EXPLANATORY NOTES

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ON RULES OF PROCEDURE RECOMMENDED

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COURT OF APPEALS STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TABLE OF CONTENTS

Law and Equity Rules

Law Rules

Equity Rules

INTRODUCTORY STATEMENT.

This pamphlet contains a number of studies and notes prepared by the Standing Committee's Reporters. The original Reporter, Robert R. Bowie, Esquire, with the assistance of Richard W. Emory, Esquire, prepared the studies on Joinder of Parties and Claims, Third-Party Practice and Summary Judgment. Mr. Bowie's successor, Frederick W. Invernizzi, Esquire, prepared the remaining studies and revised the earlier ones to conform to the action and directions of the Committee The studies and notes relate to the rules recommended by the Committee to the Court of Appeals of Maryland on August 15, 1947.

The studies and notes indicate the background of Federal or State statutes, court rules and judicial decisions, and also those in the English system, which have generally been the basis of the procedure recommended by the Standing Committee. The studies and notes are not part of the rules to which they relate. They have no official sanction; nor are they an official construction or interpretation of them. They were prepared in order to show the source, scope and function of each rule, and to aid the Standing Committee in framing their recommendations; to assist the members of the bench and bar in a better understanding of them; and to aid the Court of Appeals in its consideration of the Committee's recommendations made in its Second Report.

LEVIN C. BAILEY, Chairman,
Court of Appeals Standing
Committee On Rules of Practice and Procedure.

August 19, 1947.

JOINDER OF PARTIES AND CLAIMS
including
THIRD PARTY PRACTICE.

Efficient judicial procedure should, of course, facilitate the expeditious and economical disposition of legal controversies. Thus, several separate trials should not be necessary where a single one would do. Often a number of related claims by different persons may be involved in a single controversy, or several persons may have claims involving substantially similar questions of fact or a defendant may have claims against the plaintiff. If these various situations are handled piece-meal by separate trials, duplication of evidence, partial settlement of the dispute or unfair judgments may result.

Frequently, the related claims could be conveniently disposed of together with a substantial saving in time, effort and expense. When that would be feasible, procedure should be sufficiently flexible to permit it without interposing artificial barriers, which have no relation to efficient practical disposition of controversies. In other words, the joinder of parties and claims should be governed solely by *practical convenience* in disposing of the controversies. Where several matters can be conveniently handled together without unfairness or undue hardship to any party, that should be permitted.[1]

I. Joinder of Claims and Parties.

1. *In Equity.*

The rules developed in equity as to joinder of parties and causes of action reflect these considerations. Multiplicity of suits was discouraged and disposition of the entire controversy in all its aspects in a single proceeding was fostered. Discussing this subject, Miller's Equity Procedure says:

[1] See Blume, *A Rational Theory for Joinder of Causes of Action and Defences and for the Use of Counterclaims,* 26 Mich. L. Rev. 1 (1927); Sunderland, *Joinder of Actions,* 18 Mich. L. Rev. 571 (1920); Arnold, Simonton and Havighurst, *Report to the Committee on Judicial Administration and Legal Reform,* 6 W. Va. L. Q. 36-37, 44-51 (1929).

> "There is no inflexible rule by which to determine whether or not a bill is multifarious. To say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible. It is a question resting somewhat in the discretion of the court, under the circumstances of each particular case. Considerations of convenience in each case have much part in the decision; and the courts endeavor, on the one hand to guard against a multiplicity of suits consequent upon holding a bill multifarious and requiring separate suits; and, on the other hand, against the imposition of needless costs, delays and embarrassments resulting from holding a bill to be not multifarious."[2]

In other words, in equity the problem was largely treated as one of practical administration.[3]

Moreover, in the Maryland General Equity Rules practical convenience was expressly made the test of joinder. Rule 30 provides:

> "The plaintiff may join in one bill as many causes of action cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, *or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action can not be conveniently disposed of together, the Court may order separate trials.*"

2. *At Law.*

At common law, however, the rules on joinder of actions were governed chiefly by the forms of action and not by principles of trial convenience. Historically, since the original writ to the common law Courts authorizing the Court to hear a case was not limited to a single cause of action, the Courts took this as authority

[2] Sec. 105; see Secs. 104-114.
[3] See also, Clark and Brownell, *Joinder of Parties*, 37 Yale L. J. 28 (1927).

for allowing joinder of several claims if they could be based upon the same writ. Thus a plaintiff could join in one action any number of causes of action in assumpsit which he might have against the same defendant. But since the jurisdiction of the Court was limited by the writ to the designated form of action, he could not join a claim in one form of action with a claim in another form of action with a few exceptions, based on the historical fact that certain of the later forms of action developed from earlier forms.[4] At present in Maryland, by the statutory merger of covenant and debt with assumpsit and by judicial decision, it is now possible for a plaintiff to join any actions *ex contractu* against a single defendant or actions in trespass, case or trover against the defendant. But it is not possible to join a claim in contract with a claim for tort; for example, the claim for a breach of warranty could not be joined with a claim for negligence even though both were based on the same fundamental facts.[5]

With respect to joinder of claims by or against different parties, the common law is even more restricted. The claims joined must be between the same parties in the same rights. Different parties asserting separate claims against the same defendant or a single plaintiff asserting separate claims against several defendants could not join in one action. Thus several persons injured in the same automobile accident can not join in one action to sue the person responsible. Likewise, a husband suing for loss of services of his wife could not join in the same action with his wife against the tortfeasor. In the same way related separate claims by a plaintiff against several defendants can not be joined, except that where the concurrent negligence of two persons causes the plaintiff's injuries, he may join them as joint tortfeasors.[6] As a result of these restrictions at

[4] See Sunderland, *op. cit. supra,* n. 1, Blume, *op. cit. supra* n. 1, Clark and Brownell, *op. cit. supra* n. 3.
[5] See Poe, *Pleading and Practice* (5th Ed., 1925), V. I, Secs. 282-286.
[6] See Poe, V. I, Secs. 287-293, 317-322, 381-385, 425-431, 526-531.

law, claims which could conveniently be tried together may now require separate proceedings.

3. *Changes Elsewhere.*

To avoid waste of time and effort from unnecessary duplicate trials, a number of jurisdictions have adopted rules permitting freer joinder of parties and claims. Early efforts in this direction fixed specific categories or classes of claims in which such joinder was allowed. Experience has shown that this method is not satisfactory; it inevitably results in litigation to determine whether or not a particular joinder is permissible. Thus in an attempt to cure the disadvantage of restricted joinder it created another source of re-trials.[7]

In England, however, since 1896 the rules under the Judicature Act have authorized practically free joinder with power in the Court to order separate trials or to segregate claims whenever necessary to prevent delay, prejudice or undue expense. In other words, England adopted for law and equity the principle that joinder should depend upon trial convenience rather than artificial tests. This provision has been sympathetically administered by the Courts in a flexible fashion.[8] In recent years various states in this country have adopted the English principle and have applied similar rules of joinder. This has been done in New Jersey, New York, California, Washington, Illinois and in the Federal Rules of Civil Procedure.[9] Adoption of this method of regulating joinder has been strongly urged by practically all students of the problem.[10] Duplication of unnecessary

[7] See Wheaton, *A Study of the Statutes Which Contain the Term "Subject of the Action" and Which Relate to Joinder of Actions and Plaintiffs and to Counterclaims,* 18 Cornell L. Q. 20 (1932).

[8] English Rules, O. 16 and O. 18 (ANNUAL PRACTICE, 1940). See Blume, *op. cit. supra* n. 1; Sunderland, *op. cit. supra* n. 1; and Hinton, *An American Experiment with the English Rules of Court,* 20 Ill. L. Rev. 533 (1926).

[9] See Millar, *Notabilia of American Civil Procedure,* 1887-1937, 50 Harv. L. Rev., 1017 1021-25; Yankwich, *Joinder of Parties in the Light of Recent Statutory Changes,* 2 So. Cal. L. Rev. 315 (1929); *Recent Trends in Joinder of Parties, Causes and Counterclaims,* (Note) 37 Col. L. Rev. 462 (1937).

[10] See authorities cited in notes 1, 3, 7, and 9.

trials can be prevented wherever it is feasible, the test can be applied in the light of the particular facts in each case, and litigation over procedural matters can be avoided.

II. Counterclaims.

The same factors, which make desirable a flexible rule as to joinder of claims, also make desirable a flexible rule as to the assertion of counterclaims by the defendant. Where the counterclaims are related to the original claim, they may be tried with the original action and time and effort saved. Even where they are unrelated and joint trial is not feasible, the settlement of all claims between the plaintiff and defendant in one action may frequently prevent injustice or unnecessary circuity.[11]

In Maryland the desirability of an unlimited right of set-off has been partially recognized in actions *ex contractu*. In such actions the defendant may set-off *any* claim *ex contractu*, whether liquidated or not, which he has against the plaintiff, and judgment is given only for the difference between the two claims.[12] In such actions, however, claims by the defendant in tort cannot be set-off and in tort actions no set-off is permitted by the defendant either of tort or contract claims. Consequently, in a suit for negligence arising out of an automobile accident the defendant could not counterclaim for his damages but would be required to bring a separate suit, although substantially the same facts would be involved. Likewise, if the plaintiff owed the defendant a debt, the defendant would be unable to reduce the recovery by the plaintiff in the tort action by setting off the amount due.[13]

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[11] See Blume, *op. cit. supra* n. 1; Arnold, Simonton and Havighurst, *op. cit. supra* n. 1.

[12] Art. 75, Secs. 16, 17 (1939 Code). If plaintiff dismisses, defendant can still prosecute his own claim. Art. 75, Sec. 183 (1939 Code). By Art. 75, Sec. 142, defendant is also authorized in his cross-action to claim an injunction or mandamus as provided in Secs. 134-146.

[13] See Poe, V. I, Secs. 612-616.

