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SUMMARY JUDGMENT

BERNARD L. SHIENTAG†

THE charge is frequently made that the reformer is impractical. That charge can hardly be said to attach to those who took the lead in the adoption and extension of the rules providing for summary judgment in this state. It is the consensus, that the remedy of summary judgment has demonstrated its worth as a prompt, business-like and inexpensive method of disposing of a substantial amount of litigation. There is no more effective weapon in the arsenal of legal administration. For a sitting judge to write on the law of summary judgment, is somewhat in the nature of a hazardous undertaking. The writer knows however, that he can rely on the generosity of the bar to overlook errors that are bound to creep into any extra-judicial discussion. Indeed, some find their way into formal judicial pronouncements. That must be so, in the very nature of things. The day that any judicial officer feels an incapacity on his part to make a mistake, marks the end of his usefulness on the bench. We are beginning to appreciate the significance of what Charles James Fox termed, "the glorious uncertainty which always attends the law."

The story, now a commonplace, is told of Lamb's reply to Coleridge's question, "Charles, did you ever hear me preach?"—"I never heard you do anything else." Mindful of the implications of this story, the writer feels nevertheless, that a judge's viewpoint, particularly on matters of practice and procedure, expressed more freely and adequately than through the circumscribed medium of judicial opinions, may be of service to his brethren at the bar. It is a good thing now and then to descend from airy judicial stilts, and thrust aside "the high, mysterious brow" which judicial learning is apt to wear, especially as reflected in the Official Reports.

The story is told of Baron Parke, that on one occasion a legal friend of his was ill and Parke went to his bedside, taking with him a special demurrer, which had been submitted to him. "It was so exquisitely drawn," he said, "that he felt sure that it must cheer the patient to read it." Legend has it that once "he was summoned to advise the Lords, and in the midst of the argument was suddenly seized with a fainting fit. Cold water, hartshorn and other restoratives were applied without effect. At length an idea occurred to one of his brethren who well knew his peculiar temperament and he immediately acted on it. He rushed into the library, seized a large musty volume of the old statutes, came

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back and applied it to the nostrils of the patient. The effect was marvelous. He at once opened his eyes, gave them a slight rub, and in a few seconds he was well as ever."[1] To expect an article on summary judgment to have any such extraordinary and unnatural effect, would be futile.

The History of the Summary Judgment Rule

The history of the remedy of summary judgment in this country and in Europe has been fully covered elsewhere.[2] The rule, as now in force in this state, originated in England in 1855 and was amplified there in 1873. In 1912, it was adopted in New Jersey. Since 1885, when, in a limited form it was recommended by David Dudley Field, there had been a sporadic agitation for its adoption in this state. Finally, on the recommendation of the Convention to Formulate Rules of Civil Practice, Rule 113, providing for summary judgment, was adopted, and went into effect October 1, 1921.[3]

The end sought to be accomplished by this rule, was to do away with the delay and expense entailed upon the enforcement of a legal claim, where denials were interposed which, although sufficient on their face, were actually sham and feigned and in reality raised no genuine, triable issue of fact.

The rule as first adopted, was narrow in scope. It read 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 defense 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."

It remained without change until 1932 when, under the leadership of Judge Edward R. Finch, then Presiding Justice of the Appellate Division, First Department, its scope was extended to include many additional types of actions. By that amendment, summary judgment was allowed in an action (1) to recover a debt or liquidated demand arising on a contract, express or implied, in fact or in law, sealed or not sealed; (2) to recover a debt or liquidated demand arising on a

1. MANSON, THE BUILDERS OF OUR LAW 34.

2. See the authorities collected in Cohen, *Summary Judgments in the Supreme Court of New York* (1932) 32 COL. L. REV. 825, 830; Clark & Samenow, *The Summary Judgment* (1929) 38 YALE L. J. 423.

3. For the history of this movement see Saxe, *Summary Judgments in New York* (1934) 19 CORN. L. Q. 237.

judgment for a stated sum; (3) on a statute where the sum sought to be recovered is a sum of money other than a penalty; (4) to recover an unliquidated debt or demand for a sum of money only, arising on a contract express or implied in fact, or in law, sealed or not sealed, other than for breach of promise to marry; (5) to recover possession of a specific chattel or chattels with or without a claim for the hire thereof or for damages for the taking or detention thereof; (6) to enforce a lien or mortgage; (7) for specific performance of a contract in writing for the sale or purchase of property, including such alternative and incidental relief as the case may require; (8) for an accounting arising on a written contract, sealed or not sealed.

With respect to subdivisions 3, 4 and 5, if no issue of fact were raised other than the amount due, the court was authorized to order an assessment, to determine the amount due, before a referee, by the court alone, or by the court and jury, whichever should be appropriate.[4] With respect to subdivisions 6, 7 and 8, the court was authorized, if there were no issue of fact, to render an interlocutory judgment, and thenceforth the action was permitted to proceed in the ordinary course.

It is significant, that in the decade which elapsed between the adoption of the rule and its first amendment, both bench and bar came to look upon the summary remedy as an integral part of the law. While the original enactment was fought by many who saw in it an encroachment upon the ancient right of trial by jury, the amendment encountered practically no opposition.

Under the first amendment, the defendant was still left without recourse to a summary remedy, even though he could show that plaintiff's cause of action, while good on its face, did not in reality present a triable issue. Rule 113 was further amended in 1933, so that the defendant was permitted to take advantage of the summary procedure, on the basis of a defense as well as a counter-claim. As the rule now stands, a defendant is permitted to move for summary judgment in all cases in which the plaintiff could apply for relief. In that event, the plaintiff is required to show by affidavit or other proof, that his complaint presents a triable issue of fact, in the same manner that the defendant is required to do, if the genuineness of his answer is attacked.

4. For an analysis of the amended rule, the following articles by Judge Edward R. Finch are extremely valuable: 4 NEW YORK STATE BAR ASSOCIATION BULLETIN 264; MASS. L. Q. February 1933, p. 15; 19 A. B. A. J. 504; 17 JOURNAL AMERICAN JUDICATURE SOCIETY 180. The explanation for the redundancy found in the amended rule, appears in the article in the Massachusetts Law Quarterly. An interesting question has arisen under Subdivision 2 of the amended rule in connection with the right to summary judgment on a foreign judgment where the amount thereof is in terms of foreign currency. The court at Special Term ordered a reference to fix the amount due in American dollars. Delaney v. Strassburger, N. Y. L. J., Aug. 2, 1934, at 315. An appeal is now pending in the Appellate Division, First Department.

In addition, a defendant may proceed under the amended rule in any action, even if not included within the classes enumerated in subdivisions 1-8, if his defense, sufficient as a matter of law, is founded upon facts established *prima facie* by documentary evidence or official record. In such case the plaintiff, to defeat the motion, is required to show facts "sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record."[5] While the defendant waited long for relief, when finally it came, he was given a wider latitude in moving for summary judgment than the plaintiff.

The present rule applies to contracts implied in law as well as in fact.[6] The old cases holding that the damages must be liquidated and certain, are no longer law. As Judge Finch has pointed out, at common law the assessment of damages, whether liquidated or unliquidated, was never referable as of right to a jury.[7] Now, if a case comes under the rule, and the only question is the amount of damages, the motion is granted and an assessment ordered.[8] "The defendant, of course, will be entitled to notice of the assessment of plaintiff's damages and may appear and cross-examine plaintiff's witnesses and offer testimony upon the question of damages solely."[9]

If no triable issue is raised in an action to foreclose a mortgage, the exact amount due may be determined before a referee appointed to compute.[10] In many cases the court makes the computation, so that a reference becomes unnecessary, and final judgment of foreclosure and sale can be entered without delay. An action for replevin comes under the amended rule.[11] An action for conversion does not.[12] If the tort is waived and the complaint proceeds on implied contract, the rule may

5. See Rule 113, Rules Civil Practice (1921) as amended in 1933. See also Finch, *Summary Judgment Procedure* (1933) 19 A. B. A. J. 504, 508.

6. Lee v. Graubard, 205 App. Div. 344, 199 N. Y. Supp. 563 (1st Dep't 1923), overruling, Poland Export Corp. v. Marcus, 204 App. Div. 302, 198 N. Y. Supp. 5 (1st Dep't 1923).

7. See Finch, *supra* note 5, at 507, and cases there cited. See also McClelland v. Climax Hosiery Mills, 252 N. Y. 347, 169 N. E. 605 (1930).

8. International and Industrial Securities Corp. v. Jamaica Jewish Center, 237 App. Div. 738, 263 N. Y. Supp. 840 (1933); Fuller v. American Surety Co., 153 Misc. 432, 275 N. Y. Supp. 113 (App. Term 1st Dep't 1934).

9. See Gise v. Brooklyn Society, 236 App. Div. 852, 260 N. Y. Supp. 787, 789 (2d Dep't 1932); Aiken Mills v. Boss Mfg. Co., 238 App. Div. 605, 265 N. Y. Supp. 555 (1st Dep't 1933).

10. Pellino v. 3232 Hull Ave. Realty Corp., 237 App. Div. 759, 264 N. Y. Supp. 214 (1st Dep't 1933).

11. Rule 113, subd. 5, Rules Civil Practice (1921); Lightolier Co. v. Del Mar Club Holding Co., Inc., 237 App. Div. 432, 262 N. Y. Supp. 32 (1st Dep't 1933), *Aff'd*, 263 N. Y. 588, 189 N. E. 711 (1933).

12. Formel v. National City Bank, 152 Misc. 275, 273 N. Y. Supp. 817 (App. Term 1st Dep't 1934); Gilbert v. Gotham Credit Corp., 152 Misc. 598, 273 N. Y. Supp. 815 (App. Term 1st Dep't 1934).

be invoked.[13] An action in conversion for damages for unlawful repossession of an automobile, is not one to recover possession of a specific chattel, as provided in subdivision 5, so as to warrant summary judgment.[14] Under subdivision 8, summary judgment may be granted for an accounting only if it arises on a written contract.[15] It may embrace actions for accounting arising out of express trusts other than those of a testamentary nature.[16] It may not be granted where the cause of action is based upon negligence, misfeasance or malfeasance.

Since the Civil Practice Act by Sections 248 and 355, relieves a defendant from verifying an answer in an action for a penalty, such an action was specifically excluded from the scope of the rule. (Subdivision 3). An interesting question arises in connection with an action under Section 51 of the Civil Rights Law for violation of the right of privacy. The writer held that summary judgment would not lie in such an action, because, while it may not be for a penalty, it is based upon a wrongful act which is punishable as a misdemeanor.[17] Another justice at Special Term held otherwise.[18]

Rule 113 No Violation of Right to Trial by Jury

Two early cases disposed of the contention that Rule 113 operated as a denial of the right to trial by jury. In *General Investment Co. v. Interborough Rapid Transit Co.* the court said:

"The argument that Rule 113 infringes upon the right of trial by jury guaranteed by the Constitution cannot be sustained. The rule in question is simply one regulating and prescribing procedure, whereby the court may summarily determine whether or not a *bona fide* issue exists between the parties to the action. A determination by the court that such issue is presented requires the denial of an application for summary judgment and trial of the issue by jury at the election of either party. On the other hand, if the pleadings and affidavits of plaintiff disclose that no defense exists to the cause of action, and a defendant, as in the instant case, fails to controvert such evidence and establish by affidavit or proof that it has a real defense and should be permitted to

13. Bishop v. Spector, 150 Misc. 360, 365, 269 N. Y. Supp. 76, 81 (Sup. Ct. 1932).

14. Gilbert v. Gotham Credit Corp., 152 Misc. 598, 273 N. Y. Supp. 815 (App. Term 1st Dep't 1934).

15. Bimberg v. Unity Coat & Apron Co., 151 Misc. 442, 220 N. Y. Supp. 578 (Sup Ct. 1933).

16. City Bank Farmers Trust Co. v. The Charity Organization Society of the City of New York, 238 App. Div. 720; 265 N. Y. Supp. 267 (1st Dep't 1933), *aff'd*, 264 N. Y. 441, 191 N. E. 504 (1934); Klein v. Horowitz, 240 App. Div. 495, 270 N. Y. Supp. 834 (1st Dep't 1934). See Finch, *Summary Judgment Procedure* (1933) 19 A. B. A. J., 504, 508.

