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A SUMMARY JUDGMENT PROCEDURE FOR NORTH CAROLINA

JAMES H. CHADBOURN*

Adequate pleadings supported by convincing evidence constitute the price the average litigant must pay for victory. If he lacks either or both the sooner that is discovered the better. These commonplaces are reflected in the many procedural devices designed to check the case of the litigant whose pleas or proof do not meet the requirements exacted. The demurrer and motions for nonsuit and directed verdict, for example, are designed to save time, money, and vexation by halting proceedings which might be further protracted but for these means of exposing discrepancies.

The means for attacking the adequacy of a litigant's pleading, however, are much better designed to promote the desired economies than are the measures available for challenging the sufficiency of his proofs. This is because the former are for the most part utilized without first impaneling a jury and introducing testimony. The result is that such "motion cases" are more expeditiously handled with less crowding and clogging of dockets than are "jury cases." The "law's delays," so fondly berated by its many critics, are largely delays in those cases which (as we are wont to put it) raise issues of fact triable to jury rather than issues of law triable to court. But should there be this difference? Can not both kinds of issues be handled in the simpler way?

The increasing popularity of summary judgment procedure suggests that as the remedy. By this procedure the litigant's ability to prove his case may be tested before a jury is impaneled. Just as the demurrer and various motions question whether his pleadings make it worthwhile to continue further, so the motion for summary judgment challenges him to show by affidavits that there is great enough likelihood of his ability to prove what he has pleaded to justify the time and expense of jury trial. The advantages of the motion over the usual procedure are thus illustrated by Mr. Justice E. R. Finch of the Supreme Court of New York:

"A plaintiff has sold goods to a defendant which the defendant has resold and pocketed the proceeds. To the plaintiff's demand for payment of his bill, the defendant set up a general denial based upon a claim of defect of material, which denial was false in fact. The plaintiff then

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had to sit helplessly until the case was reached on the calendar and duly placed upon trial. Further, the defendant could compel the plaintiff to have a jury summoned and to prove his case in open court under the application of all the technical rules of evidence of the common law. The defendant could take advantage of any technical lack of proof of plaintiff and thereby defeat the claim. If the plaintiff proved his claim in every technical detail, the defendant need do nothing and only is liable for the amount of the bill, plus 6% interest and an insignificant bill of costs, which ordinarily would not compensate the plaintiff for one-tenth of the expense the defendant had cost him, to say nothing of his labor, inconvenience and loss of time. And yet we ask why business men find fault with court procedure. Summary judgment procedure has righted this wrong. A plaintiff may now move before the court upon a few days' notice, setting forth by affidavit the facts necessary for judgment, and may obtain judgment upon motion, unless the other party by affidavit or other proof shall set forth such facts as will show that there is a genuine and bona fide issue to be tried."

This procedure has been adopted in England and several American states. Professor E. R. Sunderland has this to say of its success in England:

"The immense value of the practice is indicated by its wide use. In the year 1924, for example, there were 6,773 summary judgments rendered by the masters of the King’s Bench Division, as compared with 1,546 judgments entered by the judges after trial of issues. That means that by this device the trial dockets were relieved of 80 per cent of the cases which would otherwise have come before the courts for formal trial, and that claimants in all those cases got their judgments in as many days as it would have required months through ordinary litigation in the courts."

Mr. Justice Finch has estimated that the New York motion was used in 1923 to dispose of one case out of every ten in New York County and that the time of one court equivalent to one year and a half was saved. Furthermore, that the New York motion is successfully used by deserving plaintiffs and with beneficial results is shown by figures given in a study by Mr. Felix S. Cohen. Out of 250 cases (between October 1, 1929 and January 28, 1930) in which the motion was made Mr. Cohen finds that it was withdrawn in 30, granted in 139, and denied in 81. Settlements were made in 22 of the 30 cases in which the motion was withdrawn, and in 30 of the 81 cases in which the motion was denied. Out of 22 cases going to trial after the denial of the motion judgments for plaintiff were rendered in 19. As might be expected, a
substantial saving of time was noted in contrasting the time taken in the cases of summary judgment with that taken in the cases proceeding to jury trial.4

The purpose of this paper is to propose a summary judgment procedure for North Carolina. The subject is especially timely in view of the fact that a committee of the North Carolina Bar Association has been appointed to investigate and report on it.5 For a background it may be well first to survey the presently available motions to see how they fall short of achieving the ends made possible by the motion for summary judgment.

I

C. S. §510 provides that sham and irrelevant answers may be stricken upon such terms as the court in its discretion may impose. At first glance it would seem that this statute provides all the machinery necessary to forestall the case of a defendant who can not prove his answer. If a sham answer is an untrue one—and it has been so defined by our court6—then motion to strike it as such will put defendant to the necessity of showing to the court that he has enough evidence in support of his defense to entitle him to a jury. There are no appellate records, however, to show that this motion has ever been put to such a use. On the contrary it seems to have been employed only to strike answers which were bad in form.7

Its novelty aside, there is a more serious objection to this motion as an adequate means for a preliminary test of the sufficiency of defendant's proofs. There is a considerable array of authorities to the effect that a denial good in form can not be stricken as sham. In the early English cases power to strike denials as untrue seems never to have been asserted. Only affirmative pleas or pleas violating the restrictions on double pleading were stricken.8 That this failure to assert the power is an eloquent recognition that it did not exist has been convincingly pointed out by Professor Pogson. He refers to "the entire absence of any English cases even raising the question of the power of the court to strike the general issue, when standing alone," and characterizes this as "a state of affairs that is inconceivable if the profession or the judiciary entertained the slightest idea that such a power rested in dis-

5 (1935) 37 N. C. BAR ASS'n. Rep. 193, 199, 212. The committee is as follows: C. R. Wharton, Ch'm., Greensboro; E. C. Willis, Jr., Raleigh; W. L. Ferrell, Winston-Salem; M. T. Van Hecke, Chapel Hill; T. Spruill Thornton, Winston-Salem.
7 For examples, see Flack v. Dawson, 69 N. C. 42 (1873); Schehan v. Malone, 71 N. C. 440 (1874); Deloatch v. Vinson, 108 N. C. 147, 12 S. E. 895 (1891).
cretion.” “Inevitably,” he says, “such a discretion would have been approached, considering the frequency of the general issue, often false.” 9 The majority of American cases seem to bear out this interpretation by holding that denials can not be stricken as false. 10 This widely prevailing view of the scope of the motion to strike as sham darkens the prospect of developing the North Carolina motion as a substitute for the summary judgment motion. Denials are so frequently pleaded, even along with affirmative pleas, that the adoption of the above view with reference to its scope would make the motion to strike untrue answers as sham available in relatively few cases. Trial by jury would still be necessary in most cases even though the answer were demonstrably false.

Furthermore, even if these objections could be hurdled, there would still remain the more serious one that the motion to strike as sham, because it applies only to defenses, could serve as a means for preliminary exposure of the weakness of defendant’s proofs only. There is also need to give the defendant a similar remedy against the plaintiff.