In addition to a provision like Maryland's, many states also allow as a counterclaim any claim "arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." But like the similar limited rule as to joinder of claims, this rule has proved difficult to apply in practice and has bred litigation.[14]

Under the Judicature Act of 1873, the English rules removed all such restrictions and permitted the defendant to assert as a counterclaim any claim of any character which he might have against the plaintiff, and gave the court power to order separate trials or make other orders to prevent delay or inconvenience.[15] The English practice in this regard is summarized in the English ANNUAL PRACTICE (1940) as follows:

> "Thus an equitable counterclaim can now be raised in an action-at-law and a legal counterclaim in an action in the Chancery Division. A counterclaim may be for either liquidated or unliquidated damages; it may exceed in amount the plaintiff's claim or be less than it. It may have arisen since the writ. In short, if the defendant has a valid cause of action of any description against the plaintiff, there is no necessity for him now to bring a cross-action unless his cause of action is of such a nature that it cannot be conveniently tried by the same tribunal or at the same time as the plaintiff's claim."[16]

Similar provisions for almost unrestricted assertion of counterclaims have been adopted by certain states in this country such as Arkansas, Arizona, New York Connecticut and Illinois,[17] and in the Federal Rules.[18]

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[14] See Wheaton, *op. cit. supra* n. 7.

[15] O. 19, r. 3; O. 21, r. 15 (ANNUAL PRACTICE, 1940). See Judicature (Consolidation) Act, 1925, Sec. 39, incorporating Judicature Act (1873) Sec. 24(3).

[16] At page 343.

[17] See Blume, *op. cit. supra* n. 1; (Note) 37 Col. L. Rev. 462 (1937).

[18] Rule 13.

III. Cross-claims and Third Party Practice

A third aspect of joinder relates to claims connected with the main action, but between co-parties or between a party and a person not a party to the suit.

The policy favoring the settlement of the various aspects of a controversy in a single action so far as possible applies with equal force to subsidiary claims between the parties to the same suit. Thus all the defendants may be liable to the plaintiff but may have different obligations among themselves as to the liability. Or a third person may be liable to the defendant on a contract of suretyship or as a guarantor or for some other reason. By permitting such subsidiary questions to be disposed of in the same action with the main proceeding between the plaintiff and defendant, the convenience of all parties may be promoted.[19]

Cross-claims between co-parties are, of course, well established in equity and are expressly provided for by the Maryland General Equity Rules.[20] Such cross-claims and third party practice are a part of the English practice under the Judicature Acts.[21]

1. *Third Party Practice—Introduction.*

In many cases, a person who is sued may have a right to contribution, indemnity or similar relief from someone else, not a party to the action. Under third-party practice, the defendant may implead the third person who is or may be liable to him in order to have his liability established in the same proceeding. Often this

[19] See Cohen, *Impleader: Enforcement of Defendants' Rights Against Third Parties*, 33 Col. L. Rev. 1147 (1933); Bennett, *Bringing in Third Parties by the Defendant*, 19 Minn. L. Rev. 163 (1935); *Gregory, Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action*, 47 Harv. L. Rev. 209 (1933).

[20] Rule 31.

[21] Rule 28.

will avoid a separate trial involving repetition of testimony and will ensure more consistent judgments on the related claims.

Like many procedural reforms, third-party practice originated in the English rules under the Judicature Act of 1873.[22] It first appeared in the United States in 1883 as Admiralty Rule 56 and has been accepted admiralty practice ever since. In more recent years, a number of states have adopted third-party practice. These include Arizona,[23] Arkansas,[24] Colorado,[25] Iowa,[26] Louisiana,[27] New York,[28] North Carolina,[29] Pennsylvania,[30] South Dakota,[31] Texas,[32] and Wisconsin.[33] Rule 14 of the Federal Rules of Civil procedure, adopted in 1938, extended the practice to all civil proceedings in the federal courts.

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[22] For a history of third-party practice, see Cohen, *Impleader: Enforcement of Defendants' Rights Against Third Parties,* 33 Col. L. Rev. 1147 (1933); Bennett, *Bringing in Third Parties by the Defendant,* 19 Minn. L. Rev. 163 (1935); Moore's *Federal Practice* (1938) Vol. 1, p. 736, *et seq.* See also Gregory, *Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action,* 47 Harv. L. Rev. 209 (1933); Holtzoff, *Some Problems Under Federal Third Party Practice,* 3 La. L. Rev. 408 (1941); Willis, *Five Years of Federal Third-Party Practice,* 29 Va. L. Rev. 981 (1943).

[23] Adopted all Federal Rules of Civil Procedure, including Rule 14, in 1940.

[24] Arkansas Statutes (1945 Supp.) p. 612. Uniform Contribution Among Tortfeasors Act adopted in 1941.

[25] Adopted all Federal Rules of Civil Procedure, including Rule 14, in 1941.

[26] Iowa Code (1935 ed.) Sec. 11155. Applies to all actions.

[27] Louisiana Code of Practice (Dart. 1942) Sec. 378-388. Applies only to contract actions.

[28] New York Civil Practice Act Sec. 193, adopted in 1923. Does not apply to contribution between joint tortfeasors because rights depend on a joint judgment. Fox vs. Western New York Motor Lines, 257 N. Y. 305, 178 N. E. 289 (1931).

[29] General Statutes of North Carolina (1943 ed.) Sec. 1-240, adopted in 1929. Applies only to tort actions.

[30] Purdon's Pennsylvania Statutes Annotated (1945 Supp.), Title 12, Sec. 141, adopted in 1929. Similar to Admiralty Rule 56.

[31] Ch. 167 Acts 1945 adopting Uniform Contribution Among Tortfeasors Act.

[32] See Cohen, *supra* note 22 at 1150.

[33] Wisconsin Statutes (1941 ed.) Sec. 260.19. Very liberal practice developed over a period of years. See Gregory, *supra* note 22, pp. 223, *et seq.*

2. *Maryland Third-Party Practice.*

Third-party practice is now authorized in Maryland in certain cases both at law and in equity.

Equity. Equity Rule 28 authorizes the impleading of a third party where a plaintiff sues only one of two or more persons jointly and severally liable to him. Whenever this occurs, the Rule provides that the obligor who has been sued—

> "* * * may at once proceed by petition in the nature of a cross-bill, against such party as is liable jointly with him, and such party shall be permitted to make himself a party to the original cause, and defend the same and the proceedings in the original cause shall, after the service of such petition, be conclusive as to such other party, and if he shall appear thereto, the same shall be conducted as if he had been made a party thereto in the first instance."

This Rule is useful as far as it goes, but does not cover certain situations, as where the third party is liable to the defendant but not to the plaintiff.

At Law. At law, third-party practice is available only to joint tortfeasors. The provision was enacted as Section 7 of "Uniform Contribution among Tortfeasors Act", which was adopted by Chapter 344 of the Acts of 1941 (Sections 21 to 30 of Article 50 of the Annotated Code, amended Chapter 717, Laws 1947). In order to assist one joint tortfeasor to enforce his right to contribution, this Section (Article 50, Section 27) authorizes him to bring into the action a third party who may be obligated to contribute for the tort. This section was copied word for word from the original Federal Civil Rule 14 with two exceptions: (1) the Maryland statute limits impleading a third party to tort actions in which there is a common liability between the defendant and the third party and a right of contribution between them,[84] whereas the Fed-

[84] See Baltimore Transit Co. vs. Schriefer, 183 Md. 674 (1944), holding that a defendant can not implead a third party against whom he could not claim a right of contribution.

eral Rule is applicable to any type of action, and (2) the Maryland statute provides that the plaintiff "shall" amend his pleadings to assert his claim against the third party, whereas the Federal Rule states that the plaintiff "may" amend to assert his claim against the third party.

The experience under this section has raised certain questions of practice. In Baltimore City, Supreme Bench Rule 230 deals with certain of these problems.

(a) *Amendment by Plaintiff.* The provision that the plaintiff "shall" amend to claim against the third party has apparently caused some confusion. In certain cases, the plaintiff has refused to do so, and, in Baltimore City at least, the courts appear to have concluded that he should not be forced to sue someone against his will.[85] At the same time, the Court of Appeals has indicated that the failure to amend does not affect the defendant's right to implead the third party, and, if the case goes to trial without objection, the plaintiff may recover against the third party, even though he did not amend to assert a claim against him.[86]

(b) *Time for Motion.* Some attorneys seem to fear that the motion to bring in the third-party can be used for delay. To prevent this, the Baltimore City rule requires that such motions be filed "within thirty days after the time for filing an answer to the declaration."

(c) *Pleadings.* Under the present procedure, it is not clear as to when the defendant must submit his pleading to be served on the third party. Also, if the plaintiff does not amend, there has been uncertainty whether the third party should plead to his claim.

(d) *Judgment.* There has also been some doubt about the judgments to be entered in such actions. The con-

[85] Mooney vs. Eastern Trails, Inc., Superior Court of Baltimore City, Daily Record, November 24, 1941; Shaut vs. Baltimore Transit Co., Superior Court of Baltimore City, Daily Record, October 8, 1942.

[86] See Shedlock vs. Marshall, 46 Atl. (2d) 349 (1946), and dissenting opinion of Judge Marbury in Brotman vs. McNamara, 181 Md. 225, 232 (1942).

tingent character of the claim by the defendant against the third party has raised questions as to the form of judgment on his default or after determination of the action. Also, there is uncertainty as to the right of the plaintiff to judgment against the third party if he refused to amend.

Experience under the similar Federal Rule 14 has also suggested the need for certain amendments, which have been recommended by the Advisory Committee on Rules of Civil Procedure of the Supreme Court. Their changes are designed primarily for two purposes:

(1) To require the defendant to base impleader of a third party on liability to him and eliminate his right to do so when the third person is liable only to the plaintiff; and

(2) To clarify the pleadings by the third party and other parties to the action.

Under the circumstances, it seems desirable to amend the present procedure to clarify these points. In doing so, it is also opportune to extend the third-party practice to the other types of claims in addition to joint torts.