17. Perro v. New Metropolitan Fictions, Inc., N. Y. L. J. Oct. 20, 1932, at 1623.

18. Luckner v. Association Sports Clubs, Inc., N. Y. L. J. Aug. 9, 1932, at 492.

defend, the court may determine that no issue triable by jury exists between the parties and grant a summary judgment."[19]

In *Hanna v. Mitchell,* it was said:

"It is not the object of this rule to deprive any one who has a right to a jury trial of an issue of fact, but to require a defendant, when it is claimed that in fact he has no honest defense and no *bona fide* issue, to show that he has at least an arguable defense, that he has not merely taken advantage of a technicality in the form of pleading for the purpose of delaying the enforcement of an honest claim to which in fact he has no colorable defense. The court does not try the issues but ascertains whether in fact there is an issue. . . . As we have already stated, the requirement that an issue of fact in the actions enumerated in section 425 must be tried by a jury, does not deprive the court of the power to ascertain whether there is in truth an issue of fact to be tried. To say that a false denial, which defendants are unable to justify, must nevertheless put the plaintiff to his common-law proof before a jury, although the result would be a directed verdict in plaintiff's favor as a matter of law, is to exalt the shadow above the substance."[20]

Difference between Summary Judgment and Motion To Strike out as Sham

Despite earlier cases taking a more liberal view, it soon became settled law in this state that the general issue could not be stricken out as sham; that a verified pleading could not be stricken out as sham, if it contained a denial of any material allegation of the complaint, although shown by affidavits to be false; and that an answer was not frivolous unless it appeared on mere inspection to be bad. An issue raised by *false affirmative defense* could be tested by a motion to strike out as sham, but an issue raised by a *false denial* could not. A denial of knowledge or information sufficient to form a belief would, in a proper case, authorize the granting of a judgment against the defendant, as presumptively false, while a denial that was actually false was immune from attack.[21]

These, it was pointed out in a leading case:

"were distinctions that seem to lack substance, and to be contrary to the intent and purpose of code pleading, which was to do away with the technical and artificial issues of the common law system, and substitute a system of pleading based upon a statement of the facts of the cause of action, and truthful denials thereof or defenses thereto. A fictitious denial, the effect of which

19. 235 N. Y. 133, 142, 143, 139 N. E. 216, 220 (1923). See also Fidelity & Deposit Co. v. United States, 187 U. S. 315, 319-321 (1902); *Ex Parte* Peterson, 253 U. S. 300, 309 (1920).

20. Hanna v. Mitchell, 202 App. Div. 504, 517, 518, 196 N. Y. Supp. 43, 52 (1st Dep't 1922), *aff'd,* 235 N. Y. 534, 139 N. E. 724 (1923).

21. Wayland v. Tysen, 45 N. Y. 281 (1871); Thompson v. Erie R. R. Co., 45 N. Y. 468, (1871); Cook v. Warren, 88 N. Y. 37 (1882); Dahlstrom v. Gemunder, 198 N. Y. 449, 92 N. E. 106 (1910); Kirschbaum v. Eschman, 205 N. Y. 127, 98 N. E. 328 (1912).

was merely intended to force the plaintiff to prove his cause before a jury, has no place in the Code system of pleading. It was a relic of the artificial common-law pleading which had persisted because of the resistance of the courts to the expressed will of the Legislature. With the intention of doing away with this technicality and fruitful source of delay and expense to the enforcement of a just and legal claim to which there was no defense in fact, the convention adopted rules 113 and 114."[22]

Under the old rule, pleadings, generally speaking, were taken at their face value, but under the rule we are considering "they are appraised at their real value, and may be challenged by affidavits, and must then be sustained by proof by affidavits of the actual facts."[23]

Practice on Motions for Summary Judgment

Motions for summary judgment are made on the usual five days' notice of motion. There is no occasion to bring on the application by an order to show cause. If the ordinary notice of motion is given, the answering affidavits are generally not served until the return day of the motion. In that event, it is senseless for the moving party to attempt to argue the motion until he has carefully examined the affidavits in opposition. Even if he desires to submit without argument, he should likewise examine the papers in opposition in order that he may apply, if necessary, for leave to serve a reply affidavit.

If the moving party desires to avail himself of the answering affidavits before the return day of the motion, he should, under Rule 64, give his opponent ten days' notice of motion, and in his notice set forth his demand that answering affidavits be served at least five days before the hearing. If not so served, they will not be allowed to be filed or read in opposition, unless the court, for good cause shown, shall otherwise direct. When the answering affidavits are served within the time prescribed by the Rule, the moving party may serve reply affidavits at least two days before the hearing.

It is regrettable that some attorneys ignore the requirements of Rule 64, and even when given the longer notice of motion, refrain from serving answering affidavits until the return day and then rely on the liberality of the court to allow them to be filed. Sooner or later such tactics will result in disaster. The rule is a reasonable one and should

22. Dwan v. Massarene, 199 App. Div. 872, 877, 878, 192 N. Y. Supp. 577, 581 (1st Dep't 1922). See also General Investment Co. v. I. R. T. Co., 235 N. Y. 133, 137, 139 N. E. 216, 218 (1923); Lowe v. Plainfield Trust Co., 216 App. Div. 72, 76, 215 N. Y. Supp. 50, 54 (1st Dep't 1926). On the subject of the rule making power of the Supreme Court, see General Investment Co. v. I. R. T. Co., 235 N. Y. 133, 143, 139 N. E. 216, 220 (1923); Hanna v. Mitchell, 202 App. Div. 504, 513, 196 N. Y. Supp. 43 (1st Dep't 1922), *aff'd*, 235 N. Y. 534, 139 N. E. 724 (1923); *cf.* Riglander v. Star Co., 98 App. Div. 101, 104, 90 N. Y. Supp. 772 (1st Dep't 1904), *aff'd*, 181 N. Y. 531, 73 N. E. 1131 (1905).

23. Palermo v. Northwestern Nat. Ins. Co., 201 N. Y. Supp. 106, 107 (Sup. Ct. 1923).

be complied with, in the absence of compelling reasons to the contrary.

In an early case, it was observed that upon a motion for summary judgment under Rule 113, the practice of submitting successive affidavits piecing and stringing out the assumed right of summary judgment, resolves itself into a trial by affidavit, creates a condition which ought not to obtain, and is, therefore, of doubtful propriety.[24] Without being dogmatic, it may safely be asserted, that if it is necessary to reply to the opposing affidavit, the chances are that a triable issue of fact is present, even if, to use an expression of Lord Esher, the defense is "crumbly." In many cases, however, a reply affidavit serves a useful purpose. As will be pointed out more fully later, the moving party in his original affidavit is called upon to set forth all the facts showing that he has a good cause of action and that there is no real defense thereto. The practice of withholding some essential facts for reply, is frowned upon by the courts, for generally speaking, the opposing party is not called upon, indeed he may not have the opportunity, to answer new matter set up in a replying affidavit.

In anticipation of possible applications under Rule 113, both sides should consider the advisability of proceeding promptly with necessary depositions, examinations before trial and with appropriate motions for discovery and inspection and bills of particulars. It may be necessary, under certain conditions, to resort to Rule 120, of the Rules of Civil Practice making provision for the appointment of a referee, to take the deposition of a person who has refused to make an affidavit of the facts believed to be within his knowledge, and whose affidavit is necessary for a party who intends to make or to oppose a motion in a court of record.

There is no limitation of time for making a motion for summary judgment. When there is an intention to limit the time, it is expressly stated in the Rule. No limitation is found either in Rule 112 providing for judgment on the pleadings, or in Rule 113. With respect to the former, it has been held that there is no limitation of time within which to make the motion.[25] The same is true with respect to Rule 113.

"Motions such as these" it has been said, "should be encouraged and should not be barred by unnecessary limitations of time within which they should be made. It is in the interest of litigants to get all preliminary motions out of the way as soon as practicable, and the general motion for that purpose, existing in other jurisdictions, might well be followed in this state. . . There is, of course, the omnibus motion (Civ. Prac. Act. § 117), but that is not the same as the general motion referred to. There is still too much of the ancient atmosphere about our practice."[26]

24. See Twigg v. Twigg, 117 Misc. 154, 156, 191 N. Y. Supp. 781, 782 (Sup. Ct. 1921), *aff'd*, 202 App. Div. 729, 193 N. Y. Supp. 956 (2d Dep't 1922).

25. Richardson v. Gregory, 219 App. Div. 211, 219 N. Y. Supp. 397 (4th Dep't 1927), *aff'd*, 245 N. Y. 540, 157 N. E. 849 (1927).

26. Saunders v. Delario, 135 Misc. 455, 456, 238 N. Y. Supp. 337, 338 (Sup. Ct. 1930).

A motion in the Municipal Court of the City of New York, by the plaintiff for summary judgment, supported by affidavits thereby verifying the cause of action, may be granted even if the complaint is not verified.[27] On a motion for summary judgment, it is improper to make findings of fact and conclusions of law. There is "no justification therefor until after a trial of the issues by the court (Civ. Prac. Act, § 440)."[28] The court has the power to order notes and documents to be impounded subject to its further order.[29] When the motion is granted, the entry of both an order and a judgment is good practice.[30] If upon a motion made on behalf of a defendant, it should appear that the plaintiff is entitled to judgment, the judge hearing the motion may award judgment to the plaintiff although he has not made a cross motion therefor. (Rule 113, as amended.)

Our Rule 113 did not adopt the provision of the New Jersey Rule 60 (patterned on English Order XIV), which reads: "Leave to defend may be given unconditionally, or upon such terms as to giving security, or time, or mode of trial, or otherwise, as may be deemed just." A motion for summary judgment, therefore, must be either granted or denied without conditions.[31] It cannot be denied on condition that the parties consent to an immediate trial, although proposals which have been made to give the court discretion to impose such a condition, merit careful consideration. Nor has the court any power to grant the motion with a proviso that the defendent deposit in court the amount sued for, or furnish a surety company bond. "The function of the remedy of summary judgment is to grant forthwith judgment in those cases where no triable issue is raised, and it cannot be extended to cover cases in which, though a triable issue is raised, the parties are 'protected' by the filing of a surety company bond."[32] Upon the granting of a motion for summary judgment, the court has the power to stay execution as in the case of a judgment after trial. The usual practice is to allow a stay of from five to ten days in contested motions, and two or three days where the motion has been granted on default.[33]

27. Mosca v. Parker-Aeolus Inc., 130 Misc. 186, 223 N. Y. Supp. 684 (Mun. Ct. 1927).

28. Brescia Construction Co. Inc. v. Walart Construction Co., Inc., 238 App. Div. 360, 367, 264 N. Y. Supp. 862, 871 (1st Dep't 1933).

29. General Investment Co. v. Interborough R. T. Co., 235 N. Y. 133, 144, 139 N. E. 216, 220 (1923).

30. See Weinberg v. Goldstein, 226 App. Div. 479, 480, 235 N. Y. Supp. 529, 531 (4th Dep't 1929); Donnelly v. Bauder, 217 App. Div. 59, 62, 216 N. Y. Supp. 437, 440 (4th Dep't 1926).

31. Gibson v. Standard Automobile Co., 208 App. Div. 91, 203 N. Y. Supp. 53 (1st Dep't 1924).

32. 60 West Fifty-third St. Corp. v. Haskel, 231 App. Div. 62, 64, 246 N. Y. Supp. 360, 363 (1st Dep't 1930). See also Gibson v. Standard Automobile Co., 208 App. Div. 91, 203 N. Y. Supp. 53 (1st Dep't 1924).

33. See *e.g.*, General Investment Co. v. Interborough R. T. Co., 235 N. Y. 133, 144, 139 N. E. 216, 220 (1923).

Effect of Serving an Amended Answer after Motion is Made

Originally, it was the practice to mark a motion for summary judgment off the calendar, if it appeared that after the motion was made, an amended answer was served in time, regardless of the character of the amendment. Inevitably, this led to abuse in obstructing the collection of just claims. The Appellate Division, in *Gordon Corp. v. Cosman,* severely condemned these tactics and held that to defeat the pending motion, the amendment must be something substantial and real, and not a mere change in form. The court said:

"The mere service of a new pleading, if it be merely colorable, will not of itself suffice. It becomes necessary accordingly to examine its allegations to determine whether it is a genuine and sincere amended answer or was interposed in bad faith merely restating in a different form allegations of fact shown to be sham when set forth in the earlier pleading. If the latter, inasmuch as it is substantiated by no accompanying proof of fact, it will not be held to be a genuine amended answer.[34]

"The question before us is whether or not such tactics can prevail to impede the orderly administration of justice. Was the court required to regard seriously the new unsupported pleading and stamp it as tendering, in the counterclaim, a real issue to be tried out? Must the forms of law be gone through with, and the time of the court and counsel wasted, merely because a frivolous separate defense, which has been proven to be sham, is turned, in an amended answer, into an unsupported counterclaim? If defendant expected to have this counter claim seriously considered as an honest pleading he should have accompanied it with affidavits tending to support the affirmative averments, thereby showing a triable issue."[35]

General Application of the Rule. What Is a Triable Issue?