Another motion, somewhat like the one just discussed, is the motion to strike as frivolous. C. S. §599 provides that the court may give judgment to the party aggrieved by a frivolous demurrer, answer, or reply. 11 There are two lines of cases dealing with this motion in North Carolina. According to one it is considered equivalent to a demurrer. That is, it admits the facts alleged in the pleading assailed by it but questions their sufficiency to avail the pleader. 12 As such, this motion obviously fails to meet the needs fulfilled by the motion for summary judgment. It supplies another means for scrutinizing pleadings, none for advance checking of the proofs. According to the second line of cases this motion raises only the question of whether the pleading attacked by it is “manifestly impertinent” or presents a “serious question and one fit for discussion”. In these cases the Supreme Court seems

9 Ibid., 64, note 90.
10 Ibid., 80. Professor Pogson cites North Carolina as holding that false denials may be stricken. (p. 79, note 154). But the only two cases relied on for this assertion are the Flack and Schehan cases, supra note 7. They do not sustain the assertion, for the denials were there stricken as bad in form, not as false in fact.
11 There is also provision for striking irrelevant answers, C. S. §510. That an irrelevant answer is considered to be the same as a frivolous answer, see Howell v. Ferguson, 87 N. C. 113, 115 (1882).
12 Commissioners of Yancey v. Piercy, 72 N. C. 181 (1875) (Answer stricken as frivolous and judgment awarded to plaintiff. “Public policy and the very nature of the thing will give no countenance to such a defence. It makes but little difference whether the point is made by demurrer, the more regular way, or by an order striking out that part of the answer, as was done here.”); Howell v. Ferguson, 87 N. C. 113 (1882) (Answer stricken as frivolous and judgment awarded plaintiff. “... an answer is frivolous when assuming its contents to be true, it presents no defence to the action. ... Assuming then all the allegations of the defendant’s answer to be true, there is not one of them that constitutes a substantial defence to the action, and the answer is therefore frivolous, and should have been stricken out and judgment given as for the want of an answer.”)
to assume the facts of the questioned plea true but expressly refrains from appraising their sufficiency. Rather it rules on the "seriousness" of the plea and advises a demurrer or determination by the jury if there is a desire to present the questions of the sufficiency in law of the plea or its truth in fact.\textsuperscript{23}

The motion to strike as frivolous may seem capable of being made to perform, partially at least, the function of the motion for summary judgment. If an answer or reply which can not be proved is frivolous, then motion to strike it as such is an effective implement for ending the case summarily on the so-called issue of fact. But, as in the case of the motion to strike as sham, such a use of the motion to strike as frivolous would be novel. It would do no violence to the language often used in defining a frivolous plea to interpret it as comprehending a plea without sufficient evidence to support it. That, however, has not been done. The court seems to consider the motion as admitting the facts of the assailed pleading. The judicial inertia resulting from this accustomed usage could scarcely be overcome by a latter-day attempt by this motion to have the court consider the provability of the challenged plea. Even so, the motion does not lie against the complaint and would thus not give defendant relief commensurate with plaintiff's.

The fact seems to be that the motion to strike as frivolous is superfluous from any point of view. It performs no useful function that the demurrer does not already perform. This is obviously true under the first line of cases which consider the motion equivalent to a demurrer. Though the point is less obvious, the motion is likewise supererogatory under the second line of cases. It is the thought of these cases that preliminary to a final determination of the question of law or fact presented by the answer the motion may be used to query whether that question is fit for discussion. Before the ultimate decision is made, it may first be decided that there is something worth deciding. All this rings with a specious sound of plausibility. There is a theoretical distinction between the gravity or pertinence of the question presented and the determination of the question. But it is not worth observing in

\textsuperscript{23} Erwin v. Lowery, 64 N. C. 321 (1870) (Motion to strike answer as frivolous denied. "Where the answer is put in good faith, and is not manifestly impertinent, he is entitled to have the facts alleged in it either admitted by a demurrer or passed on by a jury."); Dail v. Harper, 83 N. C. 4 (1880) (Motion to strike answer as frivolous granted. Reversed. "... it seems to us that the matters set up in the answer were not manifestly irrelevant or immaterial to the claim of the plaintiffs ... and how the matter in law may be ... is a ‘serious question and one fit for discussion’ ... We have not ourselves formed any definite opinion upon the legal questions arising on the defences made; and do not intend to intimate any, but we merely decide that the matters alleged in defence were such that the judge should have let the issues made by the statute been [sic] tried by a jury, unless the plaintiff by admitting the same on demurrer had chosen to transfer the question of law to the court.").
practice. It seems futile to allow a case to go through trial and appellate hearings first to determine that there is something to decide and then repeat the process to make the decision. Of course, if it is held that there is nothing to decide, that the question is impertinent or unfit for discussion, the motion ends the case. A demurrer would have served the same purpose. On the other hand, if it is held first, on the motion that there is a fit question and second, on a demurrer that the answer is good or bad, nothing has been added by the motion but stalling and delay.

Brief mention should be made of several other motions, either provided by statute or judicially created, to distinguish them from the motion for summary judgment. C. S. §537 provides that irrelevant or redundant matter in a pleading may be stricken on motion made before demurrer or answer. Manifestly, such a motion does not raise the question of the provability of the plea it attacks. Instead it is a device for purging a plea of those parts which, assuming them true, are not germane to the controversy or are repetitious. This motion seems to differ from a demurrer and the motions to strike as sham or as frivolous in that the latter are directed to pleas defective in whole, the former to affected parts of a plea. This motion permits of delay solely for the purpose of pruning parts of a plea when, ex hypothesi, the remaining parts are sufficient; for, if the whole plea were defective, a demurrer rather than this motion would have been used. But the motion is probably necessary as a means for preventing the bringing of the attention of the jury to irrelevant matters.

Another and perhaps more justifiable motion provided by C. S. §537 is the motion to make more definite and certain. Here the movant's position is not that his adversary’s plea is untrue, but is too vague to give adequate notice of what will be proven under the plea. The motion invokes an amendment because of the uncertainty of the plea, not judgment because of its untruth.

The last two motions which merit mention in a consideration of summary judgment procedure are judicial creations. They are the motion to dismiss and motion for judgment on the pleadings. Neither questions the provability of the opponent’s plea. The motion to dismiss or demurrer *ante tenus* is limited to two grounds: (1) that the complaint fails to state a cause of action,\(^\text{14}\) or (2) that the court has no jurisdiction.

\(^{14}\) Most cases attempt to draw a distinction between a good statement of a bad cause of action and a bad statement of a good cause of action and predicate thereon the doctrine that the motion to dismiss reaches only the former. The distinction thus drawn seems to be between a deficient statement not curable by amendment and one that is so curable. Garrett v. Trotler, 65 N. C. 430 (1871); Halstead v. Mullen, 93 N. C. 252 (1885). But other cases have held that the motion reaches defects curable by amendment. Jackson v. Jackson, 105 N. C. 433, 11 S. E. 173
over the subject matter of the action. The motion for judgment on
the pleadings seem to be recognized only as a means for securing judg-
ment on admissions made by the pleadings.

It is apparent that the North Carolina practice now recognizes no
motions which take the place of the motion for summary judgment.
Speedy settlement of meritorious claims is now impossible, save in cases
where the defendant is considerate and defaults. Potentially, two of
these motions hold possibilities for development into substitutes for the
summary judgment for plaintiff alone. If only judicial sanction could
be had, the motions to strike as sham or as frivolous could be so used.
The defendant who had no evidence to prove his answer could be pre-
vented from forcing plaintiff to docket his case on the jury calendar.
Possibly an interminable delay in awaiting the call of the case and the
misfortune of loss of evidence because of the delay would be avoided.
There is little likelihood, however, that the traditional practice on pres-
ent motions will be changed to give plaintiff the desired relief. There
is no likelihood that these motions could be developed to give defendant
comparable relief. It is appropriate, therefore, and it may be profitable
to examine in some detail how other jurisdictions have met similar
situations with their varying types of summary judgment procedure.

