June 1942

Summary Judgements in Illinois

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THROUGHOUT her vigorous youth Illinois' procedural law slept dreamily on. England had an industrial revolution. Popular clamor swept clean the judicial house. The "Supreme Court of Judicature Act, 1873," and Orders of the Supreme Court rose on the graves of common-law forms and Hilary Rules.

Over America sprang codes of civil procedure. New York led the way and its history is typical. Meeting the demand of the developing community, the New York Constitution of 1846 directed a written code of law and procedure for the whole state. The Code of Procedure, or "Field Code," was adopted in 1848, and served as a model for other states' reforms. The Code of Civil Procedure followed in 1877. This in turn was replaced by the Civil Practice Act of 1920, which restored to the courts some portion of their old rule making power, taken away in 1848. This had produced, by 1940, 301 rules of court explaining, expanding and interpreting the 1578 sections of the Act.

Yet the nation's third state trundled along with an eighteenth century law of procedure. That she could do so without an uprising of all who went to law to settle their disputes is more a tribute to human patience and docility than to the adaptability and flexibility of common-law procedure.

Nor were there lacking voices demanding reform. In 1909 Judge Gilbert called for a substantial renovation of the then existing practice. Yet even the scheme he propounded fell far short of the New York Commissioners' accomplishment of sixty years before. He did not ask abolition of the forms of action, he would but slightly have narrowed the general issue's scope, left the equity bill in most of its glory and let law and equity wend their separate ways as of old. Yet he
was looked upon as a reformer.\textsuperscript{3} No wonder Professor Whittier put so little hope in what Judge Gilbert then offered, and cried for a full-fledged code. "In 1883," said Mr. Whittier, the Lord Chief Justice of England suggested the possible need of a pleading park to display the various curiosities of common law pleading. Illinois bids fair to become that park. Entirely surrounded by reformed procedure, she still maintains that the tortuous foot-paths of the fathers are sufficient for her, and that she will have none of the graded roads of the codes, not to speak of the macadamized highway of modern English pleading. In fact, the decisions of our Supreme Court have made more tortuous the old paths and less intelligible the old guide posts. . . . Taken altogether, Illinois pleading may be said to be at least slightly(!)\textsuperscript{4} behind the position in which a reasonably prudent profession would place it. We have not lived up to the legal standard of the ordinary prudent man.\textsuperscript{4}

Then in the next year a modern Jeremy Bentham uttered some principles of procedural reform which have stood as a guide and beacon light to students of procedure to the present day.\textsuperscript{5} "... the controlling reason for a systematic and scientific adjective law must be to insure precision, uniformity and certainty in the judicial application of substantive law," said Professor Pound.\textsuperscript{6} So "rules of procedure" should exist only to secure to all "parties fair opportunity to meet the case against them and full opportunity to make their own case."\textsuperscript{7} And, "the office of pleadings should be to give notice to the respective parties of the claims, defenses and cross demands asserted by their adversaries; wherever that office may be performed sufficiently without pleadings, pleadings should be unnecessary, and where pleadings are required, the pleader should not be held to state all the legal elements of claim, defense, or cross demand, but merely to apprise his adversary fairly of what such claim, defense or cross demand is to be."\textsuperscript{8}

One may speculate as to why such voices cried so long

\textsuperscript{4} Id. at 174, 175.
\textsuperscript{6} Id. at 388.
\textsuperscript{7} Id. at 496.
\textsuperscript{8} Id. at 497, Principle V. Professor Whittier, too, yearned for a system of notice pleading, characterizing "the chief object of pleading" as "to notify the parties respectively of the claims or defenses which will be advanced by their opponents." 4 Ill. L. Rev. 174, 178.
in Illinois in vain. An answer may be that the criticism of learned men of law found no rallying among the people. In the long run the plain people suffer from anachronistic civil procedure. They cannot bring their troubles to court if delay robs them of victory. Certain it is that the lay public forced the reform in England after the debacle of the Hilary Rules. Perhaps if the lay public had given reformers some encouragement, Illinois need not have waited until 1933 for its first modern Civil Practice Act.

But it is hard for a public lacking in organization to make felt a need, particularly a need that strikes most people only spasmodically and many not at all. There was no public law revision committee to keep before the legislators the job to be done. There was no "ministry of justice" to gather together recommendations and report where change was needed. Still it is a wonder that in a long era of commerce and trade, of interchange of ideas of men in all realms of learning the winds of progress blew no seeds of procedural reform from England and the many states across the borders of Illinois.

That there was no procedural reform throughout this era of course does not mean that the legislature never tinkered with procedural matters. From 1827 to 1933 came a number

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9 Of course, there were Englishmen of bench and bar, like Baron Parke, who considered the law as it stood as the perfection of human wisdom.

"The law is the true embodiment
Of everything that's excellent,
It has no kind of fault or flaw,
And I, M'Lords, embody the Law."

(W. S. Gilbert, "Iolanthe").

Also it is a matter of common knowledge that the codes got a very cold reception from many judges, steeped in common law, who first construed them. The axiom that acts in derogation of the common law should be strictly construed was the familiar refuge. Yet Pound points out that generally the English bench and bar welcomed the reformed procedure and showed a disposition to make it work. See, for instance, his comment on Lord Campbell, 4 Ill. L. Rev. 394n.


11 The recent publication of the correspondence between Sir Frederick Pollock and Mr. Justice Holmes highlights the fact that not just through reported cases and publications were American and English lawyers trading views. American and English lawyers and jurists have long maintained close and personal relationships. We in Chicago, for instance, have recently been visited by the Master of the Rolls. And on a casual call in 1936 on one of the justices of the King's Bench Division the writer found him closeted in chambers with a Pennsylvania judge.
of practice acts. But all of these dealt principally with minor and local matters, such as venue, service of process, dockets, times for pleadings and motions, and improvements in a small way. The Practice Act of 1872\textsuperscript{12} abolished the distinction between "trespass" and "trespass on the case,"\textsuperscript{13} permitted joinder in the same action of counts in trover and replevin,\textsuperscript{14} and even went to the length of letting the defendant have an affirmative judgment against the plaintiff in a case of set-off in a contract action.\textsuperscript{15} This typifies the kind of adjustment and advance which the Illinois legislature was willing to make, and these examples are selected at random from a number of statutes.

The contrast to the experience of England and New York is marked. For no matter what the vicissitudes of the new practice at the hands of the New York judges,\textsuperscript{16} schooled in the common law, each time the legislature moved it at least tried to move forward.\textsuperscript{17} And the English judges were perforce in positive cooperation with the progressive movement in procedure, for Parliament wisely left to them the rule making power.\textsuperscript{18} The Illinois Acts—there was one in 1827,\textsuperscript{19} another in 1845,\textsuperscript{20} two in 1872 for chancery\textsuperscript{21} and courts of record,\textsuperscript{22} one for county courts in 1874,\textsuperscript{23} and one

\begin{itemize}
  \item \textsuperscript{13} § 22.
  \item \textsuperscript{14} § 23.
  \item \textsuperscript{15} § 30.
  \item \textsuperscript{16} "The original New York Code of Civil Procedure failed of effect in many important particulars with respect to which its provisions were well calculated to achieve the ends sought because so many of the judges who were first called upon to administer it were determined to limit its operation and preserve the principles and the dogmas of the old procedure wherever possible." Roscoe Pound, "Some Principles of Procedural Reform," 4 Ill. L. Rev. 388, 390 (1910).
  \item \textsuperscript{17} Whether the legislature experienced long run success may of course be questioned. The very best that can be said of a Practice Act 1600 sections long and amplified by 300 rules of court is that the whole is unwieldy. But the Practice Act to the contrary, one still may hazard the guess that the litigant was less mired in the slough of procedural technicalities than he would have been by the common law vehicle. But see Edson R. Sunderland, "Observations on the Illinois Civil Practice Act," 28 Ill. L. Rev. 861, 864 (1934).
  \item \textsuperscript{18} Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, § 74. There is a striking similarity between this and the enabling act for the Federal Rules of Civil Procedure (1938) in that any rule made by the judges had to be laid before both Houses of Parliament before taking effect. Cf. Act of June 19, 1934, Ch. 651, §§ 1, 2 (48 Stat. 1064), U.S.C., tit. 28, §§ 723b, 723c. It is not clear whether the Supreme Court may make new rules without submitting them to the Congress.
  \item \textsuperscript{19} Ill. Rev. Stat. 1833, p. 486.
  \item \textsuperscript{20} Ill. Rev. Stat. 1845, Ch. 83, p. 412.
  \item \textsuperscript{21} Ill. Rev. Stat. 1874, Ch. 22, p. 198.
  \item \textsuperscript{22} Ibid., Ch. 110, p. 774.
  \item \textsuperscript{23} Ibid., Ch. 37, p. 326.
\end{itemize}
in 1907, simply accepted what the common law had bequeathed, patched it up here and there, and rode along as before.

Against the background of the state's vigorous political and economic history, the story of her civil procedure, and its stubborn resistance to ideas from outside, is amazing. And it is against this background that the summary judgment in Illinois is to be viewed.

II

SUMMARY JUDGMENT STATUTES AND RULES

There is small wonder that legislators worrying about distinctions between trespass and case little comprehended the need or desirability for a streamlined summary judgment procedure. Yet from an early day there has been a limited "affidavit of merits" procedure. First used in only Cook County, it extended in 1872 to the whole state, and remained, slightly modified but more or less unchanged, until the new Civil Practice Act of 1933. And perhaps it was this early "as by default" procedure that kept the framers of the 1933 Act from looking abroad to the liberal English and New York rules for models for their summary judgment section and led them to adopt the narrow Section 57.

The summary judgment would perhaps never have been necessary if common law pleading had not become formalized after its origin during the feudal times. If one knew nothing of the law of pleading it would be the simplest thing to do without it.

Take an example: if a man owes another money for goods sold and delivered, the other brings an action in general assumpsit on the common counts. The man pleads the general issue. Under this he may put in any one of a dozen odd defenses. The plaintiff does not know what to prepare for, what unexpected excuse may be given, not to mention what wile or chicane. But suppose before the quarrel the buyer dies. Now the seller simply presents a claim to the executor. He says "I sold and delivered to your testator on June first, 1900, a hundred barrels of turpentine for which

24 Laws, 1907, p. 443.
he promised to pay, and the reasonable value is $1,000." The executor finds no protection behind the screen of general issue. If he has a defense he states it. "You said it was turpentine but it turned out to be water: there was a breach of warranty," he may say. If the issue is real the probate judge may call a jury to decide, or even send it over to a law court of general jurisdiction. But if the executor has no defense that ends the matter. The probate judge can forthwith direct the executor to pay. Whether there is a dispute or not there need be no bother about pleadings.25

What the summary judgment procedure endeavors to do is make the result as easy when the parties are still alive, still engaging in normal commercial intercourse. The plaintiff files his complaint as before. It says nothing. For that whereas the defendant, on the [first] day of [June, 1900], was indebted to the plaintiff in [$1,000], for the price and value of goods then sold and delivered by the plaintiff to the defendant, at his request: . . . And thereupon the defendant afterwards, to wit, on the day and year aforesaid, in consideration of the premises, promised to pay him the said sum of money on request: Yet the defendant hath disregarded his promise and hath not paid any of the said monies or any part thereof, to the plaintiff's damage of [$1,000]; and thereupon he brings suit. . . . 26 We don't even know that the plaintiff is suing over some turpentine. To all of this the defendant replies, "And the defendant, by (Adam Jones), his attorney, says that he did not promise in manner and form as the plaintiff hath above complained. And of this the defendant puts himself upon the country."27 Still we have not budged an inch.

