The Motion for Summary Judgment and Its Extension to All Classes of Actions

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MUCH criticism is directed against the courts for the long delays in the administration of justice. Particularly is this true in the large metropolitan centers where the court calendars are so crowded that frequently it takes from two to four years before the trial of a case. This dissatisfaction, both in and out of the legal profession, with the law's delay has long been manifested. Criticism is directed not so much against the substantive law as against what is called the business of the courts, their organization and procedure, their method of handling litigation, the expense involved, and the delay, often the unconscionable delay, in disposing of pending cases.¹

To remedy these long delays and to alleviate the criticisms against the courts and their procedure, the summary judgment procedure was introduced. This procedure has become an important feature in our modern practice of law. Its benefits are numerous. It does more than to prevent delays and secure speedy justice. It aids in the prompt disposition of bona fide issues of law as well as of sham defenses. It causes the whole judicial process to function more speedily and with less complexity. It tends to discourage litigation and the interposition of sham defenses, to effectuate settlements, to expedite judgments, to simplify court procedure and to lessen court congestion—in short, it has contributed to the cause of speedy justice and has alleviated the economic waste of unnecessary and protracted litigation.²

The Wisconsin Supreme Court realized the possibilities of the motion for summary judgment in remedying the long delays in the court calendar. In Sullivan v. State it said that the purpose of providing for summary judgments was to avoid delay and to cut down the frequent contributions to injustice which proceeded from technicalities of pleading and practice.³ Other courts have also indicated that the motion for summary judgment was to stamp out the practice of delaying judgment by the interposition of defenses which could not be substantiated by evidence.⁴

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¹ Shientag, Summary Judgments in the Supreme Court of New York (1932) 32 Col. L. Rev. 825.
³ 213 Wis. 185, 195, 251 N.W. 251 (1933).
The purpose of this article is to show the effect of the summary judgment in relieving the courts from undue criticisms by the long delays in the trial of cases, the development of the summary judgment, its procedure and application, with special stress being laid on Wisconsin law and procedure, criticisms directed against the motion for summary judgment, and the advisability and possibility of extending it to all actions, regardless of type, equally on behalf of defendants and plaintiffs.

DEVELOPMENT AND EXTENT OF USE OF THE SUMMARY JUDGMENT

The summary judgment provision was introduced into England in 1855. It was restricted at that time to actions on bills and notes. Its objective was to expedite court procedure. Thus it insured litigants' economy in obtaining a judgment where the circumstances of the case lent themselves to a shortened procedure. The preamble to the Summary Procedure on Bills of Exchange Act of 1855 clearly sets forth the objects and purposes of the summary judgment, stating as follows:5 "Whereas bona fide holders of dishonored Bills of Exchange and Promissory Notes are often unjustly delayed and put to unnecessary Expense in recovering the Amount thereof by reason of frivolous and fictitious Defenses to Actions thereon, and it is expedient that greater facilities than now exist should be given for the Recovery of Money due on such Bills and Notes . . . ."

By the Judicature Act of 1873 the scope of the summary judgment was increased, embracing additional classes of cases.6 A plaintiff could make the motion in actions on contract, express or implied, where there was a liquidated demand for money. This included bills of exchange, promissory notes, negotiable and non-negotiable, and other simple contract debts. By decision this also included "common law" assumpsit actions for labor and services performed7 and for goods sold and delivered8 and other actions of a like nature. These latter actions were not necessarily for a definite and certain sum of money; it was sufficient if the plaintiff state a cause of action and produce an affidavit upon the hearing of the motion setting forth the basis for the asserted liability of the defendant. A plaintiff could also make the motion in actions on a bond or contract under seal for the payment of a liquidated amount in money. Likewise a plaintiff could make the motion in an action on a statute where the sum sought to be recovered was a fixed

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5 The Summary Procedure on Bills of Exchange Act, 18 & 19 Vict. c. 67 (1855).
6 Annual Practice, Order III, Rule 6, Order XIV, Rule 1.
8 M'Cawley Co. v. Campbell, L. R. 4 Ir. 410 (1879).
sum or in the nature of a debt other than a penalty, in actions on a guaranty, whether under a seal or not, where the claim against the principal was in respect of a debt or liquidated demand only, and in actions involving a trust where the plaintiff sought to recover only a debt or liquidated demand in money, payable by the defendant, with or without interest. Thereafter a section which did not appear among the Rules of 1873 was added. This section permitted plaintiffs to make the motion for summary judgment in actions between landlords and tenants for the recovery of land where the tenancy was determinable under the terms of a contract. However, the courts in England have refused to grant motions for summary judgment under this class of cases where there is any dispute as to the title to the land or where there are any complicated questions as to the relations of the parties.

The actions under the laws of England within the scope of the summary judgment procedure are actions for the recovery of debts or liquidated demands in money, and actions between landlords and tenants with respect to repossession. There are some jurisdictions in the United States in which the summary judgment procedure is more extensively used than in England where it was first introduced. The adoption and use of the summary judgment in New York is especially interesting to attorneys in Wisconsin because not only has Wisconsin originally adopted the summary judgment rule from New York, but also the Wisconsin Supreme Court has said that it accepts and adopts the interpretation of the New York statute given by the New York courts. Prior to the adoption of the summary judgment rule in New York, a defendant who wished to delay trial and prevent a judgment for which he had no bona fide defense could interpose a general denial in his answer. This general denial frequently was a sham defense, but the court was powerless to strike it. As a result a movement was started in New York to do away with these sham defenses and thus avoid the long delays which were becoming prevalent in the New York courts.