II

Prior to the code reform of pleading there were various attempts at
simplifying and expediting the collection of claims. A summary civil
procedure bearing some resemblances to the summary judgment of modern practice attained quite a vogue, particularly in the southern states. Then the advent of the codes brought these experiments in summary procedures to an end in the states which adopted the reformed system. The loss seems to have been greatest in South Carolina where the venture had achieved notable success.\(^9\)

The adoption of code pleading in England seems to have had quite the opposite effect on the development there of a summary procedure. A beginning had been made in 1855 with a provision for summary judgment in actions on promissory notes and bills of exchange. Then the Judicature Act of 1873 not only completed the reform in pleading comparable to that effected by our codes, but it also hastened the evolution of a more comprehensive summary judgment procedure.\(^20\)

Modern day summary judgment procedures stem from this English procedure. It may be well therefore to set forth its provisions in some detail. Order III, Rule 6 provides that the writ or summons may be indorsed with plaintiff's claim (the indorsement serving as the complaint) in

\[\ldots\text{all actions where the plaintiff seeks to recover only a }\textit{debt or liquidated demand in money, payable by the defendant, with or without interest, arising:}\]

\begin{itemize}
  \item[(A)] on a contract, express or implied (as for instance on a bill of exchange, promissory note or check, or other simple contract debt); or
  \item[(B)] on a bond or contract under seal for the payment of a liquidated amount in money; or
  \item[(C)] on a statute where the sum sought to be recovered is a fixed sum or in the nature of a debt other than a penalty; or
  \item[(D)] on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only; or
  \item[(E)] on a trust; or
  \item[(F)] in actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant.\]

With proper indorsement, the plaintiff can then seek summary judgment by the following procedure provided by Order XIV:

\[\ldots\text{Where the defendant appears to a writ or summons specially indorsed under Order III, Rule 6, the plaintiff may, on affidavit made by}\]

\(\text{R. W. Millar, Three American Ventures in Summary Civil Procedure (1929) 38 }\text{YALE L. J. 193.}\)

\(\text{Charles E. Clark and Charles U. Samenow, The Summary Judgment (1929) 38 }\text{YALE L. J. 423, 424.}\)
himself, or by any person who can swear positively to the facts(175,382),(867,444) verifying the cause of action and the amount claimed (if any), and stating that in his belief there is no defense to the action, apply to a Judge for liberty to enter final judgment. . . . The Judge may thereupon, unless the defendant, by affidavit, by his own viva voce evidence, or otherwise, shall satisfy him that he has a good defense to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly.”

Provisions are also made for partial summary judgments (Order XIV, Rule 4) and for leave to defend (Order XIV, Rule 6). The leave is granted when defendant shows a defense entitling him to trial according to the ordinary procedure.

The two main types of limitations in the procedure thus established are the restriction of the availability of the motion to plaintiff alone and the limitation of the types of cases in which it is available. Similar limitations appear in the British Colonial and American practices based on the English pattern. All but New York and Michigan seem to restrict the remedy to the plaintiff. Variations in the types of cases to which the motion is applicable and in the procedures for the motion may now be briefly traced.

The provisions prescribing the actions in which the procedure shall be available vary in respect to the kind of cases set forth as well as in the degree to which the descriptions are particularized. New York and Connecticut have very elaborate catalogues of cases. In New York the cases are: to recover a debt or liquidated demand arising on a contract express or implied in fact or in law, sealed or not sealed; or to recover a debt or liquidated demand arising on a judgment for a stated sum; or on a statute where the sum sought to be recovered is a sum of money other than a penalty; or 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; or 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; or to enforce or foreclose a lien or mortgage; or 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; or for an accounting arising on a written contract, sealed or not sealed. In Connecticut the cases are actions to recover a debt or liquidated demand arising on a negotiable instrument, contract (except

22 Ibid., 424-456.
25 Supra note 22.
quasi-contract), recognizance, judgment, statute where the sum sought to be recovered is a fixed sum or in the nature of a debt, guaranty, actions for the recovery of chattels, to quiet title, to enforce or foreclose a lien or mortgage, and to discharge "any claimed invalid mortgage," lien, caveat, or lis pendens. In other jurisdictions the cases are less elaborately set forth and are often less comprehensive in scope. In New Jersey they are actions to recover a debt or liquidated demand arising "upon a contract, express or implied, sealed or not sealed; or upon a judgment for a stated sum; or upon a statute". In Michigan the procedure is applicable to "any cause arising out of contract or judgment or statute"; in Rhode Island "in an action founded on contract express or implied when the plaintiff seeks to recover a debt or liquidated demand"; in the District of Columbia, "in any action arising ex contractu"; in Illinois, "in any suit upon a contract, express or implied or upon a judgment or decree for the payment of money, or in any action to recover possession of land, with or without rent or mesne profits, or in any action to recover possession of specific chattels"; in Massachusetts, "in any action of contract where the plaintiff seeks to recover a debt or liquidated demand"; in Delaware, "in actions in the Superior Court upon bills, notes or bonds or other instruments in writing for the payment of money, or for the recovery of book accounts, or foreign judgments, and in all actions of scire facias on recognizance in the Orphans' Court and Courts of Chancery, judgments or mortgages"; in Pennsylvania, "in actions of assumpsit"; in Virginia, in all actions at law; in West Virginia, in contract actions for money and suits on official bonds; and in Wisconsin in actions to recover a debt or liquidated demand arising on a contract or judgment.

There is thus considerable divergence among the jurisdictions having summary judgment procedure in regard to the kinds of cases to which it is applicable. The most prevalent types of limitation are the restrictions to claims for liquidated demands and to contract actions. There

27 Supra note 23.
29 Rules of the Supreme Court of the District of Columbia, Rule 73, §1.
31 8 Ann. Laws of Mass. (Michie, 1933) c. 231, §59B.
36 Wis. Stat. (11th ed.) §§270, 635. This is a rule of court promulgated June 22, 1931. Such a rule was advocated in Frank Boesel, Summary Judgment Procedure (1930) 6 Wis. L. Rev. 5.
is likewise diversity in the procedures set forth as the means of seeking
the judgment.

Connecticut and New Jersey follow the English model with some
variations. The Connecticut practice is as follows:

"... final judgment shall be entered by the Court at any time after
the defendant has appeared, either before or after an answer has been
filed, upon written motion and affidavit of the plaintiff or of any person
having personal knowledge of the facts verifying the cause of action,
and the amount he believes to be due and his belief that there is no
defense to the action, unless the defendant, within ten days after the
filing, in duplicate, of such motion and affidavit or within such further
time as the Court for good cause shown may prescribe, shall show by
affidavit such facts as may be deemed by the Court sufficient to entitle
him to defend."37

The chief differences from the English practice are that in Connecti-
cut the motion may be made before or after answer, whereas in England
it must be made before answer, and the defendant is limited in Con-
necticut to affidavits instead of having the English option to give vi
cus viva evidence. In New Jersey, on the other hand, the defendant's show-
ing may be made by "affidavit or other proof," but the plaintiff's motion
may be made only after answer.38 The showing to be made by def-
fendant to avoid summary judgment is substantially the same in these
two states as in England—such facts as may be deemed by the court
sufficient to entitle him to defend.