But enter a summary judgment statute. Plaintiff or some one else with knowledge deposes and states all the evidentiary facts. The turpentine was delivered on defendant's order to his paint shop, invoice attached, on June 1. Defendant never said there was water in the barrels, but used up the turpentine in the course of his business. Yet defendant, without any valid defense or excuse, refuses to pay. Therefore,

25 Here is expanded an idea hinted at by Roscoe Pound, "Some Principles of Procedural Reform," 4 Ill. L. Rev. 388, 496n (1910): "It is curious that in jurisdictions in which one may litigate a claim against an estate involving $37,000 (as in Thomson v. Black, [200 Ill. 465, 63 N.E. 1092] (1903)) on an informal statement of claim, he cannot litigate an ordinary debt or claim for labor of a hundredth part of that amount without formal and technical pleadings."
26 Form suggested by Stephen, Pleading (Williston ed., 1895), p. 43.
27 Ibid., 172.
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plaintiff moves that unless he shows a valid defense judgment be entered against him without more ado. The affidavit is filed with the motion.

The defendant must speak now or else forever after hold his peace. If the turpentine was diluted with water he so swears, and swears how and where and when he discovered it, and complained about it, and offered to give it back. If his affidavit raises a real defense and shows evidential facts of sufficient strength to support him, motion for summary judgment is denied. There is a triable issue of fact, triable to a jury. But if the affidavit of merits raises no real defense, plaintiff gets a judgment forthwith. Indeed if he has no real defense defendant will probably quit at once. Thus the summary judgment procedure gets rid in one fell swoop of litigious hypocracies and shams. And for a litigant having a genuine dispute it clarifies the issues on which the case is to be tried and gives an idea in advance of the evidence to be offered and to be met. Thus the summary judgment procedure accomplishes what a flexible pleading system might have been able to do.

England first felt the impact of the summary judgment eighteen years before the Supreme Court of Judicature Act, 1873. In 1855 Parliament passed a bill whose title aptly states the end and purpose of summary judgment procedure. "An Act to facilitate the Remedies of Bills of Exchange and Promissory Notes by the prevention of frivolous or fictitious defenses to actions thereon" made recovery on negotiable instruments a swift and easy affair. The plaintiff was to indorse on his writ, by which the suit was commenced, a notice that unless the defendant within twelve days got leave of court to appear, plaintiff would sign final judgment against him for the amount claimed on the bill or note. Leave to appear could be had by defendant only by showing that he had a defense on the merits, or at least that he had enough in his favor by way of defense that it was reasonable to make plaintiff prove his case to a jury.

This was an absolute reversal of the common law theory that the defendant had a right to set up and go to trial upon any issue he pleased, and that the genuineness of his defense could not be questioned in ad-

vance of the trial itself. Under this statute the plaintiff was presumed to have a valid claim when suing on a bill or note, and the defendant was presumed to have no bona fide defense whatever. This presumption against the defendant could be removed only by producing sufficient evidence by way of affidavit to show the probable existence of a good defense.\textsuperscript{30}

Of course the plaintiff did not have to avail himself of the statute. If he attached no notice to his writ, this "presumption" did not operate in his favor.

But the procedure, now gathering popularity, especially with the business community, was amplified with the Judicature Act. The schedule of rules promulgated by Parliament with the Act allows it where the plaintiff seeks "merely" to recover a debt or liquidated demand arising on a contract, express or implied, or on a bond or sealed instrument a liquidated amount, or on a statute or guaranty where the claim is liquidated, or on a trust.\textsuperscript{31} Here the emphasis is on liquidated claims. Apparently the Parliament thought that such cases were about all that the judges could handle in this summary way. Perhaps, too, such demands were the most usual in ordinary commercial dealings. But gradually the judges felt their way forward until today the rules meet the needs of a wide variety of cases. In addition to those retained from the original schedule, there are now included cases where a landlord seeks to recover possession, with or without a demand for rent, a plaintiff seeks recovery of a specific chattel with or without a claim for hire or damages for its detention, or of any property forming security for payment of money, and "all other actions in the King's Bench Division" (except libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise, and cases in which plaintiff alleges fraud).\textsuperscript{32} Thus tort cases, and especially personal injury cases, which were long excluded, and cases involving title to land, about which English courts have always been peculiarly sensitive,\textsuperscript{33} are now subject to summary judgment procedure. It is only to be


\textsuperscript{31} Schedule, \S 7.

\textsuperscript{32} Rules of the Supreme Court, 0. 3, r. 6. The Annual Practice (1940), p. 192.

\textsuperscript{33} L. Hand, J., in Irving Trust Co. v. Maryland Casualty Co., 83 F. (2d) 168 (1936).
regretted that Chancery Division cases are not also included.

In comparison with the English experience and against the background of her thriving economic development the Illinois statutes akin to summary judgment are woefully inadequate. Yet however much they have been criticized by latter day writers and however poor they seem compared with other jurisdictions, under them a practice grew up which was at least akin to the summary judgment procedure and which facilitated the course of litigation as much as might be expected in a jurisdiction so demonstrably backward in civil practice reform.

In 1853 the Illinois General Assembly passed "an act to regulate the practice in the circuit court of Cook county and the Cook county court of common pleas."34

Any party having commenced suit in either of said courts, shall be entitled to a default at any vacation term, upon proof of due service of process upon the defendant, and a copy of the declaration with a rule to plead, at least ten days before such term, unless such defendant, or the attorney of such defendant . . . shall, before the expiration of said ten days, if the suit be founded on a contract, file a plea to said action, and also an affidavit setting forth that he believes he has a good defense to said suit upon the merits. . . .35

Thus came the affidavit of merits to litigants of Cook County. Its deficiencies are at once apparent, most important of which is the lack of disclosure by defendant of the defense he intends to rely on. But it is worthy of notice that it is not tied to liquidated demands, but applies to all contract cases, and is in this respect far more courageous than the nineteenth century English summary judgment rules.

The Practice Act of 1872 extended this to all courts of record in the state.

If the plaintiff in any suit upon a contract, expressed or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand, and the amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment as in case of default, unless the defendant, or his agent or attorney, . . . shall file with his plea an affidavit stating that he verily believes he has a good defense to said suit, upon the merits to the whole or a portion of the plaintiff's demand,

and if a portion, specifying the amount (according to the best of his judgment and belief). . . .

Here we find a considerable improvement in drafting. Contracts are to include "expressed or implied" contracts, but must be for payment of money. The plaintiff must show the nature of his demand, not just state that he has one. The defendant is to be allowed set-off and credits. But by a set-off or credit, or a partial defense, the defendant cannot stop the plaintiff from getting judgment "as by default," for the plaintiff can win on a portion of his original claim, if not on the whole of it.

A criticism is, of course, that the defendant is not required to say what the nature of his defense is to be. But even so the defendant, and less so his attorney, is not likely to play fast and loose with the court by swearing that he has a defense and then turning up in court with not a word to be said in his favor. This section had possibilities of great usefulness within its narrow range. It was amended in 1877, but only to make it inapplicable to suits against executors or administrators of decedent estates.

The next major improvement came in 1907 as a correction of the criticism just taken. In the Practice Act of that year were added the very vital words with respect to the defendant's affidavits of merits: "and specifying the nature of such defense." Now the plaintiff and defendant are on a parity. Plaintiff must in his affidavit "show" the nature of his demand, the defendant must "specify" the nature of his defense. Also there is added what is left to implication in Section 36 of the 1872 Act.

If the affidavit of defense is to only a portion of the plaintiff's demand, the plaintiff shall be entitled to a judgment for the balance of his demand, and the suit shall thereafter proceed as to the portion of the plaintiff's demand in dispute as if the suit had been brought therefor. . . .

Section 36 was clear that the plaintiff could win the uncontested portion of his claim, but was not specific that he could also proceed to trial on the contested balance.

Such were the statutes that grew up through the years

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36 An act in regard to Practice in Courts of Record, § 36 (Approved Feb. 22, 1872).
38 Act of June 3, 1907, § 55, Laws, 1907, p. 455.
and to which the framers of the 1933 Act looked for guidance. Though these framers were writing a momentous and long overdue chapter in Illinois procedural history, one cannot help feeling that as to summary judgments they let a grand opportunity slip through their fingers. There is an almost slavish adherence to the words of the prior enactments.

... if the plaintiff, in any action upon a contract, express or implied, or upon a judgment ... for the payment of money, ... or in any action to recover possession of specific chattels, shall file an affidavit ... on the affiant's personal knowledge, of the truth of the facts upon which his complaint is based and the amount claimed (if any) over ... all just deductions, credits, and set-offs (if any), the court shall, upon plaintiff's motion, enter a judgment in his favor for the relief so demanded, unless the defendant shall, by affidavit of merits filed prior to or at the time of the hearing on said motion, show that he has a sufficiently good defense on the merits to all or some part of the plaintiff's claim to entitle him to defend the action. If the defense is to a part only of the plaintiff's demand a judgment may be entered ... for the balance of the demand, and the case shall thereafter proceed as to the portion of the plaintiff's demand in dispute as though the action had been originally brought therefor. ...

In 1941 the legislature amended Section 57 to bring within its compass suits in equity, as well as actions at law, and to allow the defendant to have a summary judgment of dismissal in his favor. The applicable suits are contracts, actions on money judgments, and suits for specific chattels. This is surely very narrow territory. The English statute had long been more liberal. New York was just in the process of expanding its rule. And the legislators need only have looked across to the neighboring state of Michigan to find a thriving new summary judgment procedure.

