1939

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Recommended Citation
Ernest A. Fintel, Methods of Objecting to Pleadings and of Obtaining Summary Judgment, 4 Mo. L. Rev. (1939)
Available at: http://scholarship.law.missouri.edu/mlr/vol4/iss2/2

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METHODS OF OBJECTING TO PLEADINGS AND OF OBTAINING SUMMARY JUDGMENT

Ernest A. Fintel*

The trend to vest in the courts and to relinquish by the legislature the authority to make rules of practice and procedure is ever increasing. At this writing there are such bills pending in Missouri and Texas, and there will soon be such a measure prepared for the Kentucky legislature. It is thought that an article here published dealing with the methods of objecting to pleadings and of obtaining summary relief as existing in certain Northeastern states would not only be of interest in Missouri but in the Middle and Southwestern states, and would as well furnish some comparative material under one cover which might be of assistance in shaping thought respecting the adoption of court rules on the specified subjects. Obviously, however, some of the rules discussed would be unnecessary in certain jurisdictions, because practice rules should be drafted to best solve local problems.

Any revision of rules of practice and procedure, whether legislative or court enacted, requires exhaustive research and comparative analysis of similar rules in numerous jurisdictions. This article does not attempt that, nor is an attempt made to analyze the innumerable decisions interpreting the rules relating to the specified practice, for such is within the province of an authoritative local text. It is, however, the purpose of this discussion to indicate the manner in which objections to pleadings and

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1a. Since the preparation of this article the Missouri bill was defeated in committee. Efforts are being made to cause reconsideration of the matter.
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Motions for summary relief are made in certain Northeastern Atlantic states, and with such various procedures in mind, attempt to suggest from a practitioner's view what might constitute good court rules on the subjects.

The states selected for this study are not, in the author's opinion, the most advanced in their treatment of this branch of practice. Some, in fact, may be properly called backward. Five of the six states included, however, handle a vast amount of litigation and may be considered representative of the jurisdictions in their section of the country.

Recognizing that it is impossible to find the rules of practice and procedure of the various states within one volume, there is appended here-to some of the most important statutory and court rules discussed, in the belief that the consolidation and organization of this widely scattered material will be of particular value to those interested in comparing the actual statutes and rules.

NEW YORK

In New York the statutes and rules to be considered are detailed and specific. Demurrers and pleas have been abolished; objections to pleadings are taken by motions, which must be specific, although the relief prayed for may be in the alternative and one may move as to part of a pleading and plead to a different part.² Litigation in New York respecting the considered motions has been tremendous, hence the case law reference is only illustrative of general principals. The following classification may be helpful:

I. Motions available to correct any pleading.
   A. To state separately and number.³
   B. To make definite and certain.⁴
   C. To add or drop parties.⁵
   D. To strike out irrelevant and unnecessary matter.⁶

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². C. P. A. §§ 277, 280, 117, 281.
3. R. C. P. 90.
4. R. C. P. 102.
5. R. C. P. 103.
6. R. C. P. 102. Misjoinder and non-joinder—if these defects appear on the face of the pleading, they must be taken by motion; otherwise they are waived. R. C. P. 102; C. P. A. § 278. See, however, C. P. A. §§ 192, 193, permitting adding or dropping of parties at any stage of the cause.
6. R. C. P. 103.

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II. Motions for judgment dismissing various pleadings or parts thereof.
   A. To dismiss the complaint or a cause of action therein if the following defects appear on the face thereof.  
      1. That the court has not jurisdiction of the person of the defendant.  
      2. That the court has not jurisdiction of the subject of the action (not waived).  
      3. That the plaintiff has not legal capacity to sue.  
      4. That there is another action pending between the same parties for the same cause.  
      5. That the complaint does not state facts sufficient to constitute a cause of action (not waived).
   
   B. To dismiss the complaint or a cause of action therein if the following defects do not appear on the face thereof.  
      1. Same grounds as II, A 1, 2, 3, and 4.  
      5. Statute of Frauds.  
      6. Infancy or other disability.  
   
   C. To treat an entire answer as a nullity if it is sham or frivolous.  
   
   D. To dismiss a counterclaim or strike out an affirmative defense in an answer if the following defects appear on the face thereof.  
      1. Same grounds as II, A 2, 3, 4, and 5.  
      2. That the counterclaim is not one which may be properly interposed in the action.  
      3. That the defense consisting of new matter is insufficient in law.  

7. R. C. P. 106.  
8. This objection is never waived and may be made at any time. C. P. A. § 279.  
11. R. C. P. 109. Notice the word "judgment" is omitted from the rule, for the dismissal of a counterclaim or affirmative defense still leaves in the answer denials good in form. To be noticed within ten days after service of the answer.  
12. Can be made at any time. C. P. A. § 279.
E. To dismiss a counterclaim if the following defects do not appear on the face thereof.\textsuperscript{13}
   
   1. Same grounds as II, A 2, and 4; and II, B 2, 4, and 5.

F. To treat an entire reply as a nullity if it is sham or frivolous.\textsuperscript{14}

G. To strike out a reply or separate defense therein for insufficiency.\textsuperscript{15}

III. Motion for judgment on the pleadings after issue is joined.\textsuperscript{16}

IV. Motion for summary judgment when an answer is served.\textsuperscript{17}

   A. To recover a debt or liquidated demand arising on
      
      1. A contract, express or implied, in fact or in law, sealed or not sealed.
      
      2. A judgment for a stated sum.
      
      3. A statute where the sum sought is other than a penalty.

   B. To recover an unliquidated debt or demand for money only on
      
      1. A contract, express or implied, sealed or not sealed, other than for breach of promise to marry.
      
      2. A statute where the sum sought is other than a penalty.

   C. In the following equitable actions:
      
      1. To recover possession of specific chattels with or without a claim for hire or damages or the taking or detention thereof.
      
      2. To enforce or foreclose a lien or mortgage.
      
      3. For specific performance of a written contract for the sale or purchase of property, including alternative or incidental relief as the case may require.
      
      4. For an accounting arising on a written contract, sealed or not sealed.

   D. For the defendant, in any action where an answer is served alleging a defense which is sufficient as a matter of law, where the defense is founded upon facts established \textit{prima facie} by documentary evidence or official record.\textsuperscript{18}

\textsuperscript{13} R. C. P. 110.
\textsuperscript{14} R. C. P. 104.
\textsuperscript{15} R. C. P. 111. Notice the omission of the word “judgment.” See note 11, supra.
\textsuperscript{16} R. C. P. 112.
\textsuperscript{17} R. C. P. 113.
\textsuperscript{18} The third from the last paragraph of Rule 113 was thus construed in Lederer v. Wise Shoe Co., 276 N. Y. 459, 12 N. E. (2d) 544 (1938), overruling previous lower court cases.

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V. Motion for partial judgment.\textsuperscript{19} 

To state separately and number.\textsuperscript{20} The purpose of this motion is to unscramble a poorly drawn and confused pleading which fails to distinguish properly and state separately different causes of action, counterclaims or affirmative defenses which the pleader seeks to join, and to thereby enable opposing counsel to plead responsively.\textsuperscript{21} While it is directed to a defect of form,\textsuperscript{22} and no substantial right is forfeited by failure to move for its correction,\textsuperscript{23} the motion is not for mere technical advantage, consequently a party is entitled to know what he must answer and prepare to meet.\textsuperscript{24}

Though no time is limited by the rules for the bringing of this motion, as its purpose is to enable responsive pleading in an orderly manner, the defect is usually waived unless made before answering or the filing of a motion to dismiss the pleading concerned.\textsuperscript{25} The motion is determined solely on the pleading attacked, and no affidavits are permitted.\textsuperscript{26}

To make definite and certain.\textsuperscript{27} This motion, like the previous one, is to aid a party to draw a responsive pleading; hence where a pleading is ambiguous, equivocal, indefinite, uncertain or obscure, the remedy is to move to require the pleading to be made more definite and certain by an amendment.\textsuperscript{28} It is distinguishable from a motion for a bill of particulars in that it is directed toward eliminating obscurity or indefiniteness of language in what might otherwise be a proper pleading, whereas the function of a bill of particulars in New York is to provide for the disclosure of more specific information than is required in a legally sufficient

\begin{itemize}
\item \textsuperscript{19} R. C. P. 114.
\item \textsuperscript{20} R. C. P. 90.
\item \textsuperscript{21} Cohen & Co. v. Japan Cotton & Silk Trading Co., Inc., 250 App. Div. 770 (2d Dep't 1937).
\item \textsuperscript{22} Hence, defects claimed must be specified in the notice of motion. R. C. P. 62.
\item \textsuperscript{23} Krower v. Reynolds, 99 N. Y. 245, 1 N. E. 775 (1885).
\item \textsuperscript{24} Brenner v. Title Guarantee & Trust Co., 276 N. Y. 230, 11 N. E. (2d) 890 (1937).
\item \textsuperscript{26} Upson Co. v. Erie R. R., 213 App. Div. 262, 210 N. Y. Supp. 112 (4th Dep't 1925).
\item \textsuperscript{27} R. C. P. 102.
\end{itemize}
pleading so as to narrow the issues and prevent surprise at the trial, as well as to facilitate preparation therefor.29

The motion is made on specified objections which are waived unless raised within the time specified.30 It often prays for some further relief, as for example, to state and number separately and to strike out of the pleading certain matter. The pleading alone is considered; affidavits are improper.31 Failure to move as provided may be penalized in subsequent proceedings by construing the defective pleading adversely to the party failing to make timely objection.32

To add or drop parties.33 While misjoinder, non-joinder and defect of party remedies may be had by motion under Rule 102, the relief there specified is not exclusive.34

To strike out irrelevant and unnecessary matter.35 Where a pleading contains unnecessary, improper, impertinent, scandalous, irrelevant, redundant, repetitious, sham or frivolous matter, a motion specifying the objectionable matter may be made to strike out such matter, and if the motion is granted, the pleading is deemed amended accordingly. Only two of the terms used have somewhat different meanings from those commonly known. A pleading or matter is sham when it is so clearly false in fact that it does not in reality involve any matter of substantial litigation.36 Frivolous, on the other hand, is matter which is so clearly and palpably bad as to indicate bad faith on the part of the pleader and to require no argument and no reasoning by the court to determine it is bad.37 While

30. The motion must be made within 20 days after service of the defective pleading. Rule 105. But in Levin v. Levin, 157 Misc. 156, 283 N. Y. Supp. 720 (Sup. Ct. 1935), the service of an answer during the pendency of the motion was held not to be an abandonment of the motion.
31. Deubert v. City of N. Y., 126 App. Div. 359, 110 N. Y. Supp. 403 (2d Dep't 1908). Nor may proof be taken by a referee and reported to the court on such a motion. Hopkins v. Hopkins, 28 Hun 436 (Sup. Ct. 1882).
33. R. C. P. 102.
34. See note 5, supra.
35. R. C. P. 103.
motions under this rule are to be decided on the pleadings, those claiming sham may require affidavits. If no motion is made under the rule within the specified time and before answer or motion to dismiss, the objection is waived, although an answer served during the pendency of the motion is not deemed an abandonment of the motion or a waiver of the right to appeal.

To dismiss the complaint when the defect appears on the face thereof. There are five specified grounds for a motion for judgment when the defect appears on the face of the complaint. Motions must be noticed within twenty days after the service of the complaint; otherwise they are waived.

Two of the grounds, that the court has no jurisdiction of the subject of the action and that the complaint does not state facts sufficient to constitute a cause of action, are never waived and hence will not be mentioned hereafter. They may be raised at any time, i.e., after answer, at the trial, and even though no objection was taken at the trial, the existence of either of these two defects may be the basis of an appeal. No affidavits are considered on any of the enumerated grounds.

The failure of the complaint to state facts sufficient to constitute a cause of action is the principal objection of the five grounds and the most used. Averments which sufficiently point out the nature of the pleader's claims are sufficient, if under them he would be entitled to give the neces-

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38. Affidavits are necessary to show denials are sham, but are not necessary or proper to show a pleading is frivolous. Fleischer v. Terker, 259 N. Y. 60, 181 N. E. 14 (1932).
41. R. C. P. 106.
42. Lack of jurisdiction of the person, i.e., a foreign ambassador or a foreign executor, must be raised by a motion on special appearance; otherwise a general appearance and waiver would result. Meyers v. American Locomotive Co., 201 N. Y. 163, 94 N. E. 605 (1911). For lack of jurisdiction of the subject matter, see People v. Central R. R. of New Jersey, 42 N. Y. 283 (1870). Lack of plaintiff's capacity to sue includes infancy, insanity, and a foreign corporation not having obtained a certificate of authority to do business within the state. Wood & Selick v. Ball, 190 N. Y. 217, 83 N. E. 21 (1907). The pendency of another action means another action in this state. Barnes v. Andrews, 208 App. Div. 356, 204 N. Y. Supp. 326 (2d Dep't 1924); see also for an illustration, Cornell v. Bonsall, 176 App. Div. 798, 163 N. Y. Supp. 384 (2d Dep't 1917). Failure to state a cause of action would be, for example, failure to allege due performance of a condition precedent in a contract action.
43. C. P. A. § 278.
44. C. P. A. § 279.
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sary evidence to establish his cause of action. For the purpose of motions under this subdivision, as in a demurrer, the facts alleged in the complaint are deemed admitted, and where the facts as thus deemed admitted would not support a recovery, the complaint is bad. It is thus a question of law whether the complaint is sufficient. A bill of particulars is not part of the pleadings and is not ordinarily read with the complaint, although it may be.

To dismiss the complaint when the defect does not appear on the face thereof. Motions under this rule require an affidavit, unlike motions under Rule 106, stating facts tending to show that defects exist which do not appear on the face of the complaint, and answering affidavits are permitted. Actually, the practice is an adaptation of the old equity practice of raising questions of law by a plea in bar and having them determined before the defendant pleaded to the merits. A comparison of the nine grounds in Rule 107 with the six grounds in Rule 106, discloses that the first four grounds are identical. The fifth ground of Rule 106 of course cannot be repeated in Rule 107, as the defect would have to appear on the face of the complaint. There are, therefore, five new or additional grounds for objecting to a complaint, not found in Rule 106. These are briefly res adjudicata, Statute of Limitations, release, Statute of Frauds, and infancy or disability of the defendant, and are too well known to require illustration.

It is intended that all the foregoing motions with the two indicated exceptions be made within 20 days from the date of the service of the complaint or before answer, with the right, however, to plead the defenses specified in Rule 107 in the answer. The motions relating to matters of form usually result in orders permitting amendment; those made under

52. R. C. F. 107.
Rule 106, where the defect appears on the face of the complaint, may result in an order dismissing the complaint or one permitting amendment or one granting such other relief as may be just. If the complaint is dismissed, the dismissal is not on the merits and a new action may be brought as long as the same defect does not again exist.56

Under Rule 107 the court in its order may dismiss with leave to amend, direct the inclusion of the objection in the defendant's answer, or direct the facts be found by a jury or referee. In the latter, the order must clearly and succinctly state the questions of fact and direct that these be tried by a jury or referee, the findings of which shall be reported to the court for its action.56 Alleged duress in obtaining a release, which release is set up as a defense, would be an example of the nature of facts which might be submitted to a jury or referee.57 An example of directing that the facts be set up in the defendant's answer would be where the issue of fact involves the merits of the plaintiff's entire case.

If the time of the defendant to answer58 expires during the pendency of the motion, the defendant is allowed, unless the court orders otherwise, ten days after notice of entry of the order disposing of the motion is served.59

To treat an entire answer or reply as a nullity.60 There are two grounds upon which such a motion may be made. If an entire answer is sham, or frivolous, a motion may be made praying that the answer or reply be treated as a nullity and that judgment be rendered accordingly; whereupon the court may dismiss the pleading or allow a new one to be served on such terms as it deems just. The motion is specifically limited to an attack on an answer and reply; hence a counterclaim which is subject to attack on grounds specified in Rule 109 is not within the purview of Rule 104.

56. See R. C. P. 108, and Barker v. Conley, 267 N. Y. 43, 195 N. E. 677 (1935). The facts decided by the jury must determine the case one way or the other.
58. Twenty days from service of the complaint.
59. C. P. A. § 283.
60. R. C. P. 104. In Wayland v. Tysen, 45 N. Y. 281 (1871), it was held a verified answer containing general denials could not be dismissed as sham. To the same effect, where the denial was on information and belief, see Rockowitz v. Siegel, 151 App. Div. 636, 136 N. Y. Supp. 192 (1st Dep't 1912). See, however, People v. McCumber, 18 N. Y. 315 (1858), where such an attack was allowed, which case, despite being decided before the present practice, would seem to be a better decision.
There was lack of uniformity with regard to whether affidavits might be used when sham was claimed; now it is clear they may be used. If it is frivolous, no affidavits may be considered. The motion must be made within 20 days from the time the defective answer or reply is served.

*When the defect appears on the face of the counterclaim.* This rule gives to a plaintiff essentially the same grounds to object, within 10 days after service of the answer, to the defendant’s counterclaim or affirmative defense as the defendant had with respect to the plaintiff’s complaint. There are six grounds for objection under this Section. Comparison with the grounds specified in Rule 106 shows that four of them are the same. That the counterclaim is not one which may be properly interposed in the action means that it does not comply with the essentials prescribed by statute. That the defense consisting of new matter, called an affirmative defense, is insufficient in law is again the Code substitute for a demurrer, and hence the facts alleged are deemed true. No affidavits are considered. The motion to strike out an affirmative defense, however, searches the record and involves the sufficiency of the complaint as well as the affirmative defense. Motions to dismiss the counterclaim for insufficiency do not, however, “search the record”.

