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SURVEY OF SUMMARY JUDGMENT, JUDGMENT ON THE PLEADINGS AND RELATED PRE-TRIAL PROCEDURES*

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SUMMARY JUDGMENT

Summary judgment procedures provide for a hearing at an early stage in the litigation to ascertain whether there is any triable issue of fact or whether one or the other of the parties is entitled to judgment as a matter of law.¹ The parties are enabled, by this device, to pierce the formal allegations of the pleadings through the use of affidavits or other written proof setting forth the evidentiary facts underlying their respective claims. If the proof offered discloses a genuine factual issue, the summary judgment is denied and the action is tried in the ordinary manner.²

The summary judgment, and judgment on the pleadings, formerly, the demurrer, have always been valuable legal short cuts to avoid expense and delay. Today, when court calendars are impossibly crowded, and trial costs steep, their value is all the more apparent. This article will try to answer some of the many questions dealing with the availability and application of the summary judgment, judgment on the pleadings and related procedures.

Necessary Criteria

The statutes and rules set forth varying formulations of the criteria for deciding whether a trial is necessary,³ but the test depends, in the

* This article is adapted from the study prepared for the Advisory Committee on Practice and Procedure of the New York State Temporary Commission on the Courts. The study was prepared under the direction of the reporter, Professor Jack B. Weinstein, of Columbia Law School. The authors were Harold L. Korn, director of research, and Gerald E. Paley, research assistant.

† See Contributors' Section, Masthead, p. 519, for biographical data.

¹ For a discussion of the history of various summary judgment provisions, see Clark, Code Pleading § 88 (2d ed. 1947); Millar, Civil Procedure of the Trial Court in Historical Perspective 237-52 (1952); Vanderbilt, Minimum Standards of Judicial Administration 219-20 (1949); Bauman, "The Evolution of the Summary Judgment Procedure," 31 Ind. L.J. 329 (1956); Millar, "Three American Ventures in Summary Civil Procedure," 38 Yale L.J. 193 (1928); Clark and Samenow, "The Summary Judgment," 38 Yale L.J. 423 (1929).

² If the motion is denied and leave to defend is given, some rules provide it may be given unconditionally or subject to such terms as to giving security or time or mode of trial or otherwise as the judge may think fit. N.J. R. Civ. P. 4:58-5; Eng. Rules of the S. Ct., O. 14, r. 6. (The Annual Practice 1956).

³ See, e.g., West's Ann. Cal. Code Civ. Proc. § 437c (1954) ("if it is claimed that there is no defense to the action or that the action has no merit, . . . judgment may be entered . . . unless the other party . . . shall show such facts as may be deemed . . . sufficient to present a triable issue of fact."); Conn. Prac. Book § 53 (1951) (if plaintiff shows there is "no

last analysis, upon the court's own understanding of what constitutes a genuine factual issue. Thus, an uncommonly restrictive interpretation has recently been advanced in a number of federal decisions holding that a bare allegation in a pleading is sufficient to raise an issue, even though no attempt is made to meet the affidavits and other evidentiary matter offered to controvert the allegation.⁴ These decisions, thwarting the purpose of summary judgment to reach the factual basis behind the pleadings, have prompted the Advisory Committee on the Federal Rules to propose an amendment which would, in effect, overrule them.⁵

Although the summary judgment procedure is designed primarily to expose spurious questions of fact, it frequently appears on the hearing that a decision of a question of law would completely dispose of the controversy. In England, if an arguable legal question exists, the application must be denied and leave to defend given.⁶ In American

defense to the action," summary judgment will be granted unless defendant shows "such facts as may be deemed by the court sufficient to entitle him to defend"; Mass. Ann. Laws c. 231, § 59B (1956) ("unless the defendant by affidavit, by his own evidence or otherwise shall disclose such facts as the court finds entitle him to defend"); Eng. Rules of the S. Ct., O. 14, r. 1. (The Annual Practice 1956) (if plaintiff states that there is no defense to the action, summary judgment shall be granted unless the defendant shall satisfy the judge "that he has a good defense to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally . . .").

A proviso in the Massachusetts rule, however, seems to limit the effect of its summary judgment procedure as a device for avoiding trial: "Judgment as aforesaid shall be entered at the expiration of seven days from the order [for immediate entry of judgment] unless the defendant in the meanwhile files a demand for trial; and if such demand is filed as aforesaid the case shall be advanced for speedy trial." Mass. Ann. Laws c. 231, § 59B (1956). See *Norwood Morris Plan Co. v. McCarthy*, 295 Mass. 597, 605, 4 N.E.2d 450, 455 (1936).

Fed. R. Civ. P. 56(c) provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The provisions of the following jurisdictions are substantially the same as the federal rule: *Ariz. Code Ann.* § 21-1212 (1939); *Colo. Rev. Stat. Ann.*, R. Civ. P. 56 (1953); 13 *Del. Code Ann.*, Ct. Rule 56 (1953); 30 *Fla. Stat. Ann.*, R. Civ. P. 1.36 (1956); *Ky. Prac. & Serv. R. Civ. P.* 56 (Baldwin 1956); *Ill. Ann. Stat. c.* 110, § 57 (Smith-Hurd Supp. 1956); 3 *Md. Ann. Code* 4873, Gen. Rules Prac. and Proc., Summary Judgment Rule 1 (1951); *Minn. R. Civ. P.* 56, 232 *Minn. Rep.* (1952); *Neb. Rev. Stat.* § 25-1332 (Cum. Supp. 1955); *Nev. R. Civ. P.* 56; *N.J. R. Civ. P.* 4:58; *N.M. Stat. Ann.* § 21-1-1 (56) (1953); *Tex. Ann. Rules, R. Civ. P.* 166-A (1955); *Utah Code Ann.*, R. Civ. P. 56 (1953); *Va. Code Ann.*, Rules of S. Ct. of Appeals, Rule 3:20 (Supp. 1956); *Wis. Stats.* § 270.635 (1951).

⁴ E.g., *Chappell v. Gottsman*, 186 F.2d 215 (5th Cir. 1950); *Frederick Hart & Co. v. Recordgraph Corp.*, 169 F.2d 580 (3d Cir. 1948); *Reynolds Metals Co. v. Metals Disintegrating Co.*, 8 F.R.D. 349 (D.N.J. 1948) (following but strongly disapproving the rule stated in the text), *aff'd*, 176 F.2d 90 (3d Cir. 1949).

⁵ The proposed amendment to rule 56(e) provides:

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

See Report of Proposed Amendments to the Rules of Civil Procedure 56-59 (Oct. 1955); Wright, "Rule 56(e): A Case Study on the Need for Amending the Federal Rules," 69 *Harv. L. Rev.* 839 (1956); Jenner and Tone, "Pleading, Parties and Trial Practice," 50 *Nw. U.L. Rev.* 612, 621 (1955); 41 *Iowa L. Rev.* 453, 454 (1956).

