of dismissal was premised on failure to prosecute.

The federal cases are gathered in 5 Moore's Federal Practice, ¶ 41.12, at 1137 n. 1 (Supp. 1975). As a general proposition, it may be said that any breach of the Rules which is not expressly subject to some other Rule (such as Rule 12(E) which provides for the motion for definite statement) falls within the reach of this portion of Rule 41(B)(1). For example, the failure to comply with Rule 10(A)'s provisions with respect to the caption of a pleading is not subject to any of the defenses or objections contained in Rule 12, but it is within Rule 41(B)(1)'s "failure to comply with these rules." At least, this is the implication which may be drawn from Group of Tenants v. Mar-Len Realty, Inc., 40 Ohio App. 2d 449, 321 N.E.2d 241 (1974). One would think that this general rule should also apply to Rule 10(D)'s requirement that certain writings be attached to the complaint. However, it has been held that a Rule 12(B)(6) motion to dismiss for failure to state a claim should be used to challenge this particular failure to comply with the Rules. Longstreth Co. v. Charles Vangrove & Son, Inc., 27 Ohio Misc. 15, 265 N.E.2d 843 (Mun. Ct. 1970). In one case, a Rule 12(E) motion for definite statement was used for this purpose. Ryder Truck Lines, Inc. v. Victory Express, Inc., 67 Ohio Op. 2d 220 (Ct. App. 1974).

In any event, the severe sanction of dismissal should not be employed unless the failure to comply with the Rules was willful, or unless the defect cannot be corrected by amendment or otherwise. If the failure was not willful, or if the defect can be cured, the court should sustain the motion to dismiss, but should grant leave to amend or take whatever other action is required to remedy the defect. Government Nat'l Mtg. Ass'n v. Smith, 28 Ohio App. 2d 300, 277 N.E.2d 233 (1971).
reasons is entered after the commencement of the adversary hearing. Thus, as a practical matter, we may conclude that dismissals for failure to comply with the Rules or for failure to comply with a court order will be entered prior to the commencement of the adversary hearing. That being true, these dismissals will take place before there has been an original trial, and the order vacating them will not be an order granting a "new" trial. Once again, the fourth test for finality will not apply.

b. Involuntary Dismissals "On the Merits"

This discussion must begin with a preliminary note. When it is said that a dismissal, whether voluntary or involuntary, is "on the merits," it is generally understood to mean that a new action may not be commenced on the same claim because the claim itself is barred by the doctrine of res judicata. Subject to the exceptions mentioned in the notes, two general rules apply to dismissals. As a general rule, voluntary dismissals are "otherwise than upon the merits," and a new action on the same

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121 The general rule and most of the exceptions applicable to voluntary dismissals are found in Rule 41(A). Subdivision (1) of that Rule pertains to voluntary dismissals by notice or stipulation, and provides that "[u]nless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice." Thus, the general rule is that the dismissal is "without prejudice" — that is, "otherwise than upon the merits."

The first exception to the general rule is "unless otherwise stated in the notice of dismissal or stipulation." In other words, the voluntary dismissal by notice or by stipulation will be "without prejudice" unless the notice or stipulation specifies that it is to be "with prejudice."

The second exception to the general rule is found in the balance of Rule 41(A)(1), which reads: "except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court, an action based on or including the same claim."

This second exception applies only to dismissals by notice, and is commonly referred to as the "two-dismissal rule." See C. Wright & A. Miller, Federal Practice and Procedure § 2368, at 187 (1971). In substance, this exception provides that the second voluntary dismissal of the same claim, if taken by notice, will be a dismissal "on the merits" for res judicata purposes despite any language to the contrary in the notice itself.

Ohio R. Civ. P. 41(A)(2) governs voluntary dismissals by court order, and provides that "[u]nless otherwise specified in the order, a dismissal under this paragraph is without prejudice." Once again, the general rule is that a voluntary dismissal by court order is without prejudice. The only exception to this rule is "unless otherwise specified in the order."

Thus, the basic rules with respect to voluntary dismissals may be summarized as follows: All voluntary dismissals are dismissals otherwise than upon the merits for res judicata purposes, unless the notice, stipulation, or court order specifies that the dismissal is with prejudice, or unless the dismissal is taken by notice, and the "two-dismissal rule" applies.

There is, however, an additional exception that applies to all three types of voluntary dismissals, but this is not a true exception to the res judicata rule; rather, it is a rule of construction which renders the "savings statute" (Ohio Rev. Code Ann. § 2305.19 (Page 1954)) inapplicable to voluntary dismissals taken after the statute of limitations has run. In Howard v. Allen, 28 Ohio App. 2d 275, 279, 277 N.E.2d 239, 242 (1971), the court stated:

It might be noted that some distinction must be made in regard to a failure upon the merits or otherwise than upon the merits with regard to the applicability of [Ohio Rev. Code Ann. § 2305.19 (Page 1954)] and the applicability of the doctrine of res judicata. For example, a voluntary dismissal is not a failure other-
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claim may be commenced after such dismissals. Involuntary dismissals, however, are "on the merits," unless the court specifies in its order of dismissal that the dismissal is "without prejudice" or "otherwise than upon the merits,"122 and therefore no new action may be commenced on a claim so dismissed.


However, such voluntary dismissal would ordinarily not be res judicata [because of the applicability of the general rule with respect to voluntary dismissals].

In pertinent part, Ohio Rev. Code Ann. § 2305.19 (Page 1954) provides: "In an action commenced . . . if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of . . . failure has expired, the plaintiff . . . may commence a new action within one year after such date." The general rule applicable to all voluntary dismissals would bring such dismissals squarely within this provision since they are dismissals "otherwise than upon the merits." It has been held, however, that the "savings statute" does not apply to such dismissals because they are not "failures" otherwise than upon the merits. See Beckner v. Stover, 18 Ohio St. 2d 36, 247 N.E.2d 300 (1969); Cero Realty Corp. v. American Mfrs. Mut. Ins. Co., 171 Ohio St. 82, 167 N.E.2d 774 (1960); Siegfried v. New York, L.E. & W.R.R., 50 Ohio St. 294, 34 N.E. 331 (1893). See also note 55 supra. All of this stems from a remark in the Siegfried case:

To fail implies an effort or purpose to succeed. One cannot, properly, be said to fail in anything he does not undertake, nor, in an undertaking which he voluntarily abandons. . . . [A] failure in the action, by the plaintiff, otherwise than upon the merits, imports some action by the court, by which the plaintiff is defeated without a trial upon the merits. . . . A dismissal by the plaintiff, involves no action of the court; it is a voluntary withdrawal of his case, and is not a failure in the action.

50 Ohio St. at 296-97, 34 N.E. at 332. Accordingly, an action that is voluntarily dismissed by the plaintiff is not an action that fails otherwise than upon the merits, even though the dismissal is otherwise than upon the merits. Hence, the "savings statute" does not permit the commencement of a new action within a year of the dismissal.

122 The general rule and the basic exceptions applicable to involuntary dismissals are found in Ohio R. Civ. P. 41(B)(3): "A dismissal under this subdivision [subdivision (B) of Rule 41] and any dismissal not provided for in this rule [Rule 41], except as provided in subsection (4) of this subdivision, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies."

Thus, the general rule is that all involuntary dismissals, whether penalty dismissals under Rule 37 or 41(B)(1), or non-penalty dismissals under Rule 12, 41(B)(2), or any other Ohio Rule, are dismissals "on the merits."

The first exception to this general rule may be found in the language of the order for dismissal — if the court's order specifies that the dismissal is "without prejudice," or is "otherwise than upon the merits," the involuntary dismissal will not be "on the merits." However, there is an exception to this exception. When, by the nature of the case, the order of dismissal affects a substantial right, and in effect determines the action and prevents a judgment in favor of the party whose claim has been dismissed, the dismissal will be "on the merits" even though the court's order specifies otherwise. State ex rel. Everson v. George, 13 Ohio St. 2d 22, 223 N.E.2d 324 (1968); Schindler v. Standard Oil Co., 165 Ohio St. 76, 133 N.E.2d 336 (1956). Thus, when a court determines that an action was not commenced within the statute of limitations, and that a right to amend would be of no avail (e.g., State ex rel. Everson v. George, 13 Ohio St. 2d 22, 223 N.E.2d 324 (1968)), because the plaintiff cannot allege facts which take the claim out of the statute (e.g., absence from the state, as in Wetzel v. Weyant, 41 Ohio St.2d 135, 323 N.E.2d 711 (1975), or discovery of a fraud, as in Peterson v. Teodosio, 34 Ohio St. 2d 161, 297 N.E.2d 113 (1973)), a dismissal of the action for that reason will be a dismissal "on the merits" even though the court's order specifies that the dismissal is "otherwise than upon the merits." LaBarbera v. Batsch, 10 Ohio St. 2d 106, 227 N.E.2d 55 (1967). By its very nature, such a claim cannot be commenced anew, and the court's characterization of such a dismissal as being without prejudice or otherwise than upon the merits is mere surplusage.

The second exception is stated in Ohio R. Civ. P. 41(B)(4)(a) as follows: "A dismissal (a) for lack of jurisdiction over the person . . . shall operate as a failure otherwise than on
That is not the sense in which the phrase "on the merits" is used here. Here, the phrase is used solely for the purpose of distinguishing these involuntary dismissals from the involuntary penalty dismissals discussed in the preceding section. Accordingly, the involuntary dismissals discussed below may or may not raise the bar of *res judicata*, but that is not of concern here, since the same may be said of involuntary penalty dismissals. All we wish to do here is to separate these involuntary dismissals from involuntary penalty dismissals for the purpose of analyzing the applicability of the various tests for finality.

By and large, involuntary dismissals on the merits can be divided into two subcategories: those which occur during the pleadings stage of an action, and those which occur during the adversary hearing.

(1) Dismissals on the Pleadings (Rule 12)

As a general rule, a dismissal on the pleadings will be the product of a successful Rule 12 motion to dismiss. But this motion, like all of the merits." But a judicial gloss of this Rule has created an exception to this exception. Although insufficiency of process or insufficiency of service of process will ordinarily result in a lack of jurisdiction over the person, it has been held that a dismissal for either of these reasons is not a dismissal for lack of jurisdiction over the person, and is "on the merits" unless the court otherwise specifies in its order. Howard v. Allen, 28 Ohio App. 2d 275, 277 N.E.2d 239 (1971), aff'd on other grounds, 30 Ohio St. 2d 130, 283 N.E.2d 167 (1972). The court apparently felt that Rule 12(B) and Rule 41(B)(4) were intended to complement each other, and that to the extent a defense included in Rule 12(B) was not included in Rule 41(B)(4), it was excluded from the operation of the latter Rule. Since insufficiency of process and insufficiency of service of process were specifically included in Rule 12(B) but not in Rule 41(B)(4), they were not subject to the latter Rule. This construction of the Rule is questionable, even though it appears to be in accord with pre-Rule decisions. See, e.g., Mason v. Waters, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966).

The third exception is likewise found in Ohio R. Civ. P. 41(B)(4)(a): "A dismissal (a) for lack of jurisdiction over . . . the subject matter . . . shall operate as a failure otherwise than on the merits." This echoes the pre-Rule Ohio law on the subject. See Wasyk v. Trent, 174 Ohio St. 525, 191 N.E.2d 58 (1963).

The fourth and final exception is found in Ohio R. Civ. P. Rule 41(B)(4)(b) as follows: "A dismissal . . . (b) for failure to join a party under Rule 19 or Rule 19.1 shall operate as a failure otherwise than on the merits." Again, this is in accord with the pre-Rule Ohio practice. See Schindler v. Standard Oil Co., 165 Ohio St. 76, 133 N.E.2d 336 (1956). Thus, the general rule and its exceptions may be summed up as follows:

All involuntary dismissals are dismissals on the merits for *res judicata* purposes, unless:

1. The order for dismissal specifies that the dismissal is without prejudice, or otherwise than upon the merits, except that where, by its nature, the action cannot be commenced anew after its dismissal, the dismissal is on the merits irrespective of a specification in the order to the contrary; or
2. The dismissal is for lack of jurisdiction over the person, except that dismissals for insufficiency of process or insufficiency of service of process are on the merits, unless the order of dismissal otherwise specifies; or
3. The dismissal is for lack of jurisdiction over the subject matter; or
4. The dismissal is for nonjoinder of necessary or indispensable parties.


This is not invariably true. Most of the grounds for dismissal which we shall examine in this section may be presented as defenses in the responsive pleading. If that is the case, their validity may not be determined until just prior to the beginning of the adversary hearing or at the adversary hearing itself. But even if they are asserted in the responsive pleading, they may be determined at the pleading stage. Ohio R. Civ. P. 12(D) provides:
the other motions we have examined, raises issues that are collateral to the lawsuit, and not issues which arise on the pleadings. Thus, the motion proceeding is a "hearing" or "summary proceeding" and not a "trial," and for this reason cannot qualify as an "original trial" for the purposes of the fourth test for finality.

However, not all of the defenses or objections listed in Rule 12 will result in an involuntary dismissal on the merits; some of the resulting dismissals will be involuntary penalty dismissals. The difference between the two can best be illustrated by subdividing the Rule into its component parts.

(a) The Jurisdictional Defenses. Rule 12(B) contains four defenses which, for convenience, may be referred to as the jurisdictional defenses. These are the defenses of lack of jurisdiction over the subject matter (Rule 12(B)(1)), lack of jurisdiction over the person (Rule 12(B)(2)), insufficiency of process (Rule 12(B)(4)), and insufficiency of service of process (Rule 12(B)(5)).

If the defect challenged by these defenses can be corrected by amendment,¹²⁵ service of new or additional summons,¹²⁶ or otherwise, the court may not dismiss the action. Rather, it must sustain the challenge and give the plaintiff leave to correct the defect by a date certain.¹²⁷ This in itself is not a final order,¹²⁸ and is not subject to a final order.

¹²⁵ The amendment required may be an amendment of the pleadings under the provisions of Rule 15(A), or an amendment of the summons or proof of service under the provisions of Rule 4.6(B). For example, if the lapse of time does not prevent it, an amended pleading adding a necessary party defendant may cure a defect in subject matter jurisdiction. Holland v. Carlson, 40 Ohio App. 2d 325, 319 N.E.2d 362 (1974). Likewise, an amendment to the proof of service might "cure" a service which appears defective on the face of the original record. Krabill v. Gibbs, 14 Ohio St. 2d 1, 235 N.E.2d 514 (1968); Eckstein v. Cummins, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974).

¹²⁶ Ohio R. Civ. P. 4(A) provides that "[u]pon request of the plaintiff separate or additional summons shall issue at any time against any defendant." If the first summons is defective, or improperly served, a plaintiff may circumvent the defenses of insufficiency of process or insufficiency of service of process, if time permits, by obtaining the issuance and service of an alias summons. See, e.g., Mason v. Waters, 6 Ohio St. 2d 212, 217 N.E.2d 218 (1968).

¹²⁷ The basic principle is set down in Peterson v. Teodosio, 34 Ohio St. 2d 161, 175, 297 N.E.2d 113, 122 (1973):

The spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies. Civ. R. 1(B) requires that the Civil Rules shall be applied "to effect just results." Pleadings are simply an end to that objective. The mandate of Civ. R. 15(A) as to amendments requiring leave of court, is that leave "shall be freely given when justice so requires." Although the grant or denial of leave to amend a pleading is discretionary, where it is possible that the plaintiff, by an amended complaint, may set forth a claim upon which relief can be granted, and it is tendered timely and in good faith and no reason is apparent or disclosed for denying leave, the denial of leave to file such amended complaint is an abuse of discretion. Although the court was speaking here in terms of amending a complaint under the
Rule 60(B) motion for relief from judgment. If the plaintiff fails to correct the defect by a given date, the court may dismiss the action, but the ground for dismissal will be failure to prosecute, a ground which was discussed in the previous section on involuntary penalty dismissals.

However, if leave to amend, or to take some other corrective action, would be of no avail because the defect reached by the challenge cannot be corrected, the court should dismiss the action outright, and in such a case, a dismissal with leave to amend will be treated as a final dismissal which is subject to a Rule 60(B) motion for relief from judgment. Thus, whether the court correctly dismisses the case outright, or incorrectly dismisses the case with leave to amend or to take some other, albeit fruitless, corrective action, the dismissal will be a dismissal "on the merits" rather than a penalty dismissal. It is this dismissal with which we are here concerned.

As a general rule, such a dismissal will occur prior to the adversary hearing, and thus before there has been an original trial. Hence, an

provisions of Rule 15(A), there is no doubt that the principle expressed applies to all cases in which corrective action can cure "pleading deficiencies."

There is some federal authority for the proposition that a dismissal in this instance is a dismissal for failure to comply with a court order. See, e.g., the district court's order discussed in Mann v. Merrill Lynch, Pierce, Fenner, and Smith, Inc., 488 F.2d 75 (5th Cir. 1973). It is difficult to see how leave to amend, even if by a date certain, amounts to an order of the court. By its nature, "leave" is permission, not a mandate. Thus, if a plaintiff does not amend within the time granted by the court's "leave" to amend, he merely fails to take advantage of a grant of permission, but he does not disobey a court order. At best, the plaintiff should be penalized for failure to prosecute. The matter is otherwise, however, if the court does not grant "leave" to amend, but orders an amendment to be made by a certain date. In such a case, a failure to amend by the given date is a failure to obey a court order, and will justify a dismissal with prejudice. Erie-Lackawanna R.R. Co. v. United States, 279 F. Supp. 316 (S.D.N.Y. 1967).

There is some federal authority for the proposition that a dismissal in this instance is a dismissal for failure to comply with a court order. See, e.g., the district court's order discussed in Mann v. Merrill Lynch, Pierce, Fenner, and Smith, Inc., 488 F.2d 75 (5th Cir. 1973). It is difficult to see how leave to amend, even if by a date certain, amounts to an order of the court. By its nature, "leave" is permission, not a mandate. Thus, if a plaintiff does not amend within the time granted by the court's "leave" to amend, he merely fails to take advantage of a grant of permission, but he does not disobey a court order. At best, the plaintiff should be penalized for failure to prosecute. The matter is otherwise, however, if the court does not grant "leave" to amend, but orders an amendment to be made by a certain date. In such a case, a failure to amend by the given date is a failure to obey a court order, and will justify a dismissal with prejudice. Erie-Lackawanna R.R. Co. v. United States, 279 F. Supp. 316 (S.D.N.Y. 1967).

Whether such a dismissal will be "on the merits" for res judicata purposes may depend either upon the ground asserted as the basis for the challenge or the language of the order itself. See note 122 supra. It may be, for example, that no amount of amendment will bring an action within the subject matter jurisdiction of the court in which it is first commenced, but the action may properly be commenced in a different court. That being so, the first court would have to dismiss the action without leave to amend, but such a dismissal would be without prejudice to the commencement of the action anew in a proper court. Ohio R. Civ. P. 41(B)(4)(a).

Even if the jurisdictional defenses are presented in the responsive pleading, and no Rule 12(D) motion for preliminary hearing is served and filed, they will normally be determined before the adversary hearing begins. The plain sense of Rule 12(D) is that these
order vacating the dismissal and reinstating the case will not be an order which grants a new trial, and the fourth test for finality will not apply.

To this general rule, there may be one notable exception, depending upon the circumstances. It is noted in Rule 12(H)(2) that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action". The key word is "whenever"; the defense of lack of jurisdiction of the subject matter may be presented to the court "by suggestion or otherwise" at any time, provided that the court still has jurisdiction to determine its own jurisdiction. If the case has gone up on appeal, the trial court has probably lost its jurisdiction, and the defense would have to be presented to the appellate court, or its presentation would have to await a remand of the case to the trial court. Thus when the basis for dismissal is lack of subject matter jurisdiction, the applicability of the fourth test for finality will depend upon the point in the proceedings at which the dismissal took place. If it occurs before the adversary hearing, the general rule will apply, and the fourth test will be precluded. If it occurs during or after the adversary hearing, however, the fourth test will apply if the adversary hearing has ripened into a "trial". This presupposes, of course, that the order vacating the dismissal reinstates the case or sets it down for a new adversary hearing.

Further, since the defense of lack of subject matter jurisdiction may be presented for the first time on appeal, a dismissal on this ground can present all of the same problems encountered in the discussion of voluntary dismissals by court order.

(b) The Venue Defense. Rule 12(B)(3) provides for the defense of improper venue. Normally dismissal is not an appropriate remedy when an action is improperly venued; rather, the court must transfer the action to the proper forum. However, there is at least one instance in which defenses will be disposed of before the adversary hearing gets under way. Thus, the court said in Hersch v. Debreczeni, 33 Ohio App. 2d 235, 238, 294 N.E.2d 918, 920 (1973): "It is noted that any of the seven defenses enumerated in Civil Rule 12(B), whether made in a pleading or by motion, shall be heard and determined before trial. Civil Rule 12(D)." The Rule 12(D) motion for preliminary hearing simply gives the parties some control over when these defenses are to be determined before trial. If any party wants an early determination—at the pleadings stage for example—he may move for a preliminary hearing. If the parties are content to wait, however, they need do nothing, since just before the adversary hearing begins the court will take up these defenses on its own motion. See note 141 infra.

Accordingly, if these defenses are properly presented by motion or pleading, and if their validity is sustained, the dismissal will occur prior to the adversary hearing.

134 Fox v. Eaton Corp., 48 Ohio St. 2d 236, 358 N.E.2d 536 (1976); Gates Mills Inv. Co. v. Parks, 25 Ohio St. 2d 18, 266 N.E.2d 552 (1971). As the court held in Jenkins v. Keller, 6 Ohio St. 2d 132, 216 N.E.2d 379 (1966) (syllabus at 5): "Where a court has no jurisdiction over the subject matter of an action or an appeal, a challenge to jurisdiction on such ground may effectively be made for the first time on appeal in a reviewing court."


Ohio R. Civ. P. 3(C)(1) provides:

When an action has been commenced in a county other than stated to be proper in subdivision (B) of this rule, upon timely assertion of the defense of improper venue
a dismissal will be appropriate. If there is no proper forum in Ohio, but there is a proper forum in another jurisdiction, and if the defendant consents to certain conditions with respect to jurisdiction, venue, and the statute of limitations, the court will stay the Ohio action for not more than sixty days so that the plaintiff may recommence the action in the proper out-of-state forum. If, within the sixty day period, the court receives notice by affidavit that the plaintiff has recommenced the action, it will dismiss the action without prejudice, but if the required notice is not received within the sixty days, the court must dismiss the action without prejudice. Thus, in either event, the action commenced in Ohio will be dismissed. However, since the dismissal for failure to recommence the action within the sixty day period smacks of a dismissal for failure to prosecute, we shall consider here only the dismissal after timely recommencement.

Although this point can be raised by the court on its own motion, the objection to venue will normally be raised upon motion by the defendant, or will be included as a defense in the defendant's responsive pleading. In either event, the assertion of the defense of improper

as provided in Rule 12, the court shall transfer the action to a county stated to be proper in subdivision (B) of this rule.

For the mechanics of transferring the action, consult Dayton City School Dist. v. Cloud, 26 Ohio Misc. 133, 266 N.E.2d 273 (C.P. 1971).

Ohio R. Civ. P. 3(D) provides:

When a court, upon motion of any party or upon its own motion, determines: (1) that the county in which the action is brought is not a proper forum; (2) that there is no other proper forum for trial within this state; and (3) that there exists a proper forum for trial in another jurisdiction outside this state, the court shall stay the action upon condition that all defendants consent to the jurisdiction, waive venue, and agree that the date of commencement of the action in Ohio shall be the date of commencement for the application of the statute of limitations to the action in that forum in another jurisdiction which the court deems to be the proper forum. If all defendants agree to the conditions, the court shall not dismiss the action, but the action shall be stayed until the court receives notice by affidavit that plaintiff has recommenced the action in the out-of-state forum within sixty days after the effective date of the order staying the original action. If the plaintiff fails to recommence the action in the out-of-state forum within the sixty day period, the court shall dismiss the action without prejudice.

Ohio R. Civ. P. 3(D) does not expressly so provide, but this is the logical conclusion which follows from the text of the Rule. See McCormac, Venue—“New” Concepts in Ohio, 39 U. Cin. L. Rev. 474, 484 (1970).

Ohio R. Civ. P. 3(D), quoted at note 138 supra.

Id.

Ohio R. Civ. P. 12(B), 12(B)(3).

Ohio R. Civ. P. 12(B). On this point, there seems to be a conflict in the Ohio Rules. Rule 12(B) stipulates that the defense of improper venue “shall be asserted in the responsive pleading . . . if one is required” or “may at the option of the pleader be made by motion.” However, Rule 3(D) states: “When a court, upon motion of any party or upon its own motion, determines.” At first blush, the latter provision would seem to preclude the inclusion of this particular defense in the responsive pleading, or at least to preclude the court from employing this option if the defense of improper venue is not raised by motion. But it must be noted that Rule 3(D) refers to the “motion of any party,” and not to the motion “of the pleader,” as does Rule 12(B). Accordingly, the motion to which Rule 3(D) has reference is not the Rule 12(B)(3) motion to dismiss for improper venue, but the Rule 12(D) motion for a preliminary hearing. The original assumption was that a Rule 12(B) defense would not be determined prior to the beginning of the adversary hearing unless some party to the action moved for an earlier determination under the provisions of Rule 12(D).
venue must be "timely . . . as provided in Rule 12." The defense will be "timely" if presented by motion "made before pleading if further pleading is permitted," if presented by a responsive pleading served within twenty-eight days after the service of the pleading containing the claim, or if presented in an amendment to such a responsive pleading made as a matter of course under the provision of Rule 15(A). If not timely presented, the defense is waived.

Thus, under this assumption, the court would not exercise its power under Rule 3(D) unless it was compelled to do so "upon motion of any party" (a Rule 12(D) motion for preliminary hearing, for example), or unless it chose to do so "upon its own motion" if none of the parties moved for a preliminary hearing. Eventually, the Ohio Supreme Court realized that when read together Rules 12(A)(2) and 12(D) created an impossible situation, so it eliminated the basic assumption when the Rule 12(B) defenses were presented by motion. In effect, it held that the motion presenting the defenses was also a Rule 12(D) motion for a preliminary hearing and determination of those defenses. See State ex rel. Keating v. Pressman, 38 Ohio St. 2d 161, 311 N.E.2d 524 (1974). See also John P. Novatny Elec. Co. v. State, 73 Ohio Op. 2d 364 (Ct. Cl. 1976), rev'd on other grounds, 46 Ohio App. 2d 255, 349 N.E.2d 328 (1975). (However, the Ohio Court of Claims' conclusion that a Rule 12(D) motion for a preliminary hearing converts a Rule 12(B) motion to dismiss into a Rule 12(C) motion for judgment on the pleadings should be taken with a very large grain of salt.) The basic assumption still holds true, however, when the Rule 12(B) defenses are asserted in the responsive pleading. These defenses will not be heard and determined during the pleading stage of an action unless one of the parties moves for a preliminary hearing under the provisions of Rule 12(D), or unless the court takes them up "upon its own motion." In any event, if they are not heard and determined at the pleading stage, the court should hear and determine them "on its own motion" prior to the commencement of the adversary hearing. Thus, whether the defense of improper venue is presented by motion or as a defense in the responsive pleading, the court may exercise the authority conferred upon it by Rule 3(D) since it will do so "upon motion of any party or upon its own motion."

142 OHIo R. Civ. P. 3(C)(1).

143 OHIo R. Civ. P. 12(B).

144 OHIo R. Civ. P. 12(A)(1). (2). This twenty-eight day period may be extended under the provisions of OHIo R. Civ. P. 6(B).

145 OHIo R. Civ. P. 12(H). Normally, such an amendment will have to be made within twenty-eight days of the service of the pleading to be amended. OHIo R. Civ. P. 15(A). Board of Comm'rs. v. McQuary, 26 Ohio Misc. 239, 265 N.E.2d 812 (C.P. 1971). But compare Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974) with Lloyd v. William Fannin Bldrs., 40 Ohio App. 2d 507, 320 N.E.2d 738 (1973). Contrary to what is expressly stated in Rule 12(H), and affirmed in Mills and McQuary by way of dictum, Lloyd appears to permit the amendment by leave of court after the time for amending as a matter of course has expired. Indeed, Layne v. Huffman, 42 Ohio St. 2d 287, 237 N.E.2d 767 (1975), almost compels the conclusion that amendment with leave of court is an available alternative to amendment as a matter of course. In Huffman, the action in which the defense of nonjoinder had to be raised was commenced prior to the effective date of the Ohio Rules of Civil Procedure, and was pending when Rule 19.1, the applicable rule, became effective on July 1, 1970. Since the absent party was merely a necessary party, the defense of nonjoinder had to be raised by either a Rule 12(B)(7) motion to dismiss, by the defendant's responsive pleading (in the context of this case, the answer), or by an amendment to that responsive pleading made as a matter of course within twenty-eight days after the service of the pleading. But by July 1, 1970, the time for doing any of these things had long since expired. Thus, after July 1, 1970, the only way in which the defense of nonjoinder could be raised was by an amended answer served and filed with leave of court, and this is not one of the methods included in Rule 12(H).

Nevertheless, the court of appeals held that the defense had been waived because it had not been asserted under the Ohio Rules of Civil Procedure became effective. Although the court of appeals twice found that joinder was not required prior to July 1, 1970, it held that after the Ohio Rules of Civil Procedure became effective, the defense had to be asserted. Thus, the court held:
Thus, the defense of improper venue will be presented at an early stage of the proceeding, and in the normal course of events, its validity will be determined before the commencement of the adversary hearing.\(^{147}\) If the dismissal is entered pursuant to Rule 3(D), it will be entered before the commencement of the adversary hearing. Further, the proceedings leading to the dismissal will involve collateral issues, and not issues arising on the pleadings. Accordingly, the dismissal will take place prior the original trial, and an order vacating the dismissal and reinstating the action will not be an order granting a "new" trial.

(c) The Nonjoinder Defense. In substance, and subject to some exceptions,\(^{148}\) Rules 19 and 19.1 require the joinder of all necessary and

By the second Assignment of Error, plaintiff contends that the trial court erred in finding Civ. R. 19.1 to be applicable to Mr. Layne's prior action which was commenced prior to the effective date of the civil rules. We find no prejudicial error in such application by the trial court. Civ. R. 86 provides that the civil rules govern all proceedings in actions pending when they took effect unless their application would not be feasible or would work injustice. We have expressly found that no injustice is worked by the application of Civ. R. 19.1 to the prior action, waiver having been involved, and neither party having lost any right that he would have had under prior procedure. 43 Ohio App. 2d 53, 60, 333 N.E.2d 147, 152 (1974).

One might wonder how it is not an injustice to hold that one has waived a defense which he was not required to assert prior to the effective date of the Ohio Rules of Civil Procedure, and which, by the letter of those same Rules, he could not assert after they became effective. Nevertheless, the Ohio Supreme Court concurred in the view of the court of appeals, stating:

Prior to this court's decision in Clouston v. Remlinger Oldsmobile Cadillac [22 Ohio St. 2d 65, 258 N.E.2d 230 (1970)] no cause of action existed allowing a wife to recover for the loss of consortium of her husband. The fact that Clouston was decided subsequent to the filing of Mr. Layne's original complaint, and that the Civil Rules did not become effective until July 1, 1970, does not negate the applicability of Civ. R. 19.1 to this cause. See Civ. R. 86.


Further, the decision indicates that the action by the wife (the second action) was commenced on August 17, 1972. From all that appears, the defendant did not assert the defense of nonjoinder by a Rule 12(B)(7) motion, but filed his answer on September 25, 1972. This answer did not include the defense of nonjoinder. On April 18, 1973, long after the time for amendment as a matter of course had expired, defendant filed an amended answer in which, for the first time, he raised the defense of nonjoinder. Now, either this amended answer was filed out of rule, and no objection was made thereto, or it was filed with leave of court. In either event, if the language of Rule 12(H) is to be taken at face value, it was not the proper vehicle for raising the defense of nonjoinder; that defense had been waived when it was not raised by motion, the original answer, or an answer amended as a matter of course within twenty-eight days after the service of the original answer. Yet neither the court of appeals nor the supreme court noted this point, although either court could easily have disposed of the case by alluding to it. Why this omission? A number of explanations are possible. It may be, for example, that neither court thought it significant, due to the conclusion that the defense was waived when not raised in the first action. From the context of the two decisions, it is more likely that neither court took note of the defendant's failure to comply with the letter of Rule 12(H) because both courts had accepted the proposition that the defense could be raised by an amendment made with leave of court after the time for amending as a matter of course has expired.

\(^{146}\) Ohio R. Civ. P. 12(H).

\(^{147}\) See note 141 supra.

\(^{148}\) Ohio R. Civ. P. 19(D), 19.1(D) make exceptions for class actions by specifying that they are "subject to the provisions of Rule 23." In addition, Rule 19.1(B) specifies: "If a party to the action or a person described in subdivision (A) shows good cause why that
indispensable parties who are subject to service of process.\textsuperscript{149} The court may not dismiss an action for the nonjoinder of necessary parties who could have been joined, but were not;\textsuperscript{150} rather, upon the timely presentation of the defense of nonjoinder, the court will order that they be made parties.\textsuperscript{151} If they are not joined pursuant to such an order, the court may dismiss the action for failure to obey a court order. This dismissal, however, is in the nature of an involuntary penalty dismissal, and does not concern us here.

Neither may the court dismiss the action for the nonjoinder of necessary parties if the joinder of those parties is not feasible because they are not subject to service of process.\textsuperscript{152} But if the absent parties are

person should not be joined, the court shall proceed without requiring joinder.\textsuperscript{153} Settlement with the absent party has been held to be good cause for not compelling joinder. Layne v. Huffman, 43 Ohio App. 2d 53, 333 N.E.2d 147 (1974), \textit{aff'd on other grounds}, 42 Ohio St. 2d 287, 327 N.E.2d 767 (1975).

\textsuperscript{149} Both Rules begin with the statement: "A person who is subject to service of process shall be joined as a party in the action..." \textit{Ohio R. Civ. P. 19(A), 19.1(A).}


\textsuperscript{151} Both Rules state: "If he [a person who is subject to service of process] has not been so joined, the court shall order that he be made a party upon timely assertion of the defense of failure to join a party as provided in Rule 12(B)(7)." \textit{Ohio R. Civ. P. 19(A), 19.1(A).} However, Rule 19.1(A) also adds that the above-quoted mandate to order joinder is "subject to subdivision (B) hereof;" that is, it is subject to the exception quoted in note 148 \textit{supra}.

It is reversible error to dismiss an action for nonjoinder without first ordering joinder as required by the Rules. As it is said in John P. Novatny Elec. Co. v. State, 46 Ohio App. 2d 255, 259, 261, 349 N.E.2d 328, 331, 332 (1975):

On the other hand, it would appear that the board of trustees of the University of Akron is a necessary party defendant to this action. However, a nonjoinder of the board of trustees is not a ground for dismissal but, rather, is a ground for applying Civ. R. 19(A), as to a party in whose absence complete relief cannot be accorded among those already parties.

The complaint does state a claim for relief against the state of Ohio, with the department of public works as defendant, even though the board of trustees of the University of Akron should have been joined as a party defendant. . . . The trial court should have ordered that the board of trustees of the University of Akron be joined as a party defendant, pursuant to Civ. R. 19, rather than dismissing the complaint. The assignment of error is well taken.


If plaintiffs who should be joined in a single action file separate actions against a defendant, and if that defendant timely presents the defense of nonjoinder in each such action, the court may cure the nonjoinder by ordering a consolidation of the actions under the provisions of Rule 42(A). Moore v. Baker, 25 Ohio Misc. 140, 266 N.E.2d 593 (C.P. 1970). But the failure to timely present the defense of nonjoinder in the first action to be commenced may result in a waiver of the defense if the plaintiffs are merely necessary parties. Layne v. Huffman, 43 Ohio App. 2d 53, 333 N.E.2d 147 (1974), \textit{aff'd}, 42 Ohio St. 2d 287, 327 N.E.2d 767 (1975). However, there is some authority for the proposition that a waiver will not result if the defense of nonjoinder is presented at the earliest opportunity after the defendant first learns of the facts which require the joinder of the plaintiffs. Peters v. Durroh, 28 Ohio App. 2d 245, 277 N.E.2d 69 (1971).

\textsuperscript{152} \textit{Ohio R. Civ. P. 19(B) provides: "If a person as described in subdivision (A)(1), (2) or (3) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." The import of Rule 19(B) is that the action will not be dismissed unless the absent party is deemed indispensable to its continuance. In other words, an action may proceed without the joinder of necessary parties, but it may not proceed without the joinder of indispensable parties.}
indispensable parties, if their joinder is not feasible because they are not subject to service of process, and if the defense of nonjoinder has been timely presented, the court must dismiss the action. This is the dismissal "on the merits" currently under discussion.

Normally, the defense of nonjoinder is timely if presented by a motion to dismiss for failure to join a party under Rule 19 or Rule 19.1 "made before pleading if a further pleading is permitted", if presented in a responsive pleading served within twenty-eight days after the service of the pleading containing the statement of claim, or if presented in an amendment to that responsive pleading if the amendment is made as a matter of course under the provisions of Rule 15(A).

When the absent party is an indispensable party however, the general rules with respect to timeliness are not controlling. Rather, the defense of nonjoinder of an indispensable party will be timely if it is presented as indicated in the preceding paragraph, or by a later pleading if one is permitted, or by motion for judgment on the pleadings...
under the provisions of Rule 12(C), or in the trial on the merits. In short, there are six opportunities for presenting the defense of failure to join an indispensable party rather than the usual three; and the defense is not waived unless the challenger misses all six.

The first five opportunities present no particular problem because all will occur before the adversary hearing begins. Accordingly, if the defense is found to be valid, and the case is dismissed, the dismissal will take place prior to the commencement of the adversary hearing. There will not have been an original trial, and an order vacating the dismissal and setting the case down for trial will not be one which orders a "new" trial. Thus, in these circumstances the fourth test for finality will not apply.

The sixth opportunity presents more of a problem. As Rule 12(H) states, the defense of failure to join an indispensable party may be made "at the trial on the merits." The Ohio courts have not yet determined the meaning of that phrase. Essentially, the question is

Motorists Mut. Ins. Co. v. Bates, 34 Ohio Misc. 1, 295 N.E.2d 445 (Mun. Ct. 1972), which appears to contradict the statement made above and in the text, may be correctly decided, but the decision in that case was incorrectly expressed. In paragraph 2 of the syllabus, the court stated: "Where one party to an action does not object by a motion or pleading to the failure of the other party to join an indispensable party until after the statute of limitations against the inclusion of such indispensable party has expired, the objection is waived." And in the body of the opinion the court held:

Civ. R. 19 requires the joinder of all persons needed for a just adjudication in a case like this. However, defendant raised no objection by motion or pleading as allowed by Civ. R. 12(C) and 12(H) and Civ. R. 15(A). Instead, defendant waited until the statute of limitations had run against the inclusion of the plaintiff’s insured as a party. Accordingly, the objection to the absence of the insured as a party plaintiff is deemed to be waived.

If the absent party in this case had been an indispensable party, the court would have been incorrect, since Rule 12(H) permits the defense of nonjoinder to be raised as late as "at the trial on the merits," as it was in this case. The absent party was not indispensable here, however. As the insured-subrogor of the plaintiff, she was, at best merely a necessary party under the provisions of Rule 19(A)(3). Thus, under the facts of the case, the decision is technically correct; since the objection to the nonjoinder of a necessary party was not timely made in the manner prescribed, it was waived. However, there are some facts in the case which indicate that the plaintiff-insurance company had been wholly subrogated to the claim of its insured-subrogor, and that she retained no part of her claim against the defendant. If those are indeed the facts, then she would not even have been a necessary party, and the real question before the court was whether she, or the subrogated insurance company, was the real party in interest under the provisions of Rule 17(A).

Ohio R. Civ. P. 12(H) provides:

A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or if he has made no motion, by responsive pleading or an amendment thereof made as a matter of course under Rule 15(A), except (1) ... the defense of failure to join an indispensable party ... may be made by a later pleading, if one is permitted, by motion for judgment on the pleadings or at the trial on the merits. ...
this: does "at the trial" mean just before the adversary hearing commences (for example, before the impanelling of the jury begins), or does it also comprehend some point in time during the course of the adversary hearing? There is some Ohio authority for the latter proposition, but it is far from definitive.\textsuperscript{164}

Since Ohio's Rule 12(H) is modeled on section 60-212(h) of the Kansas Statutes Annotated,\textsuperscript{165} that statute may give some guidance in interpretation. The Kansas statute contains a sentence not found in the Ohio Rule. Immediately following language that is essentially identical to that of Ohio Rule 12(H), the Kansas statute states: "The objection or defense, if made at the trial shall be disposed of as provided in section 60-215(b) in the light of any evidence that may have been received."\textsuperscript{166} Except for some minor variation in the wording which does not affect the substance, section 60-215(b) of the Kansas statutes, as the section read at the time the Ohio Rules were adopted, is identical to Ohio Rule 15(B). Both provide for amendment of the pleadings to conform to the evidence received at trial. Indeed, both speak of evidence "objected to at the trial on the ground that it is not within the issues made by the pleadings."\textsuperscript{167} In Kansas, then, "at the trial" must include "during the trial," or the reference to disposing of the defense "in the light of any evidence that may have been received" would have no meaning.

No doubt the Ohio Rule should be given the same interpretation, even though Ohio did not choose to include the sentence found in the Kansas statute. Both Ohio Rule 12(H) and Ohio Rule 15(B) contain the phrase "at the trial". It is clear from the context of Rule 15(B) that this phrase means "during the trial",\textsuperscript{168} and there is no apparent reason why it should be given a more restrictive meaning in Rule 12(H). Therefore, the defense of failure to join an indispensable party may arise


\textsuperscript{165}As the Ohio Rules Advisory Committee Staff Notes states: "Ohio Rule 12(G) and (H) are patterned after Sec. 60-212 (g) and (h) of the Kansas Rules of Civil Procedure because the Kansas approach is shorter and clearer than either the pre-1966 or the present [1966] federal rule. Ironically, in 1969, Kansas repealed the Rule upon which the Ohio Rule was "patterned," and adopted the language of the 1966 amendment to Fed. R. Civ. P. 12(h). See § 60-212. Apparently not everyone shares the same view of what is "shorter and clearer."

\textsuperscript{166}KAN. STAT. § 60-212(h) (Supp. 1975).

\textsuperscript{167}KAN. STAT. § 60-215(b) (Supp. 1975).

\textsuperscript{168}In pertinent part, Ohio R. Civ. P. 15(B) reads:

"If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence (emphasis added)."

All of this clearly contemplates an occurrence "during" the trial.
at some point in the adversary hearing itself. If it does, and if the action is dismissed because of it, the question is whether the adversary hearing had progressed to a point where it became a "trial" within the meaning of section 2311.01 of the Ohio Revised Code. If it did not, the order vacating the dismissal and setting the case for trial will not be an order granting a "new" trial. Thus, the applicability of the fourth test for finality will depend upon the point in time at which the action was first dismissed, and the defense of failure to join an indispensable party may well present the same problems as the defense of lack of subject matter jurisdiction, or the voluntary dismissal by court order.

(d) The "Failure to State a Claim" Defenses. Rule 12 provides three methods for challenging the sufficiency of the plaintiff's statement of a claim: the 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the 12(C) motion for judgment on the pleadings, and the 12(F) motion to strike an insufficient claim from a pleading. Since a favorable ruling on any of these motions may result in the dismissal of the plaintiff's claim, this would be a logical place to discuss each of them. However, since this defense is substantively different than the Rule 12 defenses discussed above, and since the Matson schema which we have adopted as a frame of reference places this type of dismissal in the third category of judgments, the principal discussion of these motions will be reserved for that category.

Nevertheless, there is a connection between the Rule 12(C) motion for judgment on the pleadings and certain previously mentioned Rule 12 defenses. Rule 12(H) specifically notes that the defenses of failure to join an indispensable party and lack of subject matter jurisdiction may be presented by a motion for judgment on the pleadings. If either of these two defenses is presented in this manner, the motion must be served and filed at some point prior to the commencement of the adversary hearing, and the validity of the defense will be heard and determined before the adversary hearing begins. Further, when the motion for judgment on the pleadings is used for this purpose, the issues presented by the motion will be issues collateral to the issues which arise on the pleadings, and the motion proceeding will be a "hearing" or "summary proceeding" rather than a "trial". Thus, if a dismissal results from this presentation, it will occur before there has been an original trial, and

171 This result will be achieved either by Rule 12(D) motion for preliminary hearing which is now presumed to be included in the Rule 12(C) motion for judgment on the pleadings, see State ex rel. Keating v. Pressman, 38 Ohio St. 2d 161, 311 N.E.2d 524 (1974), or by the court taking up the question on its own motion. See notes 133 and 141 supra.
the order vacating the dismissal and setting the case for trial will not be an order which grants a "new" trial. Once again, the fourth test for finality will not apply to such an order.

