

THE SUMMARY JUDGMENT*

CHARLES E. CLARK AND CHARLES U. SAMENOW

Dissatisfaction in and out of the profession with the "law's delay" has long been manifested. As an effective remedy for such delay within the limits prescribed by its form and purpose, the summary judgment procedure has become an important feature of the most modern practice systems. Under this procedure judgment may be entered summarily for the plaintiff in the more usual types of civil actions, on motion setting forth his demand and his belief that there is no defense to it, unless the defendant, by counter-affidavit, shows that the facts are in dispute. The reform is usually advocated because of its effectiveness in preventing delays by defendants, and in securing speedy justice for creditors.¹ But its advantages would seem to be more than merely these. Because of its simplicity it is available for the prompt disposition of bona fide issues of law as well as of sham defenses. Except where a trial is necessary to settle an issue of fact, the whole judicial process is, by this procedure, made to function more quickly and with less complexity than in the ordinary long drawn out suit.

It is proposed in this article to consider the rules and decisions concerning summary procedure in the jurisdictions where it has already been adopted. These may be classified in three groups on the basis of the scope of the provision, the first being most extensive, the second more limited but still effective within its bounds, and the third applicable only to a few special types of action. In the first group are England, the English colonies, of which Ontario affords an example, and Connecticut under rules just adopted. In the second are New Jersey, New York, Michigan, District of Columbia, Illinois, Delaware, Pennsylvania, Indiana, the Virginias, and, formerly, Kentucky and South Carolina. In the third are Alabama, Kentucky, Arkansas, Tennessee, West Virginia, and Missouri. These jurisdictions will be considered in the order stated.

* This article is an amplification of a report prepared for the Connecticut Judicial Council in the spring of 1928. On November 12, 1928, the judges of the Superior Court of Connecticut, upon recommendation of the Connecticut Judicial Council, adopted an extensive summary judgment rule. This is considered below in the article.

¹ Cf. AM. JUD. SOC. BULL. XIV (1919) 100 as to the benefits of the procedure: "First, it discourages the defense which is interposed only for delay; Second, it gives the plaintiff a speedy judgment in the average commercial case; Third, it encourages creditors to resort to the courts, knowing they will get rapid satisfaction."

I

ENGLAND

1855 marks the introduction into England of a summary judgment provision restricted in its application to actions upon bills of exchange and promissory notes.² In much the same fashion as did its successor in the Rules of 1873, it provided for special indorsement of the plaintiff's claim upon the writ of summons and for affidavits by the defendant as a condition of leave to defend.³ It is upon the procedure in these rules that the English summary judgment as it stands today is modeled. The object of the rule was, as its name indicates, expedition and economy in obtaining a judgment where the circumstances of the case lent themselves to a shortened procedure.⁴ The intention of the framers is well set forth in the preamble to the Summary Procedure on Bills of Exchange Act (1855):⁵ "Whereas bona fide holders of dishonored Bills of Exchange and Promissory Notes are often unjustly delayed and put to unnecessary Expense in recovering the Amount thereof by reason of frivolous or fictitious Defences to Actions thereon, and it is expedient that greater facilities than now exist should be given for the Recovery of Money due on such Bills and Notes. . . ." It is worthy of note that the Judicature Act of 1873, the final step in the English reform of pleading, resulted in a very liberal extension of the expedited process, rather than its abandonment as had happened in America.⁶

With such a purpose in view, Order III, Rule 6 provides that the writ of summons may be specially indorsed in certain specified types of actions. This, with Order XIV which prescribes the procedure to be used in moving for judgment, constitutes the modern English provision.

² The Summary Procedure on Bills of Exchange Act, 18 & 19 VICT. c. 67 (1855).

³ Cf. Rules under the Judicature Act, Order III, Rule 6 and Order XIV, Rule 1, ANNUAL PRACTICE (1928) 13 *et seq.*, 156 *et seq.*; 1 YEARLY PRACTICE (1928) 19 *et seq.*, 141 *et seq.*

⁴ Cockburn, C. J., in *Walker v. Hicks*, 3 Q. B. D. 8, 9 (1877): "The object of the special indorsement is this: on the one hand, it is to have a very prompt and summary effect in favor of the plaintiff, by entitling him to apply to sign final judgment under Order XIV, and on the other hand, it is intended that the defendant should have an opportunity of avoiding further proceedings by payment of the debt." See *Grove, J.*, in *Bailey v. Bailey*, 13 Q. B. D. 855, 856 (1884), and *Dowse, B.*, in *Stewartstown Loan Co. v. Daly*, L. R. 12 Ir. 418, 419 (1884), to the same effect.

⁵ *Supra* note 1.

⁶ Compare the history of the English rules with that of the early American ventures in South Carolina, Kentucky, Alabama, Missouri, Arkansas and Kansas, where the adoption of the Code marks their death. Millar,

THE SPECIALLY INDORSED WRIT

The writ of summons may be specially indorsed with the plaintiff's claim in

“. . . all actions where the plaintiff seeks to recover only a debt or liquidated demand in money, payable by the defendant, with or without interest, arising:

(A) on a contract, express or implied (as for instance on a bill of exchange, promissory note or check, or other simple contract debt); or

(B) on a bond or contract under seal for the payment of a liquidated amount in money; or

(C) on a statute where the sum sought to be recovered is a fixed sum or in the nature of a debt other than a penalty; or

(D) on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only; or

(E) on a trust; or

(F) in actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant.”⁷

These actions fall naturally into two categories: (1) actions for recovery of debts or liquidated demands in money; (2) actions between landlord and tenant for the recovery of land.

DEBT OR LIQUIDATED DEMAND IN MONEY

Written instruments for payment of money. Actions under this head, including suits on bills, notes, checks, and express contracts, constitute the clearest and most usual case for the summary remedy. Practically the only difficulty that has here arisen is the indorsement of a claim on negotiable instruments for interest and the expense of “noting” protest.⁸ This difficulty was cleared up by a provision in the Bills of Exchange Act of 1882,⁹ which defined such claims as liquidated demands. Such

Three American Ventures in Summary Civil Procedure (1928) 33 YALE L. J. 193, 203, 208, 210, 212.

⁷ This section does not appear among the Rules of 1873.

⁸ In the early cases, such claims were not permitted to be specially indorsed. *Rogers v. Hunt*, 10 Ex. 474 (1854) (under the Common Law Procedure Act of 1852); *Skelly v. McKenna*, L. R. 6 Ir. 24 (1879); *Ryley v. Master*, [1892] 1 Q. B. 674. But *cf. Rodway v. Lucas*, 24 L. J. C. L. 155 (1855) (under Common Law Procedure Act: interest presumed on bill of exchange in the absence of express stipulation); *Northern Bank v. Chapman*, L. R. 6 Ir. 25 (1879) (“noting” expenses agreed upon in composition held liquidated demand.) *Skelly v. McKenna*, *supra*, would seem to be an isolated instance where “notary charges” were considered proper independently of contract or statute.

⁹ 45-46 VICT. c. 61, § 57 (1882); *Lawrence v. Willcocks*, [1892] 1 Q. B. 696; *Dando v. Boden*, [1893] 1 Q. B. 318.

claims are, however, still subject to the limitation in the Money-lender's Act (1900) as to improper interest and excessive bonuses.¹⁰ As to actions on contracts, the claim must be liquidated; claims for unliquidated damages cannot be specially indorsed. This follows, of course, from the requirement that the action be one to "recover a debt or liquidated demand in money."¹¹

Implied contracts. The general tenor of the decisions is that claims under the *indebitatus* counts are within the rule.¹² Examples are claims: in quantum meruit for professional services;¹³ by a surety against his principal for reimbursement;¹⁴ for goods sold and delivered;¹⁵ and on a solicitor's bill of costs.¹⁶

Bond or contract under seal. A claim for liquidated damages on a common money bond may be specially indorsed¹⁷ but not a claim on a penalty bond.¹⁸ Here difficulty has arisen as to the

¹⁰ *Wells v. Allott*, [1904] 2 K. B. 842 (excessive interest); *Dott v. Bonnard*, 21 T. L. R. 166 (1904) (excessive bonus). The policy behind the Moneylenders' Acts would naturally lead to a denial of the remedy of summary judgment to usurious moneylenders.

¹¹ That the claim be liquidated is the central requirement of the summary procedure. For various definitions of "debt" and "liquidated demand," cf. *ANNUAL PRACTICE* (1928) 16; 1 *YEARLY PRACTICE* (1928) 19; *Hibbert, LAW OF PROCEDURE* (2d ed. 1921) 30; *ODGERS, PLEADING AND PRACTICE* (9th ed. 1926) 47-49. See *Kennedy, L. J., in Workman Co. v. Lloyd Brazilleno*, [1908] 1 K. B. 968, 981: ". . . debt or liquidated demand" does not mean "definite sum of money recoverable in the common law action of debt in its most technical form."

¹² See *Farwell, L. J., in Workman Co. v. Lloyd Brazilleno*, *supra* note 11, at 978 (action for installment due on shipbuilding contract): "I can see no reason for excluding from the operation of Order III, Rule 6 any action falling under any of the eight *indebitatus* counts which is brought on an executed consideration for a fixed sum agreed to be paid for such execution."

¹³ *Lagos v. Grunwaldt*, [1910] 1 K. B. 41 (1909); cf. *Stephenson v. Weir*, L. R. 4 Ir. 369 (1879) (claim for work and labor).

¹⁴ *Borland v. Curry*, L. R. 4 Ir. 273 (1878) (suit by surety for sums paid on notes and costs at principal's request); cf. *Ahern v. O'Donovan*, 15 Ir. L. T. 7 (1881) (plaintiff must show how the defendant's "liability" arose).

¹⁵ *M'Cawley Co. v. Campbell*, L. R. 4 Ir. 410 (1879).

¹⁶ Cf. *Larkin v. M'Inerney*, L. R. 16 Ir. 246 (1885) (untaxed bills of costs were referred for taxation, judgment to be entered for the amount to be certified). Where the defendant delays too long in asking for taxation there will be no inquiry except as to extravagant items, and summary judgment will be ordered. *Jones & Son v. Whitehouse*, [1918] 2 K. B. 61.

¹⁷ *Strickland v. Williams*, [1899] 1 Q. B. 382.

¹⁸ *Tuther v. Caralampi*, 21 Q. B. D. 414 (1888). See *ANNUAL PRACTICE* (1928) 17-18 for a discussion of the difference between liquidated damages and a penalty.

circumstances under which summary relief may be given in actions on mortgage covenants.¹⁹

Judgment. No separate provision is made for summary judgments in actions on judgments. Such actions are, however, held to come under the category of debts arising on contract under the Rule.²⁰ Final judgment may be signed on foreign as well as on English judgments.²¹ It has been held that a claim for arrears of alimony awarded on an interlocutory judgment may not be specially indorsed since it is still subject to modification by the court making the order.²²

Statute, guaranty or trust. A claim under a statute may be specially indorsed where the sum sought to be recovered is a fixed sum, or in the nature of a debt other than a penalty.²³ A demand against a surety on a covenant has been held to be a guaranty under the Rule.²⁴ An action for principal and interest due under a legacy has been held to be based on trust within the Rule.²⁵ The special indorsement does not seem to have been often used in cases falling in this category.

ACTIONS BETWEEN LANDLORD AND TENANT FOR RECOVERY OF LAND

The tendency is to limit the application of this section to the more simple litigation not involving devolution of land titles.²⁶ Where complicated questions arise as to the relation of the parties, summary relief is denied.²⁷ The same policy is adhered to where a forfeiture for breach of covenants other than the

¹⁹ Where the claim is purely for money, the right to relief is clear. But where foreclosure and receivership are also prayed, Order XIV is not available. *Imbert-Terry v. Carver*, 34 Ch. D. 506 (1887); *Hill v. Sidebottom*, 47 L. T. R. 224 (1882). As to the effect of a receivership alone, it has been held, notwithstanding receivership, that a claim for principal and interest due on a mortgage may be specially indorsed. *Lynde v. Waithman*, [1895] 2 Q. B. 180. But see *Poulett v. Hill*, [1893] 1 Ch. 277.

²⁰ *Hodsoll v. Baxter*, 120 Eng. Rep. 739 (1858).

²¹ *Grant v. Easton*, 13 Q. B. D. 302 (1883). See ANNUAL PRACTICE (1928) 20-22 for an extended analysis of actions on British, colonial, and foreign judgments.

²² *Bailey v. Bailey*, *supra* note 4.

²³ Exclusion of penalties was added in 1883. This limitation is another indication of a somewhat conservative attitude in England towards the new procedure.

²⁴ *Cf. Caldwell v. Wren*, 2 Ir. L. T. 146 (1878); *Lloyd's Banking Co. v. Ogle*, 1 Ex. D. 262 (1876).

²⁵ *Hamilton v. Brogden*, 60 L. J. Ch. 88 (1890).

²⁶ *Casey v. Hellyer*, 17 Q. B. D. 97 (1886); *cf. Pilkington v. Power*, [1910] 2 Ir. 194 (tenancy at will); *Hopkins v. Collier*, 29 T. L. R. 367 (1913) (year-to-year tenancy); *Daubuz v. Lavington*, 13 Q. B. D. 347 (1884) (attornment between mortgagor and mortgagee creating tenancy at will); *Hall v. Comfort*, 18 Q. B. D. 11 (1886) (same).

²⁷ See ANNUAL PRACTICE (1928) 25.

non-payment of rent is involved.²⁸ The application of this provision is very much narrowed by these limitations.

PROCEDURE

Under Order XX, Rule 1 (a) when the writ is specially indorsed, no statement of claim (or complaint) need be delivered, but the indorsement is deemed to be the statement of claim. It must, therefore, fulfill the requirements of a statement of claim,²⁹ and, like a bill in equity or a declaration at law, it should apprise the defendant of a plaintiff's claim.³⁰ The indorsement must show the connection of the defendant with the plaintiff's cause of action.³¹ The courts incline toward strict conformity with the Rules,³² but bare technicalities may not be used by the defendant as a defense.³³

²⁸ *Arden v. Boyce*, [1894] 1 Q. B. 796; *Stokes v. Tracey*, [1920] 2 Ir. R. 444. These cases explicitly recognize that there is no reason for the rule but blindly follow precedent. See *Arden v. Boyce*, *supra* at 800; *Stokes v. Tracey*, *supra* at 447. Where the tenancy is determinable under the terms of the contract, it is held to come within Order III, Rule 6. *Keating v. Mulcahy*, [1926] Ir. R. 214.

²⁹ *Cassidy v. M'Aloon*, L. R. 32 Ir. 368 (1893); see *Anlaby v. Praetorius*, 20 Q. B. D. 764, 770 (1888), to the effect that it must be signed and have "Statement of Claim" written across the head of it. *But of. Satchwell v. Clarke*, 66 L. T. R. 641 (1892), holding that the indorsement is not to be tested by standards as rigid as those set up for statements of claim.

³⁰ See *Meade v. Mouillott*, L. R. 4 Ir. 207 (1879): "The least that the defendant should have is something that looks like (and in substance is) a pleading;" *Walker v. Hicks*, 3 Q. B. D. 8 (1877); *Bickers v. Spoight*, 22 Q. B. D. 7, 8 (1888); *Yeatman v. Snow*, 42 L. T. R. 502, 503 (1880), as to the notice function of the special indorsement.

Cf. also Beaufort v. Ledwith, [1894] 2 Ir. R. 16 (in an action for rent and arrears, averment of due date essential); *Murphy v. Murphy*, [1903] 2 Ir. R. 329 (where personal representative sues for arrears of rent, allegation that deceased had only chattel interest in the land necessary); *Stirling & Co. v. North*, 29 T. L. R. 216 (1913) (where the writ was indorsed for claim on three notes before the last two were due, held, since the defendant's counsel had not appeared to set up the defect, that the judgment cured the writ); *Aston v. Hurwitz*, 41 L. T. R. 521 (1879); *Bickers v. Speight*, *supra* note 30, prescribing the requirements of a special indorsement under the Common Law Procedure Act of 1852 as a guide to the user of the Rules of 1833.

³¹ *Guinness v. Caraher*, [1900] 2 Ir. R. 505; *Seaton v. Clarke*, L. R. 28 Ir. 514 (1891).

³² *Walker, C.*, in *Cassidy v. M'Aloon*, *supra* note 29, at 369: "It is only by virtue of a special statutory jurisdiction that final judgment can be obtained summarily in an action. By the common law a plaintiff has no right to obtain a judgment summarily, and if he wishes to avail himself of the statutory jurisdiction, he is bound to comply strictly with the requirements of the Rules." See *Gurney v. Small*, [1891] 2 Q. B. 584, 586; *Parpaite Freres v. Dickinson*, 38 L. T. R. 178, 179 (1878).

³³ *Cf. Veale v. Automatic Boiler Co.*, 18 Q. B. D. 631 (1887); see also cases cited *supra* note 30.

Liquidated demand. The requirement that the indorsement be one for a liquidated demand only has proved to be a most serious obstacle to many applications to sign final judgment during the early development of the procedure. The plaintiff was forced to resort to the general procedure where the following joinder of claims was presented: interest and "noting" expense on bills of exchange;³⁴ foreclosure and money due in actions on mortgage covenants;³⁵ injunction and money received;³⁶ also where interest was claimed when it did not appear to be due under a contract or a statute.³⁷ The inclusion of Order XIV, Rule 1 (b) whereby the judge or master was empowered to strike out any claim which could not be specially indorsed, without affecting the rest of the claim, relieved the plaintiff of the necessity of adopting such a course of action.³⁸

Amendment. The Rules provided that amendment of statement of claim, whether indorsed on the writ or not, may be made once, of right, the action to go on as if it had been made from the beginning.³⁹ It was held in *Gurney v. Small*⁴⁰ that amendment after service of summons was too late. But in the majority of decisions on this point, a more liberal attitude is taken.⁴¹ Such a point of view would seem to be more compatible with the purposes of the framers of the Rules.

Once having properly indorsed a writ, the plaintiff may proceed to summary judgment by the process specified in Order XIV:

"Where the defendant appears to a writ or summons specially indorsed under Order III, Rule 6, the plaintiff may, on affidavit

³⁴ *Supra* note 8; *cf. supra* note 9.

³⁵ *Supra* note 19.

³⁶ *Yeatman v. Snow*, *supra* note 30.

³⁷ *Sheba Mining Co. v. Trubshawe*, [1892] 1 Q. B. 674 (money due for goods and interest); *Gold Ores Reduction Co. v. Parr*, [1892] 2 Q. B. 14 (installments due on shares and interest); *Wilks v. Wood*, [1892] Q. B. 684 (goods sold and delivered and interest); see *ANNUAL PRACTICE* (1923) 18-20; *1 YEARLY PRACTICE* (1928) 26-27.