*When the defect does not appear on the face of the counterclaim.* The pleadings and supporting affidavits are considered. As the five grounds of objection are the same as five of the eight grounds specified under Rule 107 regarding a complaint, and as the motion is determined by the same rule, i.e. 108, no further discussion is necessary.

Additional defendants brought in as a result of a counterclaim may reply to the counterclaim within 20 days, but because they are defendants

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61. Fleischer v. Terker, 259 N. Y. 60, 181 N. E. 14 (1932). “If it is to be disposed of on motion, its falsity must be determined by affidavits.”
63. R. C. P. 105.
64. R. C. P. 109.
65. C. P. A. §§ 266-269, 271. “A counterclaim may be any cause of action in favor of the defendants or some of them against the plaintiffs or some of them, a person whom a plaintiff represents, or a plaintiff and another person or persons alleged to be liable.” § 266.
69. R. C. P. 110.
the remedies provided in Rule 109 are not available to them, for it specifies that "the plaintiff" may make the application under said rule, and these newly brought in defendants may only serve a reply or an appearance. 70

To strike out the reply or a separate defense therein. 71 If a reply or a separate defense therein is insufficient in law upon the face thereof, the defendant may, within 10 days after service of the reply, move to strike it out. This motion in effect is the same as the motion to strike out new matter in a defense on the ground of insufficiency in law as provided in Rule 109, with the additional requirement, however, that the reply must not contain matter inconsistent with the complaint. 72 The motion searches the record to the extent that it will test the sufficiency of a counterclaim but not the sufficiency of the complaint.

Motion for judgment on the pleadings. This motion after issue is joined may only be made on two grounds, i.e., lack of jurisdiction of the court over the subject of the action and failure of a pleading to state facts sufficient to constitute a cause of action or defense. As the motion can be made only after answer, the case may be moving up on the trial calendar while the sufficiency of the pleadings is being tested; consequently, it does not delay a case at all, while motions made before answer usually do. The motion encompasses the determination of questions of law 73 and is in effect a demurrer. 74

The sufficiency of any pleading may be raised on the motion. It truly searches the record, and thus differs from Rule 109, as the court may give judgment to any party, regardless of which one makes the motion, for the first bad pleading is condemned. 75 Usually only the pleadings are considered, although under certain circumstances the bills of particulars may be considered on the motion. 76 The allegations in the pleadings are deemed

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admitted for the purpose of the motion\textsuperscript{77} and every legitimate inference
drawn therefrom is resolved in favor of the pleader.\textsuperscript{78} Neither party is
entitled to judgment on the pleadings if on their face an issue of fact
remains to be tried.\textsuperscript{79} The courts have adopted a practice permitting an
amendment if it is believed the defect may be cured by a new pleading.\textsuperscript{80}
Where both sides move for judgment on the pleadings, there no longer re-
mains any question requiring proof or submission of the case to the jury.\textsuperscript{81}

\textbf{Motion for summary judgment.} Summary judgment is available to a
plaintiff or a defendant and may be rendered on motion in eight specified
types of actions as listed in Rule 113. By decision of the New York Court
of Appeals the third from the last paragraph of said rule has been inter-
preted to permit summary judgment being rendered \textit{in any kind of an action}
where the defendant brings the motion and where the defense is
founded upon facts established \textit{prima facie} by documentary evidence or
official record and where no issue respecting the verity and conclusiveness
of such record exists.\textsuperscript{82}

The purpose of this motion is to “defeat the law’s delays” by giving
prompt relief to those having a good, clearcut claim or defense. It is used
a great deal in New York\textsuperscript{83} and provides a rather simple method for a
preliminary inquiry into the merit of a cause of action or defense. Space
prevents a complete description of the mechanics of the motion.\textsuperscript{84} Briefly,
however, if the plaintiff moves for judgment, his affidavits must show evi-

\begin{itemize}
\item \textsuperscript{77} Saragovitz v. Cohen, 147 Misc. 557, 264 N. Y. Supp. 201 (Sup. Ct. 1933).
\item \textsuperscript{78} McCormick v. Westchester Lighting Co., 142 Misc. 27, 252 N. Y. Supp. 849 (Sup. Ct. 1931), aff’d, no opinion, 238 App. Div. 845 (3d Dep’t 1933).
\item \textsuperscript{79} Fleischer v. Terker, 259 N. Y. 60, 181 N. E. 14 (1932).
\item \textsuperscript{80} Wnuk v. Tull, 151 Misc. 3, 270 N. Y. Supp. 520 (Sup. Ct. 1934).
\item \textsuperscript{81} Crown Corset Co. v. Ludwig Baumann & Co., 213 App. Div. 113, 210 N. Y. Supp. 60 (1st Dep’t 1925), aff’d, no opinion, 241 N. Y. 606, 150 N. E. 574 (1926).
\item \textsuperscript{82} Lederer v. Wise Shoe Co., 276 N. Y. 459, 12 N. E. (2d) 544 (1938) (specifically overruling previous lower court cases). It was urged that a motion for summary judgment was available only in the eight specified types of action listed in Rule 113. The court distinguishes between sound reasons existing for limiting summary judgment where proof is dependent upon affidavits made by persons not subject to cross-examination, and no reasons existing for imposing such a limitation where a legal defense is established by documentary evidence or official record, and where no issue exists about the verity and conclusiveness of such record. See also Tymon v. Tyrose Homes, Inc., 253 App. Div. 900 (2d Dep’t 1938), mod’d, 254 App. Div. 591, 1 N. Y. Supp. (2d) 974 (2d Dep’t 1938).
\item \textsuperscript{83} See Saxe, \textit{Summary Judgments in New York, A Statistical Study} (1934) 19 CORN. L. Q. 237.
\item \textsuperscript{84} For a concise description of the mechanics relating to the motion, see Rule 113 in the Appendix, and for an excellent detailed discussion, see Shientag, \textit{Summary Judgment} (1935) 4 FORDHAM L. REV. 186. For history of summary judgment in New York, see Dwan v. Massarene, 199 App. Div. 972, 192 N. Y. Supp. 577 (1st Dep’t 1922).
\end{itemize}
dentary facts entitling him to judgment. If the defendant moves, his affidavits must allege evidentiary facts which disclose defenses and show that his denials and contentions are sufficient to defeat the plaintiff. The motion by either party will be defeated if the other party shows facts which may be deemed by the judge sufficient to entitle him to a trial of the issues.

It is interesting to note the distinction between a motion for summary judgment and a motion for judgment on the pleadings. The former may be made only in the specified types of actions and under certain circumstances; the latter may be made in any type of case without limitation. In the former, affidavits are considered, for the motion does not depend upon the pleadings alone, but instead on evidence relied on by each party to sustain the ultimate facts alleged in each pleading, such evidence being set forth in the supporting affidavits. In the latter, the pleadings alone and the bills of particulars are considered. In a motion for summary judgment the court goes behind the pleadings which on their face appear sufficient, and determines whether each party in his affidavits is urging in good faith facts which create a debatable issue of fact which should be tried.

The distinction between this motion and one to dismiss an entire answer for sham under Rule 104 is that the sham motion may be made in any action and also that in the sham motion the plaintiff has the burden of proving the falsity of the sham answer beyond doubt; whereas on a summary judgment motion the plaintiff need only show facts sufficient in law to entitle him to judgment, and the burden then shifts to the defendant to show that he in good faith disputes the existence of the facts relied on by the plaintiff or that other facts exist which give him a good defense.

While the actions specified in subdivisions 1 through 8 of summary judgment Rule 113 are specific, for the purpose of illustration a case brought under each classification is given in the notes.86

The test of the determination of the motion is important. It is not which party by his affidavits has convinced the court he is right, but is, instead, whether the court is satisfied that there is a triable issue of fact in the action. Where there is no triable issue other than the assessment of damages, it does not prevent summary judgment, for the plaintiff may still have a trial as to the amount of the damages. If the defendant fails to file replying affidavits alleging evidentiary facts showing there is merit to his defense and that the denials are not sham, the motion will be decided in favor of the plaintiff. Complicated questions of law will not defeat the motion.

Where the defendant's counterclaim is less than the plaintiff's claim, and he does not attack the plaintiff's claim, judgment for the difference between the amount demanded by the plaintiff and the amount demanded by the defendant in his counterclaim may be given. Where, however, the defendant's counterclaim demands a sum larger than that demanded in the plaintiff's complaint, no summary judgment may be granted the plaintiff.


88. General Inv. Co. v. Interborough Rapid Transit Co., 235 N. Y. 133, 139 N. E. 216 (1923). Cardozo, J., in Curry v. Mackenzie, 239 N. Y. 267, 146 N. E. 375 (1925), stated "There must be a failure on the part of the defendant to satisfy the court 'by affidavit or other proof' that there is any basis for his denial or any truth in his defense." See also, Gravenhorst v. Zimmerman, 236 N. Y. 22, 139 N. E. 766 (1923). A bank's answer and its affidavits in opposition to a summary judgment motion raised a question of fact, claiming a check was certified in error, and this was held sufficient to raise a substantial issue of fact and so summary judgment was denied. Met. Life Ins. Co. v. Bank of U. S., 259 N. Y. 365, 182 N. E. 18 (1932).


Unlike the practice in England and New Jersey, the court must enter an unconditional order granting or denying the motion. The judgment entered as a result of the motion is appealable, and the appeal is usually taken from both the order and the judgment.

Partial Summary Judgment. If in an action specified in Rule 113 it appears that a defense applies to only a part of the plaintiff's claim, or that a defense admits only part of the plaintiff's claim, the plaintiff may obtain judgment by a motion for partial summary judgment for so much of his claim as is admitted or as is not attacked, and the action may be severed as to the balance. What was said with respect to motions for summary judgment is equally applicable to the limited rule regarding partial summary judgment.

New Jersey

As compared to the relatively complex and explicit provisions of the New York practice on this subject, the rules in New Jersey may seem brief and limited in scope. To a certain extent this is undoubtedly true, but the contrast is largely due to the difference in the system of practice used in these two jurisdictions. Whereas New York is a code pleading state whose Practice Act was written to supplant the previously existing common law system, the practice of New Jersey is still common law, but with statutory modification to remove objectionable rigidity of form. New Jersey has departed from common law formal pleas and demurrers.

96. R. C. P. 114.
97. 1 CARMODY, PLEADING & PRACTICE IN NEW YORK (1929-1937) § 106.
99. The Practice Acts of 1903 and 1912, and Rules of Supreme Court of 1912 comprise most of such modification. They have not since been amended in any basic respect. See note 101, infra.
100. This has been largely accomplished by liberalizing the rules of pleading with reference to joinder of parties, causes of action, inconsistent counts and defenses, transfer of causes, amendments of pleadings and process, and simplicity of form.
for the correcting and testing of defective pleadings, and the present practice in this regard, as well as with respect to summary judgment, is found in the statutes and court rules. The following outline of the motion practice may be helpful:

I. Motions attacking jurisdiction and relating to procedural defects. (Pleas to jurisdiction; pleas in abatement.)

A. To dismiss the suit or to quash the summons where the defect does not appear on the record (dilatory pleas).
1. For lack of jurisdiction over the person.
2. For lack of jurisdiction over the subject matter of the action.
3. Because the plaintiff has not legal capacity to sue.
4. Because a prior action is pending between the same parties for the same cause.

II. Motions addressed to the complaint.

A. Relating to defects and irregularities in form.
1. To strike out the complaint (but with discretion in the court to permit an amendment thereof) for duplicity, obscurity, uncertainty, unnecessary repetition, prolixity, impertinence, or where it is so framed as to embarrass or delay a fair trial.
2. To strike out a count of the complaint for superfluity.


102. See discussion in Parks v. McClellan, 44 N. J. L. 552 (Sup. Ct. 1882). Other dilatory objections available include: irregularities in issuance or service of process, defects in description of parties, discrepancy between summons and complaint, faulty venue, and non-payment of costs in prior action. See Harris, Pleading & Practice in New Jersey (Rev. ed. 1939) §§ 272, 273, 275, 276, 278, 279, 280.

103. Motions relating to joinder of parties and causes are omitted. The rules relating to joinder are, however, liberal. Rev. Stat. (1937) tit. 2, c. 27, § 31 provides that non-joinder or misjoinder of parties shall not defeat the action, but a motion to compel plaintiff to amend is available to correct defects in parties, and a motion to strike on this ground is improper. C. Cedar Cove, Inc., v. Staub, 9 N. J. Misc. 885, 155 Atl. 836 (Sup. Ct. 1931). Practically the only restraint on joinder of causes is that the separate causes shall be susceptible of convenient joint trial. Rev. Stat. (1937) tit. 2, c. 27, § 37; S. C. R. 21. Impropriety of joinder is waivable and may be raised by motion to strike before answer (or reply). S. O. R. 22. The motion is decided on the face of the pleading and the court will allow plaintiff to elect, Murphy v. Patten, 85 Atl. 56 (Sup. Ct. 1912); or separate the causes into two separate actions. See Weinberger v. Agricultural Ins. Co., 81 N. J. L. 127, 79 Atl. 542 (Sup. Ct. 1911); Davis v. Pub. Ser. Corp., 77 N. J. L. 275, 72 Atl. 82 (Sup. Ct. 1909).
B. Relating to defects in substance appearing on the face of the complaint.

1. To strike out the complaint (but with discretion in the court to permit an amendment thereof).
   (a) Same grounds as I, A. 1-4, supra.
   (b) Because the complaint does not disclose a cause of action.

C. To strike out the complaint for sham.

III. Motions addressed to the answer, reply and subsequent pleadings.

A. Relating to defects and irregularities in form.

1. To strike out the answer, reply, rejoinder, et cetera (but with discretion in the court to permit an amendment) where it is defective or irregular or so framed as to embarrass or prevent a fair trial, for duplicity, unnecessary repetition, prolixity, uncertainty, argumentiveness, or the presence of irrelevant matter.

B. For objections in point of law.

1. To strike out the answer, reply, rejoinder, et cetera, as insufficient in law.
2. To strike out the answer and for summary judgment where it is sham or insufficient in law.
3. To strike out the reply, rejoinder, et cetera, for a departure.

IV. Motions addressed to a counterclaim.104

(Motions relating to matters in abatement and motions addressed to the complaint, except motions to strike for lack of jurisdiction over the person are applicable.)105

The above outline is based on the common law classification and does not in all cases represent distinctions recognized in the modern practice. For instance, matters in abatement were at common law taken by plea where the defect did not appear on the record,106 but by demurrer where

104. A counterclaim is treated as a cross-action. S. C. R. 66.

105. See also motion to strike a counterclaim on the ground that it may not be conveniently disposed of in the action. Rev. Stat. (1937) tit. 2, c. 27, §§ 137, 141.

106. 49 C. J. 179, § 197; id. at 233, § 275.
it was apparent on the face of the pleadings.\textsuperscript{107} Both the dilatory pleas and
demurrers have now been supplanted by motions,\textsuperscript{108} and as a matter of
practice, the objections are in effect taken by the same motion,\textsuperscript{109} whether
the defect is apparent on the record or not. Of course, if the defect is not
apparent, the motion must be supported by deposition or evidence sub-
mitted as the court may direct.\textsuperscript{110}

All objections, whether in point of law or as to formal defects and ir-
regularities, must be raised by motion before filing an answering plead-
ing;\textsuperscript{111} but objections in point of law may be reserved in the answer or
subsequent pleading and raised on the trial.\textsuperscript{112} Failure to make timely
motion as to formal defects and irregularities, however, constitutes a waiver
and precludes subsequent objection on such matters.\textsuperscript{113} Where the motion
is addressed to the pleading, it must raise all of the objections then exist-
ing,\textsuperscript{114} and the notice therefor must specify the particular defects objected
to.\textsuperscript{115} Where timely motion has been addressed to a pleading, the time
for filing a responsive pleading is extended during the pendency of the
motion and is fixed by the court in its order deciding the motion.\textsuperscript{116}

\textit{Motions attacking jurisdiction and relating to matters in abatement.}

\textit{To quash the summons for lack of jurisdiction over the person.} Lack of
jurisdiction over the person was raised at common law on special appear-

\textsuperscript{107} TIDD'S \textit{PRACTICE} (3rd Am. ed. 1840) 694; 49 C. J. 362, § 452.
\textsuperscript{108} S. C. R. 39-41, 56.
\textsuperscript{109} On motions relating to matters in abatement, the judgment rendered
generally quashes the writ or dismisses the suit, whereas on motions tantamount
to a demurrer, it strikes out the complaint or other pleading. See Baldauf v.
Russell, 88 N. J. L. 303, 96 Atl. 96 (1915); and S. C. R. 40.
Depositions may be taken before a justice, commissioner or examiner on 4 days' writen notice and with opportunity for cross-examination afforded. REV. STAT. (1937) tit. 2, c. 27, § 228; S. C. R. 191.
\textsuperscript{111} S. C. R. 30. Motions must be made on 2 days' written notice specifying the
grounds therefor. REV. STAT. (1937) tit. 2, c. 27, §§ 143, 144, 147; S. C. R.
\textsuperscript{112} S. C. R. 40, providing that the motion may be made before the trial
court which may determine such issue of law prior to trial on the merits on motion of either party. Lehigh Valley R. R. v. United Lead Co., 102 N. J. L. 545, 133 Atl. 290 (Sup. Ct. 1926).
\textsuperscript{113} S. C. R. 30, 39-41.
\textsuperscript{115} And matters not specified will not be heard. REV. STAT. (1937) tit. 2,
c. 27, § 114; Dunn v. Chernewski, 101 N. J. L. 27, 127 Atl. 338 (Sup. Ct. 1925);
\textsuperscript{116} No rule or statute so provides, but in practice leave to answer over or
otherwise plead is granted, the court making such order as may be just.
S. C. R. 40; Central R. R. v. VanHorn, 38 N. J. L. 133, 140 (Sup. Ct. 1875).
ance by demurrer or plea to the jurisdiction, in lieu of which a motion was substituted by rule in 1912. The grounds on which the relief is granted, however, remain the same, and a special appearance is necessary. Where, however, failure of jurisdiction occurs through defects in process, its issuance, return or service, the question is raised on special appearance by motion to set aside the service of the summons and complaint, rather than motion to quash.