There may also be a connection between the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted and some of the Rule 12(B) defenses explored above. There is, for example, some rather tenuous authority for the proposition that the Rule 12(B)(6) motion may be used to raise defenses which could be raised by special demurrer under the old Code of Civil Procedure, if those defenses appear from the face of the pleading containing the statement of claim. 172 If this is in fact the case, the defenses which may be presented under the guise of failure to state a claim upon which relief can be granted are the defenses of lack of jurisdiction over the person, 173 lack of juris-

172 See Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 320 N.E.2d 688 (1974). This case deals specifically with the defense of the statute of limitations, a defense that could be raised by special demurrer prior to the enactment of the Ohio Rules of Civil Procedure. Law of April 16, 1900, div. II, ch. 6, § 5061(9), 1900 Ohio Laws 288. (codified at Ohio Rev. Code Ann. § 2309.08(I) (Page 1954) (repealed 1970)). It may be that the case should be limited to its facts, since the statute of limitations defense presents something of a unique situation. Nevertheless, it can be argued that if one portion of former section 2309.08 of the Ohio Revised Code can be incorporated into Rule 12(B)(6), there is no reason in principle why the rest cannot also be incorporated. Thus, it is at least theoretically possible that Rule 12(B)(6) incorporates all of the defenses included in that section to the extent that those defenses have survived. Misjoinder of parties, for example, was a recognized defense under former section 2309.08, but for all practical purposes it has been abolished by Rule 21, which states that "misjoinder of parties is not ground for dismissal of an action." Accordingly, this is a defense that has not survived into the Rules era.

173 "The defendant may demur to the petition only when it appears on its face that: (A) The court has not jurisdiction of the person of the defendant." Law of April 16, 1900, div. II, ch.6, § 5061(1), 1900 Ohio Laws 288. (codified at Ohio Rev. Code Ann. § 2309.08(A) (Page 1954) (repealed 1970)). Jurko v. Jobs Europe Agency, 43 Ohio App. 2d 79, 334 N.E. 2d 478 (1975), illustrates a situation in which a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief may be granted might be used to raise the defense of lack of jurisdiction over the person. Before examining Jurko, it must be noted that when out-of-state service is attempted under the Ohio "long arm" rule (Ohio R. Civ. P. 4.3), the claim sued upon must be one which arises out of the particular minimum contact relied upon as the basis for in personam jurisdiction. As Rule 4.3(A) puts it: "Service of process may be made outside of this state, as provided herein, in any action in this state, upon a person who . . . has caused an event to occur out of which the claim which is the subject of the complaint arose . . . ." There follows a listing of eight "events" which qualify as basic minimum contacts with the State of Ohio. To put it another way, it may loosely be said that a plaintiff has a claim for relief under the "long arm" rule if the claim arises out of one or more of the eight minimum contact events listed in Rule 4.3(A). With this in mind, we may proceed to an examination of Jurko.

In effect, that case imports into Rule 8 the requirement that the pleader allege jurisdictional facts when service is attempted under Rule 4.3. Citing Lantsberry v. Tilley Lamp Co., 27 Ohio St. 2d 303, 272 N.E.2d 127 (1971), and Wright v. Automatic Valve Co., 20 Ohio St. 2d 87, 253 N.E.2d 778 (1969), as authority, the Court of Appeals of Cuyahoga County held that the pleader must plead, at least in a conclusory manner, the minimum contact relied upon for service, and must allege facts which show that the claim arises out of that minimum contact. In the court's words:

The short and plain statement [of the claim required by Rule 8(A)] must show that the pleader is entitled to relief and where there is an issue of long-arm jurisdiction good pleading dictates that the plaintiff recognize that fact at the outset and deal with that issue in his complaint. . . . While the plaintiff is entitled to have his factual allegations sustaining personal jurisdiction construed in his favor . . . the plaintiff must nevertheless first plead or otherwise make a prima facie showing of jurisdiction over the defendant's person.
diction over the subject matter,174 and failure to join a necessary or indispensable party.175 Again, however, it must be emphasized that this technique may be used, if indeed it may be used at all, only if these defenses appear from the face of the pleading containing the statement of claim.

If the defenses of lack of jurisdiction over the person, lack of jurisdiction over the subject matter, failure to join a necessary party, and failure to join an indispensable party are presented by the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, there is no particular problem. To be timely, such a motion would have to be made before pleading if a further pleading is permitted.176 Thus, they would be presented before the commencement of the adversary hearing, and if the motion were sustained, the dismissal would likewise take place prior to the adversary hearing. Accordingly, the vacation of such a dismissal would fall within the oft-repeated rule

Plaintiff's complaint failed to associate the alleged breach of contract and tortious activity with any conduct or transaction in Ohio and therefore did not sufficiently plead facts sustaining personal jurisdiction over defendants.

If service is attempted under the "long arm" rule, and the complaint does not contain these required jurisdictional allegations, it does not appear from the face of the complaint that the court has jurisdiction over the person of the defendant which will authorize it to grant relief on the claim, and it can be said that the complaint does not state a claim upon which relief can be granted. Thus, in these circumstances, the Rule 12(B)(6) motion can theoretically be used to raise the defense of lack of jurisdiction over the person. In concluding this, however, it is only proper to note that in Jurko the challenge to jurisdiction was made by a Rule 12(B)(2) motion to dismiss for lack of jurisdiction over the person, and such a motion would appear to be the more appropriate vehicle for raising the question.

174 Law of April 16, 1900, Sec. 3, § 5061, 1900 Ohio Laws 268 (codified at Ohio Rev. Code Ann. § 2309.08(B) (Page 1954) (repealed 1970)): "The defendant may demur to the petition only when it appears on its face . . . That the court has no jurisdiction of the subject of the action."

Holland v. Carlson, 40 Ohio App. 2d 325, 319 N.E. 2d 362 (1974), illustrates a possible application of this section through Rule 12(B)(6). Certain statutes, such as former Ohio Revised Code section 2741.02 (will contests) required the joinder of the persons specified in the statute. Law of May 14, 1878, div. VII, Ch. 15, § 2, 1878 Ohio Laws 597 codified at Ohio Rev. Code Ann. § 2741.02 (Page 1954) (Repealed 1976)). In their absence, the court will not have subject matter jurisdiction of the particular action before it, though it may have subject matter jurisdiction of that type of action in general. As Holland noted, when the nonjoinder of a required party appears from the face of the complaint, the challenge to jurisdiction may be raised by a motion to dismiss for failure to join a necessary party. Although the statute involved in Holland, and its successor in Ohio Rev. Code Ann. § 2107.73 (Page 1976), describe the parties listed therein as "necessary," they are more correctly described as "indispensable." See note 153 supra. However, since the presence of these parties is essential to the court's jurisdiction, and since the court cannot grant the relief requested in the absence of such jurisdiction, it would also appear from the face of such a complaint that it does not state a claim upon which relief can be granted. Thus, in theory, the lack of subject matter jurisdiction can also be raised by the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Again, however, the better practice is to use the more specific motion provided for in Rule 12(B).

175 See Law of April 16, 1900, Sec. 3, § 5061, 1900 Ohio Laws 268 (codified at Ohio Rev. Code Ann. § 2309.08(F) (Page 1954) (repealed 1970)): "The defendant may demur to the petition only when it appears on its face that . . . there is a defect of parties plaintiff or defendant."

The situation described in note 174 supra also illustrates the possible use of a Rule 12(B)(6) motion in this instance.

176 Ohio R. Civ. P. 12(B).
with respect to the applicability of the fourth test for finality — it would not apply because there had never been an original trial.

There are sound policy reasons why the defense of failure to state a claim upon which relief can be granted should not be permitted as a cover for these other defenses. The defenses of lack of jurisdiction over the person and failure to join a necessary party are waived if they are not presented by motion before pleading, in the responsive pleading, or in an amendment to that responsive pleading made as a matter of course under the provisions of Rule 15(A). But the defense of failure to state a claim upon which relief can be granted is waived only if it is not presented by motion before pleading, in the responsive pleading, in an amendment to that responsive pleading made as a matter of course under the provisions of Rule 15(A), in a later pleading if one is permitted, by motion for judgment on the pleadings as provided in Rule 12(C), or by motion at the trial on the merits. Thus, if the defense of failure to state a claim upon which relief can be granted is read to include the defenses of lack of jurisdiction over the person or failure to join a necessary party when these defenses appear from the face of the pleading, the time for asserting these defenses would necessarily be extended beyond the time specified in the Rules. Accordingly, the better interpretation of the Rules will preclude the use of this defense as a cover for the other four defenses, and the assertion of these latter four defenses should be limited to the methods specifically authorized by the Rules.

177 Ohio R. Civ. P. 12(H).
178 Id.
179 This is the essential thrust of Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974). In that case, it was held that the defense of the statute of limitations could be raised by a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief could be granted when the defense appeared from the face of the complaint. The same defense could not be asserted in the answer under the cover of the defense of failure to state a claim upon which relief could be granted because Rule 8(C) requires the defense of the statute of limitations to be pleaded affirmatively when it is asserted by way of answer.

An exception to this principle of interpretation may be warranted when a party is indispensable because, by statute, his presence is required in order to vest the court with subject matter jurisdiction over the particular case at bar. See note 153 supra. In such cases, the party might be indispensable under the statute, but he would not necessarily qualify as indispensable under the terms of Rule 19. The Attorney General of Ohio, for example, is an indispensable party in certain actions involving charitable trusts because the court would not have jurisdiction of the action in his absence. See Ohio Rev. Code Ann. § 109.25 (Page 1969), which specifies that “[a] judgment rendered in such proceedings without service of process or summons upon the attorney general is void, unenforceable, and shall be set aside. . . .” However, it is difficult to see how the Attorney General would be a necessary party to such an action under the provisions of Rule 19(A), and if he is not a necessary party under those provisions, he cannot be an indispensable party under the provisions of Rule 19(B). But the Rule 12(B)(7) defense of nonjoinder is by its express terms limited to “failure to join a party under Rule 19 or Rule 19.1.” Accordingly, when a party is indispensable solely by reason of a statutory requirement such as Ohio Rev. Code Ann. § 109.25 (Page 1969), and not also indispensable by reason of the provisions of Rule 19, there is no motion in the Ohio Rules of Civil Procedure which expressly provides for the assertion of the defense of failure to join an indispensable party. Therefore, the principle of interpretation advocated in the text would not necessarily be violated by the use of the Rule 12(B)(6) defense of failure to state a claim upon which relief can be granted for the purpose of raising the defense of nonjoinder in these limited instances.

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(c) *The Indefinite Statement Objection.* Rule 12(E) authorizes a motion for a definite statement if a pleading to which a responsive pleading is permitted is so vague or ambiguous that the movant cannot reasonably be required to frame a responsive pleading. If the motion is granted, the party against whom the motion has been directed must serve and file an amended pleading containing the required details within fourteen days after notice of the court's order granting the motion, or within such other time as the court may designate. If the responding party fails to comply with the court's order within the fourteen days or the time specified, the court may strike the pleading to which the motion was directed "or make such other order as it deems just." No doubt this "other order" which the court may make includes an order of dismissal in appropriate circumstances. Such a dismissal, however, will be an involuntary penalty dismissal for failure to prosecute (if the pleader elects to stand on the original pleading or fails to plead again within the time designated by the court), or for failure to comply with the Rules (if the plaintiff fails to plead over within the fourteen days specified in Rule 12(E) in those cases in which the court has not fixed some other time for the service and filing of the amended pleading), or for failure to comply with a court order (when the court's order granting the motion for a definite statement also orders the service and filing of an amended pleading, and the pleader elects not to comply therewith). Since dismissals for these reasons have been covered in a preceding section, and since they are not germane to our present subject, they are noted here only for the sake of completing the analysis of Rule 12.

(f) *The Improper Pleading Objection.* Much the same can be said of most of the dismissals which may result from a successful motion to strike from the pleadings under the provisions of Rule 12(F). In substance, this Rule provides that upon the motion of a party, or upon its own motion, the court may order stricken from any pleading any redundant, immaterial, impertinent or scandalous matter. The order striking the improper material from the pleading may simply grant leave to amend, or it may order the service and filing of an amended pleading with the offensive matter deleted.

If the pleading challenged by the motion to strike is a complaint, counterclaim, cross-claim or third party claim, and if the party against whom the order is made does nothing in response to it, the court may dismiss the claim. But if it does so, the dismissal will be an involuntary penalty dismissal for failure to prosecute or for failure to comply with a court order, and not a dismissal "on the merits".

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181 *Ohio R. Civ. P. 12(E).*
(2) Dismissals for Lack of Standing (Rule 17(A))

The objection that a plaintiff lacks standing to sue (that he is not the real party in interest, for example) is something of an exception to what has been seen so far in that it arises out of the provisions of Rule 17(A) rather than the provisions of Rule 12.\textsuperscript{182} But there are additional differences as well.

The first essential difference between this objection and the previously examined Rule 12 defenses and objections is the time frame within which the objection may be presented. Because the objection goes to the subject matter jurisdiction of the court,\textsuperscript{183} the objection may be presented at any time prior to the entry of judgment.\textsuperscript{184} Thus, in a

\textsuperscript{182} This may be another of those old special demurrer defenses that are arguably incorporated into the Rule 12(B)(6) defense of failure to state a claim upon which relief can be granted if they clearly appear from the face of the pleadings. Law of April 16, 1900, Sec. 3, § 5061, 1900 Ohio Laws 288 (codified at OHIO REV. CODE ANN. § 2309.08(F) (Page 1954) (repealed 1970)) provided that: “The defendant may demur to the petition only when it appears on its face . . . [t]hat there is a defect of parties plaintiff or defendant.”

\textsuperscript{183} In State ex rel. Dallman v. Court of Common Pleas, 35 Ohio St. 2d 176, 179, 298 N.E.2d 515, 517 (1973), the Ohio Supreme Court described the requirement that an action be prosecuted in the name of the real party in interest as a “jurisdictional requirement”:

It is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action. We conclude, therefore, that neither this court nor the Court of Appeals has jurisdiction to determine this cause on its merits.

\textsuperscript{184} The purpose of requiring that an action be brought by the real party in interest is to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. As the Ohio Supreme Court said in State ex rel. Dallman v. Court of Common Pleas, 35 Ohio St. 2d 176, 179, 298 N.E.2d 515, 517 (1973):

The wisdom of this jurisdictional requirement, that a party must have standing to raise an issue, is well illustrated by the instant case. Few cases present a better example of an instance in which the nature of the parties is such as to not assure adjudication in accordance with the historical connotations of the adversary process.

Theoretically, an objection on this ground is viable both before and during the adversary hearing, but such an objection comes somewhat late after the adversary hearing is concluded. Accordingly, it may be said that this objection is waived unless it is made before the entry of judgment.

In comparison, an objection to subject matter jurisdiction is never waived. See, e.g., Gates Mills Inv. Co. v. Parks, 25 Ohio St. 2d 16, 266 N.E.2d 552 (1971), and Jenkins v. Keller, 6 Ohio St. 2d 122, 216 N.E.2d 379 (1966). This is only true, however, when the objection is to the court’s subject matter jurisdiction over a particular class of cases. Where the objection is to the court’s subject matter jurisdiction over a particular case within the class of cases over which the court has jurisdiction — an objection premised on the failure to exercise some prerequisite to the court’s exercise of jurisdiction in the particular case — it is waived unless made before the question becomes moot. As a general rule, the question is mooted by the entry of judgment. As the court stated in Jenkins:

[W]here a Court of Appeals has general jurisdiction of the subject matter of an appeal from a judgment of a Court of Common Pleas, any irregularity in prosecuting such appeal is waived by failure of the party having the right to do so to make objection until after the Court of Appeals has heard the appeal and rendered judgment; the judgment so rendered is valid and will not be disturbed on a collateral attack on the ground of lack of jurisdiction.

\textit{Id.} at 127, 216 N.E.2d at 382 (emphasis in original). While this case speaks specifically

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sense, this objection is a transition from the Rule 12 defenses and objections, which must be presented before the commencement of the adversary hearing, and the Rule 41(B)(2) motion to dismiss, which must be made during the adversary hearing.

The second essential difference lies in the nature of the proceeding leading to the dismissal for lack of standing. Rule 17(A) requires that an action be brought in the name of the real party in interest, and provides for a dismissal of the action if it is not. Normally, an objection on this ground will be raised by motion, but theoretically there is no objection to it being raised as a defense in the answer.

of the jurisdiction of the court of appeals, the principle is equally applicable to the jurisdiction of the trial courts.

A pair of very confused cases, Motorist Mut. Ins. Co. v. Cook, 31 Ohio App. 2d 1, 285 N.E.2d 389 (1971), and Motorists Mut. Ins. Co. v. Bates, 34 Ohio Misc. 1, 295 N.E.2d 445 (Mun. Ct. 1972), suggest that the objection cannot be made after the statute of limitations has run on the claim. But that is not correct. Neither court recognized that the real problem before it was the problem of who is the real party in interest when an insurance company has been fully subrogated to its insured under an uninsured motorist trust agreement. That being so, neither court realized that the solution to the particular problem was to be found in Rule 17(A). This Rule provides:

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

In effect, this last sentence of Rule 17(A) provides that the ratification, joinder, or substitution relates back to the date the action was commenced. Therefore, if the action was timely commenced to begin with, an objection to lack of standing may be made after the statute has run, since the bar of the statute is itself barred by the relation back principle.

Ohio R. Civ. P. 17(A) states that: "Every action shall be prosecuted in the name of the real party in interest." See also that part of Rule 17(A) quoted in note 184 supra.

If the thrust of the objection is to the court's subject matter jurisdiction, see note 183 supra, it can be argued that it falls within the purview of a Ohio R. Civ. P. 12(B)(1) motion to dismiss for lack of jurisdiction over the subject matter. But this is really a semantic quibble about the designation to be placed in the caption. Any motion, no matter how designated, will be adequate to the task if it clearly asks for a dismissal of the action on the ground that it is not prosecuted in the name of the real party in interest. See Ohio R. Civ. P. 7(B)(1), which specifies: "A motion, whether written or oral, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." For the sake of classification, however, we might say that Rule 17(A) creates a motion that should be designated as a "motion to dismiss for lack of standing."

None of the Rules expressly provide for the inclusion of this objection in the responsive pleading. However, one aspect of the objection is included in Rule 9(A). Rule 17(A) authorizes certain parties to sue in their representative capacity:

An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his name as such representative without joining with him the party for whose benefit the action is brought.

If an opposing party wishes to challenge the claimant's authority to sue in such a representative capacity, he may do so by answer. Thus, Rule 9(A) states: "When a party desires to raise an issue as to the . . . authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge." Indeed, this requirement that supporting particulars be included may make the responsive pleading, or perhaps a motion for summary judgment, the only usual method for raising this aspect of the Rule 17(A) objection to standing.

That aside, it can be argued that since lack of standing is in essence the same as lack of subject matter jurisdiction, the objection may be included in the responsive pleading.
and then triggered by a Rule 12(D) motion for preliminary hearing or by the court's own motion.188 These motion proceedings are generally "summary proceedings" or "hearings" rather than "trials" since they involve only collateral issues, but this may not be the case when the objection is to lack of standing. As State ex rel. Dallman v. Court of Common Pleas189 notes, the question of standing depends upon whether the claimant has alleged a personal stake in the outcome of the controversy. The resolution of that question inevitably requires a judicial examination of the issues which arise on the pleadings, and such an examination is a "trial." As we have previously noted, however, no issues "arise" on the pleadings unless a fact or conclusion of law is maintained by one party and controverted by the other.190 Therefore, whether the motion proceeding is a "trial" or a "hearing" will depend on the way in which the objection of lack of standing is presented.

If the objection is presented by a motion to dismiss for lack of standing,191 the inquiry is focused on the nature of that motion. Is it akin to the old special demurrer for defect of parties plaintiff,192 or is it akin to the motion to quash for lack of jurisdiction over the subject matter?193 If the former, then it is essentially similar to the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, and may only be employed if the lack of standing appears from the face of the pleading containing the statement of claim.194 That being so, no issues arise on the pleadings because the motion admits the truth of the allegations in the pleading, and does not controvert them, and the motion proceeding is a "hearing" rather than a "trial."195 On the other

under the authority of Rule 12(B)(1). But the argument need not be so finely honed. Rule 12(B) broadly states: "Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required." This is sufficient authority for including the objection in the answer.

188 See notes 133 and 141 supra.
189 35 Ohio St. 2d 176, 298 N.E.2d 515 (1973). See also note 183 supra.
190 OHIO REV. CODE ANN. § 2311.02 (Page 1954).
191 See note 186 supra.
192 See note 182 supra.
193 See note 183 supra.
194 As the Ohio Rules Advisory Committee Staff Note to Rule 12(B) states, "on a motion to dismiss for failure to state a claim, as on a demurrer, a court is limited to the face of the pleading under attack." See also Stephens v. Boothby, 40 Ohio App. 2d 197, 318 N.E.2d 535 (1974); Lewis v. Bendinelli, 26 Ohio Misc. 189, 270 N.E.2d 375 (C.P. 1970); LLW of April 16, 1900, Sec. 3, § 5061, 1900 Ohio Laws 268 (codified in OHIO REV. CODE ANN. § 2309.08(F) (Page 1954) (repealed 1970)).

Defendants did not answer the complaint of the plaintiffs, but chose to move for the summary judgment "at any time" and without supporting affidavits. . . . No answers having been filed by the defendants, there are no issues made up by the pleadings; the practical result of choosing not to answer amounts to an admission of the validity of the facts alleged by the complainants. Such procedural situation has the color of a case in which there was a request for judgment on the pleadings as authorized by Civ. R. 12(C). . . . It is more correctly put, however, to say that facts alleged by plaintiffs stand undisputed.

The court's conclusion that an unsupported motion for summary judgment is akin to a motion for judgment on the pleadings is strained and probably incorrect; it would have
hand, if the latter comparison is the more accurate, the motion may be supported by oral testimony at a hearing on the motion or by documentary evidence in testimonial form. If this supporting evidence controverts the allegations of the statement of claim, we are presented with a subsidiary problem: is this method of controverting the fact or conclusion of law maintained by the pleader within the contemplation of section 2311.02 of the Ohio Revised Code so that it may be said that issues arise on the pleadings? A literal reading of section 2311.02 produces a negative answer; clearly, that section presupposes that the controversy will arise from the "pleadings" — the statement of claim and the responsive pleading thereto — and a motion is not a "pleading." That section, however, was enacted as part of the original Code of Civil Procedure, and the draftsmen of that Code simply did not foresee the modern motion to dismiss for lack of standing. Thus, section 2311.02 must be bent slightly to meet the requirements of today's procedure, and a strict, literal reading is not warranted. In today's practice, a supported motion, other than a motion for summary judgment, can serve much the same purpose as a responsive pleading under the old Code, and where that motion's supporting evidence controverts the allegations of fact or conclusions of law in the claimant's pleading, the "controversy" falls within the spirit of section 2311.02, if not the letter, and one may fairly conclude that the issues produced by that "controversy" arise on the pleadings. Accordingly, where the lack of standing appears from the conflict between the allegations of the statement of claim and the evidence supporting the motion to dismiss, the claimant's status as a real party in interest is an issue which arises on the pleadings, and the motion proceeding is a "trial" rather than a mere "hearing" or "summary proceeding."

Because of the paucity of reported authority on point, one cannot say which of these two views is the correct one. In State ex rel. Dallman v. Court of Common Pleas, the Ohio Supreme Court raised lack of standing on its own motion, so that case is of no help at all. In Motorist Mutual Insurance Co. v. Cook the supposed lack of standing appeared from the face of the complaint, but the trial court apparently raised the objection on its own motion during trial even though the plaintiff's standing was not controverted in the defendant's answer. It is not clear from the report of Motorists Mutual Insurance Co. v. Bates whether been more accurate to compare it with a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Apart from this, however, the court's conclusions are correct.


199 Law of March 14, 1853, § 260, 1853 Ohio Laws 57.


the supposed lack of standing appeared from the face of the complaint or not. It would appear that the issue was not raised in the pleadings, but was raised by an oral motion to dismiss made during the trial, and that this motion was premised on a stipulation of facts entered into by the parties. Since none of these cases involved a motion to dismiss for lack of standing made before the service of the responsive pleading, the courts had no occasion to analyze the nature of such a motion.

If the motion to dismiss for lack of standing is by its nature limited to the face of the pleadings, or if it is not so limited by nature but is nevertheless an unsupported motion which challenges a lack of standing which appears from the face of the pleadings, the dismissal consequent upon the granting of the motion will be a dismissal that occurs before there has been an original trial, and a subsequent vacation of that dismissal and reinstatement of the case will not be a reinstatement for the purpose of a "new" trial. Accordingly, the fourth test for finality will not apply.

The contrary will result if the motion to dismiss for lack of standing can be, and is, supported by either oral evidence or documentary evidence in testimonial form which contradicts allegations of fact or conclusions of law in the claimant's pleading. A dismissal premised on such evidence will be a dismissal following a judicial examination of the issues which arise on the pleadings — a dismissal after a "trial." Therefore, an order vacating that dismissal and reinstating the case will be an order which grants a "new" trial, and the fourth test for finality will apply.

The problems may become equally complex when the objection of lack of standing is included as a defense in the responsive pleading. Normally, standing to sue, or the lack of it, will appear from the face of the statement of claim. As Rule 8(A) puts it, "A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." To satisfy this requirement, the claimant need not specifically plead the conclusion that he has standing to sue (that he is entitled to relief), but that conclusion must be at least reasonably inferable from the facts alleged. Thus, to be a proper pleading, the statement of claim must contain some facts which indicate standing to sue. The objection of lack of standing may then be raised in the responsive pleading either by a denial of the facts from which standing may be inferred, or, in a proper case, from the admission of those facts followed by a specific denial of the claimant's standing to sue. 202 Motorist Mutual Insurance Co. v. Cook 203 illustrates this latter point. In that case, Motorist made payment to its insured under the terms of the uninsured motorists coverage of its policy,

202 In some cases, it may be necessary to couple this denial with the averment of facts which demonstrate the lack of standing. Although not directly on point, Rule 9(A) serves as a guide in this respect. It states: "When a party desires to raise an issue as to the authority of a party to sue . . . in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge."

and took a "receipt and release of trust agreement" in return. (For convenience, we may refer to this document as a "trust receipt agreement.") In part, this trust receipt agreement stipulated that:

[t]he undersigned [the insured] agrees to take, through any representative designated by the said Company, such action as may be necessary or appropriate to recover the damages suffered by the undersigned from any person or organization who may be legally liable therefor, and to hold any money recovered from such person or organization in trust for the benefit of the Motorist Mutual Insurance Company to be paid to the Company immediately upon recovery thereof. 203a

Further, standard provisions of this type of coverage provide that:

In the event of payment to any person under this Part: (a) the company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury because of which such payment is made. 204

From the language of these two documents, it may be argued that the insurance company has no right of action against the third party tortfeasor, but is limited to a right of action against its insured if the insured recovers from that tortfeasor and refuses to reimburse the insurance company. 205 Assume for sake of argument that this is a correct conclusion, and assume further that the insurance company brings an action, as Motorist did, against the third party tortfeasor and pleads the terms of the policy and the trust receipt agreement in its complaint, or attaches the documents to the complaint pursuant to the requirements of Rule 10(D). In such case, the third party tortfeasor must admit the terms of the documents, but may deny the inference of standing to be drawn from them by specifically denying that the insurance company has standing to sue. Such a denial controverts the inferred conclusion of law maintained by the insurance company, and the issue of standing arises on the pleadings. 206

203a Id. at 3, 285 N.E.2d at 391.
204 See SAMPLE INSURANCE POLICIES — PROPERTY LIABILITY COVERAGES — INTRODUCTORY BOOK 19, 22 (Feb. 1975). Although the report of the decision does not give the actual language of Motorist's policy, it may be assumed that it conforms to the standard language quoted in the text.
206 A somewhat similar situation arises when the claimant is suing in a representative capacity. As Rule 9(A) points out, such a claimant need not aver his authority to sue in representative capacity, since this authority will be inferred from the claimant's identification of himself as a representative. If the defending party wishes to challenge that authority, however, he must raise the issue of lack of standing as a representative "by specific negative averment, which shall include such supporting particulars as are pecu-
The lack of standing will not always appear from the face of the complaint, however. The bailee of an automobile, for example, might bring an action for damages to the automobile even though he has no such right of action as bailee.\textsuperscript{207} If the complaint does not indicate the plaintiff's status as bailee, the action will appear to have been brought by one who is a real party in interest. In such a case, the defendant must take a cue from Rule 9(A) and meet the averments of the complaint with a specific negative averment as to standing, coupled with such supporting particulars as are peculiarly within the defendant's knowledge.

The validity of this defense will normally be determined as part of the adversary hearing, but there are a number of ways in which a pre-adversary hearing determination may be sought. Where the issue arises as a pure question of law from the face of the pleadings, as it might in a situation similar to \textit{Motorist Mutual Insurance Co. v. Cook}, a Rule 12(C) motion for judgment on the pleadings can be used for this purpose. Where the issue cannot be concluded from the face of the pleadings because additional evidence is required, a Rule 56 motion for summary judgment would be in order. The full discussion of both of these motions has been reserved for a later point in this article.

A third way of raising the question before the commencement of the adversary hearing is by a motion for a preliminary hearing similar to the Rule 12(D) motion. Technically, the Rule 12(D) motion does not lie since it may only be used in conjunction with a Rule 12(B) defense,\textsuperscript{208} and the objection to standing is not such a defense.\textsuperscript{209} But this technicality will not preclude "either party from moving for a preliminary

\textsuperscript{207} In pertinent part, \textit{Ohio Rev. Code Ann.} \textsection 4505.04 (Page 1973) provides that:

No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle sold or disposed of, or mortgaged or encumbered, unless evidenced: (A) By a certificate of title or a manufacturer's or importer's certificate issued in accordance with sections 4505.01 to 4505.19, inclusive, of the Revised Code. (B) By admission in the pleadings or stipulation of the parties.

Since the bailee's possessory interest in the automobile cannot be evidenced by a certificate of title, it is now fairly well settled that a court cannot recognize the bailee's claim for damages to the automobile. Moore v. Workman, 28 Ohio App. 2d 303, 277 N.E.2d 445 (1971). Thus, the bailee is not the real party in interest with respect to such a claim, and does not have standing to sue. But the defense of lack of standing may be waived under the provisions of \textit{Ohio Rev. Code Ann.} \textsection 4505.04(B) (Page 1973) if the bailee's complaint alleges that the automobile is "his," and the defendant's answer does not controvert that allegation, \textit{e.g.}, Duffey v. Cleveland Coin Mach. Exch., Inc., 77 Ohio L. Abs. 27, 138 N.E.2d 307 (Ct. App. 1956), or if the parties stipulate to the plaintiff's ownership of the automobile, \textit{e.g.}, Truitt v. Pennsylvania R. R., 68 Ohio L. Abs. 356, 122 N.E.2d 412 (Ct. App. 1953). However, if the bailee is obligated to repair the damage or indemnify the bailor, and does so, the bailee may have an action as subrogee of the bailor, and may establish his or her action for damages by proving the bailor-subrogor's title.

\textsuperscript{208} \textit{Ohio R. Civ. P.} 12(D) stipulates that it applies only to "the defenses specifically enumerated (1) to (7) in subdivision (B) of this rule, whether made in a pleading or by motion."

\textsuperscript{209} Unless, that is, it is considered an aspect of subject matter jurisdiction under the provisions of Civil 12(B)(1). \textit{See} notes 183 and 186 \textit{supra}.
hearing as a matter of right under the “common law.” Further, if some Rules authority for such a motion is thought necessary, it might be found under the provisions of Rule 21. If such a motion is made, will the proceeding on the motion amount to a “trial?”

In all probability it will, since the issue of standing in our present context arises on the pleadings, and its resolution will require the judicial examination of issues of fact and/or law. If the court ultimately dismisses the action, the dismissal will be the consequence of a “trial,” and a subsequent vacation of the dismissal and reinstatement of the case will, in effect, be an order for a “new” trial. Thus, the fourth test applies.

Finally, the court may take up the matter on its own motion prior to the commencement of the adversary hearing. If it does so, the result will be the same as if a party had moved for a preliminary hearing. Accordingly, the fourth test will again be applicable to the vacation of the dismissal.

(3) Dismissals during the Adversary Hearing
(Rules 17(A) & 41(B)(2))

As the Dallman,212 Cook,213 and Bates214 cases indicate, a dismissal for lack of standing may occur during the adversary hearing either pursuant to the court’s own motion, or pursuant to a motion to dismiss made by the defending party. If such a dismissal is granted, it will normally follow upon a judicial examination of the issues which arise on the pleadings. Such dismissals, however, will be relatively rare. A dismissal during the adversary hearing is far more likely to result from the application of Rule 41(B)(2).

In substance, Rule 41(B)(2) provides that when an action is tried to the court without a jury, the court, as trier of the facts, may dismiss the action at the close of the plaintiff’s evidence if it is satisfied that upon

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210 The essential difference between a “common law” motion for a preliminary hearing and a Rule 12(D) motion for a preliminary hearing lies in the trial court’s discretion. The trial court has complete discretion with respect to the “common law” motion, but none at all with respect to the Rule 12(D) motion. If the latter motion is properly made, the court must hear and determine the validity of the defense prior to the commencement of the adversary hearing. State ex rel. Keating v. Pressman, 38 Ohio St. 2d 161, 311 N.E.2d 524 (1974). See note 141 supra.

211 Under Rule 17(A), dismissal of the action for lack of standing is a last resort; the principal object of the Rule is the substitution of the real party in interest for the original claimant. Thus, in a real sense, the object of the defense of lack of standing is the dropping of the original claimant and the adding of the real party in interest. In this respect, Rule 21 provides that: “Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.” When the objection of lack of standing is included in the responsive pleading, it may be said, at least in a very rough way, that a motion for a preliminary determination of the validity of that objection is a motion to add and drop parties under the authority of Rule 21.


the facts and the law the plaintiff has shown no right to relief.\textsuperscript{215} Clearly, a prerequisite to such a dismissal is a judicial examination of the issues of law or of fact which arise on the pleadings.

Thus, whether the dismissal is for lack of standing under Rule 17(A), or for want of proof under Rule 41(B)(2), it will be a dismissal after trial. Accordingly, an order vacating the dismissal and reinstating the case will be an order for a "new" trial, and the fourth test for finality will be fully applicable.

Because dismissals are more complex than default judgments, any attempt to summarize the rules with respect thereto must necessarily result in a gross oversimplification. Nevertheless, such a summary is valuable because it will yield some rules which will apply in most cases.

As a general rule, when a motion for relief from a voluntary or involuntary dismissal is granted, the relief will be either the vacation of the judgment of dismissal and the setting down of the case for an adversary hearing on the merits, or the reinstatement of the action at the point where it was terminated by the dismissal with the intent that an adversary hearing on the merits will occur in due course. Since either party may prevail at the adversary hearing, the order vacating the dismissal will neither determine the action nor prevent a judgment, and will not be a final order under the first test for finality. One likely exception to this general rule is an order vacating a voluntary dismissal by court order after judgment. In such a case, the vacation of the dismissal will probably be accompanied by reinstatement of the original judgment. That being so, the action is determined, and a judgment in favor of the party who had obtained the dismissal is prevented. Accordingly, such an order is final under the first test.

The application of the fourth test for finality is more complex. Where the general rule with respect to relief applies, the order granting

\textsuperscript{215} In pertinent part, Ohio R. Civ. P. 41(B)(2) provides:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff.

In most cases, such an involuntary dismissal will not only be "on the merits" in the sense that we here use that term, but also in the res judicata sense, because the dismissal will follow upon the completion of the plaintiff's presentation of his or her case, and will be premised on a finding by the court that the plaintiff has shown no right to relief.

However, not every such judgment of dismissal need be on the merits in the res judicata sense. Rule 41(B)(2) includes the statement "[i]f the court renders judgment on the merits against the plaintiff," which implies that the court need not make the judgment against the plaintiff a judgment on the merits. Further, Rule 41(B)(3) authorizes the court to render Rule 41(B) judgments of dismissal without prejudice. In pertinent part, the Rule states: "A dismissal under this subdivision [i.e., subdivision (B) of Rule 41] and any dismissal not provided for in this rule . . . operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies." [Emphasis added.] No exception takes Rule 41(B)(2) dismissals out of this general grant of authority. Therefore, in a proper case, a court may order a dismissal without prejudice.

What is a proper case for such an order? Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967) gives the clue. If the court feels that the plaintiff can "fill a gap in his proof" if he has another chance to prove his case, it may dismiss without prejudice so that the plaintiff may commence a new action on the same claim. But this it may do only if the defendant would not be unduly prejudiced thereby.

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that relief may or may not be final under the fourth test, depending upon the point in the proceedings at which the dismissal took place. Generally, if the dismissal occurs at some point prior to the commencement of the adversary hearing it will occur before there has been a trial, and the order granting relief will not be an order granting a "new" trial. The most likely exception to this general rule is a dismissal for lack of standing when lack of standing does not clearly appear from the face of the pleadings. Such a dismissal will normally require a judicial examination of the issues which arise on the pleadings, and will thus follow upon a "trial."

If the dismissal occurs at some point during the adversary hearing, the applicability of the fourth test will depend upon what has occurred in the adversary hearing prior to the dismissal. If there has been some judicial examination of the issues which arise on the pleadings prior to the entry of the dismissal, the dismissal will have occurred subsequent to a trial, but if there has been no judicial examination of the issues which arise on the pleadings prior to the entry of the dismissal, there will not have been a trial. Accordingly, the order vacating the dismissal and setting the case down for trial may or may not be an order which also grants a "new" trial. If the dismissal is entered after the adversary hearing has been concluded, it will almost always be a dismissal after trial, and the order granting relief will be an order granting a "new" trial. As a general rule, then, the fourth test for finality will not apply if the dismissal takes place prior to the adversary hearing. It may or may not apply, depending upon timing and circumstances, if the dismissal takes place during the adversary hearing, and it will apply if the dismissal takes place after the adversary hearing has been concluded.

C. Cognovit Judgments

The next major class of judgment listed in the Matson v. Marks schema is the cognovit judgment entered on a confession of judgment pursuant to a warrant of attorney. No doubt this class of judgment is so described because the bulk of such judgments arise out of cognovit notes which contain a warrant of attorney authorizing the confession of judgment. However, not all judgments by confession are cognovit judgments, so we must first examine judgments by confession in general before proceeding to cognovit judgments.

1. Judgments by Confession in General
(Ohio Revised Code section 2323.12)

Section 2323.12 of the Ohio Revised Code authorizes a person indebted, or against whom a cause of action exists, to personally appear in a court of competent jurisdiction and, with the assent of the creditor or person having such cause of action, confess judgment. The statute also provides that the debt or cause of action shall be briefly stated in the judgment, or in a writing to be filed as a pleading in other actions.

\[\text{Note} 4 \text{ supra.}\]
This latter provision is of some importance, since it implies that the confession of judgment may occur before suit on the debt or cause of action has actually been commenced.\(^{217}\) Suppose that such a judgment is entered without suit having been commenced, and suppose that the person confessing judgment later seeks relief from that judgment pursuant to a timely made Rule 60(B) motion for relief from judgment. If the motion is well-taken, what relief can the court grant? Since there is no action in existence, about the only relief which the court can grant is the vacation of the judgment. The judgment creditor would then be free to commence an action against the judgment debtor.

Will the order vacating the confessed judgment be a final order? If the judgment creditor is free to commence an action against the judgment debtor,\(^{218}\) the order will not be final under the first test for finality. Since such an action will be the original action, and since either party may prevail in the action, the vacation of the judgment does not affect a substantial right in an action, and neither determines the action nor prevents a judgment for the judgment creditor. Thus, none of the three requirements of the first test of finality is met. Likewise, the fourth test does not apply because the order vacating the judgment cannot also provide for a "new" trial, there never having been an original trial. Indeed, there could not have been an original trial because there are no pleadings, let alone issues arising on the pleadings. Nor does the third test apply, because while the motion for relief from the judgment may very well be a summary application, it is not a summary application in an *action* after judgment. Thus, if the order is to be final at all, it will have to be final under the second test as an order affecting a substantial right made in a special proceeding. Under these peculiar circumstances, it is at least theoretically possible that the summary proceeding to vacate the judgment qualifies as a special proceeding.

It may be supposed, however, that confessions of judgment before suit is commenced will be extremely rare; they are far more likely to occur after the complaint has been filed and service obtained.\(^{219}\) Moreover, in any given case, they may not occur until after the answer has been served and filed as well.\(^{220}\) If the judgment debtor personally

\(^{217}\) The court stated in Lessee of Matthews v. Thompson, 3 Ohio 272, 273 (1827): "The objection to the want of process and pleadings can not be sustained. Judgments confessed in person, or by power of attorney, in open court, are valid without process; and as an issue is not required in such cases, the pleadings may be dispensed with."

\(^{218}\) The only likely bar to such an action would be the statute of limitations. However, there is little doubt that the party confessing judgment would be estopped from pleading the running of the statute of limitations. *See* Markese v. Ellis, 11 Ohio App. 2d 160, 229 N.E.2d 70 (1967).

\(^{219}\) This is the equivalent of the old common law judgment by cognovit actionem. After service, and in lieu of entering a plea to the declaration, the defendant acknowledged and confessed that the plaintiff's cause of action was just and rightful. 47 AM. JUR. 2d *Judgments* § 1098 (1969).

\(^{220}\) This is the equivalent of the old common law judgment by confession *relicta verificatione*. After pleading, but before trial, the defendant both confessed the plaintiff's cause of action and withdrew or abandoned his plea or other allegations, whereupon judgment was entered against him without proceeding to trial. 47 AM. JUR. 2d *Judgments* § 1098 (1969).
appears and confesses judgment in open court, the judgment will be a proper judgment by confession under Ohio Revised Code section 2323.12.\textsuperscript{221} When the judgment debtor does not personally appear in open court, but confesses judgment through an attorney or through a responsive pleading, the judgment is technically a judgment by consent and not a judgment by confession.\textsuperscript{222} For most purposes, however, the distinction between the two types of judgment is not a meaningful one.\textsuperscript{223}

When the offer of judgment is made after suit has been commenced, the judgment rendered must conform to the cause of action stated in the complaint.\textsuperscript{224} Thus, the court must examine the complaint to determine whether a claim for relief has been stated, and whether the offer of judgment corresponds to that claim. This examination does not amount to a trial in the technical sense of the word because it is not a judicial examination of the issues of law or fact which arise on the pleadings. The fact that no issues arise on the pleadings precludes the designation of the confession of judgment as a trial because the offer to confess judgment or to have judgment entered by consent admits the truth of the plaintiff’s claim, thereby eliminating the controversy which is essential to the production of issues on the pleadings.\textsuperscript{225} This is true even when

\begin{itemize}
\item \textsuperscript{221} Rosebrough v. Ansley, 35 Ohio St. 107 (1878).
\item \textsuperscript{222} Id.
\item \textsuperscript{223} According to Rosebrough v. Ansley, supra note 221, a judgment by consent is not valid unless the record reflects a cause of action existing against the party consenting to the judgment. As a general rule, such a cause of action must be found in the pleadings, and the judgment by consent is valid only to the extent that it is premised on the issues raised by the pleadings. This limitation ordinarily will not apply to judgments by confession, since in the latter there may not be any pleadings. Instead, the record is made to reflect the cause of action against the party confessing judgment either through a brief statement of the cause of action in the judgment entry itself, or by a recitation of the cause of action in a writing to be filed as a pleading in another action. See Ohio Rev. Cod. Ann. § 2323.12 (Page 1954).
\item \textsuperscript{224} The court stated in Rosebrough v. Ansley, 35 Ohio St. 107, 111-12 (1878):

\begin{quote}
Whether the parties to a judgment consent or dissent, the judgment must nevertheless be regarded as the act and decision of the court, and, if the court be without authority in the premises, its judgment can not be sustained on the ground that consensus tollit errorem.
\end{quote}

No one would contend that a judgment would be sustained on the ground of consent if the record showed that no cause of action existed against the party consenting; and we think it equally fatal to a judgment under our practice, if no statement of the cause of action appear on the record. In ordinary practice the cause of action must be stated in the pleadings, and the judgment must be confined to the cause of action so stated.

\begin{quote}
We must therefore look to the pleadings for the statement of the cause of action. The court of common pleas had no power or authority to render judgment upon any other or different cause of action. Notwithstanding the written consent on file, it was the duty of the court to look into its record and ascertain whether the cause was one in which a judgment could be properly rendered, and to limit its judgment to and by the cause of action therein stated.
\end{quote}

In saying this, the supreme court recognized one exception — a true judgment by confession made before suit was commenced. In such a case, the court noted, there are no pleadings, and it is sufficient if the cause of action is "stated on the record, either in the judgment or in a writing filed as pleadings" in other actions. 35 Ohio St. 107, 112 (1878).
\end{itemize}

\textsuperscript{225} See note 219 supra.
the offer of judgment is made after the service and filing of an answer which controverts the allegations of the complaint, since the offer of judgment is the equivalent of withdrawal of the answer. Therefore, when the offer of judgment is accepted and judgment entered, the judgment is entered before there has been a trial as that term is defined in Ohio Revised Code section 2311.01. That being so, a later order vacating the judgment and setting the case for adversary hearing is not an order which mandates a "new" trial, and is not final under the fourth test for finality. Further, since either party may prevail at the adversary hearing to come, it is not an order which determines the action and prevents a judgment for the party in whose favor the judgment by confession or consent had been entered. Consequently, it is not a final order under the first test for finality.