³⁸ See *BATY*, *SUPREME COURT PRACTICE* (2d ed. 1924) 64.

³⁹ Order XXVIII, Rule 2, *ANNUAL PRACTICE* (1928) 460; *1 YEARLY PRACTICE* (1928) 415.

⁴⁰ *Supra* note 32.

⁴¹ *Cf. Robinson v. Ralston*, L. R. 3 Ir. 26 (1880) (amendment striking out small unliquidated claim); *Roberts v. Plant*, [1895] 1 Q. B. 597 (the action after amendment under Order XXVIII, Rule 2, goes on as if the amendment had been made in the beginning); *Paxton v. Baird*, [1893] 1 Q. B. 139 (holding unnecessary a new appearance by the defendant). Where the amendment serves to change a writ generally indorsed into one specially indorsed, service of notice of the amended writ to the defendant is necessary. *Haigh v. Purcell*, [1908] 2 Ir. R. 56.

made by himself, or by any person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any), and stating that in his belief there is no defense to the action, apply to a Judge for liberty to enter final judgment. . . . The Judge may thereupon, unless the defendant, by affidavit, by his own *viva voce* evidence, or otherwise, shall satisfy him that he has a good defense to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly."⁴²

Appearance by the defendant is prerequisite to an application under Order XIV.⁴³

The affidavit. Since the affidavit is practically the sole guaranty against perjury by the plaintiff, fairly strict compliance with rules is demanded. The affidavit must be made by the plaintiff in person⁴⁴ or by one with knowledge of the facts.⁴⁵ Originally in suits by a corporation, the affidavit was thrown out on the ground that a corporation could not make an affidavit⁴⁶ but later the Rule was relaxed to admit one made by a clerk.⁴⁷ The affidavit must verify the cause of action on the deponent's own knowledge and must contain a statement of belief that the defendant has no defense.⁴⁸ Order XIV, Rule 2 would seem to indicate that the affidavit must at least be made at the time of application for judgment by summons. But *Begg v. Cooper*,⁴⁹ which has not been overruled, holds that it may be filed after the issuance of the summons. Although minor defects in the

⁴² Order XIV, Rule 1 (a) (in same form as in the Revision of 1893), ANNUAL PRACTICE (1928) 156; 1 YEARLY PRACTICE (1928) 141.

⁴³ An interesting comparison may be made with the Common Law Procedure Act of 1852 which provided for default judgment in much the same cases as in Order III, Rule 6, with the following prerequisites; a) special indorsement of the writ of summons; b) non-appearance by the defendant; c) affidavit by the plaintiff of personal service on the defendant.

Order XIV, Rule 1 would seem to be more than the slight extension of the above which Rosenbaum labels it. ROSENBAUM, RULE-MAKING AUTHORITY (1917) 49, n. 16.

⁴⁴ *Frederici v. Vanderzee*, 2 C. P. D. 70 (1877).

⁴⁵ *Cf. Lagos v. Grunwaldt*, *supra* note 13 (solicitor may make affidavit if he shows means of knowledge).

⁴⁶ *Bank of Montreal v. Cameron*, 2 Q. B. D. 536 (1877); see dictum per Brett, L. J., at 539: "As there is no reason why corporations in this particular case should not be put on the same footing as other plaintiffs, no doubt the rule will shortly be amended for the purpose." *Cf. Shelford v. L. & E. Ry.*, 4 Ex. D. 317 (1879); *Muirhead v. Cable Co.*, 27 W. R. 708 (1879) (both to the effect that a corporate defendant may defend by showing defence otherwise than by affidavit).

⁴⁷ *Pathe Cinema v. United Theatres*, [1914] 3 K. B. 1253.

⁴⁸ *Symon v. Palmers' Stores*, [1912] 1 K. B. 259; *Manning v. Moriarty*, L. R. 12 Ir. 372 (1883).

⁴⁹ 40 L. T. R. 29 (1878).

plaintiff's affidavit may be cured by reference back to the special indorsement,⁵⁰ it may, on the other hand, neither validate⁵¹ nor invalidate⁵² the writ. While the cases are in conflict as to whether the plaintiff may file an affidavit in reply,⁵³ the better view is to leave it to the discretion of the trial court.⁵⁴ The defendant's affidavit of defense is much more leniently construed than the plaintiff's affidavit.⁵⁵ Order XIV, Rule 3 (b) provides that the affidavit shall state whether the alleged defense goes to the whole or to a part only, thus serving Order XIV, Rule 4 which provides for partial summary judgments. Where the defendant's affidavit contains partial admission of the plaintiff's cause of action, it may be looked to in order to ascertain his intention as to the apportionment of the sums admitted.⁵⁶ It is worthy of note that under Order XIV, Rule 1 (a), the defendant may avail himself of *viva voce* evidence or other means of showing a defense than by affidavit; and under Rule 3 (c) the judge may order the defendant to attend and be examined on oath or to produce any documents. This procedure is used only in case of necessity, amounting as it does, to a trial on summons.⁵⁷

Against whom final judgment may be signed. Principles of substantive law are conclusive in determining against whom Order XIV is available. For instance, final judgment has been

⁵⁰ *Murphy v. Nolan*, L. R. 13 Ir. 468 (1886) (particulars of indebtedness); *May v. Chidley*, [1894] 1 Q. B. 451 (allegation of notice of dishonor in action on check).

⁵¹ *Gold Ores Reduction Co. v. Parr*, *supra* note 37.

⁵² See *Southport Tramways Co. v. Gandy*, 66 L. J. Q. B. 532, 533 (1897).

⁵³ *Cf. North Cent. Waggon Co. v. Wales Waggon Co.*, 39 L. T. R. 623 (1879) (no affidavit in reply) with *Girvin v. Crepe*, 13 Ch. D. 174 (1879) (allowing it). Where the plaintiff's affidavit was found to be defective, a supplemental affidavit was not allowed. *Imperial Tobacco Co. v. McAllister*, 50 Ir. L. T. 156 (1916).

⁵⁴ *Davis v. Spence*, 1 C. P. D. 719 (1876); *Rotheram v. Priest*, 41 L. T. R. 558 (1880).

⁵⁵ Compare with the Ontario practice, *infra* pp. 437, 438. Mere suggestion of a defense on reasonable grounds has been considered sufficient. See *Harrison v. Bottenheim*, 26 W. R. 362, 363 (1878) (hearsay admissible for this purpose). For cases as to sufficiency of defense, see *infra* notes 73-75.

Failure of the defendant to file an affidavit is fatal. *Cf. Pilkington v. Power*, [1910] 2 Ir. R. 194 (where defendant does not file an affidavit of defense because of attempt to compromise, he cannot rely on surprise to set aside an order for final judgment); see *Bradley v. Chamberlyn*, [1893] 1 Q. B. 439, 442 (where defendant relies on legal technicalities, he may not later file affidavits).

⁵⁶ *Parker v. Guinness*, 27 T. L. R. 129 (1910).

⁵⁷ See *Millard v. Baddeley*, [1884] W. N. 96, 96.

refused against a married woman, as such.⁵⁸ But, under the Married Woman's Property Acts, a judgment may be taken against her personal property.⁵⁹ Consequently, the courts are careful in the wording of these orders. It has been held that a judgment may be taken against an administratrix to be levied on the deceased's effects *quando occiderint*;⁶⁰ or against a corporation;⁶¹ or a partnership even though one of the members of the firm be an infant.⁶² Under Order XIV, Rule 5, if one of several defendants presents a good defense and another does not, an order will be given against the latter while the former will be allowed to defend.⁶³ It is of very great interest to note the handling of a case where one co-surety, being sued alone, seeks to bring in the other. This has been denied as prejudicial to the plaintiff's rights.⁶⁴ With the joinder machinery provided by the "third party notice" provision,⁶⁵ however, it is uncertain how the question would be settled today.⁶⁶

Time for application for summary judgment. It is well settled that once the plaintiff takes steps to try the action by jury, after the defendant has appeared, it is too late to move for leave to sign final judgment.⁶⁷ There is doubt whether the plaintiff can apply for leave to sign final judgment after a defense has been filed.⁶⁸ And where final judgment has been irregularly signed,

⁵⁸ *Durrant v. Ricketts*, 8 Q. B. D. 177 (1881); *Ortner v. Fitzgibbon*, 50 L. J. Ch. 17 (1880).

⁵⁹ *Bursill v. Tanner*, 13 Q. B. D. 691 (1884); *cf.* *Downe v. Fletcher*, 21 Q. B. D. 11 (1888) (plaintiff need not prove existence of separate estate to recover for debt contracted for before coverture); *Bird v. Barstow*, [1892] 1 Q. B. 94 (where a married woman defendant has paid money into court as a condition of leave to defend, the plaintiff is entitled to it forthwith, without inquiry whether she had separate estate at the date of judgment).

⁶⁰ *Findlater v. Tuohy*, L. R. 16 Ir. 474 (1885).

⁶¹ *Shelford v. Ry.*; *Muirhead v. Cable Co.*, both *supra* note 46.

⁶² *Harris v. Beauchamp*, [1893] 2 Q. B. 534 (infant's personal property being protected).

⁶³ *Weall v. James*, 68 L. T. R. 515 (1893); *cf.* *Duffner v. Bowyer*, 40 T. L. R. 700 (1924) (plaintiff allowed to continue against second defendant even though he had agreed to relieve the latter from his duty upon signing judgment against the first).

⁶⁴ *Caldwell v. Wren*, *supra* note 24; *Thorne v. Seel*, [1878] W. N. 215 (indemnitor).

⁶⁵ Order XVI, Rule 52.

⁶⁶ *Cf.* *Gloucestershire Banking Co. v. Phillipps*, 12 Q. B. D. 533 (1884) (upholding summary judgment against a third party joined); 1 YEARLY PRACTICE (1928) 141.

⁶⁷ *Stewartstown Loan Co. v. Daly*, L. R. 12 Ir. 418 (1884); *cf.* *Hackett v. Lalor*, L. R. 12 Ir. 44 (1883) (after issue was raised).

⁶⁸ *Cf.* *McLardy v. Slateum*, 24 Q. B. D. 504 (1890) (allowed after de-

the defendant is entitled to have the judgment and the execution set aside.⁶⁹

Partial summary judgment. "If it appears that the defence set up by the defendant applies only to a part of the plaintiff's claim."⁷⁰ In one instance where an amount was admitted shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms . . . as the Judge may think fit; and the defendant may be allowed to defend as to the residue of the plaintiff's claim."⁷⁰ In one instance where an amount was admitted subject to a counterclaim for a much larger sum, judgment was refused.⁷¹ The imposition of terms at the Judge's discretion would seem effectively to safeguard the rights of the honest defendant.

Leave to defend. "Leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the Judge may think fit."⁷² Such leave is given where the defendant shows a defense entitling him to a trial.⁷³ Such a situation arises where a conflict in the

fense was filed) with *Annaly v. Comyn*, L. R. 30 Ir. 102 (1892) (too late after defense); *Sligo Ry. v. Palmer*, L. R. 24 Ir. 58 (1888) (too late after statement of claim and defense were filed).

⁶⁹ *Hughes v. Justin*, [1894] 1 Q. B. 667; cf. *Anlaby v. Praetorius*, *supra* note 29 (premature entry of judgment).

⁷⁰ Order XIV, Rule 4. For application of the rule, cf. *Dennis v. Seymour*, 4 Ex. D. 80 (1879); *Lazarus v. Smith*, [1908] 2 K. B. 266. Clearly, where the plaintiff admits a partial defense set up, only partial summary judgment will be granted in his favor. *Rye v. Hawkes*, L. R. 16 Ir. 12 (1885).

⁷¹ *Court v. Sheen*, 7 T. L. R. 556 (1891).

⁷² Order XIV, Rule 6.

⁷³ The following are representative cases showing various defenses which were upheld:

a. In contract actions: *Warner v. Bowlby*, 9 T. L. R. 13 (1892) (payment to assignor in action by assignee of claim); *Ford v. Harvey*, 9 T. L. R. 328 (1893) (breach of covenants not to compete in suit for balance due on sale of law practice); *Thompson v. Marshall*, 41 L. T. R. 720 (1879) (denial of liability as a partner).

b. In action on guaranty: *Lloyd's Banking Co. v. Ogle*, *supra* note 24 (no knowledge of details of claim).

c. Actions for payments due on shares of stock: *Truffault Co. v. Saunders*, 14 T. L. R. 40 (1897) (fraud in the prospectus); *Ironclad Mining Co. v. Gardner*, 4 T. L. R. 18 (1887) (agreement with promoter as to restriction of defendants' liability); *Lindsay v. Martin*, 5 T. L. R. 322 (1889); *Groom v. Rathbone*, 41 L. T. R. 591 (1879) (set-off for director's fees); *Wing v. Thurlow*, 10 T. L. R. 53 (1893) (misrepresentation).

d. Landlord and tenant: *Crawford v. Gillmor*, L. R. 30 Ir. 238 (1891) (estoppel by judgment and in pais).

e. Actions on bills and notes: *Jacobs v. Booth's Distillery Co.*, 85 L. T. R. 262 (1901) (misrepresentation); *Anonymous*, [1876] W. N. 64 (denial of consideration); *Fuller v. Alexander*, 52 L. J. Q. B. 103 (1882) (fraud in partner's acceptance).

f. Actions on judgment: *Codd v. Delap*, 92 L. T. R. 510 (1905) (fraud);

affidavits raises an issue of fact⁷⁴ or a difficult question of law,⁷⁵ or where the defendant brings the case within the prohibitions of a salutary law.⁷⁶

Counterclaims. As to the disposal of counterclaims and set-offs, *Sheppard v. Wilkinson*⁷⁷ suggests three courses: (1) if the counterclaim be less in amount than the claim, judgment may be signed by the plaintiff for the difference; (2) if more, the defendant should have leave to defend; (3) if without basis, there should be judgment for the plaintiff for the full amount of his claim. The court in that case ordered that the execution of the judgment be stayed until trial of the counterclaim. Where the counterclaim is not closely connected with the cause of action, it will not ordinarily be considered.⁷⁸ Again, the best solution would leave the matter in the discretion of the trial judge.⁷⁹

Terms. Where the defense is not very clear, it may not be set up unless supported by payment into court or a deposit for security.⁸⁰ But once the defense is established, the defendant is entitled to his money back.⁸¹ On the other hand, if it fails, the

Manger v. Cash, 5 T. L. R. 271 (1889) *semble*; *cf. Bellew v. Markoy*, L. R. 4 Ir. 747 (1878) (defense of statute of limitations as to part of claim held to bar summary judgment).

⁷⁴ *Bickers v. Speight*, *supra* note 30; *Lynde v. Waithman*, *supra* note 19; *Jones v. Stone*, 70 L. T. R. 174 (1894) (issue as to fact of estoppel); *cf. Saw v. Hakim*, 5 T. L. R. 72 (1888) (where the affidavits so conflict that there would seem to be perjury on the part of one of the parties); see also cases cited *supra* note 73.

⁷⁵ *Electric & General Contract Corp. v. Thomson-Houston Elec. Co.*, 10 T. L. R. 103 (1893); *Western Nat. Bank v. Perez Triana Co.*, 6 T. L. R. 366 (1890).

⁷⁶ *Woodall v. Cresswell*, 9 T. L. R. 619 (1893) (stock transactions brought within the Gaming Act); *Wells v. Allott*; *Dott v. Bonnard*, both *supra* note 10.

⁷⁷ 6 T. L. R. 13 (1889).

⁷⁸ *Rotheram v. Priest*, *supra* note 54 (separate trial for the counterclaim); *Hoby v. Birch*, 62 L. T. R. 404 (1890) (in action by the liquidator for money due the company, the defendant may not set off debt against the company); *Newman v. Lever*, 4 T. L. R. 91 (1887) (counterclaim for damages not allowed in suit on note).

⁷⁹ *Cf. Anglo-Italian Bank v. Wells*, 38 L. T. R. 197 (1878).

⁸⁰ *Hongkong & Shanghai Banking Co. v. Java Agency*, 8 T. L. R. 53 (1891); *Gerrard v. Clowes*, [1892] 2 Q. B. 11; *Ray v. Barker*, 4 Ex. D. 279 (1879); *cf. Carta Para Mining Co. v. Fastnedge*, 30 W. R. 880 (1882) (where, even though the defendant showed no good defense, since he urged the right to cross-examine the plaintiff's agent on a material question, he was allowed to defend on payment into court).

⁸¹ *Yorkshire Banking Co. v. Beatson*, 4 C. P. D. 213 (1879). *But cf. In re Ford*, [1900] 2 Q. B. 211 (money to remain in court to abide the event).

plaintiff is entitled to the money without further inquiry.⁸² A mere deposit by the defendant of the sum claimed does not entitle him, of right, to defend.⁸³ A decision as to the sufficiency of security is not appealable; the matter is in the discretion of the trial judge.⁸⁴

A denial of summary judgment because of a technical objection has been held not to be *res adjudicata* to a subsequent application.⁸⁵ The order, if given, is interlocutory, and not until judgment is signed, is it considered final.⁸⁶ Where the recovery is for a debt and costs, the plaintiff may levy two separate executions under Order XLII, Rule 18.⁸⁷ If complicated accounts are involved, the proceedings may be stayed until account is taken.⁸⁸ It is of interest to note the power given the judge to direct the future conduct of the litigation, and the limitations which have developed thereupon.⁸⁹ Rule 9 provides that the imposition of costs shall be dealt with by the judge.

The English rules seemed to have well served the purposes for which they were designed. Naturally enough, they have developed furthest as efficient debt collectors.⁹⁰ Their effect on English procedure can best be shown by the court statistics of recent years when the press of litigation has well brought out the efficacy of the Rules.⁹¹ Their influence on American procedure, particularly in New Jersey and New York, has been marked.

⁸² *Bird v. Barstow*, *supra* note 59.

⁸³ *Crump v. Cavendish*, 5 Ex. D. 211 (1880).

⁸⁴ *Hoare v. Morshead*, [1903] 2 K. B. 359.

⁸⁵ *Dombey v. Playfair*, [1897] 1 Q. B. 368.

⁸⁶ *Cf. Standard Discount Co. v. La Grange*, 3 C. P. D. 67 (1877); *In re a debtor*, [1903] W. N. 6 (when signed, judgment is final for purpose of bankruptcy proceedings); *In re Gurney*, [1896] 2 Ch. 803 (a summary judgment creditor obtains no priority until judgment is actually signed).

⁸⁷ *Harris v. Jewell*, [1883] W. N. 216.