In an early case in England, under Order XIV, on which the original Rule 113 was patterned, Mr. Justice Manisty observed, "that it was most important that Order XIV, which, if properly acted on, was most beneficial to the suitors by saving unnecessary litigation, should not be perverted to the trial of disputed questions of fact upon affidavits. He had the greatest distrust of affidavits upon disputed questions of fact, and would never consent to try such questions upon affidavit. The affidavits were contradictory, and he was struck with the remark of one of the Judges that 'there must be perjury on one side or the other.' How was it to be tried on which side was the perjury? How could that be tried upon affidavits? Upon such a conflict of affidavits it was only just that

34. Gordon Corp. v. Cosman, 232 App. Div. 280, 283, 249 N. Y. Supp. 544, 547 (1st Dep't 1931).

35. *Id.* at 284, 249 N. Y. Supp. at 548.

the defendant should be allowed the opportunity of defending the action upon the merits, and that without any condition."[36]

Lord Halsbury wrote that the proceeding established by that order is "a peculiar proceeding, intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay."[37]

Lord Esher said that "the rule which had always been acted upon . . . in considering cases under Order XIV was that the summary jurisdiction conferred by that order must be used with great care. A defendant ought not to be shut out from defending unless it was very clear indeed that he had no case. . . . " The test he laid down was that if the defense was "so far plausible that it was not unreasonably possible for it to succeed if brought to trial, it ought not to be excluded."[38] Lord James in a comparatively recent case stated: "I think Order XIV is a very useful process indeed, but it has to be used with very great care and must never be used unless it is clear that there is no real substantial question to be tried."[39]

Our courts at the outset, adopted the view expressed in the English cases. The power under Rule 113, it was held, "must be exercised with care and not extended beyond its just limits. The court is not authorized to try the issue, but is to determine whether there is an issue to be tried. If there is, it must be tried by a jury."[40]

To justify summary relief "the court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried. . . . The remedy is to be administered in furtherance of justice."[41] In varying terms, the courts express the view that to constitute a triable issue, it must appear from facts adduced in the moving papers and answering affidavits that there is no "real defense,"[42] no "genuine or substantial issue created,"[43] no "substantial issue of fact."[44] Even if he has "an apparent defense, he should be allowed to defend."[45] How-

36. Saw v. Hakim, 5 L. T. R. 72, 73 (1888).

37. See Jones v. Stone [1894] A. C. 122, 124.

38. See Sheppards & Co. v. Wilkinson & Jarvis, 6 L. T. R. 13, 13 (1889).

39. Codd v. Delap, 92 L. T. R. 510 (1905).

40. Dwan v. Massarene, 199 App. Div. 872, 879, 192 N. Y. Supp. 577, 582 (1st Dep't 1922). See also, General Investment Co. v. Interborough R. T. Co., 235 N. Y. 133, 143, 139 N. E. 216, 220 (1923).

41. Curry v. Mackenzie, 239 N. Y. 267, 270, 272, 146 N. E. 375, 376, 376 (1925).

42. Commonwealth Fuel Co. v. Powpit Co. Inc., 212 App. Div. 553, 557, 209 N. Y. Supp. 603, 607 (2d Dep't 1925).

43. Gravenhorst v. Zimmerman, 236 N. Y. 22, 27, 139 N. E. 766, 768, (1923).

44. Metropolitan Life Ins. Co. v. Bank of U. S., 259 N. Y. 365, 368, 182 N. E. 18, 19 (1932).

45. General Investment Co. v. I. R. T. Co., 235 N. Y. 133, 139, 139 N. E. 216, 218 (1923).

ever, it must be "a *bona fide* defense to the action, one which he may be able to establish. It must be a plausible ground of defense, something fairly arguable and of a substantial character."[46]

"Phantom issues" will not suffice. A shadowy semblance of an issue is not enough to defeat the motion. "The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine or substantial, so that only the latter may subject a suitor to the burden of a trial."[47]

"Rule 113 of the Rules of Civil Practice would serve no purpose whatever if frivolous and transparently insufficient proofs and arguments such as have been brought forward here be held to create a triable issue. The already overcrowded trial term calendars would be cluttered up with phantom issues, the disposition of which would usurp and waste the time of the court. A defendant must show real and substantial facts 'sufficient to entitle him to defend' (Rule 113) if he is to avert summary judgment under these rules which were carefully devised to eliminate unnecessary delay and further the prompt administration of justice."[48]

We are, however, constantly warned not to grant summary relief, if conflicting affidavits are presented; that it would be an unwarranted use of the rule to pass on questions of credibility or weight of evidence. "It is quite evident that the statements in the affidavits are at variance with each other. It may be that at the trial some of the affiants will be unable to stand the test of cross-examination, a frequent result which has emphasized not only the danger of deciding issues of fact on affidavits, but the advisability of sending such issues to trial where the witnesses may be subjected to the test of cross-examination and their testimony scrutinized with care by the trial justice or the jury."[49]

Section 457a of the Civil Practice Act, providing that "the judge may direct a verdict when he would set aside a contrary verdict as against the weight of the evidence," should have no application to a motion for summary judgment.[50] Otherwise the judge, in effect, would be trying a case on affidavits, instead of allowing the witnesses to be subjected to the test of cross-examination.

Complicated Questions of Law

The presence of a difficult question of law, does not operate to defeat summary judgment.

46. Dwan v. Massarene, 199 App. Div. 872, 880, 192 N. Y. Supp. 577, 582 (1st Dep't 1922).

47. Richard v. Credit Suisse, 242 N. Y. 346, 350, 152 N. E. 110, 111 (1926).

48. Strasburger v. Rosenheim, 234 App. Div. 544, 547, 255 N. Y. Supp. 316, 320 (1st Dep't 1932).

49. Miner v. Reinhardt, 225 App. Div. 530, 534, 233 N. Y. Supp. 592, 595, 596 (1st Dep't 1929).

50. *Contra:* Seedgrower v. Jones, 223 N. Y. Supp. 785 (Sup. Ct. 1927).

"The theory of our amended rules and procedure was to simplify the practice. The demurrer was eliminated. Where the answer raises an issue the plaintiff cannot have judgment on the pleadings. And if in reality there be no issue of fact, as may be shown by affidavits, but only a question of law there is no way of having that question determined prior to the trial unless it may be done by virtue of rule 113. Certainly it can be disposed of with less delay under that rule than by waiting for the case to be reached for trial. I think where there is no question of fact involved that a motion for summary judgment under rule 113 may properly be considered even though an important question of law has to be determined."[51]

The Affidavits Generally

Affidavits to be used on a motion for summary judgment should be prepared with great care. They should be drawn, only after the case has been fully gone over with those familiar with the facts, and the important documentary evidence examined. It is most unwise to prepare such affidavits hastily, after a casual discussion of the facts. Not only may the affidavits so drawn fail to serve their purpose on the motion, but if the application for summary relief is denied, any misstatements in the affidavits, although made unintentionally, may count heavily against the client on the trial. When affidavits are prepared, that should always be kept in mind.

The affidavit should proceed in logical sequence. State whether the affiant is twenty-one or over—if not, give his exact age, his address, his present occupation and connection with the case. Then state clearly and concisely the facts, the evidentiary facts, not ultimate facts or conclusions, of which the affiant has personal knowledge. The fact that it is stated as a conclusion that the affiant has personal knowledge of the facts will not suffice. The facts as set forth in the affidavit must show that he has such knowledge. Time and again judges are obliged to ask themselves—what is there to show that the affiant has personal knowledge about the various things he is telling us? Let the affidavit follow substantially the same form as though the affiant were giving testimony in court. That is always the safe way to proceed.

Some affidavits remind one of jig-saw puzzles. The facts may all be there, but you have to search for the different pieces and put them together. If the court fails to find one of the scattered pieces, the attorney has himself to blame. Do not submit a memorandum on the law in the guise of an affidavit. It is futile to fill in, or seek to bolster up an affidavit weak on the facts, by the citation of legal authorities.

Every original document or instrument submitted on the motion,

51. Coutts v. Kraft, 119 Misc. 260, 261, 196 N. Y. Supp. 135, 136, 137 (Sup. Ct. 1922), *aff'd*, 206 App. Div. 625, 198 N. Y. Supp. 908 (2d Dep't 1923). But see Electric General Contract Corp. v. Thomas-Houston Electric Co., 10 L. T. R. 103 (1893).

should be marked as an exhibit.[52] The affidavit should recite that the original will be exhibited to the court and should identify the document, describing its character, giving its date and, if recorded, the liber and page number. Generally it is advisable to attach a copy, photostatic or otherwise, to the affidavit. It is important that the order disposing of the motion, recite all original documents exhibited to and considered by the court, in arriving at its determination. When this is not done, and the documents have not been marked, there is often a controversy on appeal, as to what papers were actually before the court.

Do not, in an affidavit give the contents of a paper, which presumably should be in your possession, without attaching the original, or a copy, or explaining why this cannot be done. Thus, do not say "In a letter addressed to me the defendant admitted," *etc.* Attach the letter or explain why you cannot do so. It is only if neither the original, nor a copy, is available that the contents of the paper should be stated. If the letter was addressed to a third party, state when, where and under what circumstances the affiant saw it, who now has the original, and what efforts were made to obtain the original or a copy.

The Moving Affidavit

The basis of summary judgment, is that the moving party have a good pleading, supported by his affidavit or that of any other person having knowledge of the facts, setting forth such evidentiary facts, if the motion is by plaintiff, as shall establish the cause of action and negative the defense interposed, or if by defendant, show that the denials or defenses are sufficient to defeat plaintiff. While the court is ever on the alert to find that sufficient facts are alleged to defeat the motion, it is most critical of the moving affidavit, and if that fails to comply in every way with the requirement of the Rule, the motion falls.

There is a specific requirement that the moving affidavit set forth evidentiary facts. That means just what it says; conclusions of fact, or ultimate facts will not suffice. If an allegation of the complaint is admitted by the answer, no verification thereof is necessary in the moving affidavit. The facts showing that there is a good cause of action as alleged in the complaint, must be set forth with particularity and by one having actual knowledge. Thus where delivery of merchandise sued for, is in issue, it will not do to state merely that the goods were delivered. Proof of delivery should be set forth either in the affidavit or by other documents. Not only must the particulars of the cause of action be set forth clearly and unequivocally, but it must be done by one who would be in a position to testify concerning them at a trial.

52. *Cf.* General Investment Co. v. Interborough R. T. Co., 235 N. Y. 133, 144, 139 N. E. 216, 220 (1923).

The courts have repeatedly emphasized this requirement:

"Plaintiff's affidavit is made by its attorney and not by a person having knowledge of the facts, and it does not state the matters which under rule 113 the affidavit is required to state.

"For these reasons, and in spite of the fact that the defendant fails to show any facts sufficient to entitle him to defend, the plaintiff's motion must be denied, but without costs and without prejudice to a new motion for the same relief."[53]

"Civil Practice Rule 113 permits summary judgment at times in favor of a plaintiff though material averments of his complaint have been traversed by the answer. To that end there must be supporting affidavits proving the cause of action, and that clearly and completely by affiants who speak with knowledge"[54]

" . . . The facts stated in the affidavit of the plaintiff or other person having knowledge of them who would be competent to testify to the facts upon the trial, must prove the cause of action stated in the complaint to be true. It is not enough to show that there might be a liability of the defendant to the plaintiff on other facts different from those alleged.

"We must bear in mind that the rule permits a summary and drastic remedy which can only be invoked by those who demonstrate that they are clearly entitled to the relief."[55]

So a moving affidavit was held insufficient where it repeated an allegation of the complaint "that by reason of the failure of the defendant to show title to the aforesaid premises free from material defect, the said loan was not consummated." This it was held was at best a statement of ultimate and not of evidentiary fact. What was the defect in title claimed to be material? The moving party should have stated it with particularity.

The moving affidavit in an action on a promissory note recited "That the said promissory note was taken and received by the plaintiff in the ordinary and usual course of its business prior to maturity and the plaintiff is the owner and holder of said note in due course." This it was held " . . . may be sufficient for a pleading, but in an affidavit for a summary judgment where a defense has been interposed of the nature here

53. Davison Coal Co. Inc., v. Interstate Coal & Dock Co., 193 N. Y. Supp. 883, 885 (Sup. Ct. 1921).

54. Curry v. Mackenzie, 239 N. Y. 267, 269, 146 N. E. 375, 375 (1925). See also, Lonsky v. Bank of U. S., 220 App. Div. 194, 221 N. Y. Supp. 177 (1st Dep't 1927). State Bank v. Mackstein, 123 Misc. 416, 417, 205 N. Y. Supp. 290, 291 (App. Term 1st Dep't 1924).

55. Hallgarten v. Wolkenstein, 204 App. Div. 487, 490, 491, 198 N. Y. Supp. 485, 487 (1st Dep't 1923); *cf.* Romine v. Barnaby Agency, Inc., 131 Misc. 696, 227 N. Y. Supp. 235 (Sup. Ct. 1928); Jacobs v. Korpus, 128 Misc. 445, 218 N. Y. Supp. 314 (App. Term 2d Dep't 1926); Davison Coal Co., Inc. v. Interstate Coal & Dock Co., 193 N. Y. Supp. 883 (Sup. Ct. 1921); Brescia Construction Co. Inc v. Walart Construction Co. Inc., 238 App. Div. 360, 264 N. Y. Supp. 862 (1st Dep't 1933) (failure to set forth evidentiary facts and to submit important papers held fatal).

pleaded, I believe further facts should affirmatively appear giving the name of the payee, whether the note was endorsed and discounted in good faith, the time of discounting, the value paid therefor and that it was received by the present alleged owner and holder thereof without notice of any infirmity in the instrument or defect in the title of the person negotiating it. In other words, a full and complete disclosure by the plaintiff of all facts should be presented to the court, showing the plaintiff's ownership and title to the note and negativing the defense interposed."[56]

Perhaps the mistake most frequently made in moving affidavits, is to hold back important facts substantiating the claim, intending, of course, to use them if necessary in a replying affidavit. It is part of the general tendency to conceal, rather than to reveal, the case or any more of it than is felt to be absolutely necessary. This may lead to unfortunate results if it is resorted to on application for summary judgment. Generally speaking, resort should be had to a reply affidavit: (1) where the answering affidavit sets up an issue not raised by the opponent's pleading or in conflict therewith; (2) where facts are set up in the answering affidavit, which the moving party could not reasonably anticipate, particularly when such facts are contradicted by documentary proof or matters of record.