2. Judgments by Confession Pursuant to a Warrant of Attorney
   (Ohio Revised Code section 2323.13)

   As noted above, these judgments are commonly referred to as cognovit judgments because they so frequently arise out of cognovit notes. As a general rule, such judgments are still valid in Ohio, although there are some statutory limitations on their use.

   Cognovit judgments by confession pursuant to warrant of attorney may be vacated just as other judgments, but the ground for vacation may well determine the method of seeking relief and whether the order granting relief is final. If the ground for relief is lack of subject matter jurisdiction over the action because the warrant of attorney is invalid, relief may not be sought under the provisions of Rule 60(B). Such a judgment is void, and Rule 60(B) does not extend to void judgments.

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226 See note 220 supra.
227 Ohio Rev. Code Ann. § 2323.13 (Page Supp. 1976) declares invalid a warrant of attorney to confess judgment if it is contained in any instrument executed on or after January 1, 1974, arising out of a consumer loan or consumer transaction, and stipulates that the courts do not have jurisdiction to render a judgment based upon such a warrant. Warrants of attorney to confess judgment contained in other instruments are invalid, and the courts are without jurisdiction to render judgment thereon, unless the instrument contains a warning which complies with the statutory mandate as to wording and location. For a critique of the statute, see Buckley, Jr., Recent Consumer Protection Legislation in Ohio, 22 Clev. St. L. Rev. 393, 419-42 (1973).
228 Warrants of attorney to confess judgment are invalid if they are found in instruments arising out of consumer loans or consumer transactions, or if they are found in other instruments which do not contain the warning prescribed by Ohio Rev. Code Ann. § 2323.13 (Page Supp. 1976). That statute also stipulates that courts do not have jurisdiction to render judgment on an invalid warrant of attorney. See note 227 supra. Thus, if the warrant of attorney is invalid, the court does not have subject matter jurisdiction of the action.
229 See, e.g., Antonopoulos v. Eisner, 30 Ohio App. 2d 187, 284 N.E.2d 194 (1972), and the Rules Advisory Committee Staff Note to Ohio R. Civ. P. 60(B). The Advisory Committee stated:

   It should be noted that [Ohio] Rule 60(B), unlike Federal Rule 60(b) does not provide for the vacation of a void judgment. It is obvious that if a court did not have jurisdiction that a judgment rendered when jurisdiction was not present is void. Any court has inherent power to vacate a void judgment without the vacation being subject to a time limitation. The vacation of a void judgment

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An appropriate vehicle for seeking relief on this ground would be a combination motion to vacate the judgment because it is void, and to dismiss the action for lack of subject matter jurisdiction. If such a motion were granted, the order vacating the judgment and dismissing the action would be final under the first test for finality since it determines the action and prevents a judgment for the plaintiff.

If the warrant of attorney is valid, relief from such a judgment may nevertheless be obtained under the provisions of Rule 60(B)(5) on the ground that the judgment debtor did not receive prior notice of the action and has a valid defense to all or part of the claim. Relief from the judgment may also be premised on any other applicable ground listed in Rule 60(B), but as a practical matter, only one other ground is likely to be available — the fraud, misrepresentation or other misconduct of the adverse party in taking the cognovit judgment. In addition to establishing the existence of a recognized ground for relief, the judgment debtor seeking relief must also tender a defense to the judgment creditor's claim. The accepted practice in setting forth the defense is to

might be brought in the form of a motion or perhaps in the form of a procedural device such as a declaratory judgment action.

Such a motion would seem to comply with the Rules Advisory Committee's suggestion that the vacation of a void judgment "might be brought in the form of a motion." See note 229 supra.

But such an order would not necessarily prevent a judgment for the plaintiff in a new action, properly commenced, which complies with the requirements of Ohio Rev. Code Ann. § 2323.13(E) (Page Supp. 1976). As previously stated in note 122 supra, a dismissal for lack of subject matter jurisdiction is a dismissal otherwise than upon the merits, and permits the commencement of a new action on the same claim.

Matson v. Marks, 32 Ohio App. 2d 319, 291 N.E.2d 491 (1972). In this case the Court of Appeals for Franklin County noted that the Code of Civil Procedure of the State of Ohio § 534, 1877 Ohio Laws 115 (codified at Ohio Rev. Code Ann. § 2325.01 (Page 1954) (repealed 1970)) provided for relief from judgment after term "for taking judgments upon warrants of attorney for more than was due the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgments," that this ground is also one which could be asserted by motion to vacate made during term, and that "[p]ursuant to Civ. R. 60(B)(5), any grounds which constituted a cause for the vacation of a judgment during term prior to the adoption of the Civil Rules continues to constitute grounds for relief from judgment even though not specifically set forth in Rule 60(B)." Id. at 322, 291 N.E.2d at 494.

The court's conclusion from all of this is summed up in paragraph 4 of the syllabus: "The existence of a valid defense to all or part of the claim constitutes a ground for relief from a cognovit judgment entered by confession upon a warrant of attorney without prior notice to the defendant." Id. at 319, 291 N.E.2d at 493 (1959).

Livingstone v. Rebman, 169 Ohio St. 109, 158 N.E.2d 366 (1959). This particular ground is now found in Ohio R. Civ. P. 60(B)(3). For an attempted application of Rule 60(B)(3), see Cautela Bros. v. McFadden, 32 Ohio App. 2d 329, 291 N.E.2d 539 (1972).

The requirement that a defense be tendered clearly appeared in the Code of Civil Procedure of the State of Ohio § 536, 1877 Ohio Laws 115 (codified at Ohio Rev. Code Ann. § 2325.05 (Page 1954) (repealed 1970)):

Proceedings to vacate a judgment or order on the grounds mentioned in divisions (D) to (J), inclusive, of section 2325.01 of the Revised Code, shall be by petition, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and, if the party applying was defendant, the defense to the action.

Although this section was impliedly repealed on July 1, 1970, as being in conflict with Ohio R. Civ. P. 60(B), and expressly repealed for that reason by Act of June 5, 1970, 1969-70 Ohio Laws 3017, cases decided subsequent to 1971 have incorporated its "tender of defense" provisions into the "common law" of Rule 60(B). See GTE Automatic Elec.,
tender an answer to the plaintiff's complaint. If the rules of pleading would be offended by incorporating sufficient facts in the answer to disclose the defense, the motion for relief from judgment and the tendered answer may be supported by documentary evidence in testimonial form from which the prima facie validity of the defense may be determined.

If the judgment debtor's motion for relief from judgment is successful, the type of relief granted may depend upon the interrelationship between the ground for relief and the tendered defense to the judgment creditor's claim. In ruling on the motion for relief from judgment, the court must first determine if there is a valid ground for relief, and then whether the tendered defense would be a tenable defense if ultimately proven. Where the proof establishing the ground for relief from the judgment is unrelated to the proof tending to establish the validity of the defense, and the court finds in favor of the movant on both points, the court should suspend the judgment and set the case down for an adversary hearing on the validity of the defense.

Obviously, such an order suspending the judgment and setting the case for adversary hearing is not a final order under the first or fourth test for finality. It is not final under the first test because either party may prevail at the adversary hearing. Thus, the order neither determines the action nor prevents a judgment for the judgment creditor. It is not final under the fourth test because the judgment is merely suspended rather than vacated. But even if the judgment were vacated,
it would not be final under the fourth test because the adversary hearing ordered is an original trial rather than a new trial. The confession of judgment pursuant to warrant of attorney in the original proceedings conceded all of the facts and conclusions of law alleged in the judgment creditor's complaint. Since none of those facts or conclusions was controverted no issues arose on the pleadings; whatever judicial examination there may have been in the original proceeding, there was no judicial examination of issues of law or fact which arose on the pleadings, and therefore no trial as that term is defined in Ohio Revised Code section 2311.01.

Where the proof establishing the ground for relief is the same proof which tends to establish the validity of the defense, and the court finds in favor of the movant on both points, the type of relief to be granted will depend upon whether the evidence offered in support of the defense is such that reasonable minds might reach different conclusions. If there is credible evidence supporting the defense from which reasonable minds might differ, it is the duty of the court to suspend the judgment and permit the issue raised by the pleadings — the complaint and the answer tendered as part of the motion for relief from judgment — to be tried by the trier of fact. Again, the order suspending the judgment and setting the case for adversary hearing will not be a final order under the first or fourth tests for finality for the reasons given above. However, if there is credible evidence supporting the defense from which reasonable minds could not reach different conclusions, the court may determine the validity of the defense as a matter of law. If it makes that determination in favor of the judgment debtor, it should vacate the judgment and dismiss the judgment creditor's action with prejudice. Such an order would be final under the first test for finality since it determines the action and prevents a judgment for the judgment creditor.

In summary, there are two possible dispositions of a cognovit judgment by confession pursuant to a warrant of attorney. The judgment may be suspended and the case set for an adversary hearing on the validity of the judgment debtor's defense, or the judgment may be vacated and the judgment creditor's case dismissed. The first disposition will not result in a final order under the first or fourth tests for finality, but the second disposition will be a final order under the first test.

As it is said in Livingstone v. Rebman, 169 Ohio St. 109, 121-22, 158 N.E.2d 366, 375 (1959):

Where, however, proof of the ground that judgment was taken "upon warrants of attorney for more than was due the plaintiff" is dependent upon the same evidence that proves a defense, whether that defense be one of payment, statute of limitations, forgery, lack of consideration, or any other defense that would show that the judgment is for more than was due, we conceive the duty of the trial judge to be similar to his duty where he is confronted with a motion for a directed verdict at the close of all the evidence. That is, if there is credible evidence supporting the defense (which would, as a matter of course, establish the ground) from which reasonable minds may reach different conclusions, it is then the duty of the court to suspend the judgment and permit the issue raised by the pleadings to be tried by a jury or, if a jury is waived, by the court.
D. JUDGMENTS ENTERED FOLLOWING AN ADVERSARY HEARING

The final classification of judgment included in the Matson v. Marks schema is the judgment entered following an adversary hearing. This classification may be divided into at least three subclassifications: judgments entered after an adversary hearing on the merits, judgments entered pursuant to a motion for summary judgment, and judgments entered pursuant to some other motion. This third subclassification can be further divided into three categories: judgments of dismissal entered pursuant to a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, judgments entered pursuant to a Rule 12(C) motion for judgment on the pleadings, and judgments of dismissal entered pursuant to a Rule 12(F) motion to strike an insufficient claim or defense from the pleadings. Each of these will be treated in the following discussion.

1. Judgments Entered after an Adversary Hearing on the Merits

The judgments that may be entered after an adversary hearing are almost infinite in variety, and it would be impossible to consider all of them here. Further, in most cases, there is little to be gained by approaching the problem from the point of view of the original judgment. In most cases, the type of judgment will be immaterial. What will be important is the type of relief granted. Therefore, let us begin by positioning a simple fact situation which will avoid a discussion of the nature of the original judgment, but which will nevertheless provide a framework for an analysis of the order granting relief from judgment.

Plaintiff commences the action by filing a complaint against defendant. Defendant serves and files an answer which controverts the allegations of fact and conclusions of law contained in the complaint. In due time the action is heard, and both sides put on their evidence. The trier of fact finds for the plaintiff, and the court enters judgment in accordance with that finding. The defendant makes a timely and properly supported motion for relief from judgment under the provisions

\[241\] 32 Ohio App. 2d 319, 291 N.E.2d 491 (1972). For the actual text of the schema, see note 4 supra.

\[242\] A summary of the procedure to be followed in making such a motion is contained in Adomeit v. Baltimore, 39 Ohio App. 2d 97, 316 N.E.2d 469 (1974) (syllabus at ¶ 2):

In order to obtain relief under Civil Rule 60(B), the movant must file a motion as provided for in Civil Rule 7(B). He must also file a brief or memorandum of fact and law, and affidavits, depositions, answers to interrogatories, exhibits and any other relevant material. The material submitted must contain operative facts which demonstrate:

1. Timeliness of the motion. The motion must be filed within a reasonable time and for reasons stated in Civil Rule 60(B)(1), (2) and (3) not more than one year after the judgment order or proceeding was entered or taken.

2. Reasons for seeking relief. Operative facts which will demonstrate that the party is entitled to relief under one of the grounds stated in Civil Rule 60(B)(1) through (5).


In the context of this discussion, it may be doubted whether a defense need be shown unless the ground for relief is that the defendant had a defense to the plaintiff's action which he was unable to present at the adversary hearing; normally, a defense need

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of Rule 60(B). After an oral hearing\textsuperscript{243} and due deliberation, the court grants the motion.

As a general rule, it may be said that an order granting relief in these circumstances will be a final order under either the first or fourth test for finality. But the general rule will not apply in every case. In a given situation, the finality of the order granting relief under either of these two tests may well depend upon the grounds for relief and the type of relief granted. Therefore, we must explore each type of relief which may be granted, and note how that relief may be influenced by the grounds urged in support of the motion for relief from judgment.

\textit{a. The Vacation or Setting Aside of the Judgment}

Normally, an order vacating or setting aside a judgment will be accompanied by an order granting a new adversary hearing. However, in some cases the proper relief as dictated by the ground for relief, will be the simple vacation or setting aside of the judgment. Such a situation occurs when the ground for relief is that contained in Rule 60(B)(1) or 60(B)(5).

\textbf{(1) Mistake or Other Just Reason for Relief}

\textbf{(Rule 60(B)(1) & (5))}

Suppose that the judgment is contrary to law because of an error of law made by the court at some point in the proceedings. The basic facts of \textit{Smith v. Globe American Casualty Co.}\textsuperscript{244} will serve as an example. Plaintiff brought an action for a declaratory judgment to determine whether he could recover benefits under an uninsured motorist's provision in his insurance policy. Defendant defended on the ground that the policy was cancelled at the time of the accident. Defendant proved that prior to the accident it had mailed notice of cancellation to the plaintiff at the address shown in plaintiff's policy, and argued that under the terms of the policy this was sufficient to effect a cancellation of the policy. Plaintiff testified that he had never received the notice of cancellation. The trial court held that mere mailing of the notice was not enough, and that actual receipt of the notice was required for cancellation.

\textsuperscript{243} The rules with respect to the grant of an oral hearing are summed up in Adomeit v. Baltimore, 39 Ohio App. 2d 97, 316 N.E.2d 469 (1974) (syllabus at ¶ 4): If the material submitted by the movant in support of a motion for relief from judgment under Civil Rule 60(B) contains no operative facts or meager and limited facts and conclusions of law, it will not be an abuse of discretion for the trial court to overrule the motion and refuse to grant a hearing. If the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under Civil Rule 60(B), the trial court may grant a hearing to take evidence and verify the facts before it rules on the motion. This is proper and is not an abuse of discretion. If, under the foregoing circumstances, the trial court does not grant a hearing and overrules the motion without first affording an opportunity to the movant to present evidence in support of the motion, its failure to grant a hearing is an abuse of discretion.

\textsuperscript{244} 38 Ohio Misc. 82, 313 N.E.2d 21 (C.P. 1973).
Judgment was for the plaintiff. Because the court's interpretation of the law with respect to receipt of the notice of cancellation was erroneous, the judgment was contrary to law. Although it has been said that the correction of judicial error is the function of an appeal and that Rule 60(B) may not be used as a substitute for an appeal, there is authority for the proposition that a judgment contrary to law because of judicial error may be reached by a Rule 60(B) motion for relief from judgment. This proposition may be justified either on the theory that the judicial error is a "mistake" under the provisions of Rule 60(B)(1), or that it is "any other reason justifying relief from the judgment" under the provisions of Rule 60(B)(5). Assuming that these theories are correct, the appropriate relief from the erroneous judgment may well be the vacation of the judgment and the dismissal of plaintiff's case. Such relief might have been given in Smith v. Globe American Casualty Co. had the plaintiff sued for breach of contract rather than for a declaratory judgment, and had the defendant moved for relief from the erroneous judgment. Where such relief is granted, the order vacating the judgment will normally be final under the first test for finality since it determines the action and prevents a judgment for the plaintiff.

(2) Fraud, Misrepresentation or Other Misconduct (Rule 60(B)(3))

A like result could be reached when the ground for relief is the fraud, misrepresentation or other misconduct of the adverse party. If the plaintiff's claim is without any legal basis apart from the plaintiff's fraud, and the judgment in plaintiff's favor was obtained by means of that fraud, the appropriate relief would be the vacation of the judgment and dismissal of the plaintiff's claim. Since an order granting such relief would determine the action and prevent a judgment for the plaintiff, it would be a final order under the first test for finality.

(3) Judgment Satisfied, Released, or Discharged (Rule 60(B)(4))

Normally, when a judgment has been satisfied, released, or discharged the relief to be granted is the entry of a notation to that effect in the record, or in an appropriate case, a modification of the judgment

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245 Smith v. Globe Am. Cas. Co., No. 33095 (Ohio Ct. App. 8th Dist., filed April 18, 1974). The Court of Appeals, however, sustained the judgment for the plaintiff on another ground.


248 Schildhaus v. Moe, 335 F.2d 529 (2d Cir. 1964); Tarkington v. United States Lines Co., 222 F.2d 358 (2d Cir. 1955).

249 The primary case on this subject appears to be Buckman v. Goldblatt, 39 Ohio App. 2d 1, 314 N.E.2d 188 (1974), but support can also be found in Madison v. Curry, 323 N.E.2d 719 (Ohio Ct. App. 1975), and Blank v. Snyder, 33 Ohio Misc. 67, 291 N.E.2d 796 (Mun. Ct. 1972).
to reflect the extent to which it has not been satisfied, released, or dis-
charged.250 An example of the notation in the record can be found in
Mid-Continent Refrigerator Co. v. Whitterson.251 In that case, judg-
ment was taken against the defendant and his surety. The plaintiff
levied execution on goods belonging to the defendant, but then, with-
out notice to the surety, withdrew the levy. As a result of the withdrawal
of the levy, defendant's goods, which had a value in excess of the amount
of the judgment, either decayed or were stolen, and the surety's subro-
gation rights against the defendant were effectively defeated. Plaintiff
then proceeded to collect the judgment from the surety, and the surety
moved for relief from judgment on the ground that the judgment had
been discharged as to him by the withdrawal of the levy without notice.
The trial court denied the motion, and the surety appealed. The Court
of Appeals for Hamilton County reversed, holding that the surety was dis-
charged to the extent of the decrease in the value of the defendant's
goods. It went on to note that since the decrease in the value of the
goods was in excess of the amount of the judgment, the surety was dis-
charged and the judgment was to be declared satisfied.

Suppose that instead of overruling the motion in Whitterson, the trial
court had granted it and entered a notation to the effect that the surety
was discharged and the judgment satisfied. Would such an order be
appealable? Clearly, it would not under the fourth test for finality,
since there was no accompanying grant of a new trial. Whether the
order would be final under the first test is a closer question. There is
no doubt that such an order affects a substantial right — the plaintiff's
right to collect the judgment. Likewise, it determines the action since
there are no further obligatory requirements imposed on any of the par-
ties by the Rules or the applicable procedural statutes. The problem
point is whether it prevents a judgment for the plaintiff. If the language
of Ohio Revised Code section 2505.02 is taken literally, it is obvious that
it does not; the judgment in favor of the plaintiff remains a matter of
record, and is in no sense vacated or set aside. Effectively, however,
such an order does prevent a judgment in the sense that the plaintiff
cannot execute upon the judgment or otherwise collect it. From the
plaintiff's point of view, he has a judgment that isn't worth the paper it
is written on. While that may be a consideration of some moment to
the plaintiff, it is of no concern to the law. Since the plaintiff has the
judgment, and since it is presumed to have been satisfied, the law will
not view the judgment as having been "prevented." Therefore, the order
declaring the judgment satisfied is not one which is appealable under the
first test for finality.

Not all cases, however, will result in the simple annotation to or
modification of the judgment. In some situations, vacation of the judg-
ment will be warranted. A slight variation of the facts in Schmelzer v.

250 See, e.g., Snowden v. D.C. Transit Sys., Inc., 454 F.2d 1047 (D.C. Cir. 1972), in
which the judgment was reduced by $5,000 to reflect the amount paid to the plaintiff by a
co-defendant who had settled during trial.

251 32 Ohio App. 2d 227, 289 N.E.2d 379 (1972). Modification of the judgment is a

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Farrar will illustrate. Plaintiff brought an action against Farrar and Secrest as joint tortfeasors. Prior to the commencement of trial, plaintiff and Farrar entered into a covenant not to sue, under the terms of which Farrar paid plaintiff the sum of $8,500. The existence of this covenant was kept secret from both the court and defendant Secrest, and the action proceeded to trial against both defendants. The jury found against both in the amount of $6,075, and judgment was entered in plaintiff's favor for that amount. Thus, the amount paid by Farrar in consideration for the covenant not to sue was in excess of the amount of plaintiff's damages as found by the jury and confirmed by the judgment. That being so, the payment of the $8,500 by Farrar effectively released Secrest from any liability to the plaintiff. Had Secrest known of the covenant before the end of the trial she would have been required to interpose the defense of release at the trial, but here she did not learn of it until after judgment had been entered. Under these circumstances, it would seem that a Rule 60(B)(4) motion for relief from judgment due to satisfaction would be an appropriate vehicle for raising the defense, and the vacation of the judgment against Secrest would seem an appropriate form of relief. Obviously, such an order would be final under the first test for finality since it affects a

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253 The court of appeals was quite critical of this procedure: Although we do not condone the tactics of plaintiff in executing a covenant not to use [sic], the existence of which was concealed from defendant Secrest, and proceeding to trial against both defendant Farrar and defendant Secrest as if such covenant had not been executed, we fail to find any reason why the covenant not to sue should have any different effect because of the circumstances.

254 Here, we depart from the facts of the actual case. In the actual case, the jury found for Secrest, but against Farrar. Plaintiff moved for judgment notwithstanding the verdict, but this motion was overruled. On the first appeal (40 Ohio App. 2d 440, 390 N.E.2d 707) the court of appeals reversed and remanded the case for an entry of judgment against Secrest on the question of liability, and a new trial on the question of damages. On remand, however, the trial court entered summary judgment for Secrest, and the plaintiff again appealed. Once again, the court of appeals reversed and remanded for a new trial on the question of damages. In the meantime, the judgment against Farrar had been vacated by the trial court as being null and void in light of the covenant not to sue. Since this effectively nullified the only jury finding with respect to damages, the question of the plaintiff's actual damages was an open one, and the court of appeals could not say as a matter of law that the amount paid by Farrar for the covenant not to sue was full compensation to the plaintiff.

255 If the plaintiff has received full satisfaction for his damages under a covenant not to sue, other defendants jointly or severally liable for those damages are released, and further action against them is barred. See Riley v. Cincinnati, 46 Ohio St. 2d 287, 348 N.E.2d 135 (1976); Whitt v. Hutchinson, 49 Ohio St. 2d 53, 330 N.E.2d 678 (1975); Diamond v. Davis Bakery, 8 Ohio St. 2d 38, 222 N.E.2d 430 (1966); Baeik v. Weaver, 173 Ohio St. 214, 180 N.E.2d 820 (1962); Cleveland Ry. v. Nickel, 120 Ohio St. 133, 165 N.E. 719 (1926); and Adams Express Co. v. Beckwith, 100 Ohio St. 348, 126 N.E. 300 (1919).


257 Apparently, Secrest first learned of the covenant not to sue when the trial court vacated its judgment against Farrar. See note 254 supra.
substantial right in an action, in effect determines the action, and pre-
vents a judgment for the plaintiff.

Although there is authority for the use of a Rule 60(B)(4) motion in
a Schmelzer-type situation, an objection to its use may be inter-
posed on technical grounds. Ohio Rule 60(B)(4), and its counterpart in
Federal Rule 60(b)(5), speak of the satisfaction, release or discharge of
a judgment. But a pre-judgment acceptance by the plaintiff of full satis-
faction for his damages, whether by covenant not to sue or a qualified
or unqualified release, releases the cause of action against other joint
or concurrent tortfeasors and not the judgment against them. Thus,
in a Schmelzer-type situation, where the covenant not to sue or the re-
lease is concealed from the court and the other defendants, a more
technically correct motion for relief is one grounded on surprise (Rule
60(B)(1)), on newly discovered evidence (Rule 60(B)(2)), on fraud, mis-
representation or other misconduct of the adverse party (Rule 60(B)(3)),
or on any other reason justifying relief from the judgment (Rule 60(B)(5)).
Where the existence of the covenant or release is discovered after the
pleadings but before the conclusion of the trial, and the court does not
permit an amended answer or supplemental answer raising the defense
of release, the motion for relief might more properly be grounded on
mistake of the court (Rule 60(B)(1)).

If a motion for relief is sustained on any of these grounds, the relief
to be granted will depend upon whether the full satisfaction of plain-
tiff’s damages is established as a matter of law, or whether this ques-
tion must be determined by the trier of fact. If the former, the court
may vacate the judgment, an order which is final under the first test
for finality, or it may enter a notation to the effect that the judgment
has been satisfied or released, an order which is not final under either
the first or fourth tests for finality. If the latter, the court may suspend
the judgment and set the case for a new adversary hearing, an order
which is not final under either the first or fourth tests for finality, or
it may vacate the judgment and set the case for a new adversary hear-
ing, and order that is final under the fourth test for finality. Thus, of
the four possible orders that the court might enter for the purpose of
granting relief from the judgment, one is final under the first test, one
is final under the fourth test, and two are not final under either test.

(4) Prior Judgment Reversed or Vacated (Rule 60(B)(4))

When a second judgment is based on a prior judgment in the sense

Willits impliedly recognized the use of such a motion, but disallowed it under the facts of that case because the defense of release
had not been interposed at the trial of the action.

Professor Moore raises this point in his critique of Snowden v. D.C. Transit Sys., Inc., 454 F.2d 1047 (D.C. Cir. 1972); Willits v.
Yellow Cab Co., 214 F.2d 612 (7th Cir. 1954). Willits impliedly recognized the use of such a motion, but disallowed it under the facts of that case because the defense of release
had not been interposed at the trial of the action.

See note 259 supra.
that the prior judgment is either \textit{res judicata} as to the second, or works a collateral estoppel with respect to an essential issue upon which the second judgment is based, and the prior judgment is reversed or otherwise vacated, the party against whom the second judgment has been entered may move, under the provisions of Rule 60(B)(4), for relief from the second judgment. If the motion is granted, the logical relief to be awarded is the vacation or setting aside of the second judgment. An order granting that relief would be final under the first test for finality, since it determines the second action and prevents a judgment for the party in whose favor the judgment had been entered.

Relief from judgment on this ground, however, is not available when the second judgment is "based" on the prior only in the sense that the prior judgment serves as legal precedent for the second.\footnote{Lubben v. Selective Serv. Sys., 453 F.2d 645 (1st Cir. 1972); Berryhill v. United States, 199 F.2d 217 (6th Cir. 1952).} Where the only connection between the two judgments is a precedential one, and the prior judgment is reversed by an appellate court, relief from the second judgment, if available at all under the provisions of Rule 60(B),\footnote{The most appropriate method for obtaining relief from the second judgment in this situation is an appeal. Bartlett v. Bartlett, 176 Ohio St. 299, 199 N.E.2d 586 (1964). \textit{But see} Clark v. Iles, 10 Ohio App. 2d 135, 226 N.E.2d 797 (1965) (syllabus), where it is said, "The failure of a trial court to conform its judgment to a specific pronouncement of law by the Supreme Court of Ohio, when afforded an opportunity to do so by a motion to vacate filed during the same term of court, constitutes reversible error." This position, however, is so contrary to the tone and tenor of LaBarbera v. Batsch, 10 Ohio St. 2d 106, 227 N.E.2d 55 (1967), that it may be doubted whether it is a correct statement of the Ohio law.} will be available on the ground of mistake by the court, and this only if the motion for relief is made within the time for taking an appeal from the second judgment.\footnote{See Schildhaus v. Moe, 335 F.2d 529 (2d Cir. 1964), where the court found that: Under such circumstances there is indeed good sense in permitting the trial court to correct its own error and, if it refuses, in allowing a timely appeal from the refusal; no good purpose is served by requiring the parties to appeal to a higher court, often requiring remand for further trial proceedings, when the trial court is equally able to correct its decision in the light of new authority on application made within the time permitted for appeal, \textit{cf.} McDowell v. Celebrezze, 310 F.2d 43 [(5th Cir. 1962)]. But nothing in the Rule, the cases, or the treatises suggests that a motion for relief from judicial error more than eight months after the entry of judgment is made "within a reasonable time" as the Rule requires. "Rule 60(b) was not intended as a substitute for a direct appeal from an erroneous judgment." Hartman v. Lauchli, 304 F.2d 431, 432 [(8th Cir. 1962)]; Wagner v. United States, 316 F.2d 871 [(2d Cir. 1963)]. Professor Moore says that a reasonable time for making a motion under Rule 60(b) on the basis of judicial error should not exceed that allowed for an appeal. Not all courts, however, recognize mistake as a ground for relief from an erroneous judgment. \textit{See}, \textit{e.g.}, Silk v. Sandoval, 435 F.2d 1266, 1267-68 (1st Cir. 1971), where the court stated that: We neither understand the basis for this interpretation, nor sympathize with it. If the court merely wrongly decides a point of law, that is not "inadvertence, surprise, or excusable neglect." Moreover, these words, in the context of the rule, seem addressed to some special situations justifying extraordinary relief. Plaintiff's motion is based on the broad ground that the court made an erroneous ruling, not that the mistake was attributable to special circumstances. We would apply the same equitable conception to "mistake" as seems implicit in the three accompanying grounds, under the principle of \textit{noscitur a sociis}.}
Some judgments have both immediate and prospective effect; that is, they not only define the rights and duties of the litigants as of the time the judgment is rendered, but they also prescribe those rights and duties for the future. Injunctions enjoining or mandating future conduct are typical of such judgments, as are decrees awarding alimony to be paid in installments. If, after the judgment has been in effect, the judgment debtor can make a clear showing of an unforeseen substantial change in conditions which imposes oppressive hardship, relief from the judgment may be granted on the ground that it is no longer equitable that the judgment should have prospective application. If the motion for relief is granted, the court may modify the judgment or vacate it, as appropriate. Here, we are interested only in the vacation of the judgment. Modification will be discussed in greater detail below.

If the judgment is vacated, is the order vacating it a final order for purposes of appeal? It is not under the fourth test for finality, since no new adversary hearing is granted as part of the relief. As for the first test, the difficulty lies in the application of the third requirement that the order must prevent a judgment. Obviously, the order does not prevent the judgment in the sense that the judgment creditor has no judgment at all, since he has had the judgment and its benefit from the date it was entered to the date it was vacated. From this latter date, of course, the judgment creditor loses the benefit of the judgment, and to this extent, the order vacating the judgment prevents it. Thus the better solution would be to interpret the word “prevent” in the context of the judgment to which it is to be applied. Where such a judgment has a continuing effect, and the continuing effect is terminated by an

264 Alimony may be awarded as a division of the marital property, and/or for the sustenance and support of one of the parties to the marital relationship. When awarded as a division of the marital property, it may be awarded in gross, or it may be awarded in installments, as the situation of the parties requires. When awarded as sustenance and support, it is generally awarded in installments which are payable periodically in the future. The court awarding alimony retains continuing jurisdiction over an award for sustenance and support, but the jurisdiction of the court over an award as a division of property generally terminates when the decree becomes final. Technically, then, only an award of alimony as a division of property is subject to a Rule 60(B) motion for relief from judgment. The award of alimony as sustenance and support, on the other hand, may be opened by a motion invoking the continuing jurisdiction of the court. Wolfe v. Wolfe, 46 Ohio St. 2d 399, 350 N.E.2d 413 (1976). The distinction between the two motions, however, is one without a great deal of difference, since the ground underlying both—that it is no longer equitable that the judgment have prospective application—is almost always the same, and the motion invoking the continuing jurisdiction of the court must generally meet all of the procedural requirements applicable to a Rule 60(B) motion for relief from judgment. Accordingly, in the light of Rule 60(B)(4), it may be questioned whether the concept of continuing jurisdiction has any present vitality.

265 In Humble Oil & Refining Co. v. American Oil Co., 405 F.2d 803, 813 (8th Cir. 1969), the court held:

Placed in other words, this means for us that modification is only cautiously to be granted; that some change is not enough; that the dangers which the decree was meant to foreclose must almost have disappeared; that hardship and oppression, extreme and unexpected, are significant; and that the movant's task is to provide close to an unanswerable case. To repeat: caution, substantial change, unforeseen, oppressive hardship, and a clear showing are the requirements.
order vacating the judgment, it is fair to say that the judgment has been prevented. Accordingly, it seems reasonable to conclude that an order vacating a judgment because it is no longer equitable that the judgment have prospective effect is a final order under the first test for finality.

As a general rule then, it may be said that when a judgment entered after an adversary hearing on the merits has been vacated or set aside, the order so disposing of the judgment is a final order under the first test for finality because it affects a substantial right in an action, in effect determines the action, and prevents a judgment for the party against whom the order is entered. But this rule does not always hold true. In a given case, the applicability of the first test for finality will depend upon the circumstances peculiar to that case.

b. Vacation of the Judgment and Re-entry of the Same Judgment

There are two common reasons for vacating a judgment and re-entering that same judgment as of a later date. The first reason is to extend the time for taking an appeal from the judgment. The second reason is to include within the judgment matters that have been adjudicated but which were inadvertently omitted from the original judgment entry.

It is well-settled that a court may not properly vacate a judgment and re-enter it as of a later date solely for the purpose of extending the time for taking an appeal from that judgment. Such a stratagem completely defeats the purpose of Appellate Rule 4(A),266 and is an abuse of the trial court's discretion.267

Should the court nonetheless abuse its discretion, will the order vacating the judgment and reinstating it be a final order for purposes

266 In substance, Ohio R. App. P. 4(A) requires the filing of the notice of appeal within thirty days of the date of the entry of the judgment or order appealed from. Appellate Rule 14(B) specifically prohibits the appellate court from enlarging or reducing the time for filing the notice of appeal, and Ohio R. Civ. P. 6(B) limits the trial court's authority to extend the time for the performance of some act to those acts which are required or allowed by the Rules. Thus, there is no authority in either set of Rules for the extension of time for filing the notice of appeal, and it is axiomatic that the courts may not do indirectly that which they are prohibited from doing directly.

267 In Town & Country Drive-In Shopping Centers Inc. v. Abraham, 46 Ohio App. 2d 262, 266-68, 348 N.E.2d 741, 744-45 (1975), the court said:

It has been set forth in many texts, as well as case law related to Civ. R. 60(B), that such rule cannot be used to circumvent or extend the time requirements by virtue of vacating a judgment and reinstating it in order to start the time for filing such notice of appeal to run anew. . . . Such rule basically is for the purpose of vacating voidable judgments and those judgments which have inherent defects, and the filing of a motion under such rule may not serve the purpose of allowing additional time for the filing of an otherwise barred notice of appeal, nor extend the time within which an appellant could have filed one of the tolling motions as referred to in App. R. 4(A). . . . The appellant here may not avoid the jurisdictional time limitation by attempting to vacate the journalized judgment entry of the trial court [by] the filing of a motion under Civ. R. 60(B). Such motion was for the purpose of being granted the right either to file a notice of appeal or a motion for a new trial. The trial court is without jurisdiction to grant any such extension for the purposes stated by the appellant.

To the same effect, see Bosco v. Euclid, 38 Ohio App. 2d 40, 311 N.E.2d 870 (1974).
of appeal? It will not be so under the fourth test for finality, since
there is nothing in such a procedure that even resembles a new trial.
Likewise, it would appear that the first test is inapplicable. Since the
judgment creditor ends with the same judgment that he had before the
vacation, the order vacating the judgment and reinstating it can hardly
be an order that "prevents" a judgment. What the judgment creditor
does lose is the repose that results from the running of the time for tak-
ing an appeal from the original judgment. While that is a substantial
right that is affected by the order of vacation and reinstatement, it is
not the prevention of a judgment.

The result will be about the same when the vacation-reinstatement
procedure is legitimately used, although there are some additional
factors. Suppose, for example, that in a case tried to the court without a
jury, the plaintiff's single claim for relief presents a number of distinct
issues for adjudication. The trial court decides each issue presented,
but the judgment entry fails to include the court's decision with respect
to one such issue. In such a case the trial court may, either on its own
initiative or on the motion of any party, vacate the original judgment
entry and replace it with a new one which supplies the omission.268
The trial court's power to do this, however, is somewhat limited if an
appeal has been taken from the original judgment. If the appeal has
not yet been docketed in the appellate court, the trial court may act under
its own authority. If the appeal has been docketed, however, the trial
court may act only with leave of the court of appeals.269 In any event,
it would appear that the order vacating the original judgment and sub-
stituting the new judgment is not a final order under the first or fourth
tests for finality. In essence the new judgment is the same as the old, so
the order vacating the first judgment is not one which prevents a judg-
ment. Further, the order vacating the first judgment does not in any
way grant a new trial. Therefore, since an essential element of each
test is lacking, neither is applicable.

Suppose, as in Gannon v. Perk,270 the trial court deliberately fails
to pass on one issue of a multi-issue claim, but enters judgment with
respect to the other issues. May it later vacate that judgment pursuant

268 See Ohio R. Civ. P. 60(A), which provides in material part that, "Clerical mistakes
in judgments, orders or other parts of the record and errors therein arising from over-
sight or omission may be corrected by the court at any time on its own initiative or on the
motion of any party and after such notice, if any, as the court orders."

In such a case, the judgment is not interlocutory under the provisions of Rule 54(B)
because of the omission. The Ohio Supreme Court made a similar finding in Gannon v.
Perk, 46 Ohio St. 2d 301, 315, 348 N.E.2d 342, 331 (1976):

This court concludes that the instant cause does not fall within the parameters
of Civ. R. 54(B). Although the complaint filed herein consists of several issues,
basically, only one claim for relief was presented. The various issues urged in
support of the claim for relief were merged into the . . . judgments of the trial
court . . . Accordingly, we hold that the . . . judgments of the Court of Com-
mon Pleas were final for purposes of appeal . . .

269 It is provided in Ohio R. Civ. P. 60(A) that, "During the pendency of an appeal,
such mistakes may be so corrected before the appeal is docketed in the appellate court,
and thereafter while the appeal is pending may be so corrected with leave of the appel-
late court."

270 46 Ohio St. 2d 301, 348 N.E.2d 342 (1976).
to a motion properly made\(^{271}\) and enter a new judgment which includes a determination of the omitted issue? The answer is not entirely clear. There is a merger of the issues into the judgment,\(^{272}\) and this gives rise to the presumption that the trial court has found against the judgment loser on the omitted issue. This application of the doctrine of merger, and resulting presumption apparently take the case out of the provisions of Rule 54(B) and render the judgment final for purposes of appeal.\(^{273}\)

If an appeal has been taken from the original judgment, it would seem that the trial court has lost jurisdiction to the court of appeals and cannot act on a motion to vacate the original judgment.\(^{274}\) If no appeal has been taken, there seems to be no reason, in principle, why the original judgment cannot be reached by a motion for relief from judgment when good ground for relief can be shown. Whether good ground for relief can be shown, however, may be a problem.\(^{275}\)

Be that as it may, suppose that the trial court does vacate the original judgment and enters a new judgment which passes on all of the issues presented. With respect to the issue omitted from the original judgment, the new judgment may decide the issue in accordance with the presumption flowing from the doctrine of merger, or it may decide the issue contrary to the presumption. If the new judgment does the former, it is the same as the old, and for the reasons given above the order vacating the original judgment and entering the new judgment cannot be a final order under the first or fourth tests for finality. If the new judgment

\(^{271}\) There is some difficulty in determining the precise ground on which such a motion is to be premised. Since we have stipulated that the court's action is deliberate, mistake is probably eliminated as a ground, and the only remaining ground that seems likely is that found in Rule 60(B)(5)—any other reason justifying relief from the judgment.


\(^{273}\) Id.

\(^{274}\) Id. On the cited page the court stated:

Accordingly, we hold that the December 31, 1974, judgments of the Court of Common Pleas were final for purposes of appeal, and, therefore, the order of the trial court dated January 24, 1975, was void for lack of jurisdiction, jurisdiction having already been conferred upon the Court of Appeals by virtue of the filing of the notices of appeal therein.

It would seem, however, that the motion may be made in the trial court while the appeal is pending, and the trial court may act upon it if, pursuant to motion, and for good cause shown, the court of appeals remands the case to the trial court for a determination of the motion. See Majnaric v. Majnaric, 46 Ohio App. 2d 157, 347 N.E.2d 552 (syllabus at ¶¶ 1-2) in which the court stated:

1. When an appeal is pending, the trial court is divested of jurisdiction except to take action in aid of the appeal. The trial court is without power to grant relief under Civ. R. 59 or to vacate, alter, or amend the judgment under Civ. R. 60(B) whether the 60(B) motion is made prior to or after the appeal is taken, except with permission of the appellate court. However, the trial court may accept the filing of papers relating to a case on appeal.

2. Where a motion to vacate a judgment is pending in the trial court and an appeal is also pending from the same judgment, the appellant may move the appellate court, for good cause, to remand the matter to the trial court for a hearing on the motion to vacate. Sustaining such a motion will not divest the appellate court of jurisdiction to hear the pending appeal if it is not rendered moot by the hearing on the motion to vacate.

\(^{275}\) See note 271 supra. Perhaps the need to establish more clearly a basis for collateral estoppel would be a sufficient reason under the provisions of Ohio R. Civ. P. 60(B)(5).
OHIO RULE 60(B)

does the latter, we have a different question but not necessarily a different answer. Obviously, the order is not final under the fourth test, since there is not the slightest indication of a new trial in such an order. Is it final under the first test? Here, again, the problem point is the third element of the test — the prevention of a judgment. Since the original judgment winner remains the judgment winner, albeit not with respect to the omitted issue, it can hardly be said that the new judgment has prevented a judgment for that party. Accordingly, it may be concluded that such an order is not final under the first test.

In sum, then, when a judgment is vacated and the same judgment is re-entered as of a later date, the order vacating the original judgment and entering the new judgment is not a final appealable order under either the first or fourth tests of finality.

c. Vacation of the Judgment and Entry of Judgment for the Moving Party

This is the least difficult situation to resolve. Clearly, when the court’s order deprives the original judgment winner of his judgment and awards the judgment to the original loser, the order affects a substantial right in an action, in effect determines the action, and prevents a judgment for the original judgment winner. Accordingly, there can be no doubt that such an order is final under the first test for finality.

Such orders are not frequent because they are generally premised on errors of law committed by the court in rendering the original judgment, and such errors are normally cured by appeal. However, where there exist exceptional circumstances which render the losing party’s failure to appeal justifiable, he may be able to obtain this type of relief

276 Madison v. Curry, 323 N.E.2d 719 (Ohio Ct. App. 1975) appears to be the only reported post-Rule decision in which this type of relief was sought. Without discussing whether the Rule 60(B) motion for relief from judgment was being improperly used as a substitute for appeal, the Court of Appeals for Hamilton County affirmed the trial court’s denial of relief on the ground that there was no error of law which would warrant the grant of relief.

277 See, e.g., Bartlett v. Bartlett, 176 Ohio St. 299, 199 N.E.2d 586 (1964) (syllabus at ¶ 1), where the court stated, “Error in the application of the law to the facts in the rendition of a judgment is judicial error and is a matter which must be raised by appeal and is not an irregularity in obtaining the judgment within the meaning of Section 2325.01, Revised Code, relating to the vacation of judgments after term.” Although the syllabus is couched in the language of the pre-Rule Ohio practice, the principle stated would still appear to be sound law, and is in conformity with the weight of federal authority on point.