The advance in New York was joyfully hailed by Justice (now Judge on the Court of Appeals) Finch, who as presiding Justice of the Appellate Division, Supreme Court, First Department, was instrumental in promulgating the amendments to Rule 113 in 1932 and 1933. Rule 113 as adopted in 1921 allowed summary judgment to recover liquidated sums on contracts and judgments (the old "debt on a record" action). The amendments extended it to unliquidated

40 2 Comp. Laws (1929), § 14260.
contract demands (except breach of promise to marry), to demands (except penalties) under statutes, to claims for recovery of specific chattels with or without claims for hire or damages, to foreclosures of liens or mortgages, to specific performance of land contracts, and to accountings arising on written contracts. If no dispute appears from the affidavits, except the amount of damages, an immediate hearing on that is to be ordered, before a referee, judge, or judge and jury. If the defendant's affidavit shows a conclusive defense he can have an affirmative judgment of dismissal in his favor. The defendant may put in counterclaims and have summary judgment on them. Indeed, the statute carried the procedure so far that the next year the Commission on the Administration of Justice recommended that the remedy be available "in any action." In connection with the beneficial development of procedural devices to accelerate litigation the importance of leaving with the judges of the courts the rule-making power cannot be overestimated. If judges, sensing the need for procedural renovations, content themselves with half measures, then judge-made rules may of course be abortive. Apparently that was the case in the Hilary Rules. But generally speaking the judges are more apt to know how efficiently to manage the business that comes before them day after day than a legislature lacking continuity of membership and wanting, in the hurly-burly of politics, sustained interest in judicial administration. We have seen how the Judicature Act of 1873 gave the judges rule-making power. In 1848 it was taken from the courts in New York. Says Judge Finch, Since 1848, court procedure in the State of New York, as indeed in many if not most of the other states of the Union, has suffered by reason of the legislative branch of the government taking over the regulation of court procedure. Such action was highly anomalous. Looked at from the standpoint of reason, it would have been much more logical for the courts to have laid down a procedure assuring certain fundamental procedural rights to the citizen before his liberty or property could be affected by legislative enactments. What actually took place, however, was that the judicial branch of the government, which had the power to pronounce the decision and even hold an act of the Legislature void because in con-

42 Rule 113.
44 § 74.
flict with the provisions of the constitution, was rendered powerless to regulate the details and in some cases even the minute details of its own procedure. 45

Under the Civil Practice Act the power to make rules of procedure is now held by a majority of the justices of the Appellate Division, the rules to be promulgated by the joint order of the Presiding Justices of the Four Departments. 46

The 1933 Illinois Act, it is true, returns some rule making power to the justices of the Supreme Court, thus departing from "immemorial tradition." 47 Sunderland calls it "a very extensive rule making power." However extensive it may be generally, it is far from extensive as to summary judgments. The types of cases in which the summary judgment can be used are rigidly limited to the four that are sanctioned by Section 57. These the judges cannot budge. The court's rules have been confined to drawing the plans for the affidavits to be used of claim and merits under the section. 48

The trouble with this division of authority in respect to the regulation of procedural law is that the legislature retains too much power and yet not enough to act intelligently and wisely, while the judges are not given power broad enough for effective action. The Judicature Act of 1873 confined itself to matters of jurisdiction and judicial organization, but the New York Civil Practice Act and now the Illinois Act of 1933 deal with procedure with a fine toothed comb.

... the major part of the field of procedure still remains under the control of the legislature. Every reform is a compromise. The tradition for statutory regulation, 49 which had continued unbroken during the entire

48 Ill. Rev. Stat. 1941, Ch. 110, §§ 259.15 and 259.16.
49 It may be that this tradition for statutory regulation which Professor Sunderland intimates was too firmly established even to "justify" an attempt to supplant it can be classified under the head of "the influence of the frontier spirit surviving the frontier." Cf. Roscoe Pound, "Some Principles of Procedural Reform," 4 Ill. L. Rev. 388, 397n. (1910). Frontier society feared that the power of the judge might weight the scales of justice. Every effort was
history of the state, was probably too firmly established to justify any attempt to entirely supplant it.\textsuperscript{50}

Imagination and daring might have led the framers of the Illinois Act into the path later taken by the proponents of the Federal Rules. An Illinois enabling act might have granted the justices of the Supreme Court power to make rules of procedure and to merge law and equity. A committee under the Court’s supervision might then have drafted the rules, with ears open to the suggestions of the bar but with eyes fixed on the goal of a flexible and modern procedure.\textsuperscript{51}

And yet without giving to the judges a complete and ample rule-making power the framers could still have made better use than they did of the available experience of other jurisdictions with summary adjustments. In 1931 summary judgments were rendered in over 80 percent of the cases proceeding to judgment in the King’s Bench Division.\textsuperscript{52}

“This is the real explanation why less than twenty judges can dispose of all the litigation in England brought in the

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\textsuperscript{51} Perhaps this speculation is too optimistic, for after the legislature abolished the forms of action and the formal distinction between actions at law and suits in equity, Civil Practice Act, § 31, the judges promulgated Rule 9 requiring every complaint to be marked “at law” or “in chancery.” The distinction is entrenched and perpetuated by the 1941 amendment of § 57. Ill. Rev. Stat. 1941, Ch. 110, § 181.

\textsuperscript{52} The score for 1931 was: summary judgments, 5,434, judgments after trial, 1,240. Civil Judicial Statistics, England and Wales, 1931, Table IX, p. 16, Command Paper 4187. For 1937 the score was 3,758 to 1,470. Civil Judicial Statistics, England and Wales, 1937, Table IX, p. 16, Command Paper 5859. For 1938, the latest year available, the score was 4,067 to 1,462. Civil Judicial Statistics, England and Wales, 1938, Table IX, p. 16, Command Paper 6135.
higher courts of general jurisdiction." In New York between June 1932 and June 1933 there were 1,569 applications, of which 988 were granted. "Causes were thus disposed of which, if tried in the ordinary way, would have taken the time of several additional Supreme Court Judges for one full court year." Detroit lawyers told Professor Sunderland that summary judgment practice was "the only thing that makes the life of a Detroit lawyer worth living." And yet the framers apparently closed their eyes to the data from other jurisdictions before them and looked only to the prior Illinois statutes. Thus the affidavit of merits section of the 1907 Act turns up with a few minor changes as the summary judgments section of the new Civil Practice Act. Dean (now Judge) Clark, in reviewing the Act for the Chicago Law Review, called the section providing for summary judgments "admirable." He was apparently trying to make the framers and supporters of the Act feel a glow of accomplishment. Yet he could not resist a footnote. The provisions for summary judgment, ... good as far as they go, are still over-restricted in the kinds of actions to which they apply, in the lack of definite authority to the court to decide questions of law on the summary proceedings, and in the lack of authority to grant such judgments to defendants.

And as to the Act in general he says,

Making all due allowances, however, for substantial gains, one cannot avoid regret that an act in many ways so extensive in character and so

56 § 55; Hurd's Ill. Rev. Stat. 1913, Ch. 110, § 55.
57 § 57; Hurd's Ill. Rev. Stat. 1913, Ch. 110, § 57.
58 Ibid.
60 Id. at 211n. This lack of authority to the court to enter a summary judgment of dismissal in defendant's favor where plaintiff by the affidavits is shown to have no case was most unfortunate. One of the amendments to Rule 113 gave the court such authority in New York. "I remember the ineffectual plea of a defendant prior to the adoption of the amendment, that if he could not have the advantage of summary judgment procedure, but instead had to proceed by formal trial he would be required to go to the inconvenience and expense of bringing witnesses from seventeen states. This amendment will lower the nuisance value of unfounded claims and suits." Edward R. Finch, "Summary Judgment Procedure," 19 A.B.A.J. 504, 508 (1933). The absurdity of not letting
upsetting to the present settled habits of bench and bar did not go still further to establish an outstanding system of practice. Members of the profession will now find that they must adjust themselves to an essentially new procedure. There would have been no additional hardship in going the complete distance in the way of reform.\(^6^1\)

And go the complete distance Dean Clark did in framing the summary judgment rule for the Federal Rules of Civil Procedure. A party asserting, or against whom is asserted, any kind of claim may have a summary judgment.\(^6^2\) This does not mean that the Advisory Committee were hasty in their decision to go the whole way. At the outset alternative forms, either excluding certain torts, on the English model, or all torts as in New York, or even all claims for unliquidated demands,\(^6^3\) were mulled over. But these were wisely put aside in favor of the complete rule. Then, too, the procedure is not limited to cases where the parties employ affidavits. “The judgment sought shall be rendered forthwith if the pleadings, deposition, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”\(^6^4\) The rule is broadly enough stated to allow a summary judgment of dismissal when defendant can by affidavit show that the court lacks jurisdiction over his person or the subject matter, or that the plaintiff lacks capacity to sue or is an infant, or that another action is pending, or that res judicata, statute of frauds, or statute of limitations, are applicable.\(^6^5\)

Finally, a pre-trial practice is sanctioned. If judgment

defendant have summary judgment of dismissal was accentuated by Illinois Rule 16 (not in the original schedule) letting him have summary judgment on a counterclaim. This is now corrected by the 1941 amendment of § 57. Ill. Rev. Stat. 1941, Ch. 110, § 181.

\(^{61}\) Id. at 211.

\(^{62}\) Rule 56(a) and (b), 28 U.S.C.A. foll. § 723 (p. 704).

\(^{63}\) At first the Advisory Committee evidently thought that the Michigan and Illinois Statutes applied only to liquidated claims. Tentative Draft, Part Two, Oct. 16, 1935, (confidential—not published) Rule 70. In this they were wrong. Michigan Comp. Laws (1929) § 14620; Illinois Rev. Stat. 1935, Ch. 110, § 185. This they corrected, as to Illinois at Tentative Draft II, Jan. 13, 1936, (Confidential—not published) Rule 41, p. 3, as to Michigan at Tentative Draft III, Mar. 1936 (Confidential—not published) Rule 45, p. 3.

\(^{64}\) Rule 56(c), 28 U.S.C.A. foll. § 723(c) (p. 704).

is not rendered on motion the court may ascertain and specify what facts exist and what are contested. It may then make an order confining further proceedings to the controverted issues, and on the trial the facts so specified are to be taken as proved. Taken in connection with Rule 16 on Pre-Trial Procedure this provision is one of the most salutary advances in procedural law since the advent of summary judgments in England in 1853. And within past two years pre-trial proceedings have found their way to Illinois, first in connection with the use of summary judgments in the Municipal Court of Chicago, and more recently in the other courts of record pursuant to one of the 1941 amendments of the Civil Practice Act. So it is not at all fantastic to urge that the framers of a complete new Civil Practice Act, riding on the flood tide of procedural reform, let slip a grand opportunity, when they drew Section 57 of the 1933 Act without opening to all cases the summary judgment procedure.

III

AFFIDAVIT OF MERITS PRACTICE UNDER THE 1872 ACT

Compared with her economic and political development the story of Illinois' procedural law is a sombre chapter in her history. She failed to live up to the standards set for her both by the needs of her citizens and by the example of neighboring jurisdictions in procedural reform. We have seen how her "affidavit of merits" and summary judgment statutes have lingered behind. And yet when we come to examine the cases that arose under such statutes as Illinois had, it appears that a fairly successful practice grew up. To be sure the statutes were narrow, applying only in contract cases.

66 § 56(d), 28 U.S.C.A. foll. § 723(c) (p. 704).
67 This is one of the most important courts of the nation, having jurisdiction in the city of Chicago over all actions on contracts, for recovery or conversion of property, for injury to real estate and for recovery of possession of real estate. Actions on "implied" contracts include those where though no contract relation exists between the parties, the defendant has received money or property for which, in equity and good conscience, he ought to pay. In such cases, the amount involved is unlimited. The court also has jurisdiction in all other civil cases where the amount claimed by the plaintiff does not exceed $1,000, exclusive of costs. Municipal Court Act, § 2, Laws 1905, p. 158. There are thirty-seven judges at respectable salaries provided for by the Act, § 8 (Laws 1929, p. 315, §§ 6½ and 7).
And yet the bench welcomed them as they came along, and interpreted them liberally with a view to accelerating the speed of litigation. The bar, taking the cue, came to use them in more and more cases as familiarity with the procedure developed, until it appears that within its accepted limits summary judgment procedure is a standard weapon of Illinois litigants today. It may even be ventured that the broad construction and forward looking attitude displayed by the judges in the reported cases on the "affidavit of merits" statutes contributed toward making a superannuated and inadequate procedural vehicle last as long as it did.