To dismiss the suit for lack of jurisdiction over the subject matter. This motion has replaced the common law plea to the jurisdiction or demurrer in cases where the defect was apparent. The objection may be supported by affidavit or deposition if necessary. It cannot be waived and may be pleaded in answer and raised on the trial.

Under the Transfer of Causes Act, a court may not dismiss the suit on this ground where any other court of the state has jurisdiction over the subject matter in question, but must transfer the cause to the proper court, though it be a court of chancery, where subsequent proceedings are thereafter taken as though the suit had originally been commenced.

117. 49 C. J. 398, § 503; 1 C. J. 40, § 29 (demurrer); 1 C. J. S. 38, §§ 9 et seq. (plea).
118. 5 C. R. 40, 56.
120. The motion existed at common law, 50 C. J. 590, § 324. See also Sweeney v. Miner, 88 N. J. L. 361, 95 Atl. 1014 (1915). But the court has broad powers to correct defects in the summons, its issuance and service. Rev. Stat. (1937) tit. 2, c. 27, §§ 48, 63. In fact the court has power to order the issuance and service of a new summons with the same effect as if served originally, even though the statute of limitations has expired in the meantime. Rev. Stat. (1937) tit. 2, c. 27, § 63. See discussion in Martin v. Lehigh Valley R. R., 114 N. J. L. 243, 176 Atl. 665 (1935); but see Limpert Bros., Inc. v. Stitt, 94 N. J. L. 472, 110 Atl. 832 (1920); and Coventry v. Barrington, 117 N. J. L. 217, 187 Atl. 348 (1936).
121. S. C. R. 40 and 56. As at common law, the movant must point to the court within the state that has jurisdiction, unless no court within the state will take cognizance of the suit. See Hill v. Nelson, 70 N. J. L. 376, 57 Atl. 411 (Sup. Ct. 1904), and note 126, infra.
123. This will be done at any stage of the proceeding, but the power is limited to cases where the court has no jurisdiction. Rev. Stat. (1937) tit. 2, c. 26, § 60. See also S. C. R. 203, 209.
there. Of course, if no court in the state has jurisdiction, the action will be dismissed.

To quash the summons on the ground that plaintiff has no capacity to sue. This motion takes the place of the common law plea in abatement to the person of plaintiff and is properly brought where the plaintiff is a fictitious person or where a legally existent person is not qualified to sue. The objection affects jurisdiction and is therefore not waived by failure to move.

To dismiss the suit because a prior action is pending between the parties for the same cause. At common law, this objection was raised by plea in abatement or demurrer before pleading to the merits. It must now be raised by motion in common with all of the former dilatory pleas. It is likewise waived unless taken before answer.

On the hearing, the movant must submit his proof by affidavit or deposition of the commencement of the prior action, its pending status, the identity of the parties, and the subject matter of the two actions.

Motions addressed to the complaint. Defects appearing on the face of the complaint were formerly raised by demurrers, which were classified as general or special. The general demurrer was used to test the sufficiency of the complaint in matters of substance, whereas the special

126. Karr v. N. Y. Jewell Filtration Co., 78 N. J. L. 198, 73 Atl. 132 (Sup. Ct. 1909); Hill v. Nelson, 70 N. J. L. 376, 57 Atl. 411 (Sup. Ct. 1904). But at common law in such a case the proper plea was in bar, not in abatement. 49 C. J. 229, § 271.
129. Such as a foreign corporation not authorized to do business, but the corporation by subsequently qualifying may maintain the suit. Commercial Credit Corp. v. Boyko, 103 N. J. L. 620, 137 Atl. 534 (1927).
131. 1 C. J. S. 121, § 81b; 49 C. J. 387, § 488 (demurrer); 1 C. J. S. 119, § 81a (plea).
132. S. C. R. 56.
133. See Harris, Pleading & Practice in New Jersey (Rev. ed. 1939) § 278.
134. Hill v. Morrison, 46 N. J. L. 488 (Sup. Ct. 1884); Hixon v. Schooley, 26 N. J. L. 461 (Sup. Ct. 1857). Where a plaintiff is suing on a liquidated demand which was available to him as a counterclaim or set-off when defendant in a prior action, his failure to counterclaim or set-off as required by statute enables the present defendant to make this motion to dismiss the second suit. Rev. Stat. (1937) tit. 2, c. 26, §§ 190, 191. See Schenck v. Schenck, 10 N. J. L. 276 (Sup. Ct. 1826). Quaere: Is this not more in the nature of a plea in bar and hence properly raised in the answer?
135. Tind's Practice (3rd Am. ed. 1840) 694.
demurrer was limited to objections to form. These special demurrers were early abolished and replaced by motions to strike out the defective complaint. General demurrers, however, survived until 1912, when by rule motions to strike were likewise substituted. As in the case of the dilatory pleas discussed above, the fundamental rules relating to common law demurers still apply to the motions by which defects in form and substance are now raised.

To strike out the complaint for defects and irregularities in form. As pointed out above, objections to the form of the complaint must be taken before answer; otherwise they are waived. The rule defining such objections reads: "Unnecessary repetition, prolixity, scandal, impertinence, obscurity and uncertainty, and any other violation of the rules of pleading, are respectively objectionable; also any pleading which is irregular, defective or so framed as to embarrass or delay a fair trial." Most of the objections named in this rule are generally recognized in almost every jurisdiction and do not need explanation here. The rule, however, includes defects cognizable at common law, but not specifically mentioned, such as duplicity, which arises where the plaintiff has confused or commingled two or more causes of action in one count. The objection that matter in the complaint will embarrass or delay a fair trial is by its terms so broad as to include all of the other specific objections to form. It provides a catch-all which the court may use to cover any peculiar situation which may not fit into any well-defined category of objectionable matter. Leave to amend may be granted to cure any of the foregoing defects.

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To strike out a count of the complaint as superfluous. A defendant may bring this motion to strike out a count of a complaint where the same cause of action has been pleaded in several counts and where there appears to be no substantial difference between them. The objection is waived unless taken by timely motion.

To strike out the complaint for failure to disclose a cause of action. This motion is tantamount to the common law general demurrer and is made on the complaint for the purpose of raising a pure issue of law as to its sufficiency in substance. It should be directed either to the whole complaint or specific counts thereof. Failure to disclose a cause of action is not waived by failure to make timely motion. It may be pleaded in the answer and raised before the trial court, which may on motion of either party determine such issue of law prior to the trial on the facts.

At common law, the form in which the action was brought was considered demurrable, and while the Practice Act of 1912 abolished the common law forms of action, it has been held by the New Jersey Court of Errors and Appeals that "the essential and differentiating rules applicable to pleading as established at common law still survive." Mistaking the remedy, however, need not be fatal, for the court may permit an amendment though the substitution of a new cause of action may be necessary.

In 1928 the Practice Act was amended to provide for the striking of sham and frivolous complaints. This statute was further amended in

146. REV. STAT. (1937) tit. 2, c. 27, § 119; Adams v. Grady, 77 N. J. L. 301, 72 Atl. 55 (Sup. Ct. 1909).
150. See note 112, supra.
152. REV. STAT. (1937) tit. 2, c. 27, § 7, providing that there shall be but one form of action at common law, viz., an "action at law."
1938 by substituting the phrase "insufficient in law" for the word "frivolous,\textsuperscript{156}\textsuperscript{156} the two terms having become synonymous by interpretation, the objection thereon being equivalent to a general demurrer.\textsuperscript{157} Though the power to strike sham and frivolous pleadings has long been recognized at common law,\textsuperscript{158} this statute further permits the court to strike complaints or counterclaims\textsuperscript{159} or parts thereof which are sham or insufficient in law with or without prejudice to the institution of another action on the same cause of action.\textsuperscript{160} Furthermore, if it appear only probable that the complaint or counterclaim is sham or insufficient in law, the plaintiff or counterclaimant may be allowed to proceed on terms.\textsuperscript{161}

If the court's decision on the motion is determinative of the whole case, and the defects are incurable, judgment may be given as in the case of a general demurrer;\textsuperscript{162} otherwise, plaintiff may now be given leave to amend.\textsuperscript{163} If the motion is denied, the movant is then permitted to file his answer, and the action proceeds as if no motion had been made.\textsuperscript{164}

To strike out the complaint for sham. Sham has been defined by the courts as sufficient in law but palpably false.\textsuperscript{165} As will be explained later, a sham defense may be stricken and summary judgment entered in certain actions.\textsuperscript{166} Such summary judgment is not expressly available to a defend-
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ant, but as has been explained above with reference to the motion to strike for failure to disclose a cause of action, he may, on a showing of sham or probability thereof, strike the complaint, or require terms as a condition to the further prosecution of the action. So, too, the court may order that the striking of the complaint or a count thereof shall be with prejudice to the institution of another action for the same cause.

The motion to strike for sham may be made on ex parte affidavits.

Motions addressed to the answer and subsequent pleadings. To strike out an answer, reply or subsequent pleading as defective or irregular or so framed as to prevent a fair trial. Defects in form such as for duplicity, unnecessary repetition, uncertainty and obscurity, argumentiveness, or presence of irrelevant matter may be raised on motion to strike out the answer or subsequent pleading. The comment concerning parallel motions addressed to the complaint is generally applicable here. Unless the motion is made before filing a reply or responsive pleading, these defects in form are waived, and even though timely objection is taken, leave to amend may be granted.

To strike out a defense as insufficient in law and for summary judgment; to strike out matter in subsequent pleadings as insufficient in law. The motion to strike for insufficiency in law is equivalent to the common law general demurrer and is similar in operation to the corresponding motion addressed to the complaint and is similarly limited to the face of the pleadings. As in the case of the demurrer it searches the record, and the court examines the sufficiency of prior pleadings as well as the pleading attacked and decides against the party first at fault.

The court may strike out the particular defense or matter objected

167. But see note 160, supra.
168. REV. STAT. (1937) tit. 2, c. 27, §§ 125, 127, 129. See HARRIS, PLEADING & PRACTICE IN NEW JERSEY (Rev. ed. 1939) 349.
169. REV. STAT. (1937) tit. 2, c. 27, § 126.
174. REV. STAT. (1937) tit. 2, c. 27, §§ 157, 158.
175. See note 148, supra.
to or permit its amendment on terms, in which event the case may go to trial on the amended defenses or on a denial or other sound defenses, and in a proper case, the court may give final judgment.

It is well established that a reply or subsequent pleading must be consistent with the prior pleadings of the party; otherwise a departure results, which may be similarly raised by motion to strike.

The plaintiff may raise issues of law in his reply, if he prefers, in the same manner as the defendant may raise similar issues in his answer.

Where plaintiff is suing to recover a debt or liquidated demand arising upon a contract, judgment or statute, he may, in addition to moving to strike the answer as insufficient at law, request summary judgment in his favor upon his affidavit verifying the cause of action and stating the amount claimed and his belief that there is no defense to the action.

Leave to defend may be granted unconditionally or conditionally in the discretion of the court. Moreover, partial final summary judgment may be granted for so much of plaintiff’s claim as is admitted or left uncontested.

As compared to the summary judgment provisions in force in New York, it is apparent that the summary relief available in New Jersey is relatively narrow. The defendant has no right to move for summary judgment, nor may plaintiff do so in cases other than for liquidated demands.

To strike out a defense as sham and for summary judgment. In the limited cases specified above with reference to defenses insufficient in law, the plaintiff may likewise by the same rules and procedure obtain summary judgment where defenses are sham unless the defendant by affidavit

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186. But see quaere, note 160, supra.
188. S. C. R. 80-84. Eisele & King v. Raphael, 90 N. J. L. 219, 101 Atl. 200 (1917); and see Coykendall v. Robinson, 39 N. J. L. 98 (1876), re striking sham general denial or plea of general issue.
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or other proof shows facts which in the court’s discretion entitle him to defend. As was explained in the New York discussion, if plaintiff’s and defendant’s affidavits are contradictory, the motion will be denied, for the court will not try an issue of fact on affidavits.

CONNECTICUT

This discussion must be read with certain underlying factors in mind. Practically every Connecticut lawyer, and a surprising number of informed lawyers of adjacent states, feel that in Connecticut the practice of the law is as near utopian as it may be in this age. Judges are of the highest calibre and are in a sense the English type of career judges. Their tenure is secure, seniority is recognized, and members of the Connecticut Supreme Court are chosen from the ranks of superior court judges, usually the senior judge. The superior court judges’ assignments take them to all the counties so they soon know all the lawyers in the state, which is invaluable if and when that judge sits on the supreme court. The bar is small, and, with the exception of a few, the members do not misstate, misrepresent, or lie to each other or the court, nor do they wilfully indulge in dilatory tactics.

The practice and procedure is provided by statutes and court rules which do not supersede the common law, much of which still controls procedure, but merely introduces a new system to make the ancient system more convenient.

Briefly the methods of attacking pleadings are as follows:


191. Contained respectively in Connecticut General Statutes of 1930, and in an official publication entitled CONNECTICUT PRACTICE BOOK (1934), hereafter cited as P. B.

192. Hunter’s Appeal, 71 Conn. 189, 41 Atl. 557 (1898).
I. Objections to the Complaint.
   A. Pleas in abatement or to the jurisdiction. 193
   B. Motion to strike out. 194
   C. Motion for more specific statement. 195
   D. Motion to expunge. 196
   E. Motion for misjoinder of parties. 197
   F. Demurrer. 198

II. Objections to the answer. 199
   A. Motion to strike out. 200
   B. Motion for more specific statement. 201
   C. Motion to expunge. 202
   D. Demurrer. 203

III. Motion for summary judgment. 204

Despite the availability of the foregoing methods of objecting to pleadings, pleas in abatement are distinctly disfavored, 202 and the motions to correct the pleadings and motions for summary judgment are used very little. 206 This may result from calendars being up to date and the extreme good faith existing between members of the Bench and Bar. 207

193. CONN. GEN. STAT. (1930) § 5506; P. B. § 83.
194. P. B. § 61.
196. P. B. § 63; GEN. STAT. (1930) § 5515.
197. P. B. § 65.
198. P. B. §§ 97, 98. "All defenses, other than those to the jurisdiction or in abatement, shall be made by an answer or by a demurrer." GEN. STAT. (1930) § 5506. All demurrers must be special. GEN. STAT. (1930) § 5507.
199. For the nature of denials, see GEN. STAT. (1930) § 5508, and P. B. § 104.
200. P. B. § 61.
201. P. B. § 62; GEN. STAT. (1930) § 5513.
202. P. B. § 63; GEN. STAT. (1930) § 5515.
203. P. B. §§ 97, 98; GEN. STAT. (1930) §§ 5506, 5507.
204. P. B. §§ 62, 53, 54, 55, 56.
206. CLARK AND SHULMAN, LAW ADMINISTRATION IN CONNECTICUT (1937) 51, 216-219.
207. Although some statutory and court rule coercion may exist from the seldom used P. B. §§ 82, 122, and GEN. STAT. (1930) §§ 5514, 5674, which in effect provide that a defendant’s attorney file at any time the plaintiff requests a writing signed by him stating whether he honestly believes there is a bona fide defense to plaintiff’s action, what the substance of the defense is, and that the defense will be made. It provides a speedy, informal way of probing the conscience of the defendant’s attorney. All the court passes on, however, is the attorney’s good faith, not whether a defense is legally sufficient. Jennings v. Parsons, 71 Conn. 413, 42 Atl. 76 (1898); Nichols v. Ansonia, 81 Conn. 229, 70 Atl. 636 (1908). If after the case is over it is disclosed that untrue pleadings or a false statement concerning a defense has been made, reasonable expenses
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**Plea in abatement or to the jurisdiction.** The office of a plea in abatement is to set up facts which otherwise would not be apparent to the court and to pray for the benefit of some legal conclusion therefrom.\(^{208}\) Generally, the common law pleas in abatement are available,\(^{209}\) but the statutes, contrary to common law, provide for the filing of one plea in which exceptions to the jurisdiction of the court and grounds of abatement may be set forth.\(^{210}\)

The practice is to file a plea in abatement or to the jurisdiction which clearly states facts not of record\(^{211}\) in such specific detail that no doubt exists, as to the ground on which the defendant excepts to the jurisdiction or contends the action should abate, for these pleas cannot be aided by intendment or inference.\(^{212}\)

The issues of fact thus raised by the plea are then tried, but the determination by the court does not preclude the parties from contesting the case on its merits, for the defendant may plead over or the plaintiff may amend.\(^{213}\) If facts showing lack of jurisdiction are not apparent on the record, attack must be made by plea, but if such facts are apparent from the record, the remedy is a motion to erase the case from the docket.\(^{214}\)

While ordinarily a plea in abatement does not go to the substance of the case,\(^{215}\) and thus may be waived if not taken within the time specified,\(^{216}\) it is certainly clear that a plea to the jurisdiction of the court and double costs may be taxed, and an attorney making intentional or reckless false statements is subject to suspension.