IV. Rules Proposed.

The rules proposed for adoption by the Committee are set out in the Second Report of the Committee to the Court of Appeals of Maryland. With some rephrasing, they follow the rules on this topic recommended to the Court of Appeals by the previous Committee on Practice and Procedure in 1940. The Court did not adopt these rules at that time. But as Judge Sloan has pointed out, the Court did not disapprove them, but merely deferred action.

The effect of the various proposed rules is briefly as follows:

Rule 1. *Application and Definitions.*

The effect of this rule is to limit the application of the succeeding rules by defining the terms "action" and "claim". By virtue of the definitions, in an action at law, *only* claims now cognizable at law can be joined or asserted as counterclaims or cross-claims, and in equity, only equitable claims can be so joined or asserted.

The report on this topic submitted to the previous Committee on Rules of Practice and Procedure in 1940 recommended that the parties be allowed to join or assert equitable claims in law actions and *vice versa* in order to carry out fully the policy of disposing of the controversy as a whole. This would conform to the existing practice under the English rules, the Federal rules, and the procedure in most states. The authority of the court to order separate trials is completely adequate to protect the right to trial by jury where requested.

However, the previous Committee decided not to permit the assertion of legal claims in equitable actions or *vice versa* except as now permitted. Accordingly, in their Report to the Court of Appeals, Rule 1 was added to the draft-rules to limit the joinder under them in this way. In view of this background, the rule has been included in the present proposed draft.

Rule 2. *Permissive Joinder of Parties and Claims.*

This rule deals with the discretionary joinder of parties and claims. In substance it embodies the English rules dating from 1873 and 1896 as they have been administered in practice and the corresponding Federal rules, with the exception discussed under Rule 1 above. This rule permits the joinder of equitable claims in equity actions and of legal claims in actions at law as follows:

(a) The plaintiff may join in one action all claims which he may have against the defendant.

(b) Where relief against one party depends on a claim against another, both may be joined. An example of such joinder now authorized in Maryland is a demand to set aside a fraudulent conveyance joined with a suit on the note.

(c) Claims by or against several plaintiffs or defendants may be joined in the alternative, when there is doubt which is entitled to the claims or liable on them.

(d) Separate claims involving different parties may be joined whenever a substantial common question of law or fact is involved or the claims can otherwise be conveniently handled together.

Rule 3. *Counterclaims and Cross-claims.*

This rule adopts substantially the English and Federal practice on permissive counterclaims.

The defending party is *allowed* to assert against his opponent any other claims he may have against him even though arising out of other transactions. This is permissive and *not* mandatory. (The provisions in the Federal practice on compulsory counterclaim are not recommended.) Of course any separate claims would be tried together only insofar as that might be convenient.

This rule also allows one party to assert against a co-party any claim relating to the pending action. This is another aspect of the policy of litigating at the same time all disputes among the parties arising out of a single transaction or occurrence.

Where any counterclaim or cross-claim requires additional parties, the court has authority under this rule to order them brought in as defendants.

Rule 4. *Third-Party Practice.*

This rule is based on Federal Rule 14, the recommended amendments to that Rule, and Supreme Bench Rule 230. The proposed rule will clarify and amend third-party practice in Maryland as follows:

(a) *Extension to Other Actions.* The right to implead a third party is made available in all types of actions, at law and in equity. The need for third-party practice arises in any kind of proceeding where a third party is or may be liable for all or a part of the claim asserted against a party. Experience in England and the United States has clearly shown the value of this procedure in all types of actions.

(b) *Amendment by Plaintiff.* The proposed rule follows Federal Rule 14 in *allowing* the plaintiff to amend to assert his claim against a third party, without *requiring* him to do so. His failure to do so does not, of course, affect the defendant's right to implead the third party, or interfere with the determination of the liability between them in that action. Since the plaintiff will not be required to assert a claim against the third party, the right of the defendant to implead has been limited to cases where the third party is or may be liable to him. In other words, the defendant can no longer implead a third party liable only to the plaintiff, since that would be useless if the plaintiff refuses to amend.

(c) *Making the Motion.* The existing provision permits the motion to be made *ex parte* "before answering," and the Federal Rule is the same. Under the proposed rule, the motion may be made *ex parte* until the action is at issue, but a copy must be served on the plaintiff. As under the Federal practice, the motion must be accompanied by the pleading to be served on the third party. This will avoid delay in serving the third party after the motion is granted, and will also advise the plaintiff of the impleader so that he can assert his claim promptly against the third party, if he wishes.

The granting of the motion is within the discretion of the court in all cases. But to meet the fear of undue delay from late motions, it has been provided that where the motion is made more than thirty days after the case is at issue, it can be granted only if the delay is excusable or not prejudicial.

(d) *Pleadings Under the Proposed Rule.* The proposed rule seeks to resolve the problems of pleading under the present procedure in the following way. The third party is required to make his defense to the third party claim in the same time and manner as in a separate action. If the plaintiff does not claim against him, the third party is not required to plead to the original claim; but since he will be bound by the judgment between the plaintiff and defendant, he may assert defenses of the defendant to the original claim. If the plaintiff elects to assert his claim against the third party, then the third party is required to make his defenses to it in the same time and manner as in a separate action.

To facilitate disposition of all related claims in the one action, the third party is allowed to assert against the plaintiff any claim arising out of the transaction or occurrence on which the original claim was based. This follows the recommended amendments to the Federal Rule.

(e) *Conduct of Proceedings.* In many respects, a third party proceeding is like a consolidated trial of the several claims.[87] The defendant and third party are ordinarily interested in defending against the plaintiff's claim, since the judgment will bind both. In addition, the defendant and third party may have to try out the claim between them. In practice, the order of the proceedings and the participation by the various parties can usually be worked out by agreement, but the court

[87] For a discussion of problems of practice see Cohen, *Impleader: Enforcement of Defendants' Rights Against Third Parties*, 33 Col. L. Rev. 1147 (1933); Bennett, *Bringing in Third Parties by the Defendant*, 19 Minn. L. Rev. 163 (1935).

must have authority to regulate the proceedings so as to avoid injustice or undue delay or expense.[38] Hence the proposed rule gives the court substantially the same authority as in a consolidated trial or joint hearing.[39]

(f) *Judgments Under the Proposed Rule.*[40] Under the proposed rule, the plaintiff would not be entitled to judgment against the third party unless he asserts a claim against him. The only exception might be where the parties had actually tried the case as if he had done so.[41] If the plaintiff does assert a claim against the third party, the problems pertaining to verdict and judgment for the plaintiff are handled in the same manner as in any other case in which there is more than one defendant.

Ordinarily, the defendant's claim against the third party depends upon recovery by the plaintiff from the defendant. If the jury finds for the plaintiff, it must also find as between the defendant and the third party. Because the defendant's rights against the third party are contingent, the judgment entered against him must usually be made conditional in conformity with their

[38] Under the English practice these matters are resolved by directions of the court issued in response to an application therefor. (Order XVIA). Under the Federal Rules and in the several states, these matters are left to the discretion of the court. It is said that they are usually settled by agreement between the parties. See Cohen, *supra,* note 22 at p. 1164-65, Willis, *supra,* note 22 at p. 994.

[39] See Trial Rule 2 (Consolidation).

[40] Problems relating to judgments under third party practice were well discussed by the Supreme Court of Pennsylvania in Vinnacombe vs. Philadelphia, 297 Pa. 564, 573, 147 Atl. 826, 829 (1929):

"If, at the trial, the jury's verdict is in favor of the original defendant, they need go no further; but if they find in favor of the plaintiff, they should also specify in their verdict (if there are issues then pending between the original and additional defendants), whether or not the latter, or any of them, are liable over to the original defendant, or jointly or severally liable with him, for the amount awarded to plaintiff, and the extent of such liability, and the cause should thereafter proceed to final judgment as in other actions; the court having the right, however, to grant a new trial to, or enter judgment non obstante veredicto in favor of any one of the parties without disturbing the other verdict in the case. Whenever the final judgment is in favor of the original defendant, the judgment against the additional defendants, if one has been entered, should be stricken off on motion; but if it is adverse to both the original and the additional defendants, plaintiff, upon receiving satisfaction from the original defendant should mark the suit to the use of the latter" * * *

[41] Compare Shedlock vs. Marshall, *supra* note 36.

rights. The proposed rule gives the court the necessary authority to mold the judgment to fit the case. Thus, if the third party defaults as to the defendant and a default judgment is entered, it can be made contingent and be stricken on motion in the event the defendant defeats the plaintiff's claim.

The proposed rule is believed to meet the major problems which have come to light under the present procedure. Like any procedural device, however, it still requires sympathetic administration to be effective. With that, the rule should aid in the more efficient disposition of controversies. If adopted, it would supersede the corresponding provision in Equity Rule 28 and Section 27 (a) of Article 50 of the Code.

Rule 5. *Separate Trials; Protection of Parties.*

The foregoing rules provide a method for bringing into court all claims which the parties think can conveniently be disposed of together. They are based on the theory that the question of what claims should be litigated in the same action is essentially a problem of convenience in administration. This rule gives the court all the necessary authority to work out the actual trial of the case so as to prevent any confusion, inconvenience, or unnecessary delay as the result of such joinder. Under it, the court can order that one or more of the claims shall be tried separately so as to avoid delay or expense or prejudice. In addition, the court may make any other orders as to the conduct of the proceedings for such purposes. Experience in other jurisdictions shows that these powers of the court are completely adequate to ensure the fair and efficient administration of the system of free joinder.

Rule 6. *Judgment Upon Multiple Claims.*

This rule governs the entry of judgments when more than one claim is presented in the action.