An indication of how well the statutes worked may be found in the types of cases in which the procedure was invoked. Of course no statistics are available, but the reported cases show the trend. From comparatively few types of cases arising under Section 36 of the 1872 Act, comparatively many types of cases are reported under Section 55 of the 1907 Act and the bona fide summary judgments section of the Act of 1933.

From the start the judges took the position, with but a few aberrations, that the purpose of the affidavits was to speed up justice. Technical objections and objections requiring literal construction of the sections were brushed aside. The salutary judicial doctrine established itself, not without a struggle, that the affidavits limited the triable issues to those set out therein, thus very much speeding the trial if the case could not be settled by the affidavits themselves. And frequently the court even refused to allow the defendant to plead or file an affidavit if he had been guilty of dilatory tactics.

Section 36 of the 1872 Act applied to contracts, expressed or implied, for the payment of money. As might be expected in the rising commercial community, suits on notes were most frequent. Then there were suits on the common

68 Cavanaugh v. Witte Gas & Gasoline Engine Co., 123 Ill. App. 571 (1905); Gottfried v. German National Bank, 1 Ill. App. 224 (1878); Henry v. Meriam & Morgan Paraffine Co., 83 Ill. 461 (1876); Mayberry v. Van Horn, 83 Ill. 289 (1876); McCord v. Crooker, 83 Ill. 556 (1876); Rock Valley Paper Co. v. Nixon, 84 Ill. 11 (1876); Smith v. Bateman, 79 Ill. 531 (1875); Wels v. Mathews, 75 Ill. App. 395 (1897); Whiting v. Fuller, 22 Ill. 33 (1859), under the Cook County statute, Act of 1853, § 3.
counts on accounts stated, suits on merchants' running accounts, and on "special contracts." An appeal bond was held a proper contract to pay money. But the most ingenious case brought within the statute was an action in which the plaintiff filed a distress warrant for unpaid rent. At common law distress is a remedy available to a landlord without legal proceedings. The tenant's goods can be distrainted and sold, to satisfy the landlord's claim. But an Illinois statute provided that "a proceeding by a distress warrant must be regarded as a suit for the collection of rent." Therefore the distress warrant was held by the Supreme Court to be an action on the lease for the payment of the rent according to the lease's terms, and so susceptible of affidavits of merits procedure. From this case on it appeared that the courts would make "contract for the payment of money" stretch to the limit of statutory elasticity.

At an early date, the courts realized that the greatest utility could be got from the affidavits if the parties were compelled therein to show the nature of the claim or defense intended to be advanced or relied on. In the 1872 Act it was easier to make the plaintiff show his cards than the defendant. Section 36 said that the plaintiff's affidavit must show the nature of his claim, while the defendant need merely swear that he believed he had a good defense to the action. This did not ask very much of the defendant. Indeed

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69 Haggard v. Smith, 71 Ill. 226 (1874); Chicago Stamping Co. v. Mechanical Rubber Co., 83 Ill. App. 230 (1898).
70 Kassing v. Griffith, 86 Ill. 265 (1877); Kern v. Strasberger, 71 Ill. 303 (1874).
71 Allen v. Watt, 69 Ill. 655 (1873).
72 Coursen v. Browning, 86 Ill. 57 (1877); Mestling v. Hughes, 89 Ill. 389 (1878); Myers v. Shoneman, 90 Ill. 80 (1878); Pinkel v. Domestic Sewing Machine Co., 89 Ill. 277 (1878).
73 Bartlett v. Sullivan, 87 Ill. 219 (1877).
74 Rev. Stat. 1874, Ch. 80.
75 Bartlett v. Sullivan, 87 Ill. 219, 221 (1877).
76 Occasionally this was enough to trip up the defendant, however. In Henry v. Meriam & Morgan Paraffine Co., 83 Ill. 461 (1876), plaintiff sued for $380 on a note and $40 expenses of collection. Defendant pleaded the general issue and nullified corporation, and filed an affidavit of merits to the $40 claim. Plaintiff's motion for judgment for $380 "as by default" was granted. In affirming the judgment the Supreme Court pointed out that if defendant's affidavit of merits goes to only part of the claim, plaintiff can have judgment at once for the uncontested balance. One's suspicion in reading the case is that defendant's counsel did not realize exactly how the statute worked and did not realize that the judges were going to take it seriously.
the Supreme Court said in 1875 that the only effect of the statute was to require defendant to verify his pleadings.

Said Mr. Justice Walker:
We have never heard it questioned that the General Assembly has the power to require any or all pleadings to be sworn to as a condition precedent to their being filed in the case. And this is the effect of this statute, and its only effect.\(^{77}\)

Fortunately the narrow notion expressed in this opinion did not seem to prevail, and the court may have taken such a limited view moved by innate judicial conservatism in deciding constitutional questions. The constitutionality of Section 36 had been attacked by defendant's counsel. Two years previously the court had taken a much stronger position. Referring to the affidavit of merits required by Section 36, Mr. Justice Scholfield said:

We perceive no ambiguity in this language. It is reasonably plain and concise, and it leaves no doubt upon our minds that it was intended by the legislature that the affidavit filed with the plea should disclose, with reasonable certainty, the entire ground of defense relied on, other than such as is of a dilatory character.\(^{78}\)

Just how much of the defense to be relied on had been shown was a matter pretty much in the discretion of the trial judges, for they were the ones to tell, as the grist of cases ground through the mill, whether the defendants' affidavits were sufficient.

But it can be demonstrated that the defendant's affidavit was not a mere verification of the pleadings. For in every case where the affidavit of defense went only to part of the claim the plaintiff could have a judgment at once for the uncontested balance, notwithstanding the fact that the pleadings did contest the whole declaration.\(^{79}\) "Having, in the affidavit, alleged one defense, which has been confessed, it is not competent to set up an additional defense not included in the affidavit. The defendants having been allowed all that they claimed, the judgment does them no injury."\(^{80}\)

\(^{77}\) Honore v. Home National Bank, 80 Ill. 489, 492 (1875).

\(^{78}\) Allen v. Watt, 69 Ill. 655, 657 (1873). The holding was that after one affidavit had been knocked out, defendant could not set up another ground of defense which had not been shown in the original affidavit. Defendant's affidavit showed a defense to only a part of the plaintiff's claim, and the court granted plaintiff's motion for judgment for the balance, denying defendant's motion for continuance because another action for the same cause was pending.

\(^{79}\) Haggard v. Smith, 71 Ill. 228 (1874); Mayberry v. Van Horn, 83 Ill. 289 (1876).

\(^{80}\) Allen v. Watt, 69 Ill. 655, 657 (1873).
Further, the court frequently held that the affidavit of one of two joint plaintiffs or defendants was sufficient, and also the affidavit of someone other than the plaintiff, such as his attorney or agent. The court said succinctly in Brigham v. Atha, "It can make no difference who makes the affidavit of claiming, so it is the truth." There is no case in the reports letting the defendant's agent or attorney make his affidavit of merits. Perhaps this would be too great a stretch of the words requiring defendant to file with his plea an affidavit stating that he verily believes he has a good defense. But Snow v. Merriam set the seal on the doom of the doctrine that all Section 36 requires the defendant to do is verify his pleadings. Plaintiff declared on the common counts, filing an affidavit of claim. Defendant pleaded, without filing an affidavit of merits. Plaintiff moved for judgment "as by default." Defendant then moved for leave to file verified pleadings. The court gave judgment for plaintiff, denying defendant's motion. Thus not even verified pleadings, wanting a supporting affidavit of merits, could have saved defendant from suffering judgment under Section 36. It seems clear, therefore, that the defendant is required to do more by way of showing his hand than simply verifying the pleadings, even under the 1872 Act.

Of course since the purpose of the statute is to provide a speedy remedy for the plaintiff in cases where he does not believe that defendant has any substantial answer to his claim, it is incumbent on the plaintiff to state exactly what his claim is and "the amount due him." Where in suing on a note plaintiff asks for the principal amount "with interest" he cannot have judgment on his affidavit of claim if he fails to state the interest rate. But if the affidavit demands "in-

81 Haggard v. Smith, 71 Ill. 226 (1874).
82 Whiting v. Fuller, 22 Ill. 33 (1859), under Act of 1845; Smith v. Bateman, 79 Ill. 531 (1875).
83 Brigham v. Atha, 84 Ill. 43 (1876); Young v. Browning, 71 Ill. 44 (1873).
84 84 Ill. at p. 44.
85 Ill. Rev. Stat. 1941, Ch. 110, § 100.
86 133 Ill. App. 641 (1907).
87 Willard v. Bristol, 251 Ill. App. 234 (1929) holds that verified pleadings, unsupported by affidavit, do not meet the requirement of § 55 of the 1907 Act.
88 Gottfried v. German National Bank, 1 Ill. App. 224 (1878).
terest according to the tenor of said notes,” it is sufficiently
definite to satisfy the statute.\footnote{Gottfried v. German National Bank, 91 III. 75 (1878).}

In determining the amount of recovery when the plaintiff
won “as by default” usually the court could give the plaintiff
just what he asked for. However, sometimes it was necessary
for plaintiff to produce evidence, on assessment of the dam-
ages. Section 37 of the Civil Practice Act of 1872 provided that
when any part of the demand was on an account, and de-
fendant suffered default, the affidavit of claim might be tak-
en as prima facie evidence of the amount due on the ac-
count, but the court might require further evidence.\footnote{Haggard v. Smith, 71 Ill. 226 (1874) is a case where plaintiff’s affidavit is so used.} This
use of the affidavit could, therefore, only be made in actions
on accounts, and such use was discretionary with the court.\footnote{See Kern v. Strasberger, 71 Ill. 303 (1874).}

Of course receiving the affidavit might not be reversible
error where other evidence sustained the assessment.\footnote{In Rock Valley Paper Co. v. Nixon, 84 Ill. 11 (1876), plaintiff’s affidavit was received in assessing damages in an action on a note. Judgment for plaintiff affirmed. There being no opposing evidence at all, production of the note warranted the judgment. “The affidavit was unnecessary and without any importance as evidence.”} But
the Supreme Court reversed a judgment “as by default” on
an appeal bond where the judge had used the affidavit of
claim as evidence of the amount due. “This action was
brought not upon an account,” said Chief Justice Craig, “but
upon an instrument in writing under seal, and as the sta-
tute\footnote{Rev. Stat. 1874, Ch. 110, § 37.} does not embrace a case of this character, of course
the affidavit could not be used as evidence.”\footnote{Mestling v. Hughes, 89 Ill. 389, 391 (1878).} The bond
alone was not sufficient to sustain the judgment because it
only named a penal sum, while plaintiff’s recovery was to
be the amount of the damages occasioned by breach of the
covenant.