⁶ Eng. Rules of the S. Ct., O. 14, r. 6. (The Annual Practice 1956).

jurisdictions, however, there is a greater emphasis on preliminary disposition wherever a trial is unnecessary, and this requires that the courts be permitted to decide such questions upon the motion for summary judgment. Thus, the Michigan rule explicitly states that the court may enter judgment if it finds the movant entitled thereto "as a matter of law, without deciding any controverted question of fact."⁷ And in Connecticut, if the court finds that the "only question or questions arising are bonafide questions of law," the defendant may file within ten days "a pleading appropriate to test such" question of law.⁸ Failure to file the pleading or to prevail thereon results in judgment for the plaintiff. While the rules in most other jurisdictions do not explicitly treat the matter, it seems that the usual practice is to consider the determination of questions of law as within the province of the summary judgment hearing.⁹

Type of Action in Which Summary Judgment Is Available

A large number of American jurisdictions, following the lead of the federal rules, have made the summary judgment procedure applicable in any type of civil action. The states that presently have such broad provisions are Arizona, California, Colorado, Delaware, Florida, Kentucky, Illinois, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, North Dakota, Texas, Utah, Virginia and Wisconsin.¹⁰ The proposed Louisiana Code of Practice contains a summary judgment provision modeled on the federal rule, but a Louisiana policy requiring

⁷ 6A Mich. Comp. Laws Annotations, app. 4, Court Rule 30, § 7 (1948).

⁸ Conn. Prac. Book § 55 (1951); see Clark and Samenow, "The Summary Judgment," 38 Yale L.J. 423, 441, 471, n. 326 (1929).

⁹ See, e.g., *Coutts v. J. L. Kraft & Bros. Co.*, 119 Misc. 260, 261, 196 N.Y. Supp. 135, 137 (Sup. Ct. Kings County 1922), aff'd without opinion, 206 App. Div. 625, 198 N.Y. Supp. 908 (2d Dep't 1923) (summary judgment provision applicable "even though an important question of law had to be determined"); *Chairmasters v. Public National Bank & Trust Co.*, 283 App. Div. 704, 127 N.Y.S.2d 806 (1st Dep't 1954); *Orange County Trust Co. v. Merchant's Acceptance Corp.*, 279 App. Div. 689, 107 N.Y.S.2d 925 (3d Dep't 1951), appeal dismissed, 303 N.Y. 900, 105 N.E.2d 487 (1952); *Ware v. Heller*, 63 Cal. App. 2d 817, 148 P.2d 410 (1944); *Bank of America Nat. Trust & Savings Ass'n v. Casaday*, 15 Cal. App. 2d 163, 59 P.2d 444 (1936); *Millar, Civil Procedure of the Trial Court in Historical Perspective* 245 (1952). Cf. *L. R. Munoz & Co. v. Savannah Sugar Refining Corp.*, 118 Misc. 24, 193 N.Y. Supp. 422 (Sup. Ct. N.Y. County 1922).

¹⁰ *Ariz. Code Ann.* §§ 21-1210-16 (1939); *West's Ann. Cal. Code Civ. Proc.* § 437c (1954); *Colo. Rev. Stat. Ann., R. Civ. P.* 56 (1953); 13 *Del. Code Ann. Rule* 56 (1953); 30 *Fla. Stat. Ann. R. Civ. P.* 1.36 (1956); *Ky. Prac. & Serv., R. Civ. P.* 56 (Baldwin 1956); *Ill. Ann. Stat. c.* 110, §§ 57, 101.15, 101.16 (Smith-Hurd Supp. 1956); 3 *Md. Ann. Code* 4873, *Gen. Rules Prac. and Proc., Summary Judgment Rule* 1 (1951); *Minn. R. Civ. P.* 56, 232 *Minn. Rep.* (1952); *Neb. Rev. Stats.* §§ 25-1330-36 (Cum. Supp. 1955); *Nev. R. Civ. P.* 56; *N.J. R. Civ. P.* 4:58; *N.M. Stat. Ann.* § 21-1-1 (56) (1953); *N.D. Rev. Code* § 28-0911 (1943); *Texas Ann. Rules, R. Civ. P.* 166-A (1955); *Utah Code Ann., R. Civ. P.* 56 (1953); *Va. Code Ann., Rules of S. Ct. of Appeals, Rule* 3:20 (Supp. 1956); *Wis. Stats.* § 270.635 (1951). For a discussion of the Colorado rule, see *Morris, "Judgment,"* 23 *Rocky Mt. L. Rev.* 581, 585 (1951); for a discussion of the Illinois rule, see *Jenner and Tone, "Pleading, Parties and Trial Practice,"* 50 *Nw. L. Rev.* 612 (1955).

full proof in marital litigation would prevent the granting of a summary judgment in such cases.¹¹

Of the jurisdictions allowing summary judgment only in certain actions, England has the broadest provision. Through a steady process of addition, its coverage now extends to all actions except libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise to marry or a claim based on an allegation of fraud.¹² New York's rule 113,¹³ through a similar series of amendments, has been made available in nine enumerated classes of action including, as its most recent addition, the declaratory judgment suit.

Iowa, Massachusetts, Michigan and Rhode Island limit the scope of the procedure to actions on a debt or liquidated demand arising out of a negotiable instrument or contract,¹⁴ and Connecticut adds to these a suit to recover specific chattels or certain real property.¹⁵ The jurisdictions with the most restricted rules provide for summary procedural devices only in actions against specified officers for certain defaults—for example, against sheriffs, coroners, clerks, judges of probate, tax collectors and attorneys at law for defaults such as failure to pay over money collected and failure to return an execution. These rules generally include provision for judgment on motion by sureties against their principals or co-sureties.¹⁶

¹¹ Summary judgment and judgment on the pleadings cannot be entered in Louisiana "in any action for divorce, separation from bed and board, or annulment of marriage, nor in any case where the community, paraphernal or dotal rights may be involved in an action between husband and wife." Proposed Article 36, Pleading, quoted in McMahon, "Pleading Under the Proposed New Louisiana Code of Practice," 28 Tul. L. Rev. 216, 228 (1954).

¹² Eng. Rules of the S. Ct., O. 14, r. 1 (The Annual Practice 1956). See, for a discussion of the English rule, Odgers, Pleading and Practice 57 et seq. (1955).

¹³ N.Y. R. Civ. P. 113.

¹⁴ Iowa Code Ann., R. Civ. P. 237 (1951); Mass. Ann. Laws c. 231, § 59B (1956) (limited to actions on a contract where plaintiff seeks to recover a debt or liquidated demand); 6A Mich. Comp. Laws Annotations, app. 4, Court Rule 30, § 1 (1948) (limited to actions on a contract, judgment or statute). R.I. Gen. Laws c. 524, § 1 (1938) (limited to actions for a debt or liquidated demand in money). Cf. West Va. Code Ann. § 5524 (1955) (motion for judgment by any person entitled to recover money on any contract).