One moving for summary judgment should be prepared to put his cards on the table, and to anticipate a defense which may be interposed. A typical instance is where the moving affidavit sets forth the bare facts of a sale and delivery of merchandise and non-payment. The answering affidavit sets up a sale by sample and that the goods delivered did not conform to the sample. The moving party in reply then submits documentary evidence showing satisfaction expressed by the vendee with the quality of the merchandise and asking for quotations on a re-order. In an action for money loaned, the loan and its non-payment are set forth in the moving affidavit. The answering affidavit states that no loan was ever made. Then the moving party in a replying affidavit attaches a letter from the defendant promising to pay if granted a little time. It frequently happens also, that a plaintiff suing on an assigned claim withholds the affidavit of the assignor from his original moving papers and submits it in reply. These are extreme instances, but typical. The practice is bad and dangerous. The Court may not grant leave to submit a reply affidavit on a motion of this character. The tendency is to discourage numerous cross-affidavits. Even if the reply affidavit is allowed, if new matter is included, it may be disregarded, unless it clearly appears that there has been an opportunity to answer the new matter. The mistake should not be made, of withholding important facts

56. Farmers Nat. Bank v. Williams, 117 Misc. 567, 569, 570, 192 N. Y. Supp. 40, 41 (Sup. Ct. 1921).

from the original affidavit. If for any reason that situation has developed, make sure that the record indicates that the opponent has had ample opportunity to reply to such new matter, and failed without explanation to avail himself of it. Above all, set forth all the documentary evidence in support of the motion. While the opposing party may explain away an admission of liability, it will have to be a plausible explanation, in order to satisfy the court.[57]

Belief of the Moving Party that There Is no Defense to the Action Or that the Action Has no Merit

Under the original Rule, it was required that the person having knowledge of the facts and making the affidavit in support of the motion should state therein "his belief that there is no defense to the action." When the Rule was amended so as to permit a defendant to move for summary judgment, it was required that an affidavit of the moving party or of any other person having knowledge of the facts be submitted, "together with the belief of the *moving party* either that there is no defense to the action or that the action has no merit as the case may be." Although the question has not yet been raised, I do not believe that the amendment contemplated any new requirement in this regard. However, in view of the change of language indicated, it might be well, where the supporting affidavit is made by a person other than a party, to incorporate not only the belief of the affiant that there is no defense to the action or that the action has no merit, but to attach an affidavit by the moving party himself, to the same effect. In any event, a statement setting forth this belief should be included in the moving affidavit. Where this has not been done, it has been held that the moving papers were insufficient, that the requirements of the rule were not met, and that the motion had to be denied.[58]

Try to follow the language of the Rule. While it has been held that the precise words of the Rule do not constitute a magic formula, and it is sufficient if they are set forth in substance,[59] there is no reason why there should ever be any controversy on this subject. Hardly a month passes without having this question raised in the Appellate Term. Surely, it is no great hardship to the bar, to use the language of the Rule, although the requirement seems to be merely one of form.

57. Saw v. Hakim, 5 L. T. R. 72, 72 (1888); Hong Kong & Shanghai Banking Corp. v. Lazard-Godchau of America Inc., 207 App. Div. 174, 201 N. Y. Supp. 771 (1st Dep't 1923), *aff'd*, 239 N. Y. 610, 147 N. E. 216 (1925).

58. First Trust & Deposit Co. v. Holt & Thomas Inc., 236 App. Div. 714, 258 N. Y. Supp. 1002 (4th Dep't 1932). See Bevelyn Realty Corp. v. Brooklyn Construction Co. Inc., 140 Misc. 74, 249 N. Y. Supp. 41 (App. Term 2d Dep't 1930).

59. 130 East 75th St. Corp v. Freeman, No. 3 c. c. Oct. 1934 (App. Term 1st Dep't) (holding that the precise language is unnecessary since there was substantial compliance).

Variance Between Pleading and Proof of the Moving Party

The moving party cannot prevail, if his pleading is defective or if the facts set forth in the moving affidavit do not support the allegations of the pleading. The facts set forth "must prove the cause of action stated in the complaint to be true. It is not enough to show that there might be a liability of the defendant to the plaintiff on other facts different from those alleged."[60] An action was brought to recover certain payments alleged to be due to the plaintiff under the provisions of a separation agreement dated November 1, 1929. The amended answer set up as a defense, a partial modification of the original agreement by a supplemental agreement dated May 28, 1931. Plaintiff moved to strike out this defense as sham and for summary judgment. This motion was denied. On appeal, the court held:

"The very persuasive argument of appellant's counsel would very likely lead to its logical conclusion had the complaint set up a cause of action based on this superseding supplementary agreement. But the cause of action alleged in the complaint cannot be the basis of a new and distinct cause of action set forth in the plaintiff's affidavits and result in a summary judgment not contemplated in the original pleadings. The fault lies with the pleader, and the remedy is only by amendment or a trial."[61]

In another case the complaint was based on an actual lease and not on any claim of attornment; the latter claim was urged in the moving affidavit and tended to contradict the claim made in the complaint itself. The court held:

"On a motion for summary judgment there must be a good complaint which is supported and proved by the affidavits submitted. As the record stands, there is a manifest variance between the pleadings and the proof."[62]

The court refused to amend the complaint to conform to the facts set up in the opposing affidavit.

While the foregoing represent the general rule, there are some cases in which typographical errors, technical or trivial defects in a complaint, have been disregarded on a motion for summary judgment, and the complaint amended to conform to the facts alleged in the affidavit. Where there was an obvious error in a date in the complaint, the plaintiff who moved for summary judgment, in connection therewith, asked to have the date corrected. The court granted the application and for the purposes of the motion for summary judgment directed that the date be deemed corrected.[63]

60. Hollgarten v. Wolkenstein, 204 App. Div. 487, 490, 491, 198 N. Y. Supp. 485, 487 (1st Dep't 1923).

61. Burgin v. Ryan, 238 App. Div. 122, 123, 263 N. Y. Supp. 242, 243 (2d Dep't 1933).

62. Max Rice Realty Co. v. V/G Sandwich Shop Inc., 239 App. Div. 472, 474, 267 N. Y. Supp. 863, 866 (1st Dep't 1933).

63. Schroeder v. Columbia Casualty Co., 126 Misc. 205, 213 N. Y. Supp. 649 (Sup. Ct. 1925).

In *McAnsh v. Blauner,* the court said:

"It appears without contradiction that the note was given pursuant to a written contract as part consideration for the purchase of real estate in Florida and that by the law of Florida eight percent is the legal rate of interest. The over-technical, dilatory and unsubstantial contention of the defendant that summary judgment should not be ordered because of failure to allege the law of Florida in the complaint merits not even passing consideration in a court of justice. We have no hesitation in considering this a typical case for amendment as of course under Section 105 of the Civil Practice Act and the complaint is deemed amended accordingly."[64]

In *Louis K. Liggett Co. v. Broadway John Corporation,* the plaintiff's affidavits showed the making of a lease of the building, except the store, and the failure to pay the accrued rent therein stipulated. The defendant sought "to justify its denial and its complete failure to show any vestige of a triable issue by the bald statement that because of the clerical mistake of the pleader in describing the lease as covering the entire building, when in fact it excluded the stores, it may delay the plaintiff until it corrects this trivial error by a new complaint." The court in granting summary judgment, held that "Section 105 of the Civil Practice Act provides that where a substantial right of any party shall not thereby be prejudiced, a mistake, omission, irregularity or defect must be disregarded. That rule should receive a liberal and common sense interpretation. In the exercise of the power thus conferred upon it, the court should give no countenance to such dilatory methods as have been attempted here by the defendant. We are justified in believing, from defendant's failure so to assert a defense, that none exists."[65]

It cannot be emphasized too strongly, however, that while the court may on a motion for summary judgment correct typographical errors, or obvious trivial mistakes in the pleadings of a moving party, it will not condone a variance between the pleading and the proof as set forth in the moving affidavit. So in *Wise v. Powell,* the court held that a motion for summary judgment was properly denied because "the reply failed to allege the affirmative defense of accord and satisfaction, which plaintiff's motion papers disclose as the basis of his claim for the denial to defendant of relief on the first and second counterclaims. . . . This defense is not open to the plaintiff, without an amendment of his reply."[66]

In a recent case in the Appellate Term, First Department, a complaint was framed on the theory of full performance of a contract. The supporting affidavit indicated that full performance was waived by a modification of the contract. The Court held that the complaint would not be amended to conform to the facts set forth in the moving affidavit

64. 222 App. Div. 381, 382, 226 N. Y. Supp. 379, 381 (1st Dep't 1928), *aff'd,* 248 N. Y. 537, 162 N. E. 515 (1928).

65. 220 App. Div. 195, 196, 221 N. Y. Supp. 189, 190 (1st Dep't 1927).

66. 216 App. Div. 618, 619, 215 N. Y. Supp. 693, 694 (4th Dep't 1926).

and reversed an order granting summary judgment.[67] It would therefore be advisable, if in preparing motion papers for summary judgment, a variance is found between the pleading and the facts, that the motion be deferred until the pleading has been amended.

The Answering Affidavit

On a motion for summary judgment "a defendant is under no burden to show that affirmative allegations in the defense are not sham when the attack on such allegations is made solely on the ground that they are insufficient in law."[68] So too, a defendant may rely on the insufficiency of the complaint or of the moving affidavit. If the complaint is defective, or if the moving papers fail to verify the cause of action alleged in the complaint by evidentiary facts, the defendant or the opposing party is not called upon to submit any answering affidavit.[69] In such a situation, even if the defendant submits an opposing affidavit, which is clearly insufficient to raise a triable issue, the motion will nevertheless be denied.

Rule 113, it has been held, "is not intended to shift the burden of proof. The Rule specifically requires a moving affidavit 'of the plaintiff or of any other person having knowledge of the facts verifying the cause of action.' . . . It is only when such *prima facie* proof is made that judgment may summarily be ordered upon the defendant's failure affirmatively to show the existence of a triable issue."[70]

The case of *Sher v. Rodkin*, clearly presented several important problems arising on these motions. The plaintiff alleged that he was " . . . the owner and holder in due course of a certain promissory note made by the defendant Charles Opper to the order of the defendant Meyer Rodkin, dated June 13, 1922, for the sum of $250, and that said note was transferred to the plaintiff in due course . . . " The defendant Charles Opper presented an affidavit stating facts sufficient to show a defense as between the original parties and further set forth that "the plaintiff also had knowledge and notice that the note would not be paid, but nevertheless accepted an assignment thereof from the defendant Rodkin with full knowledge of such fact. Deponent further says that the plaintiff is not the holder in due course of said note, and that the said

67. Equipment & Supply Co. v. Hudson Contracting Co., No. 29 c. c. Jan. 1934.

68. Hessian Hills Country Club Inc., v. Home Ins. Co., 262 N. Y. 189, 196, 186 N. E. 439, 441 (1933).

69. Gubin v. City of New York, 276 N. Y. Supp. 515 (App. Term 2d Dep't 1934) (motion denied though no opposing affidavit, because complaint is insufficient); Gellens v. Continental Banking Trust Co., 241 App. Div. 591, 272 N. Y. Supp. 900 (1st Dep't 1934) (motion denied where moving affidavit fails to support allegation of complaint which was challenged by answer).