In three states—New York, Michigan, and Illinois—the procedural
provisions of the summary judgment enactments have undergone im-
portant changes. The New York system was established originally by
rule of court effective in 1921 and was modeled closely on the style of
the English pattern. On June 15, 1933, amendments were adopted
which extended the scope of the practice chiefly by making the motion
available to defendant. That practice now is as follows:

"The complaint may be dismissed or answer may be struck out and
judgment entered in favor of either party on motion upon the affidavit
of a party or of any other persons having knowledge of the facts, setting
forth such evidential facts as shall, if the motion is made on behalf of
the plaintiff, establish the cause of action sufficiently to entitle plaintiff
to judgment, and if the motion is made on behalf of the defendant such
evidentiary facts, including copies of all documents, as shall fully dis-
close defendant's contentions and show that his denials or defenses are
sufficient to defeat plaintiff, 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, unless the other party, by affidavit or other
proof, shall show such facts as may be deemed by the judge hearing

the motion sufficient to entitle him to a trial of the issues. If upon such
motion made on behalf of a defendant it shall appear that the plaintiff
is entitled to judgment, the judge hearing the motion may award judg-
ment to the plaintiff even though the plaintiff has not made a cross-
motion therefor.

"If the plaintiff or defendant in any action set forth in subdivisions
3, 4 or 5 hereunder shall fail to show such facts as may be deemed, by
the judge hearing the motion, to present any triable issue of fact other
than the question of the amount of damages for which judgment should
be granted, an assessment to determine such amount shall forthwith be
ordered for immediate hearing to be tried by a referee, by the court
alone or by the court and a jury, whichever shall be appropriate. Upon
the rendering of the assessment, judgment in the action shall be ren-
dered forthwith.

"When in any actions in cases set forth in the subdivisions 6, 7 and 8
hereunder the judge hearing the motion has been convinced that there
is no preliminary triable issue of fact, the court shall forthwith render
an appropriate judgment or order, and thenceforth the action shall pro-
ceed in the ordinary course.

"Where an answer is served in any action setting forth a defense
which is sufficient as a matter of law, where the defense is founded upon
facts established prima facie by documentary evidence or official record,
the complaint may be dismissed on motion unless the plaintiff by affi-
davit, or other proof, shall show such facts as may be deemed by the
judge hearing the motion sufficient to raise an issue with respect to the
verity and conclusiveness of such documentary evidence or official
record.

"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 judgement until the disposition of the issue of
the main case."58

The Michigan Judicature Act of 1915 provided a summary judgment
procedure somewhat similar to the English one. The motion was to be
made at any time after the "cause shall be at issue," but it seems that
the defendant could avoid summary judgment simply by filing an affi-
davit of merits. If, however, the defendant was shown to have filed
his affidavit in bad faith for the purpose of delay, then double costs were
taxable against him.40 Barring this provision with reference to costs
the procedures today are substantially similar in the District of Colum-
bia, Delaware, and Pennsylvania.41 In 1929 the Michigan practice was
changed by rule of court. The principal changes seem to be that the
remedy is now extended to defendant; that the court may make a finding
that one party or the other is entitled to judgment as a matter of

58 Supra note 22.
41 Supra notes 32, 33.
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law (but without deciding any controverted issue of fact); and that the
affiant must be a competent witness and the facts stated such as would
be admissible under the rules of evidence.42

The Illinois Civil Practice Act of 1907 contained a summary judg-
ment provision quite similar to the earlier Michigan one.43 The Civil
Practice Act of 1933, which repealed the former Act,44 substituted a
different summary remedy.45 The statute is supplemented by two rules
of court.46 Although the remedy is still available to plaintiff alone, the
new system makes interesting changes, in that now apparently the court
no longer has to accept the affidavits at their face value but may make
a finding and now the affiant must be a competent witness and the facts
stated such as would be admissible under the rules of evidence.

In Indiana the statute provides:

"An answer or other pleading shall be rejected as sham, either when
it plainly appears upon the face thereof to be false in fact or merely
intended for delay, or when shown to be so by the answers of the parties
to special written interrogatories propounded to him to ascertain whether
the pleading is false. . . ."47

This procedure seems not to have been extensively employed.48

The Massachusetts and Rhode Island enactments resemble the Eng-
lish type but with one striking difference—the defendant may avoid
summary judgment by demanding jury trial.49 The nullifying effect of
this provision is somewhat modified in Rhode Island by a stipulation for
double costs if defendant demands a jury and ultimately loses.

Under the Virginia and West Virginia50 procedures provision for
simplified pleading is made in that the motion and affidavit take the
place of formal pleadings. But there is further provision making trial
by jury demandable as of right.

III

The foregoing comparisons and contrasts between the enactments
setting up summary judgment procedures lead naturally to an attempt
to analyze and evaluate the differing provisions. The juxtaposition of
similarities and dissimilarities invites an inquiry to determine which of
these varying measures best fulfills the purposes sought by the expedited

42 Supra note 23.
44 Ill. Rev. Stat. (Cahill, 1933) §222.
46 Rules of the Supreme Court as Amended at the June Term, 1935, rules
15-16.
48 Clark and Samenow, op. cit. supra note 20, at 463.
49 Supra notes 28, 31.
50 Supra notes 34, 35.
procedure. This determined, it may be pardonable skepticism to inquire whether even the best of the enacted systems is not subject to improve-
ment.

Attention may be first called to the restriction of the procedure to designated types of cases. It will be recalled that practically all of the statutes or rules establishing summary judgment procedure narrow its range by specifying selected actions to which alone it is applicable. The two most popular specifications of this sort are contract actions and claims for debts or liquidated sums. Now it will scarcely be gainsaid that there may be dissembling in all kinds of cases and that the require-
ment of an affidavit may more or less frequently expose the dissembler so that he can be punished by adverse summary judgment. Why, then, limit at all the procedure designed to unmask pretension in pleading? Especially, why limit it to contract and debt cases? The theory of such limitations seems to be that right and wrong are more readily distin-
guished in these cases than in others, and that therefore affidavits in support of the pleadings may be a fair basis for determining that there is or is not a triable issue in these cases while not in others.6

Further-
more, it is thought that there is more feigning by defendants in these classes of cases than in others.5 Doubtless it is easier to determine

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1 See Clark, *The New Summary Judgment Rule in Connecticut* (1929) 15 A. B. A. J. 82, 84:

“One might, perhaps, ask why the enumerated actions should be chosen, and why either a lesser or a greater number, or even all actions, should not be subject to the same procedure. The answer depends on wholly practical reasons. The summary judgment rule will work best in the comparatively simple case where no defense or one easily set forth by affidavits may be expected. Where, due to the complexity of the case, the judges will hesitate to enter a summary judgment, the effect of the new procedure may be to slow up rather than expedite the administra-
tion of justice. Experience must therefore determine the character of the cases where it will prove most effective. Judging by the precedents of other places the choice here made is a sound one. If, however, additions or even omissions may later seem desirable these may be made as experience dictates.”