¹⁵ Conn. Prac. Book § 52 (1951).

¹⁶ Ala. Code Ann. tit. 7, §§ 591-623 (1940) (summary judgment); Ark. Stat. Ann. §§ 29-201-10 (1947) (summary judgment); Iowa Code Ann., R. Civ. P. 239 (1951) (summary judgment); Miss. Code Ann. §§ 1430, 1842 (1942) (judgment on motion); Mo. Ann. Stats. § 433.070 (1951) (judgment on motion by surety against principal); N.C. Gen. Stat. § 6-2 (1953) (summary judgment for official fees); Okla. S. Ct. R. 31, 204 Okla. Rep. x (1951) (motion for judgment on supersedeas bond); Pa. Stat. Ann., tit. 12, R. Civ. P. 1098 (Purdon 1951) (summary judgment for mandamus; at any time after the complaint is filed, the court may enter judgment if the right of the plaintiff thereto is clear, but the judgment may be opened upon cause shown); Tenn. Code Ann. §§ 25-301-45 (1955) (judgment on motion); Wash. Rev. Code § 6.08.060 (1951) (judgment against sureties on motion). See, for a discussion of the Pennsylvania rule, Wright, "Modern Pleading and the Pennsylvania Rules," 101 U. Pa. L. Rev. 909, 936-37 (1953); Amram, "A Reply to Professor Wright," 101 U. Pa. L. Rev. 948, 956 (1953); Graubart, "A Rejoinder From Pennsylvania," 101 U. Pa. L. Rev. 959, 965 (1953).

In some states such provisions exist together with summary judgment rules of general application. See Ky. Rev. Stat. Ann. § 418.005 (Baldwin 1955) and note 10 *supra*.

Parties Who May Be Granted Summary Judgment

Federal rule 56 and the many rules based upon it state that a party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may move for summary judgment. These rules have been construed to allow any claimant, including a third-party claimant, an intervenor, or a claimant in interpleader to make the motion.¹⁷ They also allow the party defending against any such claim to move for summary judgment in his favor. In England, Connecticut and Massachusetts only the plaintiff or claimant can move for summary judgment.¹⁸

Some of the state provisions expressly provide that summary judgment may be granted to the party opposing the motion rather than the movant, where such a disposition is warranted, without the necessity of a formal cross-motion.¹⁹ Other rules allow judgment only in favor of the moving party.²⁰ Federal rule 56 does not cover the point, but the weight of authority on federal practice supports the former position²¹ and there is now a proposed amendment to the federal rules which would explicitly state that "summary judgment, when appropriate, may be rendered against the moving party."²²

Time of Motion

One state, Rhode Island, allows a plaintiff to move for summary judgment together with his declaration of claim.²³ Apart from Rhode Island, the earliest time at which a motion is permitted is when the defendant has appeared in the action. The jurisdictions so providing are England, Connecticut and Massachusetts, where the summary judgment procedure is available only to plaintiffs, and Texas, which allows either party to move after the defendant has appeared. Other states, including New York, do not allow the motion until after answer²⁴ and some specify any time after the cause is at issue.²⁵

The federal courts, and those states that have followed the federal rules, allow the claimant to move for summary judgment at any time

¹⁷ See 6 Moore, Federal Practice 2045 (1953).

¹⁸ Conn. Prac. Book § 53 (1951); Eng. Rules of the S. Ct., O. 14 (The Annual Practice 1956); Mass. Ann. Laws c. 231, § 59B (1956).

¹⁹ West's Ann. Cal. Code Civ. Proc. § 437c (1954); 3 Md. Ann. Code 4874, Gen. Rules Prac. and Proc., Summary Judgment Rule 4 (1951); Wis. Stats. § 270.635 (1951). For a general discussion of the problem, see Annot., 48 A.L.R.2d 1188 (1956).

²⁰ Mass. Ann. Laws c. 231, § 59B (1956); Va. Code Ann. Rules of S. Ct. of Appeals, Rule 3:20 (Supp. 1956).

²¹ See 6 Moore, Federal Practice 2088-91 (1953).

²² See Report of Proposed Amendments to the Rules of Civil Procedure 56 (Oct. 1955).

²³ R.I. Gen. Laws c. 524 § 1 (1938).

²⁴ West's Ann. Cal. Code Civ. Proc. § 437c (1954); Neb. Rev. Stat. § 25-1330 (Cum. Supp. 1955); N.Y. R. Civ. P. 113.

²⁵ 6A Mich. Comp. Laws Annotations, app. 4, Court Rule 30, § 1 (1948); Va. Code

after the expiration of twenty days from the commencement of the action, or after the service of a motion for summary judgment by the adverse party. The defendant, under these rules, may move at any time.²⁶ Considerable discussion has centered about the federal time provision, and the present rule represents a compromise between the conflicting views. As the rule was originally promulgated, the claimant could not move for summary judgment until after the responsive pleading had been served. Under that arrangement, it was felt that the defendant's recourse to the pre-pleading motions, with a corresponding extension of time to answer, would unduly postpone the plaintiff's opportunity to move for summary judgment. This objection had particular force before 1948, when two rounds of pre-pleading motions were permitted, the first being directed solely to the court's jurisdiction. On the other hand, it was thought undesirable to allow the plaintiff to move for summary judgment too soon—before the defendant had time to secure counsel and determine his course of action; accordingly, a proposed amendment allowing a claimant to move at any time after commencement of the action was not adopted.²⁷ The twenty-day provision, finally adopted in 1946, affords the defendant a sufficient period to determine his course of action. The period is shortened when the defendant moves for summary judgment before twenty days, for, in that case, he is presumably prepared and there is no reason to delay plaintiff's motion.²⁸

Supporting and Opposing the Motion

The usual form of presenting proof on a motion for summary judgment is by affidavit. A few jurisdictions provide that both parties must file affidavits,²⁹ others require them only of the movant,³⁰ and the majority, following federal rule 56(a) and (b), explicitly provide that neither party is required to submit affidavits.³¹ In the latter jurisdictions, the court may consider, in addition to the pleadings and affidavits, any depositions, written admissions or other documentary evidence submitted by the parties.

Federal rule 56(e) codifies the generally accepted doctrine that affidavits must be made upon personal knowledge by a party competent to

Ann., Rules of S. Ct. of Appeals, Rule 3:230 (Supp. 1956).

²⁶ E.g., Fed. R. Civ. P. 56(a), 56(b); Ariz. Code Ann. § 21-1210 (1939); Colo. Rev. Stat. Ann., R. Civ. P. 56 (1953).