70. Lonsky v. Bank of U. S., 220 App. Div. 194, 195, 221 N. Y. Supp. 177, 179 (1st Dep't 1927).

note was not assigned to him for value." The court held that the affidavit presented by the plaintiff contained only a statement of those ultimate facts necessary to make out a cause of action and that it failed to state any evidentiary facts which would show that he is a holder for value without notice. The Court said:

"The affidavit of the plaintiff herein merely sets forth a cause of action, but it does not point out, except by allegations of ultimate fact, proper perhaps in a complaint, but which are yet mere conclusions which must be drawn from other facts, how he will sustain his cause of action. The answering affidavit also contains only similar allegations of ultimate facts, and bare denials of the plaintiff's allegations, which might well be considered insufficient if the plaintiff had presented an affidavit stating the facts which he expects to prove in detail, for then the defendant's affidavit would not constitute 'proof' which would controvert the plaintiff's allegations. . . . Rule 113 was never intended to permit a plaintiff to set forth in an affidavit merely those allegations which would be required by a pleading to constitute a cause of action, and then to compel the defendant to disclose the evidence which he expects to use to controvert such proof as the plaintiff may present at the trial. The requirement of an affidavit 'verifying the cause of action' means an affidavit which will enable the judge to determine whether the plaintiff has in fact a cause of action, which cannot be controverted upon a trial, and in the present case the plaintiff presents no facts from which the court can determine that the plaintiff's conclusions can be established at the trial, and merely sets forth a cause of action, without verifying it in such manner that the defendant can be called upon to present his own proof before trial."[71]

It may be asked what course a party in opposition to the motion should take, when he is convinced that the moving papers are insufficient. That is a serious responsibility, but an attorney is confronted with a similar problem when he has to decide on the trial, whether he will rest at the close of the plaintiff's case without offering any evidence. One thing is clear however—an opposing party should not submit an inadequate answering affidavit addressed to the facts, even if he relies on the insufficiency of the moving papers. There is no sense to that. Either submit no opposing affidavit dealing with the facts, or submit one that goes fully into the facts and tends to support the opposition. Even if convinced that the moving papers are insufficient, it is good judgment to have an opposing affidavit on the merits, ready on the return day of the motion. In such a situation the attorney should always ask to be heard on the motion. If the court on the argument indicates that he is against the contention made, ask for leave to submit the affidavit forthwith; if he says he will reserve decision, ask for leave to submit the affidavit, in the event that he should decide that the moving papers are sufficient. All I can say is, that if I represented a client who had a real, substantial

71. Sher v. Rodkin, 198 N. Y. Supp. 597, 598, 599 (App. Term 1st Dep't 1923).

defense, I would submit his affidavit to that effect and not rely on the insufficiency of the moving papers.

It has already been shown, that in order to defeat a motion for summary judgment, when the moving party has complied with the requirements of Rule 113, it is necessary for the opponent to set up, by affidavit or other proof, facts showing what has been termed to be a real, or a genuine or an arguable defense. What the attorney may say in his argument in opposition is of no avail. A repetition of the language of the answer is worthless. It will not suffice to raise a triable issue.[72] The test is what is contained in the affidavits and other proof submitted. Frequently, affidavits are submitted in opposition, reading: "As I stated in my answer," *etc.* and, repeating the allegations set forth in the answer. In an early case, *O'Meara Co. v. National Park Bank,* the Court of Appeals said:

"Defendant's affidavits used in opposition to the motion merely repeat the various denials contained in the answer. These denials were insufficient to raise an issue on a motion for summary judgment, since, under the rule, *facts* must be presented rather than mere general or specific denials in order to defeat a motion."[73]

In *McAnsh v. Blauner* it was said:

"In a separate defense the defendant sets up that the making of the contract and the giving of the note were induced by a false representation that the plaintiff and Ralph C. Caples had and could deliver a valid and marketable title to the real estate in question. In his affidavits, however, the defendant gives no evidence whatever to sustain this allegation. He does not state who made the representations, to whom they were made, or any of the circumstances in connection with them. . . . Rule 113 casts on the defendant the burden of showing by affidavit or other proof 'such facts as may be deemed . . . sufficient to entitle him to defend'. Its purpose was to stamp out the practice of procuring a delay of judgment by the interposition of defenses good on their face, which could not be substantiated even by affidavit."[74]

Where a similar question arose in England under Order XIV, Lord Blackburn said:

"I think that when the affidavits are brought forward to raise that defense they must, if I may use the expression condescend upon particulars. It is not enough to swear, 'I say I owe the man nothing'. Doubtless, if it was true, that you owed the man nothing, as you swear, that would be a good defense. But that is not enough. You must satisfy the Judge that there is reasonable ground for saying so. So again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite

72. See Dodwell & Co. Ltd. v. Silverman, 234 App. Div. 362, 363, 254 N. Y. Supp. 746, 747 (1st Dep't 1932).

73. O'Meara Co. v. National Park Bank, 239 N. Y. 386, 395, 146 N. E. 636, 638 (1925).

74. McAnsh v. Blauner, 222 App. Div. 381, 226 N. Y. Supp. 379 (1st Dep't 1928), *aff'd,* 248 N. Y. 537, 162 N. E. 515 (1928).

facts pointing to the fraud as to satisfy the Judge that those are facts which make it reasonable that you should be allowed to raise that defense and in like manner as to illegality, and every other defense that might be mentioned."[75]

"To condescend upon particulars." That is something every attorney should keep in mind when he prepares an answering affidavit.

The defendant, sued on promissory notes, said in her opposing affidavit that she did not receive the moneys. That was held insufficient, the court saying:

"The appellant gives no explanation of why she made and signed the notes in suit. Her obligation on a motion of this character cannot rest upon the answer, but is to show by affidavit such facts as would establish that there was an issue to be tried. . . . Simply stating that she did not receive the moneys does not make out a want of consideration, nor does it explain why the notes were made."[76]

Where there has been a clear and unequivocal admission of liability, it must be explained convincingly in order to defeat the motion. Particularly is this true when the admission is in writing.

"Plaintiff showed by the affidavit of David L. Galbraith, one of the parties to the agreement, that on March 17, 1930, at a conference between the plaintiff and defendant, when plaintiff requested defendant to pay the balance due and owing, the defendant admitted the balance then due and agreed to make every effort to discharge his obligation within sixty days.

"Defendant fails in his attempted explanation of the position taken by him in this correspondence with the plaintiff. It is to the effect that he did not wish to prejudice his business relations with the plaintiff and the other parties to the agreement by disclaiming liability.

"We are clearly of the opinion that the defendant has failed to present facts entitling him to defend and that the plaintiff should have judgment in full."[77]

While Rule 113 does not specifically require the opposing party, as it does in precise language require the moving party, to verify his cause of action by evidentiary facts, that has been the practical construction placed upon the rule.[78] In this connection it should be noted that Rule 113 as originally adopted required the plaintiff to "verify" his cause of action. The words "by evidentiary facts," later added, in no way amplified the original requirement. Neither conclusions of law, nor conclusions of fact, nor so-called ultimate facts, are sufficient to satisfy

75. See Wallingford v. Directors of the Mutual Society 5 A. C. 685, 704 (1880).

76. Hardy v. Ziegenbalg, 230 App. Div. 708, 708, 709, 242 N. Y. Supp. 898, 898 (2d Dep't 1930).

77. Smith v. McCullaugh, 234 App. Div. 490, 494, 255 N. Y. Supp. 497, 500, 501 (1st Dep't 1932).

78. See Cowan Oil & Refining Co. v. Miley Petroleum Corp. Ltd., 295 Pac. 504 (Cal. App. 1931); O'Meara Co. v. National Park Bank, 239 N. Y. 386, 146 N. E. 636 (1925); Sher v. Rodkin, 198 N. Y. Supp. 597 (App. Term 1st Dep't 1923); Galusha Stove Co. v. Pivnick Construction Co., 132 Misc. 875, 230 N. Y. Supp. 720 (Sup. Ct. 1928). *Cf.* Webster & Co. v. Pelavin, 241 Mich. 19, 216 N. W. 430 (1927). See also 3 CARMODY, NEW YORK PRACTICE (2d Ed. 1931) 1078.

the requirements of the rule. To say, "I shall be prepared at the trial to show," *etc.* is bad. Likewise, "I shall have witnesses to prove" is insufficient. Many attorneys have a fear of disclosing their evidence. Thus it is frequently said "I do not at this time wish to disclose the evidence that I have in support of my defense but at the trial I shall be able to convince the court," *etc.* With that kind of opposing affidavit there probably never will be a trial.

The defendant who opposes a motion of this kind, is called upon "to assemble and reveal his proofs in order to show that the matters set up in his answer were real and were capable of being established upon the trial. Mere general averments will not suffice."[79] The opposing affidavit must be by one having knowledge of the facts. A mere general statement that the affiant has knowledge of the facts will not suffice. The affidavit itself must show that the party making it has personal knowledge of the facts to which he swears. If the party having knowledge of the facts is not available, apply for an adjournment of the motion, setting forth by affidavit the reasons for such application.

I recall one naive statement in a brief where the opposing affidavit was made by an attorney on the basis of information obtained from his client. He said "if an attorney is not a person having knowledge of the facts under Rule 113, it is difficult to see who is." He misunderstood completely the requirement of the rule.[80] That statement was exceeded only by an observation made by another attorney in his brief to the effect "that if the defendant did not have a genuine defense, why should he have gone to the expense of retaining counsel?"

A defendant claims payment. The proper way to deal with this in an opposing affidavit is not to say, "I shall prove that the plaintiff's claim was paid in full" but to set forth where, to whom, by whom and in what manner payment was made; if by check, attach the cancelled voucher or account for its absence. The affidavit in opposition is not like a pleading. In a pleading, evidentiary facts are frowned upon. In an opposing affidavit conclusions are frowned upon and facts are desired. Jessel, M. R., said on this point: " . . . If a man were allowed to say simply, 'you have not given me credit for what you ought to have given me credit for,' without giving a single item, a single date or a single fact, I think defendants would be only too ready to believe there were some mistakes in the account. It would be quite impossible to act upon such an unsupported statement, or to look upon it as anything but a sham defense."[81]

79. Dodwell & Co. Ltd. v. Silverman, 234 App. Div. 362, 363, 254 N. Y. Supp. 746, 747 (1st Dep't 1932).

80. *Cf.* Seventh National Bank of New York v. Cromwell, 131 Misc. 276, 226 N. Y. Supp. 721 (Sup. Ct. 1928).

81. See Anglo-Italian Bank v. Wells, 38 L .T. R. 197, 200. See also Lion Brewery of New York v. Loughran, 223 App. Div. 623, 229 N. Y. Supp. 216 (1st Dep't 1928).

So, if it is claimed that the merchandise sued for was defective or not in accordance with sample, general statements to that effect may not suffice. It is better to state in what respects the merchandise delivered or tendered was defective or did not conform to sample and what damage was sustained. If an oral surrender and acceptance be claimed, a general statement that the defendant surrendered the premises and the landlord or his agent accepted the surrender is insufficient. That is all right for the answer but not for the opposing affidavit. State when, where and with whom the agreement for surrender was made. Give the substance of the conversation if oral. State when the premises were vacated, to whom the keys were turned over, *etc.* Likewise, if a constructive eviction is claimed, the facts, not conclusions, should be set forth in detail.

If there is a suit on a promissory note by one claiming to be a holder in due course and for value, do not say in the affidavit, that as set forth in the answer there is a good defense as against the original payee. Set forth the facts showing such defense. State also any facts tending to raise a question concerning the plaintiff's status as a holder in due course. As will hereafter be shown, very little is required to defeat a motion for summary judgment where it is claimed that the plaintiff is not a holder in due course and for value, because, ordinarily, that is a matter which can only be demonstrated on the witness stand and the defendant will have a right to cross examine for this purpose. On the other hand, where the party claiming to be a holder in due course makes out a clear case and there is nothing in the opposing affidavit to cast any suspicion on the *bona fides* of the transaction, the motion may be granted.

If sued on *quantum meruit,* the defense may be in substance, that while there is something due to the plaintiff, he is not entitled to the amount sued for because that is not the fair and reasonable value of the services rendered or materials furnished. In that event, the motion for summary judgment would be granted and an assessment of damages ordered. In such a suit, however, the defense may be that there is nothing due to the plaintiff, that he has been paid in full, for what the services rendered or what the materials furnished were worth. If facts are set forth sufficient to raise a triable issue as to whether the plaintiff has been paid in full, the motion will be denied. A general statement to that effect may not suffice. Set forth the facts showing the character of the services and what they were worth, and if necessary submit a supporting affidavit by one qualified to express an opinion concerning the value.[82]

82. For cases dealing with summary judgment in situations where section 1083a and section 1083b of the Civil Practice Act apply, see Union Trust Co. of Rochester v. Vetromile, 239 App. Div. 562, 268 N. Y. Supp. 26 (4th Dep't 1933). Aronson v. Kuttner, 241 App. Div. 760 (2d Dep't 1934); Palmer v. Hare, 241 App. Div. 694 (2d Dep't 1934); Meurer v. Keimel, 150 Misc. 113, 267 N. Y. Supp. 799 (Mun. Ct. 1933).

Another question frequently arising on these motions is the application of the parol evidence rule. It is important that copies of all the pertinent writings be attached. The court may apply the parol evidence rule on a motion for summary judgment as it does on a trial.[83] If, however, the question is a close one and depends upon fine distinctions with respect to the facts, the court is inclined to deny the motion and allow the case to proceed to trial. It is very important to determine whether you are dealing with a condition precedent or a condition subsequent. In the former case parol evidence may be received; in the latter case it is generally rejected. The importance of setting forth fully and in detail the facts upon which the parties rely to sustain their respective contentions, can readily be appreciated.

The foregoing are a few examples of some of the pitfalls to be avoided in preparing answering affidavits in opposition to a motion for summary judgment. It cannot be emphasized too strongly that the answering affidavit is not a pleading. Facts and not conclusions should be set forth by one having personal knowledge. It is better to err on the side of saying too much in an answering affidavit than of saying too little. It must appear from the answering affidavit that there is a genuine, not a sham, issue, a substantial, not a phantom, issue, to be tried.