Under section (a) and (b) the court is expected to postpone the entry of final judgment on the various claims until all the claims are disposed of unless the delay will cause injustice. But, if desirable, the court can enter judgment on one or more of the claims before all are finally disposed of and may stay the enforcement of the judgment on appropriate terms. The purpose of these sections is to avoid, so far as possible, piece-meal disposition of a group of related claims and multiple appeals presenting similar or related questions of fact or law. At the same time the rule preserves the power of the court to enter judgment at once on one or more of the claims whenever the delay will be unfair to the parties involved. Again the standard is convenience and the avoidance of duplicate trials or appeals.

This rule also covers the entry of judgment on counterclaim. If recovery is allowed on both claim and counterclaim, the rule permits one to be offset against the other and judgment entered merely for the excess, as is now provided in Section 17 of Article 75 of the Code. The rule also makes it clear that the dismissal of the original claim does not affect the right to proceed with a counterclaim or cross-claim or to enter judgment on it.

Rule 7. Effect on Existing Law.

This rule specifies the statutes and rules which are superseded by the foregoing rules.

V. Discussion of Proposals.

Some may object that these proposals for freer joinder of claims, parties and counterclaims go too far. Experience elsewhere, however, indicates that such fears are unfounded, and that this method is by far the soundest way to handle the problem of joinder.

The reasons for this conclusion may be briefly restated:

(1) The provisions for joinder are permissive only and not mandatory. If a party prefers to assert his own claims separately or independently, he may still do so.

(2) In practice provisions for freer joinder are not abused by the parties. Since the plaintiff usually desires a prompt disposal of his case he does not join unrelated claims by himself or others unless there are good reasons for doing so. While this practical restraint is perhaps less effective as to defendant's counterclaims, this is counterbalanced by the desirability and fairness of settling all the controversies between the parties together. Otherwise a plaintiff may recover judgment against the defendant although he is liable to the defendant in excess of his own judgment. The only practical way to avoid such circuity is to permit the defendant to set up in the action all claims he may have against the plaintiff. Available statistics indicate that unreasonable joinder is seldom attempted.[42] Consequently, objections that such freedom of joinder will seriously impede the administration of justice have proved unfounded.

(3) As to all of these forms of joinder the Court is expressly given broad power to order severance, or separate trials as to any claim or issue whenever necessary or desirable to prevent delay, prejudice or unnecessary expense to any party. Moreover, if unjustified joinder is attempted the court could penalize the party by imposing costs or by other orders. Under these powers, the Court can decide how each case can be most conveniently handled and then make appropriate orders. Where trial is to be by jury, that, of course, is an important factor in determining the method of disposition. The long experience in England with this flexible method of handling joinder shows that it works well and is not difficult to administer in practice.

[42] See Arnold, Simonton and Havighurst, *op. cit. supra* n. 1.

(4) In contrast, attempts to provide for a more limited joinder have proved complex to administer in practice. Where specific categories or situations are set up in which joinder is allowed, procedural litigation has been promoted over the construction and application of such tests. As a result certain of the states have abandoned this method in favor of the more elastic English method.

The proposed rules do not create a substantive right. Such rules relate only to matters of procedure and not substantive rights. Thus, these proposals should not be construed to extend or limit the jurisdiction of the law and equity Courts of this State or the venue of actions therein. Rule 4(d) is designed to meet many of the problems which may come to light in the administration of this procedural device.

Adoption of a similar type of regulation of joinder in Maryland is recommended on the basis of this experience elsewhere with the actual operation of such a system.

SUMMARY JUDGMENT.

I. Summary Judgments in Maryland.

1. *Speedy Judgment Acts.*

Summary judgment was introduced into Maryland practice by Chapter 323 of the Acts of 1858. The procedure under this Act was basically the same as the present Speedy Judgment Acts but applied only to written contracts signed by the defendant and only in Baltimore City. Later Acts have extended the procedure to unwritten agreements and modified it in detail, but have made no major changes.[1] In addition to Baltimore City, sixteen counties now have Speedy Judgment Acts. These are similar but not identical.[2] Prince George's, St. Mary's, Calvert and Charles Counties have the same Act, and the Worcester County Act is very similar to these. The Acts for Carroll and Howard Counties are the same.

The Speedy Judgment Acts have undoubtedly provided a faster remedy for many contract actions for liquidated amounts. But they have a number of shortcomings. Among the major ones are the following.

Lack of Uniformity. The various Acts or types of Acts differ in details of pleading and practice. For example, the Acts allow the defendant varying periods to file his pleas.[3] Under some he has until the next return day after he is returned summoned; under others, fifteen days after the return day, and under still others, 40 days after service upon him. Likewise, the requirements for the affidavits differ among the Acts. The lack of uniformity in these and other respects is a source of inconvenience and unnecessary complexity.

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[1] Acts 1864, Ch. 6; Acts 1886, Ch. 184, Secs. 170-171; Acts 1894, Ch. 173; Acts 1898, Ch. 123, Secs. 312-313.

[2] For a discussion of these Acts, see Pittman, "The Maryland Speedy Judgment Acts" (1938), 2 Md. L. Rev. 305. Since that article was written an Act was enacted for Worcester County by Ch. 216 of the Acts of 1941.

[3] See Appendix A.

Technicality. The practice under the Acts has also become incrusted with many technicalities which may defeat the right to summary relief where it is justified. For example, the plaintiff loses his right to speedy judgment if he includes in his declaration a count not within the Act,[4] or if he replies to insufficient pleas,[5] or if he amends in any material respect his original papers,[6] or if his pleading has technical defects.[7]

Formal Affidavits. The requirements as to the form of the affidavits are unduly artificial.[8] In Baltimore City and 11 counties[9] the plaintiff's affidavit need only state the true amount the defendant is indebted to him. The affidavit must be made by the plaintiff in person and is not sufficient if made on his behalf by his bookkeeper or some other person whose personal knowledge may be greater than the plaintiff's.[10] In the other five counties, the plaintiff's affidavit must state the cause of action and the sum claimed due, and it may be made by an agent.

The defendant's affidavit may be made by him or some one on his behalf, but differs in form under the different statutes. Charles, Calvert, Prince George's, St. Mary's and Worcester Counties require that the defendant's affidavit deny in whole or in part the right of the plaintiff to the sum claimed and state the grounds of his defense. In Baltimore City and the other 11 counties, the defendant's affidavit must affirm that every plea is true and state in what amount the plaintiff's claim is disputed. An affidavit that "the defendant does not admit any of the plaintiff's claim to be due and owing" is not

[4] Litsinger vs. Ross, 1945, 44 Atl. (2d) 435.

[5] Picking vs. Local Loan Co., 1945, 44 Atl. (2d) 462.

[6] Mueller vs. Michaels, 1905, 101 Md. 188.

[7] Smith vs. Women's Medical College, 1909, 110 Md. 441.

[8] The requirements are discussed in Pittman, "The Maryland Speedy Judgment Acts," cited in Note 2, and in 2 Poe, Pleading and Practice (5th Ed. 1924), Secs. 409-417.

[9] Allegany, Anne Arundel, Baltimore, Carolina, Garrett, Harford, Carroll, Frederick, Howard, Montgomery, Washington.

[10] Atley vs. Senior, 1881, 55 Md. 479.

sufficient;[11] whereas an affidavit that "all of the plaintiff's alleged claim is disputed" is good.[12] In Baltimore City and 6 counties,[13] the defendant's affidavit must further aver that the affiant truly believes that the defendant will be able to produce sufficient evidence at the trial to support the plea as to the amount disputed and that he is advised by counsel to file the plea, and must be supported by a certificate of counsel that he advised the affiant to make the affidavit. If the defendant files his pleas with the necessary affidavits, the case proceeds as any other action and the affidavits have no effect upon the proceeding.[14]

Delay. The defendant can postpone judgment under the Speedy Judgment Acts by filing a demurrer or a demand for particulars. Under Article 75 Section 9 of the Code, a demurrer must be accompanied by an affidavit that it is not filed for delay and that the affiant is advised to file it and also must be supported by a certificate of counsel that he advised the defendant to file the demurrer. If these formal requisites are met, a demurrer may be filed and the time for pleading thereby enlarged. In the same way, a demand for particulars may be used to extend the time for pleading and thereby postpone summary relief.[15] The demand for particulars is popular because plaintiff's particulars often take his case out of the Speedy Judgment Act.[16]

Other Limitations. Under the Maryland Acts, this remedy is not available at all for unliquidated contract claims or for any other types of actions. Furthermore because of their mechanical or formal character, the

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[11] Baltimore Publishing Company vs. Hooper, 1892, 76 Md. 115.

[12] Codd Co. vs. Parker, 1903, 97 Md. 319.

[13] Allegany, Anne Arundel, Baltimore, Caroline, Garrett, Harford.

[14] Councilman vs. The Towson National Bank, 1906, 103 Md. 469.

[15] By Ch. 378 Acts 1914 (Art. 75 Sec. 28 (107)), in cases under the Speedy Judgment Acts, statements filed with the declaration form a part of the pleadings and have the same effect as particulars. See Newbold vs. Green, 1914, 122 Md. 648.

[16] Katski vs. Triplett, 1943, 181 Md. 545.

proceedings seldom achieve the other objective of this procedure: to narrow the issues to those genuinely in dispute in order to avoid unnecessary trouble and expense at the trial.[17]

2. *Summary Judgment By Motion On Admissions.*

Another form of summary remedy is provided by Section 24 of Article 26 of the Code. Under it, any party to an action *at law or in equity* may apply, by motion or petition at any stage of the proceedings, for a summary judgment upon the ground of any admissions of fact in the pleadings or other written admissions in the case.[18] This statute was enacted by Chapter 442 of the Acts of 1888, but appears to have been used sparingly, if at all; it has not been cited in any reported case. Since it requires written admissions as the basis for judgment, and Maryland had no adequate means for obtaining such admission until the adoption of the Discovery Rules, there were probably few occasions for its use.