²⁷ See Clark, Code Pleading § 88 n. 221 (2d ed. 1947).

²⁸ See 6 Moore, Federal Practice 2007-08, 2043-45 (1953).

²⁹ West's Ann. Cal. Code Civ. Proc. § 437c (1954); Conn. Prac. Book § 53 (1951); Iowa Code Ann. R. Civ. P. 238 (1951).

³⁰ Mass. Ann. Laws c. 231, § 59B (1956); Wis. Stat. § 270.635 (1951); Eng. Rules of the S. Ct., O. 14, r. 1 (The Annual Practice 1956).

³¹ E.g., Arizona, Colorado and New Mexico provisions, cited in note 10 supra.

testify, and must set forth only such facts as would be admissible upon a trial. Rule 56(g) allows the court to penalize a party who presents affidavits "in bad faith or solely for the purpose of delay." The rules require payment to the other party of the reasonable expenses, including attorney's fees, which the filing of the affidavits caused him to incur, and any offending party or attorney may be adjudged guilty of contempt. Rule 56(f) provides relief for an opposing party who, for good reason, is unable to support his opposition by affidavit, for example, where the facts or access to them are exclusively within the knowledge or control of the movant. It permits the court either to deny the motion, or order a continuance for discovery, or make "such other order as is just." Similar provisions also appear in many of the states.³²

It is safe to assume that the court's interrogation of the parties or their counsel may play a considerable part in its decision, although the rules generally make no explicit provision for proof other than by written evidence. The English rule, a notable exception, provides as an alternative to opposing the application by affidavit, that "the Judge may allow the defendant to be examined upon oath."³³ And an apparently unique North Dakota provision allows the court to strike out a pleading and enter judgment on the basis of its examination of the parties during a pre-trial hearing.³⁴ The most widespread recognition of oral questioning is in the common provisions discussed in the next section, which convert a summary judgment motion not granted *in toto*, into a form of pre-trial hearing, and allow the court to eliminate unsubstantial issues "by examining the pleadings and the evidence before it *and by interrogating counsel.*" (Emphasis added.)³⁵

Partial Summary Judgment

The majority of summary judgment provisions allow the motion to be granted on the issue of a defendant's liability even if a genuine issue requiring a trial as to the amount of damages exists.³⁶ In addition, most

³² E.g., Arizona, Colorado, Delaware and Utah provisions, cited in note 10 supra. See Millar, *Civil Procedure of the Trial Court in Historical Perspective* 246-48 (1952). Unlike federal rule 56(f), which applies only to the opposing party, the Illinois and Michigan rules allow either party to seek a continuance to procure proof then unobtainable. Ill. Ann. Stat. c. 110, § 101.15 (Smith-Hurd Supp. 1956); 6A Mich. Comp. Laws Annotations, app. 4, Court Rule 30, § 6 (1948).

Maryland does not provide the contempt sanction contained in federal rule 56(g). 3 Md. Ann. Code 4875, Gen. Rules Prac. and Proc., Summary Judgment Rule 5 (1951).

³³ Eng. Rules of the S. Ct., O. 14, r. 3(a) (The Annual Practice 1956).

³⁴ N.D. Rev. Code § 28-0911 (1943).

When from the examination of an adverse party before trial as provided in this title it shall appear to the satisfaction of the court that such party does not have a valid claim or defense and that his pleading has been interposed in bad faith, the court may strike out such pleading and may order the entry of judgment as upon default.

³⁵ Fed. R. Civ. P. 56(d).

³⁶ E.g., Fed. R. Civ. P. 56; Ariz. Code Ann. § 21-1210 (1939). Contra, Va. Code Ann., Rules of S. Ct. of Appeals, Rule 3:20 (Supp. 1956).

jurisdictions make provision for partial summary judgment. These provisions fall into two classes. The first, typified by Rule 114 of the New York Rules of Civil Practice, goes no further than to allow the granting of a summary judgment as to one or more of several causes of action, or a separable part of a single cause, with the remainder of the action being severed.³⁷ Most of these rules contemplate the immediate entry of a judgment on the part determined before trial,³⁸ sometimes on terms imposed by the court.³⁹ Thus, England provides that the judge may suspend execution of the judgment.⁴⁰ Illinois sets out specific alternatives in the event a motion for partial summary judgment is granted: the court may postpone entry of the judgment, enter it immediately, or enter it and stay enforcement pending determination of the remaining issues in the case.⁴¹ California, at the other extreme, specifically provides that partial summary judgment shall not be entered until termination of the remainder of the action.⁴²

The second group, in addition to allowing this kind of partial judgment, requires the court, whenever practicable, to make an order specifying all facts that exist without substantial controversy.⁴³ These provisions, drawn from Federal rule 56(d), seek to salvage as much as possible from the hearing in the way of eliminating unsubstantial issues when summary judgment is denied or granted only in part.⁴⁴ The judge who heard the motion, having gained considerable familiarity with the case, is in an excellent position to ascertain the real issues; the procedure achieves all the advantages of a pre-trial hearing without the necessity of any further expenditure of time or effort by the court or parties.

Appeal

Although a grant of full summary judgment is appealable everywhere, a grant of partial summary judgment is not usually considered a final

³⁷ N.Y. R. Civ. P. 114; Conn. Prac. Book § 54 (1951); Ill. Ann. Stat. c. 110, §§ 57, 101.16 (Smith-Hurd Supp. 1956); 6A Mich. Comp. Laws Annotations, app. 4, Court Rule 30, § 5 (1948); Eng. Rules of the S. Ct., O. 14, r. 4 (The Annual Practice 1956).

³⁸ See Clark, Code Pleading § 88 (2d ed. 1947).

³⁹ E.g., Conn. Prac. Book § 54 (1951); 3 Md. Ann. Code 4873 (1951) (providing that the court retains jurisdiction of the action even though the disputed part is below its jurisdictional amount if the original claim was within its jurisdiction).

⁴⁰ Eng. Rules of the S. Ct., O. 14, r. 4 (The Annual Practice 1956).

⁴¹ Ill. Ann. Stat. c. 110, § 101.16 (Smith-Hurd Supp. 1956).

⁴² West's Ann. Cal. Code Civ. Proc. § 437(c) (1954).

⁴³ Arizona, California, Colorado, Delaware, Florida, Kentucky, Maryland, Minnesota, Nebraska, Nevada, New Jersey, Texas and Utah. These provisions are cited in note 10 supra.

The new Illinois rule, Ill. Ann. Stat. c. 110, §§ 57, 101.16 (Smith-Hurd Supp. 1956), although otherwise substantially the same as federal rule 56, omits this provision. It was eliminated because of the fear that it invited encroachment upon the right to trial by jury or court on evidence adduced in open court. Jenner and Tone, "Pleading, Parties and Trial Practice," 50 Nw. U.L. Rev. 612, 620-21 (1955).