In construing the statute as to the time when the affida-
vits must be filed and the time when the plaintiff may have
judgment “as by default,” the courts show a vigorous de-
termination to hasten the plaintiff along. It might be thought
that affidavit procedure would be available only when plain-
tiff filed his affidavit of claim “with his declaration.”\footnote{Rev. Stat. 1874, Ch. 110, § 36.} The
courts have allowed far wider latitude, and not required in all cases that plaintiff file his declaration and affidavit of claim simultaneously. Moreover, plaintiff might have an opportunity to amend his affidavit.\(^96\) It may not even be necessary for plaintiff to file his affidavit of claim until he learns that defendant is going to plead to the merits.\(^97\) Nor, in getting judgment, need plaintiff move to strike defendant’s unsupported plea from the files, as that would be but waste motion.\(^98\)

The court may even be so ruthless as to give judgment for plaintiff before defendant can plead at all. This would seem impossible under the wording whereby plaintiff shall be entitled to judgment as by default unless defendant ‘shall file with his plea an affidavit’ of merits.\(^99\) One cannot tell whether defendant is going to file an affidavit of merits with his plea until he has filed his plea. But where defendant filed a frivolous motion for a continuance, the court gave judgment for plaintiff on the spot, without letting defendant plead at all.\(^100\) If the defendant demurs, the court may also not let him plead after his demurrer is overruled.\(^101\) This is strong medicine, well calculated to prevent dilatory defensive tactics. Further, the defendant cannot challenge the sufficiency of the affidavit of claim on motion: he must plead and file an affidavit of merits first.\(^102\)

A curious twist to the general rule that plaintiff cannot

\(^96\) Goldie v. McDonald, 78 Ill. 605 (1875). It is hard to decipher the exact facts from the report. Apparently plaintiff filed his declaration while the court was on vacation. Then he betook himself of affidavit procedure, and more than ten days before the opening of the new term he filed an affidavit of claim. This he then amended. Plaintiff got judgment because defendant failed to file an affidavit of merits. On appeal defendant urged that plaintiff did not file his affidavit, a fortiori his amendment affidavit, with his declaration. The court affirmed the judgment for plaintiff.

\(^97\) Wells v. Mathews, 75 Ill. App. 395 (1897). Plaintiff got a judgment by default on a note, which defendant had reversed because a plea in bar was on file when the judgment was rendered. Plaintiff then filed an affidavit of claim and got judgment because defendant filed no affidavit of merits. The court in affirming the judgment and dismissing defendant’s objection that the affidavit of claim had not been filed “with the declaration” said that under these circumstances plaintiff had filed his affidavit in time because he filed it as soon as he knew defendant was going to put in a plea.

\(^98\) Snow v. Merriam, 133 Ill. App. 641 (1907).

\(^99\) Rev. Stat. 1874, Ch. 110, § 36.

\(^100\) Chicago Stamping Co. v. Mechanical Rubber Co., 83 Ill. App. 230 (1898).

\(^101\) McCord v. Crooker, 83 Ill. 556 (1876).

\(^102\) Pinkel v. Domestic Sewing Machine Co., 89 Ill. 277 (1878).
get judgment before defendant's plea is filed occurred in Robien v. Kooie.\textsuperscript{103} Here plaintiff commenced suit before a justice of the peace, filing an affidavit of claim. Defendant filed no affidavit of merits and plaintiff got judgment. Defendant appealed. A trial \textit{de novo} was awarded in the circuit courts to appeals from the justices of the peace. Plaintiff then moved for judgment under Section 36 and the circuit court granted the motion before the case came on for trial. This the appellate court reversed, and rightly so. For pleadings in cases appealed from justice courts are oral. Therefore though defendant might have been in default for lack of a plea had the action been started in the circuit court, he was not in default here because an oral pleading could not in the nature of things be due until the case came on for trial. The affidavit procedure cannot hustle along the case of a plaintiff who starts before a justice of the peace.

As to the affidavits themselves, finally, the courts took a liberal attitude under the 1873 Act, not limiting them to affidavits made in Illinois. An affidavit sworn to before an Illinois commissioner residing in Ohio was held sufficient,\textsuperscript{104} as was one sworn to before an official of another state authorized to administer oaths.\textsuperscript{105}

\textbf{IV}

\textbf{AFFIDAVIT OF MERITS PRACTICE UNDER THE 1907 ACT}

In addition to the types of cases appearing under the 1872 Act the 1907 Act saw a broadening of the stream of litigation by affidavit of merits procedure. The usual actions on notes,\textsuperscript{106} on the common counts, for goods sold and delivered,\textsuperscript{107} and on bonds\textsuperscript{108} appear in the reports. But other new and variegated types appear. There are suits seeking payment for personal services,\textsuperscript{109} or for payment of special

\textsuperscript{103} 107 Ill. App. 219 (1903).
\textsuperscript{104} Kassing v. Griffith, 86 Ill. 265 (1877).
\textsuperscript{105} The official was an alderman and \textit{ex officio} justice of the peace of Pittsburgh. Kern v. Strasberger, 71 Ill. 303 (1874).
\textsuperscript{106} Perry v. Krausz, 166 Ill. App. 1 (1911).
\textsuperscript{109} Harrison v. Rosehill Cemetery Co., 291 Ill. 416, 126 N.E. 177 (1920), ac-
contracts to supply goods, by manufacture or sale. There are suits on insurance policies, both for burglary and on life. There are suits for breach of special contracts to buy commodities. There is an action on a contract to convey realty, an action for damages for breach of an agreement by a seller to repurchase a parcel of land, an action against a guarantor of payment of rent by the plaintiff’s tenant, and an action for damages for a tenant’s holding over after expiration of the lease. The affidavit procedure swept into the favor of litigants quarreling over transactions involving realty to a far greater degree than before. An interesting case involved an action for breach of warranty of title where the grantor had covenanted to pay $10 liquidated damages for each acre to which the grantee and his successors should not retain quiet enjoyment. Finally, there were suits on other miscellaneous contracts.

There are a number of cases illustrating smooth operation of the affidavit procedure and a commendable grasp by the courts of how it ought to work in fairness to both parties. Occasionally the courts made short shrift of a recalcitrant defendant. In Cramer v. Illinois Commercial Men’s Association defendant pleaded elaborately but failed to file an affidavit of merits. The court indignantly refused to set


114 Technically this is an action on a bond for nonconveyance. McKey v Provis, 181 Ill. App. 364 (1913).
120 260 Ill. 516, 103 N.E. 459 (1913).
aside a judgment for plaintiff when defendant's counsel endeavored to excuse himself by saying that plaintiffs in actions on insurance policies rarely filed affidavits of claim and that therefore he had not bothered to see to it that defendant file an affidavit of merits.

But the courts were also astute to protect the legitimate rights of defendants. In *Dailey v. Grand Lodge, Brotherhood of Railroad Trainmen*^{121} defendant filed an affidavit of merits with his pleas. Plaintiff demurred to the pleas. The demurrer was overruled but the trial court granted plaintiff's motion for judgment. This was error because defendant had a valid plea supported by affidavit on the record and the Appellate Court reversed. And in *Harrison v. Rosehill Cemetery Company*,^{122} the court reversed a judgment for plaintiff where defendant's affidavit in fact disclosed a valid defense.

The 1907 Act adhered to the wording of the earlier statute making affidavit of merits procedure in cases of contracts "for the payment of money." The prediction implicit in *Bartlett v. Sullivan*^{123} that the court would stretch the statutory words to the limit of elasticity was fulfilled in the cases under the 1907 enactment. It is easy to see that a contract to pay $10 an acre on a breach of warranty of title is a contract for the payment of money. It is easy to see that a contract to buy goods is a contract to pay money. It is even easy to see that a contract to repurchase land is a contract to pay money. Here the only thing defendant has failed to do is pay according to his agreement. But it is a very different thing to say that a contract to deliver lumber is a contract to pay money. When the lumber mill fails to make good the buyer sues in special assumpsit for damages for breach of a contract to deliver, not for breach of a contract to pay money. In *Stevens-Jarvis Lumber Company v. Quixley Lumber Company*,^{124} the court held that a contract to deliver lumber is an implied contract to pay money, within the meaning of Section 55. Unless the idea is adopted that a contract is an obligation to do one of two things in the alternative, either to perform or to pay damages, this seems terribly strained.

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^{121} 226 Ill. App. 164 (1922), reversed on other grounds, 311 Ill. 184, 142 N.E. 478 (1924).

^{122} 291 Ill. 416, 126 N.E. 177 (1920).

^{123} 87 Ill. 219 (1877).

^{124} 229 Ill. App. 419 (1923).
The court, relying on a distinction made in *Harty Bros. & Harty Company* v. *Polakow*\(^{125}\) between a contract implied in law from the existence of a plain legal obligation existing without regard to the intention of the parties and a contract implied in fact from acts or circumstances indicating mutual intention, considers an obligation to pay arising from breach of a contract to deliver lumber to be an implied contract to pay money. But the distinction seems to be wholly insubstantial. A right of action in debt on a statutory penalty is not on an implied contract to pay money.\(^{126}\) An action by a public official to collect taxes is not on an implied contract by the taxpayer to pay.\(^{127}\) An action on a judgment is not on a contract by the judgment debtor to pay.\(^{128}\) To hold, then, that there is a contract implied in law to pay money in an express contract to deliver lumber is a remarkable victory of shadow over substance. And yet the result is wholly desirable, as a matter of statutory construction, because it opens to the beneficent influence of Section 55 all actions on which the plaintiff may sue in special assumpsit, whether his contract was to pay money, erect a building, or deliver a carload of lumber.

We have seen how the 1907 Act required that the affidavit of merits specify the nature of the defense on which the defendant intended to rely. No longer was it to be left to the interpretation of hesitant judges that in the affidavit the defendant was to show his cards. Under the new clause the courts made good the rule that on trial of a cause in which affidavits had been used, the issues be limited to those raised therein. "Such affidavits," said Presiding Justice Dibell "are pleadings in the sense that they limit the issues to be tried," and held them to be part of the record and examinable by the appellate court without the aid of a bill of exceptions.\(^{129}\)

But although this doctrine is sustained by cases in all four districts of the Appellate Court, a line of cases in the second district seems irreconcilable with the accepted view.

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\(^{125}\) 237 Ill. 559, 86 N.E. 1085 (1909).

\(^{126}\) O'Shea v. Farrelly, 302 Ill. 126, 134 N.E. 2 (1922).

\(^{127}\) People v. Dummer, 274 Ill. 637, 113 N.E. 934 (1916).

\(^{128}\) Rae v. Hulbert, 17 Ill. 572 (1856).

In *Reddig v. Looney*\(^\text{130}\) plaintiff sued for services as a plumber, and the affidavit of merits did not deny that plaintiff had furnished materials and labor. On the trial the court charged that this must therefore be taken as admitted. The Appellate Court, Second District, affirmed the judgment for the plaintiff. This was in 1917. *Kadison v. Fortune Bros. Brewing Company*\(^\text{131}\) was a previous case to the same effect. The first district held that when a landlord sued a tenant for holding over after expiration of a lease, an affidavit of merits denying holding over did not put in issue execution and assignment of the lease, ownership of the property, or the right of the owner to sue for liquidated damages for hold-over according to the tenor of the lease. "All defenses the nature of which are not set up in the affidavit, are considered waived and are unavailable on the trial."\(^\text{132}\) Then in *Goddard Tool Company v. Crown Electrical Manufacturing Company*\(^\text{133}\) Mr. Justice Heard for the Second District said:

> We have set forth the affidavits of claim and of merits in so much detail for the reason that by Section 55 . . . the respective parties are limited in their evidence to the matters controverted by the affidavits.