But there is at least one post-Rule appellate decision which appears to take the opposite view. Thus, in Buckman v. Goldblatt, 39 Ohio App. 1, 5, 314 N.E.2d 188, 190 (1974), the Court of Appeals for Cuyahoga County stated that, “An application of the applicable law to the facts in this case leads to the conclusion that the levy and foreclosure were contrary to law. This impropriety results in a condition for the appellants that the catch-all provisions of Civ. R. 60(B)(5) was patterned to correct.”

278 Klapprott v. United States, 335 U.S. 601 (1949); Lubben v. Selective Serv. Sys., 453 F.2d 645 (1st Cir. 1972). The court in Lubben found that “The residual clause [of FED. R. Civ. P. 60(b)(6)], like Rule 60(b) generally, is not a substitute for an appeal, and in all but exceptional circumstances, the failure to prosecute an appeal will bar relief under that clause.” Id. at 651.

under the provisions of Rule 60(B)(5). Generally, lack of notice of the entry of the judgment will not be such an exceptional circumstance as to warrant the use of Rule 60(B)(5) as a substitute for appeal.\textsuperscript{280}

Likewise, if there is a change in the applicable law subsequent to the entry of the judgment, and the motion for relief is made prior to the expiration of the time for taking an appeal, this type of relief might possibly be obtained under the provisions of Rule 60(B)(1) on the ground that the court has made a mistake.\textsuperscript{281}

d. Vacation of the Judgment and the Grant of a New Adversary Hearing

Perhaps the form of relief most frequently granted is the vacation or setting aside of the judgment, and the grant of a new adversary hearing. (Within the framework of our present discussion, the phrase "adversary hearing" means "trial" in both the technical and the traditional sense of the word.) This form of relief is mandated when the ground for relief is newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial,\textsuperscript{282} and it is generally the type of relief granted when the successful motion for relief is premised on mistake, inadvertence, surprise or excusable neglect.\textsuperscript{283}

When the original adversary hearing qualifies as a "trial" in the technical sense, it is clear that an order vacating or setting aside the judgment and ordering a new adversary hearing is a final order under the fourth test for finality.


\textsuperscript{281} Schildhaus v. Moe, 335 F.2d 529 (2d Cir. 1964). \textit{But see} Silk v. Sandoval, 435 F.2d 1286 (1st Cir. 1971). Both of these cases are discussed more fully at note 263 supra.

\textsuperscript{282} \textit{See} Ohio R. Civ. P. 60(B)(2). If the federal decisions continue to be a fairly reliable guide to the interpretation of the Ohio Rules, it may be said that the standard governing relief from judgment on the basis of newly discovered evidence under Rule 60(B)(2) is the same as that governing the grant of a new trial on that ground under Rule 59(A)(8). United States Fidelity & Guar. Co. v. Lawrenson, 334 F.2d 464 (4th Cir. 1964). Thus, the new evidence (1) must be such as will probably change the result if the judgment is vacated and a new trial granted, (2) it must have been discovered after the time to move for a new trial under Rule 59(A)(8) has expired, (3) it must be such as could not in the exercise of due diligence have been discovered before the trial, (4) it must be material to the issues, (5) it must not be merely cumulative to former evidence, and (6) it must not merely impeach or contradict the former evidence. Taylor v. Ross, 150 Ohio St. 448, 83 N.E.2d 222 (1948).

\textsuperscript{283} These four grounds are included in Ohio R. Civ. P. 60(B)(1). Again, to some extent, they parallel the grounds of "accident or surprise which ordinary prudence could not have guarded against," the grounds for the grant of a new trial under Rule 59(A)(3). As the court said in Antonopoulos v. Eisner, 30 Ohio App. 2d 187, 284 N.E.2d 194 (1972), these four grounds have "been applied in innumerable cases involving a kaleidoscopic array of factual variations." Accordingly, it would be idle to attempt any generalization of the rules applicable to their employment.
e. Modification of the Judgment

In many cases a simple modification of the judgment will provide adequate relief, so that the judgment need not be vacated or set aside. A judgment, for example, may be partially satisfied by one of two judgment debtors. Should this occur, the other judgment debtor may move to have the judgment modified to reflect the partial satisfaction.284 If the relief granted is a pure modification of the judgment, with no part of the judgment vacated or set aside and no part of the action set for a new adversary hearing, is the order modifying the judgment a final order? It is at once apparent that it will not be final under the fourth test, since there is no grant of a new trial. As to the first test, the stumbling block is again the third element — the requirement that the order prevent the judgment. Does a modification of a judgment prevent that judgment? As a general rule, probably not. This is about the best that can be said on the subject because the types of judgments and the types of modification are so varied that each case must truly be decided in the light of its own facts. We must be satisfied, then, with another general rule — an order modifying a judgment is ordinarily not a final order under either the first or fourth tests for finality.285

2. Judgments Entered Pursuant to a Motion for Summary Judgment

The types of relief which may be granted from a summary judgment are almost as varied as the types of relief which may be granted from a judgment entered after a trial on the merits. The orders granting such relief will generally be final to the same extent as the orders granting like relief from a judgment after trial on the merits.

There is one particular form of relief from a summary judgment that is not usually encountered after a trial on the merits, however, and it is this form of relief that presents the major problem. Generally, a summary judgment may be entered at any time after the action has been commenced286 and before the adversary hearing on the merits.287

285 The most likely exception to this rule is the modification of judgments which have a prospective effect. To the extent that the modification diminishes the prospective effect of the judgment, it can be said that it prevents it, and the order of modification thus becomes final under the first test for finality.
286 Ohio R. Civ. P. 56(A) provides that a party claiming relief may move for summary judgment at any time after the expiration of the time permitted for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. Rule 56(B) provides that a party defending against a claim for relief may move for summary judgment at any time. Because of the provisions of Rule 56(A), it is technically over-broad to say that the summary judgment may be entered at any time after the action is commenced, but the waiting time provided by that subdivision of the Rule (generally, 28 days after service of the pleading containing the statement of claim) is so short that the statement is true as a practical matter. This, of course, assumes that the court will grant the motion within a reasonable amount of time after it is made.
287 Both subdivisions of Ohio R. Civ. P. 56 provide that the motion may be made only with leave of court if the action has been set for pretrial or trial. This, of course, implies that the motion ordinarily should be made and decided prior to the commencement of
That being so, the relief that may be granted from the summary judgment is quite likely to be a vacation of the judgment and the reinstatement of the case at the point where it had been terminated by the judgment. Such relief normally contemplates an adversary hearing on the merits in due course. Obviously, an order granting this type of relief is not final under the first test, since it neither determines the action nor prevents a judgment. Is it final under the fourth test? The answer depends upon whether the hearing on the motion for summary judgment is deemed to be a "trial". If it is, then the order is one which orders a "new" trial, and the fourth test is satisfied. If it is not, an essential element of the fourth test is missing.

An analysis of the language of Rule 56 clearly indicates that a "hearing" and a "trial" are separate and distinct types of proceedings. Thus, in Rule 56 (A) and (B) it is noted that the motion may only be made with leave of court if the action has been set for pretrial or trial. This is followed by Rule 56(C), which specifies that the motion shall be served at least fourteen days before the time fixed for hearing, and that the adverse party may serve and file opposing affidavits prior to the day of hearing. All of this implies that the hearing on the motion is something distinct and apart from a trial of the action itself. This is in accord with the general principle that a motion for summary judgment is to be used when there are no issues to be tried; it is a device which obviates the need for a trial. The point is made more clearly by trial, since in most instances the motion for summary judgment will be made for the purpose of avoiding a trial on the merits. Further, Rule 56(C) states that the court must grant the motion "forthwith" if it is well-taken. Thus, it may be concluded that if the motion is granted, the summary judgment will be entered at some time before the commencement of the adversary hearing on the merit.

288 Ohio R. Civ. P. 56 clearly contemplates a hearing on the motion. Subdivision (C) of the Rule provides that: "The motion shall be served at least fourteen days before the time fixed for hearing." However, the hearing need not be an oral hearing. Rule 7(B)(2) provides that "[T]o expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition." Further, the trial court will not take testimony on the issues raised by the motion. It is limited to a consideration of the pleadings, briefs, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact which are timely filed in support of, or in opposition to, the motion. See Ohio R. Civ. P. 56(C), (F); Myers v. Travelers Ins. Co., 14 Ohio St. 2d 76, 236 N.E.2d 209 (1968); Morris v. First Nat'l Bank & Trust Co., 15 Ohio St. 2d 184, 239 N.E.2d 94 (1968). Thus, in any given case, the "hearing" may consist of nothing more than the court's consideration of the pleadings (to the extent allowed by Rule 56(E)), the briefs, and whatever documentary evidence in testimonial form the parties have put before the court.

289 This is consistent with Ohio R. Civ. P. 7(B)(1), which likewise draws a distinction between a "hearing" and a "trial": "An application to the court for an order shall be by motion which, unless made during a hearing or a trial, shall be made in writing."


Summary judgment is a procedural device for terminating litigation which, if permitted to run its full course, would leave nothing for the trier of fact to resolve. As stated with stark simplicity in Rule 56(C), Rules of Civil Procedure, the scope of the court's inquiry at this stage is narrowly confined to whether there is any genuine issue of material fact. The court cannot try any issues of fact, except insofar as it is required to view the inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion.
Rule 56(D). If, after hearing the motion, the court does not grant summary judgment on the whole case or for all of the relief asked, "and a trial is necessary," the court will ascertain what facts are not controverted by the parties. Then, "upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly." Thus, the "trial" follows the "hearing" if the hearing on the motion has not obviated the need for a trial — if there remain to be determined issues which arise on the pleadings. Accordingly, from the language of the Rule itself, it may be concluded that the "hearing" is not a "trial."

This conclusion is buttressed by judicial decisions. In *Morris v. First National Bank & Trust Co.*, the Ohio Supreme Court said: "It is important to remember that a summary judgment proceeding is not a trial, but a hearing upon a motion." And again, in *Gessler v. Madison* we find: "[T]he judgment appealed from was not the outcome of a trial being entered instead pursuant to an order sustaining a motion for summary judgment."

Perhaps the case more directly on point is *Standard Oil Co. v. Grice*. In that case, the plaintiff moved for summary judgment on the defendant's counterclaim. After a hearing on the motion, the trial court announced its decision to grant the motion. Before a judgment entry to that effect was filed with the clerk for journalization, the defendant voluntarily dismissed the counterclaim by notice. The trial court struck the notice of dismissal from the files on the ground that it was filed too late. To be timely, the notice of dismissal had to be filed with the court "before the commencement of trial." If the hearing on the motion for summary judgment was a "trial," the notice of dismissal was filed too late, and the trial court was correct in striking it from the files. But if the hearing on the motion was not a "trial," the filing of the notice was timely, and the trial court was in error. On appeal, the Court of Appeals for Darke County held that the trial court erred in striking the notice of dismissal, and reversed the decision. Although Judge McBride, the author of the appellate court's opinion, did not expressly state that the hearing on the motion was not a "trial," this is the only legitimate conclusion that may be drawn from his language. He said:

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291 15 Ohio St. 2d 184, 185, 239 N.E.2d 94, 95 (1968).
293 46 Ohio App. 2d 97, 345 N.E.2d 458 (1975).
294 Ohio R. Ctv. P. 41(A)(1)(a) states, "[A]n action may be dismissed by the plaintiff without order of court . . . by filing a notice of dismissal at any time before the commencement of trial." And in Rule 41(C) it is said: "The provisions of this rule apply to the dismissal of any counter-claim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to subdivision (A)(1) of this rule shall be made before the commencement of trial."

295 Judge Robert L. McBride was a member of the Rules Advisory Committee of the Ohio Judicial Conference which drafted the Ohio Rules of Civil Procedure, so his opinion as to the proper interpretation of the Rules carries some weight.
The language of Civil Rule 41(A)(1) and (C) requires no construction. It gives either party an absolute right, regardless of motives, to voluntarily terminate its cause of action at any time prior to the actual commencement of the trial. There is no exception in the rule for any possible circumstance that would justify a court in refusing to permit the withdrawal of a cause prior to the commencement of trial. . . . The counterclaim was voluntarily dismissed under Rule 41(A)(1) by notice before the judgement entry and before the commencement of trial. Rule 41(C).

These decisions are in accord with the theory underlying the motion for summary judgment. If a supported motion297 is well taken, it negates any controversy with respect to the material issues of fact which arise on the pleadings,298 and the conclusions of law to be drawn from the evidence introduced in support of the motion follow as a matter of

297 A “supported motion” is one which is accompanied by one or more of the following types of documentary evidence in testimonial form: depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, or written stipulations of fact. See Ohio R. Civ. P. 56(C).

An “unsupported motion” is one which is accompanied by none of these documents, and it presents some unique problems. While there have been some hints to the effect that an unsupported motion is improper, see Pacific Fin. Loans v. Goodwin, 41 Ohio App. 2d 141, 324 N.E.2d 578 (1974), the better rule is that such motions are permissible. See Ohio R. Civ. P. 56(A), (B), (providing that a party may move for summary judgment “with or without supporting affidavits.”) See also Tiefel v. Gilligan, 40 Ohio App. 2d 491, 321 N.E.2d 247 (1974). If an unsupported motion is made before the service of a responsive pleading, it is essentially a Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, and should be treated as such. (While the court in Tiefel agreed with this analysis in principle, it suggested that the unsupported motion is basically a Rule 12(C) motion for judgment on the pleadings because it “closes” the pleadings. This view was incorrect. The pleadings are not closed until all of the required pleadings are served, or until the time for serving them has expired without their having been served. Since the motion for summary judgment is a motion and not a pleading, service of the motion cannot “close” the pleadings. If the motion is granted in toto, no further pleadings are required by the Rules, and it is the granting of the motion that “closes” the pleadings. If the motion is granted in part, or if the motion is denied, the movant may serve a responsive pleading. Thus, in such a situation, the pleadings are not “closed” until the motion is granted or until a responsive pleading is served, as the circumstances may require.)

If an unsupported motion is made after the service of a responsive pleading, it is essentially a Rule 12(C) motion for judgment on the pleadings because it “closes” the pleadings. This view was incorrect. The pleadings are not closed until all of the required pleadings are served, or until the time for serving them has expired without their having been served. Since the motion for summary judgment is a motion and not a pleading, service of the motion cannot “close” the pleadings. If the motion is granted in toto, no further pleadings are required by the Rules, and it is the granting of the motion that “closes” the pleadings. If the motion is granted in part, or if the motion is denied, the movant may serve a responsive pleading. Thus, in such a situation, the pleadings are not “closed” until the motion is granted or until a responsive pleading is served, as the circumstances may require.)

298 In essence, the supported motion substitutes the documentary evidence in support of, and in opposition to, the motion for the pleadings themselves. As it is noted in Ohio R. Civ. P. 56(E):

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

Thus, it is the documentary evidence, and not the pleadings, that raises an issue for trial. If the motion is well-taken, the adverse party will not be able to produce such
course. Since there is no longer any controversy with respect to the issues which arise on the pleadings, there is nothing left to try. But the hearing on the motion is not itself a trial because the court does not examine the documentary evidence in support of, or in opposition to, the motion for the purpose of determining its truth or its weight; rather, it examines the evidence simply to see if there is any "genuine issue as to any material fact." In this process, the court compares the evidence; it does not "try" it.\(^{299}\)

Therefore, since the hearing on the motion is a summary proceeding and not a trial, an order vacating the summary judgment and reinstating the case for an adversary hearing in due course is not an order which orders a "new" trial. Accordingly, the fourth test for finality is no more applicable to this situation than the first.

3. Judgments Entered Pursuant to Some Other Motion

Essentially, only three motions remain unexamined: the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the Rule 12(C) motion for judgment on the pleadings, and the Rule 12(F) motion to strike from the pleadings.

\(\text{a. The Motion to Dismiss for Failure to State a Claim (Rule 12(B)(6))}\)

Normally, the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted will be made very early in the pleadings stage and before the service of a responsive pleading.\(^{300}\) When the motion is made at this stage, the trial court must rule upon it before the commencement of the adversary hearing on the merits.\(^{301}\)

documentary evidence, and the issues of fact and conclusions of law which arise from the pleadings are negated by the supported motion for summary judgment.


\(^{300}\) The Rules do not state precisely when the motion is to be made. However, Ohio R. Civ. P. 12(B) stipulates that a motion making any of the defenses listed in that subdivision of the Rule "shall be made before pleading if a further pleading is permitted." From this, it may be inferred that the motion should be made within the time for the service of a responsive pleading, but before service of that pleading. Thus, in the case of a motion directed to a complaint, the motion should be made within 28 days after the service of the summons and complaint. See Ohio R. Civ. P. 12(A)(1). In the case of a motion directed to a counterclaim denominated as such, or to a crossclaim, the motion should be made within 28 days after the service of the pleading containing the counterclaim or the cross-claim. Ohio R. Civ. P. 12(A)(2). In the case of a motion directed to a third party complaint, the motion should be made within 28 days after the service of the summons and third party complaint. Ohio R. Civ. P. 12(A)(1), 14(A).

Generally, Rule 12(B) motions made subsequent to the service of a responsive pleading are made out of rule, and are subject to a motion to strike from the files. O'Brien v. University Community Tenants Union, 42 Ohio St. 2d 242, 327 N.E.2d 753 (1975). However, the Rule 12(B)(6) defense of failure to state a claim upon which relief can be granted is an exception to this general rule, and need not be made prior to the service of the responsive pleading. Ohio R. Civ. P. 12(H); Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974). Nevertheless, when this defense is raised by motion, it will normally be made prior to the service of the responsive pleading.

\(^{301}\) From a reading of Ohio R. Civ. P. 12(D), one would think that the trial court had the option of deciding the motion immediately or reserving the question for determination at the adversary hearing on the merits, unless a party to the proceedings moved for

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If the motion is well-taken, but the defect challenged by the motion is curable, the trial court must grant the motion with leave to amend the challenged pleading. An order granting the motion and giving leave to amend is not a final order, and need not concern us further. If the defect challenged by the motion is not curable, however, the trial court must grant the motion and dismiss the adverse party's claim. It is this order of dismissal which must now be considered.

If such an order is vacated upon motion for relief from judgment, the relief most likely to be given is the reinstatement of the case at the point where it was terminated by the order of dismissal. Such relief contemplates an adversary hearing on the merits in due course. Consequently, the first test for finality will not apply to the order vacating the dismissal, since such an order neither determines the action nor prevents a judgment for the party who has been deprived of the judgment by dismissal. Since the dismissal took place prior to the adversary hearing on the merits, the fourth test will apply only if it can be said that the hearing on the motion to dismiss for failure to state a claim qualifies as a "trial." This, therefore, becomes the key question.

Although the court in *Tiefel v. Gilligan* was not discussing the Rule 12(B)(6) motion to dismiss for failure to state a claim, language in the opinion seems to answer the question perfectly:

Defendants did not answer the complaint of the plaintiffs, but chose to move for a summary judgment "at any time" and without supporting affidavits. . . . [N]o answers having been filed by the defendants, there are no issues made up by the pleadings; the practical result of choosing not to answer amounts to an admission of the validity of the facts alleged by the complainants.

Therefore, since "there are no issues made up by the pleadings," and since the allegations of the statement of claim are admitted, at least for the purposes of the motion to dismiss, the hearing on the motion cannot be a "trial"; rather, it is a "summary proceeding." That being a preliminary hearing on the motion. However, the Ohio Supreme Court has held that the Rule 12(D) motion for a preliminary hearing is an inherent and integral part of every Rule 12(B) and Rule 12(C) motion. It has further held that such motions must be heard and determined before the commencement of the adversary hearing on the merits. See *State ex rel. Keating v. Pressman*, 38 Ohio St. 2d 161, 311 N.E.2d 524 (1974); and the cases cited in note 141 supra. 302

302 Peterson v. Teodosio, 34 Ohio St. 2d 161, 297 N.E.2d 113 (1973), quoted at note 127 supra.

303 Schindler v. Standard Oil Co., 165 Ohio St. 76, 133 N.E.2d 336 (1956). However, where the defect is not in fact curable, and the right to amend would be of no avail, the order will be treated as final even though the trial court grants leave to amend. *Id.*

If leave to amend is properly granted, but the losing party elects to stand on the challenged pleading, or does not serve an amended pleading within the time allowed, the claim may be dismissed. The dismissal will be for failure to prosecute under the provisions of *Ohio R. Civ. P. 41(B)(1)*, however, rather than for failure to state a claim upon which relief can be granted. But see note 130 supra.


so, the fourth test for finality does not apply when the defense is presented by a Rule 12(B)(6) motion made prior to the service of a responsive pleading.

When the defense of failure to state a claim upon which relief may be granted is presented in this manner, the defect challenged must appear from the face of the pleading attacked by the motion. If evidence beyond the four corners of the pleading is required to sustain the challenge, and the challenger wishes to raise the challenge by a motion made prior to the service of a responsive pleading, the motion for summary judgment must be employed.306

There are two basic ways in which this can be accomplished. The better way is for the challenger to make a properly supported motion for summary judgment under the provisions of Rule 56. But if the challenger is careless, he may simply tender documentary evidence in testimonial form in support of the Rule 12(B)(6) motion to dismiss for failure to state a claim. If the trial court does not reject this evidence, and if the evidence satisfies the requirements of Rule 56,307 the court


Thus, unless reference is had to matters beyond the fact [sic] of the complaint, it must affirmatively appear from those items actually set forth that there can be no set of facts which might entitle the plaintiff to the relief he requests. Rarely does a complaint contain this kind of statement and usually reference must be had to other facts. To test this situation is the function of a motion for summary judgment, pursuant to which admitted facts may be considered and controverted facts isolated for resolution by trial.

It must be remembered, however, that under the Rules the “face” of a pleading also includes any written instrument attached to the pleading as an exhibit or attachment. Ohio R. Civ. P. 10(C) provides: “A copy of any written instrument attached to a pleading is a part thereof for all purposes.” Accordingly, the content of such written instrument must be taken into account in determining whether the pleading states a good claim or defense. In Slife v. Kundtz Properties, 40 Ohio App. 2d 179, 318 N.E.2d 557 (1974) (syllabus at ¶ 2), the court stated:

Where a claim is founded upon some written instrument and a copy thereof is attached to the complaint in accordance with Civil Rule 10(D), the complaint should not be dismissed for failure to state a claim upon which relief can be granted unless the complaint and the written instrument on their face show to a certainty some insuperable bar to relief as a matter of law. What is said here regarding written instruments attached pursuant to Rule 10(D) is equally true with respect to a written instrument attached pursuant to Rule 10(C). The only difference between the two rules is that 10(C) is permissive with respect to attachments, while 10(D) is mandatory in the cases subject to its provisions.

Slife also gives some guidance as to how the written instrument is to be treated. The court stated:

Where a claim is founded upon some written instrument and a copy thereof is attached to the complaint in accordance with Civil Rule 10(D), the court, in ruling on a Civil Rule 12(B)(6) motion to dismiss for failure to state a claim, must avoid interpreting such instrument at that pre-trial stage unless it is so clear and unambiguous on its face that the court can determine to a certainty that the plaintiff would be entitled to no relief under any provable set of facts.

Id. (syllabus at ¶ 3).

307 As the court said in Otno R. Civ. P. 12(B) stipulates that:

When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56.

308 Again, it is said in Otno R. Civ. P. 12(B): "Provided however, that the court shall
may treat the Rule 12(B)(6) motion to dismiss as a Rule 56 motion for summary judgment.\textsuperscript{309}

Will the hearing on such a motion be a “trial” so that the fourth test for finality will apply should the order granting the motion later be vacated and the case reinstated? As noted in the preceding section, it will not, and the fourth test will not apply. Likewise, the first test for finality will not apply because either party may yet prevail after the order has been vacated and the case reinstated.

As a general rule, then, the defense of failure to state a claim upon which relief can be granted will be presented by a Rule 12(B)(6) motion to dismiss or a Rule 56 motion for summary judgment, and to present this defense both motions must be made prior to the service of a responsive pleading. There are three major alternatives to this general proposition.

The first\textsuperscript{310} authorizes the presentation of the challenge as a defense in the responsive pleading when a responsive pleading is required.\textsuperscript{311} When thus presented, the challenge will be heard and de-

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\textsuperscript{309} Thus, in Stephens v. Boothby, 40 Ohio App. 2d 197, 199, 318 N.E.2d 535, 536-37 (1974), it was said:

> Authority is given under Rule 12(B) for the court to convert a motion to dismiss, on the ground that no claim is stated for which relief may be granted, into a motion for summary judgment where matters outside the pleading are contained in the motion and not excluded by the court.

Considerable care must be taken if this method is used. An order granting such a converted motion will not be sustained on appeal unless it affirmatively appears from the record that the court accepted the tendered matters dehors the pleading and converted the motion to dismiss into a motion for summary judgment. State v. Milanovich, 42 Ohio St. 2d 46, 325 N.E.2d 540 (1975); Stephens v. Boothby, 40 Ohio App. 2d 197, 318 N.E.2d 535 (1974); Agosto v. Leisure World Travel, 36 Ohio App. 2d 213, 304 N.E.2d 910 (1973); and Westhoven v. Snyder, 40 Ohio Misc. 11, 318 N.E.2d 169 (C.P. 1973).

\textsuperscript{310} Ohio R. Civ. P. 12(B) states:

> Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto if one is required, except the following defenses may at the option of the pleader, be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

Technically, from the language of the Rule, it is clear that the “general rule” requires the presentation of the defense in the responsive pleading, and the motion to dismiss or the motion for summary judgment are the “alternative” methods of presentation. But as a practical matter, the defense is more often presented by motion than it is by responsive pleading, so it is fair to call the responsive pleading an alternative method.

\textsuperscript{311} In the abstract, the defense of failure to state a claim upon which relief can be granted may or may not technically qualify as an affirmative defense. The key to the question is the reason given in support of the defense. If the reason is that the statement of claim is insufficient in form or in fact, as for example, an allegation of fraud which does not meet the stringent requirements of Ohio R. Civ. P. 9(B), the defense is in the nature of a plea in abatement, and is not a true affirmative defense. On the other hand, if the reason is that the claimant does not have a legally recognized claim, or that the recovery on the claim may be avoided because of some legal bar, such as the running of the statute of limitations, the defense is in the nature of a plea in bar and qualifies as an affirmative defense.

It is important to keep this distinction in mind because the difference between a plea in abatement and a plea in bar dictates the detail with which each must be pleaded. If the defense is in the nature of a plea in abatement, it may be pleaded in a conclusory manner, e.g., “The complaint fails to state a claim against defendant C.D. upon which re-
terminated at the adversary hearing on the merits unless a party to the action moves for an accelerated determination. The method to be employed in obtaining an accelerated determination will depend upon the contents of the claimant's pleading. If the failure to state a claim appears from the face of the statement of claim, a pre-trial determination can be obtained by a motion for judgment on the pleadings under the provisions of Rule 12(C), by a motion for a preliminary hearing under the provisions of Rule 12(D), or by a motion for summary judgment under the provisions of Rule 56. In this circumstance, there is no essential difference between any of these motions, despite the difference in designation, since none of them need be supported by evidence beyond the face of the statement of claim. Accordingly, all are in essence motions for judgment on the pleadings and shall be treated as such in the following subsection of this article.

If the failure to state a claim does not appear completely from the face of the claimant's statement of claim, so that the challenge must be supported by extrinsic evidence, there is basically only one way of obtaining a pre-trial determination of the defense, and that is by a Rule 56 motion for summary judgment. As we have previously

112 This is the basic point made by Tiefel v. Gilligan, 40 Ohio App. 2d 491, 321 N.E.2d 247 (1974), although the procedure involved in that case differs somewhat from the situation described in the text. See note 297 supra.

113 Ohio R. Civ. P. 12(C) motion for judgment on the pleadings cannot be used for this purpose in the Ohio system because it cannot be supported by extrinsic evidence. In the Ohio system, the motion is limited to defenses which appear from the face of the pleadings. As the court said in Peterson v. Teodosio, 34 Ohio St. 2d 161, 165, 297 N.E.2d 113, 117 (1974): "Civ. R. 12(C) is a continuation of the former statutory practice and presents only questions of law, and determination of the motion for judgment on the pleadings is restricted solely to the allegations in the pleadings. Conant v. Johnson (1964), 1 Ohio App. 2d 133 (204 N.E.2d 100)." Ohio RULE Civ. P. 12(D) presents somewhat different problems. The Rule provides, "The defenses specifically enumerated (1) to (7) in subdivision (B) of (C) as rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (C) of this rule shall be heard and determined before trial.
seen, an order vacating a summary judgment and reinstating the case for an eventual adversary hearing on the merits is not final under either the first or fourth tests for finality.

The second alternative principally applies to improperly pleaded counterclaims. By the express terms of Rule 12(B), the general rule that a motion to dismiss for failure to state a claim upon which relief can be granted must be made prior to the service of a responsive pleading applies only "if a further pleading is permitted." And by the express terms of Rule 7(A), a further pleading to a counterclaim (a reply) is permitted only if the counterclaim is denominated as such. If a pleader mistakenly designates a counterclaim as a defense, the court, if justice so requires, shall treat it as a counterclaim but will neither require

on application of any party." From this, it can be argued that the sole function of the Rule 12(D) motion is to accelerate a determination of the Rule 12(B) defenses, and to this end, no supporting documentary evidence is required. Therefore, the Rule 12(D) motion cannot be accompanied by documentary evidence. This argument may very well be sound when the defenses (other than the defense of failure to state a claim upon which relief can be granted) are presented by motion prior to the service of a responsive pleading, because such motions presenting a defense can be supported by documentary evidence. See Jurko v. Jobs Europe Agency, 43 Ohio App. 2d 79, 334 N.E.2d 478 (1975). However, a different situation prevails when the defenses are presented in the responsive pleading. In this latter situation, the Rule 12(D) motion serves two functions. First, it accelerates a determination of the defenses. Second, it compels the defender to come forward with the facts and the law in support of the defense. How could the court determine the defense otherwise? If the validity of the defense appears from the face of the pleadings, it is possible for the court to determine the defense without supporting evidence, but in such a case, at the very least, the Rule 12(D) motion forces the defender to serve and file a brief in support of the defense. Yet, as Jurko informs us, the validity of the Rule 12(B) defenses will not always be apparent from the face of the pleadings. We also learn from that case that when a Rule 12(D) motion for preliminary hearing is made, "the court may hear the matter on affidavits, depositions, interrogatories, or receive oral testimony." Id. at 85, 334 N.E.2d at 482. Therefore, when the validity of the defense does not appear from the face of the pleadings, the Rule 12(D) motion prods the defender into producing the documentary evidence needed to support the defense. (Oral testimony can be produced at the oral hearing which is permitted on the Rule 12(D) motion, as shown in the Jurko case.) Thus, if it is the defender who makes the Rule 12(D) motion for a preliminary hearing, he may present documentary evidence in support of the defense with the motion. Logically, if the defender can do this, there is no apparent reason why the claimant cannot present documentary evidence against the defense when it is the claimant who makes the Rule 12(D) motion. Therefore, it may be concluded that when a Rule 12(B) defense is presented in a responsive pleading, the Rule 12(D) motion which seeks a preliminary determination of that defense may be accompanied by documentary evidence in support of, or in opposition to, that defense.

As indicated earlier, it is doubtful whether this conclusion applies to the defense of failure to state a claim upon which relief can be granted. When that defense is presented by a Rule 12(B)(6) motion, it cannot be supported by documentary evidence in testimonial form. If documentary evidence is required to sustain the defense, the challenger must employ a Rule 56 motion for summary judgment, or the court must convert the supported Rule 12(B)(6) motion to dismiss into a Rule 56 motion for summary judgment. See Stephens v. Boothby, 40 Ohio App. 2d 197, 318 N.E.2d 535 (1974). See also notes 306-09 supra. This rule should be equally applicable when the defense is presented in the responsive pleading. If evidence extrinsic to the pleadings is necessary to support the defense, and one of the parties seeks an accelerated determination of the defense, the supporting evidence must be presented by a motion for summary judgment. Should a party employ a supported Rule 12(D) motion for a preliminary hearing, the trial court must either convert that motion into a Rule 56 motion for summary judgment, or strike the supporting evidence from the file.

314 See Ohio R. Civ. P. 8(C), which provides in pertinent part: "When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the
nor permit a reply. Instead, the averments in the misdesignated counterclaim shall be deemed to be denied or avoided. In such event, should the opposing party desire to have the misdesignated counterclaim dismissed for failure to state a claim upon which relief can be granted, he need not move for dismissal within 28 days after service of the counterclaim, but may move for judgment on the pleadings "within such time as not to delay the trial," or may move to dismiss for failure to state a claim "at the trial."

The third and last alternative leads to much the same end as the second. According to Rule 12(H)(1), if the defense of failure to state a claim upon which relief can be granted is not asserted by motion to dismiss made prior to the service of a responsive pleading, or is not asserted in the responsive pleading or an amendment thereof made as a matter of course, it may be asserted in a later pleading if one is permitted, or it may be raised by a motion for judgment on the pleadings, or by a motion to dismiss made "at the trial on the merits."

If the term "answer" is read in the titular sense of simply being the designation of a particular document, then this admonition can be read to permit a reply to a misdesignated counterclaim if the court orders it. If the term "answer" is read in the substantive sense of being the required response to a complaint or a cross-claim, however, it will not include those allegations which are properly construed as a counterclaim, and the admonition will prohibit even a court-ordered reply to a misdesignated counterclaim. A substantive reading is more in accord with the provisions of Rules 8(D) and 12(B) which are discussed in notes 316-320 infra. The point is hardly one of great importance, however, for should the court erroneously order a reply to a misdesignated counterclaim, the error will seldom, if ever, be other than harmless error as that term is defined in Rule 61.

As it is said in Ohio R. Civ. P. 8(D), "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

Since no responsive pleading is permitted, the alternative of presenting the defense in a reply to the counterclaim is not available to the challenger, and if the defense is to be raised at all, it must be raised by motion.

See note 300 supra.

Ohio R. Civ. P. 12(C) authorizes a motion for judgment on the pleadings "after the pleadings are closed but within such time as not to delay the trial." Since no reply is permitted to a misdesignated counterclaim, and since the allegations of such a counterclaim "shall be taken as denied or avoided," the pleadings are closed when the document containing the misdesignated counterclaim is served (unless the court orders a reply to that part of the document which substantively qualifies as the answer), and the motion for judgment on the pleadings will lie.

Ohio R. Civ. P. 12(B) provides, "If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief." Essentially, the motion to dismiss for failure to state a claim upon which relief can be granted asserts a defense "in law." Therefore, the motion may be made at the trial.

Ohio R. Civ. P. 12(H)(1) states:

A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or if he has made no motion, by responsive pleading or an amendment thereof made as a matter of course under Rule 15(A), except (1) the defense of failure to state a claim upon which relief can be granted . . .
Whatever the alternative used, the defense of failure to state a claim will be determined pursuant to a motion for judgment on the pleadings or a motion for summary judgment, or it will be determined at the adversary hearing on the merits. We have already examined the motion for summary judgment, and have found that its vacation does not result in an order that is final under either the first or fourth tests for finality. This conclusion is equally valid when the underlying thrust of the motion is the failure to state a claim upon which relief can be granted. The motion for judgment on the pleadings will be the subject of the next subsection of this article. The discussion now turns to the determination of the defense if failure to state a claim for which relief can be granted at the adversary hearing on the merits.

As noted previously in connection with the defense of failure to join an indispensable party, the essential difficulty is with the meaning of the phrase "at the trial on the merits." Specifically, does it mean immediately before the trial begins, or does it include a determination made at some point during the trial? In the previous discussion of this problem it was concluded that a determination made during the adversary hearing on the merits was within the contemplation of the phrase. There is no apparent reason to depart from this conclusion when the defense is failure to state a claim upon which relief can be granted rather than the defense of failure to join an indispensable party. Indeed, when the defense is failure to state a claim upon which relief can be granted there is even more support for the conclusion, since such a defense, if asserted during the trial, is logically asserted by means of a motion for a directed verdict or a Rule 41(B)(2) motion to dismiss.

may be made by a later pleading, if one is permitted, by motion for judgment on the pleadings or at the trial on the merits.

The "later pleading" to which this Rule makes reference is something of a mystery. Obviously, a "later pleading" must be a pleading which follows the responsive pleading. But the only pleadings following the responsive pleading permitted by the Rules are: a reply to an answer or a third-party answer, if ordered by the court under Rule 7(A); a pleading amended under the provisions of Rule 15(A); a pleading amended under the provisions of Rule 15(B); and a supplemental pleading under the provisions of Rule 15(E).

Rule 12(H)(1) hardly contemplates a reply to an answer or a third-party answer, since neither of those pleadings contain a statement of claim. Therefore, there would be no occasion to allege failure to state a claim in the reply. Likewise, this portion of the Rule does not have reference to a Rule 15(A) pleading amended as a matter of course, since that pleading is expressly mentioned in an earlier part of the Rule. Therefore, by "later pleading," the Rule must mean a Rule 15(A) pleading amended with leave of court, or a Rule 15(B) pleading amended to conform to the evidence.

In some circumstances, a Rule 15(E) supplemental pleading may fall within the ambit of the phrase. Normally, a supplemental pleading is limited to transactions, occurrences, or events which have happened since the date of the pleading sought to be supplemented. This would generally eliminate the supplemental pleading as a vehicle for asserting the defense of failure to state a claim, since that defense will normally exist at the time the pleading sought to be supplemented was served. But one might suppose that a change in the law subsequent to the service of the original pleading was contemplated. If the change in the law were sufficient to defeat the claim, the defender might assert the defense of failure to state a claim by means of a supplemental responsive pleading.

In any event, if the defense is asserted in a "later pleading," the rules with respect to the first alternative should apply, and the situation should be the same as if the defense had been asserted in the original responsive pleading.

See text at notes 163-69 supra.

See, e.g., Bozzelli v. Industrial Comm'n, 122 Ohio St. 201, 171 N.E. 108 (1930) (syllabus at ¶4) in which the court stated:
Therefore, if the defense is properly asserted "at the trial on the merits," it will be asserted by a motion to dismiss made immediately before the trial commences, by a motion for directed verdict made on the opening statement of the claimant, by a motion for directed verdict or a motion to dismiss made at the close of the claimant's presentation of evidence, or by a motion for directed verdict or motion to dismiss made at the close of all of the evidence.

If the motion is made and granted just before the commencement of the adversary hearing on the merits, and the claim dismissed, a later order vacating the dismissal and reinstating the case for trial will not be final under either the first or fourth test for finality, since the vacating order will neither determine the action, prevent a judgment, nor order a new trial.

If the motion for directed verdict made at the close of the claimant's opening statement is limited to the legal insufficiency which appears from the face of the claimant's statement of claim, and the motion is granted, it would not appear that there has been a trial. In essence, such a motion admits the truth of the allegations contained in the statement of claim. Therefore, since those allegations are not controverted, the motion for directed verdict does not reach issues which arise on the pleadings, and the court's judicial examination of the matter is not a judicial examination of issues of fact or conclusions of law which arise on the

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Failure to object to a petition by demurrer, on the ground that it does not state facts showing a cause of action, does not waive the objection, which may be asserted at any stage of the case—by a motion for directed verdict or by a motion for new trial containing an assignment that the verdict is contrary to law.

See also Morgenstern v. Austin, 170 Ohio St. 113, 162 N.E.2d 849 (1959).

Of course, in light of the changes in procedure made by OHIO R. Civ. P. 12(H), it is now very doubtful whether the defense can still be asserted by a motion for a new trial on the ground that the verdict is contrary to law. Apart from that, however, the language of the Bozzelli syllabus, as affirmed in Morgenstern, appears to be sound, and the defense may be raised during the trial by means of a motion for directed verdict or a motion to dismiss. In Morgenstern, the action was tried to the court sitting without a jury, and the defense was raised by means of a motion for directed verdict made at the close of all of the evidence. In such a case, Rule 41(B)(2) would now substitute a motion to dismiss for the motion for directed verdict. Thus, we may conclude that the Bozzelli rule is equally applicable to a Rule 41(B)(2) motion to dismiss.

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See, e.g., Mills v. Whitehouse Trucking Co., 40 Ohio St. 2d 55, 320 N.E.2d 668 (1974). Since the motion is made in the presence of the court, it may be made orally under the provisions of Rule 7(B)(1), but if it is made orally, care must be taken to insure that it becomes part of the record.

See OHIO R. Civ. P. 50(A)(1), which states, "A motion for directed verdict may be made on the opening statement of the opponent, at the close of the opponent's evidence or at the close of all the evidence."

See OHIO R. Civ. P. 50(A)(1), quoted in note 325 supra, and OHIO R. Civ. P. 41(B) (2), which provides in pertinent part: "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant . . . may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief."

See note 325 supra. OHIO R. Civ. P. 41(B)(2) does not specifically provide for the making of a motion to dismiss at the close of all of the evidence, because, in the vast majority of cases, such a motion would be surplusage. At that point in the proceedings, the trial court must determine the case, and no motion is required to stir the court to action. However, there is no apparent reason why the motion to dismiss cannot be used at this point to invite the court's attention to the legal insufficiency of the claimant's statement of claim. Without such a motion, the trial court is quite likely to overlook the point.
pleadings. In a word, it is not a trial. This conclusion probably still holds true if the motion for a directed verdict is addressed both to the statement of claim and the claimant’s opening statement, since the opening statement cannot aid the statement of claim. Consequently, the order vacating an entry of judgment made pursuant to such a motion will be no more final under either test of finality than the order vacating a dismissal granted upon motion made prior to the commencement of an adversary hearing on the merits.

The motions for directed verdict or for dismissal made at the close of the claimant’s evidence or at the close of all of the evidence present a somewhat different problem. It has been held under the Rules that the issues of a case are made up not only on the pleadings, but also on the evidence received by the trial court. Thus, when evidence is presented by the claimant without objection from the challenger, it will be assumed that the challenger has impliedly consented to a trial of the issues raised by that evidence. Therefore, when ruling on a motion for directed verdict, or on a motion to dismiss made at the close of the claimant’s evidence or at the close of all the evidence, the trial court must consider the evidence even if the motion is expressly limited to the face of the claimant’s statement of claim. Since the received evidence may itself raise issues to be tried, and since the court must judicially examine those issues in passing upon the motion, it must be


To a certain extent, this was also true in Code pleading, but only if the party amended his pleadings to conform to the evidence presented at trial. As the Court said in Morgenstern v. Austin, 170 Ohio St. 113, 116, 162 N.E.2d 849, 851-52 (1959):

[Code of Civil Procedure of the State of Ohio § 137, 1853 Ohio Laws 57 (codified at Ohio REV. CODE ANN. § 2309.58 (Page 1954) (repealed 1970) ) which provides for amendment of pleadings to conform to the evidence] requires an amendment to the pleading upon which the party relies. It is not self-executing or a cure-all. If a party wishes to take advantage of it the burden is on him to so amend. Where a party pleads one cause of action but proves another, he must amend his pleading to conform to the proof, and if he fails to so amend, there is a failure of proof and a verdict must be directed against him.

The Rules have eliminated the need to amend. Ohio R. Civ. P. 15(B) provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues.

330 See Ohio R. Civ. P. 15(B), quoted in part in note 329 supra. The remainder of the Rule reads:

If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

From a reading of this Rule as a whole, it is clear that implied consent is the consequence of failure to object to a variance in the evidence presented at trial.
concluded that the court’s determination of the motion is a “trial.” Therefore, should an order granting the motion for directed verdict or the motion to dismiss be thereafter vacated, and the case reinstated for trial, the vacating order will be one which orders a “new” trial and will be final under the fourth test of finality.

In sum, then, an order vacating an order or judgment sustaining the defense of failure to state a claim upon which relief can be granted will never be final under the first test for finality, but depending upon how the defense is presented, such an order may occasionally be final under the fourth test for finality.

b. The Motion for Judgment on the Pleadings (Rule 12(C))

The motion for judgment on the pleadings may be made after the pleadings are closed but before the commencement of the adversary hearing on the merits.\(^{331}\) If timely, the motion must be heard and determined before the beginning of the adversary hearing.\(^{332}\) Should the motion be granted without leave to amend, the “judgment” entered is a true, final judgment within the meaning of Rule 54(A), and as such, is subject to a motion for relief from judgment under the provisions of Rule 60(B).\(^{333}\) As a general rule, the types of relief which may be granted are as varied as the types of relief which may be granted from a judgment entered after an adversary hearing on the merits, and if such relief is granted, the rules previously discussed in connection with the judgment after trial on the merits will apply.

However, there is one particular form of relief from a judgment on the pleadings that is not usually encountered after a trial on the merits — the vacation of the judgment on the pleadings and the reinstatement of the case for an adversary hearing on the merits. Obviously, this type of vacating order is not final under the first test for finality, since it neither determines the action nor prevents a judgment. Therefore, if it is to be

\(^{331}\)Ohio R. Civ. P. 12(C) provides: “After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” Rule 12(D) states that “the motion for judgment mentioned in subdivision (C) of this rule shall be heard and determined before trial on application of any party.”