⁴⁴ See 6 Moore, Federal Practice 2295 (1953).

order or judgment and hence is not appealable.⁴⁵ So, too, a denial of the motion is a non-final order from which no appeal may be taken.⁴⁶ The rules would be otherwise in jurisdictions allowing appeal from intermediate or interlocutory orders.⁴⁷ California specifically allows appeal from the grant of a partial summary judgment even though the judgment may not be entered until termination of the remainder of the action.⁴⁸

OTHER ACCELERATORY PROCEDURES PRELIMINARY TO TRIAL

Many pre-trial procedural devices, while not eliminating the need for a trial, serve to expedite and simplify litigation. They serve primarily to speed up the early stages of an action which subsequently goes through the course of litigation. Although these devices will not be dealt with, they are, for example, pre-trial hearings and free disclosure. On the other hand, procedures like summary judgment are designed to accelerate judgment and at the same time, avoid the delay caused by long trial calendars, and the trouble and expense of a trial.

The most common of the latter procedures is, of course, the motion, or other device for challenging the legal sufficiency of a pleading. This will be treated later in this article. The present section treats other, somewhat less common, procedures for securing a speedy disposition. The most important of these is a method for raising objections based on facts outside the pleadings by a preliminary motion to dismiss supported by affidavits. This procedure, like summary judgment, usually fails if a genuine issue of fact requiring a trial appears. Some jurisdictions, however, go a step further and provide for a preliminary trial on the issue raised by such motion, or place the whole case on a special short calendar when it appears that the trial will require only a short time.

Certain devices which expedite the process and pleading stage will also be considered, although they do not provide for a preliminary disposition, because they are often thought of as useful supplements to the summary judgment procedure.⁴⁹

⁴⁵ See *id.* at 2299-2314; Clark, *Code Pleading* 562 (2d ed. 1947).

⁴⁶ See, e.g., Eng. Rules of the S. Ct., O. 14, r. 1 (The Annual Practice 1956); 6 Moore, *Federal Practice* 2302, 2318-23 (1953).

⁴⁷ See, e.g., Wis. Stat. § 274.33(3) (1951) (section dealing with appealable orders); Clark, *Code Pleading* 564 (2d ed. 1947).

⁴⁸ West's Ann. Cal. Code Civ. Proc. § 437(c) (1954).

⁴⁹ A number of similar devices that have been used in continental countries are described in Bauman, "The Evolution of the Summary Judgment Procedure," 31 *Ind. L.J.* 329 (1956). Among these is an early French executory procedure whereby a defendant was precluded from asserting any defenses except those particularly specified, such as payment, release or extension of time. However, this summary method was limited in scope to actions on public documents evidencing a liquidated demand.

Pleading Devices

Virginia early adopted a method for instituting suit by a motion for judgment with notice in place of a writ and a complaint. This procedure, originally limited to specified actions calling for dispatch, proved highly successful and was continuously expanded.⁵⁰ Today, an action in Virginia may be commenced by filing a motion for judgment in the clerk's office in "all civil actions at law in a court of record seeking a judgment in personam for money only," and in certain other enumerated actions at law.⁵¹ If the defendant does not file a responsive pleading within twenty-one days after service on him of the notice of motion for judgment, he is in default. If issue is joined, however, the defendant then has the right to a jury trial.⁵² This procedure, however, provides no device for disposing of unfounded defenses;⁵³ its value lies chiefly in the liberal approach to pleadings that it has engendered in the courts. Although the notice must state a good cause of action, there is a complete absence of any requirement of formality; it is viewed by the courts as an act of the parties rather than of their attorneys.⁵⁴ Aside from this advantage, a claimant may often proceed by notice of motion when it is too late to mature a regular action in a given term of court.⁵⁵ Due to its unqualified success in Virginia, several other jurisdictions have provided notice of motion for judgment procedures of more limited application.⁵⁶

England has recently adopted a provision, order 14B, allowing a plaintiff to apply for trial without pleadings.⁵⁷ The application must be

⁵⁰ See Bauman, *supra* note 49 at 343; Fowler, "Virginia Notice of Motion Procedure," 24 Va. L. Rev. 711 (1938); Millar, "Three American Ventures in Summary Civil Procedure," 38 Yale L.J. 193, 217 (1928).

⁵¹ The provision applies to "all civil actions at law in a court of record seeking a judgment in personam for money only (except when a tax refund is sought), actions for establishment of boundaries, ejectment, unlawful detainer, detinue and declaratory judgments (when at law), including cases appealed or removed to such courts from inferior courts, whenever applicable to such cases." Va. Code Ann., Rules of S. Ct. of Appeals, Rule 3:1 (Supp. 1956).

⁵² Va. Code Ann. § 8-211 (Supp. 1956).

⁵³ This may be accomplished by resort to Virginia's broad summary judgment provisions. Va. Code Ann., Rules of S. Ct. of Appeals, Rule 3:20 (Supp. 1956).

⁵⁴ Security Loan & Trust Co. v. Fields, 110 Va. 827, 67 S.E. 342 (1910); see Fowler, *supra* note 50 at 732 et seq.; Clark & Samenow, "The Summary Judgment," 38 Yale L.J. 423, 464 (1929).

⁵⁵ See Millar, "Three American Ventures in Summary Civil Procedure," 38 Yale L.J. 193, 221 (1928).

⁵⁶ The procedure is available in West Virginia in all contract actions and in actions against a surety. West Va. Code Ann. §§ 4308, 5524 (1955). Kentucky, Mississippi, Missouri, Tennessee and Washington also have provisions for judgment on motion in a limited class of actions. See note 16 *supra*. The early "bank notice" procedures of Alabama and Mississippi were provisions in bank charters allowing them to sue their debtors by means of notice and motion rather than the usual common law method. See Millar, "Three American Ventures in Summary Civil Procedure," 38 Yale L.J. 193, 215 (1928).