\(^{208}\) O'Brien's Petition, 79 Conn. 46, 63 Atl. 777 (1906). If the ground of abatement is solely one of law, the plea must be so framed as to raise clearly the issue of law. Sanford v. Bacon, 75 Conn. 541, 54 Atl. 204 (1903).

\(^{209}\) P. B. 250, although of course the statutes control. Southey v. Dowling, 70 Conn. 153, 39 Atl. 113 (1897).


\(^{211}\) Sisk v. Meagher, 82 Conn. 483, 74 Atl. 880 (1909).


\(^{213}\) GEN. STAT. (1930) §§ 5537, 5538.

\(^{214}\) Williams Co. v. Mairs, 72 Conn. 430, 44 Atl. 729 (1899) ; Sisk v. Meagher, 82 Conn. 483, 74 Atl. 880 (1909).

\(^{215}\) Rogers v. Hendrick, 85 Conn. 206, 82 Atl. 586 (1912).

\(^{216}\) P. B. § 85. The day following the return day of the writ. Writs are returnable the first Tuesday of each month except July and August, but must be served twelve days before; otherwise they are returnable the first Tuesday of the following month; or before any subsequent pleading is filed. P. B. § 84. But of course the court may by order grant time. P. B. § 86.
over the subject matter is never waived,\(^\text{217}\) and may be raised by the court suo moto.\(^\text{218}\) With this exception, there is little chance of error in this jurisdiction regarding the waiving of rights to file or to object to any pleading, for the order of pleas, motions, demurrers, etc., is specified, and the filing of any pleading, which term here includes any pleading, plea, motion or demurrer, waives the right to file any prior pleading unless the court orders otherwise.\(^\text{219}\) Because of its clarity this subject will not be mentioned again under the various motions.

As pleas in abatement are not looked upon with favor by the courts, amendments of pleas are granted sparingly,\(^\text{220}\) although ordinarily amendments of defective pleadings are quite liberally permitted.\(^\text{221}\)

**Motion to strike out.** This motion provides for the striking out or removing from the record of an entire pleading or motion which is sham, frivolous, improperly filed, or unfit because of indecent or scandalous allegations.\(^\text{222}\) It has been held this is a "rarely available remedy" and does not overlap a motion to expunge or a demurrer.\(^\text{223}\) The motion lies only where the defect is clearly apparent on the face of the pleadings.\(^\text{224}\) The entire pleading must be palpably and clearly bad for the reasons specified.\(^\text{225}\)

\(^{217}\) Marci II v. Merriman & Sons, Inc., 115 Conn. 678, 163 Atl. 411 (1932); Woodmont Ass'n v. Milford, 85 Conn. 517, 84 Atl. 307 (1912).

\(^{218}\) Whitehead v. Roberts, 86 Conn. 351, 85 Atl. 533 (1912).

\(^{219}\) See the order listed in P. B. §§ 83, 84. For example, filing an answer would waive abatable defects, Tracy v. N. Y., N. H. & H. R. R., 32 Conn. 1, 72 Atl. 156 (1909); and the right to demurrer, Ohlin v. Kowner, 96 Conn. 394, 114 Atl. 117 (1921); and certain jurisdictional defects as court's jurisdiction over the person, Lasus v. Church Corp., 123 Conn. 166, 193 Atl. 204 (1937); and the right to a more specific statement, Kearns v. Widman, 94 Conn. 257, 108 Atl. 551 (1919); or the right to have matter expunged, Dawson v. Orange, 78 Conn. 96, 61 Atl. 101 (1905); and in fact any defects raised by motion, Brown v. Woodward, 75 Conn. 254, 33 Atl. 112 (1902); and it withdraws a pending demurrer, Jackson v. Savage, 79 Conn. 294, 64 Atl. 377 (1906); although a pleading may be filed after the time has expired by obtaining a court order or consent of the opposing party, P. B. §§ 84, 86, GEN. STAT. (1930) §§ 5533, 5534. All defects then existing must be raised at one time. P. B. § 64.

\(^{220}\) Brockett v. Fair Haven & W. R. R., 73 Conn. 428, 47 Atl. 763 (1900).

\(^{221}\) Bennett v. United Lumber & Supply Co., 114 Conn. 614, 159 Atl. 572 (1932); Clayton v. Clayton, 115 Conn. 683, 163 Atl. 458 (1932); GEN. STAT. (1930) §§ 5510, 5537, 5538. And pleading after amendment is of course permitted. P. B. § 95.

\(^{222}\) Donovan v. Davis, 85 Conn. 394, 82 Atl. 1025 (1912).

\(^{223}\) Equitable Trust Co. v. Plume, 92 Conn. 649, 103 Atl. 940 (1918). If not apparent on the face, the remedy would be a plea in abatement.

\(^{224}\) For example, interposing a tort counterclaim in a contract action, Schaefer v. O. K. Tool Co., Inc., 110 Conn. 523, 148 Atl. 330 (1930); or where a pleading contains only legal conclusions, Bd. of Water Comm'mrs v. Manchester, 89 Conn. 671, 96 Atl. 182 (1915), or where a writ was filed without ever serving a complaint, although the court said a motion to erase the entire case from the

Published by University of Missouri School of Law Scholarship Repository, 1939
Motion for a more specific statement. Where the pleadings do not fully disclose the ground of the claim or defense, the adverse party may move for a more particular statement specifying the particulars desired and the grounds of his motion.\(^2\) The motion is available to parties to enable them to protect themselves from surprise at the trial,\(^2\) and as such would seem to be equivalent to a motion for a bill of particulars, which motion is ordinarily only available if a complaint designated the "common counts" is filed.\(^2\) The power to order a more specific statement under this motion, which has a counterpart in most jurisdictions, is here, however, exercised cautiously and only for substantial reasons.\(^2\)

Motion to expunge. This is the typical motion to strike out parts of a pleading which are unnecessary, repetitions, prolix, scandalous, impertinent, obscure, uncertain, irrelevant, immaterial, or evidential.\(^2\) It has been said its use should be avoided by the profession and discouraged by the trial court.\(^2\) The motion cannot be used to whittle away a pleading, hoping to make it demurrable.\(^2\) While strange, it has been held that expunged matter remained in the files and "could have been utilized as docket was more appropriate, but served the same purpose as a motion to strike out, Galvin v. Birch, 97 Conn. 399, 116 Atl. 908 (1922); or where a substituted complaint does not obviate defects of a previous complaint held had on demurrer, Oefinger v. Dalton, 116 Conn. 720, 165 Atl. 351 (1933). It would seem from the last two cases that motions to strike out and motions to erase a pleading from the court files are in effect the same.

226. P. B. § 62; GEN. STAT. (1930) § 5513, under which the usual motion to state and number separately may be made.

227. Huber v. Douglas, Inc., 94 Conn. 167, 108 Atl. 727 (1919). A more specific statement of damages may be had, Matysewski v. Wheeler, 97 Conn. 593, 117 Atl. 545 (1922); or specification of acts of negligence relied on, Doerr v. Woodland Transportation Co., 105 Conn. 689, 136 Atl. 693 (1927). While not a motion objecting to a pleading, there is also available a motion for disclosure, P. B. §§ 72-77, the purpose of which is to obtain facts exclusively in the possession of the opposite party which are material to the support of the mover's cause of action or defense.

228. P. B. § 63; GEN. STAT. (1930) § 5527. However, such a common count complaint is in itself insufficient in law, if no supplemental complaint or bill of particulars is served; so its only real effect seems to be to give a plaintiff more time, Dunnett v. Thornton, 73 Conn. 1, 46 Atl. 158 (1900).

229. Prince v. Takash, 75 Conn. 616, 54 Atl. 1003 (1903).

230. P. B. § 63; GEN. STAT. (1930) § 5515.

231. Donovan v. Davis, 85 Conn. 394, 82 Atl. 1025 (1912); Bitello v. Lipson, 80 Conn. 497, 69 Atl. 21 (1908). It has a very limited function if based solely on immateriality or irrelevancy. State v. Erickson, 104 Conn. 542, 133 Atl. 683 (1926). It does not determine substantial rights, Whitney v. Cady, 71 Conn. 166, 41 Atl. 550 (1898); or prevent one from stating his case in his own way, so long as issues are not clouded, Freeman's Appeal, 71 Conn. 708, 43 Atl. 186 (1899).

evidence," presumably, however, as evidence of an admission in the pleadings.

**Motion for misjoinder of parties.** The exclusive remedy for misjoinder of parties is by motion. However, neither misjoinder nor nonjoinder of parties is a ground for a plea in abatement of an action, although the proper remedy for nonjoinder is a demurrer.

**Demurrer.** The demurrer is the only manner in which the sufficiency of a cause of action or defense may be tested before trial. It must be to an entire cause of action or to an entire or partial defense and must distinctly specify the reason for the alleged insufficiency, and the grounds are generally the same as at common law. "Speaking Demurrers" are not countenanced as the pleading is tested solely on its own allegations. If a defendant fails to plead over after his demurrer is overruled, final judgment may be entered against him, but he should appeal from this judgment and not the respondeas ouster. If he does plead over, that is not a waiver of his right to appeal from the decision on the demurrer. Prior to trial, no procedure exists for obtaining judgment on the pleadings.

**Summary Judgment.** This remedy is available to a plaintiff by motion in any action to recover a debt or liquidated demand in money arising out of certain limited types of actions, i.e., negotiable instruments; contracts, except quasi contracts; judgments; statute; guaranty; and

233. Nat. Transportation Co., Inc., v. Toquet, 123 Conn. 468, 196 Atl. 344 (1937); and see Theron Ford Co. v. Dudley, 104 Conn. 519, 133 Atl. 746 (1926).
234. P. B. § 65; GEN. STAT. (1930) § 5522; Montgomery v. Branford, 107 Conn. 697, 142 Atl. 574 (1928). And additional parties may be summoned in by the court. GEN. STAT. (1930) § 5521.
236. P. B. §§ 97, 98; GEN. STAT. (1930) §§ 5506, 5507. If a demurrer to one cause of action or defense is sustained, such cause of action or defense is removed from the case, unless it is also applicable to another cause of action or defense. P. B. § 99. The remedy for misjoinder of causes of action is by demurrer, P. B. § 100, although such defects are waived if not seasonably taken. P. B. § 101.
240. P. B. § 52. See Appendix for the complete list of actions in which the motion may be made. For discussion of the statutory sections, see Clark, The New Summary Judgment Rule in Connecticut (1929) 15 A. B. A. J. 82. The procedure apparently is used very little in Connecticut. See CLARK AND SHULMAN, LAW ADMINISTRATION IN CONNECTICUT (1937) 51, which is a statistical survey. It would appear from this study that all the motions addressed to pleadings discussed above are used very little in Connecticut, for there seems to be a feeling there that these motions do not affect the course of a case much except to delay it.
certain equitable actions for recovery of chattels, to quiet title, or discharge certain liens.

The plaintiff, any time after the defendant has appeared, may file a motion with supporting affidavits by himself or anyone having personal knowledge, verifying the cause of action and the sum he believes to be due, and that the defendant has no defense; whereupon, the defendant must, by replying affidavit, show such facts as may be deemed by the court sufficient to entitle him to defend. If the defendant's affidavit is insufficient, frivolous, or false, or for the purpose of delay, the court may strike it from the court files. If the defense applies only to part of the claim, the plaintiff may have final judgment for part, and the action will be severed and proceeded with as to the remainder of the claim.241

It is to be noted that only the plaintiff may obtain summary judgment. Questions of law cannot be decided on the motion, but must await the finding by the court that the defendant has no defense on the facts, and thereupon the defendant may file an appropriate pleading to test the question of law. If he fails to file such a pleading, the plaintiff may have judgment. As a denial of the motion is considered interlocutory, no appeal lies from such an order.

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PENNSYLVANIA

In this jurisdiction a plaintiff's first pleading is called the plaintiff's statement of claim. The defendant files an affidavit of defense thereto which may contain a set-off, counterclaim or new matter, whereupon the plaintiff's reply is filed and the pleadings are closed. A rule in Pennsylvania is in the nature of an order to show cause granted by the court upon motion or petition of a party.

The methods of raising objections to pleadings may be classified as follows:

I. Motions addressed to the plaintiff's statement of claim.242
   A. Motion to strike off.243

242. Plaintiff has similar remedies against the defendant's set-off, counterclaim, or new matter. Practice Act (1915) § 15 (which is really only a pleading act). Section citations hereinafter apply to said act.
243. § 21.
B. Rule for more specific statement.\textsuperscript{244}

C. Statutory demurrer.\textsuperscript{246}

II. Motions addressed to defendant's affidavit of defense.\textsuperscript{246}

A. Motion to strike off.\textsuperscript{247}

B. Rule for judgment for want of a sufficient affidavit of defense.\textsuperscript{248}

\textit{Motion to strike off.} This motion is available against any pleading\textsuperscript{249} which fails to comply with the requirements particularly specified by the practice act.\textsuperscript{250} It attacks only the defects in form; no errors in substance may be raised.\textsuperscript{251} If the motion is not made within fifteen days after service of the statement of claim and before an affidavit of defense on the merits is served, the defects are waived.\textsuperscript{252}

\textsuperscript{244}This rule, obtained on petition of the defendant, is not provided for in the Practice Act of 1915, but was in use prior to the act. Bradley v. Potts, 165 Pa. 418, 25 Atl. 734 (1893). And it has been held that the remedy under the old procedure is therefore still effective and available. Rhodes v. Terhoyden, 272 Pa. 387, 116 Atl. 364 (1922).

\textsuperscript{245}While all common law pleas and demurrers have been abolished by §§ 3 and 4 of the Practice Act, § 3 provides that "defenses heretofore raised by these pleas shall be made in the affidavit of defense," and § 20 provides that a defendant may raise any question of law in his affidavit of defense without answering the averments of fact in the statement of claim, and any question of law so raised may be set down for a hearing and disposed of by the court. It is important at the outset to notice that an affidavit of defense raising questions of law is a statutory demurrer as distinguished from a true affidavit of defense answering on the merits the averments of facts in the plaintiff's statement of claim.

\textsuperscript{246}Defendant has similar remedies against plaintiff's reply to defendant's set-off, counterclaim, or new matter. § 15.

\textsuperscript{247}§ 21.

\textsuperscript{248}§ 17. This rule also provides that the defendant may move for judgment against a plaintiff for want of a reply or sufficient reply to the whole or any part of the defendant's set-off, counterclaim, or new matter. It seems the defendant's affidavit of defense is not subject to a rule for a more specific statement, for if it violates the formal requirements of the statutes, plaintiff may move to strike it off, and if it is not specific and definite, it is insufficient and subject to a rule for judgment for want of a sufficient affidavit of defense.

\textsuperscript{249}Affidavit of defense is stricken if defective in form. Fleck-Marshall v. Lamparter, 12 D. & C. 113 (1928). Defective counterclaim or set-off may be stricken. Riling v. Idell, 291 Pa. 472, 140 Atl. 270 (1928). ("The form of reply and the law applicable to determine its sufficiency will be like that of the affidavit of defense"). Amram, Common Pleas Practice (1936) 106; Smith v. Faust, 92 Pa. Super. 267 (1928).

\textsuperscript{250}For example, failure to allege if contract is oral or in writing. § 9; Gilmer Bros. v. Walker, 29 D. R. 510 (1919); but an amendment will be allowed, Manolakis v. Am. Ex. Co., 9 D. & C. 454 (1927). Claim is stricken if not sworn to, Minnick v. Denny, 1 D. & C. 120 (1921); also if prolix, Ritchey v. Pratto, 4 D. & C. 188 (1923); but a prolix affidavit of defense is not stricken if plaintiff is not injured thereby, Rumsey v. Keystone, 14 D. & C. 291 (1930).

\textsuperscript{251}Sovich v. Reading Co., 10 D. & C. 194 (1928). Some courts require supporting affidavits, but this seems unnecessary.

METHODS OF OBJECTING TO PLEADINGS

Rule for more specific statement. This rule is available where a statement of claim, set-off or counterclaim or new matter is good in form and sets forth a good cause of action and complies with the statutory requirements relating thereto, but is nevertheless not detailed or specific enough in its allegations of fact. This motion and a statutory demurrer are not interchangeable. Actually, the motion elicits information formerly obtainable in a bill of particulars which is now obsolete, for under the practice act a statement of claim must be so specific that it has been held every statement of claim, and answer embodies within it a bill of particulars.

The right to move for a more specific statement is waived if an answer on the merits is filed, or trial is begun, even though amendments of pleadings are permitted quite freely. A pleader is penalized if he fails to move to strike off or obtain a rule for a more specific statement by being prevented from objecting at the trial to the admission of evidence under and substantiating the general indefinite averments.