When these two subdivisions of Rule 12 are read together, it is clear that the phrase “within such time as not to delay the trial,” at least means “at some time before the trial begins.” Therefore, we can conclude that the motion must be made before the commencement of the adversary hearing on the merits if it is to be timel.

\(^{332}\)A fair reading of the portion of Ohio R. Civ. P. 12(D) quoted in note 331 supra, would lead to the conclusion that the court may reserve a ruling on the motion until the adversary hearing on the merits unless a party to the action moves for a preliminary hearing. But in State ex rel. Keating v. Pressman, 38 Ohio St. 2d 161, 311 N.E.2d 524 (1974), the Ohio Supreme Court held that a motion for a preliminary hearing is impliedly a part of every Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Since there is no logical reason why such a holding should not be extended to all of the motions mentioned in Rule 12(D), we may conclude that the holding has equal application to the Rule 12(C) motion for judgment on the pleadings, and that every such motion impliedly contains within it an application for a hearing and determination of the motion prior to the commencement of the adversary hearing on the merits.

\(^{333}\)Peterson v. Teodosio, 34 Ohio St. 2d 161, 297 N.E.2d 113 (1973). As Peterson points out, if the defect reached by the motion is curable, the court must grant leave to amend. But if the court fails to do so, the judgment entered is no less final for being erroneous. LaBarbera v. Batsch, 10 Ohio St. 2d 106, 227 N.E.2d 55 (1967).
final at all within the terms of our present discussion, it must find its
definiteness in the fourth test. Since the original judgment and the vacating
order are both entered before there has been an adversary hearing on
the merits, the key problem presented by the fourth test is whether the
vacating order amounts to an order which grants a "new" trial. The
answer to that question depends in turn upon whether the court's de-
termination of the original motion is a hearing in a summary proceed-
ing or a trial. We can answer this second question only in the context
of the defenses which may be presented by the motion for judgment on
the pleadings.

From previous discussions, it is clear that the Rule 12(C) motion for
judgment on the pleadings may be used as the vehicle for the initial
presentation of the defenses of lack of jurisdiction over the subject mat-
ter, failure to state a claim upon which relief can be granted, and failure
to join an indispensable party. From a review of Rule 12(H), we
learn that the motion may likewise be employed for the initial presenta-
tion of the objection of failure to state a legal defense to a claim. The
three defenses will first be examined.

If the validity of these defenses is apparent from the face of the claim-
ant's pleadings or from the uncontroverted facts in the record as a whole,
the hearing on the Rule 12(C) motion will not amount to a trial. This
is especially true with respect to the defenses of lack of subject matter
jurisdiction and failure to join an indispensable party, since these two
defenses involve issues which are collateral to the issues which arise on
the pleadings. It will be equally true with respect to the defense of fail-
ure to state a claim upon which relief can be granted, since the motion
for judgment on the pleadings in effect admits the truth of the statement
of claim and the facts of record and thus eliminates any controversy
with respect to those facts. In short, since there is no controversy there
are no issues which arise on the pleadings, and in the absence of such is-
ues the judicial examination performed during the hearing does not
amount to a trial.

The situation becomes more complex when the validity of the de-
fenses is dependent upon the truth of facts alleged in the defendant's
responsive pleading. In this circumstance, the use of the motion for
both the presentation of the defense, and its pre-trial resolution, may
well depend upon which party to the litigation is the moving party.

Since no responsive pleading is required or permitted to the de-
fender's responsive pleading in the usual course of proceeding, the aver-
ments of the defendant's pleading are taken as denied or avoided.

334 See OHIO R. CIV. P. 12(H)(1).
335 Id.
336 OHIO R. CIV. P. 8(D) states: "Averments in a pleading to which no responsive plead-
ing is required or permitted shall be taken as denied or avoided." And, after listing the
pleadings which may contain a statement of claim, and the authorized responsive pleadings
thereto, Rule 7(A) provides: "No other pleading shall be allowed, except that the court may
order a reply to an answer or a third-party answer." Therefore, unless the trial court orders
a reply, there will be no responsive pleading to the defendant's responsive pleading, and the
averments contained in that pleading will be taken as controverted by denial or avoidance.
This presumption creates a controversy with respect to those facts which are essential to the validity of the defenses, and since the controversy arises on the pleadings the issue with respect to those defenses also arises on the pleadings. That being so, a judicial examination of the issue, whether an issue of law or fact, normally amounts to a trial.

Accordingly, while the defender may employ the motion for judgment on the pleadings to raise the defense which is dependent upon the facts alleged in the responsive pleading, he may not employ it for the purpose of obtaining a pre-trial resolution of that defense. In order to resolve the controversy created by the presumption, the trial court would have to receive evidence which establishes the truth of the defender’s factual averments. As previously seen, however, the motion for judgment on the pleadings cannot be supported by evidence beyond the pleadings themselves. Therefore, the motion for judgment on the pleadings is not available to the defender as a means of obtaining a pre-trial resolution of these defenses in this particular circumstance, and a motion for summary judgment would be the proper motion.

Of course, if the trial court orders the claimant to make reply to the

337 See note 313 supra. Rhoades v. McDowell, 24 Ohio App. 94, 156 N.E. 526 (1927), illustrates this proposition. The case involved a petition, an answer, and a reply. The answer set up the affirmative defense of fraud, and the reply attempted to avoid this defense with an allegation of estoppel. Since the reply formally closed the pleadings, the plaintiff moved for judgment on the pleadings. However, the court noted that the allegations of estoppel were deemed to be denied since no further pleading was allowed, and thus the motion for judgment on the pleadings did not lie:

The affirmative facts of alleged estoppel set up and relied upon in the reply were as a matter of law, denied, and being denied, the court, of course, could not pass upon them over the objection of said defendant, for it is a well-recognized rule that where issue is joined upon a single material proposition a judgment upon the pleadings cannot be rendered. Id. at 101, 156 N.E. at 528.

At the time this case was decided the motion for summary judgment was not available, so the court made no mention of that motion as an alternative to the motion for judgment on the pleadings.

338 See note 306 supra. Care must be taken here to understand precisely what is being said. While a motion for judgment on the pleadings is an inappropriate vehicle for obtaining a resolution of the defense because it cannot be supported by documentary evidence, it remains a proper vehicle for asserting the defense if the defense has not previously been asserted by motion or responsive pleading. But this latter use of the motion when the defense must be supported by documentary evidence would appear to be a waste of effort. The defense must remain unresolved until the time of trial unless it can be said that the necessary documentary evidence can be introduced in support of the Rule 12(D) motion for a preliminary hearing which is an implied conjunct of the Rule 12(C) motion for judgment on the pleadings. See notes 313 and 332 supra. This seems to be a rather devious method for avoiding the thrust of Rule 12(C). Further, when the Rule 12(D) motion is supported by documentary evidence, it is, in essence, a Rule 56 motion for summary judgment. However, if one compares Ohio Rule 12(C) with FED. R. Civ. P. 12(c), one must conclude that the court may not treat a motion for judgment on the pleadings as a motion for summary judgment. Yet this is more or less what the court would have to do if it were to accept the thesis that the Rule 12(D) motion is an implied part of the Rule 12(C) motion, and that the documentary evidence is tendered in support of the former rather than the latter. In short, when all of the Rules are fairly considered, it is apparent that the Rule 12(C) motion for judgment on the pleadings may be used to assert any one of these three defenses if they have not been made previously, but if both their assertion and pre-trial resolution is desired, the Rule 56 motion for summary judgment is the only appropriate motion.
defender's responsive pleading, a different situation may be presented. Unless the reply expressly denies the averments upon which the defender relies, those averments will stand admitted. If they are admitted, the motion for judgment on the pleadings may be employed for both the presentation and pre-trial resolution of the defense, since the validity of the defense can be determined from the face of the pleadings and without the aid of extrinsic evidence. In this instance, since the facts are uncontroverted, no issues arise on the pleadings, and the hearing on the motion is not a trial.

Absent a court-ordered reply, the claimant may move for judgment on the pleadings if the defender's responsive pleading contains new matter, even though the new matter is deemed to be denied or avoided by operation of Rule 8(D). In such a case the claimant's motion admits the truth of the new matter in the defender's responsive pleading, and this admission supersedes the denial or avoidance implied by the Rule. Thus, since the controversy is eliminated by the motion, no issues arise on the pleadings, and the hearing on the motion is not a trial.

A court-ordered reply, however, can complicate the question. If the reply is limited to admissions and denials of the facts alleged in the defender's responsive pleading, and the admissions of fact do not amount to an admission of the validity of the defense pleaded, the case is at issue, and neither party may properly move for judgment on the pleadings since there remain issues of fact to be resolved by the taking of evidence. This would appear to be true even if both parties moved for judgment on the pleadings, since the admissions made by one party's

339 In its discretion, the trial court may order a reply to an answer or a third-party answer. See Ohio R. Civ. P. 7(A), quoted in note 336 supra.

340 Ohio R. Civ. P. 8(D) states: "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading." When a reply is ordered by the trial court under the authority granted it by Rule 7(A), the reply becomes the required responsive pleading to the defender's responsive pleading.


342 In effect, such a motion by the claimant presents the objection of failure to state a legal defense to the claim. As it is noted in State ex rel. Johns v. Board of Cty. Commrs., 29 Ohio St. 2d 6, 6-7, 278 N.E.2d 19, 20 (1972) (citations omitted):

By filing a motion for judgment on the pleadings, relator admitted, for purposes of the motion, the truth of all relevant and well-pleaded allegations in the answer. In sustaining that motion, the court below necessarily viewed the answer in the same light.

By admitting the truth of this allegation, for purposes of the motion for judgment on the pleadings, relator squarely placed before the court below the question of whether that averment stated a good defense to the complaint.

343 As the court stated in Rhoades v. McDowell, 24 Ohio App. 94, 156 N.E. 526 (1927) (syllabus at ¶ 2): "A judgment upon the pleadings cannot be rendered when issue is joined upon a single material proposition."
motion cannot be used to aid the other party. On the other hand, if the reply does not deny the defender's allegations of fact, but pleads facts which tend to avoid the thrust of the defender's defense, the avoiding facts are deemed to be denied, or their thrust avoided. In such event, the claimant cannot move for judgment on the pleadings because Rule 8(D)'s presumption has put the case at issue. If the only controverted issue in the case is the issue created by that Rule 8(D) presumption of denial or avoidance, however, the defender may move for judgment on the pleadings because the admissions resulting from the motion supersede the presumption and eliminate the controversy.

With the controversy thus eliminated, no issues arise on the pleadings, and the hearing on the motion is not a trial.

The motion for judgment on the pleadings need not be limited to the initial presentation of the three defenses mentioned above. It may also be used as a means of obtaining a pre-trial determination of these defenses, as well as the other Rule 12(B) defenses, if those defenses have been previously asserted in the responsive pleading. In such event, the rules are the same as those discussed above when the validity

344 See Rhoades v. McDowell, 24 Ohio App. 94, 156 N.E. 526 (1927) (syllabus at ¶1):
In a case where separate motions for judgment on the pleadings are made by the plaintiff and defendant, and are submitted to the trial court at the same time, the admissions thereby made by the defendant cannot be considered by the court in favor of the plaintiff in passing upon the motion of the plaintiff, nor can the admissions thereby made by the plaintiff be considered by the court in favor of the defendant in passing upon defendant's motion, as said motions are independent of each other and present only questions of law upon the facts admitted by each motion.


346 See note 337 supra.

It is the established rule that, upon defendant's motion for judgment on the pleadings, the facts pleaded properly in the [complaint] are to be taken as true, the facts admitted or alleged in the answer and not denied are to be taken as true, and the facts alleged properly in the . . . reply are to be considered as true, and plaintiff is also entitled to all reasonable inferences to be drawn from the facts.

348 Specifically, the additional defenses are lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, and failure to join a necessary party. However, the grant of a motion premised on any one of these grounds will rarely result in a final order since in most cases the defect can be cured by new service, a transfer of the action to a proper forum, or the amendment of the pleadings and the bringing in of the absent party. Thus, the order granting the motion will seldom be subject to a Rule 60(B) motion for relief from judgment. But there will be an occasional case in which the grant of the motion will result in a final order. Suppose, for example, that jurisdiction over the person of the defendant is premised on the applicability of Rule 4.3, the "Long-Arm" rule, and the plaintiff has not pleaded the minimum contact upon which he or she relies. In such case, the defense of lack of jurisdiction over the person may be asserted in the answer, and a ruling on that defense may be obtained by a motion for judgment on the pleadings. If, under the provisions of Rule 11, the plaintiff cannot amend and plead facts which establish a minimum contact, the motion should be granted and the case dismissed. Assuming the existence of a suitable ground for relief from judgment, the order of dismissal would be subject to a Rule 60(B) motion for relief from judgment. Thus, the problem of the finality of the order granting relief from judgment is not wholly theoretical.
of the defense was dependent upon allegations of fact made in the responsive pleading. As noted, those facts are impliedly denied or avoided by operation of Rule 8(D). That being so, a motion for judgment will not lie unless it is made by the party in whose favor the presumption of denial or avoidance works. In the absence of the motion, the case is at issue, but with the making of the motion an admission of those facts replaces the presumption of denial or avoidance, and the issue is removed. Thus, in the absence of an issue arising on the pleadings, the hearing on the motion is a hearing in a summary proceeding, and not a trial.

Much the same can be said for the objection of failure to state a legal defense to the claim. If the validity of the objection appears from the face of the responsive pleading, or from the face of the pleadings as a whole, the motion for judgment on the pleadings is an appropriate vehicle for both the initial presentation of the objection and its pre-trial resolution, and the hearing on the motion will not amount to a trial since no controverted issues arise on the pleadings. If the validity of the objection is dependent upon extrinsic evidence, however, the motion for judgment on the pleadings will not properly lie; the motion for summary judgment is the appropriate motion for both presentation and resolution.

From all of the above, then, it may be said that when the motion for judgment on the pleadings is properly employed for the presentation and resolution of a defense or objection, or for the resolution of a defense or objection previously asserted in a responsive pleading, the hearing on the motion is a hearing in a summary proceeding and is not a trial. That being so, an order vacating the judgment entered pursuant to the grant of the motion will not be one which orders a "new" trial, and the fourth test for finality will not apply.

c. The Motion to Strike from the Pleadings (Rule 12(F))

Rule 12(F) may be divided into two parts. The first provides a vehicle for challenging substantive deficiencies in a pleading, while the second provides a method for objecting to certain formal irregularities in a pleading. Here, we are concerned only with the first part of the Rule.

This part, in turn, can be divided into two sub-parts, the first going

349 In pertinent part, OHIO R. Civ. P. 12(F) provides:
Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court’s own initiative at any time, the court may order stricken from any pleading any insufficient claim or defense. . . .

350 The second part of OHIO R. Civ. P. 12(F), treated in isolation, would read:
Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court’s own initiative at any time, the court may order stricken from any pleading any redundant, immaterial, impertinent, or scandalous matter. [Emphasis added.]
to substantive deficiencies in a statement of claim, and the second going to substantive deficiencies in a statement of defense. While these are similar in effect, the uniqueness of the first requires separate treatment.

(1) The Motion to Strike an Insufficient Claim

In substance, Rule 12(F) provides that upon motion or on its own initiative, the court may strike from a pleading any insufficient claim. This provision of the Rule becomes meaningful when contrasted with the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Federal Rule 12(f) has no corresponding provision, and it would appear that none is required since the function served by this provision is the same as that served by Ohio Rule 12(B)(6) motion to dismiss for failure to state a claim. But Ohio Rule 12(F) does have a distinct function, and that function is explained in the following extract from the Ohio Rules Advisory Committee Staff Note:

Rule 12(F) authorizes the court to strike from any pleading "any insufficient claim or defense." The words "claim or" were added in the Ohio rule. This provision explicitly permits an attack on one claim or defense in a pleading containing more than one claim or defense paralleling the Ohio statutes which permit a demurrer to one of several causes of action or defenses.

With this explanation, we can construct a rule governing the proper use of the provision, and integrate that use with the use of the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Thus, if a pleading contains a single statement of claim and that statement is legally insufficient, or if a pleading contains a number of statements of claim and all such statements are legally insufficient, the proper motion to be used in challenging the sufficiency of the pleading is the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. However, if a pleading contains more than one statement of claim, and one or more, but less than all, of such statements are legally insufficient, the proper motion to be used in challenging the insufficient statement or statements is the Rule 12(F) motion to strike from the pleading.

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351 See note 349 supra for the text of Ohio R. Civ. P. 12(F).
352 We are here speaking of a challenge made before service of the responsive pleading, so we are necessarily ignoring the Rules provisions for asserting the challenge in the responsive pleading, for asserting it by way of a motion for judgment on the pleadings, and for asserting by motion to dismiss or for directed verdict at the adversary hearing on the merits. See Ohio R. Civ. P. 12(H). Further, since we are contrasting Rule 12(B)(6) with Rule 12(F), we are also necessarily ignoring the possibility of asserting the challenge by a Rule 56 motion for summary judgment. All things being equal, these are alternative methods of asserting the challenge in the circumstances described.
353 Again, since we are contrasting the use of Rule 12(F) with the use of Rule 12(B) (6), we are ignoring the alternative methods of asserting the challenge mentioned in note 352 supra, including the use of a motion for partial summary judgment under the provisions of Rule 56(B).

It must be mentioned that not all of the reported decisions appear to agree with this
Like its "big brother," the Rule 12(B)(6) motion to dismiss for failure to state a claim, the Rule 12(F) motion to strike an insufficient claim from a pleading admits, for the purposes of the motion, the truth of all of the facts well-pleaded in the statement of claim which it attacks.\textsuperscript{354} Likewise, the Rule 12(F) motion to strike an insufficient claim is a "pure" motion; that is, it cannot be aided by evidence extrinsic to the pleading attacked. If the legal insufficiency of the claim challenged does not clearly appear from the face of the statement of claim, the motion cannot be granted.\textsuperscript{355}

Even if the motion to strike an insufficient claim is correctly employed and properly granted, however, it will not result in a final order. As noted in Rule 8(E)(2), if one or more, but less than all, claims in a pleading are insufficient, the pleading itself is not insufficient.\textsuperscript{356} Therefore, when the motion is granted, it should be granted with leave to serve and file an amended pleading which does not contain the insufficient claims, and the case may proceed on the amended pleading.\textsuperscript{357} Even though such an order may be construed as a dismissal of the stricken claims, it is not a final order because it does not dispose of

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\textsuperscript{354} Miles v. N. J. Motors, 32 Ohio App. 2d 350, 291 N.E.2d 758 (1972).

\textsuperscript{355} Miles v. N. J. Motors, 32 Ohio App. 2d 350, 352, 291 N.E.2d 758, 761 (1972).

\textsuperscript{356} This opinion unfortunately confuses the formal defects of redundancy, etc., with the substantive defect of legal insufficiency, and deems the former to be aspects of the latter, thereby unduly limiting the use of the Rule 12(F) motion to strike.

\textsuperscript{357} See Omo R. Civ. P. 8(E)(2) states in part: "When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements."

While this statement is expressly limited to alternative statements of the same claim, in principle it is equally applicable to two or more independent claims joined under the provisions of Rule 18(A).

\textsuperscript{357} This is the essential thrust of Westmoreland v. Valley Homes Mut. Hous. Corp., 42 Ohio St. 2d 291, 328 N.E.3d 406 (1975), although that case dealt with a Rule 12(E) motion for a definite statement rather than a Rule 12(F) motion to strike an insufficient claim. As it was noted in the syllabus: "A court order granting a motion for a definite statement pursuant to Civ. R. 12(E) requires the filing of an amended pleading or sup-
all of the claims. Accordingly, since the order granting the motion is not final, it is not subject to a Rule 60(B) motion for relief from judgment. At best, it is subject to a motion for reconsideration or rehearing, and as previously noted, an order granting reconsideration or rehearing is no more final than the order which it sets aside. In the vast majority of cases, then, the question of finality will never arise.

There are at least two ways in which the order striking the claim might become final. To begin with, the claimant might elect to stand on his original pleading. If the trial court's order striking the claim also ordered the service and filing of an amended pleading, the claimant could stand on the original pleading by refusing to serve and file the amendment. This would leave the court little choice but to dismiss the action for failure to obey a court order. Alternatively, if the court did not order an amended pleading, the claimant could simply refuse to proceed further on the original pleading, and this would normally result in a dismissal for failure to prosecute. But both of these dismissals would be penalty dismissals under the provisions of Rule 41(B)(1), and these have been considered in an earlier section of this article. In any event, if the claimant elects either of these options, he will normally do so with the view toward taking an appeal from the dismissal, and it is unlikely that the claimant would venture a Rule 60(B) motion for relief from judgment in lieu of that appeal.

The second way in which a 12(F) motion might become final depends upon the content of the judgment entry striking the claim. If that entry not only strikes the claim, but also dismisses it, and expressly states that there is no just reason for delay in making the order of dismissal final, the order will be final under the provisions of Rule 54(B).

Technically, in a Rule 12(F) situation the court need not grant leave to amend if the defect reached by the motion is incurable. In such a case, the original pleading can stand, with the insufficient claims deemed eliminated by the court's order granting the motion to strike. So much may be implied from Miles v. N. J. Motors, 32 Ohio App. 2d 350, 291 N.E.2d 758 (1972). Even in such a case, the court should order the service and filing of an amended pleading for the sake of clarifying the pleadings and tidying up the record. In any event, if the defect reached by the motion is curable the court is required to grant leave to amend. As it is said in Peterson v. Teodosio, 34 Ohio St. 2d 161, 297 N.E.2d 113 (1973) (syllabus at ¶ 6): "It is an abuse of discretion for a court to deny a motion, timely filed, seeking leave to file an amended complaint, where it is possible that plaintiff may state a claim upon which relief may be granted and no reason otherwise justifying denial of the motion is disclosed."

358 As it is said in Ohio R. Civ. P. 54(B):
When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, ... the court may enter final judgment as to one or more but fewer than all of the claims ... only upon an express determination that there is no just reason for delay. In the absence of such a determination, any order or other form of decision, however designated, which adjudicates fewer than all the claims ... shall not terminate the action as to any of the claims ..., and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

358 See notes 18 and 19 supra.

Although it is again more likely that the claimant would attempt an appeal from this order, he might attempt to have it vacated if a suitable ground therefor could be found within the parameters of Rule 60(B). Supposing that this has occurred, and that the court has granted the motion for relief, the relief most likely to be granted is the vacation of the order striking the claim and the reinstatement of the case at the point where it was interrupted. This reinstatement, of course, would contemplate an adversary hearing on the merits of the stricken claim in due course. Thus, we are faced with the question whether the order vacating the dismissal and reinstating the case would be a final order for purposes of appeal.

Once again, it is obvious that it is not final under the first test for finality because either party may prevail on the claim at the adversary hearing on the merits. Thus, the order neither prevents a judgment nor determines the action with respect to that claim.

With respect to the fourth test for finality, the key element is again the nature of the hearing on the motion to strike. If the hearing was a "trial," the vacating order is one which orders a "new" trial and is final under the fourth test, but if that hearing was simply a hearing in a summary proceeding, the vacating order does not order a "new" trial and the fourth test does not apply.

What, then, is the nature of the hearing? What has been said with respect to the Rule 12(B)(6) motion to dismiss for failure to state a claim is equally applicable here. Since the Rule 12(F) motion to strike cannot be supported by extrinsic evidence, and since it admits all of the facts well-pleaded in the statement of claim attacked, it in no way controverts the claimant's allegations. Therefore, since there is no controversy with respect to the allegations, no issue arises on the pleadings, and the judicial examination of the facts and the conclusions of law alleged in the statement of claim is not a trial. That being so, the vacating order is not final under the fourth test for finality.

In sum, then, it may be said that the Rule 12(F) motion to strike an insufficient claim will almost never lead to a final order. If in a rare instance it should do so, the order vacating that final order and reinstating the case at the point it was interrupted will not be a final order under either the first or fourth test for finality.

(2) The Motion to Strike an Insufficient Defense

If, as the Ohio Rules Advisory Committee indicates, the Rule 12(F) motion to strike an insufficient defense is truly the Rules equivalent of the old demurrer to the responsive pleading, then it may be used to attack the answer to a complaint, the reply to a counterclaim denominated as such, the answer to a cross-claim, and the third-party answer (hereinafter collectively referred to as the "responsive pleading").

In pertinent part, the Rules Advisory Committee Staff Note to Rule 12(F) provides: "Rule 12(F) authorizes the court to strike from any pleading 'any insufficient claim or defense.' . . . This provision explicitly permits an attack on one . . . defense in a pleading containing more than one . . . defense paralleling the Ohio statutes which permit a
used to attack the reply if, under the provisions of Rule 7(A), the court orders a reply to an answer or third-party answer.362

(a) Attacking the Responsive Pleading. If former sections 2309.21 and 2309.23 of the Ohio Revised Code are still controlling with respect to the proper interpretation of Rule 12(F), that rule’s motion to strike an insufficient defense from a responsive pleading may only be directed to a defense consisting of new matter in the responsive pleading.363 By and large, the phrase “new matter” has reference only to affirmative defenses.364 Thus, it may generally be said that the motion to strike an

demurrer to one of several . . . defenses. See, §§ 2309.12, 2309.21, 2309.23 and 2309.23. R. C.”

Of these four cited Code provisions, the second and the third are the pertinent ones. Ohio Rev. Code Ann. § 2309.21 (Page 1954) (repealed 1970) provided: “The plaintiff may demur to a counterclaim or defense consisting of new matter on the ground that on its face it is insufficient in law.” Ohio Rev. Code Ann. § 2309.23 (Page 1954) (repealed 1970) provided: “The plaintiff may demur to one or more of several counterclaims or defenses consisting of new matter, and reply as to the residue.”

As far as the counterclaim is concerned, the Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, or the Rule 12(F) motion to strike an insufficient claim from a pleading has replaced the demurrer mentioned in both of these sections, so we are here concerned only with the Rules equivalent of the demurrer to the defense.

362 See the text of the Ohio Rules Advisory Committee Staff Note to Rule 12(F), quoted in note 361 supra, as well as Ohio Rev. Code Ann. § 2329.25 (Page 1954) (repealed 1970), which provided: “The defendant may demur to the reply, or to a separate denial or avoidance therein of a defense or counterclaim, on the ground that on its face it is insufficient in law.”

363 See note 361 supra for the text of these sections.

364 In Conant v. Johnson, 1 Ohio App. 2d 133, 136, 204 N.E.2d 100, 102 (1964), the court defined the term “new matter,” quoting from 43 Ohio Jur. 2d Pleading § 120 (1960):

The term “new matter” refers to something relied upon by the defendant extrinsic to the matters set up by the plaintiff in his petition, or put in issue thereby, which, if true, is in law a defense to the action. [This defense impliedly admits the truth of the facts stated in the petition, and that upon these facts the plaintiff is entitled to recover, but avoids the effect of these statements by the new matter stated in the answer, by alleging facts that destroy the effect of the facts stated in the petition — facts which go to show that a right of action, once existing, has been lost or discharged, as by release accord and satisfaction, performance, the statute of limitations, etc.] The term “new matter” embraces strictly matters of confession and avoidance as understood at common law.

The material in brackets is in the original, but was not quoted by the Conant court.

Since the time of Conant, Volume 43 of Ohio Jurisprudence Second has been revised. The matter referred to now appears at 43 Ohio Jur. 2d Pleading § 145 (1973). The new version is substantially the same as the old, except that the material quoted in Conant is now preceded by the following:

The term “new matter” has long been used to refer to the averments set out in affirmative defenses, and while the term does not appear in Civil Rules, such rules do not affect the meaning of the term, or the type of averments in an answer to which it may properly be applied.

From all of the above, it is clear that “new matter” means an affirmative defense—a defense which the common law would term a plea in bar. See Ohio R. Civ. P. 8(C), and B. Shipman, Handbook of Common-Law Pleading 30 (3d ed. 1923), where the author notes:

It follows from the nature and object of the plea in bar that it must generally deny all or some essential part of the averments of fact in the declaration, or, admitting them to be true, allege new facts which obviate or repel their legal effect. In the first case, the defendant is said to traverse the matter of the declaration; in the latter, to confess and avoid it. Pleas in bar are consequently divided into pleas by way of traverse and pleas by way of confession and avoidance.
insufficient defense may only be directed to affirmative defenses asserted in the responsive pleading, and not to a defense consisting only of admissions and denials.\textsuperscript{365}

In the absence of a reply ordered by the court under the provisions of Rule 7(A), the allegations contained in an affirmative defense are deemed to be denied or avoided by operation of Rule 8(D). This presumption creates a controversy with respect to those allegations, and issues of fact and law thereby arise on the pleadings. However, since the Rule 12(F) motion to strike an insufficient defense is essentially the same as a demurrer to the "new matter" in the responsive pleading, it necessarily admits the truth of all of the facts well-pleaded in the affirmative defense, and eliminates the controversy created by the presumption.\textsuperscript{366} But the motion to strike the insufficient defense must be a "pure" motion as opposed to a "speaking" motion; that is, it may not be supported by matters extrinsic to the responsive pleading. Thus, the motion will not properly lie unless the insufficiency of the affirmative defense appears from the face of the responsive pleading itself.\textsuperscript{367} Of course, it must be kept in mind that the "face" of the pleading includes any written instrument attached to the pleading as an exhibit or attachment.\textsuperscript{368}

Normally, a responsive pleading containing an affirmative defense will also contain a separate defense consisting of the admissions and

In the footnote to this portion of the text, Professor Shipman states, "Pleas by way of confession and avoidance are divided into pleas by way of justification and excuse, and pleas by way of discharge. They are also referred to as affirmative defenses or defenses of new matter."

\textsuperscript{365}If a responsive pleading contains only admissions and denials, and the admissions admit all of the material facts alleged in the statement of claim, or the denials fail to deny all of the material facts alleged in that statement, the responsive pleading fails to state a legal defense. But in such case, the responsive pleading is not subject to a Rule 12(F) motion to strike an insufficient defense from the pleading. Rather, in this situation the claimant may obtain judgment in his or her favor by means of a Rule 12(C) motion for judgment on the pleadings.\textsuperscript{366}

As it is said in State ex rel. Hayes v. Heiser, 149 Ohio St. 188, 190, 78 N.E.2d 40, 41 (1948), "The demurrer admits all the well pleaded allegations of the answer and searches the entire record." Whether the Rule 12(F) motion to strike an insufficient defense from the pleading searches the entire record remains to be decided. If it does, the motion to strike may well result in a dismissal of the statement of claim as one which does not state a claim upon which relief can be granted. See State ex rel. Nimmo v. Cain, 152 Ohio St. 203, 88 N.E.2d 579 (1949); State ex rel. Lantz v. Board of Trustees, 147 Ohio St. 256, 70 N.E.2d 890 (1946). Thus, the movant may see his or her motion to strike "boomerang."

In Everett v. Waymire, 30 Ohio St. 308, 314 (1876), the supreme court held that when ruling on a demurrer to an answer, the trial court must:
take the pleading by the four corners, consider it as a whole, and, if the whole answer is found to contain facts sufficient, if well and clearly stated, to constitute a defense to the action, overrule the demurrer. The general demurrer tests the strength of the pleading, and not its form.

There is, however, federal authority to the effect that if a motion to strike is supported by documentary evidence admissible under the provisions of Fed. R. Civ. P. 56, it may be treated as a motion for partial summary judgment. See, e.g., Kramer v. Living Aluminum, Inc., 38 F.R.D. 347 (S.D.N.Y. 1965). To date, there is no reported Ohio decision which follows this lead.

\textsuperscript{366}See Ohio R. Civ. P. 10(C), which provides: "A copy of any written instrument attached to a pleading is a part thereof for all purposes." See also note 306 supra.
Not infrequently in such cases, the affirmative defense will be pleaded either hypothetically or in the alternative so as to avoid an unintended admission of the validity of the claimant's claim. To the same end, the affirmative defense is quite likely to incorporate by reference the admissions and denials of the preceding separate defense. If that is the case, and if the allegations denied in the separate defense are material to the claimant's right to recover, will a motion be granted to strike the affirmative defense which incorporates those denials by reference? The reported authority is far from overwhelming, but the one court to consider the question held that the motion would lie on the theory that the incorporated denials are mere surplusage, and do not protect the affirmative defense from attack on the ground that it is insufficient in law.

Suppose the above to be the case, and suppose that the motion to strike the affirmative defense is granted. Will the order striking the affirmative defense be a final order? It will not, for one or more of the following reasons. First, the motion to strike does not reach the separate defense consisting of admissions and denials; it reaches only the affirmative defense, and the case remains at issue with respect to the material allegations denied. Second, even if the motion to strike reached both the separate defense of admissions and denials and the affirmative defense, the insufficiency of the affirmative defense would not render insufficient the whole pleading. If the separate defense is good, and we have stipulated that it is, the case is still at issue with respect to the allegations denied in the separate defense. Third,

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369 Ohio R. Civ. P. 8(B) mandates that: "A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies."

370 This may be done under the authority of Ohio R. Civ. P. 8(E)(2), which stipulates: "A party may set forth two or more statements of defense alternately or hypothetically, either in one . . . defense or in separate . . . defenses. . . . A party may also state as many separate . . . defenses as he has regardless of consistency and whether based on legal or equitable grounds."

371 This may be done under the provisions of Ohio R. Civ. P. 10(C), which stipulates that: "Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion."

372 See Ohio Nat'l Life Ins. Co. v. Ohio Life Ins. Co., 188 N.E.2d 324, 326 (C.P. 1961): The defendant, in its First Defense, which contains a general denial, denies the allegations material to the plaintiff's right to recover. In view of this fact, the repetition of such denial by reference, in said Third Defense, seems superfluous and cannot, in our opinion, have the effect of protecting said Third Defense from its vulnerability to a demurrer, if such defense is otherwise vulnerable thereto.

373 See notes 363 and 364 supra.


375 If the Ohio R. Civ. P. 12(F) motion to strike an insufficient defense searches the pleadings as did its predecessor, the demurrer (see note 366 supra), it can be argued that the motion also tests the sufficiency of the separate defense consisting of admissions and denials.

376 As it is said in Ohio R. Civ. P. 8(E)(2): "When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements."

If the separate defense consisting of admissions and denials is also insufficient, the proper way of disposing of it is by a motion for judgment on the pleadings. Thus, if the
if the insufficiency in the affirmative defense is curable, the court must grant leave to amend so that a cure can be effected.\textsuperscript{377} Hence, even the issue raised by the affirmative defense will not be foreclosed by the order to strike unless the defender fails to serve an amended responsive pleading.

Therefore, since the order to strike does not result in a final order, it is not subject to a Rule 60(B) motion for relief from judgment, and no problem is presented for resolution.

This is true only in the normal case, however; the unusual case may present a situation in which the grant of a motion to strike can result in a final order.

Suppose, for example, that an insured sues his liability insurer for breach of contract in failing to defend him against a claim which, on the face of the complaint, was within the coverage of the insurance policy. The insurer admits that the injured party's complaint stated a claim which fell within the coverage of the policy, that it refused to defend the claim, and that the attorney's fees and costs incurred by the insured in defending the claim were reasonable. The insurer alleges, however, that it was justified in not defending the claim because the claim was not in fact covered by the policy of insurance. In this situation, the whole defense depends upon whether the insurer may refuse to defend based upon objective facts known to all the parties. Since \textit{Motorists Mutual Insurance Co. v. Trainor},\textsuperscript{378} it has been quite clear that the insurer's duty

claimant intends to challenge both defenses, he should couple a motion for judgment on the pleadings with the motion to strike the affirmative defense. Indeed, the claimant would be under some compulsion to do so. As it is said in \textit{Ohio R. Civ. P. 12(G)}: "A party who makes a motion under this rule must join with it the other motions herein provided for and then available to him."

However, should the claimant fail to join the two motions as Rule 12(G) commands, he will not lose the right to later assert the point by motion. Since Rule 12(G) speaks only of motions made under the aegis of Rule 12, it does not preclude a subsequent motion for summary judgment under the provisions of Rule 56(A), nor does it prohibit a motion for directed verdict under the provisions of Rule 50(A)(1). Moreover, it can be argued with some merit that a failure to join the motion for judgment on the pleadings with the motion to strike will preclude the making of the motion for judgment on the pleadings at a later date. This "stringing out" of the Rule 12 motions is admittedly the very abuse which Rule 12(G) was designed to prevent. On the other hand, if the point can be raised by a Rule 56 motion for summary judgment, and if that motion can be made at a later date, it seems idle to prohibit a motion for judgment on the pleadings made at a later date, since the end result would be the same—a "stringing out" of the motions. Yet, if it were held that the motion for judgment on the pleadings must be joined with the motion to strike, and that the objection cannot be taken by any pre-trial motion, then the objection itself would be forfeited until the time of trial. In such a situation, the claimant would have to try a case to which the defendant has no defense. This result is hardly in accord with Rule 1(B), which commands that, "These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." Whatever the end result of the above argument, the proper way of handling the situation is to join the two motions as required by Rule 12(G).

\textsuperscript{377}This is a necessary extension of Peterson v. Teodosio, 34 Ohio St. 2d 161, 297 N.E.2d 113 (1973). See note 127 supra.

to defend is based solely on the facts stated in the injured party's complaint. Therefore, in this situation the defense is legally insufficient. While a motion for judgment on the pleadings or a motion for summary judgment would be a more suitable method of disposing of the question, a motion to strike the allegations of noncoverage will lie, since the allegations are, by their nature, a plea in bar.\textsuperscript{379} Thus, if the court grants the motion to strike, it must also enter judgment for the insured, since there is no defense to the insured's action and nothing left to try. Obviously, such a judgment will be final for purposes of appeal, since it determines the action and prevents a judgment for the insurer. Should this judgment later be vacated on motion for relief from judgment, the relief most likely to be given is a reinstatement of the case for an adversary hearing on the merits. Thus, we are presented with the question whether the vacating order is a final order for the purpose of appeal.

It is not final under the first test for finality because it does not determine the action nor prevent a judgment — either party may prevail at the adversary hearing. Nor is it final under the fourth test for finality because the hearing on the motion to strike was not a trial. It was not a trial because the motion to strike admitted the truth of all of the facts well-pleaded in the defense challenged, thereby eliminating the controversy which arose from the presumption of denial or avoidance created by Rule 8(D). In the absence of such a controversy no issues arose on the pleadings, and the process of judicial examination was a summary proceeding, not a trial. Accordingly, the order vacating the judgment and reinstating the case was not an order which granted a "new" trial.

\textbf{(b) Attacking the Reply.} If the court orders a reply to an answer or a third-party answer under the authority of Rule 7(A), that reply will be in the nature of a responsive pleading to an affirmative defense in the answer or third-party answer.\textsuperscript{380} As such, it may consist solely of

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  \item \textsuperscript{379} As Professor Shipman notes in commenting on the plea in bar, "Pleas by way of confession and avoidance are divided into pleas by way of justification and excuse, and pleas by way of discharge. They are also referred to as affirmative defenses or defenses of new matter." B. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING 30 n. 21 (3d ed. 1923). The purported defense mentioned in the text is clearly a plea by way of justification and excuse.
  \item \textsuperscript{380} Since the Rules do not define the reply to an answer or third-party answer, we may assume that that term has much the same meaning as it did under the old Code of Civil Procedure which defined it in the following terms, "When an answer contains new matter, the plaintiff may reply to it, denying generally or specifically each allegation controverted by him. He also may allege, in ordinary and concise language, new matter, not inconsistent with the petition, constituting an answer to such new matter." Code of Civil Procedure of the State of Ohio § 101, 1853 Ohio Laws 57 (codified at Ohio Rev. Code Ann. § 2309.24 (Page 1954) (repealed 1970).

The only difference between the former Code's definition of a reply and the current version is the reference to the plaintiff's ability to deny "generally" the new matter contained in the answer or third-party answer. Under the Rules, a general denial is all but prohibited. Ohio R. Civ. P. 8(B) states:

Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials or designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the

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admissions and denials, solely of an affirmative defense, or of a combination of admissions and denials and an affirmative defense. Accordingly, all of the rules set out in the foregoing subsection apply to a motion to strike directed to the reply, but for the sake of completeness, and because of one slightly different twist, they are summarized below.

If the reply consists solely of admissions and denials, a motion to strike will not lie, since a motion to strike may only be directed to an affirmative defense. A motion for partial summary judgment, or in an appropriate case a motion for judgment on the pleadings, can be used to dispose of the reply if the denials therein do not put the affirmative defense in issue.

If the reply consists solely of an affirmative defense to the affirmative defense, the motion to strike will lie.

If the motion is granted, it will merely eliminate the reply. It will not dispose of the issues raised by the complaint and the affirmative defense to the complaint in the answer or third-party answer, and since these issues remain to be tried, the ruling on the motion to strike the affirmative defense in the reply will not be a final order. However, the motion to strike might work some sleight of hand if the affirmative defense in the answer or third-party answer will completely dispose of the claim set forth in the complaint or the third-party complaint. (Hereinafter, for convenience, we shall simply talk of an answer rather than of an answer or third-party answer, since what is said of the one will apply to the other.)

court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

If a general denial is to be used at all under the Rules, however, it is most properly used in a reply to an answer or third-party answer. In this connection, it must be remembered that the reply is directed only to new matter in the answer or third-party answer, and not to the pleading as a whole. Thus, for example, if the new matter consists solely of an allegation that the action was not commenced within the statutory period of limitations, the plaintiff may generally deny that allegation in the reply if he can show that the action was timely commenced. Even here care must be taken, for the use of the general denial must be tailored to the language used in the new matter. Suppose, for example, that an action for personal injury is brought two and one-half years after the injury occurred, but the action is timely because the defendant had been out of the state for nine months after the tort was committed. If the complaint does not set forth facts which take the case out of the usual two-year statute, the defendant may answer with the statute of limitations defense taken from Ohio R. Civ. P., Appendix of Forms, Form 15: “The right of action set forth in the complaint did not accrue within [two] years next before the commencement of this action.” Given our facts, this is a true statement, and cannot be met with a general denial. Rather, it must be met with an admission and an averment of facts which bring the case within the appropriate savings clause of Ohio Rev. Code Ann. § 2305.15 (Page Supp. 1977).

In any event, a reply may deny the new matter in the answer or third party answer, and/or it may present new matter constituting an answer. As previously mentioned, “new matter” means “affirmative defense.” See note 364 supra. Therefore, it is correct to say that a reply is a responsive pleading to an affirmative defense in the answer or third-party answer.

381 See, e.g., Rhoades v. McDowell, 24 Ohio App. 94, 156 N.E. 526 (1927), in which the reply asserted the affirmative defense of estoppel to the answer’s affirmative defense of fraud.

382 See notes 363 and 364 supra.

383 If one wishes simply to eliminate the reply, a motion for partial summary judgment should be adequate to the task; if one wishes to dispose of the whole case, and the affirmative defense pleaded in the answer or third-party answer will do so, a motion for judgment on the pleadings will be suitable, as will a motion for summary judgment on the whole case.
Consider, for example, the following hypothetical. The complaint sets forth a claim for personal injury caused by the negligence of the defendant, but does not allege when the injury occurred. The first defense in the answer contains the usual denials of negligence, etc., and the second defense sets up the bar of the statute of limitations, alleging that the injury occurred on a date more than two years prior to the commencement of the action. The effect of this second defense is to admit the allegations of negligence (the confession), but to escape the consequence of that admission through the bar of the statute (the avoidance). If this second defense is valid, the plaintiff's cause is lost. However, the validity of the avoidance is dependent upon the truth of the allegation that the injury occurred on the stated date, and this allegation is deemed to be denied or avoided by operation of Rule 8(D). At this point, then, the case is at issue, though it may be subject to disposal by motion for summary judgment.

Suppose, however, that the court orders the plaintiff to reply to the affirmative defense of the statute of limitations, and the plaintiff does so by attempting to plead an estoppel. In substance, the plaintiff's reply alleges that the defendant offered to settle the case on the basis of the plaintiff's expenses but the plaintiff at that time refused because she did not know what these expenses might ultimately be, that the defendant said that this was understandable and it was logical to wait, that the defendant said that he would contact her again at a later time but did not do so, and that by reason of his promise to contact her later with respect to settlement he is now estopped from raising the statute of limitations. If this reply has now admitted the truth of the allegation that the injury occurred on the date stated in the second defense of the answer, but seeks to avoid the thrust of that admission with the allegation of facts which purport to give rise to an estoppel. Once again, these facts alleged in the reply are deemed to be denied or avoided by operation of Rule 8(D), and the case is at issue. But the issues in the case are now reduced to one and one only — is the defendant estopped from asserting the bar of the statute of limitations? However, the facts alleged in the reply are not sufficient to raise the defense of estoppel. If the defendant moves to strike the reply as being insufficient, the motion will admit the truth of the facts alleged, and will eliminate any controversy with respect to the facts. But the difficulty is this: if the motion is granted, as it should be, and the reply stricken, will the admissions made by the reply remain so that the court may use them as a basis for giving judgment to the defendant? If they do, the motion to strike will dispose of the whole case and will result in a final order, but if they do not, the case reverts to its posture before the reply was made and is still at issue with respect to the date on which the injury occurred.