⁸⁸ *Wallingford v. Mutual Society*, 5 App. Cas. 685 (1880).

⁸⁹ Rule 8 (a) (b); *cf. Langton v. Roberts*, 10 T. L. R. 492 (1893) (where the court was not allowed to restrict defense to a specific question) with *Bolton v. Thorne-George*, (1894) 38 Sol. J. 683 (where it was considered proper for the court to strike two defenses and order a third to be put on the short cause list). Where "no jury trial" is not made an express condition of leave to defend, the defendant is entitled to jury trial as under the general procedure. *Macartney v. Macartney*, 25 T. L. R. 318 (1909); *Wolfe v. De Braam*, 81 L. T. R. 533 (1898).

⁹⁰ See *Sunderland, An Appraisal of English Procedure* (1926) 9 J. Am. Jud. Soc. 164, 165.

⁹¹ Thus, in the King's Bench Division there were, in 1923, 6773 summary judgments as compared with 1546 judgments after trial; in 1924, 5635 as against 1255; in 1925, 5181 as against 1466; in 1926, 4718 as against 1279. See CIVIL JUDICIAL STATISTICS (1924) 16; CIVIL JUDICIAL STATISTICS (1925) 16; CIVIL JUDICIAL STATISTICS (1926) 16, with tables indicating the extent of the use of the rules; see also *Sunderland, op. cit. supra* note

ONTARIO

The Ontario practice as to summary judgment is borrowed from England.⁹² Since the rules governing its pronouncement differ only slightly, differences rather than similarities will here be indicated.

THE SPECIAL INDORSEMENT

Rule 33⁹³ provides that:

"... the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, where the plaintiff seeks to recover a debt or liquidated demand in money (with or without interest, and whether the interest be payable by way of damages or otherwise),⁹⁴ arising

(a) Upon a contract, express or implied (as for instance on a bill of exchange, promissory note, check, or other simple contract debt);⁹⁵ or

(b) On a bond or contract under seal for the payment of a liquidated sum;⁹⁶ or on a judgment;⁹⁷ or

(c) On a statute where the amount sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(d) On a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand; or

(e) On a trust,⁹⁸ and also

90, at 166, pointing out that trial dockets of the King's Bench Division were relieved of eighty per cent of the cases which would otherwise have demanded formal trial.

⁹² See AM. JUD. SOC. BULL., *supra* note 1, at 101. The Ontario Rules, in their original form, were compiled shortly after the adoption of the English Schedule of 1875. Revisions were made in 1893 and 1913.

⁹³ RULES OF PRACTICE AND PROCEDURE (1928) 10, 16. The Rules are to be found annotated in HOLMESTEAD, ONTARIO JUDICATURE ACT (4th ed. 1915) 369-377, 400-414.

⁹⁴ This provision is unique as part of the Rules proper. A similar provision was made in England in the Bills of Exchange Act of 1882 by defining interest and protest charges as liquidated sums. *Supra* note 9.

⁹⁵ Identical with English Order III, Rule 6 (a); *cf.* Clarkson v. Dwan, 17 P. R. 92 (Ont. 1896) (writ indorsed for goods sold and delivered, promissory notes with interest and notarials); McIntyre v. Munn, 6 Ont. L. R. 290 (1903) (action for recovery of advances made under a contract).

⁹⁶ Same as Order III, Rule 6 (b); *cf.* Davidson v. Gurd, 15 P. R. 31 (Ont. 1892).

⁹⁷ Robertson v. Robertson, 6 Ont. L. R. 170 (1908) (claim for arrears of alimony under foreign judgment); *cf.* Solmes v. Stafford, 16 P. R. 78 (Ont. 1893), *aff'd* and modified, 16 P. R. 264 (1894). This also has no counterpart in England where, however, summary judgment in actions on judgments is given without such express sanction.

⁹⁸ (c) (d) and (e) are identical with the English Order III, Rule 6 (c) (d) and (e).

- (f) In actions for the recovery of land (with or without a claim for rent or mesne profits);⁹⁹
 (g) In actions for the recovery of chattels;¹⁰⁰ and
 (h) In actions for foreclosure or sale."¹⁰¹

The rules of construction are the same as in England¹⁰² except, of course, where the statute expressly differs. The same difficulties as to special indorsement of claims for interest in addition to the liquidated demand arose in the early history of the Rules as in England, but under the present wording of the act this is no longer an issue.¹⁰³ The practice as to amendment also follows the English practice.¹⁰⁴

PROCEDURAL MACHINERY

The affidavit. A salient difference from the English practice is here manifested in the absence of a requirement that the plaintiff file an affidavit.¹⁰⁵ Only the defendant is required to present one when he appears; if he does not comply, the plaintiff is entitled to default judgment.¹⁰⁶ Upon its being filed, the

⁹⁹ This shows a radical difference from the parallel English provision (Order III, Rule 6 (f)) in that here there is no restriction to actions between landlord and tenant. Under this section, a claim against an overholding tenant for damages equal to double the yearly rental value of the premises may not be specially indorsed since the damages are not liquidated under a statute. *Magann v. Ferguson*, 29 Ont. 235 (1899); *cf. Central Trust Co. v. Steel Co.*, 6 Ont. L. R. 464 (1903); *Spears v. Fleming*, 19 P. R. 127 (Ont. 1900) (unpaid vendor suing for possession of the land).

¹⁰⁰ This provision first appeared in Consol. Rule 138 in 1897.

¹⁰¹ First adopted in the Revision of 1913; (g) and (h) are outstanding; they appear under no other Rules in any jurisdiction until the very recent adoption of the summary judgment in Connecticut. See *supra* note 92.

¹⁰² This follows naturally from the judicial history of Ontario. Indeed, English cases are very generally cited in the Ontario cases.

¹⁰³ *Cf. Solmes v. Stafford*, *supra* note 97 (unliquidated interest on a judgment); *Casselman v. Barrie*, 16 P. R. 507 (Ont. 1892) (interest on a money claim); *Baldwin v. Quinn*, 16 P. R. 248 (Ont. 1894) (interest on claim for arrears of rent); *Clarkson v. Dwan*, *supra* note 95 (excessive interest claim where no special contract to pay it was alleged). Under Order 52 (2) the interest claim is allowed.

¹⁰⁴ Amendment is specifically provided for in Order 57 (3). See *HOLMESTEAD*, *op. cit. supra* note 93, at 376-377; *cf. Davidson v. Gurd*, *supra* note 96, with *Nesbitt v. Armstrong*, 14 P. R. 366 (Ont. 1892).

¹⁰⁵ Consol. Rule 603 of 1897 had provided for the same procedure as now used in England under Order XIV, Rule 1, making an affidavit by the plaintiff an absolute condition to the granting of an application for summary judgment. See *Munro v. Pike*, 15 P. R. 164, 164 (Ont. 1893); *Clarkson v. Dwan*, *supra* note 95, at 95. But, as amended in Rule 57 (1), only the defendant need file an affidavit.

¹⁰⁶ Rule 56 (1) (2); *cf. McVicar v. McLaughlin*, 16 P. R. 450 (Ont. 1895) (non-appearance by the defendant held to be admission of the correctness of the claim).

plaintiff may cross-examine as to its contents and move for judgment which will be granted if the court is not satisfied that the defendant has a good defense to the action on its merits.¹⁰⁷

Practice. The motion may be made as to a cause of action specially indorsed, though the writ may also contain a claim of a different nature.¹⁰⁸ Amendment of the writ may be made on motion, judgment being awarded in accordance with the writ as amended.¹⁰⁹ Partial summary judgments,¹¹⁰ conditional¹¹¹ and unconditional¹¹² leave to defend are granted or withheld in the same manner as in England. Judgment may be awarded and execution issued against any defendant without prejudice to the plaintiff's right to proceed against any other defendant.¹¹³ Reference may be directed when the only issue is as to the amount recoverable¹¹⁴ and any inquiries may be made at any stage of the proceedings.¹¹⁵ Further variation from the English procedure may be noted in the practice of allowing notice of motion for judgment, by leave; where a special reason for urgency is shown, such leave may be given *ex parte*, subject to such directions as to notice and affidavit as may seem just.¹¹⁶ Also, in actions of account, it is specially provided that, in the event of

¹⁰⁷ Rule 57 (1); *cf.* Stephenson v. Dallas, 13 P. R. 450 (Ont. 1890) (where both parties cross-examined on the affidavits).

¹⁰⁸ Rule 57 (2).

¹⁰⁹ Rule 57 (3).

¹¹⁰ Rule 58; see HOLMESTEAD, *op. cit. supra* note 93, at 408-409.

¹¹¹ Rule 60; Stephenson v. Dallas, *supra* note 107 (where there is no distinct defense offered, defendant may defend only on terms); Merchants' Nat. Bank v. Ontario Coal Co., 16 P. R. 87 (Ont. 1894) *semble*; see HOLMESTEAD, *op. cit. supra* note 93, at 407-408. This Rule places terms in the discretion of the trial judge who may direct a speedy trial.

¹¹² Rule 60. Where an arguable question appears, or a reasonable defense is shown, the defendant is allowed to defend unconditionally. *Castro Co. v. Kouri*, 18 Ont. L. R. 462 (1909); *Can. Electric Co. v. Water & Light Co.*, 16 Ont. L. R. 641 (1903); *Davey v. Sadler*, 1 Ont. L. R. 626 (1901); *Wilkes v. Kennedy*, 16 P. R. 204 (Ont. 1894); *cf.* *Leslie v. Poulton*, 15 P. R. 332 (Ont. 1893) (where, although no clear defense was shown, other circumstances impelled the court to order a trial of the issues).

¹¹³ Rule 59. But *cf.* *Hoffam v. Crerar*, 18 P. R. 473 (Ont. 1899) (where settlement with a number of joint contractors out of court was held to bar summary judgment against the other contractors). It is worthy of note that the same restrictions obtain in Ontario as do in England as to the wording of summary judgments given against married women. *Re Hamilton v. Perry*, 24 Ont. L. R. 38 (1911); *Cameron v. Heighs*, 14 P. R. 56 (Ont. 1890); *Kinnear v. Blue*, 10 P. R. 465 (Ont. 1885); *Quebec Bank v. Radford*, 10 P. R. 619 (Ont. 1885); *Cameron v. Rutherford*, 10 P. R. 620 (Ont. 1885).

¹¹⁴ Rule 61. Compare with this the denial of motions in England when the amount was not ascertained.

¹¹⁵ Rule 65.

¹¹⁶ Rule 62.

non-appearance by the defendant, the plaintiff may apply for the taking of the account claimed; if appearance is entered, the plaintiff may move for judgment without pleading, and unless a preliminary question arises, judgment will be pronounced.¹¹⁷

An early Ontario case¹¹⁸ has an interesting dictum to the same effect as many later English dicta: namely, that the summary judgment should be only sparingly granted; that indeed, it is to be withheld unless the plaintiff will be seriously prejudiced. This would seem quite at variance with the policy as represented in the Ontario Rules as they now stand—a policy which favors the granting of the summary judgment.

To the American student of procedure, the Canadian experience with the summary judgment is especially valuable. While the objection may be made to an English practice that it was developed under conditions radically different from ours, this argument is not applicable to the Canadian rule developed under economic and legal conditions very similar to our own.

OTHER BRITISH COLONIES

The summary judgment is quite usually found in the British Colonial practice system. In the Canadian provinces of New Brunswick,¹¹⁹ Nova Scotia,¹²⁰ British Columbia,¹²¹ Saskatchewan,¹²² Manitoba¹²³ and Alberta,¹²⁴ appear summary judgment provisions closely similar to the English but without the additional features of the Ontario procedure. In Quebec, the Code of Civil Procedure¹²⁵ provides for a speedy judgment in a care-

¹¹⁷ Rules 63, 64.

¹¹⁸ See *Barber v. Russell*, 9 P. R. 433, 442 (Ont. 1882).

¹¹⁹ Order III, Rules 6, 14, THE JUDICATURE ACT AND RULES OF COURT (N. B. 1927) 37, 54; cf. *Balmain v. Neil*, 11 D. L. R. 294 (1912) (action for goods sold and delivered).

¹²⁰ Order III, Rules 5, 6; Order XIV, NOVA SCOTIA JUDICATURE ACT (1920) 27, 45.

¹²¹ Order XIV, BRITISH COLUMBIA SUPREME COURT RULES; cf. *Lembke v. Chin Wing*, 4 D. L. R. 431 (1912); *Bank of Ottawa v. Adler*, 6 D. L. R. 410 (1912).

¹²² Order IX, RULES OF COURT OF SASKATCHEWAN (1921) 27; cf. *Foster v. Dlugos*, 10 Sask. L. R. 361 (1917) (under Rule 135); *Weyburn v. Security Bank*, 22 D. L. R. 689 (1915).

¹²³ Cf. Court of Queen's Bench Act, 58 & 59 VICT. MANITOBA c. 6, § 278 (d) (1895); I MANITOBA REV. STAT. (1913) c. 46, §§ 300 (d), 609; see *Morris v. London Loan Co.*, 19 Can. Sup. Ct. 434, 438 (1891).

¹²⁴ Rule 275 *et seq.*, ALBERTA RULES OF COURT (1914) 46; cf. *Elgin City Banking Co. v. Mawhinney*, 16 D. L. R. 74 (1914); *Scandinavian Nat. Bank v. Shuman*, 37 D. L. R. 419 (1917) (citing English precedents).

¹²⁵ CURRAN, CODE OF CIVIL PROCEDURE (1922) c. 50; cf. *Davis v. Chauvette*, 27 Que. P. R. 207 (1924); *Riddell v. Vipond*, 27 Que. P. R. 303 (1924). This provision would seem to be based on the French summary civil procedure which is fully treated in ENGELMANN-MILLAR, HISTORY OF CONTINEN-

fully enumerated list of cases, with no identity with the English practice. While the Australian summary judgment is modeled on the English rule, the South African practice shows many local characteristics.¹²⁶ The summary judgment seems to have found its way into the various corners of the British Empire shortly after the adoption by the home country of the Rules of 1873.

CONNECTICUT

On November 12, 1928, the judges of the Superior Court of Connecticut adopted an extensive summary judgment rule to be effective on February 1, 1929. The rule is interesting both in the manner of its adoption and in its content. It was recommended to the judges by the recently created Judicial Council of Connecticut after a very careful and extensive investigation of the subject.¹²⁷ Its inauguration by the judges rather than by the legislature is an example of the use which can be made of rule-making power in the courts.

The actions in which such judgments may be sought are set forth in the rule as follows:

"All actions to recover a debt or liquidated demand in money, with or without interest, arising:

- (a) On a negotiable instrument, a contract under seal or a recognizance; or
- (b) Any other contract, express or implied excepting quasi contracts; or
- (c) On a judgment for a stated sum; or
- (d) On a statute where the sum sought to be recovered is a fixed sum or in the nature of a debt; or
- (e) On a guaranty, whether under seal or not, when the claim against the principal is in respect of a debt or liquidated demand only; and in all other actions
- (f) For the recovery of specific chattels, with or without a claim for withholding the same provided that if such claim be for other than nominal damages and be unliquidated it may be severed and proceeded with as provided in paragraph two.
- (g) To quiet and settle the title to real estate or any interest therein; or

TAL CIVIL PROCEDURE (1927) 745-7, 768-9; cf. DE BECKER, *THE CODE OF CIVIL PROCEDURE OF JAPAN* (1928) 86.

¹²⁶ Cf. *Bayne v. Blake*, 9 Comm. L. Rep. 366 (Australia 1909), decided under Rules of Supreme Court (1906) Order XIV (a), n. 1; BUCKLE AND JONES, *THE CIVIL PRACTICE OF THE MAGISTRATES' COURTS IN SO. AFRICA* (2d ed. 1924) 294.

¹²⁷ The rule is set forth in full and discussed in Clark, *The New Summary Judgment Rule*, to appear in the February issue of (1929) 3 *CONN. B. J.*; see also Clark, *The New Summary Judgment Rule in Connecticut* (1929) 15 *A. B. A. J.* 82.

- (h) To enforce or foreclose a lien or mortgage; or
- (i) To discharge any claimed invalid mortgage, lien or caveat or *lis pendens*; . . .”¹²⁸

This rule would seem, in some respects, to be even broader than the Ontario Rule, heretofore the most extensive.¹²⁹

As to the practice machinery, the section 14 (1) provides that:

“ . . . final judgment shall be entered by the Court at any time after the defendant has appeared, either before or after an answer has been filed, upon written motion and affidavit of the plaintiff or of any person having personal knowledge of the facts verifying the cause of action, and the amount he believes to be due and his belief that there is no defense to the action, unless the defendant, within ten days after the filing, in duplicate, of such motion and affidavit or within such further time as the Court for good cause shown may prescribe, shall show by affidavit such facts as may be deemed by the Court sufficient to entitle him to defend.”

Later paragraphs provide for partial summary judgments; for application of the rules to counterclaims and to all pending actions; for the use, in foreclosure actions, of the alternative remedy of a motion to disclose defense; and for affidavit by corporate officer in actions by or against a corporation.¹³⁰

An interesting provision appears in the Connecticut rule (paragraph 3) to the effect that, if the court is of the opinion from the affidavits that:

“ . . . the only question or questions arising are bona fide questions of law, it shall file its finding so stating and that defendant has no defense on the facts, and thereafter the defendant shall, if he so desires, file within ten days a pleading appropriate to test such question or questions of law.”

In default of such pleading or if the defendant

“ . . . fails to prevail thereon, final judgments, as of course, shall be entered by the Court for the plaintiff.”

This settles a problem of some dispute in other jurisdictions, whether questions of law may be raised upon the motion for summary judgment; it further provides a machinery for testing such question. On the whole this plan seems practical, subject to a possible question whether the machinery is not too cumbersome and whether the court should not decide the matter on the affidavits without further pleading.

It will be of great interest to note the construction and development of the rule after it has been in effect for a few years. The history of its adoption along with the favorable judicial attitude toward the rule augurs well for its future.

¹²⁸ CONN. RULES OF CIVIL PRACTICE § 14 A. (1).

¹²⁹ Compare with the Ontario rules, *supra* pp. 436, 437.

¹³⁰ § 14 A. (2) (4) (5) (6).

II

NEW JERSEY

The adoption in New Jersey of a new practice act in 1912 served as the occasion for the introduction into that state of the summary judgment procedure.¹³¹ Like the rest of the act, the Rule was modeled upon the English provision but covered a much more restricted field of cases.¹³² It was made to rest upon the foundation of the old common-law power of the judges to strike sham or frivolous answers.¹³³ The New Jersey courts have relied on this power as a basis for upholding the procedure against the claim that it was unconstitutional in depriving the defendant of his right to a jury trial.¹³⁴

Rule 57 provides:

"When an answer is filed in action to recover a debt or liquidated demand arising:

a. Upon a contract express or implied, sealed or not sealed;¹³⁵ or

¹³¹ Provision was made both in statute and rules of court. N. J. Laws 1912, 380; 2 N. J. COMP. STAT. (Supp. 1915) §§ 291, 292; Rules 57-60, N. J. Laws 1912, 394-395; SHEEN, NEW JERSEY PRACTICE ACT (1916) 239-241.