Statutory Demurrer. While Section 4 of the practice act abolishes demurrers, the same Section provides that "questions of law heretofore raised by demurrer shall be raised in the affidavit of defense as provided in section twenty." Hence, the statutory demurrer is only a substitute for

256. Duggan v. Duggan, 291 Pa. 556, 140 Atl. 342 (1928), where the court stated that the defendant should first decide if the statement of claim complies with the relevant statutes, and if not, he should move to strike it off. If the statement does conform to the statutes but is not sufficiently specific, he should take "a Rule for a more specific statement and follow it by a motion for a non-pros, if the Rule were made absolute and not complied with." (A non-pros is an involuntary dismissal of the action without prejudice. It is not a final judgment on the merits, although it might become that if the Statute of Limitations has run on a new action.)
258. King v. Brillhart, 271 Pa. 301, 114 Atl. 515 (1921). See also, Daveler v. Fisher, 16 D. & C. 601 (1931); Amram, COMMON PLEAS PRACTICE (1936) 82. The old decisions on granting or refusing motions for bills of particulars govern decisions on rules for more specific statements. Commonwealth v. Firemen's Fund, 23 D. & C. 618 (1934). Where the rule is made absolute, i. e., the party taking it has put it down for argument and it is sustained, an amended pleading may be filed; if the order of the court is not complied with, a motion for non-pros may be made. Duggan v. Duggan, 291 Pa. 556, 140 Atl. 342 (1928).
the common law demurrer.²⁶² It is important to note that the statutory demurrer is raised by an affidavit of defense specifying the ground on which the defendant contends the statement of claim is insufficient in law and praying for a hearing and disposition of the question of law so raised, and as such affidavit of defense is a true pleading, the defendant need file no other pleading until it is disposed of by the court.²⁶³ Like a demurrer, it attacks defects appearing on the face of the pleading, and no facts dehors the pleading may be considered.²⁶⁴

The court may sustain a demurrer as to the whole or a part of a plaintiff’s statement of claim.²⁶⁵ However, judgment for the defendant is only granted in clear cases where the defect in plaintiff’s statement of claim cannot be amended.²⁶⁶ While thus in clear cases the defendant may obtain judgment, the court cannot give judgment against the defendant, for if the statutory demurrer is overruled, the defendant has an absolute right to file within fifteen days a supplemental affidavit of defense,²⁶⁷ and as the order overruling the demurrer is interlocutory, no appeal may be taken.²⁶⁸

²⁶² Winters v. Pennsylvania R. R., 304 Pa. 243, 155 Atl. 486 (1931); Miller v. Lochman, 15 D. & C. 91 (1931); Kochersperger v. Bank, 16 D. & C. 263 (1930). Where a plaintiff pleads a good cause of action but no proper allegations of damage, statutory demurrer is sustainable. Sabiston v. Sabiston, 299 Pa. 448, 149 Atl. 700 (1930). But if there is an erroneous measure of damages alleged, the proper remedy would be for the defendant to move to strike off plaintiff’s claim or file a rule for a more specific statement. Casella v. Valenti, 17 D. & C. 603 (1932).


²⁶⁶ All facts and reasonable inferences as alleged in the plaintiff’s statement of claim are deemed true, Troop v. Franklin Sav. & Trust Co., 291 Pa. 18, 139 Atl. 492 (1927); but no inferences or conclusions of law are admitted, Commonwealth ex rel. Davis v. Blume, 307 Pa. 406, 161 Atl. 551 (1932); and judgment for the defendant is not permitted where the defect in plaintiff’s statement of claim may be amended, Seaman v. Tamaqua Nat. Bank, 280 Pa. 124, 124 Atl. 323 (1924); the court must give the pleader a chance to amend, Winters v. Penn. R. R., 304 Pa. 243, 155 Atl. 486 (1931). The test for granting judgment against the plaintiff was stated in Rhodes v. Terheyden, 272 Pa. 397, 116 Atl. 384 (1922), as being “not whether the statement is so clear, in both form and specification, as to entitle plaintiff, without amendment, to proceed to trial, but whether, upon the facts averred, it shows, as a ‘question of law,’ that plaintiff is not entitled to recover . . . the doubt should be resolved against entering summary judgment, the power so to do being intended only for clear cases. . . .”


Although the right to file a statutory demurrer is waived by the filing of an affidavit of defense on the merits by the defendant, the defendant is not precluded from pointing out insufficiencies in the statement of claim, if the plaintiff subsequently moves for judgment for want of a sufficient affidavit of defense.\

 Rule for Judgment for want of a sufficient affidavit of defense. Excluding the default provisions, Section 17 provides in contract, not tort, actions for very limited summary relief. Briefly, the Section permits the testing by rule of the sufficiency in law of the affidavit of defense of the defendant or reply of the plaintiff to defendant’s set-off, counterclaim or new matter. To succeed, plaintiff’s statement of claim must set forth a self-sustaining, legally sufficient cause of action, which would entitle the plaintiff to a verdict for the full amount of his claim. It is not clear when no counterclaim is interposed, whether the motion “searches the record,” despite the court’s talk of “judgment on the pleadings,” “summary judgment” and that the defendant has not waived his right to attack plaintiff’s statement of claim for insufficiency when the plaintiff attacks his affidavit of defense. In any event, it is clear the plaintiff may, under certain circumstances, by this motion, obtain the dismissal of the defendant’s affidavit of defense. Like a statutory demurrer, which it really is, it is granted only in clear cases and is determined upon the facts set

270. § 17; Schanne v. Bioren, 100 Pa. Super. 76 (1930).
271. Commonwealth v. Magee, 24 Pa. Super. 329 (1904), where because plaintiff’s statement was not sufficiently clear, judgment was denied.
272. See Clark and Samenow, The Summary Judgment (1929) 38 YALE L. J. 423, 462, where it is said that Pennsylvania’s § 17 provides only for default judgments. It is believed that this is inaccurate, for not only may a plaintiff obtain judgment if a defendant fails to file an affidavit of defense, but the plaintiff may obtain judgment if the affidavit of defense filed by the defendant is, upon test under this section, found to be on its face insufficient in law. In Parry v. First Nat. Bank of Lansford, 270 Pa. 556, 113 Atl. 847 (1921), the court says, “The filing of the affidavit constituted no waiver of defendant’s right subsequently to rely upon the inadequacy of plaintiff’s averments, when the latter asked for judgment on the pleadings.” See also Irwin v. Weikel, 282 Pa. 259, 127 Atl. 612 (1925); Madison-Kipp Corp. v. Price Battery Corp., 311 Pa. 22, 166 Atl. 377 (1933). In Taggart v. DeFillippo, 315 Pa. 438, 173 Atl. 423 (1934), it was held that the appellate court could of its own volition reverse a judgment in favor of the plaintiff because of the inadequacy of his statement and send back the record with a procedendo. The motion is not truly one for judgment on the pleadings, since it does not condemn the first bad pleading, nor does § 17 provide typical summary judgment relief, for no affidavits are permitted to show facts dehors the pleadings and so at best it is an attempt to provide relief against defensive pleading, which is, on its face, insufficient in law.
forth in the record and without affidavits. The motion is brought after the defendant files his affidavit of defense on the merits, and the allegations of fact contained in the affidavit of defense are deemed true.

The test laid down by the court seems to be that the plaintiff is entitled to judgment "only when the affidavit of defense clearly presents no meritorious defense; nevertheless, when the affidavit does not present a legal defense to plaintiff's claim, judgment should be summarily entered in the interest of the speedy administration of justice." 

An appeal may be taken from the order refusing to grant judgment for want of a sufficient affidavit of defense. This motion may be made at any time and is never waived.

**Attack on Set-off, Counterclaim or New Matter.** These, if defective, are subject to attack by motion to strike off, or by rule for a more specific statement of set-off or counterclaim, or by plaintiff's reply in the nature of a statutory demurrer to the set-off or counterclaim. The sufficiency of the set-off or counterclaim may also be raised on a motion for judgment for want of a sufficient affidavit of defense.

It appears that where an affidavit of defense contains a set-off, counterclaim, or new matter, a motion for judgment by the defendant against the plaintiff for want of a sufficient reply to the whole or any part of the set-off, counterclaim, or new matter is a broader motion than any other motion permitted under present Pennsylvania practice, for under Section 17 of the practice act the court may enter judgment in favor of the plaintiff or the defendant for such amount as may be found due, with leave to proceed for the balance, or such other judgment as justice may require. The filing of a reply within fifteen days, as required by statute, cannot be considered a waiver of the right to attack a set-off, counterclaim, or new matter.

There are many variations of the relief which may be granted if an affidavit

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of defense is sufficient or is not sufficient where there are also pleaded set-offs, counterclaims, or new matter, the relief being dependent, however, upon the fundamental motions discussed above. 281

Massachusetts

Massachusetts is another common law practice state with statutory modification. 282 Probably more of the common law features have been retained than in New Jersey, but it has nevertheless been considerably modernized as compared to Delaware, which is unique in its retention of old common law pleading.

Most of the modern practice is contained in the Practice Act of 1851 as amended and as supplemented by rules of the supreme judicial, superior, and district courts. 284 The common law forms of pleading in personal actions have been retained in substance, but the designations have been abolished, such actions now being classified as contract, tort, or replevin. 285 The rules relating to joinder of causes and defenses are comparatively

281. For example, if an affidavit of defense is insufficient, and the counterclaim pleaded by the defendant is likewise insufficient, the plaintiff may take a rule for judgment for want of a sufficient affidavit of defense and at the same time file a reply in the nature of a statutory demurrer to the counterclaim. Michelin Tire Co. v. Schulz, 295 Pa. 140, 145 Atl. 67 (1929). If an affidavit of defense is sufficient and the counterclaim is insufficient in substance, the plaintiff may only file a reply in the nature of a statutory demurrer. Riling v. Idell, 291 Pa. 472, 140 Atl. 270 (1928). New matter is considered the same as a set-off and counterclaim, is subject to the same motions, and must be as full and specific in its allegations of fact as a statement of claim. Isaac v. Donegal & Conay Mut. Fire Ins. Co., 301 Pa. 351, 152 Atl. 95 (1930).

282. There are, however, no separate law and equity courts.

283. Gen. Laws (Ter. ed.) c. 231, referred to hereinafter only by chapter and section.

284. See Rules of the Supreme Judicial Court (1926), 252 Mass. 585 (1926), as amended; Rules of the Superior Court (1932); Rules of the District Court (1922).

285. The common counts may be pleaded, but not unitedly, but if necessary in the alternative. C. 231, § 7, Seventh; Mass. Mut. Life Ins. Co. v. Green, 185 Mass. 306, 70 N. E. 202 (1904); Noble v. Segal, 214 Mass. 159, 100 N. E. 1112 (1913). The scope of the count on an account annexed has been widened and is used extensively in commercial contract actions. C. 231, § 7, Fourth and Ninth; and see, Hathaway v. Cronin, 17 N. E. (2d) 312 (Mass. 1938); Stock & Sons v. Snell, 213 Mass. 449, 100 N. E. 880 (1913), 226 Mass. 499, 116 N. E. 263 (1917). Where common counts are pleaded, however, a bill of particulars must be filed with the writ. C. 231, § 14. Failure to so file is ground for demurrer. Brocklehurst Co. v. Marsch, 225 Mass. 3, 113 N. E. 646 (1916). As to answering the common counts, see c. 231, § 26. Actions relating to real property are for the most part governed by statute. C. 237-244. See also, c. 231, §§ 8, 9, 22.

286. C. 231, § 1. The division in which the action falls must be specified in the writ. C. 231, § 11.
strict, and joinder is limited to causes falling within the same division of actions, and to consistent defenses. This formalism is, however, largely offset by liberal rules of amendment.

Objections in the nature of pleas in abatement determinative by facts dehors the record are raised by statutory answer in abatement, as distinguished from answer on the merits. Where such matters in abatement are apparent on the record, however, a motion to dismiss is the proper practice. Objections in point of law are raised by statutory demurrer.

287. See c. 231, § 7, Sixth, relating to personal actions. Where doubt exists, however, a count in tort and one in contract may be joined with an averment that both are for one and the same cause of action. Plaintiff, in the discretion of the court, may go to the jury on both counts, Atwater v. Clancy, 107 Mass. 369 (1871); or be required to elect, New Haven & N. Co. v. Campbell, 123 Mass. 104 (1880).

288. Jewett v. Locke, 72 Mass. 233 (1856). Equitable defenses and matter which would avoid a defense in equity may, however, be pleaded in an action at law. C. 231, §§ 31, 32.

289. C. 231, §§ 51, 52, 53, 54, 55. Super. Ct. Rules 5, 23, 25. The power to permit amendments is very broad. Amendments are made by motion for leave to amend before, during, or after trial, but before final judgment, and are always subject to the sound discretion of the court. See Peladeau v. Gillespie Lbr. Co., 285 Mass. 10, 188 N. E. 380 (1933). Many common law technical rules of pleading have also been liberalized. For example, see note 285, supra, pleading common counts, and note 288, supra, pleading equitable defenses, and matter in avoidance of defenses.


292. C. 231, §§ 15-19. Grounds for demurrer, in addition to other causes, are stated in § 18: (1) misjoinder of causes of actions; (2) insufficiency of the declaration (complaint) or some count thereof in law; (3) insufficiency of the answer in law; (4) that the declaration or answer does not state a cause of action or defense in accordance with the rules of pleading contained in the practice act, C. 231. Specific causes for demurrer must be assigned. §§ 16, 17. But the demurrer need not be verified. McCarthy v. Collector, 12 N. E. (2d) 722 (Mass. 1938). If the adverse party does not amend the pleadings demurred to, he is deemed to have joined in demurrer. § 15. As to difference between demurrer and plea in abatement and motion to dismiss, see Tyler v. Boot & Shoe Workers Union, 285 Mass. 54, 188 N. E. 509 (1933).
corresponding to the common law general demurrer. Defects in the formal stating of a cause may be similarly demurred to where the objections are specified. Redundant, impertinent or scandalous matter may be attacked by motion.

The defendant must file his answer in abatement, demurrer or answer within the time limited for his appearance. He may combine an answer in abatement with an answer on the merits so long as the answer in abatement is set forth first. The same is true of a demurrer. In such a case, he may move for a trial on an issue raised by an answer in abatement before trial on the merits, or may set the demurrer down for a preliminary hearing.

293. As to the following grounds of general demurrer, see misjoinder of causes of actions. C. 231, § 18, First; Smith v. Denholm & McKay Co., 288 Mass. 224, 192 N. E. 651 (1934). Insufficiency of declaration or a count thereof in law. C. 231, § 18, Second; Bretta v. Meltzer, 280 Mass. 573, 182 N. E. 827 (1932); Daddario v. City of Pittsfield, 17 N. E. (2d) 894 (Mass. 1938). But where the demurrer is addressed to the whole declaration, it will be overruled if any count thereof is good. Vitagraph Inc. v. Park Theatre Co., 249 Mass. 25, 144 N. E. 85 (1924). Insufficiency of the answer in law. C. 231, § 18, Third; Montague v. Boston, & Fairhaven Iron Works, 97 Mass. 502 (1877). Inconsistency of defenses may be properly raised on this ground. Wolff v. Perkins, 254 Mass. 10, 149 N. E. 691 (1925). As to demurrers to answers in abatement, see note 290, supra. The grounds of demurrer in any case may be stated in the words of the statute. C. 231, § 18. Without more particularity. Bretta v. Meltzer, 280 Mass. 573, 182 N. E. 827 (1932). Demurrers which are frivolous, immaterial or interposed solely for the purpose of delay may be treated as a nullity. C. 231, § 76.

294. Thus it is provided by c. 231, § 7, Second, that “the declaration shall state concisely and with substantial certainty the substantive facts necessary to constitute the cause of action.” Failure to observe this rule may be assigned as grounds for statutory demurrer. C. 231, § 18, Fourth; Pollock v. N. E. Tel. & Tel. Co., 299 Mass. 255, 194 N. E. 133 (1935); Grandchamp v. Costello, 289 Mass. 506, 194 N. E. 837 (1935). It seems that a demurrer may also lie for irrelevancy. Willett v. Herrick, 242 Mass. 471, 136 N. E. 366 (1922). Where defects or omissions in the form of the statement of the cause of action are relied on, they must be specifically pointed out; otherwise they are waived. Daddario v. City of Pittsfield, 17 N. E. (2d) 894 (Mass. 1938).


If, however, defendant pleads in abatement or demurs separately, provision is made for answering over where the plaintiff amends so as to cure the defect,\textsuperscript{301} where the answer in abatement or demurrer is overruled.\textsuperscript{302} So too, where an issue on an answer in abatement is determined in favor of the defendant and the demurrer is sustained, plaintiff may be given leave to amend, subject to the discretion of the court.\textsuperscript{303}

Objections to pleadings which are not properly raised within the time limited are waived,\textsuperscript{304} except such objections in point of law which are by nature not waivable.\textsuperscript{305} The same general principles are applicable to subsequent pleadings.\textsuperscript{306}

In 1929, a statute was passed providing for the immediate entry of judgment on motion in cases where plaintiff seeks recovery of a debt or liquidated demand, on plaintiff’s affidavit\textsuperscript{307} verifying the cause of action and stating that in his belief there is no defense thereto.\textsuperscript{308} The relief provided is similar to summary judgment as discussed above, except that the entry of judgment on a finding that defendant’s affidavits fail to


302. But subject to the discretion of the court. C. 231, § 52 (demurrer), § 53 (answer in abatement). Where an issue of fact is found against defendant on an answer in abatement, the court may permit defendant to amend his answer in abatement or answer over; otherwise, final judgment will be rendered against him. C. 231, §§ 50, 53, except that where answer on the merits is filed with answer in abatement, trial on the merits may then be had. Parks v. Smith, 155 Mass. 28, 28 N. E. 1044 (1891). A demurrer may be filed under leave to answer over after issue on answer in abatement was found against defendant. Young v. Gilles, 113 Mass. 34 (1873).