⁵⁷ Eng. Rules of the S. Ct., O. 14B (The Annual Practice 1956). This procedure is available in all cases in which summary judgment is available, with the exception of claims based on negligence, nuisance or breach of duty where damages are sought for either personal injuries or damage to a vehicle from a road accident. See Bauman, *supra* note 49 at 340 et seq.

made after the defendant has appeared in answer to a writ of summons accompanied by a notice that the plaintiff intends to apply for an order for trial without further pleadings. It is made by serving a summons and an affidavit which summarizes the questions believed to be in issue, and states the reasons for contending that the case is suitable to be tried without pleadings. The defendant then files an affidavit summarizing his defense and his reasons for opposing the application. The plaintiff may file an affidavit in reply. If, on hearing the application, the judge or master is satisfied that the case can properly be tried without further pleadings, he orders the affidavits to stand as pleadings and gives other directions concerning subsequent proceedings as he deems necessary. If he denies the application, the summons is dismissed and costs are assessed against the plaintiff. The defendant's time to deliver his defense then runs from the date of the dismissal.⁵⁸

The Evershed Report, which advocated the adoption of order 14B, asserted that the new procedure would result in a substantial saving of time and expense.⁵⁹ It was suggested that the fact that the claim and defense must be under oath, and that the parties are brought before the master at an early stage in the proceedings, would compel early disclosure of the nature of each party's case and would discourage the raising of formal issues which have no substantial basis in fact. Odgers states that because of this, little use has thus far been made of the procedure. He contends that affidavits are a poor and costly substitute for pleadings as a means of formulating the issues.⁶⁰ And he points out that a simpler procedure is available to a plaintiff who thinks that pleadings are unnecessary: under order 20, rule 1, he may indorse his writ generally but in sufficient detail to disclose the nature of the dispute and apply to the master to dispense with the statement of claim.⁶¹

Motions to Dismiss Supported by Affidavits

The motion to disniss, which has replaced the demurrer in most code states, generally may not be supported by affidavits. The ancient prohibition of the "speaking demurrer" persists, and the motion reaches only defects (and sometimes affirmative defenses) that appear on the face of the pleading.⁶² An objection based on facts outside the pleading must wait until trial, or until a motion for summary judgment can be made if that procedure is available.

⁵⁸ See Odgers, *Pleading and Practice* 75-78 (1955).

⁵⁹ Final Report of the Committee on Supreme Court Practice and Procedure 34 (1953).

⁶⁰ Odgers, *Pleading and Practice* 78 (1955).

⁶¹ *Ibid.* See Eng. Rules of the S. Ct., O. 20, r. 1(b) (The Annual Practice 1956).

⁶² E.g., *Ryan v. Knights of Columbus*, 82 Conn. 91, 72 Atl. 574 (1909); *State ex rel. Moriarty v. Smith*, 72 Conn. 572, 45 Atl. 355 (1900); *Haag v. Bloom*, 121 Pa. Super. 529, 184 Atl. 467 (1936); see Clark, *Code Pleading* § 80 (2d ed. 1947).

Illinois, Michigan and New York have adopted provisions permitting a motion to dismiss on certain specified objections, which may be supported by affidavits and hence based on facts outside the pleadings.⁶³ The specified grounds represent objections which, if sustained, are dispositive of the action. They are:

- (1) lack of jurisdiction of the subject matter;
- (2) lack of jurisdiction over the person (except in New York);
- (3) plaintiff's lack of capacity to sue;
- (4) pendency of another action;
- (5) former judgment;
- (6) statute of limitations;
- (7) release;
- (8) statute of frauds;
- (9) non-accrual of the cause of action because of defendant's infancy or other disability.

Michigan adds the defense of assignment or other disposition of the cause of action by the plaintiff before suit, and Illinois permits attacks where the claim is barred by "other affirmative matter."

As on a motion for summary judgment, the court may grant the motion if no genuine issue of fact requiring a trial is presented.⁶⁴ Even if a genuine issue exists, the Illinois and Michigan provisions allow the court to try the issue immediately upon the proof presented for the motion if the right to jury trial is not involved; but if a jury trial is rightfully demanded in apt time, the motion must be denied without prejudice.⁶⁵ If the motion is not determined on the merits, the defense may be raised in the answer.

The New York rule provides that the issue may be determined by the court, by a jury, or by a referee, but the cases hold that where the defendant is constitutionally entitled to a jury trial, the issue must be decided by a jury.⁶⁶ The trial is only as to the specific issues raised on the motion. The court has the additional alternative of overruling the motion and letting the defendant plead the facts in his answer.

Preliminary and Short Cause Trials

Under the provisions just discussed, it is possible to obtain a preliminary trial of the specified defenses and an accelerated judgment even

⁶³ Ill. Ann. Stat. c. 110, § 48 (Smith-Hurd Supp. 1956); 6A Mich. Comp. Laws Annotations, app. 4, Court Rule 18 (1948); N.Y. R. Civ. P. 107, 110.

⁶⁴ See Millar, *Civil Procedure of the Trial Court in Historical Perspective* 250-52 (1952).

⁶⁵ See Note, 33 Chi.-Kent L. Rev. 191 (1955).

⁶⁶ *Garfunkel v. Malcolmson*, 217 App. Div. 632, 217 N.Y. Supp. 32 (1st Dep't 1926); *Herzog v. Brown*, 217 App. Div. 402, 216 N.Y. Supp. 134 (1st Dep't), aff'd, 243 N.Y. 599, 154 N.E. 622 (1926).

though a genuine issue of fact exists which would defeat a motion for summary judgment.

A similar procedure exists in California, permitting the court, upon the motion of either party, to proceed to the trial of specified defenses before the trial of any other issue in the case. The grounds for invoking the California provisions are "that the action is barred by the statute of limitations, or by a prior judgment, or that another action is pending upon the same cause of action, or . . . any other defense not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution thereof"⁶⁷

If the movant is unsuccessful on the trial of the narrow issue, the action proceeds in the ordinary manner and usually another trial will be necessary for the remaining issues in the case. It appears that the fear of two trials has induced some reluctance on the part of the courts to invoke these provisions, and they are not frequently used.⁶⁸

A different approach to the problem of summary determination of genuine issues of fact is found in the English summary judgment provision. When leave to defend is given, but the master is of the opinion that the trial will not exceed three hours,⁶⁹ the case is set down on a Short Cause List. In practice it is often found that the defendant's affidavit on the motion for summary judgment has made the real issues clear and rendered further pleadings unnecessary. The usual form of the resulting order is to grant leave to defend on the condition that the action be tried in the Short Cause List, with restrictions against raising any new defense or counterclaim not raised by the defendant's affidavit, unless notice, if given within four days of the date of the order or leave, is granted by the court. The order may also provide for the exchange of lists of documents and inspection of such documents.⁷⁰ Generally, a case which contains a substantial counterclaim will not be put on the Short Cause List. Even if the action is not placed on this list, after an unsuccessful motion for summary judgment, the master may order that the affidavits stand as pleadings, instead of requiring separate pleadings.⁷¹

⁶⁷ West's Ann. Cal. Code Civ. Prac. Proc. § 597 (1954).

⁶⁸ See *Rizzuto v. United States Shipping Board Emergency Fleet Corp.*, 213 App. Div. 326, 210 N.Y. Supp. 482 (2d Dep't 1925); *Gordon v. Pushkoff*, 67 N.Y.S.2d 873 (Sup. Ct. N.Y. County 1946), *aff'd* without opinion, 272 App. Div. 872, 72 N.Y.S.2d 402 (1st Dep't 1947); see also Comment, 3 U.C.L.A.L. Rev. 72, 83 (1955).

⁶⁹ The Evershed Committee proposed that the figure be set at two hours. Final Report of the Committee on Supreme Court Practice and Procedure 33 (1953).