After this the Second District went off on a frolic of its own. Worse, the court was apparently unaware of what it was up to. In *Manufacturers State Bank of East Moline v. American Surety Company*\(^\text{134}\) plaintiff sued on a surety bond on account of peculations of its president, alleging waiver by defendant of a ninety days notice requirement in the instrument. The affidavit of merits but in issue the president's theft but did not deny waiver of the requirement that it be notified within ninety days after the loss. The trial court excluded evidence controverting the alleged waiver, and judgment was reversed. Yet despite this decision the court blandly put down the following remarks, which seem entirely inconsistent with the result:

> Before the amendment [requiring the defendant to specify the nature of his defense] was adopted the gates were wide open to the defendant to offer any proper proof under any plea filed by him but since the adoption of that amendment the gates are closed against him as to all proofs not tending to support the specific defenses set up in the affidavit of defense. We have held in *Reddig v. Looney, supra*, that matters of

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\(^{130}\) 208 Ill. App. 413 (1917).

\(^{131}\) 163 Ill. App. 276 (1911).

\(^{132}\) Id., 279.

\(^{133}\) 219 Ill. App. 34, 38 (1920).

\(^{134}\) 230 Ill. App. 474 (1923).
defense not set out in the affidavit of merits are waived and that a defendant will not be permitted to give in evidence any matter of defense not stated in his affidavit.\textsuperscript{135}

It is almost incredible that a court could hand down a decision so diametrically opposite to its written opinion in the case.

\textit{McPherson v. Board of Education of Waukegan Township High School District}\textsuperscript{136} followed in 1925, and at least brought the court's opinion into consistency with its decision. The trial court had refused to hear evidence in mitigation of damages of what plaintiff, after dismissal in breach of his teaching contract, could have earned in the employ of someone else. The affidavit of merits did not controvert the damage of $411 alleged by plaintiff. The Second District reversed. Mr. Justice Partlow said:

Under the general issue every material allegation of the declaration must be proved as alleged, and if they are not proved the party bringing the suit has not made out a cause of action. . . . This was the rule prior to the passage of Section 55 . . . and it continued to be the rule after the passage of that statute, except insofar as it was changed by the statute. When appellee filed his declaration accompanied by an affidavit stating the nature of his claim and the amount due, . . . if appellant had filed no pleas and no affidavit of defense, appellee would have been entitled to judgment against appellant, as in a case of default. But when appellant filed the general issue and a special plea accompanied by an affidavit stating the nature of his defense, a different rule was set in operation so far as appellee was concerned. Appellee was no longer entitled to judgment as in case of default, but it thereupon became his duty to prove every material allegation of his declaration and, if he failed to do so, he was not entitled to judgment. This court so held in the recent case of \textit{Manufacturers State Bank of East Moline v. American Surety Company of New York}, 230 Ill. App. 474.\textsuperscript{137}

This is a clear and complete statement of the heretical doctrine, and the court adhered to it in a carefully considered opinion five years later. "According to the contention of appellees," said Presiding Justice Jett, throwing up his hands in horror in \textit{Cox v. Aetna Casualty and Surety Company},\textsuperscript{138} "a case would be tried in a cause in which an affidavit of claim had been filed by the plaintiff, and an affidavit of merits by the defendant, upon the issues made by the affidavits instead of by the pleadings." Here defendant of-

\textsuperscript{135} 230 Ill. App. at 481.  
\textsuperscript{136} 235 Ill. App. 426 (1925).  
\textsuperscript{137} 235 Ill. App. at 429.  
\textsuperscript{138} 261 Ill. App. 394, 399 (1930).
ferred evidence that a condition of the policy that the home office of the company be notified of loss had not been met, though it had not raised the issue in its affidavit of merits. For exclusion of this evidence the judgment was reversed.

And yet it seems that the result so scorned by the Second District is preferable. The best opinion on the subject was delivered by Presiding Justice Matchett for the First District in Cooper v. Anderson.\textsuperscript{139} There a landlord sued his tenant on the latter's guarantee of rent on assignment of the lease to a third party, now in arrears. Defendant's affidavit of merits showed that on assigning the lease he had been released of all further liability for rent. On the trial defendant put in no evidence to support this, and plaintiff's evidence showed a guaranty. But plaintiff offered no evidence to prove execution of the lease, assignment, or amount of rent due, and for this omission the trial court directed a verdict for defendant. This the appellate court reversed. The court relied on the decisions in Reddig v. Looney, Allen v. Watt, Goddard Tool Company v. Crown Electrical Manufacturing Company, and Kadison v. Fortune Brothers Brewing Company and specifically repudiated the Manufacturers State Bank and McPherson cases.

The many decisions of the courts of this district to which we have referred preclude this court from accepting the interpretation of Section 55 as expressed in these last two cases. The statute in question is remedial in its nature, not in derogation of the common law, and should, we think, be liberally construed to the end that the injustice of delaying litigants in the collection of their just claims may be obviated. It is true that the affidavits do not take the place of pleadings, but the evidence to be offered and the issues to be tried are limited to the issues as made by the pleas as verified by the affidavits. When the plaintiff has filed an affidavit with his declaration, pleas avail nothing unless they are also verified, and only to the extent that the material facts alleged therein are supported by the affidavit of defendant. It can hardly be supposed that it was the intention of the legislature to require a plaintiff to offer proof upon the trial of a cause which the defendant would be precluded from denying.\textsuperscript{140}

Unfortunately no case in the Supreme Court resolved this conflict but the latest case on the point favors the view just set out.\textsuperscript{141}

\textsuperscript{139} 246 Ill. App. 1 (1927).
\textsuperscript{140} Cooper v. Anderson, 246 Ill. App. 1, 11 (1927).
Another improvement wrought by the 1907 Act was the specific provision that where plaintiff was entitled to judgment for the uncontested part of his claim, he might still proceed to trial as to the contested portion. *McKey v. Provus*\(^1\) nicely illustrates this. Plaintiff sued on a penal bond for $3,000 for defendant's failure to convey a parcel of land. Defendant's affidavit admitted liability of $1,500. The court gave judgment for that amount at once, without prejudice to plaintiff's right to go to trial as to the rest. Plaintiff went to trial, proved that the property was worth the full $3,000, and got a judgment for that amount less a credit to defendant for the $1,500 already paid. "Section 55 . . . must be regarded as a highly remedial statute intended to do away with the technical rule of the common law which permitted only one judgment to be entered in a suit . . . ."\(^2\)

If there can be more than one judgment in an action brought under Section 55, there would seem to be no analytical objection to plaintiff's taking a voluntary nonsuit on the contested portion of his claim, and suing for it later. But at this the court balked. In *Bein v. Blazejczyk*\(^3\) plaintiff sued for goods worth $155. Defendant's affidavit conceded liability for $80. Plaintiff took judgment for that and dismissed as to the rest of his claim. Then he brought another action for $75. The court held that the judgment in the former case was a bar. The statute was not intended to do away with the common law rule which forbids the splitting of a cause of action, the court thought. "That rule of the common law is based upon the fundamental principle that there must be an end of litigation, and that a party should not twice be vexed with the same cause of action."

It is true that a party should not be twice vexed, but analytically Section 55 seems to allow him to be. If plaintiff can go to trial for the contested portion of his claim, there is no earthly reason why he has to go to trial in the very same proceeding. Certainly the statute does not say so.\(^4\)

*Teague v. John E. Burns Lumber Company*,\(^5\) an

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1\(^{12}\) 181 Ill. App. 364 (1913).
1\(^{13}\) Id. at 367.
1\(^{14}\) 213 Ill. App. 243 (1919).
1\(^{15}\) Of course there would be further annoyance to the defendant, and increased cost to the public in having two lawsuits where one would do.
1\(^{16}\) 187 Ill. App. 225 (1914).
analogous case, correctly analyzes the effect of Section 55. Plaintiff sent defendant a bill for $1,800 for lumber sold and delivered. Defendant returned a check for $800 and a receipted bill for $1,000 for damages resulting from plaintiff's delay, notifying plaintiff not to deposit the check unless he accepted it in full payment. Under applicable law acceptance would be an accord and satisfaction. Yet plaintiff banked the check and sued for $1,000. The court held that because of Section 55 he might recover. "If the debtor can be made to pay promptly though unwillingly, by execution, the portion of the indebtedness admitted, without prejudice to the right of the creditor to the rest, why should he not be so made to pay by the creditor by the use of a check for such admitted portion, notwithstanding his desire to have it returned?" 147

Here plaintiff has cashed the check. It is as if he had got a partial judgment for the amount admitted to be due. But here he can sue, take a nonsuit, sue again. So he should be able to do the same where he has already got a partial judgment. The only objection the court can trot out is the lame talk about not splitting a cause of action. The cause of action is the same in each case. In each it is in part admitted, in part contested. In each it is tried as to the balance. If plaintiff can sue whenever he wants to in one, on analysis there is no reason why he should not sue when he wants to in the other. 148

As to other points about the affidavit of merits practice, the cases sailed along under the 1907 Act on a fairly even keel, following the same course as under the 1872 Act. Section 55 made it clear that defendant in specifying the nature of his defense had to disclose facts. For instance, it is not enough for defendant in a suit on a note to swear that plaintiff is not a holder in due course, he must show why. "Specifying" the nature of the defense means the pointing out with particularity the facts which constitute such defense. To do this evidently the affidavit must state in a direct and positive manner facts sufficient to disclose the elements of a substantial defense. The affidavit should be as to existing facts, so

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147 Id. at 227.
148 The reasoning in the somewhat similar case of Watson v. Lee Loader & Body Co., 302 Ill. 276, 134 N.E. 719 (1922) supports this argument.
that if false the party making it could be convicted of perjury." 149 The affiant must swear that matters set forth are true or believed true by him. 150 Of course it is enough that affiant swear. It is not necessary for the defendant to swear to the truth of the matters stated in his affidavit of merits when he is relying on the affidavit of another. 151 The affidavit, to protect the defendant, must go to the whole or some particular portion of plaintiff's claim, and the portion to which it is a defense must be specified. In two cases the court struck out affidavits of partial defense and gave plaintiff judgment "as by default" where the affidavits did not make clear what part of plaintiff's claim was contested. 152 

As to the amount of damages that may be awarded under Section 55 the courts seemed quite certain of their power to settle the figure. Where neither party offers evidence, the court may enter judgment for the amount claimed 153 or call for additional evidence. In the Orsinger case the court found the assessment easy without evidence submitted by plaintiff because a commodity like flour has a market price of which the court can take judicial cognizance.