When an investigation for a method to speed up the court calendars was made, it was discovered that a great many sham pleas were being interposed. Upon further inquiry, it was discovered that the procedure of the summary judgment which had been used extensively in England since 1855 and less extensively in New Jersey since 1873 had been exceedingly instrumental in reducing the number of these pleas. Because of its great possibilities in eliminating the evils aforementioned,
The summary judgment procedure was adopted and became effective in October, 1921.\textsuperscript{13}

The New York procedure in regard to the summary judgment was of much narrower compass than that adopted in England and in several states in the United States. In New York, at first, it was limited to actions on contracts, express or implied, and to actions on a judgment for a stated sum where there was a definite and absolute debt or liquidated demand.\textsuperscript{14} As compared with the English rule, it could not be applied to actions on statutes where the sum sought to be recovered was a fixed sum or in the nature of a debt other than a penalty,\textsuperscript{15} or to actions for the recovery of land,\textsuperscript{16} or to suits on trusts.\textsuperscript{17} The New York courts have also refused to permit its use in a suit for an injunction.\textsuperscript{18} It was held by the New York court that one could move for summary judgment in a case involving liquidated damages and on a contract, but not in a case to foreclose a mortgage.\textsuperscript{19}

The New York courts did express approval of the general scheme\textsuperscript{20} and on April 16, 1932, the scope of the motion for summary judgment was extended by an amendment adopted by the joint order of the presiding justices of the Appellate Division of the Supreme Court in the four judicial departments. The amended rule\textsuperscript{21} not only permitted the motion for summary judgment to be made in an action to recover a debt or liquidated demand arising on a contract, express or implied, or on a judgment for a stated sum, but also permitted the motion to be made in an action on a statute where the sum sought to be recovered is a sum of money other than a penalty; it likewise permitted the motion to be made in actions to recover an unliquidated debt or demand for a sum of money only arising on a contract, express or implied, other than for breach of promise to marry, in actions to recover possession of specific chattels, with or without claim for the hire thereof, or for damages for the taking or detention thereof, in actions to enforce or foreclose liens or mortgages in actions for the specific performance of a contract in writing for the sale or purchase of property, and in actions for an accounting arising on a written contract. This recent change and the recent decisions of the court indicate a decided tendency to extend the motion for summary judgment to other classes of cases. Of course, as may well be expected, a remedy newly adopted, will not gain mo-

\textsuperscript{13} N. Y. Civil Practice Rules, Rule 113 and Rule 114 (1921).
\textsuperscript{15} Cf. Annual Practice, Order III, Rule 6, Order XIV, Rule 1.
\textsuperscript{17} Op. cit. supra, note 15.
\textsuperscript{21} Cahill, N. Y. Civil Practice Act, Rule 113 (1932).
momentum until the legal profession has become acquainted with it, its objects and its effects. It is suggested that the courts and the lawyers are not sufficiently acquainted with the summary judgment so that the time is ripe for extending it to other classes of actions not mentioned in this recent statute of New York.

Until the extension of the summary judgment in New York in 1932, Connecticut had used the most comprehensive and extensive summary judgment scheme known in the United States. It was adopted by order of the judges of the Superior Court to be effective in February, 1929. Whereas in New York by 1921 motions for summary judgments could be made only in actions on contracts and actions on judgments, in Connecticut such motions could be made also in actions on negotiable instruments, actions on statutes, actions on guaranties, actions for the recovery of specific chattels, actions to quiet title, actions to enforce or foreclose liens or mortgages and any action to discharge an invalid mortgage, lien caveat or lis pendens. It is interesting to note, that in 1932, New York followed Connecticut. The procedure was allowed in actions for specific performance of written contracts for the sale or purchase of property and in actions for an accounting arising on a written contract. The history of its adoption along with the favorable judicial attitude toward the rule augurs well for its future.

Illinois, the most recent state to adopt a code of civil procedure, has had a long and uninterrupted experience with the summary judgment procedure. Cook County has enforced the rule since 1853. The rule which provided for default judgments was applicable to nearly the same class of cases as in the early English procedure. In 1872, because of "delay in the administration of justice," the rule which had been enforced in Cook County was adopted in Illinois generally. Just prior to the enactment of the code of January 1, 1934, in Illinois, the motion was limited to actions on contracts, express or implied, for the payment of money. When the code was adopted the remedy as to summary judgments was extended to other types of actions, comparable to what had been done in New York and Connecticut.

The current provision in the Illinois Code extends the motion for summary judgment not only to actions on contracts and actions on judgments, but also to include actions to recover possession of land,

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22 Cf. Conn. Rules of Civil Practice, § 14A (1); see also sections 14A (2), (3), (4), (5) and (6). See also Conn. Gen. Stat. (1932) Title LVIII, c. 317, §§ 5971-5981.
23 New York Civil Practice Act (Cahill, 1932) Rule 113.
24 Common Law Procedure Act, 1853.
25 Rules under the Judicature Act, Order III, Rule 6 (1873).
26 Ill. Laws (1872), c. 332, § 36.
with or without rent or mesne profits and to include actions for the recovery of chattels. Only the plaintiff in Illinois can make the motion. But a defendant may employ the summary judgment procedure where he has filed a counterclaim. 29

Many states have adopted the summary judgment procedure. Some states have extended its scope. Others have held it applicable only to a few special types of actions. In addition to England, New York, Connecticut and Illinois, the following states have also adopted the summary judgment, in some form or another: New Jersey, 29a District of Columbia, 30 Pennsylvania, 31 Indiana, 32 Virginia, 33 West Virginia, 34 South Carolina, 35 Kentucky, 36 Alabama, 37 Arkansas, 38 Tennessee, 39 Missouri, 40 Louisiana, 41 Massachusetts, 42 Michigan, 43 Minnesota, 44 Rhode Island, 45 and Wisconsin. 46a