¹³² Cf. English Order III, Rule 6 and Order XIV.

¹³³ The statute, §§ 15, 16, provides:

"Subject to rules, any frivolous or sham defenses to the whole or any part of the complaint may be struck out; or, if it appear probable that the defense is frivolous or sham, defendant may be allowed to defend on terms. Defendant, after final judgment, may appeal from any order made against him under this section.

If the answer as filed, or after any part thereof shall be struck out, leaves a part of the plaintiff's claim uncontested, judgment interlocutory or final may be entered for such part as is not contested, and the cause may proceed to trial as to the residue."

The following cases have been decided under these provisions apart from the Rules: *Milberg v. Keuthe*, 98 N. J. L. 779, 121 Atl. 713 (1923) (ejectment); *Larner v. Montclair*, 99 N. J. L. 510, 123 Atl. 886 (1924) (damages for wrongful dismissal).

¹³⁴ *Wittemann v. Giele*, 99 N. J. L. 478, 123 Atl. 716 (1924); see *Eisele v. Raphael*, 90 N. J. L. 219, 223, 101 Atl. 200, 202 (1917); cf. *Coykendall v. Robinson*, 39 N. J. L. 98, 99 (1876) (on the common-law power).

¹³⁵ Cf. *Perloff v. Island Dev. Co.*, 133 Atl. 178 (N. J. Sup. Ct. 1926) (action on implied contract for money back); *Lembeck Brewing Co. v. Krause*, 94 N. J. L. 219, 109 Atl. 293 (1920) (action on covenant in mortgage allowed even though note was barred by the statute of limitations); *Eisele v. Raphael*, *supra* note 134 (balance due on account in "margin" stock transaction); *Boynnton Lumber Co. v. Evans*, 101 N. J. L. 120, 128 Atl. 180 (1925) (suit on mechanic's lien based on statutory right); *Merchants' Bank v. Roosma*, 2 Misc. 690 (N. J. 1924) (action on note); *Conklin v. Genung*, 92 N. J. L. 618, 108 Atl. 366 (1919) (claim for deficiency after foreclosure of bonds); *Dananhower v. Birch*, 97 N. J. L. 193, 116 Atl. 786 (1920) (assessments levied against stockholders in judicial proceed-

b. Upon a judgment for a stated sum; or

c. Upon a statute;¹³⁵

the answer may be struck and judgment final may be entered upon motion and affidavit as hereinafter provided,¹³⁷ unless the defendant by affidavit or other proof shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend."¹³⁸

Other provisions closely follow the English model: namely, in specifying the nature of the plaintiff's affidavit;¹³⁹ in providing for judgment for only a part of the claim where there is a defense to the remainder;¹⁴⁰ and for leave to defend unconditionally or upon terms.¹⁴¹ No summary judgment may be entered except by virtue of an order of the court or a justice at chambers.¹⁴² The application for such judgment may be made on *ex parte* affidavits. Four days' notice is specified unless the court or justice, for special reasons, shall order shorter notice.¹⁴³

The practice under these Rules has not been complicated, questions having arisen on only a few details. The statute itself settled a former controversy by providing that an appeal may be

ings); *Fidelity Life Ins. Co. v. W. & H. R. R.*, 98 N. J. L. 507, 120 Atl. 734 (1923) (interest due on bonds); *Birdsall v. Gardella*, 129 Atl. 817 (N. J. Sup. Ct. 1925) (bail recognizance).

¹³⁵ *Emburgh v. Board of Freeholders*, 87 N. J. L. 627, 94 Atl. 586 (1915) (action under statute allowing recovery of salary—pro rata—and election expenses by member of deposed county board); *McDonnell v. Du Clos*, 2 Misc. 86 (N. J. 1924); *cf. Bolton v. Bolton*, 86 N. J. L. 69, 89 Atl. 1014 (1914) (arrear of alimony may be basis of summary judgment even though the decree is not a judgment in the sense of being entitled to full "faith and credit;" at court's discretion).

¹³⁷ This is the practice when sham of frivolous defenses are interposed. *Conklin v. Genung*, *supra* note 135 (defense of usury and discharge of sureties by extension held sham in action for deficiency judgment); *Danahower v. Birch*, *supra* note 135. Or where the defendant fails to show facts entitling him to defend. *McDonnell v. Du Clos*, *supra* note 136. If a counterclaim is without merit, that too is stricken out. *Madison Trust Co. v. Swenson*, 2 Misc. 83 (N. J. 1924); *cf. Eisele v. Raphael*, *supra* note 134.

¹³⁸ *Cf. Perloff v. Island Dev. Co.*, *supra* note 135; *Smith v. Hopping*, 88 N. J. L. 195, 95 Atl. 993 (1915) (variance between plaintiff's complaint and affidavit).

¹³⁹ Rule 58; *cf. English Order XIV, Rule 1 (a)*.

¹⁴⁰ Rule 59; *cf. English Order XIV, Rule 4*.

¹⁴¹ Rule 60; *cf. English Order XIV, Rule 6*; *cf. Meyer v. Nickelsburg Bros. Co.*, 37 N. J. L. J. 36 (1913) (all defenses but one being stricken, the defendant was given leave to defend on that one on condition that he give security against judgment).

¹⁴² *Milberg v. Keuthe*, *supra* note 133 (Commissioner of Supreme Court not authorized person).

¹⁴³ This provision seems to have been added after the original adoption of the Rules. *Cf. SUPREME COURT RULES (1919) No. 84*.

taken from the orders.¹⁴⁴ The attitude of the courts in the few decisions rendered is that the findings of the trial judge as to the frivolousness or failure of the defenses is deemed conclusive.¹⁴⁵ Interest claims have not been such a source of difficulty in New Jersey as elsewhere. The practice would seem to be merely to deduct them when erroneously allowed.¹⁴⁶

Although in effect for sixteen years, the New Jersey summary judgment seems not to have been much used. The reason for this is entirely conjectural. It is quite probable that future crowded court dockets may invite its more extensive use.

NEW YORK

HISTORICAL BACKGROUND

Constitutionality. The constitutionality of the summary procedure has presented a more serious problem in New York than elsewhere, because of previous New York decisions indicating a lack of power to strike answers fair in form but false in fact.¹⁴⁷ Before the adoption of the code the New York cases had held that the general issue could not be stricken as false and sham, on the ground that such an action would be an infringement of the constitutional right to jury trial.¹⁴⁸ But they did exercise the power to strike in the case of special pleas which were false and sham.¹⁴⁹ The Code of Procedure then provided that:

"Sham and irrelevant answers and defenses may be stricken out on motion and upon such terms as the court may in their discretion impose."¹⁵⁰

¹⁴⁴ N. J. Laws 1912, 380; see *Madison Trust Co. v. Swenson*, *supra* note 137, at 85. The earlier practice was to consider these orders not reviewable. *State Mutual Bldg. & Loan Ass'n v. Williams*, 78 N. J. L. 720, 75 Atl. 927 (1910) (order striking plea); see *Brown v. Ward*, 44 N. J. L. 177, 179 (1882) (sham and frivolous pleadings).

¹⁴⁵ See *Eisele v. Raphael*, *supra* note 134, at 221, 101 Atl. at 202; *Witte-mann v. Giele*, *supra* note 134, at 479, 123 Atl. at 716; *cf. Larner v. Montclair*, *supra* note 133, at 512, 123 Atl. at 887 (where the defendant does not present the affidavits and exhibits before the appellate court, the conclusion of the trial court will not be disturbed).

¹⁴⁶ *Cf. Emburgh v. Board of Freeholders*, *supra* note 136 (deducting interest allowed below where it was not provided for in statute under which the action was brought). As to the question under the English practice, see *supra* p. 429.

¹⁴⁷ See CLARK, *CODE PLEADING* (1928) 383-384; Rothschild, *Simplification of Civil Practice in New York* (1923) 23 COL. L. REV. 618, 646.

¹⁴⁸ *Wood v. Sutton*, 12 Wend. 234 (N. Y. 1834); see *Dwan v. Massarene*, 199 App. Div. 872, 874, 192 N. Y. Supp. 577, 578 (1st Dep't 1922).

¹⁴⁹ *Broome County Bank v. Lewis*, 18 Wend. 564 (N. Y. 1836); see *Dwan v. Massarene*, *supra* note 148.

¹⁵⁰ N. Y. CODE PROC. § 152; later N. Y. CODE CIV. PROC. § 538 to the effect that:

"If an answer or reply be sham or frivolous the court may treat the

At first this was liberally construed, the courts refusing to limit its application to affirmative pleas.¹⁵¹ But by 1871 there was a reversal of sentiment and in *Wayland v. Tysen*¹⁵² the court denied a motion to strike a general denial in spite of the plaintiff's affidavit that the answer was sham.

In the second decade of the twentieth century, with the press of litigation and the need for relief against dilatory procedural tactics, criticism of these views developed.¹⁵³ This culminated in the adoption in 1921, by the Convention on Rules of Civil Practice, of Rules 113 and 114 which provided for a summary judgment procedure, especially designed to suppress false and sham answers in specific classes of civil actions. This provision did not operate to supplant the ancient power of the judges to strike pleadings or order judgment thereupon, but existed with it as a special, speedy remedy in the designated cases.¹⁵⁴ Naturally enough in view of the previous decisions, the constitutional issue arose immediately upon the formulation of the Rules. It was, however, soon settled in favor of the validity of the rules,¹⁵⁵ and since the first year of their use, no further question has arisen on this point.

THE RULES

The Rules which went into effect in October 1921 are as follows:

"Rule 113. *Summary Judgment*.—When an answer is served in an action to recover a debt or liquidated demand arising,

1. on a contract, express or implied, sealed or not sealed; or
2. on a judgment for a stated sum;

the answer may be struck out and judgment entered thereon on motion, and the affidavit of the plaintiff or of any other person having knowledge of the facts, verifying the cause of action and stating the amount claimed, and his belief that there is no de-

pleading as a nullity and give judgment accordingly, or allow a new pleading to be served upon such terms as the court deems just." *Cf.* N. Y. C. P. A. Rule 104.

¹⁵¹ *People v. McCumber*, 18 N. Y. 315 (1858).

¹⁵² 45 N. Y. 281 (1871). This was followed by: *Farmers' Nat. Bank v. Leland*, 50 N. Y. 673 (1872) (denial of information and belief); *Neuberger v. Webb*, 24 Hun 347 (N. Y. 1881) *semble*.

¹⁵³ See (1923) 1 N. Y. L. REV. 16.

¹⁵⁴ *Cf.* Rule 104, *supra* note 150; *Katz v. Weinschelblatt*, 209 App. Div. 606, 205 N. Y. Supp. 76 (2d Dep't 1924); see also N. Y. C. P. A. Rules 106-112 dealing with motions addressed to the pleadings; *Rothschild, op. cit. supra* note 147, at 650.

¹⁵⁵ *Dwan v. Massarene, supra* note 148; *Hanna v. Mitchell*, 202 App. Div. 504, 196 N. Y. Supp. 43 (1st Dep't 1922), *aff'd*, 235 N. Y. 534, 139 N. E. 724 (1923); see *General Invest. Co. v. I. R. T. Co.*, 235 N. Y. 133, 142, 139 N. E. 216, 219 (1923); (1922) 22 Col. L. REV. 483. The exhaustive opinion in *Hanna v. Mitchell, supra*, is by Justice Page, Chairman of the Convention which adopted the rules.

fense to the action; unless the defendant by affidavit or other proof, shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend.

"Rule 114. *Partial Judgment*.—If it appear that such defense applies only to part of plaintiff's claim or that any part be admitted, the plaintiff may have final judgment forthwith for so much of his claim as such defense does not apply to or as is admitted, on such terms as may be just, and the action may be severed."

These sections represent a further adaptation and restriction of the English Rules in America.¹⁵⁶ The tendency to limit their application to the clear cases of "debt or liquidated demand" is evident. Fundamentally, the rules governing the procedure in the granting of summary judgment, within the limits set, are the same in New York and in England. What differences do appear are the result, in some cases, of variant judicial structure; in others, of historical background.

SCOPE OF RULE 113

Contract. The contract sued upon must give rise to a "debt or liquidated demand," actions sounding in damages being regarded as without the scope of the summary remedy.¹⁵⁷ From the outset the remedy has been most freely used in commercial cases. Actions on and arising out of negotiable instruments,¹⁵⁸ sales,¹⁵⁹ banking,¹⁶⁰ insurance,¹⁶¹ and real estate transactions¹⁶²

¹⁵⁶ Cf. N. J. RULES 57-60; ONT. RULES 33, 57-62.

¹⁵⁷ See cases *infra* note 170.

¹⁵⁸ For a full discussion of the treatment of such claims, see *infra* note 195.

¹⁵⁹ *Montgomery v. Lans*, 194 N. Y. Supp. 96 (Sup. Ct. 1922) (contract to sell merchandise for plaintiff on certain date for certain sum); *Wilbur-Dolson Silk Co. v. Wallach Co.*, 206 App. Div. 470, 201 N. Y. Supp. 465 (1st Dep't 1923) (price of silk thread after time for inspection had elapsed); *Dibble v. Jones*, 130 Misc. 359, 223 N. Y. Supp. 785 (Sup. Ct. 1927) (purchase price of seed).

¹⁶⁰ *Richard v. Credit Suisse*, 242 N. Y. 346, 152 N. E. 110 (1926) (restitution of money for establishment of foreign credit); *McNamara Trading Co. v. Royal Ins. Co.*, 288 Fed. 985 (S. D. N. Y. 1923) (balance due on policy deposited with bank as collateral); *Connors Car Co. v. Mfrs. Nat. Bank*, 124 Misc. 584, 209 N. Y. Supp. 406 (Sup. Ct. 1925), *aff'd* without opinion, 210 N. Y. Supp. 939 (App. Div. 4th Dep't 1925) (money paid out by bank on a forged check).

¹⁶¹ *Cleghorn v. Ocean Accident Corp.*, 216 App. Div. 342, 215 N. Y. Supp. 127 (2d Dep't 1926) (suit by insured against indemnitor to recover amount of judgment paid), *aff'd* on this point, 244 N. Y. 166, 155 N. E. 87 (1926); *Devlin v. Ins. Co.*, 123 Misc. 784, 206 N. Y. Supp. 365 (Sup. Ct. 1924) (suit by accident victim for injuries sustained, judgment against Cab Co. being unsatisfied), modified and *aff'd*, 213 App. Div. 152, 210 N. Y. Supp. 57 (1st Dep't 1925).

¹⁶² *Coutts v. Kraft*, 119 Misc. 260, 196 N. Y. Supp. 135 (Sup. Ct. 1922),

have furnished the bulk of the precedents in the new practice.

The indebitatus counts generally will support a motion under Rule 113¹⁶³ as well as, also, the quantum meruit count.¹⁶⁴ A distinction has been made between contracts implied in fact and those implied in law.¹⁶⁵ Although this has been subjected to much criticism,¹⁶⁶ it is explicable by the conservative attitude of the New York courts.

Judgment. This seems to be the least used section of the Rules. *Pinney v. Geraghty*¹⁶⁷ appears to stand alone as an adjudication in this category.

Claims not within the Rule. A great number and variety of cases have been held to be without the scope of the Rule. Claims involving unliquidated damages lead all others.¹⁶⁸ The courts

aff'd, 198 N. Y. Supp. 908 (App. Div. 2d Dep't 1923); *Stern v. Zeno*, 116 Misc. 661, 191 N. Y. Supp. 298 (Sup. Ct. 1921) (actions for rent); *Haiss v. Schmukler*, 121 Misc. 574, 201 N. Y. Supp. 332 (Sup. Ct. 1922); *Isaacs v. Schmuck*, 218 App. Div. 516, 218 N. Y. Supp. 568 (2d Dep't 1926), *rev'd*, 245 N. Y. 77, 156 N. E. 621 (1927) (recovery of down payments on land purchase contract); *Title Guarantee & Trust Co. v. Smith*, 215 App. Div. 448, 213 N. Y. Supp. 730 (1st Dep't 1926) (action for title examining fee).

¹⁶³ See *Appelbaum v. Gross*, 117 Misc. 140, 147, 191 N. Y. Supp. 710, 714 (Sup. Ct. 1921), *aff'd*, 200 App. Div. 914, 193 N. Y. Supp. 924 (2d Dep't 1922).

¹⁶⁴ *Cf. Jacobs v. Korpus*, 128 Misc. 445, 218 N. Y. Supp. 314 (Sup. Ct. 1926) (for services).

¹⁶⁵ *Cf. Poland Export Co. v. Marcus*, 204 App. Div. 302, 198 N. Y. Supp. 5 (1st Dep't 1923) (no summary judgment on promise to pay implied in law from violation of duty). But *cf. Lee v. Graubard*, 205 App. Div. 344, 199 N. Y. Supp. 563 (1st Dep't 1923) (recovery allowed on contract implied in fact where defendant wrongfully received aldermanic salary); *Cassidy v. Sullivan*, 205 App. Div. 347, 199 N. Y. Supp. 566 (1st Dep't 1923); *Hamilton Fire Ins. Co. v. Greger*, 218 App. Div. 536, 218 N. Y. Supp. 534 (1st Dep't 1926) (recovery by subrogee of sums paid to the insured), *rev'd*, 246 N. Y. 162, 158 N. E. 60 (1927); see Comment (1923) 6 N. Y. U. L. REV. 59, 63-64.

¹⁶⁶ *Cf. Finch, Summary Judgments under the Civil Practice Act of New York* (1924) 49 A. B. A. REP. 588, 591. But compare the explicit distinction made in the new Connecticut rules, *supra* p. 440.

¹⁶⁷ 209 App. Div. 630, 205 N. Y. Supp. 645 (3d Dep't 1924) (suit against indemnitor on judgment recovered against plaintiff by C); *cf. Massee Lumber Co. v. Benenson*, 23 F. (2d) 107 (D. N. Y. 1927) (allowance of claim against bankrupt estate not judgment against bankrupt so as to come within Rule 113).