Moving Party May Not Take Advantage of Defects In the Pleading of an Adversary

As has already been stated, the pleading of a moving party is open to attack on a motion for summary judgment. He cannot prevail unless he has a good pleading, supported by an affidavit setting forth evidentiary facts to sustain the allegations of the pleading. The granting of the motion, is in effect an adjudication that the pleading of the moving party is sufficient in law. From the very nature of the remedy of summary judgment, it is apparent that the same rule has no application to the pleading of the opposing party. Even if the answer is defective, if the affidavit in opposition sets forth facts showing an arguable defense, the motion fails.

This was recognized by the Court of Appeals in the leading case of *Curry v. Mackenzie*:

"The defendant's affidavit discloses a defense also of part payment, in that he paid for the later services after he was no longer general manager. His answer in that regard is, it is true, defective, for payment should have been stated as a defense, partial, if not complete, and is not to be proved under a denial. The facts, however, have now been shown, and the answer, though imperfect, may be amended at the trial or sooner. Technical defects in the

83. Lion Brewery of New York v. Loughran, 223 App. Div. 623, 229 N. Y. Supp. 216 (1st Dep't 1928).

pleading of an adversary are not available to a plaintiff upon an application under this rule for the entry of summary judgment. The application is defeated if the defendant 'shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend' (Rule 113). The remedy is to be administered in furtherance of justice."[84]

The court said that "*technical defects* in the pleading of an adversary are not available to a plaintiff upon an application under this rule for the entry of summary judgment." It would perhaps be more accurate to say that no defect in the pleading of an adversary is available to a moving party on an application for summary judgment.

Thus in *Perlman v. Perlman,* the court below, granted the plaintiff's motion for summary judgment with leave to defendant to serve an amended answer within five days, and further provided that upon failure so to amend the plaintiff might enter judgment. The Appellate Division held that such ruling was based upon a misconstruction of the very nature of the remedy invoked. If the facts set forth in the opposing affidavit showed an arguable defense, the defect in the answer should have been disregarded and the motion should have been denied. If on the other hand, regardless of the answer, the opposing affidavit did not show the existence of a substantial defense, there was no reason to grant leave to amend. The higher court said:

"The sufficiency of pleadings attacked by a motion for summary judgment under Rules 113 and 114 of the Rules of Civil Practice is not determinative. The basic principle of such a motion is whether the party whose pleading is attacked has shown by *affidavit* or otherwise a triable issue or a right to defend. Even though the pleading itself be deemed insufficient, the motion must be denied if the affidavits show facts sufficient to constitute a defense entitling the pleader to defend. Conversely, if sufficient facts are not shown, no leave to plead anew should be granted."[85]

This rule would apply where the defendant sued for goods sold and delivered, and improperly set up breach of warranty as a defense, rather than as a counterclaim.

Some question has arisen whether the rule is applicable to a situation where a defendant has failed to set up a counterclaim, not arising out of the transaction in suit, but nevertheless one which under the Civil Practice Act he had a right to interpose. It would seem that even in such a case, if the opposing affidavit sets up facts showing the existence of a counterclaim of this kind, summary judgment may not be granted. This should be the rule, if we follow to its logical conclusion the principle that on a motion for summary judgment the affidavits and not the pleadings of the opposing party, are determinative.

84. 239 N. Y. 267, 272, 146 N. E. 375, 376 (1925). Weinberg v. Goldstein, 226 App. Div. 479, 480, 235 N. Y. Supp. 529 (4th Dep't 1929).

85. Perlman v. Perlman, 235 App. Div. 313, 314, 257 N. Y. Supp. 48, 50 (1st Dep't 1932). See also Gellens v. Continental Bank & Trust Co., 241 App. Div. 591, 592, 593, 272 N. Y. Supp. 900, 902, 903 (1st Dep't 1934).

It will be noticed moreover, that in the case of *Curry v. Mackenzie*, the court held that the defective answer "may be amended at the trial or sooner." The court did not order the amendment or grant the motion unless an amended pleading was served within a certain time.[86] However where an opposing party discovers a defect in his own pleading, it would be advisable for him to serve with his answering affidavits a cross motion for leave to amend.

The rules above set forth would seem to be applicable if a defendant is the moving party. The motion should not be granted and the complaint dismissed, where the facts in the opposing affidavit show a genuine triable issue, although they are at variance with the complaint. Here also, the pleading should not be determinative.[86a]

Facts Exclusively Within the Knowledge of the Moving Party

Since the rule was aimed at defenses that are feigned and not genuine, it follows that under certain circumstances a defense of lack of knowledge of the plaintiff's claim, is ground for a denial of the motion. Such a lack of knowledge, however, must be shown to be real, rather than sham. If the facts on which the application for summary judgment is based, are exclusively within the knowledge of the moving party, the relief asked for will be denied. If this were not so, summary judgment would be a perversion of justice, instead of in furtherance thereof.

The answering affidavit should disclose this situation clearly. It should set forth enough to show that, in truth, the opposing party has no knowledge of the essential facts and that the situation is such that he could not reasonably be expected to have such knowledge. It should set forth, for example, what efforts were made to ascertain the facts and with what result. If the facts are available to the opposing party by investigation or inquiry on his part, his plea of lack of knowledge would be without force. So, of course, if the facts are matters of public record. "Under Rule 113 a defendant may properly in certain cases be compelled to state his version of the matter in litigation, but where he shows that he has no knowledge or information in regard to any material allegation made by the plaintiff, he cannot be compelled to accept the plaintiff's version and the court under such circumstances cannot strike out the answer."[87]

Thus in a case where an administratrix was sued on a subscription alleged to have been made by her intestate, summary judgment was denied, it not having been shown that the defendant had knowledge of

86. See Weinberg v. Goldstein, 226 App. Div. 479, 235 N. Y. Supp. 529 (4th Dep't 1929).

86a. Marrin v. Smith, N. Y. L. J. Mar. 13, 1935, p. 1291, "A defendant cannot get summary judgment, even though the complaint is bad, if the true facts warrant a denial."

87. Rogan v. Consolidated Coppermines Co., 117 Misc. 718, 727, 193 N. Y. Supp. 163, 168 (Sup. Ct. 1922).

the truth of the plaintiff's allegations.[88] "The test applied was whether defendant had the knowledge which she denied she possessed, and plaintiff, having failed to show that she had, was refused summary judgment."[89]

On the other hand, in one of the earliest cases arising under the new rule, a defendant denied knowledge or information as to the ownership of notes in suit. On the return day of the motion for summary judgment, the notes were presented in court. It was held that the defendant immediately became possessed of the knowledge and information denied by it in its answer. "Upon production of the notes in court the instruments became under direction of the justice subject, if inspection of them was requested, to examination by counsel for defendant. Notice that the notes would be produced in court was given to defendant in the motion papers. Defendant omitted to file any affidavit or proof in support of its denial of information or knowledge as to the ownership of the notes or disclosing that it had a meritorious defense to the action."[90] So it was held that a denial of knowledge or information sufficient to form a belief as to the plaintiff's infancy was ineffectual, in the absence of a showing contrary to the proof advanced by plaintiff by affidavit, coupled with his birth certificate, a matter of record.[91]

In situations of this character a good deal depends on the strength of the affidavit of the moving party. In one case involving this problem, the court said:

"The defendant's denial is at least as strong and as plausible as the plaintiff's affirmation. Where a plaintiff's allegations are unsatisfactory and are made as to matters concerning which the defendant could not be expected to have knowledge, the defendant should not be penalized for denying them in the only manner possible to him. It may be that upon a trial the plaintiff would not be able to convince the jury that it did agree with the owner to extend his liability beyond the legal liability of a bailee who receives goods for the purpose of doing work upon them. It may be that the defendant would be able to show, by cross-examination or otherwise, that there was no such agreement."[92]

This case, like so many others involving summary judgment, depends for its value as an authority, on the particular facts and circumstances involved. Facts would have to be set forth in opposing affidavits, tending to contradict or to cast doubt or suspicion upon the case set up in the moving affidavits. "A statement of one's belief is not a statement of

88. Woodmere Academy v. Moskowitz, 212 App. Div. 457, 459, 208 N. Y. Supp. 578, 580 (2d Dep't 1925).

89. Edelman v. Public National Bank, 136 Misc. 213, 214, 239 N. Y. Supp. 335, 336 (N. Y. City Ct. 1930).

90. General Investment Co. v. Interborough R. T. Co., 235 N. Y. 133, 141, 139 N. E. 210, 219 (1923).

91. Bower v. Samuels, 226 App. Div. 769, 234 N. Y. Supp. 379, 380 (2d Dep't 1929).

92. Brooklyn Clothing Corp. v. Fidelity-Phenix Fire Ins. Co., 205 App. Div. 743, 748, 200 N. Y. Supp. 208, 212 (2d Dep't 1923).

fact. . . . No testimony to this effect would be admissible upon a trial."[92a]

To warrant summary judgment in an action upon an insurance policy for example, the facts must be unusually clear, and fully presented. If there is doubt or suspicion as to matters which ordinarily could not be expected to be within the knowledge of the insurer the motion will be denied. This applies particularly where the defense is arson, or suicide or where disability is in issue. It will not do, however, for a defendant to contend that the facts are exclusively within the knowledge of the moving party and at the same time say in the opposing affidavit that he is in possession of facts showing plaintiff is not entitled to judgment but does not desire to disclose those facts until the trial. In one case, summary judgment was allowed in an action on a policy of fire insurance, the court saying:

"The defendant does not show any evidentiary facts that entitle it to a trial in respect of the claimed origin of the fire. There is an issue of fact in respect of the amount of damages. This issue of fact does not bar summary judgment under the present provisions of Rule 113."[93]

In this case it should be noted that in the opposing affidavit after making certain statements concerning the nature of the occupancy, defendant said:

"From these facts defendant without at this time disclosing the details of the evidence it expects to adduce upon the trial of the action, believes the fire to be of incendiary origin and hopes to prove such fact at the trial."[93a]

Sometimes a situation arises where the person who has sole knowledge of the facts has left the employ of the opposing party. Ordinarily, that of itself would not be sufficient to defeat the motion. What investigation has the opposing party made, are the whereabouts of the former employee known, has he refused to make an affidavit, is there anything shown to cast doubt on the facts alleged by the moving party, is there any evidence of collusion or that the former employee is so prejudiced that a truthful version cannot be expected from him? Here also, a good deal depends on the nature of the controversy and on the strength and completeness of the moving affidavits. The opposing party, who himself is ignorant of the facts, may resort to Rule 120, to which reference has already been made, and apply for leave to take the testimony of a former employee, to be used in opposition to a motion for summary judgment, if the employee has refused to make an affidavit.

A type of case which commonly raises this question, is an action by a holder in due course. Assuming that the affidavits in opposition set forth facts showing a genuine defense as between the original parties to

92a. Irving Trust Co. v. Orvis, 139 Misc. 670, 671, 248 N. Y. Supp. 773 (Sup. Ct. 1931).

93. C. J. G. Corp. v. Knickerbocker Ins. Co., 242 App. Div. 685, 685, 273 N. Y. Supp. 42, 43 (2d Dep't 1934).

93a. See Case on Appeal, C. J. G. Corp. v. Knickerbocker Ins. Co., p. 53.

the instrument, under what circumstances will summary judgment be granted? In the leading case of *Karpas v. Bandler,* summary judgment was denied in such a situation, the court saying:

"In the case at bar the plaintiff being an interested witness, a jury would not be bound to accept his testimony that he did not have knowledge of a conditional delivery of the note, if there was in fact such a conditional delivery. The jury might consider the testimony of the plaintiff in the light of all the transactions between the parties, including the close business relations between the plaintiff and Goldberg, and might reject the plaintiff's testimony of lack of knowledge even though such testimony were not directly contradicted. As was said by Mr. Justice Greenbaum in *Vogel v. Pyne,* 197 App. Div. 633, 637:

" 'Where the determination of an important issue depends upon an interested witness whose testimony is suspicious or where the attendant circumstances are inconsistent with the conduct of a *bona fide* holder of the notes for value, it is for the jury to say, although there is no direct oral or written testimony contradictory of that given by such witness, whether his testimony is to be credited and whether he was a *bona fide* holder of the notes for value'."[94]

So, in *Weiss v. Goldberger* where the same result was reached the court said:

"There is sufficient to require a submission of the issue of the plaintiff's innocence and good faith to a jury. A $5,000 note was purchased for $3,000 under such circumstances as could not be said to be the ordinary business transaction with commercial paper. The plaintiff, as before stated, apparently a man of limited means and needing the money in his own business, starts to make payment for the note in very small installments running over the course of ten days until the very day when he learns that criminal proceedings are pending in connection with the obtaining of the note; and on this day he claims that he paid five-sixths of the purchase price, and then some time within the next two weeks thereafter obtains the endorsement of his transferor. It certainly cannot be said that the foregoing facts, so far as concerns the plaintiff, are free from suspicion or susceptible of but the one inference of plaintiff's innocence and good faith; and hence the credibility of the plaintiff as an interested witness, even though uncontradicted, would present a question of fact which should be submitted to the jury."[95]