The statute is nevertheless of great interest. It is an early recognition of the desirability of summary disposition of *any* case, whether at law or in equity, where there is no genuine controversy as to the material facts. But in making admissions the only basis for summary relief, the statute is too restrictive. The same procedure

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[17] In Gemmell vs. Davis, 71 Md. 458 (1889), at 464, Judge Alvey stated the "beneficial objects contemplated by the Legislature" in the enactment of Maryland's Speedy Judgment Acts as "not only to furnish a short and expeditious method of recovery in the class of actions mentioned, but, by requiring disclosure under oath, as to the real amount or matter in dispute or actual contest between the parties, to avoid unnecessary trouble and expense in the trial."

[18] "Any party to an action or suit at law, or in equity, may, at any stage thereof, apply to the court for such order or judgment as he may, upon any admission of fact in the pleadings or other written admissions in the case, be entitled to without waiting for the determination of any other question between the parties. Such application may be made by motion or petition so soon as the right of the party applying to the relief claimed has appeared from the pleadings or other written admissions in such action or suit, and the court may, upon such application, give such relief, subject to such terms, if any, as such court may think fit, and such order or judgment shall, with the proceedings relating thereto, form part of the record and be reviewable on appeal from the final judgment or decree in such action or suit."

should be extended to any case where it can be shown that the material facts are not genuinely and in good faith controverted.

II. Summary Judgment Procedure in Other Jurisdictions.

In England, many states and the federal courts, summary judgment procedure has been developed much farther than in Maryland. The experience in these jurisdictions seems to show that a liberal summary judgment procedure free from the limitations and technicalities of the Maryland Speedy Judgment Acts is an effective means of expediting and reducing the cost of litigation.[19]

1. *Development Of Summary Judgment Elsewhere.*

Several examples will illustrate this development of summary judgment in other jurisdictions.

England—Summary judgment procedure was first adopted in England in 1855. Originally the remedy was available only in actions upon bills of exchange and promissory notes. Gradually the summary practice was extended to other actions and by 1933 was available in all law actions (except those for fraud, seduction, libel and kindred matters) and in specified equity proceedings.[20] Many Canadian provinces and British colonial jurisdictions have adopted summary procedure patterned on the English practice.

New York—The experience in New York is instructive. Summary judgment procedure was initiated there in 1921 by the adoption of Rule 113 of the Rules of Civil

[19] Clark and Samenow, "The Summary Judgment" (1929), 38 Yale Law Journal 423; 3 Moore, Federal Practice (1938 ed.) p. 3175; Clark, "Summary Judgments," (1941), American Bar Association Judicial Administration Monographs, Series A No. 5; Finch, "Summary Judgment Procedure" (1933), 19 A. B. A. J. 504; Shientag, "Summary Judgment" (1933), 4 Fordham L. Rev. 186.

[20] English rules under the Judicature Act. 0.3, rule 6; Orders 14, 14A and 15.

Practice.[21] As first adopted, the rule was limited to an action to recover a debt or liquidated demand arising on a contract or a judgment for a stated sum. Only the plaintiff could move for judgment.

Since then the rule has been extended to apply to actions (1) for a debt or demand, whether liquidated or unliquidated, arising on a contract, a money judgment, or a statute for money recovery other than a penalty, (2) for possession of a chattel with or without a claim for hire or for damages for its taking or detention, (3) to enforce a lien or mortgage, (4) for specific performance of a written contract for the sale or purchase of property, including such alternative and incidental relief as the case may require, (5) for an accounting arising on a written contract, and (6) for mandamus. Where the claim is for an unliquidated amount, the court may grant judgment subject to damages being assessed by judge, jury or referee.

The defendant was given the right to summary relief in 1933 for either a defense or a counterclaim. He may obtain summary relief not only in the specified classes of cases available to the plaintiff, but also in any other action where his defense is founded upon facts established *prima facie* by documentary evidence or official record. In 1944, the rule was made applicable as between co-defendants. The court was also authorized to grant judgment for the opposing party without the formality of a cross-motion if at the hearing it appeared that the opposing party was entitled thereto.

The New York Commission on the Administration of Justice and the New York Judicial Council have strongly recommended that the procedure be further extended to include all types of actions.[22]

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[21] For a history of Rule 113 and summary judgment procedure in New York, see Finch, supra Note 19; and Shientag, "Summary Judgment" (1941 ed.).

[22] See N. Y. Commissions on Administration of Justice (1934), 287; Third Report N. Y. Judicial Council (1937), 30.

Wisconsin—In 1929 the Supreme Court of Wisconsin by rule adopted New York's Rule 113 as it existed in 1921.[23] In 1935 the rule was extended to permit summary relief in a larger class of actions and to grant defendants the same rights as plaintiffs. Wisconsin in 1941 took the final step by extending summary procedure to "any civil action or special proceeding."

Illinois—Illinois adopted summary judgment procedure in 1933 to replace a speedy judgment act for contract actions dating from 1853 and similar to the Maryland Acts.[24] Under the 1933 Act, the plaintiff might make a motion for judgment, to be supported by affidavit, in any action at law (1) upon a contract, (2) upon a judgment or decree for the payment of money, (3) to recover possession of land with or without rent or profits, or (4) to recover possession of specific chattels. In 1941 Illinois extended its summary judgment law to give defendants the same rights to summary relief as plaintiffs, to bring counterclaims within the Act, and to apply the summary judgment procedure to equity as well as law.[25]

Federal Courts. When the Federal Rules of Civil Procedure were adopted in 1938, Rule 56 provided for summary judgment based on the experience with this remedy up to that time. Under this Rule, any party (plaintiff, defendant or third party) may request a summary judgment, in any proceeding, by simple motion filed with or without supporting affidavits. The summary judgment is granted if the court, on hearing the motion, determines that there is no genuine issue as to any material fact. If the only issue is the amount of damages, the case is set for trial for the assessment of

[23] For the history of summary judgment procedure in Wisconsin, see Ritter and Magnuson, "The Motion for Summary Judgment and its Extension to All Classes of Actions" (1936), 21 Marquette L. Rev. 33, 38, and Wisconsin Statutes (1941 ed.) Sec. 270.635.

[24] See Jones, Illinois Statutes Anno. (1935 ed.) Vol. 18, Sec. 104.057, 105.15, 105.16.

[25] See Jones, Illinois Statutes Anno. (1945 Supp.) Vol. 18, Sec. 104.057.

damages. If, on the motion, judgment is not rendered on the whole case, the court is directed to determine what facts are genuinely controverted and to enter an order specifying the facts not controverted, which facts are deemed established at the trial.

Other Similar Rules. Arizona and Colorado have adopted Federal Rule 56. Summary judgment procedure therefore applies to all actions in those States. Connecticut, Michigan and New Jersey, and California also have reasonably liberal provisions for summary judgments although limiting such relief to certain types of actions.[26]

2. *Experience With Summary Judgment Elsewhere.*

Experience in these and other jurisdictions has shown that a broad summary judgment procedure is a most useful judicial tool.[27] In many cases where the material facts are not really in dispute, the parties are afforded an inexpensive and expeditious method of adjudication. In those cases where a trial is necessary, the procedure will often limit it to the questions actually disputed in good faith and thereby greatly reduce the cost and time

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[26] See Clark and Samenow, supra Note 19 and Note (1939), 13 So. Cal. L. Rev. 7.

[27] The many rules and statutes prescribing summary judgment procedure have everywhere been held constitutional. See for example General Investment Co. vs. Interborough Rapid Transit Co., 1923, 235 N. Y. 133, 139 N. E. 216 (upholding summary relief for a plaintiff under N. Y.'s Rule 113) and Stewart vs. Ahrens, 1937, 273 N. Y. 591, 7 N. E. (2d) 707 (upholding summary relief for a defendant under N. Y.'s Rule 113).

The claim that summary judgment denies the right to trial by jury has been repeatedly rejected. In Fidelity & Deposit Co. vs. United States, 1902, 187 U. S. 315, the Supreme Court, in sustaining a rule of the District Court for the District of Columbia, similar to the Maryland Speedy Judgment Acts, said at page 320:

"If it were true that the rule deprived the plaintiff in error of the right of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right to trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses and to defeat attempts to use formal pleading as means to delay the recovery of just demands."

In Ex Parte Peterson, 1920, 253 U. S. 300, 310, Mr. Justice Brandeis said:

"No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined. It does not infringe the constitutional right to a trial by jury, to require, with a view to formulating the issues, an oath by each party to the facts relied upon."

of the litigation. On the basis of experience in New York, the Judicial Council of that State commended the remedy of summary judgment as "noteworthy for its marked contribution to the cause of speedy justice and the alleviation of the economic waste of unnecessary and protracted litigation."[28]

This remedy has been extensively used. For example, in New York during 1940, 11,600 motions for summary judgments were heard and disposed of and over 60% were granted.[29] In Great Britain the statistics indicate that the procedure has eliminated from the trial dockets about 80% of the cases which would otherwise have required trial. Thus the Court of King's Bench entered four times as many summary judgments as judgments after trial.[30]

The remedy has been employed successfully in almost every type of action. In addition to the typical actions for a debt or contract claim, it has been used effectively in actions to enjoin violation of the anti-trust laws,[31] to enjoin infringement of a copyright,[32] by a trustee in bankruptcy to recover a preference,[33] to enforce a mechanic's lien,[34] to recover the reasonable value of an attorney's services,[35] to recover against a carrier for non-delivery of goods.[36]

In practice the summary judgment procedure under these broader rules does not appear to have been abused. In discussing its operation in New York, Justice Shientag of the Supreme Court of New York, concludes:[37]

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[28] Third Annual Report (1937), p. 30.
[29] Shientag, supra, Note 21, at p. 103.
[30] See Clark and Samenow, supra, Note 19, at page 435.
[31] Associated Press vs. United States, 1945, 326 U. S. 1.
[32] Houghton Mifflin Co. vs. Stackpole Sons, Inc., 1940, C. C. A. 2, 113 F. (2d) 627.
[33] Schwartz vs. Levine & Malin, Inc., 1940, C. C. A. 2, 111 F. (2d) 81.
[34] Nolte vs. Nannino, 1931, 107 N. J. L. 462, 154 Atl. 831.
[35] Waxman vs. Williamson, 1931, 256 N. Y. 117, 175 N. E. 534.
[36] Garfinkle vs. Pennsylvania R. R. Co., 1932, App. Div., 147 N. Y. Misc. 810, 266 N. Y. Supp. 35.
[37] Shientag, supra, Note 21 at p. 105.