Motion for Summary Judgment in Wisconsin

After a careful and comprehensive study the advisory committee on rules of pleading, practice and procedure, created by the Wisconsin legislature in 1929, recommended to the Supreme Court of Wisconsin the adoption of the summary judgment as it existed in New York at this time. 47 As a result the rule was adopted, identical in language with Rule 113 of the New York Rules of Civil Practice as it existed in 1921. The only difference between the New York rule of 1921 and the Wisconsin rule of 1929 is that the New York rule includes the following words, "by the judge hearing the motion," and the Wisconsin rule,

29a New Jersey was one of the first states to introduce the summary judgment into the United States. N. J. Laws (1912) c. 223, Schedule A, Sec. 57; N. J. Laws (1928) c. 151, p. 306; see also 1925-1930 Supp. to N. J. Comp. Stat. (1931) §§ 163-291, 163-292.
30 Rules of the Supreme Court of the Dist. of Col., Rule 73, § 1.
33 Ind. Stat. (Burns, 1933) § 409.
34 Va. Code (1924) c. 251, § 6046, includes all actions.
35 W. Va. Code (1931) c. 56, § 6, limited to contracts.
37 Ky. Stat. (Carroll, 1927) Title X, c. 5, § 444, applies only to actions by or against sureties.
38 Ala. Code (1923) c. 346, art. I-VI.
39 Ark. Dig. Stat. (Crawford & Moses, 1921) c. 102, §§ 6250-6258.
41 Mo. Stat. (1932) § 2941, applies only to action by and against sureties.
45 Minn. Stat. (Mason, 1927) § 909, applicable only to sheriffs.
46 R. I. Laws (1932) c. 1893.
47 Boesel, The Summary Judgment (1930) 6 Wis. L. Rev. 5.
"by the court hearing the motion." This difference in language makes it certain that under the Wisconsin procedure the motion must be heard by the judge in open court whereas in New York there might be the possibility of the judge hearing the motion in his chambers.

The rule as adopted by Wisconsin in 1929 provides that the answer may be stricken if the action is to recover a debt or liquidated demand arising on contract, or on judgment for a sum stated, and judgment may be entered upon the motion and the affidavit of the plaintiff or someone familiar with the facts. The cause of action, the amount claimed, and a statement of the belief that there is no defense must be verified. The defendant may, however, defend upon a showing by affidavit, or other proof, that he has a bona fide defense.

This statute, being patterned after the New York Rule of 1921, was of much narrower scope than that adopted in England and in several of the states in the United States at that time (1929). It was limited to actions on contracts and actions on judgments for a stated sum where there is a definite and absolute debt or liquidated demand. The Wisconsin court has indicated that it looks upon the summary judgment as harsh even in its limited field. Nevertheless the court has also indicated that it will do as other courts have done—give full consideration to the legislative intent and purpose.

It is interesting to note that at the time of the adoption of the summary judgment statute, the Wisconsin legislature refused to include actions under a statute where the sum sought to be recovered was a fixed sum or in the nature of a debt, or actions on guaranties, sealed or unsealed, when the claim against the principal was in respect of a debt or liquidated demand only, or in actions for the recovery of specific chattels, or in actions to quiet and settle the title to real estate or any interest therein or in actions to enforce or foreclose a lien or a mortgage, or in actions to discharge any allegedly invalid mortgage, lien or caveat or lis pendens. All of these had been covered by the Connecticut statute, and the legislature in New York followed Connecticut a few years later. In New York it was also provided that the motion could be made in actions for the specific performance of a contract in writing for the sale or purchase of property, including such alternative and incidental relief as the cases might require, and in suits for accountings arising on written contracts, sealed or unsealed.

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48 Wis. Stat. (1931) § 270.635.
49 Sullivan v. State, 213 Wis. 185, 251 N.W. 251 (1933).
51 Conn. Rules of Civil Practice, § 14A (1).
52 New York Civil Practice Act (Cahill, 1932) 540.
The summary judgment statute has been expanded in Wisconsin. The statute permits, in part, the entry of summary judgment in an action to recover on a debt or demand arising on an express or implied contract other than for breach of promise to marry, or on a judgment for a sum stated, or on a statute where the sum sought to be recovered is fixed or in the nature of a debt. Similarly judgment may be entered to recover possession of specific real or personal property, with or without claim for damages for the use thereof, also to enforce or foreclose a lien or mortgage, or to enforce specific performance of a written contract (including alternative and incidental relief), or to compel an accounting under a written contract. The motion may be made by either plaintiff or defendant. Thus, the possibility of sham or frivolous denials in the answer is diminished, and likewise the possibility of plaintiff's going to trial without sufficient proof to overcome the denials or defenses of the defendant is diminished. Hence the calendars can be cleared of cases where the plaintiff should not have started action. The motion for summary judgment is primarily a plaintiff's remedy. An order denying application for summary judgment is now appealable.

The constitutionality of the summary judgment procedure has not been raised in Wisconsin. It has been contended in New York that this procedure affected the litigant's right to a trial by jury. But an intermediate appellate court in New York met this contention by pointing out that the court does not try any issues of fact under this scheme of procedure but does determine whether there is an issue of fact to be tried. These observations are pertinent with respect to any of the types of actions within any of the statutory schemes.