¹⁶⁸ *Mogul v. Lavine*, 247 N. Y. 20, 159 N. E. 708 (1923); *Lawrence Textile Corp. v. Express Co.*, 125 Misc. 858, 211 N. Y. Supp. 679 (Mun. Ct. 1925); *Norwich Pharmacal Co. v. Barrett*, 205 App. Div. 749, 200 N. Y. Supp. 298 (3d Dep't 1923) (all holding that claims by shipper against carrier for loss are without Rule 113 because sounding in damages); *Schwed v. Kennedy*, 220 App. Div. 189, 221 N. Y. Supp. 179 (1st Dep't 1927) (damages for wrongful discharge); *State Realty Co. v. Post*, 123 Misc. 925, 206 N. Y. Supp. 713 (Sup. Ct. 1924) (action against guarantor

have also refused to apply the Rule in: suit for injunction;¹⁶⁹ summary proceedings by a landlord;¹⁷⁰ suit for partition;¹⁷¹ action under statute relating to levy on earnings and income of judgment debtor;¹⁷² action by bailee of goods on insurance policy;¹⁷³ and claim for recovery of an increased rental paid under protest.¹⁷⁴

THE AFFIDAVIT

The affidavit is the universal distinguishing feature of the summary judgment, furnishing as it does, the necessary guaranty of trustworthiness of the claim sued upon. It must be made on the personal knowledge of the affiant,¹⁷⁵ should state the elements of the cause of action,¹⁷⁶ and a belief that the defendant has no defense. The tendency is to compel the plaintiff to bring himself squarely within the requirements of the Rules. Even though the answer be defective in form, the affidavit may raise the issue and show defenses;¹⁷⁷ but mere repetition of the denials in the answer are ineffective.¹⁷⁸ The affidavit must contain "evidential" not "ultimate" facts, or mere "conclusions of law."¹⁷⁹ An early

of lease for deficiency in rent where contract provided that lessor re-rent at "best possible price"); *Schaffer Stores v. Sweet*, 228 N. Y. Supp. 599 (Sup. Ct. 1928) (suit on defendant's agreement to be liable for shortages).

¹⁶⁹ 103 Park Av. Co. v. Exchange Buffet Co., 203 App. Div. 739, 197 N. Y. Supp. 422 (1st Dep't 1922), *rev'd* on another point, 242 N. Y. 366, 152 N. E. 117 (1926).

¹⁷⁰ 905 West End Ave. Co. v. Peers, 118 Misc. 754, 195 N. Y. Supp. 86 (1st Dep't 1922).

¹⁷¹ See *Lowe v. Plainfield Trust Co.*, 216 App. Div. 72, 76, 215 N. Y. Supp. 50, 54 (1st Dep't 1926).

¹⁷² *Royco Realty Co. v. Farlor*, 225 N. Y. Supp. 688 (Sup. Ct. 1927).

¹⁷³ *Brooklyn Clothing Corp. v. Fire Ins. Co.*, 205 App. Div. 743, 200 N. Y. Supp. 208 (2d Dep't 1923), *rev'g* 118 Misc. 674, 195 N. Y. Supp. 27 (Sup. Ct. 1922).

¹⁷⁴ *Hinrichs v. City of New York*, 121 Misc. 592, 201 N. Y. Supp. 377 (Sup. Ct. 1923), *aff'd* without opinion, 242 N. Y. 527, 152 N. E. 413 (1926).

¹⁷⁵ *Lonsky v. Bank of U. S.*, 220 App. Div. 194, 221 N. Y. Supp. 177 (1st Dep't 1927).

¹⁷⁶ *Nemours-Stevens v. Nemours Trading Co.*, 204 App. Div. 38, 197 N. Y. Supp. 241 (1st Dep't 1922) (exact allegation of "damages" necessary); *Moe v. Bank of U. S.*, 211 App. Div. 519, 207 N. Y. Supp. 347 (2d Dep't 1925) (insufficient allegation as to refusal of payment); *cf. Farmers' Nat. Bank v. Williams*, 117 Misc. 567, 192 N. Y. Supp. 40 (Sup. Ct. 1921) (requirements in action on note stated).

¹⁷⁷ *Ford v. Reilley*, 127 Misc. 373, 216 N. Y. Supp. 273 (Sup. Ct. 1926).

¹⁷⁸ *O'Meara Co. v. Nat. Park Bank*, 239 N. Y. 386, 146 N. E. 636 (1925); *cf. Maltz v. Daly*, 120 Misc. 466, 198 N. Y. Supp. 690 (Sup. Ct. 1923) (where the defendant does not file an affidavit, summary judgment will be granted); *Hoof v. Hunter Corp.*, 193 N. Y. Supp. 91 (Sup. Ct. 1922) (verified answer not enough).

¹⁷⁹ *Kellog v. Berkshire Bldg. Corp.*, 125 Misc. 818, 211 N. Y. Supp. 623 (Sup. Ct. 1925); *Sher v. Rodkin*, 198 N. Y. Supp. 597 (Sup. Ct. 1923); see (1929) 38 YALE L. J. 548.

case intimates that one affidavit for each party is enough.¹⁸⁰ The matter has not, as yet, been conclusively determined. In all probability, the courts will tend to limit the number in order to avoid opportunity for delay.

PROCEDURAL MACHINERY

With the affidavits before it, the function of the court is to determine whether or not a bona fide issue has been presented for trial. If none is found, an order is made granting the motion for summary judgment. On the other hand, if an issue does appear, it is not within the power of the court to decide it summarily. The defendant is entitled, as a matter of constitutional right, to a trial under the general procedure. Issue-finding, rather than issue-determination, is then the key to the procedure.

The defendant must set up a bona fide defense, supported by affidavits, in order to bar the motion;¹⁸¹ feigned issues¹⁸² are not sufficient. Failure to present an affidavit of defense is usually fatal to the defendant's case.¹⁸³ Presentation and proof by affidavit by the plaintiff of a good cause of action are, however, conditions to recovery under the Rules.¹⁸⁴ Where questions of law arise, they may be disposed of without delay.¹⁸⁵ And where

¹⁸⁰ Cf. *Twigg v. Twigg*, 117 Misc. 154, 191 N. Y. Supp. 781 (Sup. Ct. 1921), *aff'd* without opinion, 193 N. Y. Supp. 956 (App. Div. 2d Dep't 1922).

¹⁸¹ Actions on negotiable instruments furnish varied instances of defenses which have been held insufficient. Cf. *Hongkong Banking Corp. v. Lazard-Godchaux Co.*, 207 App. Div. 174, 201 N. Y. Supp. 771 (1st Dep't 1923) (in action on draft, resolution by defendant that plaintiffs look to guarantors for payment held admission of liability), *aff'd* without opinion, 239 N. Y. 610, 147 N. E. 216 (1925); *Spiegel Realty Co. v. Gotham Nat. Bank*, 121 Misc. 547, 201 N. Y. Supp. 599 (Sup. Ct. 1923) (in action to recover amount of forged checks, defense of negligence in discovering forgery held unrelated to defendant's acceptance), *aff'd* 204 N. Y. Supp. 927 (App. Div. 1st Dep't 1924); *Cogswell v. Cogswell*, 130 Misc. 541, 224 N. Y. Supp. 59 (Sup. Ct. 1927) (general denial; no defense in pleadings and affidavit). Some of these are, obviously, decisions based on the substantive law of negotiable instruments.

¹⁸² Cf. *Evalenko v. Catts*, 125 Misc. 726, 210 N. Y. Supp. 35 (Sup. Ct. 1925), *aff'd* without opinion, 213 N. Y. Supp. 796 (App. Div. 1st Dep't 1926).

¹⁸³ *Maltz v. Daly*; *Hoof v. Hunter Corp.*, both *supra* note 178.

¹⁸⁴ *Hallgarten v. Wolkenstein*, 204 App. Div. 487, 198 N. Y. Supp. 485 (1st Dep't 1923) (affidavits did not fully show contract for purchase of stock); *Twigg v. Twigg*, *supra* note 180 (mere assertion of an account stated is insufficient); *Hauswald v. Katz*, 216 App. Div. 92, 214 N. Y. Supp. 705 (1st Dep't 1926) (plaintiff must prove consideration for alleged guaranty); see *State Bank v. Mackstein*, 123 Misc. 416, 205 N. Y. Supp. 291 (Sup. Ct. 1924).

¹⁸⁵ *Coutts v. Kraft*, *supra* note 162; cf. *Rotenbach v. Young*, 119 Misc. 267, 196 N. Y. Supp. 220 (Sup. Ct. 1922), *aff'd* without opinion, 200 N. Y.

counterclaims are interposed, they are handled in the same manner as any other part of the answer.¹⁸⁶

The determination of what is and what is not a bona fide defense presents the greatest problem in the application of Rule 113. Each case must be considered on its own particular facts, and generalizations are of comparatively little assistance to the trial judge in disposing of the individual case. Inability to bring the specific facts within the confines of the statute leads necessarily to a denial of the plaintiff's motion, situations of doubt being resolved in the defendant's favor. When the answer sets up a denial of knowledge and information sufficient to form a belief, its treatment varies. Unless the defendant is actually without knowledge, it will be suppressed as sham.¹⁸⁷ Such a denial, even though true when made in the pleadings, may be shown to be false at the time of the hearing.¹⁸⁸ A defense based on a salutary law is sufficient;¹⁸⁹ similarly of action pending;¹⁹⁰ cases where a question of credibility arises;¹⁹¹ or where too complex a state of facts is presented;¹⁹² or usury¹⁹³ or wagering.¹⁹⁴ Cases dealing with defenses that have been held sufficient basis for denying the motion for summary judgment in actions on bills and notes,¹⁹⁵ insurance claims,¹⁹⁶ and implied contracts

Supp. 946 (App. Div. 1st Dep't 1923). Compare the practice in the Connecticut rules, *supra* p. 441.

¹⁸⁶ See *infra* p. 453.

¹⁸⁷ Cf. *Woodmere Academy v. Moskowitz*, 212 App. Div. 457, 208 N. Y. Supp. 578 (2d Dep't 1925) (action on bond subscription; denial entitled defendant to defend); *Rogan v. Coppermines Co.*, 117 Misc. 718, 193 N. Y. Supp. 163 (Sup. Ct. 1922) (denial of sufficient information of assignment in action on note); see *Comm. Fuel Co. v. Powpit Co.*, 212 App. Div. 553, 556, 209 N. Y. Supp. 603, 606 (2d Dep't 1925).

¹⁸⁸ See *General Invest. Co. v. I. R. T. Co.*, *supra* note 155, at 141, 139 N. E. at 219; *Rothschild*, *op. cit. supra* note 147, at 648.

¹⁸⁹ *Farnham Realty Co. v. Posner*, 200 App. Div. 827, 193 N. Y. Supp. 788 (1st Dep't 1922) (housing law).

¹⁹⁰ *Ritz Carlton Co. v. Ditmars*, 203 App. Div. 748, 197 N. Y. Supp. 405 (1st Dep't 1922).

¹⁹¹ *Posner v. Vogel*, 198 N. Y. Supp. 233 (Sup. Ct. 1923).

¹⁹² *Goldstein v. Korff*, *infra* note 195.

¹⁹³ *Beckwith Agency v. Herald Pub. Co.*, 214 App. Div. 212, 212 N. Y. Supp. 108 (1st Dep't 1925); *C. I. T. Corp. v. Spence*, 130 Misc. 659, 224 N. Y. Supp. 297 (Mun. Ct. 1927); cf. *Moers v. Exchange Bank*, 208 App. Div. 473, 203 N. Y. Supp. 727 (1st Dep't 1924) (where court held, in action under statute to recover usury, that answer to the effect that the defendant had taken it inadvertently in the belief that the plaintiff was a corporation was sufficient to raise a question for the jury).

¹⁹⁴ *Perera v. Longone*, 215 App. Div. 796, 213 N. Y. Supp. 418 (1st Dep't 1926).

¹⁹⁵ Bills, notes and checks: a. *Plaintiff not a holder in due course*: *Christo v. Bayukas*, 196 N. Y. Supp. 500 (Sup. Ct. 1922); *Asbestos Finance Co. v. Hazen*, 122 Misc. 269, 203 N. Y. Supp. 565 (Sup. Ct. 1924) (plaintiff in privity with the payee as to fraud and misrepresentation); *Moir v.*

are collected in the footnotes.¹⁹⁷ Where any of the defenses raised are undisposed of, it has been held improper to grant the motion.¹⁹⁸

Johnson, 211 App. Div. 427, 207 N. Y. Supp. 380 (4th Dep't 1925) (plaintiff took after maturity, in bad faith, and with notice); Doniger v. Lasoff, 125 Misc. 838, 211 N. Y. Supp. 486 (Sup. Ct. 1925) (plaintiff not even a "holder"); Tidewater Oil Corp. v. Pierce, 213 App. Div. 796, 210 N. Y. Supp. 759 (1st Dep't 1925) (assignment, fraud and misrepresentation); Karpas v. Bandler, 218 App. Div. 418, 218 N. Y. Supp. 500 (1st Dep't 1926) (notice of conditional delivery of note).

b. *Failure of consideration*: Donnelly v. Bauder, 217 App. Div. 59, 216 N. Y. Supp. 437 (4th Dep't 1926) (nonnegotiable note); Berson Sydeman Co. v. Waumbeck Mfg. Co., 212 App. Div. 422, 208 N. Y. Supp. 715 (1st Dep't 1925) (trade acceptance; denial of consideration); Franco v. Schwartz, 225 N. Y. Supp. 739 (Sup. Ct. 1928) (accommodation indorsement).

c. *Forgery-alteration*: Caledonian Ins. Co. v. Nat. City Bank, 120 Misc. 804, 200 N. Y. Supp. 618 (Sup. Ct. 1923) (drawer's negligence), *rev'd*, 208 App. Div. 83, 203 N. Y. Supp. 32 (1st Dep't 1924); Am. Surety Co. v. Empire Trust Co., 128 Misc. 116, 217 N. Y. Supp. 673 (Sup. Ct. 1926) (forged indorsements); Cohen v. Public Nat. Bank, 123 Misc. 103, 204 N. Y. Supp. 332 (Sup. Ct. 1924) (denial of sufficient information and knowledge).

d. *Miscellaneous*: Goldstein v. Korff, 203 N. Y. Supp. 119 (Sup. Ct. 1924) (law and facts too complex); Gramercy Finance Corp. v. Greenberg, 127 Misc. 897, 217 N. Y. Supp. 224 (Sup. Ct. 1926) (collateral agreement not to hold defendant).

¹⁹⁶ Insurance claims: Peninsular Transp. Co. v. Ins. Co., 200 App. Div. 695, 193 N. Y. Supp. 886 (1st Dep't 1922) (issues joined on subject and amount of insurance, and cause and extent of loss); Dolge v. Ins. Co., 211 App. Div. 112, 207 N. Y. Supp. 42 (2d Dep't 1924) (complaint not stating cause of action under accident insurance policy), *aff'd* without opinion, 240 N. Y. 656, 148 N. E. 746 (1925).

¹⁹⁷ Implied contract: Curry v. MacKenzie, 239 N. Y. 267, 146 N. E. 375 (1925) (issue as to cost or value in action for price of work and materials); Keystone Hardware Co. v. Tague, 246 N. Y. 79, 158 N. E. 27 (1927) (counterclaim for specific performance or balance of purchase price in action for money had and received); Frear v. Bailey, 127 Misc. 79, 214 N. Y. Supp. 675 (City Ct. 1926) (issue as to whether there had been an account stated); Abercrombie & Fitch Co. v. Colford, 123 Misc. 138, 204 N. Y. Supp. 209 (Sup. Ct. 1924) (divorce set up in action for goods delivered to defendant's wife).

Summary judgment has also been denied in other actions where the following defenses were raised: Rawlins v. N. J. Ins. Co., 221 App. Div. 399, 223 N. Y. Supp. 85 (3d Dep't 1927) (issue whether undertaking declared upon was "to stay execution"); Sorensen v. East River Savings Inst., 119 Misc. 297, 196 N. Y. Supp. 361 (Sup. Ct. 1922) (action for amount of deposit given as gift; bank allowed to bring in parties to protect unknown heirs' interests); Alwais v. Assurance Corp., 211 App. Div. 734, 208 N. Y. Supp. 137 (1st Dep't 1925) (action on compromise of negligence actions: answer setting up condition of contribution by another held good); Armleder Truck Co. v. Barnes, 207 App. Div. 764, 204 N. Y. Supp. 472 (2d Dep't 1923) (action for price of stock: answer setting up waiver and estoppel held for jury); *cf.* Schulman v. Cornman, 221 App. Div. 170, 223 N. Y. Supp. 19

PARTIAL SUMMARY JUDGMENT

Partial failure of the defenses or an absolute admission of liability for part of the claim is a necessary condition to a judgment under Rule 114. Where the amount due is disputed,¹⁹⁹ or the admission is not absolute,²⁰⁰ the remedy is denied. Judgment has been given where a bona fide counterclaim was set up against part of the claim, the counterclaim being severed to be disposed of separately.²⁰¹ This practice was followed in *Haiss v. Schmuckler*,²⁰² where the court severed a claim for expenses and allowed judgment for the remainder.

PRACTICE

A denial of the motion for summary judgment has been held not to prejudice a later application.²⁰³ And in one case where the appellate court held a summary judgment improperly granted, the plaintiff was given leave to apply for partial judgment.²⁰⁴ *Loma Corp. v. Wing*²⁰⁵ represents an instance where a jury assessment of damages was directed, the court refusing to allow the defendant to obstruct judgment by a bare denial. This, however, seems to be the exception rather than the rule. Failure to give proper notice has been held to subject the order to reversal.²⁰⁶ The court has no power to strike out some of several defenses and order trial of the rest.²⁰⁷ Nor may it grant a conditional summary judgment.²⁰⁸ Originally, the order was

(1st Dep't 1927) (co-partners being sued for balance due on option to purchase realty: denial of partnership good); *Schnitzler v. Tartell*, 130 Misc. 565, 224 N. Y. Supp. 339 (Sup. Ct. 1927) (objection based upon party-joinder upheld).

¹⁹⁸ *Warner v. Collier Distributing Corp.*, 218 App. Div. 354, 218 N. Y. Supp. 262 (4th Dep't 1926).

¹⁹⁹ *Hilbring v. Mooney*, 130 Misc. 273, 223 N. Y. Supp. 303 (City Ct. 1927).

²⁰⁰ *Doctors' Service Corps v. Russell*, 121 Misc. 600, 201 N. Y. Supp. 764 (Sup. Ct. 1923); *Buffalo Theatre Co. v. Indemnity Ins. Co.*, 218 App. Div. 669, 219 N. Y. Supp. 212 (1st Dep't 1926); *Berson Sydeman Co. v. Waumbeck Mfg. Co.*, *supra* note 195; *cf. Appelbaum v. Gross*, *supra* note 163.