303. C. 231, § 52 (demurrer), § 53 (answer in abatement). See note 289, supra, amendments in general.

304. Matters in abatement are waived unless raised before or at the same time as answering to the merits, Craig Silver Co. v. Smith, 163 Mass. 262, 39 N. E. 1116 (1895); or before filing an affidavit of merits, Whipple v. Rogerson, 73 Mass. 247 (1859). Purely formal objections to the pleadings are waived by failure to raise by demurrer.


306. C. 231, § 84, puts the parties at issue after answer without replication or further pleading. See also Super. Ct. Rule 26.

307. Or an affidavit of any other person who can swear to the facts. C. 231, § 59B.

308. C. 231, § 59B; Norwood Morris Plan Co. v. McCarthy, 4 N. E. (2d) 450 (Mass. 1936), 107 A. L. R. 1215 (1937); Friede v. Mackey, 10 N. E. (2d) 102 (Mass. 1937). The motion for judgment is made on four days’ notice, and unless the defendant by his own evidence or by affidavit shows facts entitling him to defend, judgment may be ordered. If defendant fails to appear or file an affidavit, judgment may be entered by default.
disclose facts entitling him to defend may, nevertheless, be defeated where defendant files a demand for trial within seven days after the court's granting of the motion. The statute, therefore, does not authorize summary judgment except on what amounts to defendant's consent, for defendant may still demand a trial in the face of a finding that no real issue exists.

**DELAWARE**

Practice and procedure in this jurisdiction is uniquely ancient. Strict old common law pleading and practice as it existed prior to the Hilary Rules and Procedure Acts of England still governs procedure and practice in the law courts; for example, they still use the old common law declarations, pleas in abatement and in bar, special and general demurrers, common law forms of actions, although the distinction between case and trespass has been abolished, equitable defenses may not be interposed in a law case, and the demurrer is the only way of testing the sufficiency of any pleading, although there does exist a summary judgment statute.

309. Entry of judgment is suspended for seven days after the granting of the motion and may then be entered if no demand for trial is filed. C. 231, § 59B. But if defendant files an insufficient affidavit and fails to appear at the hearing, he is in default and may not avail himself of the right to demand a trial. Norwood Morris Plan Co. v. McCarthy, 4 N. E. (2d) 450 (Mass. 1936), 107 A. L. R. 1215 (1937). As originally proposed, the statute sought to penalize the unjustified demanding of a trial by providing that a defendant who fails to prevail on his defense be assessed additional costs to cover plaintiff's expenses, including counsel fees. Annual Report, Judicial Council of Mass. (1925) 32, 141; (1925) 11 MASS. L. Q. 32, 141; Annual Report (1926) 12 id. at 44. This provision was rejected by the legislature. See also, Finch, *Summary Judgments* (1933) 18 Mass. L. Q. 15.

310. See Finch, *Summary Judgment Procedure* (1933) 19 A. B. A. J. 504, 507, and comment thereon by Judicial Council of Mass., Annual Report (1933); (1933) 19 MASS. L. Q. 24, reporting that in applying the statute, the courts do not waste time by ordering summary judgment, thereby inviting defendant's demand for trial and resulting in a further motion for advancing the case for speedy trial, but rather deny the motion for judgment or advance the case for trial. Judgment is generally ordered only where defendant has forfeited his right to demand a trial by defaulting. Norwood Morris Plan Co. v. McCarthy, 4 N. E. (2d) 450 (Mass. 1936), 107 A. L. R. 1215 (1937).

311. Hilary Rules, 1834. Procedure Acts, 1852, 1854 and 1860. For modern effect of Hilary Rules, see Reppy, *The Hilary Rules and Their Effect on Negative and Affirmative Pleas under Modern Codes and Practice Acts* (1929) 6 N. Y. U. L. Rev. 95. The controlling authority for bench and bar on practice in the law courts is the practice text by Hon. Victor B. Wooley (1906), for there have been no major changes since then. The authority on pleading is CHITTY, *PLEADING* (12th ed. 1850), or earlier editions.

312. Del. Rev. Code (1935) § 4648, provides for "judgments at first term" in all actions on bills, notes, bonds, instruments for the payment of money, recovery of book accounts, foreign judgments, or *seire facias* on recognizances in Orphans or Chancery Court, judgments and mortgages. The plaintiff proceeds by filing with the clerk a copy of the written instrument on which judgment is
Despite equity and law courts being separate, the five law judges, in addition to their nisi prius duties, also gather together a few times a year to sit as the supreme court and hear not only law appeals, but equity appeals. The chancellor sits as a judge on law appeals.

Because all are familiar at least in a historical way with common law pleading and practice, and as the most important phases of this practice as connected with the subjects under consideration have already been mentioned, particularly under the discussion of New Jersey and Massachusetts, and as little ammunition for revisers’ guns is here available, it will serve no useful purpose to delve into the strict common law practice.

Despite the existence of the antiquated system, the writer knows of no place, with the exception of Connecticut, where the practice of law is more pleasant than in Delaware. The bench and bar are so small the members are personally acquainted with each other, counsel do not indulge in dilatory tactics, chicanery, or misstatements, all of which might be the reason that, despite the laws courts having had granted to them over seventy years ago rule-making power, they have never exercised it to effect any substantial reforms, although the chancery court practice is governed by rules made in 1917; all of which induces an unassailable proposition that it is not only the statutes and rules which make practice and procedure workable and satisfactory in a jurisdiction, but what is more important is the existing local condition of the bench and bar.

...
METHODS OF OBJECTING TO PLEADINGS

COMMENT

Certain fundamentals and suggestions for a concise group of court rules emerge from the foregoing discussion.

Pleadings should not exist to enable practitioners to demonstrate their skill, but exist instead to aid in the administration of justice by promptly disclosing the real issues so that they may be quickly determined. Corrective amendments should not be limited so long as justice is done and no one is actually, as distinguished from legally, surprised, nor should variance defeat substantial justice, nor should it be necessary to label an action or to observe formalistic technicalities in pleading as was necessary at common law and is still necessary in Delaware. Moreover, it does not seem necessary to designate an action as at law or in equity, nor is it necessary to attempt to distinguish between motions to quash, pleas in abatement or to the jurisdiction or in bar, special and general demurrers, exceptions, motions to strike, expunge, erase, make definite and certain, or for a bill of particulars, or motions to elect remedies or causes of action, all of which weapons permit a barrage of objections which tend to harass a party and cause delay and create tenuous distinctions.

There should exist, as there does in Connecticut, where it is probably least needed, some penalty provision to deter litigants and attorneys from serving false, sham, improper or dishonest pleadings or affidavits, for these hinder the speedy administration of justice. It seems advisable not to permit appeals from interlocutory orders on dilatory motions, for any alert practitioner can hamstring a case for years with such appeals even before he has to answer, particularly where too many successive motions are permitted. For the same reason, all available objections to a pleading should be taken at one time by one motion—otherwise be waived, excepting, of course, the jurisdiction of the court over the subject matter and that the claim or defense is insufficient at law. It is further deemed expedient to permit the raising of all defenses in law or fact by answer, if not previously raised by motion, for the plaintiff may then move to dismiss the pleading, or for judgment on the pleadings, or for summary judgment on the merits where the cause of action or defense is well pleaded.

314. Clark, Procedural Fundamentals (1927) 1 CONN. B. J. 67. Innocent litigants should not be made to suffer for the lack of skill of their counsel.
315. Connecticut, New Jersey and Massachusetts prohibit such appeals; New York allows them.
Most states have abolished common law forms of actions and provided that there shall be one form of civil action and that a pleading should contain a "plain and concise statement of the material facts." There is, however, always some difficulty in determining what a "fact" is; hence, the word "facts" was omitted in the new Federal Rules, which provide that a pleading shall contain a "short and plain statement of the claim showing that the pleader is entitled to relief." However, despite the most concise illustrative forms appended to the Federal Rules, it seems that facts must still be alleged.

When we have been served with a pleading, certain questions arise. Has the court jurisdiction? Are there procedural defects? Does it conform to statutory and rule requirements? Is it otherwise defective as to form? Should it be more specific? Is it defective or insufficient in substance? If we wish to object, how shall we do it? If rules provide that all objections and defenses must be raised by motion or pleading and then specify the nature of objections and defenses available by motion, permitting, however, that all may be raised in the responsive pleading if not taken by motion, it is clear that objections and defenses could be quickly raised and passed upon, thereby preliminarily limiting issues of fact and law. Proper rules may make a motion as formidable a weapon as the members of any bench and bar may desire. Our first object should be to test procedural defects, then to correct defects of form, next to have issues of law resolved, and lastly to provide for summary relief in clear cases. All these can be accomplished by motions.

Some say we should object to every defect in the pleading served and follow through to the appellate court, for failure to do so will weaken our position at every turn of the case. Others say, "Why move? You teach

318. Federal Rule 8a (2); nor does the 1937 Illinois C. P. A. § 33 require facts to be pleaded. RSW. STAT. (1937) c. 110, § 157.
319. Washburn v. Moorman Mfg. Co., 25 F. Supp. 546 (S. D. Cal. 1938), holding that no fact was stated to support the conclusion of "implied contract" to pay.
320. See, for example, McCarty, Attacking a Defective Pleading (1934) 20 IOWA L. REV. 49. Some existing dangers are that the defective pleading will be construed against the pleader, the jury sees too much, too much evidence may be admitted, the theory of the case may be changed. See also Sorensen v. Keesev Hosiery Co., Inc., 244 N. Y. 73, 154 N. E. 826 (1926).
your adversary to plead, he is permitted to amend, and then you are faced with a stronger pleading and delay has occurred.\textsuperscript{2} The solution depends, of course, not only on each case, but upon the practice in each jurisdiction. For example, in Connecticut we have seen that very few motions addressed to form are made, while in New York they are used a great deal.

It should be possible to immediately raise certain procedural objections comparable to the common law dilatory pleas. It should not be necessary, as in Pennsylvania, to file an affidavit of defense on the merits and await trial to raise such objections.\textsuperscript{3} It is believed that such a rule should provide for preliminary attack where the following defects are claimed: no jurisdiction of the court over the subject matter of the action; no jurisdiction over the person; defects in process, its issuance or service; improper venue; another action pending; lack of capacity of the plaintiff to sue. Clearly these motions in many cases require a showing of extrinsic facts and need affidavits to support them. It should be provided that if the court cannot decide the question raised by the motion on the affidavits, it may require oral testimony. These objections should be taken within a specified time and be consolidated with the corrective motion next discussed. In any event, they should be taken before answer, or otherwise be waived.\textsuperscript{3}

All jurisdictions have some method available to correct and clarify a pleading. Might it not be advisable to have one comprehensive rule to clarify a pleading which would encompass the right to object by motion to any departure from statutory or rule requirements as to form, i.e., to state and number separately, to make definite and certain, to correct defects of parties apparent on the face of the pleading, and misjoinder of causes of action\textsuperscript{4} and to strike out? Little need be said about the benefit

\textsuperscript{2} See N. J. S. C. R. 42, and Federal Rule 12 (g).

\textsuperscript{3} No harm is done by leaving immaterial or irrelevant matter in a complaint. Donovan v. Davis, 85 Conn. 394, 82 Atl. 1025 (1912). As the usual course is amendment or re-pleading, the only result is delay. For a general discussion of demurrers and motions, see CLARK, CODE PLEADING (1928) 340 et seq.

\textsuperscript{4} The Procedural Rules Committee of Pennsylvania is contemplating making available certain motions which would permit the raising of these objections by preliminary motion.

\textsuperscript{5} Except, of course, jurisdiction of the court over the subject of the action.

\textsuperscript{4} Misjoinder or non-joinder of parties and misjoinder of causes of action will not be dealt with here, for they are properly a separate subject. There should, of course, be available motions to correct such defects, for neither
of a motion to require each cause of action and defense to be separately stated and numbered, for most jurisdictions already have this remedy available in some form or other. In order to promote simplicity in responsive pleading, however, it is equally important that each material allegation be in a separate paragraph and separately numbered, and that the allegations and the entire pleading be clear, concise and definite. The latter requirements present a problem.

Should there be a motion to make a pleading more definite and certain, with the additional remedy to move for a bill of particulars, as available in New York; or should there be only one motion for a more specific statement of claim, as in Pennsylvania and Connecticut; or should the function of all of these be combined in a single motion? The solution would depend upon whether the rules require a pleading to concisely state material facts, as in New York and New Jersey, or just the nature of the claim, as in Illinois and the Federal Rules, or completely set forth in detail all the facts, as in Pennsylvania. It is felt conciseness and clarity of pleading is better than the confusion of issues resulting from the lengthy pleadings of Delaware and Pennsylvania, and hence it is urged that rules require that the pleadings shall be in the simplest form possible, and yet clear and definite enough so that the opponent knows the nature of the claim or defense.

In most cases each party knows as much as the other about the case. Nevertheless, an effort is usually made sometime before trial to obtain more information. Would it not be best to squarely face the problem by recognizing two needs; one, to provide a method of obtaining a very simple, misjoinder nor defects of parties should defeat an action, nor should misjoinder of causes defeat an action or require amendment unless the causes cannot be tried together. The court should be permitted to remedy such defects at any stage of the cause.

325. The New York distinction seems sound, but its necessity is questionable. A motion to clarify by making more definite and certain lies in New York where language is ambiguous, equivocal, uncertain or obscure, and the party is honestly in doubt as to the meaning of his adversary's pleading; while a motion for a bill of particulars lies to obtain more factual information than is required by a legally sufficient pleading and to narrow issues, prevent surprise, and aid in preparation for trial. See Arnold, Motions to Make Specific and to Resolve Conclusions (1931) 7 IND. L. J. 77. However, some writers hold that there is no distinction between these motions. See Note (1926) 24 Mich. L. Rev. 315, and Conover v. Knight, 84 Wis. 639, 54 N. W. 1002 (1893). See also Federal Rule 12e. In Pennsylvania, so complete a statement of claim is required that there is no provision for an examination before trial. In theory, the Pennsylvania system of a full complaint saves a dilatory motion for a bill of particulars as used in New York. In practice, however, the Pennsylvania motion for a more specific statement is the same as the New York motion for a bill of particulars.
Methods of Objecting to Pleadings

concise and clear pleading to enable the drafting of a concise responsive pleading by making available a motion to make definite and certain not only language ambiguities and obscurities, but by requiring a disclosure of the nature of the cause of action or defense with sufficient particularity so that the opponent is given fair notice of the pleader's case; the other, to provide by separate rule for more detailed and specific evidentiary information to aid in preparing for trial by making available rules for disclosure, discovery, deposition, examination before trial, and appropriate pre-trial procedure, for clearly even the most specific complaint, supplemented by a further statement or bill of particulars, is at best a poor substitute for facts obtained as a result of these other procedural methods.

A pleader is entitled to know with certainty the nature of his opponent's claim and what his essential contentions are. This may require the clarification of language and the addition of some allegations, but would not require disclosure of evidentiary facts to "prepare for trial." The test for the "more definite and certain" phrase of our clarifying motion would be whether the pleading attacked is clear, concise, and definite enough that the opponent knows with sufficient particularity the nature of the pleader's claim or defense so that a proper responsive pleading may be drawn.

To insure adherence to our agreed proposition that pleadings shall set forth simply, clearly and with definiteness the nature of the pleader's claim or defense, we must provide a pruning shears. A provision in our clarifying motion to strike out would accomplish this purpose. It should encompass the right to strike allegations, separate counts or defenses from a pleading, if such part be immaterial, redundant, unnecessary, impertinent, scandalous, or may tend to prejudice, embarrass, or delay the fair trial of the action. It is to be noted, however, that sham and frivolous were omitted from the specified grounds, for if a whole pleading, count, or defense is sham, it may be attacked under the broad summary judgment motion later provided, and if frivolous, it is insufficient in law and would fall under the motion for dismissal of the pleading, count, or defense.

It has been said that a motion to strike and a demurrer are in effect the same. It is not intended that the proposed motion to strike should

326. See Federal Rule 12e.
327. For an excellent article discussing demurrers, motions to strike, et cetera, see Pike, Objections to Pleadings under the New Federal Rules of Civil Procedure (1937) 47 Yale L. J. 50. In Southern Home Ins. Co. v. Putnal, Missouri Law Review, Vol. 4, Iss. 2 [1939], Art. 2

http://scholarship.law.missouri.edu/mlr/vol4/iss2/2
encompass a demurrer or be limited by comparison to a demurrer. Such a motion to strike on the grounds specified should permit the use of supporting affidavits, as, for example, a defense might set up fraud, duress, or grossly outrageous, dishonest conduct, which on its face in, for example, a simple negotiable instruments case, would certainly look scandalous and yet could be shown by affidavit to be relevant and material.

The court should not, as it does in Connecticut, frown on motions to strike out, inasmuch as a pleading containing such improper matter does not comply with the standard we have set, and thus it should not be permitted to remain for counsel to read to the jury if he gets a chance. The other grounds suggested for the comprehensive clarifying motion need no discussion.