2 See Am. JnD. Soc. BULLETIN No. 14 (1919):

“It is a matter of common experience in most civil courts that there are certain classes of cases in which the proportion seriously defended is very small. Among such cases are always those where the sum sued for is liquidated in amount. Claims of that nature are generally for the price of goods sold and delivered, or for money lent or similar clear obligations, and the defense, if any is interposed at all, is apt to be set up to gain the defendant a little longer time for payment. Now the ordinary procedure provided for actions, both under these rules and in all the states, presupposes a situation where there is something to be said on both sides; the defendant is therefore given every opportunity to present his story, and allowed ample time to put it into shape. It is obvious that it is undesirable to permit a defendant who has no real defense to put off the plaintiff’s judgment by resorting to procedural delays. But at present he can take advantage of the pro-
cedure designed to protect a defendant who has a real defense; he can file a pleading in more or less common form which will delay the creditor until trial—
a period varying in different courts from weeks to months or even a year.

“A division of actions is therefore logical which will make possible a departure from the ordinary procedure in cases which, it is known from experience, are not generally defended. While it is not necessary to go so far as to make the court a
whether in a suit on a negotiable instrument defendant's plea of payment or forgery is supportable than it is in an action for negligent injury to determine whether his plea of the general denial or contributory negligence is likewise provable. Yet it requires no reach of the imagination to conjure up complicating factors that would make the suit for contract or debt a closer one more taxing to the powers of discrimination between right and wrong than the suit for negligence. The truth would seem to be that a case of any type may be so simple that faking can be exposed by the affidavits required. On the other hand, it may be so complex that it is impossible without a more elaborate and extensive investigation than the summary judgment procedure contemplates to determine which, if either, side is the faker. Perhaps the simple case is more recurrent in claims on contract or for debts than in other kinds of claims, and there is a shred of reason to limit summary judgment procedure to this class of cases. Even this limitation, however, has not proved a safeguard against the use of summary judgment in cases too complicated to be so disposed of. In New York, for example, the judges have had to propound a doctrine that the complexity of the case compels refusal of summary judgment. With this safeguard, no reason is perceived why the remedy should not be extended to all cases.

In this connection it is not without significance that the provisions of the New York rule have been twice extended—once in 1932 and again in 1933. These amendments were procured largely through the influence of Mr. Justice Finch. As early as 1924 he had advocated broadening the range of the procedure. In a statement before the American Bar Association, he said:

"Since this principle of summary judgment now has vindicated in practice its adoption, let us hope that the legislature will soon apply it more extensively, and there would seem to be no reason why it might not be extended also to certain actions in equity. The reason given by those who confined the rule as enacted was that it was felt that in order to facilitate its acceptance by the Bar generally, it had better at first, at least, be confined to those actions in which the relief was of the simpler kind. This reason, however, no longer exists and hence there is confidence and hope for the extension of the application of this beneficent provision."54

54 Goldstein v. Karff, 203 N. Y. Supp. 119 (1924) (Summary judgment for plaintiff reversed. "In any event, the matter is so complex as to the facts, and so delicate in regard to the questions of law involved, as not to warrant a summary judgment).
Of course, there is the possibility that the motion will be made for delay in cases so complicated that the movant knows it will be denied. Such a perverted use of the motion might be deterred by a provision similar to the Michigan one taxing double costs against such a movant.

Their greater simplicity, real or supposed, may then be assigned as a probable but unjustifiable reason for limiting summary judgment procedure to claims in contract and for debts or liquidated sums. Another reason, equally probable as far as the limitation to debt claims is concerned, is the relative ease with which damages are assessed in such cases. At the time of the summary judgment enactments the bar was already familiar with assessment by the court in liquidated claims when judgment went by default final. On the other hand, the accepted practice was to have the jury assess damages in unliquidated claims when judgment went by default and inquiry. Assessment by jury was thus associated with unliquidated claims. It would have been perchance too great a break with tradition to provide for determination of damages by the court as a feature of summary judgment procedure applicable to unliquidated claims. If this be so, the only option was to limit the procedure to liquidated claims or to provide for unliquidated claims a writ of inquiry on damages triable to jury. The latter alternative, inasmuch as it involved impaneling a jury, may have been thought too slight an improvement over trial of the whole case to the jury to justify the change.

However, these problems with reference to damages should not, it is believed, cause the restriction of summary judgment procedure to liquidated claims. The lying and dilatory pleader against whom an unliquidated claim is brought can and should be made subject to summary exposure. One way is to break with tradition and allow the court to determine damages. This, however, is productive of delay by absorbing time of the judge which might otherwise be used in further clearing the calendar. A better way seems to provide for a reference of the damages issue.

More common than the limitation of the summary remedy to contract and liquidated claims is the restriction of its availability to plaintiff alone. Only New York and Michigan extend the procedure to allow defendant to make the motion for and receive a summary judgment.

\[^{23}\text{Supra note 23.}\]
\[^{24}\text{See HINTON, CASES ON TRIAL PRACTICE (2nd ed., 1930) Chap. II; McIntosh, N. C. PRAc. AND Proc. (1929) §§632, 633.}\]
\[^{25}\text{With reference to the possible constitutionality of such a provision it may be observed that at common law assessment of damages by a jury was not considered a matter of right. See the cases collected by Mr. Justice Finch, op. cit. supra note 1, at 507.}\]
\[^{26}\text{Supra notes 22, 23. See also (1933) 47 HARV. L. REV. 140.}\]
Implicit in this restriction, it may be hazarded, is the notion that many more spurious defenses than complaints are filed; that defendants are, for the most part, the feigners; and that, therefore, a procedure designed to expose insupportable pleas need be available to plaintiff alone. There are practical considerations to make this conjecture quite plausible and there are some statistics to sustain it. Plaintiff has the option between maintaining the status quo and starting a law suit. If in the wrong, he will scarcely start a suit foredoomed to fail because of impossibility of proof when he knows the price of such failure will be court costs and attorney’s fees. Defendant, on the other hand, has not the same option as plaintiff’s. His is the choice between defending and default judgment. Even though in the wrong, the temptation is strong to put in a defense—say, a general denial—forcing the case to be docketed for jury trial. True he, too, knows that enhanced costs against him may result from his sham defense, but he may yield to the hope that delay will result and from it loss or weakening of the plaintiff’s testimony. In short, the motives of plaintiff and defendant to file false pleas are different. Defendant has a much greater one than plaintiff. This lends reasonableness to the view that defendant falsifies more than plaintiff. So, too, do some fragmentary statistics available. These figures show a high percentage of judgments for plaintiffs—three to one in contested cases; ten to one in all cases.\(^5\)

In addition to the probability that more defendants than plaintiffs are dishonest another factor lends some support to the preference usually given plaintiff by summary judgment procedures. That factor is the consideration that the consequences of the adversary’s prevarication in pleading are more drastic to plaintiff than to defendant. Professor Pogson observes this as a reason for different treatment of plaintiff and defendant with reference to authentication of pleadings. His observation is equally apposite here:

“It is perhaps more unfair,” he says, “that an honest plaintiff shall be delayed . . . in his remedy by a dishonest answer than that an honest defendant shall be embarrassed by a dishonest complaint, since in the former case the plaintiff is kept out of his rights and his property with increasing risk of absolute loss, while in the latter case the hardship is chiefly trouble and expense, which on a balance sheet between the parties about equalize themselves in most jurisdictions, amounting to a practical stalemate.”\(^6\)

But the right of the plaintiff to recover is not invariable; it is only more probable. And when plaintiff is in the wrong hardship on the


\(^6\) Pogson, *op. cit. supra* note 8, at 47.
defendant is not absent; it is only relatively less than that on the plaintiff when defendant is in the wrong. These circumstances are not justifiable reasons for making summary judgment unavailable to defendant altogether. Although the cases in which he could use it successfully are less likely to occur than cases in which plaintiff could so use it, still there are such cases. It may be, for example, that plaintiff is bringing an action solely for its nuisance value. Provision should be made for these cases, with the safeguard that, if defendant ultimately loses on verdict and is found to have made the motion solely for delay, double costs should be taxable against him. Because of the circumstances just noted, however, the courts may reasonably be expected to be more wary of granting defendants' motions than plaintiffs'.