**Procedural Problems**

The word "motion" as used in a motion for summary judgment, is like any other motion, an application for an order, and may be made either upon notice of motion or upon order to show cause. However, there are certain distinctions between the motion for summary judgment and other motions. As between the motion for summary judgment and a motion to strike sham pleas, the latter applies to all actions, whereas the motion for summary judgment applies only to those classes of action mentioned in the statute; also in

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a motion to strike sham pleadings, the plaintiff must first establish the falsity of the pleading, whereas in a motion for a summary judgment, the defendant must show that he has a bona fide defense. In a motion for judgment on the pleadings, the moving party contends that there is no cause of action, whereas in a motion for summary judgment, the moving party does not claim that the pleadings do not raise an issue, but does claim that the adverse party has no evidence to support his claim or defense. In a motion for judgment on the pleadings, there will be only the answer and the complaint. In a motion for summary judgment, the moving party must also have affidavits. Further, a "good denial" may be sufficient to prevent a motion for judgment on the pleadings, but a "good denial" may not be sufficient in a summary case.

The affidavit is the important and distinguishing feature of the summary judgment. The Wisconsin statute in regard thereto provides that there shall be at least two affidavits accompanying the notice of motion. First, there shall be the affidavit of the moving party, wherein he states that he believes that there is no defense to the action, or that the action has no merit, as the case may be. Evidentiary facts showing a cause of action must be stated. Secondly, there must be an affidavit by some person having knowledge of the facts, and containing evidentiary facts, not ultimate facts or mere conclusions of law. In the case of In re Littleton's Estate the court held that the affidavit must set forth the evidentiary facts with such particularity that the court shall be satisfied therefrom of the plaintiff's actual right to recover. In Dwan v. Massarene it was said that the plaintiff's affidavit must state "such facts as are necessary to establish a good cause of action, and that it will not be sufficient if it verifies only a portion of the cause of action, leaving out some essential part thereof."

In a Michigan case, La Prise v. Wayne, an affidavit in support of the plaintiff stated "that plaintiffs have a good and meritorious cause of action against said defendant and that the amount claimed by the plaintiff is as follows . . ." This affidavit was held to be clearly insufficient. The plaintiff's affidavit should be strictly construed, and if it is insufficient to support his cause of action, the motion should be denied, although the defendant fails to file an opposing affidavit, or to show any facts sufficiently to entitle him to defend.

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61 36 C. J. 205.
The Wisconsin court has pointed out that the affidavits of plaintiff must disclose a cause of action. In *Sullivan v. State,* Justice Wickham said: "If, however, the real spirit and purpose of the summary judgment law are to be given effect, the search of the record should include the affidavits in support of the complaint, and where these affidavits disclose no cause of action, the complaint should be dismissed even though, without the affidavits and solely upon the pleadings, a demurrer would have to be overruled as to all or part of it. The purpose of providing for summary judgments is to avoid delay and to cut down the frequent contributions to injustice which proceed from technicalities of pleading and practice. It seems quite as important to us that the plaintiff's cause of action should be summarily dismissed when no cause of action is shown by the pleading and affidavits, as it is that the defendant's formally sufficient pleadings should be disregarded when the plaintiff has satisfied the terms of the statute and the defendant has failed to convince the court that there exists a genuine issue." Moreover, the sufficiency of the affidavits of both parties is to be determined by rules of evidence. In other words, the affidavits must state facts which would be admissible in evidence, and must affirmatively show that the affiant would, if sworn as a witness, be competent to testify to the facts contained in his affidavit.63

What has been said heretofore as to the plaintiff is also applicable to the defendant. In making the motion for summary judgment his affidavit should allege that the action has no merit. He must also state evidentiary facts showing that his denials are sufficient to defeat the plaintiff's case. In addition there may be the affidavit of some person who has knowledge of the facts. This latter affidavit must contain such evidentiary facts, including documents or copies thereof, as shall show that the defendant's denials or defenses are sufficient to defeat the plaintiff's contentions.

Thus the preliminary skirmish resolves itself into a battle of affidavits, in which evidentiary facts are the principal weapons.64 The motion will be granted or overruled depending upon whether or not the affidavits disclose an issue. The opposing party must set up a bona fide defense to the motion, supported by affidavits, in order to bar the motion; and failure to present an affidavit of defense to the motion

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62 Wis. 185, 251 N.W. 251 (1933).
64 Wis. Stat. (1935) § 270.635.
for summary judgment is usually fatal to the opposing party's case.\textsuperscript{64} In \textit{Jefferson Gardens, Inc. v. Terzan}\textsuperscript{65} it was held that where the defendant does not deny the allegations of the affidavits presented by the plaintiff in support of his motion, the allegation of that affidavit is taken as true. Despite the intimation, in an early case,\textsuperscript{68} the matter has not been conclusively determined. In all probability, the courts will tend to limit the number, in order to avoid opportunity for delay.

Remembering, then, that the motion will be denied unless an issue of fact is presented by the pleadings, cognizance must be taken of the fact that the court does not decide on the truth of the affidavits, but takes them as being absolutely true. Nor does it decide on the reputation of the affiants as to truth and veracity, for the purpose of the motion for summary judgment is merely to determine whether or not a defense worthy of trial exists, or whether the action has sufficient merit to entitle the plaintiff to go to trial. The test used in determining the propriety of a summary judgment has been variously stated by the different courts.