²⁰¹ *Little Falls Dairy Co. v. Berghorn*, 130 Misc. 454, 224 N. Y. Supp. 34 (Sup. Ct. 1927). But *cf. Dietz v. Glynne*, 221 App. Div. 329, 223 N. Y. Supp. 221 (2d Dep't 1927); see *infra* p. 453.

²⁰² *Supra* note 162.

²⁰³ *Davison Coal Co. v. Interstate Coal Co.*, 193 N. Y. Supp. 883 (Sup. Ct. 1921).

²⁰⁴ *Donnelly v. Bauder*, *supra* note 195.

²⁰⁵ 123 Misc. 222, 204 N. Y. Supp. 216 (Sup. Ct. 1924).

²⁰⁶ *Aronstam v. Scientific Utilities Co.*, 196 N. Y. Supp. 306 (Sup. Ct. 1922) (4 day notice necessary), *aff'd* without opinion, 199 N. Y. Supp. 908 (App. Div. 1st Dep't 1923).

²⁰⁷ *King Motor Co. v. Allen*, 209 App. Div. 281, 204 N. Y. Supp. 555 (4th Dep't 1924).

²⁰⁸ *Gibson v. Casualty Co.*, 208 App. Div. 91, 203 N. Y. Supp. 53 (1st

not considered appealable on the ground that no substantial right of the parties was violated.²⁰⁹ But there has since been a reversal of view.²¹⁰

The treatment of counterclaims is an interesting and important phase of the practice under the Rules. In *Dell'Osso v. Everett*,²¹¹ summary judgment was granted but execution stayed until trial of the counterclaim. Professor Rothschild very properly criticized this order as being anything but "summary."²¹² The Appellate Division later vacated the stay.²¹³ A better course is to treat the counterclaim as any other part of the answer: if it appears to set up a substantial claim, it may operate as a bar to the summary judgment;²¹⁴ otherwise, if it appears to be sham and without basis.²¹⁵ The courts will generally not allow the set-off of an unmaturing claim against a matured one.²¹⁶ One fairly recent case severed the counterclaim for separate trial, restraining the plaintiff from assigning a partial summary judgment until after its trial.²¹⁷ In the same year, however, the Second Department of the Appellate Division refused to follow this, holding that, where the entire answer was stricken out, with the answer would go the counterclaim, leaving nothing to be tried.²¹⁸ The result would seem to be an indisposition on the part of the busier courts to consider counterclaims in any other way than as part of the answer. It may be pointed out that, in a few rare instances, a defendant has availed himself of Rule 113 to

Dep't 1924) (reversing order granting motion unless, within 5 days, the defendant should post security against judgment). But *cf.* the English and New Jersey practice giving the defendant leave to defend on terms. *Supra* pp. 433, 434, 443.

²⁰⁹ See *Dwan v. Massarene*, *supra* note 148, at 880, 192 N. Y. Supp. at 583.

²¹⁰ *Interstate Paper Co. v. N. Y. Tribune*, 207 App. Div. 453, 202 N. Y. Supp. 232 (1st Dep't 1923); *United Products Corp. v. Standard Textile Co.*, 231 N. Y. Supp. 115 (1st Dep't 1923); see CLARK, *op. cit. supra* note 147, at 385.

²¹¹ 119 Misc. 502, 197 N. Y. Supp. 423 (Sup. Ct. 1922).

²¹² Rothschild, *op. cit. supra* note 147, at 649.

²¹³ 206 App. Div. 718, 200 N. Y. Supp. 840 (2d Dep't 1923), *aff'd* without opinion, 238 N. Y. 551, 144 N. E. 887 (1924).

²¹⁴ *Melcher v. Graziano*, 212 App. Div. 589, 209 N. Y. Supp. 425 (1st Dep't 1925) (counterclaim for defective merchandise in action for goods sold and delivered); *Wilkinson v. Electric Co.*, 123 Misc. 250, 204 N. Y. Supp. 854 (Sup. Ct. 1924).

²¹⁵ *Goodman v. Wallach*, 195 N. Y. Supp. 328 (Sup. Ct. 1922); *Smith v. Cranleigh*, 231 N. Y. Supp. 201 (App. Div. 1st Dep't 1923); *cf.* *O'Neill v. McKinley Co.*, 214 App. Div. 181, 212 N. Y. Supp. 7 (1st Dep't 1925) (counterclaim adjudicated in former action).

²¹⁶ *Appleton v. Nat. Park Bank*, 211 App. Div. 703, 203 N. Y. Supp. 223 (1st Dep't 1925) (unmaturing note), *aff'd* without opinion, 241 N. Y. 561, 150 N. E. 555 (1925).

²¹⁷ *Little Falls Dairy Co. v. Berghorn*, *supra* note 201.

²¹⁸ *Dietz v. Glynne*, *supra* note 201.

obtain a summary judgment on his counterclaim.²¹⁹ There would seem to be no reason for preventing further use of the remedy in this situation.

OTHER MOTIONS FOR JUDGMENT

It is well recognized that a motion for judgment on the pleadings under Rule 112 may not be supported by affidavits.²²⁰ This motion is to be decided from the face of the pleadings, not on the merits as presented by the affidavits.²²¹ It is of interest to note the case of *Winter v. American Aniline Products*,²²² where the defendant's motion for judgment on the pleadings for the plaintiff for nominal damages was granted. Rule 112 with Rules 104, 105, 109 and 111 are, therefore, only of minor interest in this study, since they are concerned either with reaching pleading defects or with raising issues of law substantially as was done under the common-law demurrer.²²³ It would seem, however, that the tendency to observe an absolute distinction between the motion for summary judgment and other motions is unnecessary and possibly unfortunate. No reason appears why these, in some cases at least, could not be used either alternatively or concurrently with salutary effect.

Under Rules 107 and 108 the defendant in New York is given the opportunity to raise certain specified issues of fact by motion for judgment with affidavits.²²⁴ The procedure by affidavits of the parties is in many ways similar to the summary judgment procedure.²²⁵ It seems a desirable method of quickly raising

²¹⁹ See *Rotenback v. Young*, *supra* note 185, at 268, 196 N. Y. Supp. at 221. In 1926, a total of 7 summary judgments were taken by defendants in New York county; 1927 shows the same figures.

²²⁰ *Donnelly v. Bauder*, *supra* note 195; *Sabol v. Frost*, 217 App. Div. 254, 217 N. Y. Supp. 757 (4th Dep't 1926); see *Rabenstein v. Morehouse*, 128 Misc. 385, 391, 219 N. Y. Supp. 560, 565 (Oneida County Ct. 1926); *Beha v. Weinstock*, 129 Misc. 337, 339, 221 N. Y. Supp. 500, 502 (Sup. Ct. 1927), *rev'd*, 247 N. Y. 221, 160 N. E. 17 (1928).

²²¹ See *Palermo v. Ins. Co.*, 201 N. Y. Supp. 106, 107 (Sup. Ct. 1923); *N. Y. Consol. R. R. v. New York*, 204 App. Div. 171, 173, 197 N. Y. Supp. 387, 389 (2d Dep't 1922).

²²² 204 App. Div. 792, 198 N. Y. Supp. 717 (1st Dep't 1923). This was later reversed in the Court of Appeal on the ground that the complaint stated a cause of action for substantial damages. 236 N. Y. 199, 140 N. E. 561 (1923); see Comment (1923) 9 CORN. L. Q. 70.

²²³ See *Rothschild*, *op. cit. supra* note 147, at 650-651.

²²⁴ Under the original rule four grounds of defect might be raised on this procedure: lack of jurisdiction of the person of the defendant, lack of jurisdiction of the subject of the action, incapacity of the plaintiff to sue, and another action pending. In 1921 five other grounds were added: *res adjudicata*, statute of limitations, release, statute of frauds, and infancy or disability of the defendant. Under Rule 110 the plaintiff may follow a somewhat similar procedure as to the defendant's counterclaim.

²²⁵ The court is careful to preserve the jury trial right. *Herzog v.*

many continually recurring issues where the facts are clear and only questions of law are presented.²²⁶ But since the defendant has still the option of raising the issue by answer,²²⁷ and since he is naturally less disposed to favor a speedy decision, it is not as important a remedy as the summary judgment.²²⁸

The seven year history of the New York summary judgment is tinged with conservatism and is characterized by a decided leaning toward great caution.²²⁹ In spite of this, it has proved a great relief to the congestion in the New York courts, particularly in the First and Second Departments.²³⁰ Hailed as "the

Brown, 217 App. Div. 402, 216 N. Y. Supp. 134 (1st Dep't 1926), *aff'd* without opinion, 243 N. Y. 599, 154 N. E. 622 (1926); *cf.* Rothschild, *New York Civil Practice Simplified* (1926) 26 COL. L. REV. 30, 52; Rothschild, *New York Civil Practice Simplified* (1927) 27 COL. L. REV. 413.

²²⁶ Holland v. Atlantic Stevedoring Co., 210 App. Div. 129, 205 N. Y. Supp. 397 (2d Dep't 1924), *aff'd* without opinion, 239 N. Y. 605, 147 N. E. 214 (1925) (lack of jurisdiction); Zilmaur Realty Co. v. Pinsky, 208 App. Div. 467, 203 N. Y. Supp. 715 (1st Dep't 1924) (statute of frauds); Swan v. F. W. Woolworth Co., 129 Misc. 500, 222 N. Y. Supp. 111 (Sup. Ct. 1927) (accord and satisfaction); *cf.* Atkinson, *Pleading The Statute of Limitations* (1927) 36 YALE L. J. 914, 931, 932, as to raising the issue of the statute of limitations.

²²⁷ Gentilala v. Fay Taxicabs, 214 App. Div. 255, 212 N. Y. Supp. 101 (1st Dep't 1925), *aff'd* on this point, 243 N. Y. 397, 153 N. E. 348 (1926); *cf.* Harmon v. Alfred Peats Co., 243 N. Y. 473, 154 N. E. 314 (1926).

²²⁸ In general, see CLARK, *op. cit. supra* note 147, at 386, 387; Rothschild, *op. cit. supra* note 225; Atkinson, *op. cit. supra* note 226.

²²⁹ See Asbestos Finance Co. v. Hazen, 122 Misc. 269, 271, 203 N. Y. Supp. 565, 567 (Sup. Ct. 1924) (to the effect that the plaintiff would not be harmed by being forced to try a just cause of action: "The C. P. A. was never intended as a sharp-edged instrument to frustrate justice"); Rodger v. Bliss, 130 Misc. 168, 169, 223 N. Y. Supp. 401, 404 (Sup. Ct. 1927). But see Montgomery v. Lans, 194 N. Y. Supp. 96, 97 (Sup. Ct. 1922) (Rule should be liberally construed). The latter sentiment would seem to find little support in the decisions.

²³⁰ See Finch, *op. cit. supra* note 21, at 593 where the writer estimates that, in 1923, one out of every ten cases was so disposed of in New York County, thus saving the time of one trial "part" for a year and a half. In 1925, 511 motions for summary judgment were made; in 1926, 571; in 1927, 433. Motions for judgment for the same period were: for 1925, 633; for 1926, 830; for 1927, 673. Of the 571 motions for summary judgment made in 1926, 250 were granted, 177 denied, 55 withdrawn, and 39 off calendar. In 1927, of the total of 433, 217 were granted, 184 denied, and 32 withdrawn. See JUDICIAL STATISTICS OF THE WORK OF THE SUPREME COURT OF NEW YORK IN THE FIRST JUDICIAL DEPARTMENT (1925) 21; JUDICIAL STATISTICS OF THE WORK OF THE SUPREME COURT OF NEW YORK IN THE FIRST JUDICIAL DEPARTMENT (1926) 21; JUDICIAL STATISTICS OF THE WORK OF THE SUPREME COURT OF NEW YORK IN THE FIRST JUDICIAL DEPARTMENT (1927) 21. Those off calendar in 1927 are not reported. This latter fact would account for the falling off of the totals in 1927. The proportion granted (with reference only to those denied) is 53-42 in 1926; 51-46 in 1927. This near balance would seem to indicate that the remedy has not yet reached the peak of its efficacy.

most salutary and satisfactory of the innovations introduced by the Civil Practice Act,"²³¹ it is yet to be developed to its highest effectiveness. Such development seems to lie in the removal of many of the present barriers, and in extension of the procedure to other cases.

MICHIGAN

The Judicature Act of 1915 introduced into Michigan a summary judgment strikingly similar to the English rule, although somewhat less extensive.²³²

"At any time after any cause arising out of contract or judgment, or statute shall be at issue, upon motion of the plaintiff, after the usual notice to the defendant, supported by the affidavit of the plaintiff, or anyone in his behalf having knowledge of the facts, verifying the plaintiff's cause of action, and stating the amount claimed, and his belief that there is no defense to the action, the court shall enter a judgment in favor of the plaintiff, unless the defendant shall prior to, or at the time of the hearing said motion, make and file an affidavit of merits. Said affidavit of merits shall state whether or not the defense claimed therein applies to the whole of the plaintiff's claim, and if not, it shall state definitely what item or items of the plaintiff's claim and the amount thereof is admitted.

"If in any case it appear upon the trial thereof to the satisfaction of the court, that any affidavit of merits made therein, for the purpose of preventing a summary judgment, or for the purpose of procuring a continuance, was not made in good faith, but was made solely for the purpose of delay, the court shall award the plaintiff in the judgment rendered therein, double the amount of the costs taxable in the case."

The few recent cases which have reached the courts of highest resort in Michigan deal mainly with the sufficiency of the affidavit. This must conform generally to the requirements established in Circuit Rule 34.²³³ The provision for double costs as a penalty for affidavits made for the purpose of delay is commendable as lending greater efficacy to the statute.²³⁴ Although restricted in scope, the Michigan summary judgment presents a simple and clear example of expedited procedure.

²³¹ Rothschild, *op. cit. supra* note 1, at 650; *cf.* Comment (1928) 6 N. Y. U. L. REV. 59, 70.

²³² 3 MICH. COMP. LAWS (Cahill, 1915) c. 234, §§ 12581, 12582.

²³³ *Cf.* Webster v. Pelavin, 241 Mich. 19, 216 N. W. 430 (1927) (affidavit must state facts, not conclusions of law); Slobodnick v. La Buda, 238 Mich. 550, 213 N. W. 698 (1927) (averment of personal knowledge of the acts stated). Mere statement that the plaintiff has a good cause of action is insufficient. La Prise v. Smith, 234 Mich. 371, 208 N. W. 449 (1926).

²³⁴ *Cf.* CONN. GEN. STAT. (1918) § 5805, providing for double costs in cases where a false affidavit or statement of merits has been made by the defendant. The Connecticut Judicial Council in its first report recommends that this be amended to permit of the allowance of reasonable counsel fees,

DISTRICT OF COLUMBIA

Rule 73 of the Supreme Court of the District of Columbia appeared about the time of the adoption of the English Rules of 1873. An overcrowded court docket seems to have been the impelling force leading to its adoption.²³⁵ Its similarity to the English summary judgment procedure is marked; it is limited, however, to contract actions. The Rule provides: ²³⁶

"In any action arising *ex contractu*, if the plaintiff or his agent shall have filed, at the time of bringing his action, an affidavit setting out distinctly his cause of action, and the sum he claims to be due, exclusive of all set-offs and just grounds of defense, and shall have served the defendant with copies of his declaration and of said affidavit, he shall be entitled to a judgment for the amount so claimed, with interest and costs, unless the defendant shall file, along with his plea, if in bar, an affidavit of defense denying the right of the plaintiff as to the whole or some specified part of his claim, and specifically stating also, in precise and definite terms, the grounds of his defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part. And where the defendant shall have acknowledged in his affidavit of defense his liability for part of the plaintiff's claim as aforesaid, the plaintiff, if he so elect, may have judgment entered in his favor for the amount so confessed to be due."

The provisions as to the affidavit and the partial judgment closely follow the English model. Rule 19 of the Supreme Court of the District of Columbia provides for a like process in actions for the recovery of land.²³⁷

not to exceed \$50. FIRST REPORT OF THE JUDICIAL COUNCIL OF CONNECTICUT (1928) 40.

²³⁵ See Cartter, C. J., in *Nat. Met. Bank v. Hitz*, 11 App. D. C. 193, 199 (1879): "This rule was adopted in this jurisdiction when we were overwhelmed with a great oppression of business. The calendar in the Circuit Court had run up to a thousand cases or thereabouts. Great delays in judgment occurred; creditors were postponed in the collection to an indefinite time. Defendants resorted to formal denials of pleading for the purpose of securing the time that the delays of the law gave them."

See also *Cropley v. Vogeler*, 2 App. D. C. 28, 34 (1892): "The rapid increase of the business of the courts of recent times, sufficient sometimes to block the administration of justice, and the facility with which unscrupulous persons may use the ancient processes for the purpose of fraud and delay, have induced throughout the United States the adoption of a very general modification of our system of pleading and practice, and the substitution in the place of the old of new forms, based to a great extent on the processes of the civil law."

²³⁶ RULES OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, Rule 73, § 1. The power of the court to make rules of practice seems to have been conferred as early as 1853. Cf. *ABERT, COMP. STAT. D. C. (1894) 297 § 31*. The Rule is also to be found in *Fidelity Co. v. United States*, 187 U. S. 315, 318, 23 Sup. Ct. 120, 121 (1902).

²³⁷ Cf. *Columbia Laundry Co. v. Ellis*, 36 App. D. C. 583 (1911); *Pulliam v. Capital Traction Co.*, 37 App. D. C. 301 (1911).

As decided almost half a century later in New York the Rules were held not to constitute a violation of the right to trial by jury. Their inauguration was considered a proper exercise of the power of the court to provide rules of practice.²³⁸ Naturally enough, Rule 73, restricted as it was to actions *ex contractu*, was applied most frequently to actions on commercial paper and on the several counts in *assumpsit*.²³⁹ Other situations where the procedure was used were suits against principal and surety on a construction bond;²⁴⁰ by the beneficiary of an insurance certificate;²⁴¹ and on an award.²⁴² It was early decided that unliquidated damages were not recoverable under the Rule.²⁴³

Assertions made in the affidavit must be plain and positive.²⁴⁴ Participial averments, however, do not render it bad.²⁴⁵ Although a technical nicety is not required, the plaintiff must conform to all the requirements of the Rule.²⁴⁶ No affidavit by the plaintiff in reply is provided for.²⁴⁷ The allowance of amendment is in the discretion of the trial court.²⁴⁸ The plaintiff may not, by anticipating defenses, require the defendant to negative or defend against such new matter.²⁴⁹ Indeed the facts set forth in the defendant's affidavit are assumed to be true as a safeguard of the right to jury trial. This is in line with the consistent policy in this jurisdiction of construing the plaintiff's affidavit strictly, while the defendant's affidavit is broadly construed.²⁵⁰

²³⁸ *Smoot v. Rittenhouse*, 27 Wash. L. Rep. 741 (U. S. Sup. Ct. 1876), cited in *Fidelity Co. v. United States*, *supra* note 236, at 319, 23 Sup. Ct. at 122; *Cropley v. Vogeler*, *supra* note 235; see *Nat. Met. Bank v. Hitz*, *supra* note 235, at 199.