"In its actual workings, Rule 113 has resulted in none of the threatened evils. It has not given rise to abuses that were once feared, that is, to the exclusion of arguable defenses or claims or to the improper use of the motion to anticipate an opponent's line of proof. It has reduced delay and congestion in our calendars. It has tended to minimize the expense of litigation. It has fostered public confidence in the administration of justice."

As far as can be determined, the procedure has worked equally well in the Federal Courts.[38]

III. Recommended Rule.

1. *Form Of Rule Recommended.*

On the basis of this experience, the Committee has proposed to the Court of Appeals the adoption of a summary judgment rule. This draft rule is based on Rule 56 of the Federal Rules of Civil Procedure, with certain changes to adapt it to the existing Maryland procedural system.

In many ways, the proposed procedure resembles that prescribed by Section 24 of Article 26 of the Code, discussed briefly above. Both apply to any action at law or in equity, and both are available to any party at any stage of the proceeding. Both are designed to permit summary disposition of matters not genuinely in dispute. The major difference is that Section 24 requires written admissions to prove there is no genuine dispute whereas the proposed rule permits use of affidavits, depositions or other evidence to establish that fact.

2. *Advantages Of Proposed Rule.*

Compared with the present Maryland Speedy Judgment Acts, the proposed rule would have the following advantages:

[38] See Ilsen, "Recent Cases and New Developments in Federal Practice and Procedure" (1941), 16 St. Johns L. Rev. 1, 44.

(a) *Uniformity.*—The proposed rule would provide a single uniform procedure for summary relief throughout the State. It would, therefore, correct the present diversity and complexity arising from seventeen separate Speedy Judgment Acts.

(b) *Simplicity and Flexibility.*—The proposed procedure would largely eliminate the special technicalities of pleading and practice which now encumber speedy judgment actions. Pleadings would be prepared and filed in the same form as in ordinary actions. The party desiring summary relief would merely file a simple motion requesting such relief, supported by affidavits or other written evidence as appropriate.

(c) *Types of Action.*—In Maryland the present speedy judgment procedure applies only in an action in contract for liquidated damages. The proposed rule would make summary relief available in all types of actions at law or in equity, regardless of whether the claim is for liquidated or unliquidated damages or other relief.

(d) *For Defenses and Cross-Claims.*—In Maryland only a plaintiff may procure a speedy judgment. The proposed rule would extend summary relief to defendants and third parties. Such extension has proved extremely successful in England, New York, Illinois, California, Wisconsin, Arizona, Colorado and the Federal courts.

The proposed rule would also permit any party to request summary judgment on any counterclaim, setoff or other cross-action. This is not now possible in Maryland. Experience in other jurisdictions has shown that the remedy may be employed as effectively to dispose of a cross-action as to dispose of the initial cause of a proceeding.

(e) *Affidavit and Other Evidence.*—Under the speedy judgment practice, the affidavits are largely formal; they affirm that the action or defense is in good faith

without presenting the facts on which it is based. Under the proposed rule, supporting and opposing affidavits must submit evidentiary facts to the court. In addition, at the hearing the court considers the pleadings, and any depositions or admissions on file, as well as the affidavits, to determine whether any genuine dispute exists.

The court does not, of course attempt to decide any issue of fact or of credibility, but only whether such issues exist. If the affidavits or other evidence show a genuine conflict, the court must deny the motion. Thus the proposed procedure is not a substitute for a trial, but only a hearing to decide whether a trial is necessary. But the party opposing the motion must show by *facts* that there is a real dispute. Thus the procedure directs the attention of the court and parties to the substance of the controversy rather than to formal requirements.

Following New York and Wisconsin the proposed rule allows the court, on hearing the motion, to grant judgment for the opposing party where that is appropriate, even though no cross-motion has been filed.

(f) *Partial Summary Judgment.*—Under the proposed rule, if the court is satisfied that part of a claim or a defense to part of it is not in genuine dispute, the court may grant summary judgment as to that part on such terms as it deems just.

This provision differs from Federal Rule 56, as interpreted by the courts; it has been held not to allow partial summary judgments except where the only disputed issue is the amount of damages. On the other hand, England, New York and Connecticut do allow such partial judgments. Since the Maryland Speedy Judgment Acts now authorize such partial judgments, it was decided to include this provision. In the form proposed, the court has discretion as to granting the partial judgment and may decide that an order limiting the issues will be a better method than entry of judgment. Fur-

thermore, in granting it, the court may impose conditions (such as suspension of execution) designed to avoid complexity, undue expense or injustice.

Apparently, the framers of the Federal Rules considered that such partial judgments were undesirable because they split up the claim into parts, and were likely to result in multiple appeals. In view of these disadvantages, it would seem that if this authority is retained, the court should use it sparingly and only where entry of partial judgment will be substantially more useful than an order limiting the issues under other provisions of the rule. (See paragraph (g) below).

To cover situations where a partial summary judgment is below the jurisdiction of the court, or leaves the amount in dispute below its jurisdiction, the proposed rule embodies the substance of existing provisions of the Baltimore City Act covering these points.

(g) *Limiting the Issues in Dispute.*—When upon hearing a motion for summary judgment, the court determines that a trial is necessary, the proposed rule directs the court to ascertain what material facts are not actually disputed and to enter an order specifying these facts and directing such further proceedings as are just. At the trial, facts so specified are deemed established. In this way the procedure helps to define the issues and to limit them to matters in substantial controversy, thereby reducing the expense and time of litigation.

(h) *Applicability.*—The rules are not intended to apply to Divorce, Workmen's Compensation or other similar special proceedings.

3. *Repeal Of Existing Procedures.*

The proposed rule is intended to provide a more effective remedy than the present Speedy Judgment Acts and Section 24 of Article 26. Judging by the experience

elsewhere, a fair trial of the new procedure should establish its value and advantages in saving time and expense without impairing the rights of litigants in genuine controversies. Consequently, when the new rule comes into operation, it should supersede both of these existing procedures. To keep both the old and new methods in effect would be both useless and confusing.

But the success of the proposed method will depend on the understanding by the Bench and Bar of its purposes and practical operation. To facilitate this, it is recommended by the Reporter that a reasonable period should be allowed between the adoption of the rule and its effective date. This will permit the Courts and practitioners to become thoroughly familiar with new practice through discussion, talks and articles, before it replaces the older procedure, and should therefore promote its acceptance and effective administration.

APPENDIX A.

Effect Of Speedy Judgment Acts On Time For Pleading.

	Speedy Judgment Actions	*Other Actions*
Allegany	15 days after returned	1 month after returned
Anne Arundel	15 days after returned	1 month after returned
Baltimore	15 days after returned	15 days after returned (if plaintiff serves defendant with rule to plead in 15 days)
Baltimore City	15 days after returned	1 month after returned
Calvert	40 days after service	next return day (4 each yr.)
Caroline	next return day	next return day
Carroll	next return day	next return day
Charles	40 days after service	next return day (4 each yr.)
Frederick	next return day	next return day
Garrett	15 days after returned	1 month after returned
Harford	15 days after returned	1 month after returned
Howard	next return day	next return day
Montgomery	next return day	next return day (8 each yr.)
Prince George's	40 days after service	next return day (8 each yr.)
St. Marys	40 days after service	next return day (4 each yr.)
Washington	next return day	next return day
Worcester	40 days after service	1 month after returned

FORMS.

The forms contained herein are intended to indicate, subject to the provisions of the proposed rules, the simplicity and brevity which the proposed rules contemplate. They are intended for illustration only and are limited in number.

Illustration No. 1.

PETER PLAINTIFF vs. DANIEL DEFENDANT	IN THE SUPERIOR COURT OF BALTIMORE CITY

Peter Plaintiff by Leonard Lawyer, his attorney, sues Daniel Defendant.

For that the defendant by his promissory note dated January 6, 1947, promised to pay to the order of the plaintiff one thousand dollars sixty days after date, with interest, but did not pay the same.

And the Plaintiff claims $1,100.00.

Leonard Lawyer,

Attorney for Plaintiff.

PETER PLAINTIFF vs. DANIEL DEFENDANT	IN THE SUPERIOR COURT OF BALTIMORE CITY

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

The Plaintiff moves for summary judgment on the ground that the defendant has no defense to his claim, and that there is no genuine dispute between the parties as to any material fact, and that he is entitled to judgment as a matter of law.

Leonard Lawyer,

Attorney for Plaintiff.

TO THE DEFENDANT:

Take Notice that unless you make your defense within the time allowed by Law or Rule of Court, judgment will be entered against you. If you assert a defense, this motion may be heard by the Court fifteen days after its service on you, but not earlier than the expiration of the time allowed by Law or Rule of Court to plead in answer to the declaration.

Leonard Lawyer,

Attorney for Plaintiff.

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

State of Maryland, City of Baltimore, Sct.:

I Hereby Certify that on this 31st day of March, 1947, before me, the subscriber, a Notary Public of the State of Maryland in and for Baltimore City, personally appeared Peter Plaintiff and made oath in due form of law that there is now justly due and owing by Daniel Defendant, the defendant in the above case, to him, the plaintiff, on the promissory note a photostatic copy [*or the original*] of which is attached hereto, and of which note he is the holder, the sum of one thousand dollars with interest at six per centum per annum from January 6, 1947, without deduction or off-set, and over and above all discounts.

As Witness my hand and Notarial Seal.

Needful Ned,

Notary Public.

(Notary Seal).