Prior to April 25, 1935, an order denying a motion for summary judgment was held not to be an appealable order because it did not, in effect, determine the action and prevent a judgment from which an appeal could be taken, as was required of appealable orders under the Wisconsin statutes,\textsuperscript{69} even though it may have affected a substantial right.\textsuperscript{70} However, after April 25, 1935, by virtue of an amendment to the Wisconsin statute, an order denying a motion for summary judgment is now an appealable order.\textsuperscript{71} See also \textit{Loehr v. Steng}\textsuperscript{72} where it was held that such an order is now appealable.

**Criticisms Answered**

At the time the summary judgment procedure was first proposed several criticisms other than constitutional objections were directed against it. Opponents of the remedy have contended that the motion for summary judgment presents the means for embarking upon a "fishing expedition," in other words, that the motion will be used to determine what evidence the adverse party will present at the trial. The cry is that in the vast majority of cases the defendant will be able to show, by hook or crook, some reason or some evidence sufficient to convince


\textsuperscript{65} 216 Wis. 230, 257 N.W. 154 (1934).


\textsuperscript{69} Wis. Stat. (1935) § 274.33 (1).

\textsuperscript{70} Schlesinger v. Schroeder, 210 Wis. 403, 245 N.W. 666 (1933).

\textsuperscript{71} Wis. Stat. (1935) § 274.33 (3).

\textsuperscript{72} 219 Wis. 361, 263 N.W. 373 (1935).
the court that there is an issue to be tried. On the other hand, it would seem to be well worth while for the plaintiff in almost every action within the classes allowed by statute, to make such a motion upon the chance that the defendant may not be able to convince the court that there is an issue to be tried, or, at least, with a view toward obtaining considerable details with reference to the defendant's defenses, which would doubtless be of great value for the purpose of cross-examination at the trial and general preparation for trial.7

In answering this objection it must be remembered that the party making the motion must state or present evidentiary facts in his affidavit showing that he has a good cause of action or that he has a meritorious defense. In a Wisconsin case, Sullivan v. State,74 Justice Wickham pointed out that to give effect to the real spirit and purpose of the summary judgment law the search of the record should include the affidavits in support of the complaint, and where these affidavits disclose no cause of action the complaint should be dismissed even though, without affidavits, and solely upon the pleadings, a demurrer would have to be overruled as to all or part of it. The New York Court of Appeals answered the defendant's contention that the plaintiff's affidavits, upon a motion for summary judgment, do not establish the defendant's default with technical precision by pointing out that the very object of a motion for summary judgment is to separate what is formal or pretended in denial from that which is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial. In short, it has been repeatedly held by the courts that if the plaintiff's affidavit is insufficient to support his cause of action, the motion should be denied, and this despite the fact that the defendant fails to file an opposing affidavit, or to show any facts sufficient to entitle him to defend.75

Hence, it follows, that since the party making the motion must also state facts, he is showing his hand and evidence as well as exposing the facts available to the person against whom the motion is directed. Thus, no undue advantage can be taken of either party. Then, too, this procedure will result in any event in a clarification of the issue in dispute which should tend to promote an adjustment of the dispute between the parties or a simpler trial of the issues. The speed of the procedure is desirable, but still more to be emphasized is its simplicity and

73 MEDINA, PLEADING AND PRACTICE UNDER THE NEW YORK CIVIL PRACTICE ACT (1922) pp. 79, 80.
74 213 Wis. 185, 251 N.W. 251 (1933).
directness in bringing out the real dispute. Like the summons for direction before the masters in chancery in England, the procedure leads to a discovery of the issues under the direct control of the court and with the penalty of a final disposition of the case if the issues are not disclosed. We may all prophesy for it a more important position in future practice than merely that of a prod for delinquent debtors. It is apparent, then, that the objection that the motion may be used as a means to embark upon a "fishing expedition" is groundless. Moreover, the remedy not only furnishes a simple, easy, and direct way of disposing of litigation in which there is no real cause of action or defense, but the procedure also aids in bringing out the real dispute and established justice in its true sense. After all, the trial of an action should not be a battle of wits, but it should have as its sole aim and purpose the establishment and the furtherance of justice.

Another objection to the summary judgment, occasionally raised, is that the motion, from a practical viewpoint, has a direct tendency to lessen the fees of attorneys inasmuch as an attorney is not likely to recover as large a fee in making the motion as he would if he appeared in open court and examined and cross-examined witnesses. This argument has strength—and weakness. Its strength lies in the fact that attorneys must earn a living, and as a practical proposition, the use of the motion does reduce the fee of the attorney. On the other hand, the motion will enable the lawyer to recover his fee within a much shorter time, since it eliminates the necessity of waiting from two to four years before the trial of a "cause" and the final disposition of the case. The objection that the motion tends to reduce the fee of the attorney is inherently weak in that the practice of law is a profession and not a business. As was pointed out in a Massachusetts case, In re Bergeron, the practice of law is not a craft or trade, but is a profession whose main purpose is to aid in the doing of justice according to law, between the state and the individual, and between man and man. The respect for the courts must be upheld, and if an attorney acts contrary to the ethics of the profession the courts will be lowered in the estimation of the people. In Ellis v. Frawley the court points out that the attorney who looks only to the fee he is getting soon forgets his high duties as a minister at the altar of justice, and becomes a mere grubber for money in the muck heaps of the world. Lastly, the attorney must not forget that although he owes a duty to his client, he also owes a duty to the court. As stated by Justice Magruder, in People v. Beattie, "The lawyer's duty is of a double character; he owes to his

77 165 Wis. 381, 161 N.W. 364 (1917).
78 137 Ill. 553, 27 N.E. 1096 (1891).
client the duty of fidelity, but he also owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession.”