As delay results where rules permit a series of motions and appeals from interlocutory orders, as is too freely allowed in New York, it should be required that the two motions provided for above should be consolidated into one motion requiring the various objections to be urged in the alternative. For example, if it is contended that there is a procedural defect such as lack of jurisdiction over the subject matter or the person, defective process, et cetera, and the complaint contains obscure language, is not properly divided into paragraphs and causes of action, and contains scandalous matter, one motion, raising all these objections in the alternative, should be made. Thus we obtain an order with one procedural effort, holding the court has jurisdiction, but requiring an amendment to clarify language, paragraphs and causes of action, and to strike out certain scandalous matter. As the motions are to obviate the need for or assist in the drafting of a responsive pleading, it should be required that the objections be raised within a specified time or before filing a responsive pleading, otherwise be waived.

57 Fla. 199, 49 So. 922 (1909), it is said that a motion to strike and a demurrer should not be confused. The first is applicable where the whole or part of a pleading is irrelevant or improper; whereas a demurrer attacks a pleading for insufficiency. To the same effect, see Hammond v. Vetsburg, 56 Fla. 359, 48 So. 419 (1908). See also Comment (1933) 3 IDAHO L. J. 156, which states that while the motion to strike and a demurrer are in theory different, they are for practical purposes the same. See also Shohoney v. Quincy, O. & K. C. R. R., 231 Mo. 131, 132 S. W. 1059 (1910). Edgerton, The Consolidation of Preliminary Motions and Demurrers in Connecticut (1913) 22 YALE L. J. 302, urged the adoption of one motion covering the motion to expunge and the demurrer. Chadbourn, A Summary Judgment Procedure for North Carolina (1936) 14 N. C. L. REV. 211, 215, 216, says that a motion to strike as frivolous serves no useful purposes that a demurrer does not perform.
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The practitioner is next ready to interpose substantive defenses, either by motions for judgment or by answer. Procedure should be provided so that these defenses may be quickly raised and determined.

At common law, in Connecticut, and in Massachusetts, the demurrer is the only method available for attacking the legal sufficiency of a pleading before trial. In New York there exists an elaborate system for obtaining the dismissal of pleadings, where certain defects do and do not appear on the face of a pleading and where an entire answer or reply is sham or frivolous. There is also a rule providing for judgment on the pleadings and another for summary judgment, and still another for partial summary judgment. Yet need the system be so complex?

Ordinarily, the legal sufficiency of a pleading, whether raised by demurrer or motion, is tested by applying the substantive law of the case to the allegations of fact appearing on the face of the pleading and without any showing of extrinsic facts. The same is true of motions for judgment on the pleadings, which in addition should search the record and condemn the first bad pleading. Demurrers and motions to dismiss a pleading for legal insufficiency exist in nearly all jurisdictions. It is said that such remedies are very valuable, for they permit the early determination of the issues of law where there are admissions in the pleadings or where no substantial issue of fact exists, and thus may completely obviate all trial preparation. In view of the consistently granted leave to amend curable defects and the granting of leave to plead over if the demurrer or motion is dismissed, the writer has considerable doubt as to the efficacy of these remedies. Most lawyers, however, would consider it heresy if their practice did not specifically provide for some remedy to dismiss a pleading for the legal insufficiency thereof. Hence, it is suggested that there be made available to the plaintiff or defendant a motion like a demurrer to dismiss an opponent's pleading for legal insufficiency appearing on the face thereof, and also a motion for judgment on the pleadings, thus raising issues of law when no issue of fact appears on the face of the pleadings. It should, of course, be provided that such motions may not

328. Consolidation of these motions with a summary judgment motion, would weaken the latter by permitting amendments, which have always been permitted in the demurrer type motion. Also, in this age of unfounded and “strike” suits, it is sometimes necessary, despite theoretical argument to the contrary, not to have to disclose your hand by affidavits, as would have to be done if these motions were combined.

329. These motions would be made without affidavits and be comparable to the common law or statutory demurrer and be like Rules 106, 109, 111, 112
delay the trial. If, however, they are made during the trial, it would seem proper to decide the motion in the light of evidence already adduced.

Many articles have been written about summary judgment, and as the subject has already been discussed under the New York statute, further comment here will be relatively brief. This procedure defeats the law’s delays in clear cases where no genuine issue of material fact exists. It provides the judge with fluoroscopic eyes so that with the help of affidavits he may look through sham denials and defenses to ascertain whether a bona fide triable issue of fact actually exists. It thwarts attorneys who file pleadings legally sufficient upon their face but unsupportable in fact. "The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suiter to the burden of a trial." It aids in lessening court congestion, discourages unfounded litigation, the only purpose of which is to induce settlement by creating a nuisance value by harassing the opposition with motions. Yet it has been said there is "judicial antipathy to the device as being in derogation of the common law." Some attorneys too may oppose the procedure, for it may quickly terminate a case, thereby decreasing the fee which would in many cases be collectable after an impressive trial. Another objection often heard is that the procedure only works if both lawyers are reputable, as it is pointed out that any lawyer can draw an affidavit for his client to sign which will show enough evidentiary facts to apparently raise a triable issue of fact.

in New York, but apparently would be unlike Federal Rule 12, for 1 Moore, FEDERAL PRACTICE (1938) 651, indicates that a motion for judgment on the pleadings under Rule 12 would be warranted not only on the disputed facts appearing on the face thereof, but "when it is made to appear from the pleadings, affidavits, or depositions that there is no substantial dispute as to certain facts which warrant a judgment for one party as a matter of law, although some of those facts may be in issue under the pleadings." Quaero: Does this not thereupon become the equivalent of a motion for summary judgment under Federal Rule 56?

330. If any reader questions the advisability of summary judgment procedure, see the following articles, in addition to those mentioned in notes 83, 84, 240, 272, 309, 310, 257, 332: Millar, Three American Ventures in Summary Civil Procedure (1928) 38 YALE L. J. 193; Finch, Summary Judgment Procedure (1933) 19 A. B. A. J. 504; Boesel, Summary Judgment Procedure (1930) 6 WIS. L. REV. 5; Ritter and Magnuson, The Motion for Summary Judgment and Its Extension to All Classes of Actions (1936) 21 MARQ. L. REV. 33 (see Wisconsin statute); Cohen, Summary Judgments in the Supreme Court of New York (1932) 32 Col. L. REV. 825; Bush, Summary Judgments in California (1931) 36 COM. L. J. 569.


To prevent such abuse, not only with respect to summary judgment motions but with respect to all pleadings, the writer deems it most important, particularly for practice in metropolitan areas, that there exist a rule which penalizes litigants and their counsel for filing sham pleadings, motions and affidavits, and that such penalty should be more severe than the imposition of costs. The court should have some method of testing the conscience and good faith of an attorney. He should be required to sign pleadings, and this should be an indication that he believes the averments contained in such pleadings are supported by the facts. Thus, a reputable attorney would not file sham, frivolous, or scandalous pleadings, motions, or affidavits. The litigant should not merely be subject to the imposition of double or triple costs, but the attorney should be subject to censure, suspension, or disbarment, depending upon the gravity of his particular offense.

Historically, summary judgment was only permitted in the clearest of cases; for example, in actions on bills of exchange or negotiable instruments. We have seen that the class of cases in which this remedy has been made available has been gradually enlarged, reaching its widest scope in Connecticut and New York. There seems to be no reason, except historical inertia, why summary judgment procedure should not be made available in every kind of a case, as is provided in Federal Rule 56, nor is there any reason why the remedy should not be likewise available to a defendant before or after answer. On such a motion, any and all defenses of law could be raised along with evidentiary facts supporting the defense on the merits. It would be well to postpone plaintiff's right to make the motion for summary judgment until after a responsive pleading has been filed, thus obviating the necessity of raising defenses and issues of fact in defendant's affidavit prior to answer.

It seems advisable, as in the Federal Rule 56, that a summary judgment motion may be made with or without affidavits, as it is conceivable that depositions, examinations, admissions, et cetera, may be sufficient to sustain the judgment without affidavits. The New York, and Connecticut requirements respecting the sufficiency of the affidavits seem advisable. It

333. Conn. P. B., Rule 82, see note 207, supra; N. J. S. C. Rule 33; Federal Rule 11, signing of pleadings by the attorney, and discussion thereof in 1 Moore, Federal Practice (1938) 613 et seq.; also Federal Rule 56g, and 3 Moore, Federal Practice (1938) 3187.

334. There is an excellent discussion of this rule in 3 Moore, Federal Practice (1938) 3171 et seq. If the rule were as broad as suggested, New York would not need R. C. P. 104, 107, 110.
is clear as held in New York that the court is not empowered to try the case on affidavits, but merely to ascertain whether a *bona fide* triable issue of material fact exists.

If no triable issue of fact exists other than the amount of damages, New York Civil Practice Rule 113 provides that these may be determined by the court alone, a referee, or by the court and jury, whichever shall be appropriate. It has been held that a party in default has no constitutional right to a trial by jury of the issue of damages, and it is believed the same principal applies on a summary judgment motion if the sole issue is the amount of damages, since the failure to present a defense sufficient in law is in effect a default. As this proposition is debatable, if summary judgment is available in all kinds of cases, might it not be advisable to give the defendant the right to elect whether the issue of damage shall be determined by the court alone, a referee, or by the court and a jury?

It is, nevertheless, important to note that the affidavit of a plaintiff, together with the pleadings, depositions and admissions, must establish his claim and negative the defenses and denials of his adversary. The defendant, if making the motion, must similarly establish that his defenses or denials are sufficient to defeat the plaintiff’s claim. The opposing party, to defeat the movant, must thereupon show that there are evidentiary facts existing which create a *bona fide*, arguable, triable issue of fact. Local conditions should dictate the notice required when summary judgment is demanded. In any event, ample time should be afforded to permit proper preparation of law and fact data without recourse to an application for adjournment.

If the court finds no *bona fide* issue of material fact, it of course may summarily dispose of the case, for, as in New York, complicated issues of law which the court must decide anyhow should not defeat the motion, nor should, as in Connecticut, an additional pleading be required to raise such issue of law, nor should the entire procedure be nullified, as in Massachusetts, by permitting the defendant to file a demand for trial. If, on the other hand, the court finds a triable issue of fact and believes a complete trial on the merits is not necessary, then a provision similar to New

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336. Massachusetts actually has no real summary judgment procedure. In discussing the Massachusetts statute, Finch, *Summary Judgment Procedure* (1933) 19 A. B. A. J. 504, 507, states, “A better joke has never been enacted in all legislative annals nor a better argument for placing court procedure in the hands of the courts, where it belongs.”
York Civil Practice Rule 108 might be advisable, as then the court might, under proper circumstances, clearly and succinctly state in an interlocutory order the questions of fact which may be tried by a jury or referee, as the case may require, the findings of which shall be reported back to the court, so that a final order on the summary judgment motion may be entered; or the court might be permitted to require supplemental affidavits or depositions clarifying certain evidentiary facts. Federal Rule 56 (d) is interesting in that it incorporates in summary judgment procedure certain pre-trial features by requiring the court, wherever practicable, to include in its order denying summary judgment the issues of fact, including those of damages, which are admitted by the papers or concerning which there is no substantial controversy, which issues are thereupon deemed established on the trial. It is to be noted that this requirement exceeds the function of the court in the optional pre-trial procedure established by Federal Rule 16.

In the last analysis, counsel and litigants must have faith in their judges; and even though judicial discretion is sometimes abused, it seems advisable to vest considerable latitude and discretion in the courts so they may determine, by experience or "hunch," if a genuine triable issue of fact exists.

It should, of course, also be provided that partial summary judgment may be rendered where warranted, and the procedure should be the same as in the motion for summary judgment. It is believed advisable that judgment rendered as a result of a summary judgment motion be appealable, although if it is only to part of the case, it is in a sense an interlocutory order, from which no appeal should lie. 337

The writer believes that the foregoing suggestions, if incorporated into rules of practice, will provide a workable system for quickly and effectively raising objections to pleadings and of obtaining judgment, thus facilitating the pleading stage of litigation by eliminating much expense and many delays now unnecessarily incurred. No attempt has been made to work out the innumerable details necessary to adopt such suggestions into any particular system of practice. That is, of course, a matter of local concern. It is hoped, however, that sound principles relating to this limited field of practice are disclosed from the material and discussion here presented.

337. 3 Moore, Federal Practice (1938) 3191, 3192, discusses the question of appeals relating to Federal Rule 56. See, however, the New York practice, which permits appeals from summary judgment or the denial thereof.
Appendix

CONNECTICUT

REVISED STATUTES (1930)

§ 5513. PLEADINGS TO ALLEGTHE MATERIAL FACTS IN CONCISE FORM. Each pleading shall contain a plain and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are to be proved; such statement being divided into paragraphs numbered consecutively, each containing as nearly as may be a separate allegation.

§ 5515. PROLIX OR UNCERTAIN PLEADING MAY BE EXPUNGED OR CORRECTED. Unnecessary repetition, prolixity, scandal, impertinence, obscurity or uncertainty in any pleading, or the incorporation of irrelevant, immaterial or evidential matter, shall be ground for a motion to expunge or otherwise correct such pleading. Such motions shall be in writing, shall specify the particular exceptions, and the action of the court thereon shall, upon appeal after final judgment, be reviewable by the Supreme Court of Errors.

RULES OF COURT*

§ 52. SCOPE OF REMEDY. A summary judgment may be entered in any action to recover a debt or liquidated demand in money, with or without interest, arising (First) (a) on a negotiable instrument, a contract under seal or a recognizance; (b) on any other contract, express or implied, excepting quasi contracts; (c) on a judgment for a stated sum; (d) on a statute where the sum sought to be recovered is a fixed sum or in the nature of a debt; (e) on a guaranty, whether under seal or not, when the claim against the principal is in respect of a debt or liquidated demand only; and (Second) in any other action (f) for the recovery of specific chattels, with or without a claim for withholding the same, provided that if such claim be for other than nominal damages and be unliquidated, it may be severed and proceeded with as provided in Section 54; (g) to quiet and settle the title to real estate or any interest therein; (h) to discharge any claimed invalid mortgage, lien, caveat or lis pendens.

§ 53. PROCEDURE. In any such action 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, in duplicate, 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 a defendant, within ten days after the filing 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. The clerk shall forthwith give to each defendant written notice of the filing by the plaintiff of such motion and affidavit. The court may, on motion of the plaintiff, order stricken from the files any affidavit of a defendant found by it to be insufficient, frivolous, false, or made only for the purpose of delay.

§ 54. JUDGMENT FOR PART OF CLAIM. If it appears that such defense applies only to a part of the plaintiff's claim, or that any part is admitted, the plain-

*Connecticut Practice Book (1934).
tiff may have final judgment forthwith for so much of his claim as the defense does not apply to, or as is admitted, on such terms as may be just; and the action may be severed and proceeded with as respects the remainder of the claim.

§ 55. Questions of Law. If the court, upon the filing of the affidavits as provided in Section 53, shall be of opinion that the only question or questions arising are bona fide questions of law, it shall file its finding so stating and that the 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. If the defendant fails to file such pleading within ten days or within such further time as the court for good cause shown may prescribe, or fails to prevail thereon, final judgment, as of course, shall be entered by the court for the plaintiff.

§ 56. Application of Rules. The provisions of these rules shall apply to counterclaims, and to all pending actions.

§ 61. Motion to Strike Out. When any pleading or motion is sham, or frivolous, or improperly filed, or unfit by reason of its indecent or scandalous allegations to become a part of the record, it may be stricken out on written motion. The motion to strike out shall not be used except as provided herein.

§ 62. Motion For More Specific Statement. Where the pleadings do not fully disclose the ground of claim or defense, and the adverse party desires an order for fuller and more particular statements, he shall make his motion in writing, stating briefly the grounds thereof and the particulars desired.

§ 63. Motion To Expunge. The motion to expunge provided for in General Statutes, Section 5515, is an exclusive remedy, and will be granted when the defect is plain, but not otherwise.

§ 64. Motion For Defective Pleading; Contents. Any motion addressed to a pleading shall embrace every cause of defect then existing not properly reached by plea in abatement or demurrer.

§ 65. Motion For Misjoinder Of Parties. The exclusive remedy for misjoinder of parties is by motion.

§ 82. Disclosure Of Defense. In cases in which there is an appearance by attorney for the defendant the plaintiff may at any time require such attorney to present to the court, to become a part of the file in such case, a writing signed by him stating whether he has reasons to believe and does believe that there exists a bona fide defense to the plaintiff's action and whether such defense will be made, together with a general statement of the nature or substance of such defense. If such attorney shall fail to disclose as required, or shall not satisfy the court that such defense will be made, the court may order judgment to be entered for the plaintiff; and if such attorney shall intentionally or recklessly make a false statement with a view to procure the continuance or postponement of an action, the court may suspend him from practice as attorney in said court for such time as it shall deem proper.

§ 83. Order Of Pleading. The order of pleading subsequent to the complaint shall be:

1. Plea in abatement, or to the jurisdiction;
2. Motion addressed to the complaint;
3. Demurrer to complaint;
4. Answer;
5. Motion addressed to answer;
6. Demurrer to answer;
7. Reply.

Further pleading shall be had, if necessary, until issue is joined.
§ 84. Waiving Right to Pleading. In all cases, when the court does not otherwise order, the filing of any pleading provided for by Section 83 will waive the right to file any pleading which might have been filed in due order and which precedes it in the order of pleading provided in that section.

§ 97. Demurrer. The demurrer is the only remedy before trial by which to test the sufficiency of a cause of action or defense, whether stated in one pleading, a count or defense, or in a paragraph or paragraphs thereof. The demurrer in each case must be to the entire cause of action or an entire or partial defense so stated, and can be used for no other purpose.