⁷⁰ See Eng. Rules of the S. Ct., O. 14, r. 8 (The Annual Practice 1956); Final Report, *supra* note 69 at 33.

⁷¹ See Final Report, *supra* note 69 at 34.

JUDGMENT ON THE PLEADINGS

As we have seen, the summary judgment may facilitate a speedy disposition of a case and avoid the sometimes exorbitant cost of a trial. Similarly, a judgment on the pleadings, or similar provisions, may accomplish this end.

The tendency of modern procedure is to abolish the demurrer as a means of raising objections of law to the pleadings. The change usually takes one of two courses: the substitution of the motion for judgment, as in New York, or the substitution of the objection in law in the responding pleading, as in England.⁷² However, many American jurisdictions have abolished the demurrer only in name and substituted a motion which, due to similarity and precedent, is treated in the same way. Indeed, Professor Millar suggests that the change of name alone is detrimental, and regards the restoration of the demurrer in Pennsylvania as highly significant.⁷³ Due to the modern freedom of amendment, he points out, the old harshness of the demurrer is gone, and since a motion to strike, to dismiss, for judgment or the like, which has replaced it, may proceed on many grounds other than legal insufficiency, the net result is a loss in exactness and clarity of procedural thinking.

This sort of criticism, however, is directed only at the typical code procedures, providing various motions under which objections to a pleading are decided immediately and without resort to any proof outside the pleading. The present federal and English systems are quite different and have remedied many of the defects of the codes.

The English Practice

The emphasis of the English practice is to place legal objections to a pleading in the responsive pleading, and postpone their determination until the trial of the whole action. The demurrer has been abolished⁷⁴ and all objections in law must be made in the responsive pleading. These questions are to be decided by the judge at or after the trial unless both parties consent, or one party obtains a court order, that they be heard and disposed of before the trial.⁷⁵ However, objections to service, jurisdiction of the court,⁷⁶ venue,⁷⁷ joinder of parties⁷⁸ and joinder of causes

⁷² See Clark, Code Pleading § 86 (2d ed. 1947); Millar, Civil Procedure of the Trial Court in Historical Perspective 170 et seq. (1952).

⁷³ Millar, *op. cit.* supra note 72 at 187 et seq.

⁷⁴ See Eng. Rules of the S. Ct., O. 25, r. 1 (The Annual Practice 1956).

⁷⁵ *Id.*, O. 25, r. 2.

⁷⁶ Defendant may make a conditional appearance within the required time and move to set aside the writ because of improper service or lack of jurisdiction. *Id.*, O. 12, r. 30; see notes to *id.*, O. 12, r. 1. See also Odgers, Pleading and Practice 9, 52 (1955). The court may, if necessary, stay the proceedings and try the question of jurisdiction as a preliminary point. *Id.* at 55.

⁷⁷ Eng. Rules of the S. Ct., O. 36, r. 1 (The Annual Practice 1956).

⁷⁸ *Id.*, O. 16, rr. 11-12. A motion objecting to the joinder of parties may be made at any

of action⁷⁹ may still be raised by motion.

As a rule, the court will order a hearing before trial only if it thinks that the objection raises a serious question of law which, if decided in favor of the party objecting, would dispense with the need for any trial, or at any rate with the trial of some substantial issue in the action. Such an order should be made only with respect to matters which would not be further clarified at a trial, and it should not be made where there are facts in dispute; if so made, it may be set aside at the hearing. As an alternative, the court may order that the points of law be dealt with before any other matters at the trial.

If the preliminary determination of a point of law substantially disposes of the whole action or of any distinct cause of action, ground of defense, set-off, counterclaim or reply, the action may be dismissed or any other just order made. If the objection is upheld but the court thinks an amendment could cure the defect, it may give the losing party leave to amend, but will make him pay the costs of the argument.⁸⁰

A second method of attacking the opposing party's pleading is by application to the court to strike out the pleading on the ground that it discloses no reasonable cause of action or answer, or that it is frivolous or vexatious. If the attack is successful, the judge may order that the action be stayed or dismissed, or that judgment be entered accordingly, as may be just.⁸¹ This is a much more summary procedure than that of the objection in law and is appropriate only when the legal insufficiency of the pleading is so plain and obvious as to admit of no hesitation in recognizing it.⁸² Affidavits may not be used under this rule. The court also has inherent jurisdiction to strike a frivolous pleading and to that end may receive evidence by affidavit. In either case, the court may give leave to amend the pleading so as to cure the defect.⁸³

The Federal Practice

The federal rules take a compromise position. They allow certain objections in point of law to be raised either by motion, or in the

stage of the proceedings. However, no cause may be defeated by reason of the misjoinder or nonjoinder of parties and the court may deal with the matter in controversy as far as regards the rights and interests of the parties actually before it. See Odgers, Pleading and Practice 14 (1955).

⁷⁹ Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of together, may at any time apply to the court or a judge for an order confining the action to such of the causes of action as may be conveniently disposed of together.
Eng. Rules of the S. Ct., O. 18, r. 8 (The Annual Practice 1956); see Odgers, Pleading and Practice 29 (1955).

⁸⁰ Eng. Rules of the S. Ct., O. 25, r. 3 and notes (The Annual Practice 1956).

⁸¹ *Id.*, O. 25, r. 4.

⁸² *Id.*, O. 25, r.1, notes; Millar, Civil Procedure of the Trial Court in Historical Perspective 172 (1952).

⁸³ Eng. Rules of the S. Ct., O. 25, r. 4, notes (The Annual Practice 1956).

responsive pleading, and let the court decide whether or not they should be heard and determined before the trial.⁸⁴ Rule 7(c) abolished demurrers, pleas and exceptions for insufficiency of a pleading. Subdivisions of rule 12 provide for a motion for a more definite statement⁸⁵ and a motion to strike "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter";⁸⁶ and after the pleadings are closed, any party may move for judgment on the pleadings.⁸⁷ Further, rule 12(b) states:

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.⁸⁸

The seven defenses specifically enumerated, whether made in a pleading or by motion, and the motion for judgment on the pleadings "shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial."⁸⁹

Rule 12 seeks to encourage the quick and simultaneous presentation of defenses and objections. Therefore, a party may join in one motion all of the defenses and objections specified in the rule that are then available to him without waiving any of them. However, if he makes a motion and does not assert all of the available grounds, he may not subsequently raise any others by motion, thus preventing a series of motions.⁹⁰ He may still assert any defense or objection not raised by motion in his responsive pleading, but any that one not raised either by

⁸⁴ A good number of states have adopted the federal provisions or some modification thereof. See, e.g., 13 Del. Code Ann., Ct. Rule 12 (1953); 30 Fla. Stat. Ann., R. Civ. P. 1.11 (1956); N.J. R. Civ. P. 4:12-2 et seq.