In these cases, it should be noted, that sufficient facts were shown to cast some suspicion or doubt upon the validity of the plaintiff's position. In such event defendant is entitled to a trial, in which cross examination may be resorted to. On the other hand, the facts may be so clear, and the situation so free from doubt that summary judgment may properly be granted.[96]

94. Karpas v. Bandler, 218 App. Div. 418, 421, 218 N. Y. Supp. 500, 503 (1st Dep't 1926).

95. Weiss v. Goldberger, 209 App. Div. 615, 618, 205 N. Y. Supp. 1, 3 (1st Dep't 1924).

96. Terner Bros. v. Glickstein & Terner, Inc., 239 App. Div. 804, 263 N. Y. Supp. 993 (4th Dep't 1933), *aff'd* 263 N. Y. 555, 189 N. E. 695 (1933), a suit by one found to be a holder in due course, where, however, the court also found that the defense as between the

Counterclaims

In *Chelsea Exchange Bank v. Munoz*,[97] the court held that the mere interposition of a counterclaim would not in and of itself operate to defeat a motion for summary judgment. The test was whether there was an issue of fact to be tried under the answer, whether based upon denial, defense or counterclaim. "Merely labeling allegations as constituting a counterclaim does not present a triable issue."[98] A counterclaim will not defeat a motion for summary relief unless supported by "facts tending to show that it is meritorious or that the defendant is entitled to defend by virtue thereof."[99]

Troublesome questions arose as to the right of a plaintiff to have summary judgment, where no triable issue was shown in opposition to the cause of action alleged in the complaint, but where there was such an issue shown in opposition to the counterclaim. Before the 1933 amendment to Rule 113, let us assume that A sued B for $5,000 and B counterclaimed for the same or a larger amount. If the pleadings admitted A's claim, or if despite a denial of the claim there was in fact no triable issue raised in opposition to A's claim, but there was with respect to B's counterclaim, the court would refuse to grant A's motion for summary judgment and to stay execution thereunder pending the trial of the counterclaim.[100]

If, before the amendment, A sued B for $10,000 and B counterclaimed for $5,000, A's claim being admitted by the pleadings, but there being a triable issue with respect to B's counterclaim, the plaintiff was entitled to partial summary judgment for $5,000, that is, the difference between the amount of A's claim and the amount of the counterclaim, without any stay of execution, and the action would be severed as to the balance.[101] The same result would probably be reached if A's claim were contested by the pleadings, but if from the papers it appeared that there was no triable issue of fact concerning it, apart from the counterclaim.

original parties was a sham. On this point see also Dodwell & Co. Ltd. v. Silverman, 234 App. Div. 362, 254 N. Y. Supp. 246 (1st Dep't 1932); Harter v. Peoples Bank of Buffalo, 221 App. Div. 122, 223 N. Y. Supp. 115 (4th Dep't 1927); Bernstein v. Kritzer, 224 App. Div. 387, 231 N. Y. Supp. 97 (1st Dep't 1928); Weinberg v. Goldstein, 226 App. Div. 479, 235 N. Y. Supp. 529 (4th Dep't 1929).

97. Chelsea Exchange Bank v. Munoz, 202 App. Div. 702, 193 N. Y. Supp. 335 (1st Dep't 1922). See also Hinman v. Hinman, 146 Misc. 786, 263 N. Y. Supp. 800 (1st Dep't 1931).

98. Gordon Corp. v. Cosman, 232 App. Div. 280, 285, 249 N. Y. Supp. 544, 548 (1st Dep't 1931).

99. Smith v. Cranleigh, Inc., 224 App. Div. 376, 377, 231 N. Y. Supp. 201, 202 (1st Dep't 1928).

100. Dietz v. Glynne, 221 App. Div. 329, 223 N. Y. Supp. 221 (2d Dep't 1927); Aetna Life Ins. Co. v. National Dry Dock Repair Co. Inc., 230 App. Div. 486, 245 N. Y. Supp. 365 (1st Dep't 1930).

101. Dairymen's League Co-operative Ass'n Inc., v. Egli, 228 App. Div. 164, 239 N. Y. Supp. 152 (4th Dep't 1930); Irving Trust Co. v. Leff, 253 N. Y. 359, 171 N. E. 569 (1930).

In 1933, the following clause was added to Rule 113:

"This rule shall be applicable to counterclaims, so that either party may move with respect to the same as though the counterclaim were an independent action. The court in its discretion may provide for the withholding of entry of judgment until the disposition of the issue in the main case."

No cases in the appellate courts construing this clause have been brought to my attention. Although its language is very broad, the purpose of the added clause was to take care of a situation where a counterclaim arose from transactions not connected with the subject-matter involved in the cause of action set up in the complaint. That counterclaim, irrespective of its amount as compared with plaintiff's claim, would be treated as an independent action. The plaintiff could move for summary judgment dismissing the counterclaim, and if shown to be without sufficient merit to warrant a trial, his motion would be granted, the counterclaim would be eliminated, and the plaintiff would then go to trial on the issues raised by his complaint and the defenses thereto. The court, in the order granting the motion, may direct that the entry of judgment dismissing the counterclaim be withheld pending the trial of the main issue.

So a defendant might move for summary judgment on his counterclaim, treating it as an independent action, and if no triable issue were raised in opposition thereto, his motion would be granted. The counterclaim would be removed from the case and the court in its order would make appropriate provision that the entry of judgment on the counterclaim, in whole or in part, be withheld until the determination of the main issue.

Although the question is by no means free from doubt, a literal construction of the amendment would not seem to give a plaintiff any different rights than he had prior thereto, where no triable issue was raised in opposition to the cause of action alleged in the complaint, but where the defendant was entitled to go to trial on his counterclaim.

Motion for Reargument and to Vacate Summary Judgment On Newly Discovered Evidence

With respect to reargument, the same rules apply to motions for summary judgment, as to motions generally. On reargument, the court considers only the original papers submitted. If the court has overlooked or misinterpreted any decision, or has erred in the construction placed upon the contents of the papers originally submitted, it may change or correct its decision. The usual practice is to apply to the judge who decided the motion, for leave to reargue.

"An order on a motion for reargument is not, ordinarily, appealable, at least where the motion was determined upon its merits, since the court which hears the original motion is the only one which can judge whether it has failed to consider any of the points raised upon the motion, and its determination upon

such a point must be final. But where such a motion is denied because of the erroneous belief that the court had no power to hear it, an appeal does lie.

"It is important, in this connection, to distinguish between motions for reargument and motions for leave to renew a motion upon new or additional papers, since a wholly different rule applies as to appeals from orders upon motions of the latter class.

"An order denying an application for leave to renew a motion upon new or additional papers is appealable. Such an application is distinguished from a motion for reargument, which, . . . is not appealable, by the fact that the latter is confined to the original motion papers. If the application is in fact for leave to renew, appeal will lie from the order thereon, even though it is misnamed in the papers as a motion for reargument."[102]

A moving party may renew his motion for summary judgment, after it has once been denied:

1st. Where leave so to do was granted in the order denying the prior motion.

2nd. Where the prior denial, without leave to renew, was predicated on a defect in the moving party's pleading and it has since been amended, although here, likewise, it would be better practice to apply to the court for leave to renew the motion.

Except as before indicated, a moving party ordinarily will not be granted leave to renew his motion for summary judgment on new or additional papers, unless he can bring himself substantially within the rule relating to newly discovered evidence. "Rule 113, C. P. R., is not intended to be used as perpetual annoyance. In the same manner that a litigant is generally limited to one trial he is restricted to a single application of the rule. . . . It is expected that he will present all, not some, of the facts supporting his contention when the application is submitted. He is not permitted to hold back anything, and if he discovers aught of advantage after submission which he should have known before that is his misfortune. The rule was conceived to end not to prolong litigation. Having once applied for summary judgment he may not without leave do so again."[103]

The defendant or party against whom summary judgment has been directed, may, in a proper case, move to vacate or to modify the judgment. In one case, the application for a new hearing was granted after affirmance on appeal, on condition that the defendant file a surety bond against any judgment that might be found against him. The motion was made on new facts claimed to be unknown at the time of the original motion. The court did not consider the requirements with respect to newly discovered evidence. It held that a court has inherent power to

102. See CARMODY, NEW YORK PRACTICE (2d ed. 1932) §§ 33, 34, and cases therein cited.

103. Edora Garment Co. Inc., v. Rothman, N. Y. L. J., July 6, 1934, at 45. See also "Denial of Motion for Summary Judgment as *Res Judicata*," N. Y. L. J., April 3, 1935, at 1688.

open its judgments in the furtherance of justice, and the "exceptional circumstances in this case require exceptional treatment."[104] The court here went very far.

In a recent case, the motion was by the defendant to set aside a summary judgment as excessive, on the ground that after having acquiesced in the amount he discovered that it was too high. The amount was admitted in the pleadings and in the affidavit. The court said, that while the defendant stood in the same position as one seeking relief on the grounds of newly discovered evidence, it did not bring itself within the rule authorizing new trials on such grounds. Nevertheless the motion was granted to the extent of having the propriety of the disputed item tried by a referee. "It would be an inexcusable maladministration of justice to compel a defendant to pay $5,625 more than it owes. Conscience would not permit such a result. Regardless of procedural fetters the more basic principles of justice will not deny relief to a litigant against whom an unfounded judgment has been made. Law is not so inflexible or inexorable. Substance will not tolerate being outwitted or outdone by forms."[105]

On an application based on newly discovered evidence, it would not be necessary to make and settle a case, as is required after a trial. The application should be made at Special Term, and ordinarily will be referred to the judge who made the original disposition.

Appeals

Originally it was held that by the denial of his motion "no substantial right of the plaintiff has been violated," and that the appellate courts would not review orders denying motions for summary judgment. The error of these rulings soon became apparent, and the earlier cases on this point were overruled.[106] By amendment of the Municipal Court Code, in 1933, appeal may be taken as of right from an order of that court denying one of these motions.[107]

104. Greenberg v. Rudnick, 143 Misc. 793, 258 N. Y. Supp. 679, 680 (N. Y. City Ct. 1932), citing Ladd v. Stevenson, 112 N. Y. 325, 332, 19 N. E. 842, 844 (1889), which referred to the inherent power of the court to relieve from judgments, taken through "mistake, inadvertence, surprise or excusable neglect," on application of anyone for sufficient reason in furtherance of justice.

105. Uptown Transportation Corp. v. Fisk Discount Corp., 151 Misc. 469, 471-472, 271 N. Y. Supp. 723, 726 (Sup. Ct. 1934).

106. Dwan v. Massarene, 199 App. Div. 872, 880, 192 N. Y. Supp. 577, 583 (1st Dep't 1922), explained in Poland Export Corp. v. Marcus, 204 App. Div. 302, 304, 198 N. Y. Supp. 5, 7 (1st Dep't 1923), overruled on this point by Lee v. Granbard, 205 App. Div. 344, 199 N. Y. Supp. 563 (1st Dep't 1923); Hongkong and Shanghai Banking Corp. v. Lazard-Godchaux Co. of America Inc., 207 App. Div. 174, 201 N. Y. Supp. 771 (1st Dep't 1923), *aff'd* 329 N. Y. 610, 147 N. E. 216 (1925). See Interstate Pulp Co. v. New York Tribune, 207 App. Div. 453, 454, 202 N. Y. Supp. 232, 233 (1st Dep't 1923).

107. § 154, 6-a.

The appeal should be from the order denying the motion for summary judgment or from the order granting summary judgment and the judgment entered thereon. The practice on this point was clarified by the early case of *Donnelly v. Bauder:*

"The respondent urges that the judgment must be sustained because no reviewable question is before this court for the reason that the appeal is only from the judgment and not from the order granting judgment. The remedy furnished by summary judgment is comparatively new. The practice generally adopted seems to be that on decision of the motion a formal order is entered denying or granting the motion. If the motion is denied, an appeal is taken from the order; if granted, a judgment is entered and the appeal is usually taken from both the order and judgment. We think that if the motion is granted, an order is not strictly necessary, although undoubtedly it is better practice to enter an order striking out the answer and directing judgment. . . . Rule 113 says: 'The answer may be struck out and judgment entered thereon on motion.' The motion seems to be for a judgment like that for a non-suit on a trial and may be entered on the direction of the court, with or without a formal order."[108]

Argument on Motion and Appeal

There is a difference of opinion among judges, on the value of oral argument, on motions for summary judgment. Some have found argument of little benefit, because of the frequent variance between what is said by counsel, and what is actually contained in the affidavits. The writer believes that argument on these motions is desirable. It often happens, that by inadvertence, something that would turn the scale has been omitted, and when attention is called to it, is readily supplied; or something has been stated as a conclusion, which may easily be restated in proper form. When the papers have been submitted without argument, the tendency is to take them as they stand. There has already been pointed out the futility of attempting to argue in support of the motion, without having carefully examined the affidavits in opposition. There can be no intelligent argument unless that is done. On appeal, I do not see any value to oral argument on these motions, unless the facts or law involved are unusually complicated.