EXHIBIT ATTACHED TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

(Photostatic Copy of Note [*or the original note*])

Baltimore, Maryland, January 6, 1947

Sixty days after date I promise to pay to the order of Peter Plaintiff One Thousand & 00/100 Dollars, with interest.

Daniel Defendant.

PETER PLAINTIFF	IN THE
vs.	SUPERIOR COURT OF
DANIEL DEFENDANT	BALTIMORE CITY

(ORDER OF COURT ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT).

Let Judgment for the Plaintiff be entered as prayed.

John Just,

Judge.

April 21, 1947.

Upon legal and satisfactory proof of the correctness and amount of the claim for which the above suit was brought, being produced to the court,

IT IS ORDERED, this 21st day of April, 1947, that the judgment by default in this case be extended for ten hundred and seventeen dollars and sixty-six cents ($1,017.66), damages assessed by the court with interest from date and costs of suit.

John Just,

Judge.

Illustration No. 2.

PETER PLAINTIFF vs. DANIEL DEFENDANT	IN THE BALTIMORE CITY COURT

Daniel Defendant by Cagey Counsellor, his Attorney, for plea says:

1. That the signature on the note sued on is not his signature.

2. That he never was indebted as alleged.

3. That he never promised as alleged.

Cagey Counsellor,
Attorney for Defendant.

The Defendant elects to try this case before a jury.

Cagey Counsellor,
Attorney for Defendant.

PETER PLAINTIFF

vs.

DANIEL DEFENDANT

IN THE
BALTIMORE CITY COURT

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

The Defendant moves for summary judgment on the ground that the signature on the note sued on is not his signature, that there is no genuine dispute between the parties as to any material fact, and that he is entitled to judgment as a matter of law.

Cagey Counsellor,

Attorney for Defendant.

TO THE PLAINTIFF:

TAKE NOTICE that this motion may be heard by the Court at any time after ten days from the date of service.

Cagey Counsellor,

Attorney for Defendant.

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

State of Maryland, City of Baltimore, Sct.:

I HEREBY CERTIFY that on this 10th day of April, 1947, before me, the subscriber, a Notary Public of the State of Maryland in and for Baltimore City, personally appeared Daniel Defendant and made oath in due form of law that the signature on the note sued on is not his signature, and that he is in nowise indebted thereon.

AS WITNESS my hand and Notarial Seal.

Nifty Nina,

Notary Public.

(Notary Seal).

PETER PLAINTIFF

vs.

DANIEL DEFENDANT

IN THE BALTIMORE CITY COURT

ORDER OF COURT.

This case coming on for hearing on the Defendant's Motion for Summary Judgment, and counsel being heard in argument, and being interrogated by the Court, and it appearing to the Court that the actual dispute between the parties is limited to the genuineness of the signature of the maker of the note, it is, this 29th day of April, 1947, ORDERED by the Baltimore City Court, that evidence to be offered before the jury be limited to the question whether the signature on the note in suit is the signature of the defendant.

Jeremiah Juristus,

Judge.

Illustration No. 3.

PETER PLAINTIFF

vs.

CARELESS CAB COMPANY

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

Careless Cab Company by Generous George, its attorney, for plea, says:

1. That the Plaintiff, by instrument under seal, released the Defendant from the claim sued on.

2. That it did not commit the wrongs alleged.

Generous George,

Attorney for Defendant.

PETER PLAINTIFF vs. CARELESS CAB COMPANY	IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

The Defendant moves the Court for summary judgment in its favor for the following reasons:

1. That the alleged personal injuries of the Plaintiff sustained in an accident on February 3, 1947, at or near the corner of Joppa Road and Charles Street in Baltimore County have been satisfied and paid, and Plaintiff has given a full release to this Defendant, a photostatic copy [*or the original*] of which release is filed herewith as an exhibit.

2. That there is no genuine dispute between the parties as to any material fact, and Defendant is entitled to judgment as a matter of law.

Generous George,

Attorney for Defendant.

TO THE PLAINTIFF:

Take Notice that this motion may be heard by the Court at any time after ten days from the date of service thereof.

Generous George,

Attorney for Defendant.

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

State of Maryland, Baltimore County, Sct.:

I hereby certify that on this 31st day of March, 1947, before me, the subscriber, a Notary Public of the State of Maryland, in and for Baltimore County, personally appeared Settle Soon and made oath in due form of law that he is an employee and adjustor for the Careless Cab Company; that on or about February 5, 1947, he discussed with Peter Plaintiff the matter of the settlement of the claim of Peter Plaintiff against the Careless Cab Company for personal injuries and property damages alleged to have been sustained by the said Peter Plaintiff on February 3, 1947, at or near the corner of Charles Street and Joppa Road in Baltimore County, when a cab of the Careless Cab Company was in collision with an automobile truck of the Baltimore County Fire Department; that at said time the said Peter Plaintiff agreed to settle said claim for the sum of $50.00 and this Affiant thereupon paid the said Peter Plaintiff the sum of $50.00 in consideration of which the said Peter Plaintiff executed and delivered to this Affiant the release, a photostatic copy [*or the original*] of which is attached hereto.

At the same time also appeared Cheerful Charlie and Henry Hop and, the photostatic copy [*or the original*] of a release purporting to be signed by Peter Plaintiff and attached hereto being exhibited to them, they severally made oath in due form of law that the original of said release was signed by the said Peter Plaintiff in their presence and that the signature of the witnesses appearing on said release are respectively their own signatures and that they signed the said paper as witnesses in the presence of the said Peter Plaintiff.

AS WITNESS my hand and Notarial Seal.

Eager Edgar,

Notary Public.

(Notary Seal).

EXHIBIT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

(Photostatic Copy of Release [*or the original*])

KNOW ALL MEN BY THESE PRESENTS that I, Peter Plaintiff, having received from Careless Cab Company the sum of Fifty Dollars ($50.00) do hereby release, acquit, exonerate and discharge Careless Cab Company, its successors and assigns of and from any and all actions, causes of action, claims, demands of any kind or character or any matter or thing whatsoever from the beginning of the world down to the day of the date of these presents, and particularly, but without in any manner limiting the foregoing, for and on account of personal injuries and property damage sustained by me on February 3, 1947, at or near the corner of Charles Street and Joppa Road in Baltimore County, when a cab of the Careless Cab Company was in collision with an automobile truck of the Baltimore County Fire Department, hereby declaring myself fully satisfied, contented and paid as aforesaid.

AS WITNESS my hand and seal this 5th day of February, 1947.

Peter Plaintiff (Seal).

Witness:

Cheerful Charlie

Henry Hop

PETER PLAINTIFF vs. CARELESS CAB COMPANY	IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

ORDER OF COURT.

This case coming on for hearing on the Defendant's Motion for Summary Judgment, the Plaintiff having declined to file affidavits opposing the motion, Counsel being heard in argument and being interrogated by the Court, and it appearing to the Court that there is no actual dispute between the parties as to the execution of the release, a photostatic copy [*or the original*] of which is filed as an exhibit with the said motion, and it appearing to the Court that the Defendant is entitled to judgment as a matter of law, it is therefore, this 29th day of April, 1947, by the Circuit Court for Baltimore County,

ORDERED That the Defendant have judgment for costs.

James Justinian,

Judge.

SERVICE OF PLEADINGS AND OTHER PAPERS.

The feature of importance in this recommended rule is the establishment of a uniform practice whereby pleadings and other similar papers are required to be served. Under such a practice the parties are notified of the progress of the proceeding without having to make constant trips to the clerk's office for the purpose of examining the docket.

The practice proposed by this rule also eliminates much of the uncertainty as to the proper procedure to be followed under the existing Discovery Rules. Its purpose being to establish a uniform practice whereby all pleadings and other similar papers (except the declaration, bill of complaint or other original pleading) required or permitted to be served or filed, are required to be served in accordance with the proposed rule.

The proposed rule is substantially similar to the practice followed in Baltimore City under Supreme Bench Rule 102. Certain additional features to adapt it to state-wide use have been derived from the Federal Rules of Civil Procedure (Rule 5) and statutes and rules of California, Illinois, Michigan, Minnesota, New York and Washington.

REVISORY POWER OF COURTS OVER JUDGMENTS, DECREES, AND ORDERS.

The purpose of this recommended rule is to give all courts throughout the State the same jurisdiction to review and reconsider judgments, orders and decrees within thirty (30) days of their entry as has heretofore existed during the term of court. Under this proposed rule a judgment, order or decree may be reopened at any time within the term or at any time within thirty (30) days of its entry, whichever time is longer. Baltimore City and Harford County already have such a provision by statute (Flack's Code of Public Local Laws (1930), Article 4, Section 317, and Article 13, Section 176), but also have a further provision making the thirty (30) day period exclusive and doing away with the practice of permitting a judgment, order or decree to be reopened at any time within the term of court (Flack's Code of Public Local Laws (1930), Article 4, Section 318, and Article 13, Section 177). There is another statute authorizing the Circuit Court of Prince George's County to reopen a judgment, order or decree any time within forty (40) days of its entry (Flack's Code of Public Local Laws (1930), Article 17, Section 199A.

COMMENCEMENT OF ACTIONS AND TIME FOR PLEADING.

The proposed Law rules on Commencement of Actions and Time for Pleading conform law actions to the existing equity practice by establishing (1) a uniform manner for the commencement of actions, (2) uniform return days, and (3) a uniform time for pleading. In addition they provide for the contents, issuance, and service of the summons. They also require that a copy of the summons and declaration, or other original pleading be served on each defendant. Compare proposed revision to General Equity Rule 11 and existing General Equity Rule 15.

Notes to Rule 1. (Commencement of Action). This rule governs the commencement of all actions at law and includes *Scire Facias.* Although the latter is a judicial writ of execution, yet it so far partakes of the nature of an original writ, that the defendant is entitled to plead to it; and hence, in that respect it is considered as an action—the writ itself being in the nature of a declaration. See, II Poe, Practice (5th ed. 1925) Sec. 585. This rule further makes it clear that no action at law shall hereafter be commenced by titling. The Reporter's study of the origin of suits by titling in Maryland follows the notes on these proposed Law rules.