As we have seen from the cases, a fairly successful practice grew up and flourished under the limited affidavit of merits sections of the Practice Acts of 1872 and 1907. More could have been desired certainly. But the bar seems to have been aware of the opportunities and the bench of the responsibilities of Section 36 and Section 55. In praise of the full-fledged summary judgment section of the 1933 Act Mr. Sunderland is highly critical of the old affidavit procedure. The affidavit of merits "is practically useless as a means for ascertaining whether or not the defendant has a bona fide defense." 154 "... the defendant was almost invariably able

150 Hunter v. Troup, 226 Ill. App. 343 (1922).
151 White v. Central Trust Co., 259 Ill. App. 68 (1930). Under the 1907 Act it is clear, therefore, that defendant need not file his own affidavit of merits. Cf. the discussion under the 1872 Act. As to plaintiff's affidavit, Clark v. Selfridge, 195 Ill. App. 357 (1915) intimated that plaintiff might have to file his own, but this was not true under the 1872 Act and Orsinger v. Consolidated Flour Mills Co., 284 F. 224 (1922) held the affidavit of plaintiff's attorney sufficient.
to make a showing which would defeat him. To do so the defendant was only required to file an affidavit of merits in which he stated his belief that he had a good defense, and indicated its nature. Such a device was practically useless."\(^5\)

On the cases that arose under Section 36 and Section 55 this seems to be an unjust damnation of affidavit of merits procedure. Dean Clark is far nearer an accurate appraisal of the working of the two sections when he says, "The Illinois procedure, in its terms, is simple and, within its limits (contract actions), has proved to be an efficacious remedy."\(^6\)

V

**SUMMARY JUDGMENT PROCEDURE UNDER THE 1933 ACT**

Eight years of the summary judgment section of the Civil Practice Act of 1933 have not brought so many cases to the reporters as twenty five odd years of affidavit of merits practice under the old Section 55, but the trend to a broader use of the procedure is indicated by the cases that have come already to the appellate courts. Plaintiffs are seeking recovery on notes,\(^157\) on bonds,\(^158\) on guarantees of the indebtedness of others,\(^159\) and for personal services\(^160\) as before. Suits to enforce life insurance policies are brought against regular companies rather than fraternal benefit societies.\(^161\) A receiver sues on a share subscription\(^162\) and a


\(^{156}\) Charles E. Clark and Charles U. Samenow, "The Summary Judgment," 38 Yale L. J. 423, 460 (1929). Though now antiquated by new statutes, especially the 1932 and 1933 amendments to New York Rule 113, this is still the best article in the field.


\(^{158}\) People v. Marx, 370 Ill. 264, 18 N.E. (2d) 915 (1938).


\(^{162}\) Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523, 19 N.E. (2d) 363 (1939).
shareholder sues to rescind a subscription and recover back money paid.\textsuperscript{163} There is a suit to enforce a shareholder’s double liability in a defunct bank.\textsuperscript{163a} As on contracts "implied in law" recovery is sought of interest accrued on a judgment\textsuperscript{164} and of arrears of alimony.\textsuperscript{165} There is a suit to recover a deposit in a savings and loan association.\textsuperscript{165a} There is an action by a surety on a probate bond against an administrator for the latter’s defalcations which the surety had to make good to the next of kin.\textsuperscript{166} There is a suit to recover part of a fund applied, contrary to the terms of a contract, to the defense of a suit for an alleged patent infringement.\textsuperscript{167} Under the clause in Section 57 applicable to actions to recover possession of land, an action under the Forcible Entry and Detainer Act\textsuperscript{168} was settled by summary judgment.\textsuperscript{169} A landlord recovered hundreds of thousands of dollars of unpaid rent.\textsuperscript{169a} And under the clause in Section 57 applicable to judgments, a plaintiff got a summary judgment in an action on a foreign judgment.\textsuperscript{170} Narrow as are the types of cases to which summary judgments are limited, yet in its early youth Section 57 has displayed considerable versatility.

In other states the most vital case arising under any new summary judgment procedure is the case to test its constitutionality against the claim that defendant is deprived of his right to trial by jury. The short and complete answer to this is that defendant is not deprived of a right to have the issues tried by jury when there are no issues for a jury to try.

Perhaps the most formidable constitutional argument was raised in New York, for Chief Justice Savage in a burst of irritation had at an early day denied plaintiff’s motion to

\textsuperscript{163} Mee v. Marks, 304 Ill. App. 370, 26 N.E. (2d) 516 (1940).
\textsuperscript{163a} Eagle Indemnity Co. v. Haaker, 309 Ill. App. 406, 33 N.E. (2d) 154 (1941).
\textsuperscript{165a} Gliwa v. Washington Polish Loan and Building Asso., 310 Ill. App. 465, 34 N.E. (2d) 736 (1941).
\textsuperscript{166} People for the use of Dyer v. Sawyer, 284 Ill. App. 463, 2 N.E. (2d) 343 (1936).
\textsuperscript{168} Ill. Rev. Stat. 1935, Ch. 57, § 11.
\textsuperscript{169} Wainscott v. Penikoff, 287 Ill. App. 78, 4 N.E. (2d) 511 (1936).
\textsuperscript{169a} Crilly v. Board of Education, 312 Ill. App. 18, 37 N.E. (2d) 873 (1941).
strike as sham a plea of general issue as "unheard of."\textsuperscript{171} The first case\textsuperscript{172} under the Field Code adopted the more liberal view, but this was overruled by \textit{Wayland v. Tysen}\textsuperscript{173} in 1871. Thereafter the court uniformly held that there existed "no power to strike out an answer consisting of a general denial of the material allegations of the complaint, even though the party verifying the answer was guilty of perjury."\textsuperscript{174} It is not unnatural that the courts derived considerable satisfaction in overruling this line of cases and sustaining the summary judgment rule under the New York Civil Practice Act.\textsuperscript{175}

Curiously enough no case has come up to test Section 57 of the Illinois Act. Instead, constitutional attack focussed on one section of the summary judgment rule applicable, under its own rules,\textsuperscript{176} to the Municipal Court of Chicago. Rule 111 of the Municipal Court formerly provided for summary judgment in cases of debts or liquidated demands, in the usual manner, except that, after affidavits of claim and of merits were in, the court might, on a further affidavit on plaintiff's behalf, by an affiant having full knowledge of the

\textsuperscript{171} Wood v. Sutton, 12 Wend. 235 (N.Y., 1834). Mr. Justice Page, who was chairman of the Committee promulgating the Rules under the Civil Practice Act of 1920, cites a number of early English cases allowing the general issue stricken as sham. See Dwan v. Massarene, 192 N.Y.S. 577 (1922).

\textsuperscript{172} People v. McCumber, 18 N.Y. 315 (1858).

\textsuperscript{173} 45 N.Y. 281 (1871).


\textsuperscript{175} Dwan v. Massarene, 192 N.Y.S. 577 (1922); General Investment Co. v. Interborough Rapid Transit Co., 235 N.Y. 133, 139 N.E. 216 (1923).

\textsuperscript{176} Authorized by § 20 of the Municipal Court Act, Laws, 1905, pp. 225, 225, the court under the energetic and scholarly guidance of the late Chief Justice Sonstebey had adopted an elaborate set of rules. Some criticism was made on the ground that they were too complicated and difficult for the lawyer, having only occasional Municipal Court practice, to manipulate. See Schofield, "The New Costs and the New Rules of the Municipal Court," 15 Chi. Bar Asso. Record 85 (1934). It was recommended that these rules be abandoned in favor of the applicable sections of the Civil Practice Act of 1933. Hershenson, "Report of the Committee on the Municipal Courts," 16 Chi. Bar Asso. Record 281 (1935). The Supreme Court's decision in Ptacek v. Coleman, 364 Ill. 618, 5 N.E. (2d) 467 (1936) was that the Civil Practice Act was not intended to apply to the Municipal Court and could not constitutionally apply because it has not been submitted to the voters of the city by referendum as provided in Ill. Const., Art. IV, § 34 (amendment adopted 1904). But this decision has been strongly criticized. McKinley, "The Civil Practice Act and the Municipal Court of Chicago," 19 Chi. Bar. Asso. Record 11 (1937). Be this as it may, the new Municipal Court Rules have done away with Rule 111, supra, simply substituted verbatim C.P.A. § 57 and Rules 15 and 16, to constitute Rules 72, 73 and 74. The new Municipal Court Rules became effective July 1, 1940.
acts and stating that the defense was not in good faith and the facts on which such belief was grounded, give summary judgment for the plaintiff. In *Diversey Liquidating Corporation v. Neunkirchen* plaintiff as receiver and liquidator of an insolvent trust company sued to recover a shareholder’s subscription, and filed an affidavit of merits sworn to by its secretary. Defendant denied the subscription and by affidavit asserted that he had subscribed subject to the proviso that his deposit in the trust company be accepted as payment. Plaintiff then moved to dismiss, on an affidavit that the defense was false and made in bad faith. This the trial court granted. The Supreme Court reversed the judgment on the ground that Section 3 of Rule 111 deprived defendant of his constitutional right of jury trial.

This decision on analysis seems unsound. The purpose of the affidavits, all agree, is to disclose whether there are any triable issues of fact. This disclosure is to the court. The trial judge must decide whether any issue should go to the jury just as the trial judge must decide when to direct a verdict, either when plaintiff has not sustained the burden of going forward with evidence, or has proved his case “up to the hilt.” Summary judgment procedure simply makes the parties unfold their tales to the judge before the jury reaches the scene. Whether plaintiff is allowed one or a dozen affidavits does not affect the quantum of evidence necessary to take the case to the jury. If the defendant can force a jury trial by putting in a sham affidavit in bad faith and for the sole purpose of delay, we are back to *Wood v. Sutton* in one fell swoop. "If there are not issues of fact to be determined,

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177 Rule 111, § 3.
178 370 Ill. 523, 19 N.E. (2d) 363 (1939).
179 The ruling that the summary judgment for plaintiff be reversed can be supported on the ground that in this instance defendant’s affidavit of merits did make an issue for the jury. From the all too telegraphic statement of facts it is not clear that plaintiff’s affidavit gave details demonstrating the falsity of defendant’s story, and was unanswered. But because the trial judge may have made an error is no ground for declaring a rule unconstitutional and void.

The argument in favor of the section’s constitutionality is, of course, based on the hypothesis that the plaintiff’s counter affidavit demonstrated conclusively the defendant’s mendacity, bad faith and intent to delay.

180 The Municipal Court’s note to Rule 111 says “it enables the court to ascertain in advance of a trial in the usual manner, not only whether a defendant has a meritorious defense to the plaintiff’s action, but also whether the plaintiff’s claim is meritorious. For this purpose the court may not only receive affidavits but may hear witnesses in open court. By this means the court can put
one is not entitled in a civil case to trial by jury .... The summary judgment law does not deprive defendant of a right to trial by jury if the affidavits present no question of fact."

Another case that gives trouble under the Municipal Court Act is *Kellogg v. Kellogg.* There plaintiff sued for arrears of alimony due under a divorce decree of a District of Columbia Court and moved for summary judgment. There is no difficulty in getting this under Rule 111, which opens summary judgments to debts or liquidated demands, but it is not so easy to bring it within the jurisdiction of the court at all. Section 2 of the Municipal Court Act opens the doors to "all actions on contracts, express or implied, whether implied in law or fact." The court construes an obligation to pay alimony as a "contract implied in law." This is fantastic. The accepted Illinois law for years has been that a judgment creates no contractual duty. It is hard to see why a decree should be different.