On arguments of this character, it is well to bear in mind one of the rules followed by Charles Russell, distinguished English barrister, later Lord Chief Justice, never to trouble about authorities or case law supposed to bear upon a particular point, until you have accurately and definitely ascertained the precise facts. He said he got this advice from Lord Westbury when he was arguing a case before him. "I was plunging into a citation of cases, when he very good-naturedly pulled me up and said 'Mr. Russell, don't trouble yourself with authorities until we have ascertained with precision the facts, and then we shall probably

108. 217 App. Div. 59, 62, 216 N. Y. Supp. 437, 440 (4th Dep't 1926).

find that a number of authorities which seem to bear some relation to the question, have really nothing important to do with it' ".

Working of the Rule

In an early case arising under Rule 113, the court said: "That this rule has worked a substantial reform in practice and greatly relieved an overburdened calendar has been demonstrated by experience."[109] This impression has since been fully confirmed. In 1931, a limited factual study of Rule 113 was made by Felix S. Cohen.[110] Two hundred and fifty motions for summary judgment, found on the calendar of the Supreme Court, New York County, between October 1, 1929, and January 28, 1930, formed the subject matter of the study. Of these 250 motions, the motion was withdrawn or marked off in 30 cases, granted in 139 and denied in 81. In 5 cases, appeals were taken from the order granting summary judgment. There were three affirmances and two reversals. When these two cases came to trial, one resulted in a verdict for the defendant and the other in a verdict for the plaintiff for a slightly smaller amount than originally allowed. In 7 cases, appeals were taken from the order denying the motion. Of these, 5 were affirmed and 2 reversed. Of the 81 cases in which the motion was denied, 30 were settled, 12 were abandoned, 15 were pending undetermined when the study was completed, and 22 went to trial. Of these 22, 19 resulted in judgment for the plaintiff (7 defaults) and 3 in judgments for the defendant (in 2 of which the complaint was dismissed).

The study disclosed that the remedy was not being utilized promptly by the bar. There was a failure to move for summary judgment until long after issue was joined. In one case, there was a delay of five years. The average delay was 114 days. In half the cases studied, there was an intervening period of 56 days or more, between joinder of issue and the making of the motion. The conclusion arrived at as the result of the study, was that "the procedure for granting summary judgment upon motion and affidavit, as it existed in New York until the recent extension of Rule 113, has generally accomplished its avowed object of reducing the delays of litigation, that it has not given rise to the abuses that were once feared (*i.e.*, the arbitrary exclusion of reasonable defenses, or the improper use of the motion to anticipate the defendant's line of proof), but that its potentialities have not been fully appreciated and utilized by the bar. The motion for summary judgment has been invoked primarily in cases where the validity of the plaintiff's action is clear and the financial responsibility of the defendant doubtful."[111]

109. See Hanna v. Mitchell, 202 App. Div. 504, 518, 196 N. Y. Supp. 43, 55, 56 (1st Dep't 1922).

110. See Cohen, *Summary Judgments in the Supreme Court of New York*, (1932) 32 COL. LAW REV. 825, 835-845.

111. *Id.* at 856.

Since this study was made, the Commission on the Administration of Justice, through its Executive Secretary, Leonard S. Saxe, made an interesting and valuable survey of the subject, which in large measure sustained the prior findings.[112] This study is worthy of careful consideration by the bar. A few of the findings and conclusions will be summarized:

In the Supreme Court, New York County, from October 1, 1921 to January 1, 1931, there were approximately 5,600 motions for summary judgment. Over 700 were withdrawn or marked off, 2800 were granted, and 2100 were denied.

In 1932 and 1933, of about 2075 motions for summary judgment, heard in the Supreme Court, New York County, there were 171 appeals, 87 in cases where the motion was granted and 84 where it was denied. There were 132 affirmances, of which 69 were in cases where the motion had been granted and 63 where it had been denied. There were 38 reversals, of which 17 were in cases where the motion had been granted and 21 where it had been denied.

The conclusions based on the statistical survey, were in part as follows:

"As the summary judgment remedy has become better known, both its utilization and efficiency have increased in the Supreme Court, New York County. It now appears to be granted with finality in well over 50% of the applications and to have eliminated about 1/9 or 11% of all Trial Term work in New York County, . . . Besides this great saving of judicial time, it has markedly expedited the disposition of cases to the benefit of litigant plaintiffs. . . .

"The burden placed by summary judgment procedure upon the Appellate Division, First Department, is quite small, . . . The proportion of affirmances and reversals of summary judgment motions is not out of line when compared with the proportion of affirmances and reversals to total cases, nor when the affirmances and reversals of motions granted below are compared to the affirmances and reversals of motions denied below. The Appellate Division is slightly more inclined to reverse a summary judgment *granted* below than one denied below, as is shown by its own figures of 28.43% of grantings reversed as compared to 23.49% of denials reversed, and yet the Court of Appeals, on review, seems to have decided that the Appellate Division is not quite strict enough in that regard."[113]

The number of such cases finding their way to the Court of Appeals is so small, however, as hardly to afford any real basis for this conclusion.

The report pointed out, that a comparison of the figures showed that summary judgment procedure in the Municipal Court, was clearly out of line with the favorable results in the Supreme Court and City Courts.

112. See Legislative Document 1934 No. 50 G-A, Statistical Survey of Summary Judgments in New York.

113. *Id.* at 21, 22.

Under the old law, an appeal to the Appellate Term from an order of the Municipal Court denying a motion for summary judgment could only be had by permission. This, it was felt, had the tendency to encourage denial of such motions. After the report was submitted to the Legislature, an amendment to the Municipal Court Code was passed, allowing such appeal, as of right.

The Personality of the Judge

The bar and the general public as well, are to be congratulated on what is apparently a recent discovery, that a judge is a human being, that he has a combination of characteristics, which for want of a better name are called his personality, and that this personality is sometimes reflected in his judicial determinations. The subject is one of absorbing interest and cannot be gone into in detail here. One thing is clear. There is less room for the interposition of a judge's personality in deciding motions for summary judgment, than there is when he passes on questions of constitutional law involving issues for the most part social, economic or political in character. The same applies to matrimonial actions, to proceedings involving the custody of children, and to questions of negligence, particularly when it comes to the assessment of damages.

In the factual study made in 1931, while, as was to be expected there was a variance in the percentage of these motions granted by different judges, it was in no way substantial. On the contrary, it indicated a close similarity of opinion among the different judges, on the tests to be applied. It did appear, that those judges who passed on many motions for summary judgment, granted a somewhat larger percentage than those who passed on a few.

In the survey made by the Commission on the Administration of Justice, it was stated that information as to the percentage of those motions granted or denied by individual judges, was not readily available. Detailed information was given with respect to the record of each judge on appeals from his determination of motions for summary judgment. The results are significant. So far as the Supreme Court, New York County, is concerned, the difference in percentage of reversals was negligible. There was probably less difference than in appeals after trial. In the Municipal Court, with two or three exceptions, the situation was the same.

All of these facts are of real value, and it is to be hoped that the newly created Judicial Council, with the active support and cooperation of the bar, will develop and perfect a system of judicial statistics and information that will enable us to discover the weak points in methods of administration and how to correct them. Too much cannot be expected at the outset, but the Council, in its first report, has made a good beginning, and has justified the confidence of those who recommended its creation.

Partial Summary Judgment

Under Section 476 of the Civil Practice Act, judgment may be rendered by the court in favor of any party and "at any stage of an action or appeal, if warranted by the pleadings or the admissions of a party or parties, and a judgment may be rendered by the court as to a part of a cause of action and the action proceed as to the remaining issues, as justice may require." Under Rule 114, if it appears that the defense interposed applies only to part of plaintiff's claim or that any part is admitted, the plaintiff may have final judgment forthwith for so much of his claim as the defense does not cover. The action is then severed as to the balance. Rule 114 is limited by the provisions of Rule 113, and under the former a motion can be granted only in cases in which summary judgment may be entered under the latter.[114]

A motion for partial summary judgment will not be granted unless the admission contained in the pleading or answering affidavit is explicit, positive and definite as to the conceded indebtedness, or unless the court finds that there is no defense to a portion of plaintiff's claim. Where plaintiff sued to recover for services rendered, in the reasonable value of $1300, and defendant admitted the services but denied that they were worth $1300 and alleged that they were "not worth more than $400," partial summary judgment was denied.[115] Where plaintiff sued for goods sold and delivered and defendant alleged that the goods instead of being of the value of $20,505 were worth "about $10,000," partial summary judgment likewise was refused. In neither was there an outright admission that any definite sum was due.[116] Of course, if these cases had arisen after the 1932 amendment to Rule 113, summary judgment would have been granted and an assessment of damages ordered because liability was admitted and only the amount of damage was in issue.

Where plaintiff sought to recover in *quantum meruit,* for work done and materials furnished to the reasonable value of $1340.05, and the answer denied the allegations of the complaint, and set up that the work was done pursuant to an express agreement whereby defendant promised to pay plaintiff $500 for the entire job, partial summary judgment was denied. The court said:

"The answer of the defendant is not an admission of part of the cause of action pleaded. . . If the defense be proved, plaintiff's cause of action, as he chose to plead it, would be completely disposed of."[117]

114. Sydeman v. Waumbeck, 212 App. Div. 422, 208 N. Y. Supp. 716 (1st Dep't 1925); Applebaum v. Gross, 117 Misc. 140, 191 N. Y. Supp. 710 (Sup. Ct. 1921), *aff'd,* 200 App. Div. 914, 192 N. Y. Supp. 912 (2d Dep't 1922).

115. Doctors' Service v. Russell, 121 Misc. 600, 201 N. Y. Supp. 764 (Sup. Ct. 1923).

116. Sydeman v. Waumbeck, 212 App. Div. 422, 208 N. Y. Supp. 716 (1st Dep't 1925); Lyons v. Shubert, 119 Misc. 694, 197 N. Y. Supp. 253 (App. Term, 1st Dep't 1922).

117. Lyons v. Shubert, 119 Misc. 694, 695, 197 N. Y. Supp. 253, 254 (App. Term, 1st Dep't 1922).

If a tender is not accepted, it may not be made the basis of partial summary judgment.[118] Under Rule 114, the court is empowered to grant partial summary judgment on such terms as may be just.[119]

Conclusion

The important rule we have been considering, is a "two-edged weapon, useful if it precludes the interposition of defenses solely for delay, but dangerous if it deprives a defendant of the opportunity to have a trial of seriously contested questions of fact."

The bar may be assured that no motion at Special Term, or on appeal, is given more thorough, painstaking study and consideration than the motion for summary judgment. It is a great responsibility to say that "in truth there is nothing to be tried." It is, however, the duty of the court so to hold when it is clear, that what has been set up as a cause of action or as a defense, presents no genuine or substantial triable issue, is sham and feigned, and asserted solely to harass and annoy or for the purposes of delay.

Whatever statistical information we now have, shows that this summary remedy has resulted in no abuse, that it is being administered carefully, yet courageously, and that it is working out exceedingly well. It is to be hoped that the recently created Judicial Council will make a yearly report on the workings of the rule, and the results accomplished by it.

The remedy of summary relief is by no means a panacea for the ills from which we are suffering, in our present methods of administering the law. It will not do away with perjury. It was not expected to. That evil has persisted in the face of Divine, as well as human, prohibition. A perjurer can defeat many motions for summary judgment. Nevertheless the rule is effective. Its tendency is to minimize perjury. It serves to discourage the bringing of suits that have no basis and the interposition of sham answers. It fosters early settlements. For every case in which perjury is committed on the stand, there are scores of false denials in answers. Under the Rule, no longer can a litigant shelter himself, and ease his conscience behind technical denials, which he deludes himself into believing are nothing more than legal red tape. He is brought out into the open. If he swears falsely, it is not to any legal jargon, but to the facts.

Would that we could say, when we decide one of these motions,

> "Of that there is no manner of doubt,
> No probable, possible shadow of doubt,
> No possible doubt whatever."

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118. Valentine v. Perlman, 216 App. Div. 548, 215 N. Y. Supp. 338 (1st Dep't 1926).

119. Applebaum v. Gross, 117 Misc. 140, 191 N. Y. Supp. 710 (Sup. Ct. 1921), *aff'd*, 200 App. Div. 914, 192 N. Y. Supp. 712 (2d Dep't 1922).

But, alas! Such omniscience is denied to mortals, except on the stage of light opera. The record shows, however, that the remedy is being administered "in furtherance of justice."

Much can be accomplished, not alone so far as these motions are concerned, but for the improvement of the administration of justice generally, if there is a closer relationship between the bench and the bar, and a better understanding of their respective problems. Then, indeed, shall we, working together as brethren in a great and honorable calling, give a true account of our stewardship for the benefit of mankind. Then will there be carried into the deep heart of man the realization that the law is not a game, but a vigilant, searching and restless process, designed to bring about what is just and honorable and useful. Then will right be exalted, and the precepts of justice come to their hour of triumph.