The provisions of summary judgment procedures which make the remedy available to plaintiff alone, and that only in certain kinds of cases, are features of capital importance. The foregoing attempt to disclose their implications and appraise their significance has led to the conclusion that both features are unnecessary restrictions. The reasons which prompted them are understandable but are not defensible. The ideal system should discard these restrictions and extend the remedy to both parties in all cases.

Other more or less important features of the enacted systems remain to be considered. Of primary importance are such matters as whether summary judgment should be avoidable by a demand for jury trial, and, if not, what showing should be required to avoid it. Of secondary importance are such matters as the nature and number of the affidavits required, whether \textit{viva voce} testimony should be allowed, time of the motion, \textit{et cetera}.

It has been observed that under the provisions for expedited procedure adopted in Massachusetts, Rhode Island, and the Virginias\textsuperscript{61} trial by jury is demandable of right. This right renders such a procedure ineffective to achieve one of the main purposes for which a summary procedure should be designed—namely, to prevent the pleader whose plea is palpably or demonstrably unprovable from being able to demand a jury trial. This is not to disparage the commonsensible attempts at simplified pleading made by enactments like the Virginia ones.\textsuperscript{62} It is rather to say that there is a failure to accomplish all that is necessary to make the procedure truly summary.

Much the same criticism may be made of the provisions once in effect in Michigan and presently prevailing elsewhere that defendant

\textsuperscript{61} \textit{Supra} notes 28, 31, 34, 35.
may avoid summary judgment merely by filing an affidavit. Of course, this requirement may so embarrass the falsifying pleader that he will have to submit to judgment. More likely it is that if he is willing to falsify his plea, so is he his affidavit. The requirement thus may often degenerate into a perfunctory formality to be observed by an unmeritorious pleader in procuring the delays incident to jury trial.

The English provision and its American prototypes seem a much more effective weapon for the expeditious disclosure of falsehood in pleadings. Under them jury trial is not demandable of right. Not only must affidavits be filed to avoid summary judgment but also the judge must make a finding entitling the party resisting judgment to jury trial.

It must be admitted that the provisions of this kind do not give to the court a very specific instruction as to the finding to be made to grant or refuse a motion for summary judgment. The English Order requires defendant to show "that he has a good defense to the action on the merits or disclose such facts as may be deemed sufficient to entitle him to defend." In Connecticut and New Jersey defendant must "show such facts as may be deemed sufficient to entitle him to defend." In the New York rule it is first stated that the party resisting the motion must "show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to a trial of the issue." Later the requirement is referred to as a showing of a "triable issue of fact."

The standards thus set up are (with the exception of the alternate one in New York) so broad and flexible that they might be thought to invest the court with an unrestricted discretion. Judicial construction, however, has narrowed the judge's power. In pronouncing these acts constitutional as not abridging the right to trial by jury the courts have held that the trial judge may go no further than to find that there is a bona fide fact issue between the parties; he may not determine that issue. This limitation is specifically provided in the Michigan rule.

Supra notes 40, 41. 
Supra notes 26, 37. 
Supra note 22. 

Compare the impressions of Mr. Cohen that the judges frequently determine a genuine issue of fact on the motion: "But despite the verbal clarity of the judicial distinction between deciding an issue of fact and deciding whether a real issue of fact exists, it is submitted that what courts decide on a motion for summary judgment is frequently an issue of fact. If the defendant's story, though adequate on its face, is factually highly improbable the motion is often granted, and if it is only moderately improbable the motion is commonly denied." Cohen, op. cit. supra note 4, at 852, 853.

The distinction is doubtless easier to phrase abstractly than to observe in a particular case. This is not an unmitigated evil, for it should have the felicitous result of giving judges sympathetic to the purposes of summary judgment procedure some latitude to effectuate them.
The idea that finding a tenable issue is the maximum function of the judge under these procedures seems quite justifiable. Unless it is accepted the procedure becomes an instrument for the abolition of trial by jury on bona fide issues of fact. True the desirability of such trial by jury is not beyond question. To abolish it, however, by the latent power of a general investiture of authority in a summary judgment procedure is an underhanded and probably unconstitutional method. It smells of the unsavory device of "sneak legislation". To put this matter beyond the peradventure of doubt the functions of the judge on motion for summary judgment should be more precisely stated.

The fact that trial by jury is not to be usurped but that the twelve are still to determine real fact-issues gives the clue for a precise phrasing of the functions of the judge in a summary judgment procedure. When trial is by the ordinary procedure before a jury the judge has the recognized power to rule on the sufficiency of the evidence. Non-suits and directed verdicts are witnesses to the power of the judge to require litigants to convince him that their evidence is worth submitting to the jury. On the motion for summary judgment the judge is exercising an analogous power and requiring a similar showing by affidavits. There seems little reason, therefore, to phrase in vague terms the finding he must make to refuse or grant summary judgment. His function will be clearer if it is provided that he is to determine whether the affidavits establish facts which would, if trial were by jury, require the submission of the case to them. In addition to greater clarity, this form of statement would serve to incorporate by reference the various criteria which have been evolved to guide the judge in his rulings on motions for non-suit and directed verdict.

Granted that the judge on the motion for summary judgment should seek only to discover not to resolve genuinely issuable disputes of fact, is there similar reason to prevent him from determining questions of law? The English Order and its closest American copies are equivocal, and their construction has been divergent with reference to the judge's power or duty to determine such questions on the motion. The more advanced systems in New York, Michigan, and Connecticut are less vague. In the two former states the rules provide that the moving party's pleas must be sufficient in law to entitle him to the summary judgment. It seems, as will be noticed later, that there is equal reason to provide that the motion shall question the sufficiency in law of the

\[\text{\textsuperscript{Supra} page 221.}\]


\[\text{\textsuperscript{\textsuperscript{Supra} notes 22, 23, 25.}\]
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adversary's plea. The Connecticut rule provides that, if the court is of the opinion from the affidavits that

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

This provision seems needlessly roundabout and productive of delay. It is just as if provision were made that a demurrer or motion equivalent to demurrer should be necessary following the motion for summary judgment in order to present questions of law with reference to the plea. There is no reason why matters which would make the plea demurrable should not be put in question at the same time that its provability is challenged. When the situation arises in which the judge finds the requisite issue of fact between the parties but also finds that a plea is demurrable must he then have to await the further presentation of the question of law by way of demurrer or otherwise? There is no need for two procedures parallel in purpose and successive in operation if they can be combined without too much complexity. In the case of the motion for summary judgment and the demurrer such telescoping seems feasible. It could be accomplished simply by allowing the movant for summary judgment to incorporate in his motion any recognized grounds for demurrer. It should go without saying that if the only triable issue raised is one that would be for the determination of the judge on evidence in a jury trial—like the construction of a written instrument, probable cause in malicious prosecution, et cetera—then the judge on the motion, should not only discover that there is a bona fide issue but determine the issue.