⁸⁵ Fed. R. Civ. P. 12(e).

⁸⁶ Id. 12(f).

⁸⁷ Id. 12(c).

⁸⁸ Id. 12(b).

⁸⁹ Id. 12(d).

⁹⁰ Id. 12(g); see 2 Moore, Federal Practice ¶¶ 2260-64, 2322-26 (1948).

Originally, subsection (g) allowed defenses numbered (1) through (5) in subsection (b) to be raised before the motion raising defense (6) which, in turn, could be raised before the answer. Fed. R. Civ. P. 12(g) (rev. ed. 1944). This procedure, with its successive rounds of motions, continued the delays and preliminary sparring characteristic of the old plea in abatement, demurrer and plea in bar. See Clark, "Simplified Pleading," 27 Iowa L. Rev. 272, 284 (1942).

motion or in the responsive pleading are deemed waived, except failure to state a claim or defense, failure to join an indispensable party and lack of jurisdiction over the subject matter.⁹¹

The Advisory Committee on Federal Rules has recommended that the motion for a more definite statement should be treated separately and not operate as a waiver of the right to make subsequent motions, because the defendant is entitled to have a comprehensible complaint before he is called upon to deal with its legal sufficiency.⁹²

Professor Moore states that motions to raise "matters not within the coverage of rule 12, may continue to be made and are not subject to the requirements of rule 12 as to consolidation and waiver."⁹³ The cases cited, however, involved only motions for a stay or for security for costs; the decisions point out that such matters are not defenses, objections or grounds of abatement and that motions raising them are therefore not inconsistent with the spirit or objective of rule 12.⁹⁴ Other decisions have expressly stated that the defenses which may be interposed by motion are confined to those enumerated in rule 12(b).⁹⁵ It has been held that indefiniteness of complaint and illegality of the means by which evidence is procured in civil suits are not grounds for a motion to dismiss,⁹⁶ and although a number of decisions have allowed the statute of limitations to be urged by motion,⁹⁷ some of them specifically reason that this defense is within rule 12(b)(6), failure to state a claim upon which relief can be granted.⁹⁸ The objection of forum non conveniens, however, is addressed to the discretion of the court and may be raised at any time before or after answer.⁹⁹

Rule 12 expressly provides for a speaking motion only for the objection of failure to state a claim and the motion for judgment on the

⁹¹ Fed. R. Civ. P. 12(h).

⁹² See Armstrong, Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments, 5 F.R.D. 339, 343 (1946); Clark, Experience Under the Federal Rules of Civil Procedure, Reporter's Summary of Suggestions, Criticisms and Published Discussions 25 (May 1, 1953).

⁹³ 2 Moore, Federal Practice 2243-44 (1948).

⁹⁴ Butler v. Judge of U.S. Dist., etc., 116 F.2d 1013 (9th Cir. 1941); Parker v. Transcontinental and Western Air, 4 F.R.D. 325 (W.D. Mo. 1944); Green v. Gravatt, 35 F. Supp. 491 (W.D. Pa. 1940); Wheeler v. Lientz, 25 F. Supp. 939 (W.D. Mo. 1939).

⁹⁵ Bowles v. Glick Bros. Lumber Co., 146 F.2d 566, 568 (9th Cir. 1945); see Tinnerman Products v. Adel Precision Products Corp., 62 F. Supp. 348, 351 (D. Va. 1945) (dictum).

⁹⁶ Bowles v. Glick Bros. Lumber Co., 146 F.2d 566 (9th Cir. 1945); Bowles v. Superior Uniform Cap & Shirt Mfg., 146 F.2d 652 (9th Cir.), cert. denied, 325 U.S. 877, rehearing denied, 326 U.S. 804 (1945).

⁹⁷ Fouts v. Fawcett Publ., 116 F. Supp. 535 (D. Conn. 1953); Henis v. Compania Agricola De Guatemala, 116 F. Supp. 223, aff'd, 210 F.2d 950 (D. Del. 1953); Foote v. Public Housing Com'r, 107 F. Supp. 270 (D. Mich. 1952).

⁹⁸ See Henis v. Compania Agricola De Guatemala, supra note 97 at 226; Foote v. Public Housing Com'r, supra note 97 at 273.

⁹⁹ Fifth and Walnut v. Loew's Inc., 76 F. Supp. 64 (S.D.N.Y. 1948), cert. denied, 338 U.S. 894 (1949).

pleadings, because it was always clear that the first five defenses of rule 12(b) could be raised in that manner. Defense number seven, added in 1946, can also be shown by affidavits or depositions.¹⁰⁰ In contrast to a motion for summary judgment, the court has discretion in deciding whether to receive matters outside the pleadings on a motion to dismiss for failure to state a claim or for judgment on the pleadings. If such matters are received, the motion is to be treated as one for a summary judgment and, in order to prevent surprise, all parties are given a reasonable opportunity to submit affidavits and other evidence.¹⁰¹ As on the determination of a motion for summary judgment, genuine questions of fact arising on these motions may not be resolved without a trial.

Only the motions based on failure to state a claim and for judgment on the pleadings are integrated with the summary judgment rule because if they are sustained without leave to plead further, a judgment on the merits results, whereas all of the defenses (except that numbered (6)) do not go to the merits. It has been suggested that the motion to strike, rule 12(f), be similarly converted into a motion for summary judgment.¹⁰²

CONCLUSION

This article has not attempted to deal with the detailed problems of any particular jurisdiction. Instead, an effort has been made to survey the general field of pre-trial depositions, to answer some of the questions posed by lawyers and litigants in general, and to form an overall picture of the availability and applicability of the methods of avoiding a long and expensive trial. While it is true that jurisdictions differ as to detail, they are in accord as to theory—in that “justice delayed is justice denied.”¹⁰³

¹⁰⁰ 2 Moore, *Federal Practice* 2256 (1948).

¹⁰¹ *Id.* at 2256 n.23; Fed. R. Civ. P. 12(b), 12(c). Judge Clark reports that the provision for treating such motions as motions for summary judgment, which was introduced by the 1948 amendment to 12(b) and (c), seems to be working very well. Clark, *Experience Under the Federal Rules of Civil Procedure, Reporter's Summary of Suggestions, Criticisms and Published Discussions* 21 (May 1, 1953).

¹⁰² See Armstrong, *supra* note 92 at 345; Clark, *op. cit.* *supra* note 101 at 25.

¹⁰³ For drafts of the rules proposed by the Advisory Committee on this subject, see 1957 Report of the Temporary Commission on the Courts (part III: First Preliminary Report of the Advisory Committee on Practice and Procedure), N.Y. Legis. Doc. (1957) no. 6(b), at pp. 81-93, reprinted in McKinney's *Session Law News of New York* (April 10, 1957), at pp. a-384-92.