The courts under Section 57 apparently will follow in the train of the earlier cases in holding that the purpose of the

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183 Rae v. Hulbert, 17 Ill. 572 (1856). Cf. the discussion under Stevens-Jarvis Lumber Co. v. Quixley Lumber Co., 229 Ill. App. 419 (1923). Of course § 57 gave the courts authority to give summary judgments in actions on judgments, and this problem is peculiar to the Municipal Court.

It has been suggested that the early Illinois cases are wrong, as a matter of orthodox common-law procedure, and that the common-law action on a foreign judgment was in general assumpsit. The common law theory seems to have been that debt lay on a domestic judgment of a court of record because it was in essence "debt on a record," while assumpsit lay on a foreign judgment because a foreign court could not give a judgment "of record," in the home country. Nevertheless debt and assumpsit seem to have been used more or less interchangeably at common law. Chitty, Pleading (16th Am. Ed., 1876) 119, 121, 123; Denison v. Williams, 4 Conn. 402 (1822); Scott & Simpson, Cases on Judicial Remedies 239, 240 (1938).

In Illinois it was early settled that debt lay in an action on a domestic, Greathouse v. Smith, 4 Ill. (3 Scam.) 541 (1842), or foreign (in the sense of sister state), Rae v. Hulbert, supra, judgment. It does not affirmatively appear that
affidavits is to determine whether there are any triable issues of fact. The affidavits must state facts and the trial will be limited to the issues stated therein. So far so good. But the Appellate Court's decision in *Chicago Title and Trust Company v. Cohen* is big with unpleasant implications. In an action on a guarantee of bonds, defendant pleaded the general issue, but his affidavit alleged fraud in the inducement. At common law fraud could be shown not under the general issue, but only by affirmative defense. The court held that the affidavit failed to deny defendant's signature on the bond, that the issue of fraud could not be raised because it was not pleaded, and gave summary judgment for plaintiff. The decision is unsatisfactory in that it does not appear whether it was commenced before or after January 1, 1934, the effective date of the Civil Practice Act. The action is said to be in assumpsit, and yet Mr. Justice Matchett goes out of his way to state that Section 57, not the old Section 55, is applicable. At any rate, the purpose of the Act is to introduce notice pleading, and it would be folly not to let defendant prove what he raised by affidavit of merits and to resurrect from their well-merited graves the old rules about what can come in under the general issue and what must be specially pleaded under this or that common law form of action.

Under the new section it is accepted that anyone's affi-
Of course Rule 15 provides that facts must be stated on the personal knowledge of affiant, and the court will make short shrift of an affidavit on information and belief. Of course the time when one party or the other may get a summary judgment under Section 57, a sensible practice seems to be developing. Certainly when defendant pleads to a complaint supported by affidavit without filing an affidavit in reply, plaintiff can get a summary judgment at once. If an affidavit of merits raises a real issue of facts, of course the case must go to trial. A proper way to fight an affidavit is by motion to strike. If defendant makes a motion to strike without filing an affidavit of merits it is like a demurrer, in effect admitting the facts in plaintiff's affidavit. If the motion to strike is denied, plaintiff can have judgment forthwith. If the motion is granted defendant may then move to dismiss plaintiff's complaint. This affords defendant some measure of affirmative relief, though it is not as sure as New York Rule 113's provision that defendant can have summary judgment of dismissal. For the court may grant a party leave to file another affidavit after one has been dismissed. However, the parties may not go on filing new affidavits forever. The court can call a halt where it will. Furthermore, the benefits of the New York and Federal procedure, allowing the defendant an affirmative judgment of dismissal, are now available in Illinois courts through the 1941 amendment of Section 57.

Dean Clark, in commenting on Section 57, regretted "the lack of definite authority to the court to decide questions of
This fear is doomed to prove groundless, it appears. For the courts have not un-naturally held that plaintiff can have a judgment when the affidavit of merits makes out no legal defense. Such a decision of course involves a determination by the judge of the applicable law. And the courts have even specifically decided that plaintiff can get a summary judgment when the only question is one of law, even without explicit statutory authority.

VI

SUMMARY JUDGMENTS IN PRE-TRIAL PROCEDURE

Before long summary judgments may be called on to play an even more important role than ever they have in the past under American statutes. The wave of procedural re-form that gathered headway in the early thirties and rose magnificently to give the Federal Rules has not spent its force. Pre-trial procedure, left optional by Rule 16, has been attempted by Federal courts in a number of districts. Armed with opportunity for effective pre-trial discovery and the taking of depositions on the one hand and with a right to summary judgment on the other, a litigant can find powerful aid in pre-trial procedure. "No proposal for procedural reform in American courts is more widely discussed today than that of pre-trial hearings."

The operation of pre-trial procedure is simple. A few weeks before the case is ready for trial, the parties are called before a pre-trial judge. Discovery and depositions have made available to adversaries reasonably accurate knowledge of the case they will have to meet. A competent pre-

trial judge can then limit the issues to be tried, get stipulations from counsel avoiding proof of formal matters, and limiting the number of experts to be called, and often even in many cases bring about a settlement. Add to the authority of the judge the power to give summary judgment for either party and the pre-trial procedure is a full-fledged agency for rendering swift and summary justice.

With or without summary judgments, pre-trial procedure in many states has overcome the initial resistance of the bar and assumed a vital role in the judicial machinery. Calendars have been speeded up so that litigants need not wait months and years before getting their day in court. The cost of litigation in terms of time wasted by parties and counsel is cut down, the public cost of maintaining courts and judges as a playground for litigation that is procedurally outmoded and wasteful is reduced. The courts can settle more controversies per judge-hour.

Illinois has not been deaf to the voices of pre-trial partisans, and the Circuit Court for Cook County has had a modified form of procedure since 1935. But under its “assignment procedure” the only function of the “assignment judge” is to assign the cases to the proper calendar and to encourage conciliation and settlement if possible. He has no power to determine what the issues in the case, or, indeed, whether there are any such issues. The full and ample provisions for depositions and discovery provided by the Civil Practice Act of 1933 cannot be availed of on the assignment procedure, nor can the summary judgment section of the Act. The power of the judge is “moral” rather than legal, persuasive rather than compelling. And yet by the assignment procedure the Cook County Circuit Court has had extraordinary suc-

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201 Massachusetts, Michigan, Wisconsin, Texas. The list is not exhaustive.
202 How the bar saved pre-trial procedure from impending doom on election day in Detroit is dramatically told in “Pre-Trial Hearings and the Assignment of Cases,” 33 Ill. L. Rev. 699, 704 (1939).
203 In three years of operation, pre-trial procedure brought the Superior Court for Suffolk County (Boston), from four years behind to two years ten months. The Detroit court went from forty to ten months in arrears during seven years of operation. See “Pre-Trial Hearings and the Assignment of Cases,” id. at 703.
204 §§ 58, 60, Rules 17, 18, 19. The best general discussion of depositions and discovery under the new act is George Ragland, Jr., “Discovery before Trial under the Illinois Civil Practice Act,” 28 Ill. L. Rev. 875 (1934).
205 § 57, Rules 15, 16.
cess in speeding up the trial of cases on its docket.\(^{206}\) It was often recommended as perfectly "feasible to extend the present assignment system into a regular pre-trial hearing."\(^{207}\) The Chicago Municipal Court was the first to do just this. The record of cases handled over the first four months of its pre-trial practice is remarkable: of 5,200 odd cases on call in September, 1940, 1,300 had been actually settled by the pre-trial conference and a total of 27,000 disposed of by settlement, pre-trial conference, or dismissal, as against just under 500 disposed of by trial before jury or judge. And for the future the court has been able to promise that "a cause of action filed for jury trial will automatically be called for for pre-trial within sixty days after filing, and it will be set for trial within thirty days."\(^{208}\)

It may have seemed too "forward-looking" for members of our bar to urge even before summary judgment procedure has been enlarged to cover all types of litigation, as in Federal Rule 56, that it should be thrown to the job of implementing pre-trial hearings in the Illinois courts. But there is no need for Illinois procedural law to linger behind the caravan as it has in the last century. Today, as never before, a premium is put upon efficiency. It may be that the very future prosperity and safety of the American Commonwealth will depend on the efficiency of its organized society in meeting the needs of people. For years the need of efficient administration of justice has not been satisfied. Therefore the development of the past year is gratifying.

The first of this year 1942 saw a new pre-trial procedure section, added as Section 58\(^{1/2}\) to the Civil Practice Act by the 1941 amendments, take effect.\(^{209}\) This amendment authorizes pre-trial procedure pursuant to rules promulgated by the Supreme Court. The Supreme Court has adopted a new rule, Rule 23 A, requiring all trial courts to provide a pre-

\(^{206}\) "The lapse of time before trial in jury cases was reduced from a year and a half to about eight months." "In nonjury cases the lapse of time before trial has been reduced from sixteen months to thirty days." "Pre-Trial Hearings and the Assignment of Cases," 33 Ill. L. Rev. 699, 708 (1939).

\(^{207}\) Id. at 709.

\(^{208}\) Caplan, "'Pre-Trial System in the Municipal Court of Chicago,'" 22 Chi. Bar. Asso. Record 164 (1941).

\(^{209}\) Ill. Rev. Stat. 1941, Ch. 110, § 182.
trial conference calendar. Furthermore, even if no pre-trial conference is required by statute or rule it is open to counsel for either party to move for such a conference.

The Circuit Court of Cook County has implemented Section 58½ and Rule 23 A by the adoption of its new Circuit Court Rule 25½. This provides a permanent pre-trial calendar for law cases and requires the attendance of counsel at pre-trial conferences just as the attendance of counsel is required at the trial itself. These improvements have been with us for so short a time that an accurate estimate of their success cannot yet be made. But on the basis of the experience of the Federal courts, of the courts of other states, and of the Chicago Municipal Court, it is safe to predict that our experience with pre-trial procedure will be most salutary.

"Judicial systems seldom respond to exhortations of reformers that they become practical and efficient. They constantly show a resistance to the demands of everyday needs. When considerations of efficiency are forced upon them, legal scholars usually rush to the defense to show that in the long run an inefficient method of doing things is more efficient than an efficient one would be." But to advocate adoption of a procedural system sound in theory and successful in practice in other jurisdictions should not put one in the class of evangelist or reformer. The tangible advantages have been realized before our eyes.

"The only touchstone of worth of a procedural device or system is its practical operation." The practical operation of pre-trial procedure, implemented on the one hand by depositions and discovery and on the other by summary judgments, can contribute substantially to the wise and effective administration of civil justice. It is in this that in the future summary judgments may find a proud role.

210 For an excellent sketch of all the 1941 amendments of the Civil Practice Act, see Albert E. Jenner, Jr., "Recent Legislation and Changes in Court Rules Affecting Illinois Practice and Procedure," 23 Chi. Bar. Asso. Record 167, 237 (1942). With reference to new Supreme Court Rule 23A, see id. at 208.
211 Id. at 209.
212 Thurman W. Arnold, "Trial by Combat and the New Deal," 47 Harv. L. Rev. 913, 945 (1934).