The answer depends upon whether the motion to strike is simply that,

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384 In substance, these are the facts of Markese v. Ellis, 11 Ohio App. 2d 160, 229 N.E. 2d 70 (1967).
385 Id.
a motion to strike, or whether it is the same as the old demurrer to a reply. If it is the former, the case should proceed as if no reply had been made, but if it is the latter, judgment should be entered for the defendant. Quite frankly, at this point we do not know just how the motion to strike is to be treated, but we may suppose that it does not serve quite the same office as a demurrer since Rule 7(C) stipulates that “[D]emurrers shall not be used.” This seems to imply that while the modern Rules motions bear some resemblance to the old demurrer, they do not carry quite the same weight, and are not to be treated as demurrers. Accordingly, in this situation it would have been better for the defendant to have used a motion for judgment on the pleadings or a motion for summary judgment, since the effect of it is uncertain. But because that effect is uncertain, it can be said that the motion to strike might dispose of the whole case and result in a final order.

If it does, the problem of the finality of a later order vacating the order granting the motion to strike and entering judgment for the defendant arises. Fortunately, it is not much of a problem. The rules which apply here are the same as those applied to the final order discussed in the foregoing section on the motion to strike the responsive pleading, and the result is the same; the vacating order is not final under either the first or fourth test for finality. The first test does not apply because the case will continue, and the fourth test will not apply because the hearing on the motion to strike was not a trial — all of the facts were admitted by the various pleadings and motions, so no issues arose on the pleadings.

Finally, if the reply consists of a combination of admissions and denials and an affirmative defense, the motion to strike will lie to the affirmative defense. But as seen in the foregoing section, the order granting the motion to strike will almost never result in a final order because the case will remain at issue on the allegations denied in the separate defense consisting of the admissions and denials.

To summarize, it will be a rare case in which a motion to strike an insufficient defense will result in a final order, but when this occurs an order vacating that order and reinstating the case for an adversary hearing on the merits will not be final under either the first or fourth test for finality.

E. Conclusion with Respect to the First and Fourth Tests for Finality

From what we have seen above, it is clear that the first and fourth tests for finality present something of a mixed bag. In some cases the applicability of these tests will depend upon the relief granted, while in others it will depend upon the nature of the proceeding which results in the vacation of the order. In a nutshell, in some cases the vacating order will be final because it determines the action and prevents a judgment (the first test), in other cases it will be final because it vacates a judgment and grants a new trial (the fourth test), and in still other cases it will not be final because it neither determines the action, prevents a
judgment, nor orders a new trial. Thus, the applicability of either or both tests will vary with circumstances, and neither test is a sure basis for an appeal from the vacating order. Accordingly, we must now look to the second or third tests to find a more certain and simple guide. The examination shall begin with the second test.

III. THE SECOND TEST FOR FINALITY

A. THE HISTORY OF THE SECOND TEST

At the present time, the second test for finality can be stated in the following language: An order affecting a substantial right made in a special proceeding is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial.386

While this may have been the original interpretation of the second test,387 it was not the only interpretation followed in the early years after the Code of Civil Procedure of 1853 was first adopted.388 Shortly after the Code became effective, an alternative interpretation developed, which may be stated as follows: An order affecting a substantial right made in a special proceeding in an action after judgment is a final order which may be reviewed, affirmed, modified, or reversed,

386 See State v. Collins, 24 Ohio St. 2d 107, 108, 265 N.E.2d 261, 262 (1970), where the Supreme Court noted: "The General Assembly has stated, with judicial approval, that a final, and hence appealable, order is, inter alia, 'an order affecting a substantial right made in a special proceeding.' [OHIO REV. CODE ANN. § 2505.02 (Page 1954)]." The court continued: "Research discloses that courts have not been eager to permit enterprising counsel to ease into the appellate chair by attaching to their various causes the appellation 'special proceeding.' This judicial reluctance has an obvious and sound foundation." 24 Ohio St. 2d 107, 108, 265 N.E.2d 261 (1970).

More directly on point with the text is Morris v. Investment Life Ins. Co., 6 Ohio St. 2d 185, 187, 217 N.E.2d 202, 205 (1966), "On the threshold question of appealability, Section 2505.02 is controlling. It provides, in part, as follows: 'an order affecting a substantial right made in a special proceeding . . . is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial.' " See also Kennedy v. Chalfin, 38 Ohio St. 2d 85, 310 N.E.2d 333 (1974); In re Appropriations for Highway Purposes, 177 Ohio St. 118, 203 N.E.2d 247 (1964); In re Guardianship of Kelley, 170 Ohio St. 94, 162 N.E.2d 843 (1959); and a plethora of older cases leading all the way back to Watson & Co. v. Sullivan, 5 Ohio St. 43 (1855).

387 Watson & Co. v. Sullivan, 5 Ohio St. 43 (1855) appears to be the first reported opinion of the supreme court to concern itself with the second test. The court held, "An order of the court of common pleas, discharging an attachment against a resident as to the whole of the property attached, is an order affecting a substantial right made in a special proceeding, which may be reversed, pending the action in which the order of attachment was made." Id. (syllabus at ¶ 1).

This formulation was next followed in Welch v. Pittsburgh, Ft. W. & Chic. R.R., 11 Ohio St. 569, 571 (1860), where the court said: "An order affecting substantial right, made in a special proceeding, is deemed such a final order. Code, sec. 512 [now OHIO REV. CODE ANN. § 2505.02 (Page 1954)]."

388 The Code of Civil Procedure was first adopted in 1853, and may be found at 1853 Laws of Ohio 57. The earliest version of what is now section 2505.02 of the Ohio Revised Code was section 512 of the 1853 Code, which reads as follows:

An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title.
with or without retrial. The addition of the phrase "in an action after judgment" is understandable when the second test is read in its statutory context:

**Code of 1853 Section 512:**

An order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title.

**Ohio Revised Code Section 2505.01:**

An order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment . . . is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial.

Here, the second and third tests of finality are intertwined, which led the supreme court to the conclusion that the phrase "in an action after judgment" modified both tests. Indeed, as far as a proceeding on a petition to vacate after term was concerned, the supreme court felt

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389 This particular formulation was first expressed in Hettrick v. Wilson, 12 Ohio St. 136, 138 (1861), where the court said: "There can be no doubt that the order of the court of common pleas which is sought to be reversed, is one 'affecting a substantial right made in a special proceeding in an action after judgment,' and is, therefore, the proper subject of review upon error. (Code, section 512.) [now Ohio REV. CODE ANN. § 2505.02 (Page 1954)]." This was echoed in Taylor v. Fitch, 12 Ohio St. 169, 172 (1861) (emphasis in original):

And now arises the inquiry — Is this proceeding by petition to vacate a judgment and to have the case reinstated on the docket for trial, in itself a civil action, or is it merely a branch, offshoot, or incident of an action? — or, in the language of section 512 of the code of civil procedure, "a special proceeding in an action after judgment?"

Id. at 172.

However, as the supreme court made clear in Cincinnati, S. & C. R.R. v. Sloan, 31 Ohio St. 1 (1877), this formulation is simply an alternative reading which may be employed as circumstances require. The essential interpretation is that set out in Watson & Co. v. Sullivan, 5 Ohio St. 43 (1855), see note 387 supra. Thus the Sloan court stated:

True the special proceeding in [Taylor v. Fitch] was said to be "a special proceeding in an action after judgment;" but it does not follow from what is thus said that the final order can only be made in a proceeding after judgment in the action. Watson & Co. v. Sullivan, supra, [5 Ohio St. 43 (1855)] is a decisive authority to the contrary. Moreover, the language of the code is that "an order affecting a substantial right made in a special proceeding, . . . is a final order which may be vacated, modified, or reversed. . . ."

31 Ohio St. at 10.

Indeed, had the court not reverted to the Watson & Co. formulation, there would be no basis for an appeal from an order affecting a substantial right made in a special proceeding, or in a special proceeding in an action before judgment. Such orders would not be final under the first test for finality, because that test is limited to orders affecting a substantial right "in an action," and a special proceeding is not an action. See note 391 infra for a full discussion of the question whether a special proceeding is an action. Neither would they be final under the third test, since that test is clearly limited to orders made upon a summary application in an action after judgment. The fourth test of finality was not formulated until some years later, and thus, if such orders were to be final at all, they had to be final under the second test. Accordingly, it was necessary to re-formulate that second test so as to include them.

390 Neither the 1853 Code of Civil Procedure nor its successors provided any specific procedure for the vacation of a judgment during term of court. The common law tradition held that a court had inherent power over its own judgments during term, and could vacate them upon motion made for that purpose. Thus, Mohrman v. Nickels, 140 Ohio St. 450, 45 N.E.2d 405 (1942) (syllabus at ¶ 1), the court stated: "A court of general jurisdiction has control of its own orders and judgments during the term at which they are
that the phrase had to be applied as a modifier to the second test in order to emphasize that the proceeding on the petition to vacate was a special proceeding, and not an appealable civil action in its own right. To view the proceeding as a civil action could, in some cases, lead to an unconstitutional grant of jurisdiction to the district courts.

The case in point is Taylor v. Fitch, which is practically on all made or rendered, and the inherent power, in the exercise of a sound discretion, to vacate or modify them." Accordingly, the accepted method for obtaining the vacation of a judgment during term was the motion to vacate — a motion that may be termed a "common law" or "traditional" motion, in that it was not specifically authorized by the Code of Civil Procedure of 1853.

The vacation of judgments after term was another matter. The court lost its jurisdiction over such judgments with the expiration of the term, and a specific statutory procedure had to be developed in order to provide a means for their vacation. Basically, four procedures were devised: the motion for a new trial, the motion to correct mistakes or omissions of the clerk, the motion to vacate a judgment irregularly obtained, and the petition to vacate. See Code of Civil Procedure of the State of Ohio §§ 534-36, 1877 Ohio Laws 115 (codified at OHIO REV. CODE ANN. §§ 2325.01, .04, .05 (Page 1954) (Repealed 1970). Only three of these five methods will be discussed here: the motion to vacate during term, the motion to vacate a judgment irregularly obtained, and the petition to vacate.

When delving into the past, it is necessary to keep in mind the distinction between an appeal and a proceeding in error. Very simply put, an appeal was a trial de novo in the reviewing court, while a proceeding in error was a review of the case for errors of law appearing on the face of the record. As stated in Cincinnati, S. & C. R.R. v. Sloan, 31 Ohio St. 1, 9 (1877):

An appeal, as understood in this state, vacates the order or judgment appealed from, and carries the whole case into the appellate court for retrial upon the merits, both as to law and fact; while a petition in error under the code only brings before the appellate court the judgment or order complained of, for review on questions of law.

At the time in question, an appeal could only be taken from cases in which the parties were not entitled to a trial by jury; all other cases were reviewable for errors of law appearing on the record by means of a proceeding in error. Further, appeals could only be taken from final judgments, orders, or decrees in civil actions, while error proceedings would lie from any judgment or final order. Thus, in determining whether a case was appealable, as opposed to reviewable by proceeding in error, it was first necessary to determine that it was a civil action. Accordingly, distinctions were drawn between civil actions and special proceedings. The first appears in the REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS 9-10 (1853):

This one form of action, which is thus to take the place of all other forms of commencing suits, is called a civil action. A civil action under this code will comprehend, therefore, every proceeding in court heretofore instituted by any and all the forms hereby abolished. Every other proceeding will be something else than an action, say a special proceeding.

All civil actions, legal and equitable, will be commenced in the same way. Special proceedings will be begun, as now, unless otherwise provided.

In 1855, the Ohio Supreme Court adopted this distinction. In Watson & Co. v. Sullivan, 5 Ohio St. 43, (1855), the court stated:

[Under] section 604 of the code, it is provided that the code shall not affect any special statutory remedy not heretofore obtained by action. The legislature seems to regard all proceedings not heretofore obtained by suit or action, as a special proceeding or special statutory remedy; and it would seem to follow, that a provision in the code providing a proceeding not by action would be a special proceeding.

The court then determined that a proceeding, on motion, to discharge an attachment was a special proceeding and not a civil action, and that a proceeding in error would lie from the order discharging the attachment since the order was one affecting a substantial right made in a special proceeding.

391 12 Ohio St. 169 (1881).
fours with *GTE Automatic Electric Inc., v. ARC Industries, Inc.*

The pertinent phase of *Taylor* began when the plaintiff took a default judgment against the defendant. After the term of court had expired, the defendant filed a petition to vacate the default judgment on the ground of "unavoidable casualty or misfortune, preventing the party from defending." The plaintiff filed an answer to the petition, and the defendant filed a reply.

After a hearing, the court vacated the default judgment and reinstated the case on the docket for trial. Thereupon, the plaintiff filed a notice of *appeal*, and the appeal was duly perfected. The defendant then moved to dismiss the appeal on the ground that an *appeal* did not lie from the vacation of a judgment pursuant to a petition to vacate made after term. The appellate court, then denominated the district court, granted the motion, and the plaintiff filed a petition in error with the supreme court. In substance, the plaintiff argued that the order vacating the default judgment and reinstating the case for trial was a final order in a civil action, and was appealable because the proceeding begun by the petition to vacate could not be tried to a jury.

The Ohio Supreme Court affirmed the dismissal of the appeal. It acknowledged that the sole question before it was whether an appeal or a proceeding in error was the proper method of obtaining a review of the trial court's order vacating the judgment. The court opted for the proceeding in error because an appeal could only be taken from a civil action, and a proceeding by petition to vacate a judgment and to have the case reinstated on the docket for trial was not, in itself, a civil action, but merely a special proceeding *in an action* after judgment.

The court gave two reasons for this conclusion. First, it noted that if the proceeding on the petition to vacate was a separate civil action, the granting of the petition might lead to a second trial and a second judgment which could be inconsistent with the first judgment. Thus, there would be two actions and two judgments on the same claim involving the same parties. Both judgments could not stand. Therefore, in order to make the two judgments consistent and intelligible, all of the proceedings had to be considered as parts of a single civil action. This result would follow if the proceeding on the petition to vacate was deemed

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393 47 Ohio St. 2d 246, 351 N.E.2d 113 (1976).
394 See Act of April 24, 1877, Sec. 1, § 534, seventh, 1877 Ohio Laws 115 (amending the Code of Civil Procedure of the State of Ohio § 534, 1853 Ohio Laws 57) (codified at Ohio Rev. Code Ann. § 2325.01 (Page 1954) (Repealed 1970)). While not precisely the same, this ground is very similar to Ohio R. Civ. P. 60(B)(1)'s "mistake, inadvertence, surprise or excusable neglect;" the ground urged in *ARC Industries*.
395 In pertinent part, the applicable statute in *Taylor* read:

> That appeals may be taken from all final judgments, orders or decrees in civil actions, in which the parties have not the right, by virtue of the laws of this state, to demand a trial by jury . . . by any party against whom such judgment or order shall be rendered, or who may be affected thereby, to the district court, and the action so appealed shall be again tried, heard and decided in the district court, in the same manner as though the said district court had original jurisdiction of the action.

*See* Act of April 8, 1858, § 5, 1858 Ohio Laws 81; *Taylor v. Fitch*, 12 Ohio St. 169, 171-72 (1861).
a special proceeding in the original action after judgment in that action, and not a separate and distinct civil action.

Second, if the proceeding on a petition to vacate a judgment was a separate civil action in its own right, it could require an appellate court to exercise original jurisdiction not conferred upon it by the Ohio Constitution. When a case is appealed (in the original sense of the word) to the appellate court, that court must enter judgment in the case. But grounds may exist for the vacation of the judgment, and if so, the petition to vacate would have to be filed in the appellate court. The appellate court, however, does not have jurisdiction to hear such a civil action; it could only entertain the proceeding on the petition to vacate if it were considered an incidental part of the original action, and not a civil action in its own right. Therefore, in order to avoid an unlawful exercise of original jurisdiction by the appellate court, the proceeding must be deemed a special proceeding in an action after judgment, and not an independent civil action.

Having determined that the proceeding by petition to vacate was a special proceeding in an action after judgment, the court next determined whether the order made in the proceeding was a final order from which error proceedings would lie. It held that it was, even though the order vacated the judgment and reinstated the case on the docket for trial. In the words of the court:

Section 512 of the code of civil procedure, provides that "an order affecting a substantial right, made in a special proceeding, etc., in an action after judgment, is a final order, which may be vacated, modified, or reversed," by petition in error. The order here attempted to be appealed from comes clearly and fully within this definition; and . . . the object of [Section 512] was, to define what special or summary proceedings in an action — not the action itself — might be reviewed by petition in error.\textsuperscript{396}

Today's appeal is the direct descendent of the old proceedings in error.\textsuperscript{397} Thus, by substituting modern terminology for the old, it can be said that from the earliest times there exists authority for the proposition

\textsuperscript{396} 12 Ohio St. at 170-74 (emphasis in original).

\textsuperscript{397} Over the years, the proceeding known as an appeal evolved into an appeal on questions of law and fact, and the proceeding known as a proceeding in error became an appeal on questions of law. See Skeel, \textit{Constitutional History of Ohio Appellate Courts}, 6 \textit{CLEV.-MAR. L. REV.} 323 (1957). Thus, prior to the effective date of the Ohio Rules of Appellate Procedure, the nature of the appellate process in Ohio was summed up in the Act of April 4, 1935, \textsection{} 12223-1, 1-3, 1935 Ohio Laws 104 (codified at Ohio Rev. Code Ann. \textsection{} 2505.01 (Page 1954) (repealed 1970):

As used in the Revised Code:

(A) "Appeal" means all proceedings hereby one court reviews or retries a cause determined by another court, an administrative officer, tribunal, or commission.

(B) "Appeal on questions of law" means a review of a cause upon questions of law including the weight and sufficiency of the evidence.

(C) "Appeal on questions of law and fact" means a rehearing and retrial of a cause upon the law and the facts nd is the same as an "appeal on questions of fact."

With the advent of the Appellate Rules on July 1, 1971, the appeal on questions of law and fact was abolished. \textit{Ohio R. App. P. 2}. See \textit{Koykka, Ohio Appellate Process
that an order vacating a judgment is a final, appealable order, and this is true even if the vacating order does not completely dispose of the case. This can be said, however, only if the vacating order is an order affecting a substantial right made in a special proceeding. There is no doubt that an order vacating a judgment made pursuant to a Rule 60(B) motion for relief from judgment is an order which affects a substantial right, but is the proceeding on the Rule 60(B) motion for relief from judgment a special proceeding?

B. RULE 60(B) AND THE SECOND TEST FOR FINALITY

Whether the proceeding on a Rule 60(B) motion for relief from judgment is a special proceeding is far from certain. The difficulty stems from the former practice of appeals on questions of law. Thus, the only survivor of the former practice is the appeal on questions of law, now known as an "appeal," and this surviving proceeding can trace its lineage in a direct line to the proceeding in error created by the Code of Civil Procedure of the State of Ohio § 515, 1853 Ohio Laws 146. Accordingly, what was formerly known as a "proceeding in error" is now an "appeal." See Hettrick v. Wilson, 12 Ohio St. 136 (1861) and Taylor v. Fitch, 12 Ohio St. 169 (1861). See also In re Guardianship of Kelley, 170 Ohio St. 94, 162 N.E.2d 843 (1959); Allen v. Streithorst, 154 Ohio St. 283, 95 N.E.2d 761 (1950); De Cristoforo v. Kepp, 90 Ohio L. Abs. 449, 186 N.E.2d 503 (1959); Kahl's Jewelers v. Truss, 112 Ohio App. 341, 176 N.E.2d 310 (1960); Gynn v. Gynn, 106 Ohio App. 132, 148 N.E.2d 78 (1958), appeal dismissed, 168 Ohio St. 164, 151 N.E.2d 560, cert. denied, 358 U.S. 933 (1959). It is sufficient, under this test of finality, that the order affect a substantial right. Thus, in Cincinnati, S. & C. R.R. v. Sloan, 31 Ohio St. 1 (1877), it is said:

If the order affects a substantial right, and is made in a special proceeding, it is final within the meaning of the section, and may be reviewed for errors of law appearing on the record.

In Taylor v. Fitch, a substantial right of the plaintiff was said to be affected by the opening up of the judgment and allowing the defendant to make a defense. The order in that case was not final in the sense of being an order which finally determined or put an end to the special proceeding. Under the provisions of the code, the proceeding could not be said to be ended and finally determined, until it should be ascertained whether the defendant succeeded in establishing his defense. It is not, therefore, essential, in all cases, that the order, before it can be regarded as final, within the meaning of the provision of the code in question, should be one which puts an end to the proceeding.

Id. at 10-11 (citations omitted).

Again, in Cleveland, Columbus & Cincinnati Hwy., Inc. v. Public Utils. Comm'n, 141 Ohio St. 634, 49 N.E.2d 759 (1943), the supreme court stated:

It is to be observed that a distinction is made between an order "in an action" and an order "in a special proceeding." In the former, an order is a final order only "when in effect it determines the action and prevents a judgment," while in the latter the only essential to constitute an order a "final order" is that it be one "affecting a substantial right. . . ."

Then, if the order in question here affects a substantial right, it is a final order within the contemplation of the provisions of Section 544, General Code, whether or not it "determines the action and prevents a judgment."

Id. at 636, 49 N.E. at 760. See also Motor Serv. Co. v. Public Utils. Comm'n, 37 Ohio St. 2d 1, 305 N.E.2d 788 (1974); Buchanan v. Public Utils. Comm'n, 9 Ohio St. 2d 155, 224 N.E.2d 342 (1967); D. G. & U. Truck Lines, Inc. v. Public Utils. Comm'n, 158 Ohio St. 564, 110 N.E.2d 587 (1953); and Cincinnati Gas & Elec. Co. v. Public Utils. Comm'n, 146 Ohio St. 228, 65 N.E.2d 68 (1948). A substantial right is a legal right which may be enforced or protected by law. See Armstrong v. Herancourt Brewing Co., 53 Ohio St. 467, 42 N.E. 425 (1895) (syllabus at ¶¶ 1, 2). Clearly, a judgment falls within that definition. Indeed, as long ago as 1861, it was determined that an order vacating a judgment and reinstating the case on the docket
in part from the fact that there is no clear definition of the term “special proceeding,” and as a consequence, special proceedings are identified on an ad hoc basis.401

In their report to the General Assembly, the Commissioners on Practice and Pleadings identified special proceedings as all those proceedings which were not suits in chancery, and which were not actions at law instituted by one of the forms of action.402 Early on, the Supreme Court of Ohio adopted this view.403 For convenience, this may be called the “origins” test, since it classifies proceedings in accordance with their historical origin, with 1853 serving as the point in time at which history is frozen.

While there is some question as to whether the 1853 “origins” test is still relevant, we can attempt its application to Rule 60(B). Ohio’s Rule 60(B) finds its origin in Federal Rule 60(b),404 and the latter Rule in turn finds its origin in section 473 of the California Code of Civil Procedure.405 Since California had no common law tradition, the source of section 473 cannot be found in the common law writs such as the writ of error coram nobis, the writ of error coram vobis, or the writ of for trial was an order which affected a substantial right. See Hettrick v. Wilson, 12 Ohio St. 136 (1861), and Taylor v. Fitch, 12 Ohio St. 169 (1861).

401 Thus, in Kennedy v. Chalfin, 38 Ohio St. 2d 85, 88, 310 N.E.2d 233, 235 (1974), the supreme court stated: “Neither the General Assembly nor this court has attempted to define with specificity the identifying characteristics of a ‘special proceeding’ under R.C. 2505.02. Instead, each case has been decided by reviewing the specific proceeding in question.” A reference to 1 OHIO JuR. 2d Actions §§ 19-22 (1953), will illustrate the confusion that has resulted from this approach.

402 REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS 9-10 (1853). The applicable portions of the report are quoted in note 391 supra.

403 See Watson & Co. v. Sullivan, 5 Ohio St. 43 (1855), quoted in note 391 supra.

404 See the Ohio Rules Advisory Committee Note to OHIO R. CIV. P. 60(B).

405 See Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia 115-16 (1936), where it is said:

Subdivision (b) is an additional remedy and is not intended to exclude the independent suit, or what was formerly known as a bill of review or a petition to vacate a judgment. Application to the court under this section does not affect the finality of the judgment attacked nor does it extend the time for taking an appeal, as distinguished from the motion for new trial. This section is based upon § 473 of the California C.C.P., (Deering, 1931).

Between the publication of the Preliminary Draft and the publication of the final version of the Federal Rules, some additions were made to the text of what was then Federal Rule 57(b). The reason for these additions was given in the Final Report of the Advisory Committee on Rules for Civil Procedure 40 (1937):

This revision is (1) to conform more closely to the wording of state statutes, such as, California Code of Civil Procedure, § 473; New York Civil Practice Act, § 108; and § 9283 General Statutes of Minnesota, which have received judicial construction over a long period of years; and (2) to preserve the provisions of the federal statute referred to [Act of March 3, 1911, ch. 231, § 57, 36 Stat. 1102 (current version at 28 U.S.C. § 1655)].

Finally, in the Notes to the Rules of Civil Procedure for the District Court of the United States 57 (1938), it is said, "Application to the court under this subdivision does not extend the time for taking an appeal, as distinguished from the motion for new trial. This section is based upon Calif. Code Civ. Proc. (Deering, 1937) § 473. See also N.Y.C.P.A. (1937) § 108; 2 Minn. Stat. (Mason, 1927) § 9283."

Thus, while New York and Minnesota contributed to the result, the principle source of the Rule was Section 473 of the California Code of Civil Procedure.
audita querela, though section 473 bears some slight resemblance to these writs.\footnote{Arechiga v. Housing Auth., 159 Cal. App. 2d 657, 324 P.2d 973 (1958). The source of section 473 appears to be the traditional doctrine that a court has inherent power over its own judgments during term. See Banegas v. Brackett, 99 Cal. 623, 34 P. 344 (1893).} Further, the California courts have held that the procedure provided by section 473 is in addition to, and not in lieu of, the procedure made available by the equitable bill of review or the independent action in equity to enjoin enforcement of a judgment.\footnote{See Olivera v. Grace, 19 Cal.2d 570, 122 P.2d 564 (1942); San Joaquin & Kings River Canal & Irrig. Co. v. Stevinson, 175 Cal. 607, 166 P. 338 (1917).} Thus, if the 1853 “origins” test were to be applied to section 473 of the California Code, it would have to be said that the proceeding provided by that section is a special proceeding since it is neither a suit in chancery,\footnote{The term “chancery case” is defined in In re Stafford’s Estate, 146 Ohio St. 253, 65 N.E.2d 701 (1946) (syllabus at § 1): A chancery case is one in which, according to the usages and practices in courts of chancery prior to and at the time of the adoption of the code of civil procedure, remedies were awarded in accordance with the principles of equity and not in accordance with the rules of law.} nor an action at law which is instituted by one of the forms of action.\footnote{The Commissioners on Practice and Pleadings suggest that prior to 1853, Ohio recognized at least ten actions at law that were instituted by one of the forms of action, but they only list four: assumpsit, covenant, trespass, and trespass on the case. See REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADING 5-6 (1853). The full list should contain all “the actions resorted to in the State of Ohio, for the redress of civil injuries [which] are, Assumpsit, Covenant, Debt, Detinue, Replevin, [Trespass on the] Case, Trover, Trespass vi et armis, Scire Facias and Ejectment.” See 1 J. Swan, THE PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS AT LAW IN OHIO AND PRECEDENTS IN PLEADING 12, 13 (1845). Obviously, a Rule 60(B) motion proceeding resembles none of these actions, and cannot be equated with a pre-1853 action at law instituted by one of the forms of action. But 2 J. Swan, supra at 1000, also states: “It is said to be one of the plain and accustomed remedies of a court of law, to afford on motion, full and adequate relief against judgments irregularly or improperly obtained, where there is no fault or negligence on the part of the judgment debtor.” To support this proposition, Swan cites McKee v. Bank of Mt. Pleasant, 7 Ohio (Part II) 175 (1836), and Critchfield v. Porter, 3 Ohio 519 (1828). Of these two, Critchfield is the more significant. In that case, the supreme court stated: There is nothing in the bill showing that the complainant could not obtain the same relief upon motion to the court rendering the judgment that he now seeks by his bill in equity. The ground taken in the bill for the interference of a court of equity is, that the complainant was not served with process in the suit at law, and that an attorney of the court, without his knowledge, or any authority from him, appeared for him, pleaded, and went to trial; whereupon a verdict and judgment was obtained against him. . . . If, upon these facts being shown to the court rendering the judgment, they were competent to set it aside or suspend it, and let the complainant, the defendant at law, in to make defense, he had complete and adequate remedy at law, and chancery will not entertain jurisdiction. And this court does not doubt but that it was fully competent for the}
Accordingly, if the descendant bears the same characteristic as the ancestor, we can say that Ohio's proceeding on a Rule 60(B) motion for relief from judgment is likewise a special proceeding. But this conclusion is obviously tenuous.

In any event, the 1853 "origins" test was replaced in 1897 by a "procedure" test. The source of the new test appears to be Missionary Society of the Methodist Episcopal Church v. Ely, in which the Ohio Supreme Court said:

Our code does not, as does the code of New York, specify that every remedy which is not an action is a special proceeding, nor does [sic] our statutes give any definition of an action or a special proceeding. But we suppose that any ordinary proceedings in a court of justice, by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, involving the process and pleadings, and ending in a judgment, is an action, while every proceeding other than an action, where a remedy is sought court at law to afford the complainant, upon motion, all the relief he could obtain in a court of equity. The jurisdiction of courts of law, in setting aside judgments improperly obtained, or suspending their operation for a time, has been too long exercised, is too reasonable in itself, and attended with too many beneficial effects, to be now seriously questioned. It has become one of the regular, plain, and accustomed remedies of a court of law to afford full and adequate relief against a judgment irregularly or improperly obtained, when there has been no fault or negligence on the part of the judgment debtor. . . . The relief which is now given by courts of law, upon motion, is equitable in its character, extended upon equitable terms, and so framed as to protect rights of one party without sacrificing or jeopardizing those of the other.

It has been contended, by the counsel for the complainant, that the principles recognized by this court, in the case of Atkinson v. Commissioners, 1 Ohio, 375, would prohibit the court of common pleas from either setting aside or suspending the judgment previously rendered by them, unless it was done at the term it was rendered.

Our peculiar system of jurisprudence seemed to require that the court of common pleas should not possess the power of amending judgments in matters of substance, after the term in which they were rendered. [Here, the court gives reason for this rule.] But these objections do not exist, nor can these inconveniences ever result from the court of common pleas exercising jurisdiction in setting aside, for irregularity, a judgment previously rendered. The cause will then stand as if no judgment had ever been entered; the issue made by the parties will be tried by the proper forum; the judgment of the court given, and either party can avail himself of his right of appeal, or writ of error, as he may be advised.

3 Ohio at 522-25 (1828). McKee, reiterates the views expressed by the Critchfield court.

Thus, in the early Ohio common law, a post-term motion proceeding for the vacation of judgments irregularly or improperly obtained did exist. But even if this proceeding be deemed the ancestor of the Rule 60(B) motion proceeding (and it cannot, since it is not in the direct line of ascent), it would not support the thesis that the Rule 60(B) motion proceeding was a suit in chancery or an action at law, since the proceeding itself was neither. As a consequence, if the choice were limited to civil actions or special proceedings, one would have to denominate this ancient motion proceeding a special proceeding. But as demonstrated later, it is more properly put in a third category — that of a summary proceeding in an action after judgment.
by an original application to a court for a judgment or order, is
a special proceeding.411

In 1957, the supreme court supplemented this definition of a special
proceeding, and suggested that the hallmarks of such a proceeding
were these: it is an essentially independent judicial inquiry, begun by
petition, with notice to others concerned, which does not require ser-
vice of summons or other pleadings.412

While this "procedure" test is more or less satisfactory413 for iden-
tifying special proceedings which are wholly independent of an action,
it leaves something to be desired when applied to a proceeding begun
by motion and notice in an action. A further refinement must be ap-
plied to distinguish these latter proceedings, and this refinement was sug-
gested by the supreme court in *Kennedy v. Chalfin*.414 Roughly, the
distinction may be made in the following manner. An action consists
of service of process or its equivalent, pleading, selection and swearing
in of the jury, opening statements, the presentation of the evidence,
closing argument, instruction of the jury, reception of the verdict, and
judgment. All proceedings other than the above are either ancillary or
collateral proceedings. Ancillary proceedings are those which are de-
dsigned to aid in the final disposition of the action itself, and are normal
adjuncts to the progress of the action to judgment. Collateral proceed-
ings, though indirectly aiding in the final disposition of the action, have
as their primary objective some purpose other than the immediate prog-
ress of the action to judgment and are not likely to be employed in every
action. Thus, discovery proceedings are ancillary proceedings, while at-
tachment proceedings are merely collateral. The former directly furthers
the progress of the action to judgment while the latter has as its primary

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411 *Id.* at 407, 47 N.E. 538. As the court noted, the Ohio statutes did not define an
action or a special proceeding. The Commissioners appointed in 1906 to revise and con-
solidate the general statute laws of Ohio recognized this deficiency and, borrowing from
the *Ely* decision, supplied the following definition of an action: "An action is an ordinary
proceeding in a court of justice, involving process, pleadings, and ending in a judgment
or decree, by which a party prosecutes another for the redress of a legal wrong, enforce-
ment of a legal right, or the punishment of a public offense." This definition was first
enacted as section 11237 of the General Code, 1910 Ohio Laws Tit. IV, div. II, ch. 1,
§ 11237 (current version at *Ohio Rev. Code Ann.* § 2307.01 (Page 1954)). It does not
appear to have been affected in any way by the enactment of the Civil Rules, and is still
valid. With considerable wisdom, the commissioners did not attempt a definition of a
special proceeding.

412 *In re Estate of Wyckoff*, 166 Ohio St. 354, 142 N.E.2d 660 (1957). The reference
to a "petition" as the beginning document must be understood in the context of the case;
the use of the word "petition" was not intended to preclude a motion from being consid-
ered the "original application" which commences a special proceeding. See *State v. Col-

413 The test is far from being universally applicable. Thus, as long ago as 1861, the
supreme court identified the post-term proceeding by petition to vacate a judgment as a
special proceeding. *Taylor v. Fitch*, 12 Ohio St. 169 (1861). Yet that proceeding has
always required a petition and service of summons, although further pleadings are not
expressly required by the terms of the statutes. Compare Code of Civil Procedure of the
State of Ohio, § 536, 1877 Ohio Laws 115, with *Ohio Rev. Code Ann.* § 2325.05 (Page
1954) (repealed 1970)). For the proposition that no further pleadings are required, see

414 *38 Ohio St. 2d 85, 310 N.E.2d 233 (1974).*

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http://engagedscholarship.csuohio.edu/clevstlrev/vol26/iss1/7
objective the preservation of the defendant's assets so that there can be a recovery on the judgment. As a general rule, ancillary proceedings are not special proceedings but are deemed to be an integral part of the action in which they are utilized,\textsuperscript{415} while collateral proceedings, because they are unnecessary to a furtherance of the action and are more exceptional than usual, are special proceedings.\textsuperscript{416}

\textsuperscript{415} See id. at 89, 310 N.E.2d at 235, where the court states:

[D]iscovery techniques are pretrial procedures used as an adjunct to be [sic] a pending lawsuit. They are designed to aid in the final disposition of the litigation, and are, therefore, to be considered as an integral part of the action in which they are utilized. They are not "special proceedings," as that phrase is used in R.C. 2505.02. Hence, a sanction order arising out of discovery procedures is not an order rendered in a special proceeding.

To much the same effect, see In re Coastal States Petroleum, Inc., 32 Ohio St. 2d 81, 290 N.E.2d 844 (1972) (proceeding on a motion to quash a subpoena duces tecum). But see State v. Collins, 24 Ohio St. 2d 107, 109, 265 N.E.2d 261, 263 (1970), in which the supreme court used the following language to justify its holding that a proceeding on a pre-trial motion to suppress evidence is a special proceeding:

This conclusion is admittedly not reached without some hesitation, especially in view of the root origins of the term "special proceedings." (See Fields v. Fields [85 Ohio App. 149, 94 N.E.2d 7 (1950)]; Watson & Co. v. Sullivan [5 Ohio St. 43 (1855)].) However, later cases permit this result and we are convinced that modern exigency must not be left unattended solely upon the basis of academic genealogy.

From a perusal of this case as a whole, however, it is apparent that what the supreme court is really doing is substituting the federal "death knell" doctrine for the statutory definition of a final order. This same tendency to employ the "death knell" doctrine can be found in Roemisch v. Mutual of Omaha Ins. Co., 39 Ohio St. 2d 119, 314 N.E.2d 388 (1974), in which the supreme court held that the trial court's determination that an action cannot be maintained as a class action is a final, appealable determination. The court, however, refused to concede the application of the doctrine: "[W]e see no reason to adopt or reject the "death knell" theory, but will confine our inquiry to whether an order terminating a class action is a final, appealable order pursuant to R. C. 2505.02." Id. at 121 n.1, 314 N.E.2d at 388 n.1. But see Portman v. Akron Sav. & Loan Co., 47 Ohio App. 2d 218, 333 N.E.2d 634 (1975), which unhesitatingly ascribes the Roemisch decision to the "death knell" doctrine. A majority of the Court did not find the class action determination proceeding to be a special proceeding, rather they found it to be final under the first test for finality on the theory that it determined the action as a class action and prevented a judgment for the class. The dissenters equated the proceeding with the type of ancillary proceeding discussed in Kennedy v. Chalfin, 38 Ohio St. 2d 85, 310 N.E.2d 233 (1974), and In re Coastal States Petroleum, 32 Ohio St. 2d 81, 290 N.E.2d 844 (1972).

If this inclination toward the use of the "death knell" doctrine continues, the rule given in the text may have to be amended to make it clear that ancillary proceedings are not special proceedings, unless the order resulting therefrom affects a substantial right and, in effect, terminates the action to which the proceeding is ancillary. Collins points the way to this modification, and Roemisch would fit comfortably within it.

In any event, the language of Collins — "We are convinced that modern exigency must not be left unattended solely upon the basis of academic genealogy" — clearly signifies the abandonment of the 1853 "origins" test. See State v. Collins, 24 Ohio St. 2d 107, 109, 265 N.E.2d 261, 263 (1970).

\textsuperscript{416} Thus, in speaking of an attachment, the supreme court has said:

Indeed, the action, where there is personal service, in no manner depends on the attachment. There may be a just cause of action, and no grounds for the order of attachment. They are separate proceedings, and, in the opinion of this court, the attachment is a special proceeding, which may be reversed before the determination of the action. Watson & Co. v. Sullivan, 5 Ohio St. 43, 45 (1855).

Much the same can be said of the proceeding on an application for a preliminary injunction when the ultimate relief sought in the action is a permanent injunction. This is not a special proceeding since the allowance of the preliminary injunction is a part of the ancient suit in equity, administered in the main case without any statutory provision...
If we accept the supreme court’s determination in *Taylor v. Fitch* that a proceeding for relief from judgment is a proceeding *in* an action, we must determine whether it is an ancillary proceeding or a collateral proceeding. Of the two, the Rule 60(B) proceeding more closely resembles a collateral proceeding — it is unnecessary to the progression of the action to judgment since a judgment already exists, and it is an exceptional rather than a usual incident to the action. Thus, if the “procedure” test is still in vogue, it might be concluded that the Rule 60(B) proceeding is a special proceeding, and that as a consequence, an order vacating a judgment pursuant to a Rule 60(B) motion for relief from judgment is an order affecting a substantial right made in a special proceeding.

It is at least arguable, however, that the “procedure” test is no longer applicable, and that the Ohio Rules of Civil Procedure have supplied a new “origins” test. The source of this new test may be found in Rule 1(C), which states in material part: “These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure [in six specified statutory proceedings and] in all other special statutory proceedings. . . .”

From this one might conclude that all proceedings in civil actions find their origin in either the Rules or the statutes, and that those which find their origins in the Rules are “ordinary” proceedings, while those that derive from some special statutory provision are “special proceedings.” This simple “origins” test will not only eliminate the need to resort to the “academic genealogy” required by the 1853 “origins,” authorizing it. Where the ultimate relief sought is not a permanent injunction, however, the proceeding on the application for a preliminary injunction is collateral to the main case, and is therefore a special proceeding. See *State ex rel. Dayton v. Kerns*, 49 Ohio St. 2d 295, 361 N.E.2d 247 (1977); *May Co. v. Bailey Co.*, 81 Ohio St. 471, 91 N.E. 183 (1910). The *May Co.* court described the latter situation as “ancillary,” but in the terms of our proposed rule it is more properly classified as “collateral.”

Note must be taken of *State v. Hunt*, 47 Ohio St. 2d 170, 174, 351 N.E.2d 106, 109 (1976) wherein the court stated: “[I]t is our opinion that the findings of a competency hearing, which is preliminary and *collateral* to a determination of the defendant’s guilt or innocence, is not a “final order” as defined in R.C. 2505.02.” (Emphasis added.) In terms of our general rule, the competency proceeding would more properly be classified as ancillary because it is necessary to the furtherance of the prosecution. Thus, the result is in harmony with our rule even if the terminology is not.

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417 *See Taylor v. Fitch*, 12 Ohio St. 169, 172 (1861).

418 Ohio R. Civ. P. 1(C). Special proceedings have always been difficult to identify with precision. In addition to a review of the cases on point, one need only observe what was said in the original Ohio Rules Advisory Committee Staff Note to Ohio R. Civ. P. 1(C):

Special statutory proceedings are to be found throughout the Revised Code. Title 27 of the Revised Code, for example, contains a series of chapters which govern special statutory proceedings from Amercement (Chapter 2707, R.C.) through Will Contest (Chapter 2741, R.C.). But Title 27 does not exhaust the list of special statutory proceedings. A computer search of the Revised Code did not isolate all of the special statutory actions primarily because there are no key words which govern identity of all special statutory proceedings. Rule 1(C)(7) is a catch-all provision in light of the fact that all special statutory proceedings cannot be identified.

test, but will also eliminate the hair-splitting that must necessarily accompany the ancillary and collateral subdivisions of the "procedure" test when that test is applied to a proceeding in an action. Under the new "origins" test, a proceeding in an action will be an ordinary proceeding if it is covered by one or more of the Rules of Civil Procedure, but special if the Rules do not apply.\footnote{Unfortunately, even this new "origins" test will not eliminate all difficulty, since Rule 1(C) provides that the Civil Rules do apply to special proceedings to the extent that they are by their nature applicable, and when any statute provides for procedure by a general or specific reference to the statutes governing procedure in civil actions such procedures shall be in accordance with the Rules. Thus, in dealing with a proceeding not wholly governed by the Rules, one must first determine to what extent the Rules govern the procedure in that proceeding, and then determine whether it is "ordinary" or "special."} Therefore, since the motion proceeding to obtain relief from judgment is created by Rule 60(B), it has its origin in the Rules, and is an ordinary proceeding rather than a special proceeding. Accordingly, it is not subject to the second test for finality.

There is something ironic about this conclusion. Although the motion proceeding is created by Rule 60(B), the Rule does not specify the procedure to be followed, and the courts have looked to the former statutes to find that procedure.\footnote{See, e.g., GTE Automatic Elec., Inc. v. ARC Indus., Inc., 47 Ohio St. 2d 146, 351 N.E.2d 113 (1976); Adomeit v. Baltimore, 39 Ohio App. 2d 97, 316 N.E.2d 469 (1974); Brenner v. Shore, 34 Ohio App. 2d 209, 297 N.E.2d 550 (1973). In one way or another, these cases incorporate into the Rule some or all of the provisions of the Code of Civil Procedure of the State of Ohio §§ 534-36, 1877 Ohio Laws 115 (codified at OHIO REV. CODE ANN. §§ 2325.05-08 (Page 1954) (repealed 1970)).} Thus, in many ways this wholly ordinary proceeding is entirely dependent upon the repealed portions of a special statutory proceeding.