The opponents of the remedy further say that it seems to be forgotten that the judicial system is made up not merely of judges and courts, but also of lawyers, and that the efforts of all are futile, if the litigants who furnish the causes in litigation are not satisfied that they have had the benefit of deliberate consideration by a court, which has heard them and their witnesses, and not merely read the affidavits prepared by their attorneys. A “day in court” has a literal significance which is the guarantee against loss of confidence in the judicial process.79

This objection is not a serious one. From the outset, it must be remembered that the court is not trying the issues when a motion for summary judgment is made, but rather it merely determines whether or not a defense worthy of trial exists, or whether the action has any merit to entitle a plaintiff to a trial, and to dispose of the case summarily only when such defense or meritorious action is lacking.80 Further, most of the cases in our courts of general jurisdiction, which go to judgment, eventually result in judgment for the plaintiff. It results, therefore, that the delay is, for the most part at the expense of the one who, by the law of probabilities, is the more deserving of the parties. To the extent that our courts are permitting avoidable delay, to that extent are they denying justice.81 Moreover, litigants have no vested rights in delays in litigation.

The last objection to the motion for summary judgment, as advanced by many opponents of the remedy, is that it is too revolutionary. These opponents forget that the remedy has been used with great effectiveness in England since 1855. Moreover, it is necessary that the court keep pace with the times not only in its application of substantive law but also in its procedure. In Ex Parte Peterson82 Mr. Justice Brandeis lauded the introduction of new devices which were properly adaptable to the “ancient institution.” In Cropley v. Vogeler83 cognizance was taken of the fact the trend in the United States is to cast aside ancient processes in favor of more modern procedure. Although it has been truly said that it takes time, and often a long time, to make

79 Rothschild, Summary Judicial Power (1934) 361, 362.
82 253 U.S. 300, 40 Sup. Ct. 543, 64 L.ed. 919 (1920).
83 2 D.C. App. 28 (1893).
a new remedy thoroughly operative, still, as early as January, 1924, the procedure was recognized in this country as avoiding much unrighteous delay.\textsuperscript{84} Since that time the motion for summary judgment in the United States, as well as in England, has thoroughly demonstrated its effectiveness in avoiding delays and in establishing justice.

Experience during the last fifteen years in New York, and more recently in Wisconsin, has indicated that the procedure has generally accomplished its avowed objective of reducing the delays in litigation, that it has not given use to the abuses that were once feared.\textsuperscript{85} That the motion, at first, was limited to a few classes of actions, was to be expected in view of the fact that any change must be gradually developed lest those who are prone to conservatism object too vigorously. The adoption of the narrower rule was solely due to the desire that at least an entering wedge for the new procedure should be made. And there are many indications that the procedure, at least in Wisconsin, will be extended to all classes of actions. The stimulus of more crowded dockets will certainly lead to its extension along more liberal lines. Then, too, the bench and bar have not, as yet, fully appreciated and utilized its present potentialities. As soon as attorneys become acquainted with its procedure and application, its simplicity, and its benefits in not only avoiding delays but also in the clarification of issues which will result in simpler trials, its use will be more general.

It can be readily understood that a sham answer in an action on a contract is just as false as in an answer in a quasi contract action. An unreal defense in a suit to enforce or foreclose a mortgage or in a suit to enforce specific performance of a contract is just as sham as a defense in a suit for injunction. A false denial in an answer in any one of the classes of actions mentioned by the statute\textsuperscript{86} is just as unreal as in a tort action. In short, a false denial in an answer is without merit regardless of the kind of action in which it is interposed. Moreover, the motion may be used in those cases where there is no dispute as to the facts, thus avoiding costly jury trial and compelling a person to wait two or four years, only to have the court direct a verdict. From these and other cases, where a verdict has been directed, it can be seen that the delay and the cost of a trial might have been avoided had the court known that there was no issue to try. Of course, it is not contended that the court should direct a verdict. This would be carrying the motion too far and would result in the serious abuse of having the court "try" actions on affidavits without having the opportunity of seeing the

\textsuperscript{85} Shientag, \textit{Summary Judgments in the Supreme Court of New York} (1932) 32 \textit{Col. L. Rev.} 824, 856.
\textsuperscript{86} Wis. Stat. (1935) § 270.635.
witnesses, their demeanor on the stand, and without being given the assistance of counsel in determining the reputation of the witnesses for truth and veracity. Nor is it contended that the use of the motion could not be subjected to any abuse at all. However, under the surveillance of the court its abuses can be limited to a small number. Under the present system of regulating practice and procedure in Wisconsin, the extension and enlargement of the scope of the rule can be readily made by the supreme court, without the difficulties and delays of legislative enactment.

APPENDIX*

ORDER TO SHOW CAUSE

CIRCUIT COURT MILWAUKEE COUNTY STATE OF WISCONSIN

John Doe, Plaintiff.

vs. ORDER TO SHOW CAUSE

Richard Roe, Defendant.

To: -------------------------------

Attorney for Defendant

Upon the attached affidavits of ------------------------------- and ------------------------------- and on motion of -------------------------------, attorney for the plaintiff;

IT IS ORDERED, that the defendant, Richard Roe, show cause before the court in the branch thereof presided over by Hon.------------------------------- at the court house in the City of Milwaukee, Wisconsin, on the------------------------------- day of-------------------------------, 10.-., at ----- o'clock, A.M., or as soon thereafter as counsel can be heard, why the answer of said defendant heretofore filed in this action should not be stricken from the records in this action and judgment entered for the plaintiff and against the defendant, Richard Roe, pursuant to Supreme Court Rule, Sec. 270.635, in the sum of------------------------------- Dollars ($------------------------------- ) with interest according to the demand of the complaint.