²³⁹ *Cropley v. Vogeler*, *supra* note 235 (common counts for goods sold and delivered); *Strauss v. Hensey*, 7 App. D. C. 289 (1895) (money counts); *Riley v. Mattingly*, 42 App. D. C. 290 (1914) (general counts and account for legal services).

²⁴⁰ *Fidelity & Deposit Co. v. U. S.*, *supra* note 236.

²⁴¹ *Woodmen of the World v. Davis*, 48 App. D. C. 614 (1911).

²⁴² *Bailey v. District of Columbia*, 4 App. D. C. 356 (1894).

²⁴³ *Deane v. Echols*, 2 App. D. C. 522 (1894). But *cf.* *Mearns v. Chatard*, 47 App. D. C. 257 (1918) (suit for proceeds of converted stock; recovery allowed of value at time of conversion).

²⁴⁴ See *Foertsch v. Germuiller*, 2 App. D. C. 340, 345 (1894).

²⁴⁵ *Gundersheimer v. Earnshaw*, 13 App. D. C. 178 (1898).

²⁴⁶ *Williams v. Bradley*, 2 App. D. C. 346 (1894); see *Young v. Warner*, 6 App. D. C. 433, 436-437 (1895).

²⁴⁷ See *The Richmond v. Cake*, 1 App. D. C. 447, 465 (1893).

²⁴⁸ *McReynolds v. Mtge. & Acceptance Corp.*, 13 F. (2d) 313 (Ct. of App. D. C. 1926); *Meyers v. Davis*, 13 App. D. C. 361 (1898).

²⁴⁹ *Booth v. Arnold*, 27 App. D. C. 287 (1906). But *cf.* *Woodmen of the World v. Davis*, *supra* note 241, distinguishing *Booth v. Arnold* and stating that this does not necessarily render the affidavit ineffective; the excess may be disregarded.

²⁵⁰ See *St. Clair v. Conlon*, 12 App. D. C. 161, 165 (1898); *Gleason v. Hoeke*, 5 App. D. C. 1, 5 (1894); *Lawrence v. Hammond*, 4 App. D. C. 467, 469 (1874); *Meyers v. Davis*, *supra* note 248, at 367; also *Alvey*,

The plaintiff's attorney is deemed to be the plaintiff's agent for the purpose of making affidavits.²⁵¹ An explicit provision states who may make an affidavit in behalf of a corporation.²⁵² Where several defendants have the same defense, an affidavit by only one is sufficient.²⁵³ The entire absence of an affidavit of defense is fatal to the defendant's cause.²⁵⁴ In *Consumers' Brewing Co. v. Tobin*,²⁵⁵ where the plaintiff conceded a credit claimed by the defendant in his affidavit, summary judgment was denied. The fact that the defense appears unreasonable cannot affect the defendant's right to trial.²⁵⁶ The order granting summary judgment is appealable.²⁵⁷

The summary judgment has been treated with conservatism in the District of Columbia. Recent cases are few. It is not improbable that the stimulus of more crowded court dockets will lead to its extension along the more liberal lines of the English and Connecticut provisions.

ILLINOIS

In 1872, because of "delays in the administration of justice,"²⁵⁸ Illinois adopted a rule which had been enforced in Cook County since 1853. In its present form²⁵⁹ the rule reads:

"If the plaintiff in any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand, and the amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment, as in case of default, unless the defendant,

C. J., in *Strauss v. Hensey*, *supra* note 239, at 294: "The court cannot question or traverse the truth of the facts stated in the defendant's affidavit. Those facts the court is bound, for the purposes of securing to the defendant the right to trial, to assume to be true, and that, too, without reference to what the plaintiff may have stated in his affidavit; . . ."

²⁵¹ *Harris v. Leonhardt*, 2 App. D. C. 318 (1894).

²⁵² Rule 73, § 3: "When the defendant is a corporation, the affidavit of defense may be made by an officer, agent or attorney of such corporation." Cf. the Connecticut rule, *supra* p. . .

²⁵³ *Tyrer v. Chew*, 7 App. D. C. 175 (1895).

²⁵⁴ *Boogher v. Byers*, 10 App. D. C. 419 (1897) (plea of the statute of limitations, unsupported by affidavits, raises presumption of the revival of the claim by acknowledgment); *Finney v. Pa. Iron Works Co.*, 22 App. D. C. 476 (1902); cf. *Pumphrey v. Bogan*, 8 App. D. C. 449 (1896) (where issue is raised as to the new promise after the statute has run, summary judgment was refused).

²⁵⁵ 18 App. D. C. 584 (1901).

²⁵⁶ See *Gleason v. Hoeke*, *supra* note 250, at 7.

²⁵⁷ *Johnson v. Wright*, 2 App. D. C. 216 (1894).

²⁵⁸ Ill. Laws 1872, 333, § 36; see *Cooper v. Anderson*, 246 Ill. App. 1, 5 (1927); *Means v. Miner*, 243 Ill. App. 556, 561 (1927).

²⁵⁹ ILL. REV. STAT. (Cahill, 1927) c. 110, § 55, cf. Common Law Procedure Act of 1852, *supra* note 43.

or his agent or attorney, shall file with his plea an affidavit, stating that he verily believes the defendant has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand, and specifying the nature of such defense, . . ."

The statute further provides that no affidavit of merits need be filed with a demurrer or motion; that the time for filing affidavits may be extended on good cause; and that the plaintiff may in cases of surprise, have a continuance over to the next term to produce evidence. Provision is also made for partial judgment by default. The course of decision as to the sufficiency of the affidavits and as to the partial judgment seems to be more liberal than the tenor of the cases under the English rule.²⁶⁰ The Illinois procedure, in its terms, is simple and, within its limits (contract actions), has proved to be an efficacious remedy.²⁶¹

DELAWARE

In Delaware, provision is made for "snap judgments" or "judgments at first term" in certain enumerated classes of cases and under a designated procedure, all of which show many of the features of the English summary judgment. It is provided:²⁶²

"In all actions in the Superior Court upon bills, notes, or bonds or other instruments in writing for the payment of money,²⁶³ or for the recovery of book accounts,²⁶⁴ on foreign judgments,²⁶⁵ and in all actions of scire facias on recognizances in the Orphans' Court and Courts of Chancery, judgments or mortgages,²⁶⁶ judgment by default shall be entered upon motion by the plaintiff or his attorney on the last day of the regular term to which the original process is returnable, notwithstanding appearance by the defendant, unless the defendant, or if there be more than one, one or more of them, shall have previously filed in the cause an affidavit²⁶⁷ stating that he or they verily

²⁶⁰ See the cases listed in 11 CALLAGHAN, ILLINOIS DIGEST (1925) 11257 *et seq.*

²⁶¹ See cases listed *ibid.*

²⁶² DEL. REV. CODE (1915) c. 128, § 6.

²⁶³ A written receipt or check given by the defendant has been held not to be such an instrument. *Green v. Trust Co.*, 25 Del. 585, 83 Atl. 935 (1912); *Spruance v. Gray*, 30 Del. 117, 102 Atl. 529 (1917). And in action on a building contract for the recovery of the agreed price, the court refused to find an unconditional obligation for the payment of money, the condition being the completion of the contract. *Swayne v. Remley*, 1 Penn. 1, 39 Atl. 453 (Del. 1897).

²⁶⁴ *Cf.* *Taylor v. Addicks*, 4 Penn. 411, 55 Atl. 1010 (Del. 1903) (unitemized claims for attorney's services not book entries within the statute).

²⁶⁵ *Koury v. Claymont Develop. Co.*, 32 Del. 115, 119 Atl. 858 (1923).

²⁶⁶ *Goodfriend v. Light & Power Co.*, 31 Del. 194, 112 Atl. 831 (1921) (foreclosure).

²⁶⁷ The usual requirement is made that the affidavit contain facts, not

believes or believe there is a legal defense to the whole or part of such cause of action, and setting forth the nature and character of the same; if the defense be to a part only of the cause of action, the defendant, or if there be more than one, any one of them shall, in such affidavit, specify the sum which he or they admit to be due, and judgment shall be entered for the plaintiff at his election for the sum acknowledged to be due; Provided, that no judgment shall be entered by virtue of this section unless the plaintiff, or if there be more than one,²⁷³ some one or more of the plaintiffs shall, on or before the first day of the term²⁶⁹ to which the original process is returnable, file in the office of the Prothonotary a copy of the instrument of writing, . . .”

A stay of execution for six months must be granted upon security being given by the defendant for the payment of such judgment. Upon sufficient cause, the court may open such judgment and let the defendant into a trial, security being given. In case of a suit by or against a corporation, the affidavit by the cashier or treasurer is sufficient.²⁷³ If no judgment is entered, any affidavit filed under this section by either party to the action may not be used in such action for any purpose whatever.

The courts are averse to “snap judgments” except in clear cases.²⁷¹ The defendant’s affidavits are usually considered true²⁷² and, where there is doubt at all, “judgments at first term” and not granted.²⁷³ Although a mere statement by the defendant of a belief that he has a defense is not enough,²⁷⁴ the tendency is to hold the defenses interposed sufficient as a bar.²⁷⁵ Although this procedure is a sufficient safeguard against purely

conclusions of law. *Reynolds v. Fahey*, 4 Penn. 264, 55 Atl. 221 (Del. 1903).

²⁶⁸ Where the capacity of the party appears in the caption, it need not be expressly averred in the affidavit. *Jersawit v. Banning*, 32 Del. 47, 118 Atl. 727 (1922); *Koury v. Claymont Develop. Co.*, *supra* note 265 (partners).

²⁶⁹ Cf. *Miller v. Hart*, 3 Penn. 297, 51 Atl. 603 (Del. 1901) (where the affidavit of demand was filed before the action was brought the motion for judgment was refused); followed in *Goodfriend v. Light & Power Co.*, *supra* note 266.

²⁷⁰ Cf. *Wilmington Sash & Door Co. v. Taylor*, 25 Del. 528, 82 Atl. 86 (1911), holding that the treasurer of the plaintiff corporation should have sworn to his capacity in the affidavit. Judgment will not be granted to a corporation unless the fact and place of its creation are averred. *Toerring Co. v. Moore Co.*, 24 Del. 269, 75 Atl. 786 (1910).

²⁷¹ See *Spruance v. Anderson*, 27 Del. 414, 415, 89 Atl. 1 (1913).

²⁷² *Layton v. Lawson*, 27 Del. 143, 86 Atl. 520 (1913); *Otis Elevator Co. v. Ford*, 27 Del. 286, 88 Atl. 465 (1913).

²⁷³ *Davenport v. Addicks*, 5 Penn. 4, 57 Atl. 532 (Del. 1904).

²⁷⁴ *Potts v. Wells*, 3 Penn. 11, 50 Atl. 62 (Del. 1900).

²⁷⁵ Examples of some of the defenses upheld are: *Bloom v. Handloff*, 29 Del. 172, 97 Atl. 586 (1916) (denial of indebtedness); *Layton v. Lawson*, *supra* note 272 (res adjudicata); *Ridings v. McMenemy*, 1 Penn. 15, 39 Atl. 463 (Del. 1897) (payment); *Thomas v. Frankhouser*, 23 Del.

formal defenses set up for delay in the enumerated actions, it is open to the twofold criticism that it does not cover as wide a field as it might practically embrace, and that the attitude of the courts is conservative.

PENNSYLVANIA

The Pennsylvania motion for judgment under section 17 of the Practice Act presents a greatly modified version of the English type of summary judgment.²⁷⁶ It provides shortly that:

"In actions of assumpsit the prothonotary may enter judgment for want of an affidavit of defense for any amount admitted or not denied to be due. The plaintiff may take a rule for judgment for want of a sufficient affidavit of defense to the whole or any part of his claim,²⁷⁷ and the court shall enter judgment or discharge the rule as justice may require. When the defendant sets up a set-off or counterclaim, he may move for judgment against the plaintiff for want of a reply, or for want of a sufficient reply to the whole or any part of the set-off or counterclaim, and the court may enter judgment in favor of the plaintiff or defendant for such amount as shall be found due, with leave to proceed for the balance."²⁷⁸

The act was, according to a late dictum,²⁷⁹ intended to "simplify proceedings, and to reach the real issues as speedily as possible. . . ." Section 17 would seem, however, to operate merely as a provision for default judgment in the absence of defending affidavits in actions of assumpsit. It therefore seems limited in application. Special emphasis is placed on the rule that there will be no reversal unless the error is clear.²⁸⁰

INDIANA

The Indiana legislature, as early as 1887, dealt with the problem of expediting trial procedure. The statute, unmodified after an existence of over forty years, provides that:

21, 90 Atl. 465 (1914) (failure of consideration on note); *Collins v. Hansen*, 2 Penn. 155, 44 Atl. 624 (Del. 1899) (payment of mortgage).

²⁷⁶ Pennsylvania, although not a "code reform" state, adopted a simplified Practice Act in 1915. See Amram, *The Pennsylvania Practice Act of 1915* (1916) 64 U. OF PA. L. REV. 223.

²⁷⁷ ROSENBAUM, *op. cit. supra* note 43, at 51, n. 24, points out the similarity of this clause to the English provisions.

²⁷⁸ SMITH, PENNSYLVANIA PRACTICE ACT (2d ed. 1926) 261; PA. STAT. (West, 1920) § 17197; AMRAM, PENNSYLVANIA PRACTICE ACT (1925) 211.

²⁷⁹ See *Fulton Farmers' Ass'n v. Bomberger*, 262 Pa. 43, 47, 104 Atl. 805, 807 (1918).

²⁸⁰ *Kidder Elevator Co. v. Muckle*, 198 Pa. 388, 48 Atl. 272 (1901); *Wilson v. Bryn Mawr Trust Co.*, 225 Pa. 143, 73 Atl. 1071 (1909); *Comm. Finance Co. v. Ferrero*, 269 Pa. 264, 112 Atl. 449 (1921); *Prudential Realty Co. v. Cohen*, 279 Pa. 279, 123 Atl. 920 (1924).

"An answer or other pleading shall be rejected as sham, either when it plainly appears upon the face thereof to be false in fact or merely intended for delay, or when shown to be so by the answers of the parties to special written interrogatories propounded to him to ascertain whether the pleading is false...." ²⁸¹

Except for the written interrogatories clause this provision is merely a slight extension of the common-law practice with respect to sham pleas. As far as the reports show, it has not been very freely employed. In *Holland v. Fletcher* ²⁸² it was held that the answers to the interrogatories must unequivocally show that the pleading was false. The remedy prescribed is by no means complete. At its best it serves only as a means of clarifying the opponent's pleadings. ²⁸³ Although its use is not restricted to any specified forms of action it is, in effect, only the bare embryo of a summary judgment.

VIRGINIA

The origin of the summary proceeding by motion for judgment has been attributed to Virginia. ²⁸⁴ The use of the procedure against sheriffs and other officers, sureties, attorneys, and on execution bonds began as early as 1732. ²⁸⁵ By 1849, at the time of the adoption of the first of the Codes, sentiment toward widening the scope of the procedure crystallized in its extension to the use of "any person entitled to recover money by action on any contract." ²⁸⁶ In 1919, after a number of intermediate steps, ²⁸⁷ it had been made to include within its borders all actions at law. ²⁸⁸

²⁸¹ IND. ANN. STAT. (Burns, 1926) § 409, providing also for the striking of "surplusage, tautology and irrelevant matter."

²⁸² 62 Ind. App. 149, 112 N. E. 847 (1916). Examination of the party has been held, also, to be regulated by IND. ANN. STAT. (Burns, 1901) § 517 (dealing with examination of witnesses). *Stars v. Hammersmith*, 31 Ind. App. 610, 67 N. E. 554 (1903).

²⁸³ Cf. *Atkinson v. Wabash R. R.*, 143 Ind. 501, 41 N. E. 947 (1895), holding it error to reject a pleading in its entirety when a part of it is relevant.

²⁸⁴ See Millar, *op. cit. supra* note 6, at 213, 215.

²⁸⁵ For a full list of the subjects covered by the statutes in their chronological order, see *ibid.* 215 *et seq.*

²⁸⁶ VA. CODE (1849) c. 167, § 5.

²⁸⁷ Va. Acts 1912, 15—to tort actions; Va. Acts 1912, 651—extended to actions for damages arising out of breach of contract and to statutory penalties; Va. Acts 1914, 28—to the recovery of money, damages or a penalty in an action at law (superseding Va. Acts 1912, 15); Va. Acts 1916, 760—to recovery of specific personal property or damages and to statutory penalties. Millar, *op. cit. supra* note 6, at 217-219, discusses fully the time modifications during this period and the changing requirements as to the necessity of a writing.

²⁸⁸ VA. CODE ANN. (1919) c. 251, § 6046, was then adopted along with a

"Any person entitled to maintain an action at law may, in lieu of such action at law, proceed by motion before any court which would have jurisdiction of such action, after not less than fifteen days' notice, which notice shall be in writing signed by the plaintiff or his attorney, and shall be returned to the clerk's office of such court within five days after service of the same. . . .

"The defendant may make the same defenses to the notice as to a declaration in an action at law, and in the same manner, or he may state his grounds of defense informally in writing, and in the latter event the parties shall be deemed to be at issue on the grounds stated without replication or other pleading on the part of the plaintiff. No plea in abatement under this section shall be received after the defendant has demurred, pleaded in bar or filed such statement of his grounds of defense."

The noteworthy feature of this section is the complete absence of any requirement of formality.²⁸⁰ Indeed its wording contemplates that the notices be acts of the parties rather than of their attorneys. In spite of the freedom here permitted the notice must state a good cause of action; it must be a notice.²⁸⁰ Moreover, either party may demand a bill of particulars.²⁸¹ The total effect of the provision is a simplification of the pleadings, thus enabling the plaintiff to move much more rapidly than he otherwise could.²⁸²

Section 6047 allows the plaintiff to move against a number of defendants either jointly or severally, or against an intermediate number. "Such motions may be made from time to time until there is a judgment against every person liable, or his personal representative." The next section (6048) provides that when an issue of fact is joined and either party desires it or, when in the opinion of the court, it is proper, a jury shall be impaneled.²⁸³

mechanism for transferring cases from law to equity or vice versa as a compromise measure for those who clamored for the adoption of the Code. "These two changes, it was thought, would give the advocates of Code procedure full opportunity to develop the merits of the system, and if they proved more satisfactory than the present system, the transition would be much easier than by a complete substitution of one for the other . . ." I VA. CODE ANN. (1919) xii-xiii; cf. Williams, *Remedy by Motion Under the Code of 1919* (1920) 6 VA. L. REG. (N. S.) 1, for a general discussion and comparison with § 3211, *et seq.* of the Code of 1904.