C. Conclusion with Respect to the Second Test for Finality

An order granting relief from judgment pursuant to a Rule 60(B) motion is an order affecting a substantial right, but is it an order made in a special proceeding? The answer is either yes or no, depending upon which test is applied in determining the nature of the Rule 60(B) proceeding. While the better answer would appear to be in the negative because of the new "origins" test found in Rule 1(C), the question cannot be answered with certainty. Because of this uncertainty, it is preferable not to rely on the second test for finality if a better test is available. But as previously seen, the first and fourth tests for finality are about as uncertain as the second test, though for different reasons, so the discussion must now turn to the third test. Here, it is submitted, the simple and certain solution to the problem of finality will be found.

IV. The Third Test for Finality

A. The History of the Third Test

The third test for finality may be stated as follows: An order affecting a substantial right made upon a summary application in an action after judgment has been entered in that action is a final order which may
be reviewed, affirmed, modified, or reversed, with or without retrial. A comparison of the 1853 Code of Civil Procedure with the present Ohio Revised Code will demonstrate that there has been no essential change in this formulation in the last 124 years:

**Code of 1853 Section 512:**

An order affecting a substantial right made upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title.

**Ohio Revised Code Section 2505.02:**

An order affecting a substantial right made upon a summary application in an action after judgment, is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial.

Thus, what has been said of this test down through the years should be equally applicable to today’s practice.

We must first deal with the term “summary application.” “Summary” is the opposite of “plenary.” A plenary proceeding is one independent of any other proceeding in which the merits of a cause are fully inquired into and determined. As a general rule, a plenary proceeding requires process, pleadings, testimony, and a judgment, and is the equivalent of an action. A summary proceeding, on the other hand, is one in which the formalities are less strict and which is usually ancillary to some other action or proceeding. Generally, it requires only an initiating document, notice to the parties concerned, and an opportunity to be heard. It may be decided on affidavits, and it is not in any sense a “trial.” Ordinarily, the term “application” is synonymous with “motion,” but when used in conjunction with a special proceeding completely independent of an action, it may mean “petition.” In the context of our inquiry, then, the term “summary application” means a motion which initiates a summary proceeding. But the third test requires something more; it requires that the motion be made in the action, and that it be made after a judgment has been rendered in that action.

At the time the third test was enacted into law, at least two motions were in existence which appeared to qualify as summary applications in

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422 Zangerle v. Evatt, 139 Ohio St. 563, 41 N.E.2d 369 (1942).
423 Trustees v. McClannahan, 53 Ohio St. 403, 42 N.E. 34 (1895).
424 Id.; Railway Co. v. Thurston, 44 Ohio St. 525, 9 N.E. 232 (1886).
425 Code of Civil Procedure of the State of Ohio § 503, 1853 Ohio Laws 57 (codified at Ohio REV. CODE ANN. § 2309.65 (Page 1954) (repealed 1970)) defined a motion as “an application for an order addressed to the court or a judge in vacation, by any party to a suit or proceeding, or one interested therein.” The Ohio Rules of Civil Procedure contain a like definition: “an application to the court for an order shall be by motion.” Ohio R. Civ. P. 7(B)(1). Thus, in its ordinary sense, “application” means “motion.”
426 In re Estate of WycKoff 166 Ohio St. 354, 142 N.E.2d 660 (1957).
427 At first blush, one might suspect that the motion for a new trial would also qualify as a summary application in an action after judgment. However, under common law practice, the motion for a new trial had to be made before judgment was entered, or it was waived. See 2 J. Swan, THE PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS AT LAW IN OHIO AND PRECEDENTS IN PLEADING 921 (1850). This was somewhat modified by the 1853 Code of Civil Procedure. Thus, section 299 of that Code provided:

The application for a new trial must be made at the term the verdict, report,
an action after judgment. They were the traditional in-term motion to vacate or modify a judgment, and the after-term motion to vacate or modify a judgment irregularly obtained. Thus, if we keep in mind how the second and third tests for finality are intertwined in the statute, and if we keep in mind the three basic methods for obtaining relief from a judgment — the in-term motion to vacate, the after-term motion to vacate, and the after-term petition to vacate — we may safely conclude that the second and third tests were designed, at least in part, to make final those orders which vacated or modified a previously rendered judgment. The second test, with its reference to “special proceedings,” clearly applied to the after-term petition to vacate, and the third test, with its reference to “summary applications in an action after judgment,” clearly applied to the in-term and after-term motions to vacate or modify. But if this was the design of the Commissioners on Practice and Pleading it was not completely honored by the courts, for they began to draw distinctions between the in-term motion to vacate and the after-term motion to vacate. It is this distinction which must now be explored.

1. The In-term Motion to Vacate or Modify

There is no doubt that the in-term motion to vacate originated in the traditional common law notion that a court retained inherent power over its own judgments during the term of court in which they were rendered. Since this inherent power was invoked by a motion to vacate or decision is rendered, and except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented.


Section 301 provided, in material part:

Where the grounds for a new trial could not, with reasonable diligence, have been discovered before, but are discovered after the term at which the verdict, report of referee, or decision was rendered or made, the application may be made by petition filed as in other cases not later than the second term after the discovery.

Id. § 301 (current version codified at OHIO REV. CODE ANN. § 2321.21 (Page 1954)).

Likewise, the common law motions in arrest of judgment, for repleader, and for judgment notwithstanding the verdict all had to be made prior to the rendition of the judgment. 2 J. Swan, The Practice in Civil Actions and Proceedings at Law in Ohio and Precedents in Pleading 929-32 (1850). With respect to the motion for judgment notwithstanding the verdict, section 384 of the 1853 Code stated: 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.

Code of Civil Procedure of the State of Ohio § 384, 1853 Ohio Laws 57 (codified as amended at OHIO REV. CODE ANN. § 2323.18 (Page 1954) (Repealed 1970)). While this does not expressly require the motion to be made before entry of the judgment, that requirement is certainly implied.

"[A]n order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title." Id. § 512 (current version codified at OHIO REV. CODE ANN. § 2505.02 (Page 1954).

Unfortunately, the Commissioners did not address this subject in their report. See Report of the Commissioners on Practice and Pleadings 193-99 (1853).

In Huntington & McIntyre v. Finch & Co., the supreme court stated:

The court of common pleas has ample control over its own orders and judgments during the term at which they are rendered, and the power to vacate or modify
or modify, clearly a summary application in an action after judgment, one would think that after the enactment of section 512 of the Code of Civil Procedure of 1853 an order vacating a judgment pursuant to such a motion would be a final order, on the theory that it is an order affecting a substantial right made upon summary application in an action after judgment. But that has not been the result. Rather, the in-term motion to vacate or modify has been treated as if it were a motion for a new trial, and the order granting the motion to vacate has been held subject to rules governing the finality of an order granting a new trial. Thus, we must digress and examine the rules applicable to the motion for a new trial.

In the beginning, the Ohio Supreme Court quite logically thought that an order granting a motion for a new trial was a final order affecting a substantial right made upon a summary application in an action after judgment. But by 1861, the court had reversed itself, and in *Beatty v. Hatcher* it held that an order granting a motion for a new trial was not a final order. Apparently, this holding was premised on the theory them in its discretion. But this discretion ends with the term, and no such discretion exists at a subsequent term of the court.

3 Ohio St. 445, 447 (1854). Then, in the more recent case of *Moherman v. Nickels*, 140 Ohio St. 450, 45 N.E.2d 405 (1942), the court elaborated by stating:

> There is no . . . statutory authority granting the trial court power to vacate a judgment within the same term at which it was entered, but it is inconceivable that a court should have power to vacate its judgment after the term within which it was entered, and have no power to vacate one entered within the same term.

At common law, a court of general jurisdiction has power to control its own orders and judgments during the term at which they are made or rendered, and the power, in the exercise of a sound discretion, to vacate or modify them. [Citation omitted.] This is an inherent power of the court independent of any statutory authority therefor. [Citation omitted.] The power of the trial court in this respect has been recognized by this court on numerous occasions.

*Id.* at 455-56, 45 N.E.2d at 408.

431 See Continental Trust & Sav. Bank Co. v. Home Fuel & Supply Co., 99 Ohio St. 453, 126 N.E. 508 (1919), where it was said:

> The motion to vacate the judgment . . . was filed the day following the rendition of the judgment and during the same term. The lower courts, therefore, were right in considering it as a motion for a new trial, filed within the time prescribed by law. The action of the trial court sustaining such motion does not constitute a final order from which a proceeding in error may be prosecuted.


432 Thus, in *Myres v. Myres*, 6 Ohio St. 221 (1856), the court said:

> Does a petition in error lie to reverse this erroneous ruling, and order of the court? We are of opinion it does — that order coming, as we think, fairly within the definition of a final order, as given in section 512 of the code [now Ohio Rev. Code Ann. § 2505.02 (Page 1954)]. It is “an order affecting a substantial right . . . upon a summary application in an action after judgment.”

*Id.* at 227-28. In the context of this case, however, the court would have been better advised to find the order final as one affecting a substantial right made in a special proceeding, since the new trial was sought after term by means of a petition for a new trial, as provided in Code of Civil Procedure of the State of Ohio § 301, 1853 Ohio Laws 57 (current version codified at Ohio Rev. Code Ann. § 2321.21 (Page 1954)) (quoted in note 427 *supra*).

433 13 Ohio St. 115 (1861).
that such a motion was directed to the sound discretion of the trial court, and that the exercise of that discretion was not reviewable on error. At about the same time, however, the supreme court began to develop the doctrine that an abuse of discretion in making such an order would render the order final for the purpose of review. Eventually, that doctrine became well-settled.

Thus, in Beatty v. Hatcher, 13 Ohio St. 115 (1861), the court stated:

But, does error lie to reverse an order of the court granting a new trial? A motion for a new trial is addressed to the sound discretion of the court; and to the decision of the court on such a motion, error cannot, at common law, be assigned. An order awarding a new trial, is clearly not a final order, as defined by section 512 of the code [now Ohio Rev. Code Ann. § 2505.02 (Page 1954)], on which error will lie before final judgment in the case; for it is not an order which "in effect determines the action," nor is it made "in a special proceeding after judgment."

Id. at 120. Again, in Concord v. Runnels, 23 Ohio St. 601 (1873), the court noted:

A motion for a new trial is addressed to the sound discretion of the court; and although it is well-settled law that error will lie, in a proper case, where a new trial has been refused, we know of no case in which it has been held to lie where a new trial has been allowed and had, and where the court had power to grant a new trial, and its order granting such a new trial is not made ground or error by statutory provision.

Id. at 602. Finally, in Young v. Shallenberger, 53 Ohio St. 291, 41 N.E. 518 (1895), we find:

It is clear that the overruling of the motion of plaintiff in error for a new trial was not an order made in a special proceeding, or upon a summary application after judgment; it was made in a civil action, as contradistinguished from a special proceeding, and, in the ordinary course of procedure in such actions. . . Such a motion . . . is addressed to the sound discretion of the court.

Id. at 300-01, 41 N.E. at 521.

It is interesting to note that as early as 1854 the supreme court had applied this doctrine to the in-term motion to vacate. Thus, in Huntington & McIntyre v. Finch & Co., 3 Ohio St. 445 (1854), the court said:

If the order setting aside the judgment in the common pleas rested in the discretion of the court, it was not subject to reversal on petition in error. The court of common pleas has ample control over its own orders and judgments during the term at which they are rendered, and the power to vacate or modify them in its discretion.

Id. at 447. But with the exception of an oblique reference in Niles v. Parks, 49 Ohio St. 370, 34 N.E. 735 (1892), no note of the point was taken until 1922.

If, as in Young v. Shallenberger, 53 Ohio St. 291, 41 N.E. 518 (1895), the motion is made after judgment has been entered, it is not clear why the order granting or denying the motion for a new trial cannot be considered an order made upon summary application in an action after judgment. The supreme court says that it is not because it is made "in the ordinary course of procedure in such actions." This is comprehensible only when read with another of the court's remarks. Thus, the court stated in Young:

The action ends with the judgment; and the motion, which is an application to the court to reconsider its judgment, and for a re-trial, is usually, though not always essential to the proper preservation and presentation of the errors preceding the judgment, when relied on to obtain a reversal of it.

Id. at 501, 41 N.E. at 521.

In essence, then, the court considered the motion for a new trial to be basically an objection or an exception to errors made prior to the rendition of the judgment, and a necessary prerequisite to an appeal from those errors. Accordingly, as an objection or exception, it is made "in the ordinary course of procedure in such actions," and is not, in the real sense, the initiation of a summary proceeding.

Thus, in Dean v. King, Pennock & King, 22 Ohio St. 118 (1871), the court said:

Germane to the question then before us, are two or three rules of practice which have been fully settled.

2. Motions for new trials, upon the ground that the verdict is against the weight
In time, the abuse of discretion doctrine was transferred to the in-term motion to vacate or modify, and it became equally well-settled that an order vacating a judgment upon motion filed at the same term was not a final determination of the rights of the parties and is not reviewable unless the court had abused its discretion in making it.\textsuperscript{437}

of the evidence, are addressed to the discretion of the court, and if granted, the judgment will not be disturbed on error unless the case is so strong as to show an abuse of discretion.

\textit{Id.} at 134 (citations omitted). And in Smith \& Wallace \textit{v.} Bailey, 26 Ohio St. 1 (1874), the court said:

Motions of this kind [for a new trial on the ground of newly discovered evidence] are addressed to the discretion of the court, and in the absence of statutory provision, its rulings thereon cannot be assigned for error — at least not unless where the material facts are found by the court, or agreed upon by the parties, or where there has plainly been an abuse of judicial discretion.

\textit{Id.} at 2.

\textit{Id.} See Hoffman \textit{v.} Knollman, 135 Ohio St. 170, 20 N.E.2d 221 (1939), where the supreme court said:

An order of a trial court setting aside a general verdict of a jury and granting a new trial is not a final determination of the rights of the parties and is not, therefore, a judgment or final order reviewable by the Court of Appeals, unless it clearly appears that the trial court has abused its discretion in granting such order.

\textit{Id.} (syllabus ¶ 2).

\textsuperscript{437} Although this rule was first suggested in Huntington \& McIntyre \textit{v.} Finch \& Co., 3 Ohio St. 445 (1854), and given a passing nod in Niles \textit{v.} Parks, 49 Ohio St. 370, 34 N.E. 735 (1892), it was inconsistently applied until first stated clearly in Chandler \& Taylor Co. \textit{v.} Southern Pacific Co., 104 Ohio St. 188, 135 N.E. 620 (1922). See Knox Cty. Bank \textit{v.} Doty, 9 Ohio St. 505 (1859). But it has been faithfully followed since the 


It must be said, however, that 

\textit{Chandler \& Taylor Co.} is a strange case. The court began by conceding that the term "final order" included an order affecting a substantial right made upon a summary application in an action after judgment: "Section 12258, General Code [now Ohio REV. CODE ANN. § 2505.02 (Page 1954)] defined a final order to be . . . an order affecting a substantial right' made either in a special proceeding or upon a summary application in an action after judgment." 104 Ohio St. at 191, 135 N.E. at 621. It then admitted that the trial court's action in setting aside a default judgment pursuant to an in-term motion to vacate and set aside the judgment was such an order:

In the instant case, while the action of the common pleas court in rendering judgment by default would be a judgment, its subsequent action in setting aside such default upon the summary application of the defendant, came within the definitive term of the latter section and was an order as therein defined.

\textit{Id.} It next allowed that the term "judgment" "comprehends decrees and final orders rendered by a court of competent jurisdiction . . . which determine the rights of parties affected thereby" \textit{id.} at 193, 135 N.E. at 621, and that the court of appeals has jurisdiction to review such orders. The court then concluded, however, that in the absence of an abuse of discretion, the order of vacation was not a final order subject to review:

During that term the court had control of its journal entries, and any order made by it vacating a judgment and granting a new trial would not be erroneous unless there was an abuse of discretion upon the part of the court. In the absence of such abuse, prejudicial to the plaintiff, there was no final order, for the plaintiff would have had a retrial of the case and might have obtained a judgment against the defendant.

\textit{Id.} at 194, 135 N.E. at 622. The whole is then summarized by the court in the syllabus, as follows: "An order vacating a default judgment upon motion of the defendant, filed at the same term, but more than three days after its rendition, is not a final determination of the rights of the parties and is not reviewable unless the court abuses its discretion in making it. 104 Ohio St. 188 (syllabus at ¶ 2).
That which is well-settled can become unsettled, however, and with its decision in *Klein v. Bendix-Westinghouse Co.* the supreme court unsettled the 100 year old rule and disabused the bench and the bar of the notion that abuse of discretion renders an interlocutory order final. In substance, the court held that the doctrine was a product of misconception, that it had resulted from the confused merger of two lines of authority, one dealing with the jurisdiction of the appellate courts and the other with the scope of review on appeal, that it was incongruous, and that it had outlived any usefulness that it may have had.

That the doctrine was a product of the misreading of the early cases, and that it had outlived its usefulness, is true. It must be remembered that the doctrine was developed as a palliative to the common law rule that discretionary orders were not subject to reversal on petition in error; it was never intended as a modification of the rule with respect to finality. In substance, the early doctrine can be stated as

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Obviously, the conclusion does not follow from the premises, and it is apparent that the court confused the ground for reversal with the ground for finality. Nevertheless, as noted above, the rule announced has been faithfully followed, even after the abuse of discretion doctrine had been repudiated by the supreme court. Compare *Klein v. Bendix-Westinghouse Co.*, 13 Ohio St. 2d 85, 234 N.E.2d 587 (1968), *with Zook v. Amber Builders, Inc.*, 30 Ohio App. 2d 63, 282 N.E.2d 587 (1972).

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See *Huntington & McIntyre v. Finch & Co.*, 3 Ohio St. 445, 447 (1854), where the court said: If the order setting aside the judgment in the common pleas rested in the discretion of the court, it was not subject to reversal on petition in error.

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This can best be demonstrated by a review of the doctrine's historical antecedents. From all that appears, the doctrine was first announced in *Dean v. King, Pennock & King*, 22 Ohio St. 118 (1871), and two cases were cited there as authority: *Lessee of Muhlenburg's Heirs v. Florence*, 5 Ohio 245 (1831), and *Beatty v. Hatcher*, 13 Ohio St. 115 (1861). See note 435 supra for the pertinent quotation from *Dean*, less the citation of authority. *Lessee of Muhlenburg's Heirs* has no real relevance, since in that case the question of whether to grant a new trial was reserved to the supreme court en banc under the provisions of the Act of 1823 which authorized the reservation of questions of law raised in the courts of the counties. See Act of January 20, 1823, Ch. IX, 1823 Ohio Laws (General) 9, *discussed in Skeel, Constitutional History of Ohio Appellate Courts, 6 CLEVE. MAR. L. REV. 323, 324 (1957)*. *Beatty* is more to the point. After noting that a motion for a new trial was addressed to the sound discretion of the trial court, and that under the common law, error could not be assigned to the decision of the trial court on such a motion, the court in *Beatty* addressed itself to the question whether any provision of the statutes had changed the common law in this respect. It concluded that an order granting a new trial was not a final order under section 512 of the Code of Civil Procedure of 1853 (now *Ohio Rev. Code Ann.*, § 2505.02 (Page 1954)), since the order neither determined the action nor was made in a special proceeding after judgment. (The motion had to be made within three days of the verdict of the jury or the decision of the court, and therefore it was normally made before judgment was entered.) It was final, however, under the provisions of the Act of April 12, 1858, § 4, 1858 Ohio Laws 81, which, in substance, provided for error proceedings from the decision of a court on a motion for a new trial upon the theory that the verdict or decision was against the weight of the evidence. The court further held that such orders granting a new trial, though final, would ordinarily not be reviewed on error, since any wrong done the parties would be cured by the new trial. The court concluded, "And while it is not necessary to hold that we will in no case employ this power apparently conferred by the letter of the statute, we are free to say that it will require a strong case to justify its exercise." 13 Ohio St. at 122. It is this reference to a "strong case" which the *Dean* court relied upon to formulate the "abuse
follows: If error proceedings are taken from a final order of the trial court, and if that order is discretionary, the order will not be reviewed on error unless a clear case of abuse of discretion appears from the face of the proceeding in error. This formulation makes sense when the means of obtaining review was the old proceeding in error, since the petition in error could state the facts which demonstrated the existence of a clear abuse of discretion. But when the appeal on questions of law was substituted for the proceeding in error, and when the notice of appeal was substituted for the petition in error, the doctrine lost its raison d'etre since the notice of appeal could not, on its face, demonstrate the existence of an abuse of discretion. But by this time, the early doctrine had been replaced by the later one, and "abuse of discretion" had become a touchstone of finality rather than a ground for review.

Klein does not conclude the matter, however, though it must be conceded that abuse of discretion alone does not make final an order granting an in-term motion to vacate or modify a judgment, we must still inquire whether such an order is not final by its very nature. To answer this question, we must again digress and examine current developments in the new trial area.

It would serve no useful purpose to detail here the long and tormented debate of the supreme court regarding the finality of an order granting a new trial. Much of that debate has to do with the validity of the fourth test for finality, and with whether or not the General Assembly or the supreme court has the power to define "finality." This latter point may still be open to discussion. In any event, the rule now seems to be this: An order vacating or setting aside a judgment and ordering a new trial is a final order, and this is true because of discretion" doctrine. As it is said in Dean: "the judgment will not be disturbed on error unless the case is so strong as to show an abuse of discretion." Dean v. King, Pennock & King, 22 Ohio St. 118, 134 (1871). See the quotation from Dean in note 435 supra.

In sum, then, error proceedings can be taken from an order granting a motion for a new trial since such an order is final under the provisions of the Act of April 12, 1858, § 4, 1858 Ohio Laws 81, but the trial court's order granting the new trial, being discretionary, will not be reviewed on error unless abuse of discretion appears from the face of the proceedings. Thus, in the beginning, abuse of discretion had absolutely nothing to do with finality.

See note 441 supra. Confusion begins to appear, however, with Smith & Wallace v. Bailey, 26 Ohio St. 1 (1874), in which the court stated that an order granting a new trial "can not be assigned for error" unless "there has plainly been an abuse of judicial discretion." Id. at 2. See note 435 supra. If this passage is read in the context of the common law doctrine prohibiting review of discretionary orders, and in the light of Beauty v. Hatcher it makes sense. If it is read in isolation, however, it appears to say that abuse of discretion will make the order granting the new trial final for purposes of error proceedings. It is apparently upon this foundation that the latter doctrine was built.

"An order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial." Ohio Rev. Code Ann. § 2505.02 (Page 1954).

The case of Price v. McCoy Sales & Serv., Inc., 2 Ohio St. 2d 131, 207 N.E.2d 236 (1965), summarizes nicely the agonized vacillation of the supreme court on these two questions.

See id. (Taft, C. J. concurring); State v. Huntsman, 18 Ohio St. 2d 206, 249 N.E.2d 40 (1969).
such an order is in its very essence final, and not because the General Assembly has declared it to be final in the fourth test for finality.446

How can such an order be final? Obviously, it does not determine the action, nor does it prevent a judgment. Further, it has been said not to be an order affecting a substantial right made in a special proceeding.447 Likewise, it has not been described as an order affecting a substantial right made upon summary application in an action after judgment since 1856.448 How, then, can it be final in its very essence?

The answer apparently is that it is within the power of the supreme court to define a final order. Thus, the four definitions of final order included by the General Assembly in section 2505.02 of the Revised Code are not necessarily exclusive, and those definitions are only valid to the extent that they comport with the supreme court's views of finality. (That the fourth test for finality enacted by the General Assembly does so comport is merely the fortuitous result of an attempted unconstitutional exercise of power by that body.) And the supreme court has defined as final any order which disposes of the whole case or some separate and distinct branch thereof.449 The proceeding on a motion for a new trial, though a proceeding in an action, is collateral to that action, and is a separate and distinct branch of the action. The court's order

446 As it is said in State v. Huntsman, 18 Ohio St. 2d 206, 249 N.E.2d 40 (1969):

"The first paragraph of the syllabus of Price v. McCoy Sales & Service, Inc., supra [2 Ohio St. 2d 131, 207 N.E.2d 236 (1965)], reads as follows: "The granting of a motion for a new trial is a final appealable order as provided in Section 2505.02 of the Revised Code."

This rule . . . was adopted by a unanimous court. Unfortunately, there are two theories which could support the holding as stated in paragraph one of the syllabus. Those theories are (1) that the General Assembly, by virtue of the authority given it by Section 6 of Article IV of the Constitution of Ohio, as amended November 7, 1944 [now OHIO CONST. art. 4, § 3(B)(2)], had the power to make an interlocutory order appealable and had done so, or (2) that an order setting aside a judgment and granting a new trial was a "final order" within the meaning of those words as used in Section 6 of Article IV of the Constitution as then constituted. The theory followed by Judge Paul M. Herbert in his opinion, concurred in by three other members of the court, is not readily apparent. However, the theory followed by Chief Justice Taft in his opinion then concurred in by the remaining members of the court, which is now adopted by the majority of this court, is clearly stated at page 142 in the opinion . . .: "... I do not interpret our decision today as indicating that the General Assembly may make an interlocutory order appealable, by calling it a judgment or final order or by including it in the definition of a judgment or final order. As I see it, we are merely holding that an order setting aside a judgment and granting a new trial is a final order within the meaning of those words as used in existing Section 6 of Article IV of the Constitution [now OHIO CONST. art. 4, §3(B)(2)]."

Id. at 209-10, 249 N.E.2d at 42-43 (emphasis added).

447 See Young v. Shallenberger, 53 Ohio St. 291, 41 N.E. 518 (1895), quoted in note 434 supra.

448 See Myres v. Myres, 6 Ohio St. 221 (1856), quoted in note 432 supra.


"It is clear . . . that the entire concept of "final orders" is based upon the rationale that the court making an order which is not final is thereby retaining jurisdiction for further proceedings. A final order, therefore, is one disposing of the whole case or some separate and distinct branch thereof."
with respect to the motion for a new trial disposes of the whole collateral proceeding on the motion, and the court retains no jurisdiction for further proceedings in that collateral proceeding. Therefore, the order vacating the judgment and ordering a new trial disposes of the collateral proceeding, and is a final order.

If the supreme court adheres to its previous view that the in-term motion to vacate or modify is essentially a motion for a new trial, this line of reasoning can be transferred to the in-term motion to vacate or modify; to some extent it already has been. In *State ex rel. Roulhac v. Probate Court,* \(^{450}\) the defendant filed an in-term motion to vacate with a motion for a new trial. The relator filed a petition for a writ of prohibition in the supreme court, seeking to prohibit the probate court from acting on the two motions. The respondent demurred to the petition, and the supreme court sustained the demurrer, saying: “An order of the Probate Court vacating a judgment and ordering a new trial is a final order which may be reviewed upon appeal.” Thus, there is some authority, albeit contaminated by the presence of the motion for a new trial, for the proposition that an order granting an in-term motion to vacate or modify is a final order.

It will be said, however, that *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* \(^{451}\) rejects this view, and that its comments on the *Chandler & Taylor Co. case* \(^{452}\) quoted at the beginning of Part II of this article \(^{453}\) indicate that the order granting the in-term motion to vacate is to be considered an interlocutory order. But this is not the case. When those remarks are read carefully, it is clear that the supreme court is following the path it marked in *State v. Huntsman.* \(^{454}\) It has taken upon itself the task of defining final orders without rigid adherence to the language of section 2505.02 of the Ohio Revised Code, and this it can do for two reasons. First, the supreme court, and not the General Assembly, has the power to define final orders, and second, because the court has this power the General Assembly’s definitions contained in section 2505.02 are not to be considered as exclusive of other definitions. Thus, the court feels free to find the ARC Industries order a final order because, in the language of the court, it is “an order vacating or setting aside a judgment.” \(^{455}\)

\(^{450}\) 21 Ohio St. 2d 105, 255 N.E.2d 636 (1970).

\(^{451}\) 47 Ohio St. 2d 146, 351 N.E.2d 113 (1976).

\(^{452}\) See text accompanying note 39 supra.

\(^{453}\) See text accompanying note 39 supra.

\(^{454}\) 18 Ohio St. 2d 206, 249 N.E. 2d 40 (1969), quoted in note 446 supra.

\(^{455}\) GTE Automatic Elec., Inc. v. ARC Indus., Inc., 47 Ohio St. 2d 146, 149, 351 N.E.2d 113, 115 (1976). The court is quite correct in saying that the ARC Industries case “can be resolved by looking to R.C. 2505.02.” It is submitted, however, that through an unfortunate misunderstanding of the common law origin of the abuse of discretion doctrine, and the influence of that origin on the Chandler & Taylor Co. court, the ARC Industries court selected the wrong part of Ohio Rev. Code Ann. § 2505.02 (Page 1954). It is the conclusion that was at fault in Chandler & Taylor Co., not the reasoning, and this conclusion was compelled by the common law doctrine that discretionary orders could not be reviewed on appeal in the absence of a clear abuse of discretion. Unfortunately,
2. The After-term Motion to Vacate or Modify

The origins of the after-term motion to vacate or modify are lost in the mists of antiquity, but from time to time some glimmerings of its history can be seen. By 1828, it was said that the jurisdiction of courts of law to set aside or suspend judgments irregularly or improperly obtained when there had been no fault or negligence on the part of the judgment debtor could not be "seriously questioned," and that this jurisdiction could be exercised pursuant to a motion made after the term in which the judgment was rendered.\(^{456}\) By 1836, this after-term motion to set aside or suspend for irregularity was described as "one of the plain and accustomed remedies of a court of law."\(^{457}\)

Although there does not seem to have been any statutory authority for the after-term motion described above, it would appear that at some time prior to 1823 the courts were given statutory authority to amend their judgments after term for the purpose of curing imperfections, defects, or a want of form.\(^{458}\) When this authority was omitted from the 1824 Act to Organize the Judicial Courts and Regulate Their Practice,\(^{459}\) it was held that the courts no longer had the power to make post-judgment amendments of a substantive nature.\(^{460}\) Thus, from 1824 it would seem that the courts could only entertain the in-term motion to vacate or modify and the after-term motion to suspend or set aside for irregularity or impropiety.

In 1853, the after-term motion was incorporated into section 534 and 535 of the Code of Civil Procedure, thereby authorizing the after-term motion to vacate or modify a judgment for irregularity in obtaining it. These provisions remained in effect, without substantial change, until replaced by Ohio Rule of Civil Procedure 60(B) on July 1, 1970.\(^{461}\)

the misreading of this doctrine produced a distorted conclusion. With Klein in mind, the ARC Industries court should have rejected the principle conclusion of the Chandler & Taylor Co. court, but retained the reasoning. Had the ARC Industries court done this, it would have reached the subsidiary conclusion of Chandler & Taylor Co. that an order granting an in-term motion to vacate or modify was an order affecting a substantial right made upon a summary application in an action after judgment. The subsidiary conclusion is sound. The court did not reach this conclusion in ARC Industries, however, and as we have tried to demonstrate in Part II of this article, ARC Industries will probably produce as many problems as did the old abuse of discretion doctrine.

\(^{456}\) See Critchfield v. Porter, 3 Ohio 518 (1928), quoted in note 409 supra.

\(^{457}\) McKee v. Bank of Mt. Pleasant, 7 Ohio (Part II) 176, 188 (1936). See also 2 J. SWAN, THE PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS AT LAW IN OHIO AND PRECEDENTS IN PLEADING 1000 (1850), quoted in note 409 supra.

\(^{458}\) Although it is not entirely clear, the source of this authority may be the Act of February 23, 1816, § 96, 14 Ohio Laws 310.

\(^{459}\) See Act of February 18, 1824, § 96, 22 Ohio Laws 50.

\(^{460}\) In Botkin, Kellar & McNeal v. Commissioners, 1 Ohio 375 (1824), the court stated that: "The court of common pleas have [sic] no authority to amend a final judgment at a term subsequent to that in which it is rendered, except in mere matter of form. The alteration made in this judgment was in a material and substantial, and not a formal circumstance. This decision is explained in Critchfield v. Porter, 3 Ohio 519 (1828), where the court pointed out that the change in the statutory authority did not in any way affect the court's after-term jurisdiction to set aside a judgment irregularly or improperly obtained.

After-term proceedings such as these have been likened to an application for a new trial.\textsuperscript{462} Unlike the motion for a new trial or the in-term motion to vacate or modify, however, the after-term motion to vacate is not addressed to the discretion of the court.\textsuperscript{463} Therefore, the common law rule which prohibited review of a discretionary order was never applied to the after-term motion to vacate, it was held very early that error proceedings would lie from an order granting the motion and setting aside a judgment.\textsuperscript{464} It was not until 1861, however, that

\textbf{Code of 1853 section 534:}

A court of common pleas, or district court, shall have power to vacate, or modify its own judgments, or orders, after the term at which such judgment, or order, was made: . . . 3. For misprision of the clerk, or irregularity in obtaining a judgment, or order.

\textbf{Code of 1853 section 535:}

The proceedings to correct misprisions of the clerk, or irregularity in obtaining a judgment, or order, shall be by motion, upon reasonable notice to the adverse party, or his attorney in the action.

\textsuperscript{462} Thus, in Bever v. Beardmore, 40 Ohio St. 70, 78 (1883), it is said:

The proceeding under review here is of the court of common pleas, in or connected with an action on promissory notes, within its general jurisdiction. It is not of itself a civil action; but a special proceeding in an action to effect a judgment rendered therein at a former term of the same court. Taylor case, 12 Ohio St. 169. It is professedly an application for a new trial.

Although the supreme court was speaking here of a petition to vacate, the language is broad enough to include the after-term motion to vacate for irregularity in obtaining a judgment. More to the point is Gynn v. Gynn, 106 Ohio App. 132, 148 N.E.2d 78 (1958):

While an order entered under these sections is a final order as defined by Section 2505.02, Revised Code, that is, an order affecting a substantial right made in a special proceeding, and is, therefore, appealable, it is not, in fact, a final determination of the rights of the parties to which a motion for a new trial may be addressed. It is in legal effect a motion for new trial especially provided for after term upon the specific grounds set out by Section 2325.01, Revised Code [Ohio Rev. Code Ann. § 2325.01 (Page 1954) (Repealed 1970)].

\textbf{Id.} at 135, 148 N.E.2d at 81.

\textsuperscript{463} Huntington & McIntyre v. Finch & Co., 3 Ohio St. 445 (1854) makes the point in the following language:

If the order setting aside the judgment in the common pleas rested in the discretion of the court, it was not subject to reversal on petition in error. The court of common pleas has ample control over its own orders and judgments during the term at which they are rendered, and the power to vacate or modify them in its discretion. But this discretion ends with the term, and no such discretion exists at a subsequent term of the court. And the power of the court to set aside or vacate its judgments, subsequent to the judgment term, is governed by settled principles to which the action of the court must conform, and for a departure from which any judgment or order may be subject to be reviewed and reversed on proceedings in error.

\textbf{Id.} at 447. To the same effect, see Van Ingen v. Berger, 82 Ohio St. 255, 92 N.E. 433 (1910).

\textsuperscript{464} As the court said in Huntington & McIntyre v. Finch & Co., 3 Ohio St. 445, 448 (1854) (emphasis in original):

It is well settled in this state that a judgment may be vacated or set aside on motion, at a term subsequent to the judgment term, for irregularity or improper conduct in procuring it to be entered. And this has become one of the accus-
the supreme court specified in what way such an order would be final, and when it did so, the court chose the wrong basis for finality. Thus, in Hettrick v. Wilson, the motion proceeding was described as "a special proceeding in an action after judgment." While this particular formulation found some following in the lower courts, it was eventually corrected by the supreme court in Braden v. Hoffman:

[A]n order of the court of common pleas, made on motion of the defendant, and vacating a default judgment entered at a previous term, for irregularity in obtaining the same, is an order affecting a substantial right made upon a summary application after judgment, and may be reversed, vacated, or modified for errors appearing on the record.

The more accurate and precise Braden formulation has been followed ever since.

Thus, from the inception of the Code of Civil Procedure in 1853 to the advent of the Rules in 1970, it has been held without demur that an order granting an after-term motion to vacate or modify a judgment for irregularity in obtaining it is an order which affects a substantial right made upon a summary application in an action after judgment, and is, for that reason, a final order from which an appeal may be taken on questions of law. This is true even if the order granting the after-term motion vacates the judgment and reinstates the case for an adversary hearing, or vacates the judgment and grants a new trial. Indeed, if an appeal is not taken promptly, and if the original judgment creditor waits until after the adversary hearing or the new trial to appeal from the order,

tomed and settled remedies for relief against judgments wrongfully obtained, where the impropriety or irregularity has not been superinduced by the fault or negligence of the judgment debtor. McKee v. The Bank of Mount Pleasant, 7 Ohio, 188.

The order of the common pleas, setting aside the judgment under consideration in this case, was therefore subject to reversal on petition in error in the district court, if proper ground existed for such proceeding.

Here, the court was speaking of the common law after-term motion to vacate, and not the motion to vacate authorized by section 535 of the Code of Civil Procedure of 1853, since the motion to vacate was made in 1852. However, review in the district court was obtained by a petition in error rather than by a pre-code writ of error, and the petition in error was created by section 515 of the Code of Civil Procedure of 1853. Thus, at least inferentially, the supreme court must have found that the order granting the motion to vacate was a final order under the provisions of section 512 of the Code of Civil Procedure of 1853, or the petition in error would not have been authorized. The Court did not expressly address this point, however, and did not specify in what way the order was final.

465 12 Ohio St. 136, 138 (1861), see note 389 supra for the full quote.
467 46 Ohio St. 639, 22 N.E. 930 (1889) (syllabus ¶ 1).
then the appeal is too late, and the right to complain of an error in making the order is lost. 469

History, then, leaves us with two lines of authority. The first concerns the in-term motion to vacate or modify, which is at the present time in a somewhat confused state. At one time it was thought that an order granting such a motion was an order affecting a substantial right made upon a summary application in an action after judgment, but that the order was nevertheless an interlocutory order unless it was the product of an abuse of discretion. In recent years that view has been replaced, and it would now appear that such an order is final and appealable, although the precise basis for finality remains unclear. The second line of authority concerns the after-term motion to vacate or modify, and it has always been held that an order granting such a motion is a final, appealable order because it is an order affecting a substantial right made upon a summary application in an action after judgment. We must now see what effect, if any, these two lines of authority have upon Rule 60(B).

B. RULE 60(B) AND THE THIRD TEST FOR FINALITY

The Ohio Rules of Civil Procedure have abolished both the significance of the terms of court, 470 and the distinction between in-term and after-term motions to vacate. The offices once served by those motions are now served by the Rule 60(B) motion alone. 471 Thus, the Rule 60(B) motion for relief from judgment is neither an in-term motion to vacate or modify (though it may be made within term) nor an after-term motion to vacate or modify (though it may be made after the term), and yet at the same time it is both. 472 But this paradox is no solution to the problem.

469 As the court said in Makranczy v. Gelfand, 109 Ohio St. 325, 142 N.E. 688 (1924):
Therefore the plaintiff in error need not have waited for a trial upon the merits of the controversy and awaited the conclusions of such a hearing, but was entitled to the fruits of his judgment theretofore rendered, if the law vouchsafed the same to him. Not having seen fit to take advantage of his opportunity to have the correctness of the court's ruling tested within the time prescribed by the law, he has slumbered upon his rights, and has lost the same. Id. at 333-34, 142 N.E. at 690.

470 See Ohio R. Civ. P. 6(C), which provides: "The existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action consistent with these rules." See also Antonopoulos v. Eisner, 30 Ohio App. 2d 187, 284 N.E.2d 194 (1972), quoted in note 471 infra.

471 "The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules." Ohio R. Civ. P. 60(B). And as it is said in Antonopoulos v. Eisner, 30 Ohio App. 2d 187, 284 N.E.2d 194 (1972):
Where relief is sought in the trial court from a judgment not void for want of jurisdiction, Rule 60 of the Ohio Rules of Civil Procedure provides an exclusive remedy, and relief must be sought under Rule 60 whether the motion is made during term or not. (Civil Rule 60 construed in light of Civil Rule 6(C).)
Id. (syllabus ¶ 1). See also Matson v. Marks, 32 Ohio App. 2d 319, 291 N.E.2d 491 (1972) (syllabus ¶ 1), where it is said: "Civ. R. 60(B) controls relief from judgment whether such relief is sought during the term at which the judgment was entered or during a subsequent term, supereceding [sic] the former statutory provisions providing for the vacation of judgments."

472 As it is said in Matson v. Marks, 32 Ohio App. 2d 319, 291 N.E.2d 491 (1972)
The solution, it would appear, is to be found in the procedure which governs the old motions and the new motion. The after-term proceeding, whether by motion or petition, is governed by the statutory procedure set out in former Chapter 2325 of the Ohio Revised Code.

This procedure may be summarized as follows:

(syllabus ¶ 2): "Pursuant to Civ. R. 60(B)(5), any ground which constituted a cause for the vacation of a judgment during term prior to the adoption of the Civil Rules continues to constitute grounds for relief from judgment even though such grounds are not specifically set forth in Rule 60(B)." The in-term proceeding to vacate or modify is not limited to the after-term grounds for vacation or modification stated in Ohio Rev. Code Ann. § 2325.01 (Page 1954) (repealed 1970). Farley v. Pickett, 177 Ohio St. 133, 203 N.E.2d 312 (1964); First Nat'l Bank v. Smith, 102 Ohio St. 120, 130 N.E. 502 (1921). Since that proceeding invokes the sound discretion of the court, however, the court may exercise discretion to consider any of the grounds for vacation or modification included in section 2325.01. As it was said in First Nat'l Bank v. Smith, 102 Ohio St. at 122-23, 130 N.E. at 503 (1921):

There appears to be no limitation or restriction to the rule [that a court of general jurisdiction is endowed with the power to control its own orders and judgments during the term at which they are rendered] except that the power must be exercised with a sound discretion — limited only to cases in which there is an abuse of discretion. It follows, therefore, that the court, in the instant case, had the power to suspend the judgment upon any ground enumerated in Section 11631, General Code [Act of April 29, 1913, Sec. 1, § 11631, 103 Ohio Laws 405 (codified as amended Ohio Rev. Code Ann. § 2325.01 (Page 1954) (Repealed 1970))] or for any other reason within the exercise of a sound discretion.