These functions of the judge with reference to questions of fact and law are, of course, vitally important. They determine the breadth of the change wrought by this new method of trying cases. Relatively such questions as the time of the motion and nature of the affidavits are mere minutaie. Nevertheless such incidentals demand brief consideration.

There is sharp divergence among the summary judgment jurisdictions with reference to the time of the motion. In England, according to some rulings plaintiff must move before answer. In New York he must wait until after answer. In Connecticut he may move at either time. The last seems best. The motion should be allowed

E.g. for a case where this was done, see Sutter v. Harrington, 51 R. I. 325, 154 Atl. 657 (1931).
The cases seem to be conflicting. See Clark and Samenow, op. cit. supra note 19, at 432.
Supra note 22.
Supra note 37.
before answer, because, if defendant has no valid defense the motion
gives him notice that a false plea will be exposed and thereby encourages
him to default. But the motion should not be required before answer,
for plaintiff may not know whether he can successfully make it until he
sees the answer. There are occasions justifying the motion both before
and after answer. Neither time should be selected, therefore, as the
deadline, but both times should be designated as proper. But should
there not be some limit? There seems little reason to allow the motion
after the case is opened to the jury. For one of the chief reasons for
the motion is to prevent the necessity for impaneling a jury. It is too
late then for the motion to achieve the good for which it was designed.
The delays it seeks to avoid may already have taken place. It is believed
that ideally the motion should be allowed at any time before or after
answer until the case is opened to the jury. This, of course, would
apply to defendant's motion as well as plaintiff's.

The earlier statutes and rules of the English type did not make as
specific requirements with reference to the contents of the affidavits as
those incorporated in the later and more progressive rules in New
York,\textsuperscript{77} Michigan,\textsuperscript{78} and Illinois.\textsuperscript{79} Two advances in these states are
noteworthy. All provide that the affidavit must contain evidentiary
facts, thus enacting a doctrine that had been evolved judicially. Man-
ifestly, if the affidavit does no more than to restate and swear to the
allegations of the pleading, it is of no additional help in determining
whether there is a bona fide issue between the parties. It is, in every-
thing but form, a verified pleading. Of course, the term "evidentiary
facts" is vague, but still it is a useful general guide. It is the term
already used to describe those matters which are too detailed and min-
ute to be properly pleaded, just as the term "conclusions of law" is used
to describe those matters which at the opposite extreme are too general
and broad. Its content and connotation derived from use and applica-
tion in the rule of pleading thus make the term "evidentiary facts" a
good label for the requisite contents of the affidavit. It indicates the
need of more details than appear in the pleading. The second note-
worthy advance is the position taken by Michigan and Illinois that the
affidavit contain only such facts as would be admissible in evidence. A
moment's reflection on the purpose of the motion for summary judg-
ment reveals the necessity for this requirement. At the risk of unduly
belaboring the point, it may be reiterated that the purpose is to discover
a bona fide issue, that is, to test the probable provability of the pleadings.
Now the pleader may have and may show by affidavit a variety of evi-
dentiary facts to support his plea, but unless they are admissible under

\textsuperscript{77} Supra note 22. \hspace{1cm} \textsuperscript{78} Supra note 23. \hspace{1cm} \textsuperscript{79} Supra note 46.
the rules of evidence there is little likelihood that he can prove his plea. And, if that is so, there is no reason to impanel a jury to let him try. This may be a reflection on the rules of evidence. It is not meant to suggest that they are sacrosanct. The present point is that the purpose of summary judgment procedure dictates that the affidavits be limited to legally admissible facts. If the function of the judge were to determine the case on affidavits, rather than merely seek a real issue, trial by jury would be superseded and there would then be occasion to advocate abrogation of the rules of evidence which have developed as a feature of trial by jury.

IV

It is now proposed to set forth the draft of a suggested statute providing a summary judgment procedure for North Carolina. It is composite in form because the attempt is made to select and embody the best features of such legislation elsewhere as well as to include the improvements which have herein been contended for.

AN ACT TO AUTHORIZE SUMMARY JUDGMENTS AND TO REGULATE THE PROCEDURE THEREFORE

JUDGMENT FOR THE PLAINTIFF

Section 1. At the time of filing his complaint, or at any time thereafter, until the case is opened to the jury, the plaintiff in any civil case in the Superior Court, or in any court inferior to the Superior Court except the court of the Justice of the Peace, may move in writing for a judgment in his favor.

Section 2. Such motion shall be supported by an affidavit or affidavits of the plaintiff or anyone on his behalf having knowledge of the facts, which—

(a) Shall be made on the personal knowledge of the affiant,
(b) Shall set forth with particularity the evidentiary facts upon which the plaintiff's cause of action is based,
(c) Shall not consist of conclusions but of such facts as would be admissible in evidence,
(d) Shall show affirmatively that the affiant, if sworn as a witness can testify competently thereto,
(e) Shall have attached thereto sworn or certified copies of all papers upon which the plaintiff relies, and
(f) Shall state the belief of the affiant that there is no defense to the action.

Section 3. If the facts so shown are sufficient in law to entitle the plaintiff to recover, the court shall render such judgment in his favor as shall be lawful, unless the defendant shall, prior to or at the hearing of
said motion, file an affidavit or affidavits, showing by way of defense or denial or new matter to the plaintiff's said claim, such evidentiary facts as would, if trial were by jury, require the submission of the case to the jury. The affidavit or affidavits shall be subject to the same requirements as the affidavits mentioned in Section 2, supra.

Section 4. If defendant relies on new matter to defeat plaintiff's claim, plaintiff shall be allowed to file further affidavits in reply.

Section 5. The judge hearing said motion shall be entitled to disregard statements in the affidavits of either party when such statements, even though disputed, are clearly not credible, and to award judgment to the party having the burden of proof.80

Section 6. Along with the motion mentioned in Section 1 the plaintiff shall be entitled to interpose any grounds of demurrer to defendant's answer and the judge shall rule on said demurrer at the time of the hearing on said motion.

Section 7. Should the affidavits filed by or on behalf of either party contain a statement that any of the material facts which ought to appear in such affidavit are known only to persons whose affidavits the party is unable to procure, by reason of hostility or otherwise, naming such persons and showing why their affidavits can not be procured, and what affiant believes they would testify to if sworn, with his reasons for such belief, the court may make such order as may be just, either granting or refusing the application for summary judgment, or making an order for a continuance to permit affidavits to be obtained, or to permit the submissions of interrogatories to or the taking of the depositions of any of the persons so named, or to permit the production of papers or documents in the possession of such persons or sworn copies thereof. The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of papers and documents so produced shall be considered as a part of the affidavits in support of plaintiff's claim.

Section 8. If the aforesaid affidavits shall show evidentiary facts which would require the submission to a jury of an issue or issues

80 The first part of this section might be objected to on the ground that whenever a question of credibility arises there is an issue of fact triable to a jury and summary judgment should be denied. At least one case has taken this point of view. Dr. A. Posser Shoes, Inc. v. Vogel, 198 N. Y. Supp. 233 (1923). This doctrine carried to its logical extreme would mean that judgment must be denied, however improbable the story of one side may be. This should be avoided. There may be a question of credibility but only one reasonable way to decide it. It seems futile in such a case to wait for jury trial for such a decision.