²⁸⁰ See *Whitley v. Booker Brick Co.*, 113 Va. 434, 436, 74 S. E. 160, 161 (1912); *Chandler v. Baltimore R. R.*, 125 Va. 63, 67, 99 S. E. 794, 795 (1919); cf. (1911) 16 VA. L. REG. 950, 952 (editorial favoring the reduction of the whole system of pleading to a single notice stating the object of the suit).

²⁸⁰ *Maikin v. Aldridge*, 127 Va. 761, 105 S. E. 459 (1920).

²⁸¹ See *ibid.* 766, 105 S. E. at 461; *Whitley v. Booker Brick Co.*, *supra* note 289, at 436, 74 S. E. at 161.

²⁸² See *Millar, op. cit. supra* note 6, at 220.

²⁸³ Cf. *Preston v. Salem Improvement Co.*, 91 Va. 583, 22 S. E. 486

The latter part of section 6046 and section 6133 represent a combination of the subjects embraced in the statutes of 1849 and, to a certain extent, the English summary judgment. They apply the procedure specified in section 6046 respectively to actions on account and in assumpsit. As in many other jurisdictions, a number of the cases deal with the sufficiency of the affidavit.²⁹⁴ This is not, however, in this jurisdiction, an indication of an unfavorable attitude of the courts. Indeed the tendency in Virginia seems to be to replace the technical common law forms with this informal motion for judgment.²⁹⁵

WEST VIRGINIA

The Virginia proceeding by motion of 1849 was adopted by West Virginia shortly after its creation as a separate jurisdiction.

It is distinguishable from its predecessor only in that it is limited to contract actions for money, and in its formal provision as to affidavits.²⁹⁶ Defense "may be made in the same manner and to the same extent as in actions at law." This latter has been held to be permissive and not mandatory.²⁹⁷ The cases have rigidly required that the "notice" function of the notice be strictly observed.²⁹⁸ Since it replaces the declaration and summons in the ordinary action it must reasonably indicate upon what obligation judgment is sought.²⁹⁹ As to the affidavit, that need not set forth a cause of action.³⁰⁰ Jury trial may be had under the same circumstance as under the Virginia procedure, except that no jurisdictional amount is specified as in the latter state (over twenty dollars).

The arrested development of the summary remedy in West Virginia is conspicuous. In spite of this, as it has been pointed out,³⁰¹ it has recently been applied to fully one half of the contract actions litigated and its use is becoming more general.

(1895), holding this provision not a violation of the right to a jury trial; (1895) 1 VA. L. REG. 449.

²⁹⁴ *Carpenter v. Gray*, 113 Va. 518, 75 S. E. 300 (1912), holding substantial compliance with the requirement sufficient; *cf. Jones v. Hancock*, 117 Va. 511, 85 S. E. 460 (1915); *Merriman Co. v. Thomas*, 103 Va. 24, 48 S. E. 590 (1904) (as to capacity of affiant).

²⁹⁵ See *Millar, op. cit. supra* note 6, at 221.

²⁹⁶ W. VA. CODE ANN. (Barnes, 1923) c. 121, § 6. For a discussion of both the Virginia and West Virginia statutes, see Note (1922) 29 W. VA. L. Q. 62.

²⁹⁷ *Collins v. White Fuel Co.*, 69 W. Va. 292, 71 S. E. 277 (1911); see *Millar, op. cit. supra* note 6, at 222.

²⁹⁸ *Anderson v. Prince*, 60 W. Va. 557, 55 S. E. 656 (1906).

²⁹⁹ See *Stuart v. Carter*, 79 W. Va. 92, 98, 90 S. E. 537, 540 (1916); see *Jennings v. Wiles*, 82 W. Va. 573, 575, 96 S. E. 1009, 1010 (1918).

³⁰⁰ *Citizens' Nat. Bank v. Dixon*, 94 W. Va. 21, 117 S. E. 685 (1923).

SOUTH CAROLINA AND KENTUCKY

The "summary process" of 1769 of South Carolina and the Kentucky "proceedings by petition or summons" of 1805 are of historical interest. The former made it lawful for the judges "to determine, without a jury, in a summary way, on petition, all causes cognizable in the said courts, for any sum not exceeding 20£ sterling, except where the title of lands may come in question . . ." The latter was "a summary mode of recovering debts" for any person holding a bond or a note for the direct payment of money. This remedy was adopted in Alabama in 1820; in Illinois in 1833; and in territorial Kansas in 1855. It was used as a model and amplified in Missouri in 1825 to include actions on bonds or notes for the direct payment of property or money; in Arkansas in 1837 to include actions on bills; in the Iowa territory in 1839 to include actions on instruments payable in money. Professor Millar³⁰² has ascribed the spread of the statute to emigration from Kentucky, and credits whatever success it enjoyed to the fact that the set form of the petition allowed the plaintiff to serve as his own attorney.³⁰³ The remedy was at its best but a makeshift and the adoption of the Codes marked its end in each jurisdiction.³⁰⁴

III

In the remainder of the American jurisdictions where a procedure of a summary nature is found, it seems to have been affected by moral considerations. The provisions include, in the main, expedited proceedings against public officers and private citizens who are in a quasi-fiduciary relation to the plaintiff. These provisions afford, in general, a direct remedy for the wrongful omissions or commissions of the persons specified.

³⁰¹ Millar, *op. cit. supra* note 6, at 223, n. 164.

³⁰² For a full discussion of these statutes see Millar, *op. cit. supra* note 6, at 195 *et seq.*, 204 *et seq.*

³⁰³ *Ibid.* 212.

³⁰⁴ In Kentucky in 1851; in Alabama in 1852; in Illinois in 1874 (dropped from the state books); in Kansas in 1859; in Iowa in 1851. Millar, *op. cit. supra* note 6, at 213, discusses the now extinct "bank notice" which appeared in the charters of early Alabama and Mississippi banks. A typical example of the provision is to be found in *Logwood v. Bank*, Minor 23 (Ala. 1820): that if any person default in payment of any note, bill or bond to the bank, on ten days' notice and by producing before the court the certificate of the president of the bank that the debt is the bona fide property of the bank, the bank may move for judgment. Provided, that if the defendant appear and contest the claim, the court shall immediately impanel a jury to try the issue and give judgment accordingly. This is perhaps, a forerunner of our modern summary judgment. *Cf.* English Bills of Exchange Act of 1855, *supra* note 2.

This type of procedure would seem to be of purely American origin, dating back to the end of the eighteenth century.

ALABAMA

The Alabama Code presents the fullest example of the type of procedure herein to be discussed. It provides³⁰⁵ that:

“Judgment may be rendered summarily against the persons and for the defaults hereinafter stated, upon notice in writing by the person aggrieved, that a motion will be made for judgment succinctly stating in such notice the cause for which the motion will be made, and the session of the court, and the county.

“The motion may be made by the party aggrieved or his legal representative against the person in default and the sureties on his official bond; and the judgment must be rendered against such of the parties, whether principal or surety, as may have received notice of the intended motion.”

A motion entered on the motion docket during the session of the court is sufficient notice to all officers of the court and their sureties.

“Unless in cases otherwise directed by this chapter, the court must hear and determine the motion and render judgment upon the evidence, without a jury unless an issue is tendered, and a jury trial demanded when a jury must be immediately impanelled to try the facts, unless good cause be shown for a continuance.”

There is then enumerated³⁰⁶ a list of the proceedings that may be brought. Included are actions against sheriffs, coroners and other executive officers for: (a) failure to return execution, or pay over money collected; (b) failure to make money on execution; (c) false and fraudulent return; (d) failure to give notice of collection of money; (e) failure to indorse on execution true date of delivery; (f) failure to execute mesne process; (g) failure to pay over to the defendant excess received on sales; (h) failure to return execution satisfied; (i) failure to refund money when collection has been enjoined.

There are also included proceedings in favor of sheriffs or coroners; against clerks and registers; against judges of probate, tax collectors, assessors, county treasurers, and other persons receiving money for county; against attorneys at law for property or money recovered and not turned over.

The notice periods vary between three and ten days. Where prescribed, the record must affirmatively show that it has been given.³⁰⁷ Where none is provided, the courts, nevertheless, re-

³⁰⁵ ALA. CIV. CODE (1923) c. 346, art. 1, §§ 10226-10229.

³⁰⁶ *Ibid.* art. 2, §§ 10232-10241, arts. 3-6.

³⁰⁷ *Arthur v. State*, 22 Ala. 61 (1853); see *Caldwell v. Guinn*, 54 Ala.

quire a reasonable notice.³⁰⁸ Since the notice in the proceedings fulfills the function of both process and pleading, it is amendable under the same rules as obtain in ordinary actions.³⁰⁹ That the procedure is intended to be of a punitive nature is indicated by the enumeration of penalties for the various delinquencies.³¹⁰ This is the prevailing tone of the devices discussed in this section.

KENTUCKY, ARKANSAS, TENNESSEE, WEST VIRGINIA, MISSOURI

Kentucky. The Kentucky code provides:

"A judgment may be obtained on motion, by a surety against his principal or co-surety for money paid; by a client against his attorney for money collected or property received; by a party or officer against a surety for costs; and by a party against an officer for money collected or property received, and for the damages which such party is entitled to recover; and in all other cases specially authorized by statute; and the service of the notice shall be regarded as the commencement of the proceeding."³¹¹

This same remedy is extended to enable a purchaser at an execution sale of land to obtain possession.³¹² Although written pleadings are not necessary,³¹³ if one of the parties proceeds in writing, the other should follow suit.³¹⁴ Because of the exemplary nature of the proceedings the courts require a rigid conformity with the terms of the statute.³¹⁵

Arkansas. The summary proceedings by motion in Arkansas parallels that in Kentucky very closely. The statute is as follows:

"Judgments and final orders may be obtained on motion, by sureties against their principals (a) sureties against co-sureties, for recovery of money due them on account of payments made by them as such; by clients against attorneys (b) plaintiffs in execution against sheriffs, constables and other officers (c) for the recovery of money or property collected for them and damages, and in all other cases specially authorized by statute."³¹⁶

64, 66 (1875). Indeed, the record must contain all the material facts necessary to entitle the plaintiff to the summary remedy. See *Enloe v. Reike*, 56 Ala. 500, 503, (1876); *Yancey v. Hankins*, Minor 171 (Ala. 1823).

³⁰⁸ *Brown v. Wheeler*, 3 Ala. 288 (1842).

³⁰⁹ *Palmer v. Fitts*, 51 Ala. 489 (1874).

³¹⁰ See *Chandler v. Vandegrift Shoe Co.*, 94 Ala. 233, 235, 10 So. 353, 353 (1891).

³¹¹ KY. CODES (Carroll, 1927) c. 5, § 444.

³¹² KY. STAT. (Carroll, 1922) § 1689.

³¹³ KY. CODES (Carroll, 1927) c. 5, § 449.

³¹⁴ *Ashcraft v. Bowling*, 193 Ky. 31, 234 S. W. 945 (1921).

³¹⁵ See *Hall v. Commonwealth*, 71 Ky. 373, 382 (1871); *Whitaker v. Holcomb*, 210 Ky. 836, 837, 276 S. W. 973, 974 (1925).

Here, although written pleadings are not required, a rule of strict construction seems to prevail.³¹⁷ Moreover, the remedy is denied where the defendant's verified answer sets up an issue of fact.³¹⁸ This would seem to be an adoption of the rule usually found in the broader type of summary judgment.

Tennessee. Tennessee presents another example of the Kentucky type of summary proceedings. It also includes within its scope actions against certain designated officers and against sureties and indorsers.³¹⁹ There is a dearth of adjudications on the subject.

West Virginia. In addition to the remedy by way of summary proceeding in contract actions described above, West Virginia provides for judgment on motion in actions on official bonds.³²⁰ The separation of this provision from the former is further indication of the difference between the two types of procedure.

Missouri. The Missouri statute is worthy of consideration merely by virtue of a provision for judgment by motion in actions by sureties against principals for reimbursement after adverse judgment.³²¹ Under the modern third party notice device, the necessity for this is perhaps non-existent.³²²

Our long and slow journey through the summary procedure rules and statutes of the British Empire and the United States is now completed. It will serve to show that there still exists, to a considerable extent, the ancient hesitation³²³ to press a defendant in a law suit to prompt action. Most of the cases in our courts of general jurisdiction which go to judgment eventually result in judgments for the plaintiff.³²⁴ It results, there-

³¹⁶ ARK. DIG. STAT. (Crawford and Moses, 1921) c. 102, art. iv, § 6250.

³¹⁷ *Ibid.* § 6254; see *Prairie Creek Coal Mining Co. v. Kittrell*, 107 Ark. 361, 362, 155 S. W. 496, 497 (1913); *Cooley v. Lovewell*, 95 Ark. 567, 568, 130 S. W. 574, 574 (1910).

³¹⁸ *Shackleford v. Ford*, 172 Ark. 527, 290 S. W. 43 (1927); *Davies v. Patterson*, 132 Ark. 484, 201 S. W. 504 (1917).

³¹⁹ TENN. ANN. CODE (Thompson's Shannon, 1918) c. 14; cf. *Phillips v. Landess*, 280 S. W. 694 (Tenn. 1926).

³²⁰ W. VA. CODE ANN. (Barnes, 1923) c. 121, § 5.

³²¹ MO. REV. STAT. (1919) c. 116, § 12697.

³²² See (1927) 36 YALE L. J. 712.

³²³ Compare the *essoins* allowed the defendant in early practice. 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1923) 103, 104, 475; 3 *ibid.* 623-627; 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1899) 562-3; BIGELOW, HISTORY OF PROCEDURE IN ENGLAND (1830) 230 *et seq.*

³²⁴ Thus the recent studies in court administration conducted by the Yale School of Law indicate that ten judgments are entered for plaintiffs to every one for defendants. Even in the contested cases the proportion is three to one in favor of the plaintiff. See Clark, *Fact Research in Law Administration* (1928) 2 CONN. B. J. 211, 218, 225, Tables "A" and "C." The results in contested cases in New York City are similar. See JUDICIAL

fore, that the delay is, for the most part, at the expense of the one who, by the law of probabilities, is the more deserving of the parties. To the extent that our courts are permitting avoidable delay, to that extent are they denying justice.

The reluctance to force defendants to judgment appears in the restricted scope of the summary judgment. Only in Indiana and Virginia is it available generally in civil actions. In the former jurisdiction it is a weak and ineffective provision which does not embrace the handing down of final judgment. In the latter, it has not the direct forcefulness of procedure which accompanies the English type of summary judgment. In all other jurisdictions, the kinds of action in which it may be employed are carefully specified. The Ontario and Connecticut rules are, however, sufficiently broad to cover, in all probability, the actions where the remedy may be most effectively used. In view of the customary detailed description of the actions in which the procedure is available it is interesting to note the brevity of the provisions suggested by the American Judicature Society in its model rules for "Judgment upon Discovery." This is available in actions: "(1) Where the plaintiff's claim is for a liquidated sum; (2) By a landlord against his tenant for the possession of real property, with or without a claim for rent or mesne profits; (3) In the recovery of specific chattels."³²⁵ Only the Ontario rules include all these actions thus briefly described although the Connecticut rule is in other respects more extensive than either.

It is true that the motion for summary judgment may on occasion be made an instrument of delay. If it is made in an action where its denial is to be expected, some time must necessarily be consumed in disposing of it before the case can proceed in ordinary course. This is the justification for refusing to permit it in cases of unliquidated claims. Against this it may be urged, however, that, since the option of moving for the judgment lies with that party ordinarily most anxious to proceed with the case, the danger of inexcusable delay is not great. Moreover the procedure will result in any event in a clarification of the issue in dispute which should tend to promote an adjustment of the dispute between the parties or a simpler trial of the issues. It is possible, therefore, that a less complex and more desirable rule would permit of its use in all civil actions. The future experience with the remedy in jurisdictions where

STATISTICS OF THE WORK OF THE SUPREME COURT OF NEW YORK IN THE FIRST JUDICIAL DEPARTMENT (1925) 26; JUDICIAL STATISTICS OF THE WORK OF THE SUPREME COURT OF NEW YORK IN THE FIRST JUDICIAL DEPARTMENT (1926) 26; JUDICIAL STATISTICS OF THE WORK OF THE SUPREME COURT OF NEW YORK IN THE FIRST JUDICIAL DEPARTMENT (1927) 26.

³²⁵ AM. JUD. SOC. BULL., *supra* note 1.

it is more freely permitted may be watched with interest to observe whether further extension is desirable.

Our procedural rules have been designed in large part to avoid harsh and drastic measures against litigants. In many situations this purpose is fair and sound. The parties should not be denied their day in court by mere technical objections. We should not overlook, however, the objective towards which those rules should be directed, that of a simple, orderly and prompt presentation of the substantive issues in dispute between the parties. The strength of the summary procedure is that it achieves that objective in many cases. The speed of the procedure is desirable, but still more to be emphasized is its simplicity and directness in bringing out the real dispute.³²⁶ Some may think of it as in part a return to the special pleading of the common law. It is, however, more than that. Like the "summons for direction" before the masters in chancery in English procedure³²⁷ it leads to a discovery of the issues under the direct control of the court and with the penalty of a final disposition of the case if the issues are not disclosed. We may well prophesy for it a more important position in future practice systems than merely that of a prod to delinquent debtors.

³²⁶ Hence a rule should provide a means whereby issues of law, arising from the affidavit, may be passed upon the motion and final judgment be entered for *either* the plaintiff *or* defendant. Compare the Connecticut rule, *supra* p. 441.

³²⁷ For the English procedure see Judicature Act, Order XXX, Rule 2 and Order LV, Rule 15, ANNUAL PRACTICE (1928) 485, 1097; 1 YEARLY PRACTICE (1928) 434, 1076; ROSENBAUM, *op. cit. supra* note 43, at 74 *et seq.*; Higgins, *English Courts and Procedure* (1924) 7 AM. JUD. SOC. J. 185, 204; *cf.* AM. JUD. SOC. BULL., *supra* note 1, arts. 19 (1), 45; CLARK, *op. cit. supra* note 147, at 6, 373.