IT IS ORDERED FURTHER that a copy of this order be served upon the attorney for the defendant on or before-------------------------------, 19_.

Dated:-------------------------------

Circuit Judge.

---

87 Boesel, The Summary Judgment (1930) 6 Wis. L. Rev. 5.

* The following forms should be used by the plaintiff in making the motion for summary judgment. The forms used by a defendant in making the motion for summary judgment are much the same as those used by the plaintiff except that the defendant must state that he believes that the action has no merit. However, the defendant, in making the motion, must by affidavit show that his denials or defenses are sufficient to defeat the plaintiff. Otherwise, the forms are alike, the plaintiff making an affidavit to the effect that he has a good and meritorious cause of action, and supported by affidavits of the evidentiary facts showing that he has such a meritorious action.
THE MOTION FOR SUMMARY JUDGMENT

NOTICE OF MOTION

CIRCUIT COURT    MILWAUKEE COUNTY    STATE OF WISCONSIN

John Doe,        NOTICE OF MOTION
Plaintiff.

vs.

Richard Roe,     AFFIDAVIT
Defendant.

To:-------------------------------------------------------

Attorney for Defendant.

PLEASE TAKE NOTICE that on the ---- day of ----, 19__, at the open-
ing of court on said day or as soon thereafter as counsel can be heard, and at
the court room of the court above named in the courthouse of the City of
Milwaukee, Wisconsin, the undersigned, as attorney for the plaintiff in the above
entitled action, will move said court to strike from the records in this action,
defendant's answer and for summary judgment in favor of the plaintiff and
against the defendant, Richard Roe, pursuant to Supreme Court Rule, Sec.
270.635, in the principal sum of---------------- Dollars ($--------),
and for costs and disbursements of this action. Said motion
will be based on the complaint and answer in this action, heretofore filed herein,
and the affidavits of----------------- and-----------------, true and
correct copies of which are hereunto attached.

Dated:------------------------------------------------------

Attorney for Plaintiff.

AFFIDAVIT OF MOVING PARTY

CIRCUIT COURT    MILWAUKEE COUNTY    STATE OF WISCONSIN

John Doe,        AFFIDAVIT
Plaintiff.

vs.

Richard Roe,     AFFIDAVIT
Defendant.

STATE OF WISCONSIN ]ss.
MILWAUKEE COUNTY ]ss.

John Doe, being first duly sworn, on oath deposes and says:

1. That he is the plaintiff above named and makes this affidavit in support
of his motion for summary judgment, as provided in Sec. 270.635 of Wisconsin
Statutes 1935.

2. That the above entitled action is an original action in the above named
court against the defendant, Richard Roe; that said action is brought to recover
the sum of------------------- Dollars ($-----------) which amount is
alleged to be due upon (here state the character of the action so as to make it
fall within the class of actions named in Sec. 270.635 of Wisconsin Statutes,
such as: an action to recover a debt or demand arising on a contract, express
or implied—other than for breach of promise to marry.)

3. That the facts and circumstances under which the cause of action alleged
in the complaint arose are as follows: (here set forth briefly the evidentiary

15 BRYANT, PLEADING AND PRACTICE (1930) § 945.

2 Either the notice of motion or the order to show cause can be used in this
motion.
facts establishing the existence of a cause of action, attacking the original of any writings referred to, or stating that they will be presented to the court on the hearing of the motion; such as: that on or about the 12th day of March, 1934, in the presence of John Smith, an employee of the plaintiff, and at the latter's place of business, the defendant, Richard Roe, accepted from the plaintiff, the sum of three thousand dollars in United States currency; that at the same time, the defendant executed and delivered his promissory note of which a copy marked Exhibit "A" is appended to the complaint; that the said note was made payable to the order of the plaintiff; that on the date when the note became due and payable, the plaintiff sent John Smith his employee, to demand payment of the note from the defendant; that the defendant refused payment; and that the plaintiff was at all times heretofore and now is the owner and holder of the note, no part of which has been paid).

4. That by reason of the facts aforesaid, the sum of $________ is now due and owning from the defendant to the plaintiff, this affiant, together with interest thereon from the __________ day of __________, 19___.

5. That affiant verily believes that there is no defense to this action.

WHEREFORE, affiant prays that the answer of the defendant heretofore filed herein be stricken out, and that judgment be ordered for the plaintiff and against the defendant for the sum of __________, as aforesaid, and the costs of this action and this motion.

Subscribed and sworn to before me this __________ day of __________, 19__, A.D.

Notary Public—Milwaukee County, Wis.

(My commission expires: __________)

AFFIDAVIT OF PERSON WHO HAS KNOWLEDGE
OF THE EVIDENTIARY FACTS
CIRCUIT COURT MILWAUKEE COUNTY STATE OF WISCONSIN

John Doe, Plaintiff.

vs. AFFIDAVIT

Richard Roe, Defendant.

STATE OF WISCONSIN } ss.

MILWAUKEE COUNTY

John Smith, being first duly sworn, on oath says that he is employed by John Doe, the plaintiff in this action; that he has read the complaint in the above entitled action and the attached affidavit of John Doe, and has personal knowledge of all the facts and transactions therein referred to, and that all of the statements contained in the complaint and in said affidavit are true; that on or about the 12th day of March, 1934, he was present when the plaintiff gave to the defendant, Richard Roe, the sum of Three Thousand Dollars in United States currency, in return for which the defendant executed and delivered to the plaintiff his promissory note, of which a copy marked Exhibit "A" is appended to the complaint. Affiant further says that he personally presented the promissory note, mentioned in said affidavit and in the complaint to the maker of said note on the date when the same became payable and demanded payment according to the tenor of the instrument, and that payment was refused, and that the amount due thereon is as stated in the complaint.