Where, however, several causes of action or several defenses are stated in a single pleading or count, a demurrer may be addressed to such pleading or count in so far as it purports to state one or more of such causes of action or defenses.

§ 98. Demurrer to Relief. Where any relief demanded by the plaintiff cannot properly be demanded upon the allegations of the complaint, although these may be sufficient to call for some other relief, the defendant may demur to the relief so improperly demanded.

Massachusetts

General Laws (Tercentenary ed.) ch. 231.

§ 15. Demurrers. Either party may demur to the pleadings of the adverse party, but no mere defects of form in the declaration or in the subsequent pleadings shall be assigned as causes of demurrer. If the adverse party does not amend the pleadings demurred to, he shall be held to have joined in demurrer.

§ 18. Causes For Demurrer. Demurrers may be for the following as well as other causes:

First, That a count in contract and a count in tort, or that a count in the plaintiff's own right and a count in some representative capacity, are improperly joined in the declaration; or that a declaration in contract or in tort is inserted in a writ of replevin.

Second, That the matters contained in the declaration or in some count thereof are insufficient in law to enable the plaintiff to maintain his action.

Third, That the matters contained in the answer are insufficient in law to constitute a defense to the action or to some count in the declaration.

Fourth, That, in some particular or particulars specifically pointed out, the declaration or some count thereof does not state a cause of action, or the answer does not state a defense to the declaration or some count thereof, substantially in accordance with the rules contained in this chapter.

§ 20. Answer in Abatement. A defense to a real, personal or mixed action, which formerly might have been made by a plea in abatement, may be made by answer in abatement.

§ 21. Answering Over. If an answer in abatement is overruled on demurrer, or if, in consequence of such answer in abatement, the plaintiff amends, the defendant, within such time as the court orders, shall in a personal action answer, and in a real or mixed action plead, to the merits.

§ 49. No Abatement For Circumstantial Errors. No writ, process, action, declaration or other proceeding in the courts or course of justice shall be abated, arrested, quashed or reversed for any circumstantial errors or mistakes if by it the person and case may be rightly understood by the court; or for defect or want of form only.

§ 76. Frivolous or Immaterial Demurrers. If a demurrer is overruled
because it appears to the justice hearing it to be frivolous, immaterial, or intended for delay, the case shall proceed to judgment as if no demurrer had been filed, and execution may be awarded or stayed upon terms.

Rules of the Superior Court

Rule 24. Striking Out. There shall be no right to except to bills, answers and other proceedings for scandal or impertinence, but the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter in any pleading or paper at law or in equity or divorce, stricken out, upon such terms as the court shall think fit.

New Jersey

Law Courts

Revised Statutes of New Jersey (1937) as amended by Cumulative Supplement of 1938.

Tit. 2, c. 27, § 110. Pleadings According to Rules. The pleadings in all actions shall be according to rules.

Tit. 2, c. 27, § 114. Motion to Strike Pleading; Notice; Contents. The notice of a motion to strike out any pleading or any part thereof shall contain a particular statement of the defects in or objections to such pleading on which the party giving the notice intends to rely, and matters not specified in the notice shall not be considered upon the hearing.

Tit. 2, c. 27, § 124 (Amend. 1938). Striking Defenses; Defense on Terms; Appeal from Order. Subject to rules, any defense to the whole or to any part of the complaint which defense is insufficient in law or sham may be struck out, or, if it appears probable that the defense is insufficient in law or sham, defendant may be allowed to defend on terms. Defendant, after final judgment, may appeal from any order made against him under this section.

Tit. 2, c. 27, § 125 (Amend. 1938). Striking Complaint or Counterclaim or Part Thereof. Subject to rules, a complaint or counterclaim insufficient in law or sham, or any count or part thereof, may be struck out, or, if it appears probable that the complaint or counterclaim is insufficient in law or sham, plaintiff or counterclaimant may be allowed to proceed therewith on terms.

Tit. 2, c. 27, § 126 (Amend. 1938). Stricken Complaint or Counterclaim as Bar to Another Proceeding For Same Cause. The court, in passing on a motion to strike out, in whole or in part, a complaint or counterclaim as insufficient in law or sham, may, in its discretion, determine whether such striking out shall be with or without prejudice to the institution of another proceeding at law, based on the same cause or causes of action as were set forth in the complaint or counterclaim or part or parts thereof struck out, which discretion shall be exercised by the court and be indicated in the order to strike out.

Rules of the Supreme Court

Rule 30. Order of Pleadings. The order of pleadings shall be:

1. Complaint;
2. Motion addressed to the complaint;
3. Answer;
4. Motion addressed to the answer;
5. Reply.

Further pleadings may be had, if necessary, until issue is joined. Unless otherwise ordered by the court, pleadings must be filed, and motions made, in the order mentioned above.
Rule 39. OBJECTIONABLE PLEADINGS. Unnecessary repetition, prolixity, scandal, impertinence, obscurity and uncertainty, and any other violation of the rules of pleading, are respectively objectionable; also any pleading which is irregular, defective or so framed as to embarrass or delay a fair trial.

Rule 40. DEMURRS ARE ABOLISHED. Any pleading may be struck out on motion on the ground that it discloses no cause of action, defense or counterclaim respectively. The order made upon such motion is appealable after final judgment. In lieu of a motion to strike out, the same objection, and any point of law (other than a question of pleading or practice) may be raised in the answering pleadings, and may be disposed of at, or after, the trial; but the court, on motion of either party, may determine the question so raised before trial, and if the decision be decisive of the whole case the court may give judgment for the successful party or make such order as may be just.

Rule 41. OBJECTIONS TO PLEADINGS other than those provided for in Rule 40 above, shall be made by motion. The action of the court thereon is appealable after final judgment.

Rule 42. OBJECTIONS TO PLEADINGS. Every motion addressed to a pleading must present every cause of objection then existing.

Rule 43. MOTIONS. Every notice of any motion addressed to a pleading shall specify the grounds thereof.

Rule 56. DILATORY PLEAS. Pleas to the jurisdiction and pleas in abatement are abolished. In lieu thereof objection shall be made on motion. The evidence necessary to determine the question may be taken by depositions, or as the court may direct. The action of the court upon such motion may be reviewed on appeal after final judgment.

Rule 80. When an answer is filed in an action brought to recover a debt or liquidated demand arising—
(a) Upon contract express or implied, sealed or not sealed; or
(b) Upon a judgment for a stated sum; or
(c) Upon a statute;
the answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided, unless the defendant by affidavit or other proofs shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend.

Rule 81. The motion to strike out shall be made upon affidavit of the plaintiff or that of any other person cognizant of the facts, verifying the cause of action, and stating the amount claimed and his belief that there is no defense to the action.

Rule 82. If it appear that such defense applies only to part of plaintiff's claim, or that any part is admitted, the plaintiff may have final judgment forthwith for so much of his claim as the defense does not apply to or as is admitted, subject to such terms as may be deemed just.

Rule 83. Leave to defend may be given unconditionally, or upon such terms as to giving security, or time or mode of trial, or otherwise, as may be deemed just.

Rule 85. The provisions of these rules relative to striking out a frivolous or sham defense shall be applicable to motions to strike out a complaint or counterclaim as authorized by Chapter 151 of the Laws of 1928. [REV. STAT. tit. 2, c. 27, §§ 124-129, see supra.]
NEW YORK

CIVIL PRACTICE ACT

C. P. A. § 278. CERTAIN OBJECTIONS; WHEN WAIVED. An objection on either of the following grounds, appearing on the face of a pleading, is waived unless taken by motion:

1. As to the complaint: (a) that the court has not jurisdiction of the person of the defendant in cases where jurisdiction may be acquired by his consent; (b) that the plaintiff has not legal capacity to sue; (c) that another action is pending between the same parties for the same cause; (d) that there is a misjoinder of parties plaintiff; (e) that there is a defect of parties, plaintiff or defendant.

2. As to a counterclaim: (a) that the defendant has not legal capacity to recover upon the same; (b) that another action is pending between the same parties for the same cause; (c) that the counterclaim is now one which may be properly interposed in the action.

C. P. A. § 279. CERTAIN OBJECTIONS NOT WAIVED. An objection as to the jurisdiction of the court, except as otherwise provided in the preceding section, and the objection that a complaint, or a statement therein of a separate cause of action, or a counterclaim, does not state facts sufficient to constitute a cause of action, or that a defense is insufficient in law upon the face thereof, are not waived by failure to raise the same before trial.

C. P. A. § 476. JUDGMENT ON PLEADINGS OR ADMISSION OF PART OF CAUSE. Judgment may be rendered by the court in favor of any party or parties, and against any party or parties at any stage of an action or appeal, if warranted by the pleadings or the admissions of a party or parties; and a judgment may be rendered by the court as to a part of a cause of action and the action proceed as to the remaining issues, as justice may require.

RULES OF CIVIL PRACTICE

R. C. P. 90. FORMAL REQUIREMENTS OF PLEADINGS. Each separate cause of action, counterclaim or defense shall be separately stated and numbered, and shall be divided into paragraphs numbered consecutively, each as nearly as may be containing a separate allegation. The allegations contained in a separately numbered paragraph of one cause of action, counterclaim or defense may be incorporated as a whole in another cause of action, counterclaim or defense in the same pleading by reference without otherwise repeating them. Denials of facts alleged in the complaint or in an answer and denied by reply must not be repeated nor incorporated in a separate defense or counterclaim. Any fact once denied shall be deemed denied for all purposes of the pleading.

R. C. P. 102. MOTION TO CORRECT PLEADING. If any matter contained in a pleading be so indefinite, uncertain or obscure that the precise meaning or application thereof is not apparent, or if there be a misjoinder of parties plaintiff or a defect of parties plaintiff or defendant, the court may order the party to serve such amended pleading as the nature of the case may require.

R. C. P. 103. STRIKING OUT MATTER CONTAINED IN A PLEADING. If any matter, contained in a pleading, be sham, frivolous, irrelevant, redundant, repetitious, unnecessary, impertinent or scandalous or may tend to prejudice, embarrass or delay the fair trial of the action, the court may order such matter stricken out, in which case the pleading will be deemed amended accordingly, or the court may order an amended pleading to be served omitting the objectionable matter.

R. C. P. 104. SHAM OR FRIVOLOUS ANSWER OR REPLY. If an answer or reply be sham or frivolous the court may treat the pleading as a nullity and give
judgment accordingly or allow a new pleading to be served upon such terms as the court deems just.

R. C. P. 105. Motion Addressed to Pleading. A motion under Rules 102, 103, or 104, must be noticed within twenty days from the service of the pleading to which the motion is addressed. The time to make such motion shall not be extended unless notice of at least two days of an application for such extension be given to the adverse party.

R. C. P. 106. Motion for Judgment; When the Defect Appears on Fact of Complaint. Within twenty days after the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint, or one or more causes of action stated therein, where it appears on the face thereof:
1. That the court has not jurisdiction of the person of the defendant.
2. That the court has not jurisdiction of the subject of the action.
3. That the plaintiff has not legal capacity to sue.
4. That there is another action pending between the same parties for the same cause.
5. That the complaint does not state facts sufficient to constitute a cause of action.

R. C. P. 107. Motion for Judgment; When the Defect Does Not Appear on Face of Complaint. Within twenty days after the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint, or one or more causes of action stated therein, on the complaint and affidavit stating facts tending to show:
1. That the court has not jurisdiction of the person of the defendant.
2. That the court has not jurisdiction of the subject of the action.
3. That the plaintiff has not legal capacity to sue.
4. That there is another action pending between the same parties for the same cause.
5. That there is an existing final judgment or decree of a court of competent jurisdiction rendered on the merits, determining the same cause of action between the parties.
6. That the cause of action did not accrue within the time limited by law for the commencement of an action thereon.
7. That the claim or demand set forth in the complaint has been released.
8. That the contract on which the action is founded is unenforceable under the provisions of the statute of frauds.
9. That the cause of action did not accrue against the defendant because of his infancy or other disability.

R. C. P. 108. Determination of the Motion. If the plaintiff on the hearing of a motion specified in the last rule shall present affidavits denying the facts alleged by the defendant or shall state facts tending to obviate the objection, the court may hear and determine the same and grant the motion, and in its discretion allow the plaintiff to amend the complaint upon such terms as are just; or it may direct that the questions of fact, which shall be clearly and succinctly stated in the order, be tried by a jury or referee, the findings of which shall be reported to the court for its action; or it may overrule the objections, and in its discretion may allow the same facts to be alleged in the answer as a defense. If the objections be made to some of the causes of action, and not to all, judgment may be entered as provided in Section 96 of the Civil Practice Act or Rule 195 of the Rules of Civil Practice.

R. C. P. 109. Plaintiff's Motion on the Answer. Within ten days after the service of an answer, the plaintiff may serve notice of motion to dismiss a
counterclaim or strike out a defense consisting of new matter contained therein,
where one or more of the following defects appear on the face thereof:

1. That the court has not jurisdiction of the subject of the counterclaim.
2. That the defendant has not legal capacity to recover on the counterclaim.
3. That there is another action pending between the same parties for the same cause.
4. That the counterclaim is not one which may be properly interposed in the action.
5. That the counterclaim does not state facts sufficient to constitute a cause of action.
6. That the defense consisting of new matter is insufficient in law.

R. C. P. 110. Plaintiff’s Motion; When Defect Does Not Appear on Face of Answer. Within ten days after the service of the answer, the plaintiff may serve notice of motion for judgment dismissing a counterclaim on the pleadings and an affidavit tending to show:

1. That the court has not jurisdiction of the subject of the counterclaim.
2. That there is another action pending between the same parties for the same cause.
3. That there is an existing final judgment or decree of a court of competent jurisdiction rendered on the merits determining the same cause of action between the parties.
4. That the claim or demand set forth in the counterclaim has been released.
5. That the contract on which the cause of action alleged in the counterclaim is unenforceable under the provisions of the statute of frauds.

Rule 108 shall apply to the determination of the motion.

R. C. P. 111. Motion on Reply. Within ten days after service of a reply, the defendant may move to strike out the reply, or a separate defense therein, on the ground that it is insufficient in law upon the face thereof.

R. C. P. 112. Motion For Judgment on the Pleadings After Issue Joined. If either party be entitled to judgment on the pleadings, the court may, on motion, give judgment accordingly, and without regard to which party makes the motion.


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

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 person having knowledge of the facts, setting forth such evidentiary 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 disclose 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 judgment to the plaintiff, even though the plaintiff has not made a cross-motion therefore.

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 rendered forthwith.

When in any actions in cases set forth in subdivisions 6, 7 and 8 hereunder the judge hearing the motion has been convinced that there is no preliminary 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 rendered forthwith.

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 affidavit, 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 judgment until the disposition of the issue in the main case.

This rule shall be applicable to all pending actions.

R. C. P. 114. PARTIAL JUDGMENT. If it appears that such defense applies only to part of plaintiff's claim, or that any part be admitted, the plaintiff may have final judgment forthwith for so much of his claim as such defense does not apply to or as is admitted, on such terms as may be just, and the action may be severed.

If it appear that a motion to dismiss a complaint under Rule 113 applies only to one or more of several causes of action or to one or more of several parties plaintiff or defendant, and that defendant's contentions are sufficient to dispose of the claims of the complaint in such part, the defendant may have final judgment forthwith dismissing the complaint to the extent warranted, on such terms as may be just and the action may be severed.
METHODS OF OBJECTING TO PLEADINGS

PENNSYLVANIA

THE PRACTICE ACT OF 1915.

[PURDON'S PENNSYLVANIA STATUTES ANNOTATED]

§ 386 § 5. Every pleading shall contain, and contain only, a statement in a concise and summary form of the material facts on which the party pleading relies for his claim, or defense, as the case may be, but not the evidence by which they are to be proved, or inferences, or conclusions of law, and shall be divided into paragraphs numbered consecutively, each of which shall contain but one material allegation. Every pleading shall have attached to it copies of all notes, contracts, book entries, or a particular reference to the records of any court within the county in which the action is brought, if any, upon which the party pleading relies for his claim, or defense, as the case may be; and a particular reference to such record, or to the record of any deed or mortgage, or other instrument of writing, recorded in such county, shall be sufficient in lieu of a copy thereof.

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

§ 737 § 19. When the plaintiff asks for an account, and moves for judgment for want of an affidavit of defense, or for want of sufficient affidavit of defense, the court may enter an order for an account, which may be enforced by attachment or otherwise, and judgment may be entered for the amount shown to be due in favor of the plaintiff or the defendant.

§ 471 § 20. The defendant in the affidavit of defense may raise any question of law, without answering the averments of fact in the statement of claim; and any question of law, so raised, may be set down for hearing, and disposed of by the court. If in the opinion of the court the decision of such question of law disposes of the whole or any part of the claim, the court may enter judgment for the defendant, or make such other order as may be just. If the court shall decide the question of law, so raised, against the defendant, he may file a supplemental affidavit of defense to the averments of fact of the statement within fifteen days.

§ 491 § 21. The court, upon motion, may strike from the record a pleading which does not conform to the provisions of this act, and may allow an amendment or a new pleading, to be filed upon such terms as it may direct: Provided, That such motion to strike from the record any such pleading shall be filed, and a copy thereof served upon the party filing such pleading, or his attorney, within fifteen days after a copy of such pleading shall have been served upon the opposite party or his attorney.