Thus, the in-term proceeding includes, but is not limited to, the grounds stated in the statute. Matson v. Marks, 32 Ohio App. 2d 319, 291 N.E.2d 491 (1972); Harbine v. Davis, 41 Ohio L. Abs. 65, 57 N.E.2d 421 (Ct. App. 1944); Canal Winchester Bank v. Exline, 61 Ohio App. 233, 22 N.E.2d 528 (1938). Thus, by a process of double incorporation — the incorporation of the after-term grounds into the in-term proceeding, and the incorporation of the in-term proceeding into Rule 60(B)(5) — Rule 60(B) includes all of the former statutory grounds for vacation or modification after term. This rule is subject to a caveat, however: Rule 60(B)(5) cannot be used as a substitute for Rules 60(B)(1) through (4). GTE Automatic Elec., Inc. v. ARC Indus., Inc., 47 Ohio St. 2d 146, 351 N.E.2d 113 (1976); Adomeit v. Baltimore, 39 Ohio App. 2d 97, 316 N.E.2d 469 (1974); Autopoulos v. Eisner, 30 Ohio App. 2d 187, 284 N.E.2d 194 (1972); Luscre v. Luscre, 45 Ohio Misc. 9, 340 N.E.2d 854 (C.P. 1974); Celina Mut. Ins. Co. v. D'Agostino, 31 Ohio Misc. 21, 277 N.E.2d 472 (Mun. Ct. 1971). Therefore, the true rule would appear to be that Rule 60(B), through its fifth subdivision, includes within itself (but is not limited to) all of the former statutory grounds for the after-term vacation or modification of a judgment, save to the extent that such grounds are included within the first through fourth subdivisions of the Rule. In other words, under the provisions of Rule 60(B), relief from judgment can be granted for any one or more of the following specific grounds: (1) mistake, (2) inadvertence, (3) surprise, (4) excusable neglect, (5) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B), (6) intrinsic or extrinsic fraud of an adverse party, (7) misrepresentation of an adverse party, (8) misconduct of an adverse party other than fraud or misrepresentation, (9) the judgment has been satisfied, released, or discharged, (10) a prior judgment upon which the judgment is based has been reversed or otherwise vacated, (11) it is no longer equitable that the judgment should have prospective application, and (12) any other reason justifying relief from the judgment. This last ground includes, but is not limited to: (a) irregularity in obtaining the judgment, (b) fraud practiced by the successful party in obtaining a judgment, (c) erroneous proceedings against an infant or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings, (d) death of one of the parties before the judgment in the action, (e) errors in a judgment shown by an infant within twelve months after arriving at full age as prescribed in Ohio Rev. Code Ann. § 2323.21 (Page 1954), (f) for taking judgments upon warrants of attorney for more than was due the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment, and (g) when the judgment was obtained in whole or in a material part, by false testimony on the part of the successful party, or any witness in his behalf, which ordinary prudence could not have anticipated or guarded against, and the guilty party has been convicted.
(1) The timely filing of a motion setting forth the grounds for vacation or modification of the judgment (if the proceeding can be taken by motion), or the timely filing of a verified petition setting forth:
   (a) the judgment or order to be vacated or modified,
   (b) the grounds to vacate or modify it, and
   (c) if the party making the application is a defendant, the defense to the action;\textsuperscript{473}

(2) The contemporaneous filing of:
   (a) a responsive pleading containing a defense to the action if the party seeking relief is a defendant, or
   (b) a pleading containing a valid cause of action if the party seeking relief is a plaintiff;\textsuperscript{474}

(3) The service of:
   (a) reasonable notice on the adverse party or his attorney in the action, if the proceeding may be taken by motion, or
   (b) a summons on the adverse party, if the proceeding must be taken by petition;\textsuperscript{475}

(4) The service and filing of a responsive pleading to the tendered defense or cause of action;\textsuperscript{476}

(5) A hearing on the motion or petition, at which it must be determined:
   (a) that there exists a good ground or grounds for the vacation or modification of the judgment,\textsuperscript{477} and
   (b) that there exists a valid defense to the action or a valid cause of action;\textsuperscript{478}

\textsuperscript{474} See \textit{Livingstone v. Rebman}, 169 Ohio St. 109, 158 N.E.2d 366 (1959).
\textsuperscript{475} See note 473 \textit{supra}.
\textsuperscript{476} As the court said in \textit{Watson v. Paine}, 25 Ohio St. 340, 345 (1874):
   In order that the validity of the defense may be adjudged, an issue or issues should be made up by proper pleadings. If the proceeding to vacate or modify be by motion, the defendant should be required to file his answer to the original petition, with leave to the plaintiff to reply. If the proceeding be by petition, in which the matters of defense are set forth in issuable form, it would be sufficient, no doubt, to take issue thereon by reply or demurrer.
   When a proceeding by petition or by motion to vacate or modify a judgment is instituted, under section 535 or 536 [Code of Civil Procedure of 1853 §§ 535, 536, 1853 Ohio Laws 57 (codified at \textit{Ohio Rev. Code Ann.} §§ 2325.04, .05 (Page 1954) (repealed 1970))] the first thing to be done by the court, is to try and decide whether or not a "ground" to vacate or modify exists. Sec. 537 [\textit{Ohio Rev. Code Ann.} § 2325.06 (Page 1954) (repealed 1970)]. "The grounds" referred to in this section are those enumerated in the nine subdivisions of section 534 [\textit{Ohio Rev. Code Ann.} § 2325.01 (Page 1954) (repealed 1970)]. In some cases, the question thus to be tried and decided, can be determined by inspection of the record; in others the testimony of witnesses must be heard. But in all cases, this question must be tried and decided by the judge or judges. See also \textit{Livingstone v. Rebman}, 169 Ohio St. 109, 158 N.E.2d 366 (1959). A comparison of \textit{Livingstone} with \textit{Watson} indicates that there has been no essential change in procedure through the years.
(6) If the court finds that a good ground for vacation or modification exists, and that the pleadings suggest a tenable defense or cause of action, the judgment will be suspended; 479

(7) If reasonable minds could reach different conclusions from the evidence introduced in support of the defense or the cause of action, the issues raised by the pleadings will be tried on the merits; 480

(8) After the trial on the merits, the original judgment will be:

(a) vacated or modified in accordance with the result of the trial, if the party seeking relief from the judgment prevails; or

(b) restored, if the original judgment creditor prevails. 481

While some of the lower courts were of the opinion that this procedure also applied to the in-term proceeding to vacate or modify, 482 the supreme court rejected this view, 483 and there was no prescribed in-term

v. Paine, 25 Ohio St. 340, 345 (1874), and confirmed in Livingstone v. Rebman, 169 Ohio St. 109, 158 N.E.2d 366 (1959):

When the existence of ground to vacate or modify is thus decided, the case is not yet ready for a final judgment of vacation or modification. Before such judgment can be entered, if the petition or motion be filed by the defendant in the original action, it must be adjudged that there is a valid defense to the action. Sec. 538 [Code of Civil Procedure of the State of Ohio § 538, 1853 Ohio Laws 57 (codified at Ohio Rev. Code Ann. 2325.07 (Page 1954) (repealed 1970))].

479 As the court said in Livingstone v. Rebman, 169 Ohio St. 109, 158 N.E.2d 366 (1959) (syllabus at ¶ 3):

Where a court decides without reference to evidence required to prove a tendered defense that there is a valid ground to vacate or modify a judgment . . . and further decides that the tendered defense would, if true, have constituted an effective defense in the original proceeding, it is the duty of the court to suspend such judgment pending a trial on the merits of the defense.

However, Livingstone also makes the following point: If the evidence introduced to establish the ground for vacation is the same as the evidence introduced to prove the tendered defense, if the evidence is sufficient to determine all of the issues raised by the pleadings, and if reasonable minds could not reach different conclusions with respect to the evidence, then the court need not suspend the judgment pending a trial on the merits, but may vacate the judgment, if appropriate, and enter a new judgment for the party who should prevail on the issues.

480 Livingstone v. Rebman, 169 Ohio St. 109, 158 N.E.2d 366 (1959); Bulkley v. Greene, 98 Ohio St. 55, 120 N.E. 216 (1918); Lee v. Benedict, 82 Ohio St. 302, 92 N.E. 492 (1910); Follett v. Alexander, 58 Ohio St. 202, 50 N.E. 720 (1898); Frazier v. Williams, 24 Ohio St. 625 (1874); Watson v. Paine, 25 Ohio St. 340 (1874).

481 See Livingstone v. Rebman, 169 Ohio St. 109, 158 N.E.2d 366 (1959) (syllabus ¶ 6, 7), and cases cited in note 480 supra.

482 See, e.g., City of Cincinnati v. Archiable, 4 Ohio App. 218 (1915).

483 In First Nat'l Bank v. Smith, 102 Ohio St. 120, 130 N.E. 502 (1921), the court declared:

We find that in cases of this character the lower courts have followed a practice of holding that the procedure laid down in Chapter 6 [of the General Code; now Ohio Rev. Code Ann. Chap. 2325 (Page 1954) (repealed in part 1970)], is the proper procedure to be followed upon an application to vacate or suspend a judgment made at the same term in which the judgment was rendered; and, further, that in some jurisdictions a rule of court exists making it necessary as a matter of practice to follow the procedure outlined in Chapter 6 in seeking to vacate or suspend a judgment, where the application is made at the same term in which the judgment was rendered.

We think this is a wholesome rule in furtherance of good practice, especially in reference to judgments taken on cognovit instruments and by confession. But we are constrained to hold that in the face of such a rule the court may not
procedure except to the extent prescribed by a local rule of court, or to the extent that a particular court adapted the statutory after-term procedure.484

Apart from saying that the procedure for obtaining any relief from a judgment shall be by motion as prescribed in the Rules, Rule 60(B) does not prescribe the procedure to be followed in the motion proceeding for relief from judgment. But recent decisions, principally of the appellate courts, lay down a procedure which may be summarized in the following terms:

(1) The execution of a written motion which shall state with particularity:
   (a) the ground or grounds upon which relief from judgment is sought, and
   (b) the precise relief or order sought;485

(2) The contemporaneous execution of:
   (a) a brief or memorandum in support of the motion,486
   (b) documentary evidence in testimonial form487 setting forth operative facts which demonstrate that:

be limited or concluded to the grounds enumerated in Section 11631, General Code [now OHIO REV. CODE ANN. § 2325.01 (Page 1984) (repealed 1970)] and, in the absence of such a rule of court, the court may not be limited or concluded by the method of procedure outlined in Chapter 6.

We therefore hold that the court had control over this judgment during the term at which it was entered, and had the power to suspend it without reference to the method of procedure outlined in Chapter 6.

Id. at 123, 130 N.E. at 503.

484 See note 510 supra.

485 OHIO R. CIV. P. 7(B)(1); Adomeit v. Baltimore, 39 Ohio App. 2d 97, 316 N.E.2d 469 (1974). As a general rule of practice, it is sufficient to state the grounds in conclusory form in the body of the motion, with the "particulars" in support of the grounds being given in some detail in the brief or memorandum in support of the motion. Brenner v. Shore, 34 Ohio App. 2d 209, 297 N.E.2d 550 (1973).

486 See note 485 supra. As a general rule, a brief or memorandum in support of the motion is required by local rule of court. Thus, for example, Rule 11(B) of the Rules of the Court of Common Pleas of Cuyahoga County stipulates that: "The moving party shall serve and file with his motion a brief written statement of reasons in support of the motion and a list of citations of the authorities on which he relies." Where local rules such as the above are in effect, they are a compulsory supplement to OHIO R. CIV. P. 7(B)(1), and must be followed. If they are not, the motion should not be granted by the trial court. If such a motion is granted, and the opposing party properly challenges it, the granting will be held an abuse of discretion because it violates the mandates of Rule 7(B)(1) and the local supplementary rule. Rosenberg v. Catarello, 49 Ohio App. 2d 87, 359 N.E.2d 467 (1976).

487 As the court said in Adomeit v. Baltimore, 39 Ohio App. 2d 97, 102, 316 N.E.2d 469, 474 (1974): "He [the movant] may also file a brief or memorandum of fact and law, and affidavits, depositions, answers to interrogatories, exhibits and any other relevant material. . . ." The court also stated:

The rigid procedural requirements of Civil Rule 56 regarding the documents and other material the parties should submit in support of and in opposition to a motion for summary judgment are excellent guides and a commendable procedure to be followed in seeking relief or in opposing relief under Civil Rule 60(B).

Id. at 104, 316 N.E.2d 475.

Rule 56 provides that depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact may be timely filed in support of a motion for summary judgment. Rule 6(D) provides that when a motion is supported by affidavit, the affidavit shall be served with the motion. Thus, from all this we can conclude that these items of documentary evidence in testimonial form must
OHIO RULE 60(B)

(i) the motion is timely made,\footnote{488}
(ii) the movant is entitled to relief under one or more of the grounds stated in Civil Rule 60(B)(1) through (5),\footnote{489} and that
(iii) the movant has a good claim for relief,\footnote{490} or a good defense to the action;\footnote{491} and
(c) a pleading containing either a statement of claim upon which relief can be granted, or a defense to the judgment creditor's statement of claim, as appropriate;\footnote{492}

be served with the motion. \textit{But see} Matson v. Marks, 32 Ohio App. 2d 319, 291 N.E.2d 491 (1972) (syllabus \S 5): "Civ. R. 60(B) does not require the submission of affidavits with a motion for relief from judgment, and the movant is not required to submit affidavits, or other evidence, in support of such motion until required to do so by rule or order of the trial court."

With due respect, it is submitted that this statement from \textit{Matson} is in error since it is in conflict with the provisions of OHIO R. Civ. P. 6(D). In any event, this \textit{Matson} gloss on Rules 6(D) and 60(B) may be in conflict with a local rule of court. Rule 11(B) of the Rules of the Court of Common Pleas of Cuyahoga County, for example, contains the following requirement: "If the motion requires the consideration of facts not appearing of record, [the moving party] shall also serve and file [with this motion] copies of all affidavits, depositions, photographs or documentary evidence which he desires to present in support of the motion." Since local rules such as this are not inconsistent with the provisions of the Constitution or the Civil Rules, they are binding upon the parties to an action, and must be followed by both the court and counsel. \textit{Reppe v. Horton}, 44 Ohio App. 2d 63,335 N.E. 2d 722 (1974). \textit{Shore v. Chester}, 40 Ohio App. 2d 412, 321 N.E.2d 641 (1974).

\footnote{488}{GTE Automatic Elec., Inc. v. ARC Indus., Inc., 47 Ohio St. 2d 146, 351 N.E.2d 113 (1976); Adomeit v. Baltimore, 39 Ohio App. 2d 97, 316 N.E.2d 469 (1974).}

\footnote{489}{See \textit{note 488 supra}. Documentary evidence in support of this point is not required if "the grounds for relief from a judgment are such as appear upon the face of the record." \textit{Matson v. Marks}, 32 Ohio App. 2d 319, 291 N.E.2d 491 (1972). This follows the rule set down over 100 years ago in \textit{Watson v. Paine}, 25 Ohio St. 340 (1874), \textit{see \textit{note 477 supra}}, and seems a reasonable rule of economy. However, the movant's brief or memorandum in support of the motion should point out the specific portions of the record which sustain his contention that grounds for relief exist. As \textit{Adomeit} notes, the movant must submit "facutal material which on its face demonstrates . . . reasons why the motion should be granted." Thus, prudence would dictate that the movant take some pains with the presentation of his case, even to the extent of supporting the brief with transcripts of the appropriate parts of the record. See the reference in \textit{Adomeit} to "exhibits and any other relevant material," and the reference in Rule 56 "transcripts of evidence in the pending case," both mentioned in \textit{note 487 supra}.}

\footnote{490}{See \textit{Tom McSteen Contracting Co. v. Thomas Maloney & Sons, Inc.}, 39 Ohio App. 2d 31, 34, 314 N.E.2d 392, 393-94 n.5 (1974), where the court asked: "Query, must a plaintiff seeking vacation after a dismissal allege and demonstrate a cause of action sufficient to withstand demurrer (in current parlance [sic] a "motion to dismiss")? The answer to this question appears to be given in GTE Automatic Elec., Inc. v. ARC Indus., Inc., 47 Ohio St. 2d 146, 150, 351 N.E.2d 113, 116 (1976) (emphasis added): "To prevail on his motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted. . . ."}

\footnote{491}{GTE Automatic Elec., Inc. v. ARC Indus., Inc., 47 Ohio St. 2d 146, 351 N.E.2d 113 (1976); Adomeit v. Baltimore, 39 Ohio App. 2d 97, 316 N.E.2d 469 (1974); Brenner v. Shore, 34 Ohio App. 2d 209, 297 N.E.2d 550 (1973); Matson v. Marks, 32 Ohio App. 2d 319, 291 N.E.2d 491 (1972).}

\footnote{492}{Brenner v. Shore, 34 Ohio App. 2d 209, 297 N.E.2d 550 (1973) Matson v. Marks, 32 Ohio App. 2d 319, 291 N.E.2d 491 (1975). These cases both quote with approval the following passage from Canal Winchester Bank v. Exline, 61 Ohio App. 253, 259, 22 N.E.2d 528, 531 (1938): "If the party moving to suspend the judgment can within the rules of pleading set out in his answer sufficient facts to apprise the court that he has a defense, this should be done and the adjudication can be made upon the averments of the answer. If, to set forth enough facts to disclose his defense, he would offend the..."}
The timely service of the motion package on the attorneys of record for each of the parties to the action, and the filing of the motion package, with proof of service, within three days of the service;

The timely service and filing (with proof of service) of an opposition package consisting of:

(a) a brief or memorandum in opposition to the motion for relief from judgment,

(b) documentary evidence in testimonial form supporting his or her position,

rules of pleadings by setting them out in his answer, then they should be brought to the attention of the court by evidence orally or by affidavit.

Further, the court said in Tom McSteen Contracting Co. v. Thomas Maloney & Sons, Inc., 39 Ohio App. 2d 31, 33, 314 N.E.2d 392, 393 (1974):

A motion to vacate a judgment under Civ.R. 60(B) usually originates with a losing party and, where the losing party is a defendant, should be . . . accompanied by an answer setting up a valid defense. . . . A hearing or other evidence may be required to clarify the claimed defense if the rules of pleading would be offended by incorporating sufficient facts in the answer to disclose the defense.

Thus, if a pleading drafted in conformity with Rules 8 through 11 reveals upon its face a good claim or defense, documentary evidence demonstrating the claim or defense is unnecessary.

Of course, neither a pleading containing a statement of claim or defense, nor documentary evidence demonstrating a meritorious claim or defense, need be presented when the relief requested does not require an initial or new trial on the merits. Thus, where the ground for relief is that the judgment has been satisfied, released, or discharged, or that a prior judgment upon which it is based has been reversed or otherwise vacated, a new trial on the merits is ordinarily not required, and there is no need to demonstrate the existence of a defense or claim for relief.

The "motion package" contains the written motion itself, the brief or memorandum in support of the motion, the documentary evidence in testimonial form, to the extent that such documentary evidence is required by the circumstances of the case, and the pleading containing the statements of claim or defense.

To avoid technical difficulties with respect to the filing of the pleading containing the statement of claim or defense, a copy of the pleading should be filed as part of the motion package, and the original should be filed separately. The original should also contain a separate proof of service indicating that a copy was served on the attorneys of record for each of the parties as part of the motion package.

Generally, local rules of court require such a brief or memorandum. For example, Rule 11(C) of the Rules of the Court of Common Pleas of Cuyahoga County mandates that, "Each party opposing the motion shall serve and file within seven (7) days thereafter a brief written statement of reasons in opposition to the motion and a list of citations of the authorities on which he relies."

As it is said in Adomeit v. Baltimore, 39 Ohio App. 2d 97, 104, 316 N.E.2d 469, 475 (1974): "As to the person opposing the motion for relief from judgment, he should at least file a brief in opposition and some factual material in testimonial form, such as affidavits, depositions, interrogatories, exhibits, and any other material which will support him."

It is not clear to what extent the courts will apply Rule 56 procedure by analogy, but it may be worthwhile to note that Rule 56(E) provides:

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

The above quote from Adomeit suggests that this provision applies to the Civil Rule 60(B) proceedings. In any event, if the opposing party supports his brief in opposition
(c) a responsive pleading, if the movant has served and filed a pleading containing a statement of claim.\footnote{498}

A hearing on the motion,\footnote{499} at which it must be determined:

with documentary evidence in testimonial form, the local rules of court generally require that the supporting material be served and filed with the brief.

\footnote{498} There is no post-Rule reported decision expressly requiring such a responsive pleading, but it is a logical requirement under the circumstances, and can find support in the pre-Rule decisions. \textit{See note 476 supra.}

If the movant has served and filed a pleading containing a statement of defense, no further pleading is required of the party in opposition. Under the provisions of Rule 8(D), the averments of the movant's pleading are presumed to be denied or avoided. Again, to avoid technical defects in filing, the original of the responsive pleading should be filed separately, and a copy should be filed as part of the opposition package. The original should contain a separate proof of service indicating that a copy of the pleading was served as part of the opposition package.

\footnote{499} There are two prerequisites to the grant of an oral hearing on the motion: the movant must have made out a prima facie case for relief in his motion package, and the case for relief must not be determinable from the face of the record. As to the first requirement, the court in Adomeit v. Baltimore, 39 Ohio App. 2d 97, 105, 316 N.E.2d 469, 476 (1974) established the following guide:

A question arises as to when the trial court should grant a hearing before ruling on the motion for relief from judgment.

If the material submitted by the movant in support of its motion contains no operative facts or meager and limited facts and conclusions of law, it will not be an abuse of discretion for the trial court to refuse to grant a hearing and overrule the motion.

If the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under Civil Rule 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion.

This is proper and is not an abuse of discretion. If under the foregoing circumstances, the trial court does not grant a hearing and overrules the motion without first affording an opportunity to the movant to present evidence in support of the motion its failure to grant a hearing is an abuse of discretion.


With respect to the second requirement, the court's opinion in Matson v. Marks, 32 Ohio App. 2d 319, 326, 291 N.E.2d 491, 497 (1972), declares: "Unless the grounds for such relief are such as appear upon the face of the record, there necessarily must be evidence presented to permit a factual determination by the trial court upon the grounds for relief from judgment." To the same effect, see Brenner v. Shore, 34 Ohio App. 2d 209, 297 N.E.2d 55 (1973); Mid-Continent Refrigerator Co. v. Whitterson, 32 Ohio App. 2d 227, 289 N.E.2d 379 (1972). \textit{But see Tom McSteen Contracting Co. v. Thomas Maloney & Sons, Inc., 39 Ohio App. 2d 31, 314 N.E.2d 392 (1974) (emphasis by the court): "Whenever a motion to vacate under Civ. R. 60(B) does not find support on the face of the record or is not accompanied by an affidavit or other evidence to support a vacation, it is not error to deny the motion without a hearing."}

However, even if the grounds for relief and the validity of the defense or claim appears from the face of the record, it is not an abuse of discretion to grant an oral hearing "to take evidence and verify these facts" (\textit{Adomeit v. Baltimore}), or to afford a more complete exploration of the grounds (\textit{Brenner v. Shore}), or to "determine the validity of an alleged ground for vacation even though meritorious on its face" (\textit{Tom McSteen Contracting Co. v. Thomas Maloney & Sons, Inc.}).

If necessary, oral testimony may be taken at the hearing. \textit{See Brenner v. Shore, 34 Ohio App. 2d 209, 297 N.E.2d 550 (1973); Matson v. Marks, 32 Ohio App. 2d 319, 291 N.E.2d 491 (1972).} To this extent, Rule 56 apparently does not apply by analogy, since oral testimony is not permitted under that Rule. \textit{Morris v. First Nat'l Bank & Trust Co., 15 Ohio St. 2d 184, 239 N.E. 2d 94 (1968); Myers v. Travelers Ins. Co., 14 Ohio St. 2d 76, 236 N.E.2d 209 (1968).}
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(a) first, that there exists a good ground or grounds for the relief sought; 5\textsuperscript{00} and
(b) second, that there exists a valid defense to the action or a valid claim for relief. 5\textsuperscript{01}

(6) If the court finds that a good ground for relief exists, and that the pleadings and/or the documentary evidence in testimonial form suggest a tenable 5\textsuperscript{02} defense or claim for relief, the judgment will be suspended; 5\textsuperscript{03}

(7) The making of findings of fact and conclusions of law by the court; 5\textsuperscript{04}

(8) If reasonable minds could reach different conclusions from the evidence introduced in support of the defense or the claim, the issues raised by the pleadings will be tried on the merits; 5\textsuperscript{05}

(9) After the trial on the merits, the original judgment will be:
(a) vacated or modified in accordance with the result of the trial, if the party seeking relief from the judgment prevails; or


\textsuperscript{501}Id. As the court explained in Tom McSteen Contracting Co. v. Thomas Maloney & Sons, Inc., "[p]atently, the conclusive determination of the validity of the defense must await trial on the merits. The effect of a Rule 60(B) determination goes no further than to suggest a tenable defense if ultimately proven." 39 Ohio App. 2d at 34 n. 4, 314 N.E.2d at 393 n. 4.

\textsuperscript{502}See note 501 supra.

\textsuperscript{503}See Matson v. Marks, 32 Ohio App. 2d 319, 327, 291 N.E.2d 491, 497 (1972), citing Livingstone v. Rebman, 169 Ohio St. 109, 158 N.E.2d 356 (1959), for the proposition that: "an actual vacation or modification of the judgment should await a trial of the defenses, but the judgment should be suspended pending such a trial on the merits." But see Brenner v. Shore, 34 Ohio App. 2d 209, 216, 297 N.E.2d 550, 554 (1973): "Following the general procedures, if there be a determination that there is validity to the proffered defenses, and a determination that such claim of excusable neglect is meritorious, such judgment should be vacated and a hearing should be set upon the merits thereof."

The better rule would seem to be that set forth in Matson requiring suspension of the judgment until after the trial on the merits, but suspension is necessary, of course, only when a trial on the merits is required to test the asserted claim or defense. When the ground for relief would justify an outright vacation of the judgment, on the other hand, the judgment may be vacated. Thus, if the ground for relief is that a prior judgment upon which the judgment is based has been reversed or otherwise vacated, outright vacation may be justified, and there would be no need to suspend the judgment pending a trial on the merits.

\textsuperscript{504}As the court stated in Adomeit v. Baltimore, 39 Ohio App. 2d 97, 104, 316 N.E.2d 469, 475-76 (1974):

The Rules of Civil Procedure do not require the trial court to set forth its reasons for either granting or denying the motion, but it is good practice if the trial court would make findings of fact and conclusions of law and set forth its reasons for either granting or denying motions for relief from judgment. In this manner, if an appeal is taken from the trial court's ruling on the motion, a reviewing court will have before it all the factual material submitted by the parties and the trial court's decision and its reason. A reviewing court will then be able to objectively determine if a trial court abused its discretion in either granting or denying the motion for relief from judgment.

See also Brenner v. Shore, 34 Ohio App. 2d 209, 297 N.E.2d 550 (1973) ("necessary . . . for findings to be set forth . . . by the trial court").

\textsuperscript{505}Matson v. Marks, 32 Ohio App. 2d 319, 291 N.E.2d 491 (1972).

\textsuperscript{506}Id.
(b) restored, if the original judgment creditor prevails. 506

Thus, with the exception of some relatively insignificant matters of detail, the procedure governing the Rule 60(B) motion for relief from judgment is identical to the procedure which governed the after-term motion to vacate or modify for irregularity in obtaining a judgment. Indeed, at least one appellate court has expressly held that the pre-Rule procedures applicable to after-term proceedings to vacate or modify are "equally applicable under the Rules," 507 and both the supreme court 508 and other courts of appeals 509 have implied this result. 510 Therefore, although it has been said that the grant of a Rule 60(B) motion is within the trial court's discretion, that court has no more discretion under Rule 60(B) than it had under the provisions of Chapter 2325 of the Ohio Revised Code; 511 and it may fairly be said that the Rule 60(B) proceeding is more closely akin to the after-term motion proceeding than it is to the in-term motion proceeding.

In Brenner v. Shore, 34 Ohio App. 2d 209, 214, 297 N.E.2d 550, 553 (1973), the Court of Appeals for Franklin County said:

Although the Civil Rules are silent on the exact procedures to be followed in the instant type of case, we hold that the procedures as outlined in the cited cases are equally as applicable under the Civil Rules as they were under the prior code sections dealing with the vacating judgments.

Without question, this is the thrust of GTE Automatic Elec., Inc., v. ARC Indust., Inc., 47 Ohio St. 2d 146, 351 N.E.2d 113 (1976) (Syllabus ¶ 2).


It is somewhat ironic to note that the statute after-term procedure contained in OHIO REV. CODE ANN. Chap. 2325 was expressly repealed as in conflict with OHIO R. CV. P. 60(B). See Act of June 5, 1970, § 1, 1969-70 Ohio Laws, Book III, at 3017 (1970). However, section 3 of the repealing Act contained the following savings clause:

That the taking effect of the Rules of Civil Procedure on July 1, 1970, is prima-facie evidence that the sections of the Revised Code to be repealed by Section 1 are in conflict with such rules and shall have no further force or effect . . . unless a court shall determine that one of such sections, or some part thereof, has clearly not been superseded by such rules and that in the absence of such section or part thereof being effective, there would be no applicable standard of procedure prescribed by either statutory law or rule of court.

Id. § 3. No doubt this is the clause upon which the courts rely when they revile the substance of former OHIO REV. CODE ANN. §§ 2325.05-07 (Page 1954) (Repealed 1970).

In Adomeit v. Baltimore, 39 Ohio App. 2d 97, 103, 316 N.E.2d 469, 475 (1974), the court said: "It is discretionary with the trial court whether the motion will be granted and in the absence of a clear showing of abuse of discretion the decision of the trial court will not be disturbed on appeal." This is not the same discretion that the trial court has when dealing with an in-term motion to vacate or modify, however. Rather it is "governed by settled principles to which the action of the court must conform, and for a departure from which any judgment or order may be subject to be reviewed and reversed on [appeal]." Huntington & McIntyre v. Finch & Co., 3 Ohio St. 445, 447 (1854). The in-term discretionary power which the trial court formerly had was "an inherent power, in no way regulated or abridged by statute," First Nat'l Bank v. Smith, 102 Ohio St. 120, 130 N.E. 502, but that is not the case with the power conferred by Rule 60(B). As the court declared in Adomeit:

If the material submitted by the parties in support of and in opposition to the motion clearly established that the movant filed a timely motion, has stated valid reasons why he is entitled to relief under one of the provisions of Civil Rule 60(B)(1) through (5), and has a defense, the trial court should grant the motion for relief from judgment and overruling the motion would be an abuse of discretion. 39 Ohio App. 2d at 104, 316 N.E.2d at 476. See also Brenner v. Shore, 34 Ohio App. 2d 209, 297 N.E.2d 550 (1973), quoted in note 503 supra. But this is precisely the same
C. CONCLUSION WITH RESPECT TO THE THIRD TEST FOR FINALITY

The Rule 60(B) motion for relief from judgment closely resembles the pre-Rule after-term motion to vacate or modify a judgment, and an order granting the latter motion has always been held to be a final order affecting a substantial right made upon a summary application in an action after judgment. Therefore, we may fairly conclude that an order granting a Rule 60(B) motion for relief from judgment is likewise a final order affecting a substantial right made upon a summary application in an action after judgment.

V. CONCLUSION

An order granting relief from a final judgment is itself a final appealable order, and has been so ever since the first Code of Civil Procedure was adopted in 1853. While there has never been any real difficulty in finding such an order to be final, there has been a certain amount of difficulty in articulating the proper basis for such a finding.

Likewise, an order granting relief from a final judgment pursuant to a Rule 60(B) motion is a final order, but again, the difficulty lies in articulating the proper basis for finality. The supreme court stated in GTE Automatic Electric, Inc. v. ARC Industries, Inc.: “While difficulties still remain in this area, the present case can be resolved by looking to R.C. 2505.02.” As we have demonstrated in Part II of this article, however, the court’s resolution of that case was erroneous.

Actually, the difficulties mentioned by the court stem from a two-fold failure — a failure to recognize the true nature of the Rule 60(B) motion for relief from judgment, and a failure to remember the past. When those two failures are corrected, the solution becomes rather simple.

If we put aside the supreme court’s inherent power to define finality without reference to section 2505.02 of the Ohio Revised Code, we find that that statute contains four tests for finality. An order is final if:

1. It affects a substantial right in an action and in effect determines the action and prevents a judgment;
2. It affects a substantial right and is made in a special proceeding;

In short, under Rule 60(B), as under the Ohio Revised Code, the trial court’s discretion is limited to satisfying itself that the motion for relief has been timely filed (i.e., within a reasonable time after entry of the judgment), that a ground for relief exists (and even this is not wholly within its discretion, see GTE Automatic Elec. Inc. v. ARC Indus., Inc., 47 Ohio St. 2d 146, 351 N.E.2d 113 (1976)), and that the movant has a good claim or defense. Once these points have been determined in the movant’s favor, the Rule 60(B) proceeding is "governed by settled principles to which the action of the court must conform, and for a departure from which any judgment or order may be subject to be reviewed and reversed on [appeal].” Huntington & McIntyre v. Finch, 3 Ohio St. 445, 447 (1854).

512 Ohio St. 2d 146, 149, 351 N.E.2d 113, 115 (1976) (emphasis added).
3. It affects a substantial right and is made upon a summary application in an action after judgment; or
4. It vacates or sets aside a judgment and orders a new trial.

If we assume, for the moment, that an order granting relief from a final judgment affects a substantial right, it is obvious that some orders granting that relief will be final under the first test because they determine the action and prevent a judgment for the party against whom they are made. Not all of them will be final, however, because in many cases the judgment attacked will merely be suspended pending an adversary hearing on the merits, or if vacated outright, the order vacating it will also reinstate the action on the docket for an adversary hearing on the merits. Obviously, these latter orders do not determine the action, nor do they prevent a judgment for the original judgment creditor.

Likewise, some orders granting relief from a final judgment will be final under the fourth test because they vacate or set aside the judgment and order a new trial. But in many cases the order will not order a new trial; rather, because there has never been an original trial in the true sense of that word, they will order an original trial. Almost all orders granting relief from dismissals or default judgments fall into this latter category, and despite what the supreme court has said in *GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, they cannot be final orders under this fourth test for finality.

Therefore, neither the first nor the fourth tests for finality apply to all orders granting relief from a judgment pursuant to a Rule 60(B) motion for relief, though either test may apply to some such orders.

If the Rule 60(B) motion proceeding is a special proceeding, the second test for finality would apply to all orders granting relief from judgment pursuant to a Rule 60(B) motion for relief. But it is clear that the Rule 60(B) proceeding is not a "special statutory proceeding," and lacking that identification, only the supreme court can say with certainty whether or not it is a "special proceeding." Given the generally accepted tests for special proceedings, and given the supreme court's past record in this area, it is highly unlikely that the supreme court would find the Rule 60(B) proceeding to be "special" unless something akin to the "death knell" doctrine would drive it to that conclusion. But in most cases the grant of a motion for relief from judgment will not sound the "death knell" for the original judgment creditor, since he or she will ordinarily have an opportunity to recoup in another adversary hearing. Moreover, in those few cases in which no new or additional adversary hearing is ordered, the grant of relief will almost always be final under the first test for finality. It is highly unlikely, therefore, that the supreme court will ever classify the Rule 60(B) proceeding as a special proceeding.

This leaves the third test for finality, and it is here that we encounter the two-fold failure. The first failure is the failure to recognize that the Rule 60(B) motion is essentially the same as the pre-Rule after-term motion to vacate or modify. It is true that the Rule 60(B) motion is substantively broader than the older Code motion, but this is not a ma-
terial difference because finality rises out of the procedural effect of the motion, and not the substantive grounds for invoking that effect. Pro-

cedurally, the two motions are all but identical. Thus, the Rule 60(B) motion may be legitimately compared to the after-term Code motion to vacate or modify.

It is here that we encounter the supreme court’s second failure — the failure to remember history. An order granting an after-term Code mo-

tion to vacate or modify has always been held to be a final order. The basis for this finding of finality — that it is an order affecting a substant-

ial right made upon a summary application in an action after judgment — was first correctly identified in 1889, and reiterated from time to time until 1924. By this date, however, the principle that such an order was a final order had become so firmly established that the basis for finality was no longer mentioned. And because it was no longer mentioned, it was forgotten. Nevertheless, from 1889 until the advent of the Ohio Rules of Civil Procedure in 1970, it was consistently held that an order granting an after-term motion to vacate or modify was a final order on the theory that it was an order affecting a substantial right made upon a summary application in an action after judgment. Thus, the third test for finality has always been applied to such orders, albeit, since 1924, sub silentio.

Does the third test for finality also apply to the Rule 60(B) proceed-

ing? There can be no real doubt that it does. Such a proceeding re-

sults in:

1. An order. Whatever else it might be, an “order” is the judicial act which grants the relief required of the court by a motion. Since Rule 7(B) defines a motion as an “application to the court for an order,” it necessarily follows that a judicial act granting that application is an “order.” Further, the supreme court has expressly held that the action of a trial court in granting relief from a judgment is an “order.”513 In any event, it will not be argued seriously that the judicial act in granting a motion for relief from judgment is not an order.

2. Affecting a substantial right. At different times and in different circumstances, the supreme court has given different definitions of a

513Thus, in Chandler & Taylor Co. v. Southern Pacific Co., 104 Ohio St. 188, 191, 135 N.E. 620, 621 (1922), the supreme court said:

In the instant case, while the action of the common pleas court in rendering judg-

ment by default would be a judgment, its subsequent action in setting aside such default upon the summary application of the defendant, came within the definitive term of the latter section [OHIO REV. CODE ANN. § 2323.01 (Page 1954) (Repealed 1970)] and was an order as therein defined.

The statutory provision to which the court makes reference reads: “A judgment is the final determination of the rights of the parties in action. A direction of a court or judge, made or entered in writing and not included in a judgment, is an order.” OHIO REV. CODE ANN. § 2323.01 (Page 1954) (Repealed 1970). This provision was repealed as in conflict with OHIO R. CIV. P. 54(A). The statutory definition of “judgment” is narrower than that contained in Rule 54(A), which defines “judgment” as encompassing “a decree and any order from which an appeal lies.” In other words, this definition equates a “judgment” with a “final order.” Since the statute was repealed because of the definition of judgment, the fact of repeal has no bearing on what the supreme court said in Chandler & Taylor Co., and that decision is still sound.
“substantial right;”\textsuperscript{514} but in this context it has defined a “substantial right” as the right to the immediate fruits of one’s judgment.\textsuperscript{515} Obviously, an order granting relief from a judgment will result in a denial, to some extent, of the immediate fruits of that judgment, even if the relief granted is something less than the suspension, vacation, or setting aside of the judgment. Therefore, every order granting relief from a judgment is an order affecting a substantial right.

3. Made upon a summary application. As demonstrated in an earlier part of this article, a motion is a summary application. But should there be any lingering doubt upon this point, suffice it to say that the supreme court has, on a number of occasions, described the motion for relief from judgment as a summary application.\textsuperscript{516} Therefore, it must be concluded that the Rule 60(B) motion for relief from judgment is a summary application, and if the motion is granted, and relief given, the order granting that relief will be an order made upon a summary application.

4. In an action. As long ago as 1861 it was settled that proceedings to obtain relief from a judgment were not actions in their own right, nor separate proceedings. Rather, they were proceedings in an action.\textsuperscript{517} The passage of the years has not revealed any reason to depart from that view.\textsuperscript{518} In any event, motions are always made in some other pro-

\textsuperscript{514}Thus, in Armstrong v. Herancourt Brewing Co., 53 Ohio St. 467, 42 N.E. 425 (1895), the court defined a substantial right as a legal right which may be enforced or protected by law; in \textit{In re Appropriation for Highway Purposes}, 177 Ohio St. 118, 119, 203 N.E.2d 247, 248-49 (1964), the court gave the following definition:

An order affecting a substantial right arises where a litigant files a motion the sustaining of which would completely terminate the action. It would seem logically to follow that the overruling of such a motion constitutes an order affecting a substantial right of the losing party, and that is precisely what occurred in the pending case.

\textsuperscript{515}In \textit{Van Ingen v. Berger}, 82 Ohio St. 255, 92 N.E. 433 (1910), the defendant filed an after-term motion to set aside a default judgment for irregularity in obtaining it. The judgment was suspended. Error proceedings were taken, and the defendant objected on the ground that the order suspending the judgment was not a final order. To this argument, the supreme court replied: “The order does affect a substantial right in a summary application after judgment, and in that sense is a final order. . . . But for such order the plaintiff would have been entitled in law to the immediate fruits of his judgment. Of this right the order deprived him.” 82 Ohio St. at 259, 92 N.E. at 434. This definition was affirmed in \textit{Makranczy v. Gelfand}, 109 Ohio St. 325, 142 N.E. 688 (1924).

\textsuperscript{516}See, e.g., \textit{Chandler & Taylor Co. v. Southern Pacific Co.}, 104 Ohio St. 188, 135 N.E. 60 (1922); \textit{Van Ingen v. Berger}, 82 Ohio St. 255, 92 N.E. 433 (1910); \textit{Braden v. Hoffman}, 46 Ohio St. 639, 22 N.E. 930 (1889).

\textsuperscript{517}Taylor v. Fitch, 12 Ohio St. 169 (1861); Hettrick v. Wilson, 12 Ohio St. 136 (1861). As the supreme court explained in \textit{Taylor}:

Suppose a petition is filed to vacate a judgment; that the matter is heard, the judgment vacated, the original case reinstated on the docket, retried, and a judgment — but a modified judgment — again entered. The entry of the first judgment indicates the recovery of a certain sum of money; the entry of the second judgment, another and a different sum. Both must not stand; and how can they be explained and made consistent and intelligible? Obviously, only by including the proceedings to vacate the first judgment in the record of the original case. The whole, it seems to us, will constitute but one record of one case.

12 Ohio St. at 172.

\textsuperscript{518}In the poorly-reasoned case of \textit{Allen v. Streithorst}, 154 Ohio St. 283, 95 N.E.2d 761 (1950), the supreme court held that the old proceeding to vacate by petition could be begun as a separate proceeding, even though it was “proper and probably advisable” to file the
ceeding; they do not themselves initiate a proceeding. It is true, of course, that a special proceeding may be initiated by an original application, and it is equally true that the term “application” normally means “motion.” But it does not follow that a motion may be the “original application” which opens a special proceeding. Rather, when the term “application” is used in reference to an initiating document, it is to be read as meaning “petition.” The rule, therefore, remains sound; motions may only be employed in proceedings. Thus, if relief from judgment may only be obtained by a motion as prescribed in the Rules, and if motions may only be employed in proceedings, it must follow that the motion seeking relief from judgment is a summary application in a proceeding. And if that proceeding is not a special proceeding, it must be an action. Therefore, a motion seeking relief from a judgment in a proceeding other than a special proceeding is a summary application in an action.

5. After judgment. Rule 60(B) stipulates that a motion for relief from judgment may only be directed to a “final judgment, order or proceeding.” As used here in conjunction with “judgment,” the word “final” is somewhat tautological. The term “judgment” itself imports finality, and as defined in the Rules “includes a decree or any order from which an appeal lies.” Obviously, then, the term “final” as used in Rule 60(B) is intended primarily to modify the words “order” and “proceeding.” A “final order” is, of course, an order from which an appeal lies. Therefore, by definition, such an order is also a “judgment.”

The term “proceeding” is more difficult. The Rules Advisory Committee Staff Note to Rule 60(B) gives no clue to its meaning. As it stands, it could refer to a proceeding in an action, such as the proceeding on a motion, or to an independent special proceeding. Since the Rules are intended to apply to special statutory proceedings to the extent that they are not by their nature clearly inapplicable, it can be argued that the word “proceeding” has reference to special statutory proceedings. However, because the Rules are intended primarily to govern
procedure in civil actions, the better interpretation would seem to be that the word “proceeding” here has reference to an ordinary proceeding in a civil action. There are any number of such proceedings: proceedings on motions challenging the jurisdiction or challenging the pleadings; discovery proceedings; pretrial proceedings; intervention proceedings; proceedings to substitute parties; proceedings by a referee; summary judgment proceedings; new trial proceedings; and the like. Thus, an interpretation limited to ordinary proceedings in an action finds ample scope for application.

Normally, proceedings such as the above are concluded by an order. If that order affects a substantial right, in effect determines the action, and prevents a judgment for the party against whom it is made, it is a final order from which an appeal may be taken. Moreover, the proceeding in which it is made is a final proceeding to which a Rule 60(B) motion may be directed. Of course, if the order which concludes the proceeding is a final order, it is also a “judgment” as that term is defined in the Rules.

It follows, then, that in all instances in which an order granting a Rule 60(B) motion is made, the order will be made “after judgment.” Therefore, in all instances save perhaps one, an order granting a Rule 60(B) motion for relief from judgment is an order affecting a substantial right made upon a summary application in an action after judgment, and is, for that reason, a final order under the third test for finality.

The one exception may exist if the word “proceeding,” as used in Rule 60(B), is read to mean a “special proceeding.” An order granting a Rule 60(B) motion for relief from a judgment or order made in a special proceeding would be an order affecting a substantial right made upon a summary application after judgment. It would not be an order made in an action, however, unless the special proceeding was itself a special proceeding in an action, as opposed to an independent special proceeding. Accordingly, the third test for finality would not apply to independent special proceedings. As shown above, however, this interpretation of the word “proceeding” is by no means a necessary one, and if it is not the correct interpretation this possible exception does not exist. In any event, it seems safe to say that in ninety-nine percent of the cases, the Rule 60(B) motion for relief from judgment will be directed to


530 In Hoffman v. Weiland, 64 Ohio App. 467, 29 N.E.2d 33 (1940), the plaintiff obtained judgment on a promissory note. When the judgment remained unsatisfied, the plaintiff began a proceeding in aid of execution against the Guardian Life Insurance Company, as garnishee. Upon receiving the garnishee's answer, the court dismissed the proceedings in aid of execution and released the garnishee. The plaintiff appealed and the court of appeals held that the order dismissing the proceedings was final because it was an order made upon a summary application in an action after judgment. The proceeding in aid of execution is a special proceeding, but it is a special proceeding in an action. Therefore, if the court was correct, an order affecting a substantial right made upon a summary application in a special proceeding in an action after judgment is itself an order made in the action after judgment. See State ex rel. Silversteen v. Hufford, 19 Ohio L. Abs. 427 (Ct. App. 1935). But see Sam Savin, Inc. v. Burdsal, 61 Ohio App. 539, 22 N.E.2d 914 (1939), in which a similar order is more correctly described as simply an order affecting a substantial right made in a special proceeding.
a judgment or final order made in an action, and in only one percent of the cases, if at all, will it be directed to a final order in an independent special proceeding.

Since the number of instances in which the third test for finality might not apply to an order granting a Rule 60(B) motion for relief from judgment is minuscule, it is fair to say as a general rule that the third test for finality is the one test which is applicable to every order granting a motion for relief from judgment. Moreover, all orders granting such relief are final and appealable because they are orders affecting a substantial right made upon a summary application in an action after judgment. This has been the rule since Huntington & McIntyre v. Finch & Co. was decided in 1854, and the Ohio Rules of Civil Procedure afford no occasion for departure.

531 3 Ohio St. 445 (1854).