The second part of the section is suggested because of the doctrine in North Carolina that the party having the burden of proof can not receive a directed verdict. If a similar view were taken with reference to summary judgment, the procedure would be emasculated. The doctrine is indefensible. See 5 Wigmore, Evidence (2nd ed. 1923) §2495; (1932) 10 N. C. L. Rev. 311; cf. McIntosh, N. C. Prac. and Proc. (1929) §574.
relating to any part of the plaintiff's said claim, the motion shall be denied in respect to such part. The case shall proceed in respect thereto in the ordinary manner, and judgment for plaintiff shall be rendered as to the remainder.

Should it appear to the satisfaction of the court upon the trial of the case, that the affidavits upon which a summary judgment was denied were not made in good faith, but were made solely for the purpose of delay, the court shall forthwith tax against the party filing them, a sum equal to double the reasonable expenses, including counsel fees, incurred by the other party by reason of the filing of such affidavits.

Section 9. If the affidavits shall fail to show such evidentiary facts as would require the submission to a jury of issues relating to all or any part of the plaintiff's said claim, the court shall enter such judgment in the plaintiff's favor as shall be lawful, for such claim or part thereof, provided that the court may in its discretion allow the affidavits hereinbefore mentioned to be supplemented by such viva voce testimony as would be admissible in trial to a jury; and provided further the court may refuse such judgment in any case deemed too complicated to be disposed of in the manner herein set forth.

JUDGMENT FOR THE DEFENDANT

Section 10. At the time of filing his answer or at any time thereafter, until the case is opened to the jury, the defendant in any civil action in the Superior Court, or in any court inferior to the Superior Court, except the court of the Justice of the Peace, may move for a judgment in his favor in respect to all or any part of the plaintiff's claim or upon any counterclaim pleaded in his answer.

Such motion shall be supported by affidavit or affidavits. Such affidavits shall be subject to the same requirements as the affidavits mentioned in Section 2, supra, and shall contain corresponding matters with reference to defendant's defense or counterclaim.

Section 11. If the affidavits shall show facts sufficient in law to constitute a defense to all or any part of the plaintiff's claim or to entitle defendant to recover on such counterclaim, the court shall enter such judgment in favor of defendant as shall be lawful, unless the plaintiff shall, prior to or at the hearing of said motion, file an affidavit or affidavits showing such evidentiary facts as would require the submission of the case to a jury.

Section 12. If the affidavits filed by the plaintiff shall show such facts as would require submission of only part of the whole case to a jury the case shall proceed in respect to such part in the ordinary manner, and judgment shall be entered for the defendant as to the re-
mainder, provided that the court may in its discretion allow the affidavits hereinbefore mentioned to be supplemented by such viva voce testimony as would be admissible in trial to a jury; and provided further the court may refuse such judgment in any case deemed too complicated to be disposed of in the manner herein set forth.

Should it appear to the satisfaction of the court upon the trial of the case, that the affidavits upon which a summary judgment was denied were not made in good faith, but were made solely for the purpose of delay, the court shall forthwith tax against the party filing them, a sum equal to double the reasonable expenses, including counsel fees, incurred by the other party by reason of the filing of such affidavits.

Section 13. If plaintiff relies on new matter to defeat defendant's answer defendant shall be allowed to file further affidavits in reply.

Section 14. The provisions of Section 5 shall be applicable to the motion mentioned in Section 10.

Section 15. Along with the motion mentioned in Section 10, the defendant shall be entitled to demur to the plaintiff's pleading, and the judge shall rule on said demurrer at the time of the hearing on said motion.

Section 16. If on the hearing of the motion made by either party it appears that the opposite side is entitled to judgment, such judgment shall be awarded without a cross-motion therefor.

Section 17. The ruling of the judge either granting or denying the motions hereinbefore mentioned is to be deemed a ruling affecting substantial rights and may be appealed from forthwith.

Section 18. The ruling of the judge either granting or denying the motion or motions hereinbefore mentioned shall be reduced to writing and shall contain specific findings of fact or law which in his opinion justify the ruling.

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81 It was first held in New York that an appeal would not lie from an order denying summary judgment. The holding was later overruled. See E. R. Finch, op. cit., supra note 3, at 592. A recent Wisconsin statute specifically provides for such an appeal. LAWS OF WIS. 1935 c. 39. See also (1934) 13 N. Y. U. L. Q. Rev. 110.

82 The reasons for this provision are well set forth in 5 The Justinian, no. 7, page 2 (March 20, 1936).

"During the month of January, 1936, the Central Motion Part of the Manhattan Municipal Court reported as many as 2,453 litigated motions for summary judgment, and the records of both the Supreme and City Courts reveal that the legal profession has more and more become conscious of the utility of this remedy. It is to be noted, however, that the number of appeals taken to the Appellate Division and the Appellate Term has increased in proportion and that approximately half of the motions made are granted.

"It is therefore apparent that for some reason the motion for summary judgment is, to an extent, failing of its purpose. Decreasing the number of trials by increasing the number of appeals from motions is hardly an economical or practical method of expediting litigation.

"It is to be observed, however, that nowhere in the Civil Practice Act is there any provision compelling the judge hearing the motion to give his reasons for
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Assessment of Damages

Section 19. When a summary judgment is to be rendered for money (with or without other relief) and the amount thereof is only a matter of computation, such computation shall be made by or under the direction of the court, and a judgment therefor rendered forthwith.

Where the amount of money for which such judgment is to be rendered must be determined upon evidence, the court shall order an assessment, either by a referee or by the court with or without a jury, and upon the making of such assessment a judgment therefor shall be rendered forthwith.

Several Judgments and Their Enforcement

Section 20. (a) Where a summary judgment is asked for, more than one judgment may be rendered in the same cause, but in such cases each judgment shall recite the date and substance of each prior judgment rendered in the cause.

(b) Where a summary judgment is rendered upon a part only of a case, while other matters remain undetermined, it may nevertheless be enforced forthwith, unless, in case of judgment upon a counterclaim, the court shall find and recite in such judgment, that it would be unjust to enforce such counterclaim prior to the determination of the issues of fact in the main case.

Construction of This Act

Section 21. This act is to be deemed remedial and shall be construed liberally with a view to making the administration of justice more expeditious, convenient, and inexpensive.83

granting or denying it. The result of this condition is that when a motion for summary judgment is either granted because no genuine issue is presented or denied where a genuine issue appears, neither the moving party nor his opponent knows upon what ground the ruling has been based. Hence the number of appeals (and the size and expense of the record).

"The appellant in such a case is compelled to prepare for his appeal arguments substantiating all the points he has offered on the motion, regardless of whether or not they have any merit, for he has no means of knowing what the Special Term justice considered to be genuine issues.

"An amendment of the present procedure would present manifold benefits. Were the judge hearing the motion required to state in his decision what he considered the genuine issue the appellant would be enabled, upon appeal, to concentrate all his argument upon one point, and, failing in his appeal, would have the adjudication of two courts as to the deficiency of his cause of action. A substantial saving in the printing of the record and brief would also be effected, together with a saving of time by the litigants.

"Similarly, should a motion be granted in toto, there would be considerable caution exercised in determining whether a meritorious cause of action does exist before an appeal is taken, since the reasoning of the judge who heard the motion must first be overcome."

83 This proposed statute is based on a draft prepared for the North Carolina Bar Association by Professor E. R. Sunderland of the School of Law of the University of Michigan. The draft suggested in the text, however, differs in several respects from Professor Sunderland's. It is not to be considered, therefore, as altogether representing his views.