Subscribed and sworn to before me this __________ day of __________, 19__, A.D.

Notary Public—Milwaukee County, Wis.

(My commission expires: __________)
THE MOTION FOR SUMMARY JUDGMENT

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

CIRCUIT COURT MILWAUKEE COUNTY STATE OF WISCONSIN

John Doe, Plaintiff.

AFFIDAVIT IN OPPOSITION TO MOTION

vs.

FOR SUMMARY JUDGMENT

Richard Roe, Defendant.

STATE OF WISCONSIN ]ss.

MILWAUKEE COUNTY

Richard Roe, being first duly sworn, on oath deposes and says: That he is
the defendant in the above entitled action; that he makes this affidavit for the
purpose of showing unto the court, facts sufficient to convince the court that
the defendant, in the above entitled matter, has a good, sufficient and meritorious
defense to the claim set up in the complaint; and for the further purpose of
showing unto the court that some of the facts stated in plaintiff's affidavit and
the affidavit of---------------------, are erroneous and false.

(Here state evidentiary facts showing that the defendant has a meritorious
defense such as: Your affiant further deposes and says, that neither on
the 12th day of March, 1934, nor at any other time has the defendant re-
ceived Three Thousand Dollars or any other amount from the plaintiff; that
the defendant executed his promissory note to the plaintiff on the promise of
plaintiff that he would send the money therefor to defendant within two days
after the execution of the note; that the defendant has never received any
money, as aforesaid from the plaintiff; that plaintiff on or about the 13th day
of March, 1934, called the defendant by telephone and told him that he (the
plaintiff) could not get the money and that he would tear up defendant's note;
that the note was, therefore, given without consideration and plaintiff is not a
holder in due course.)

WHEREFORE, affiant believes that the defendant has a good, sufficient and
meritorious defense to the claim set up by the plaintiff in his complaint and
prays that plaintiff's motion for summary judgment be dismissed and that plain-
tiff pay the costs of this motion.

Subscribed and sworn to before me this this--------day of--------, 19--. A.D.

Notary Public—Milwaukee County, Wis.

(My commission expires:-----------)

ORDER GRANTING SUMMARY JUDGMENT

CIRCUIT COURT MILWAUKEE COUNTY STATE OF WISCONSIN

John Doe, Plaintiff.

ORDER GRANTING SUMMARY JUDGMENT3

vs.

Richard Roe, Defendant.

The above entitled action having this day come on regularly to be heard
upon motion of----------------, attorney for plaintiff, to strike out the
answer of the defendant and for summary judgment for the plaintiff; and
------------------- appearing for----------------- in support of
said motion, and------------------- appearing for-------------------
in opposition to said motion (recite other matter considered):

IT IS ORDERED THAT the motion of the plaintiff for summary judg-
mment pursuant to Supreme Court Rule, Sec. 270.635, be, and the same hereby

3 5 BRYANT, WISCONSIN PLEADING AND PRACTICE (1930) § 945.
is, granted; that defendant's answer be, and the same hereby is, stricken out; and that judgment be entered for the plaintiff against the defendant for $_____________ Dollars, and interest thereon from ________________, 19___, and costs of this action and Ten Dollars ($10.00) costs of motion.

Dated: ________________

By the court: ____________________________

Circuit Judge.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

CIRCUIT COURT MILWAUKEE COUNTY STATE OF WISCONSIN

John Doe, Plaintiff.

vs.

Richard Roe, Defendant.

The above entitled action having this day come on regularly to be heard upon motion of ____________, attorney for plaintiff, to strike out the answer of the defendant and for summary judgment for the plaintiff; and ____________, appearing for ____________ in opposition thereto; and the court having heard the arguments of counsel and having read and considered the affidavits of ____________ and ____________, in support of said motion, and the affidavit of ____________ in opposition to the motion, and the court being fully advised,

IT IS ORDERED THAT the motion of the plaintiff to strike the answer and for judgment against the defendant, Richard Roe, pursuant to Sec. 270.635, Wisconsin Statutes, 1935, be denied; and that the defendant, Richard Roe, have of the plaintiff, Ten Dollars ($10.00) costs of this motion.

Dated: ________________

By the court: ____________________________

Circuit Judge.

JUDGMENT

CIRCUIT COURT MILWAUKEE COUNTY STATE OF WISCONSIN

John Doe, Plaintiff.

vs.

Richard Roe, Defendant.

The motion of the plaintiff in the above entitled action to have stricken out the answer of the defendant and for summary judgment for the plaintiff and against the defendant, pursuant to Supreme Court Rule, Sec. 270.635, having been duly heard and considered, and said motion having been granted by the court and entry of the judgment directed accordingly, now, on motion of ____________, attorney for the plaintiff;

IT IS ADJUDGED, that the plaintiff, John Doe, (here state the relief granted, such as: do have and recover of the defendant, Richard Roe, the sum of _________________ Dollars ($_____________), together with interest in the sum of _________________ Dollars ($_____________), making in all the sum of _________________ Dollars ($_____________), and costs of this action, including motion costs, hereby taxed in the sum of _________________ Dollars ($_____________).

By the court: ____________________________

Circuit Judge.

_________________________________ (Date)

45 BRYANT, PLEADING AND PRACTICE (1930) § 945.
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