With this rule compare General Equity Rules 3 and 4.

This rule provides that the first step in an action at Law is the filing of the declaration. Under Rule 3 (compare proposed General Equity Rule 11 (2)) this is to be followed forthwith by issuance of a summons and its delivery to the sheriff for service.

Notes to Rule 2. (Return Days). This rule and the proposed General Equity Rule 11 (1) establish the first Monday in every month as a return day.

Notes to Rule 3. (Issuance of Summons). With the provision permitting additional summons upon request

of the plaintiff compare General Equity Rule 11. See also proposed General Equity Rule 11 (2).

Notes to Rule 4. (Form of Summons). This rule prescribes the contents of the summons which substantially follows the requirements stated in the existing General Equity Rule 11. Compare proposed revision to General Equity Rule 11, part (3).

Notes to Rule 5. (Service of Summons and Original Pleadings). Under this rule the declaration must always be served with a copy of the summons. For the Equity Rule on service, see existing General Equity Rules 11 and 13. See also proposed revision to General Equity Rule 11, part (4).

Notes to Rule 6. (Time for Pleading). This rule requires the defendant in all law actions to make his defenses within fifteen days after the return day to which he is returned summoned. Compare proposed General Equity Rule 11 (5). All subsequent pleadings must be filed within fifteen days after the filing of the next preceding pleading. With this latter provision compare existing General Equity Rules 15 and 23. It is to be observed that under this Law rule, the court at any time, for good cause shown, may shorten or extend the time allowed for filing defenses or any other pleading. A similar provision is made in the Equity practice. See General Equity Rule 15.

Notes to Rule 7. (Judgment by Default). With this provision compare General Equity Rules 15 and 16.

Notes to Rule 8. (Effect on Existing Laws and Rules). This rule specifies the statutes which are superseded or affected by the foregoing rules.

ORIGIN OF SUITS BY TITLING IN MARYLAND.

The Maryland practice which permits the institution of a suit by titling[1] in most actions at law, is related to

[1] 2 Poe, Pleading and Practice (5th ed. 1925) secs. 59-75.

the question of how suit is begun and when an action at law shall be deemed "commenced". In most jurisdictions, in the absence of a statutory provision to the contrary, an action is deemed commenced, so far as the parties to it are concerned, from the time the writ, summons or other process is issued, where this is an official act.[2] The solution to the question becomes important in at least two situations: (1) when two actions on the same subject matter are pending between the same parties, and (2) when the problem arises in connection with the Statute of Limitations. In order better to understand the origin of the Maryland practice of "titling" it is necessary to develop briefly a summary of how actions at law were commenced in early English common law practice.

Common Law Practice — England.[3] With few exceptions, an action at law was commenced by the suing out of an original writ which issued out of Chancery and was returnable either in the Court of King's Bench or Common Pleas. It contained a summary statement of the cause of complaint and required the sheriff, in most cases, to order the defendant to satisfy the claim, and on defendant's failure to comply, then to summon him to appear in the court to which returnable to account for his non-compliance. The term "original writ", as used in the English practice, was one of technical meaning. According to Blackstone, it was a mandatory letter from the King, sealed with his great seal, directed to the sheriff of the county wherein the injury was committed, to be by him returned into the Court of King's Bench or Common Pleas, and was the foundation of the jurisdiction of the court, being the King's warrant for the judges to proceed in the determination of the cause. The original writ, being essential to the institution of the suit, had two purposes, viz., to compel appearance of the defendant and

[2] 1 Am. Jur. Actions, sec. 58.

[3] For historical background see the following: 1 Tidd's Practice (1796); 1 Tidd's Practice (2nd ed. 1807); 1 Tidd's Practice (3rd ed. 1856); 3 Chitty, General Practice (1835); Stephens, Pleading (3rd ed. 1882); Evans, Common Law Practice in Maryland (1839).

to indicate the authority for the institution of the suit. It also limited and defined the right of action. If the defendant did not appear in obedience to the original writ, there then issued other writs, called writs of process enforcing the appearance of the defendant, either by attachment, or distress of his property, or arrest of his person, according to the nature of the case. These writs differed from the original writs in that they issued, not out of Chancery, but out of the Court to which the original writ had been returnable. One of these judicial writs was the writ of capias ad respondendum, a writ which issued in most of the personal actions. This writ directed the sheriff to enforce the appearance of the defendant by arrest of his person. Its use was associated with the first noticeable relaxation of practice relative to the original writ. The capias, being only process, issued only after an original writ had been first sued out and returned; but, to save time and fees, the practice developed of resorting to it in the first instance, thus eliminating the step of procuring the original writ. Under this practice, the plaintiff's attorney commenced suit by preparing a draft (called a praecipe) of the original writ appropriate to the proposed action. This he took to the proper officer of the court, whose duty it was to issue capias and other process on original writs. The officer received the praecipe for the purpose of transmitting it to Chancery, as instructions for the preparation of the original writ, in the event it became necessary to do so. Meanwhile the officer of the common law court issued the capias in the form marked out by the praecipe.

Under the capias or other process the defendant was compelled to appear, either by force of actual arrest (where the law authorized the proceeding) or by other methods of practice. Appearance originally was actual and when made, the plaintiff also appeared. It was at this point that the pleadings, which were originally oral, commenced. During the middle of the reign of Edward

III,[4] the practice developed of making an appearance by entries on the records of the court. In case of arrest, appearance was considered effected by giving bail. With this practice there also developed the practice of drawing the pleadings in written form. The pleadings commenced with a declaration, which was a statement of the plaintiff's cause of action, stated more fully than in the original writ but still in strict conformity with the tenor of the original writ.

Present Practice — England.[5] Under present English practice, the common law practice has been simplified. It is now provided that civil proceedings are commenced by a writ (i. e., writ of summons), or in such other manner as prescribed by the rules of court.[6] The procedure is briefly as follows: The plaintiff or his counsel prepares the writ which states, among other things, the nature of the claim and the relief or remedy required and the court in which plaintiff intends to bring suit. The writ is then taken to the clerk's office, or other appropriate office of registry, and there by official act issued. After issuance it is served in the manner provided for the service of process. On appearance by the adverse party, the plaintiff requests a summons for directions. A hearing date is set at which time it is then decided whether there shall or shall not be pleadings. If the court so orders, the plaintiff prepares, serves and files his statement of claim. In certain actions, the writ may be indorsed specially[7] instead of generally, the result of which is that the proceeding commences with the issuance of the writ containing a detailed indorsement of the plaintiff's statement of claim.

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[4] 1326-1377.

[5] 2 Odgers, The Common Law of England (2nd ed. 1920) pp. 1129-1148; 1186-1210.

[6] The English and Empire Digest, Practice, Part II, p. 263; Part III, p. 264; Pleading, Part VIII, p. 130.

[7] Judicature Acts of 1873 and 1875; R. S. C., Ord. III, r. 6. See also the English and Empire Digest, Practice, Part IV, p. 270; Pleading, Part VIII, pp. 130, 138.

Maryland Practice.[8] Prior to 1851 the then remedies (forms of action) available to a plaintiff were applied for by a request to the clerk of the court to issue a judicial writ. That is, actions were commenced by a "titling" (an instruction to the clerk to issue the writ which commenced the action). The form of the titling varied in the different actions. In case or assumpsit it was only the names of the parties connected by a bracket with the word "case" in the margin, and a request to the clerk to issue the writ. The formal words, which constituted the form of action, did not give the defendant any information as to the cause of the action nor why it was brought. For each form of action there were distinct writs. The attorney, at his peril (amendments to forms of actions not then being permitted), had to determine for his client what form of action suited his case. Under the English common law practice the original writ set forth the cause of action almost as fully as the declaration which later followed. In the Maryland practice, however, original writs were apparently never used (how they were obviated does not appear from the authorities); instead the summons or capias, which did not set forth the cause of action but only the form, issued in the first instance. Most of the personal actions in the Maryland practice were commenced by an instruction (titling) to the clerk to issue a writ of capias ad respondendum. This writ was addressed to the sheriff directing the arrest of the defendant. When an action was so commenced bail could not be demanded in a sum greater than $133.33 unless a copy of the declaration, setting forth the true cause of action, accompanied the writ. The defendant's appearance resulted in the next step, which required the plaintiff to inform the court and the defendant of his reasons for bringing him into court. This step was the filing of the declaration. When this was done the clerk entered

[8] Evans, Common Law Practice in Maryland (1839), (2nd ed. 1867); Cox, Common Law Practice in Civil Actions (1877); 2 Poe, Pleading and Practice (5th ed. 1925) secs. 59-75. See also, Tyler, A Treatise on the Maryland Simplified Preliminary Procedure and Pleading (1857).

on the docket a "rule plea." Under the then existing rules of court, if a declaration and notice to plead was sent with the writ, the defendant was required to plead within fifteen days after appearance. For this reason, or because bail greater than $133.33 was sought, all actions at law except scire facias, attachment and replevin came to be generally commenced by filing a declaration rather than by a titling.

By the Constitution of 1851 imprisonment for debt was abolished and as a result the writ of capias ad respondendum was done away with. The summons, the other method by which defendants were informed that an action at law was brought against them, then became the only method for initiating an action at law. Under the provisions of the Constitution of 1851, the Legislature of 1852 passed an act[9] authorizing the writs or summons to be amended from one form of action to another. This in turn was followed by the Act of 1856, Chapter 112, which abolished forms of action and created three writs by which actions were to be instituted, viz., the writs of summons, replevin and ejectment. Under this Act it became unnecessary to mention any form or cause of action in the writ of summons; however, before the action could be brought the plaintiff had to deliver to the clerk a memorandum in writing of the action to be brought. This memorandum corresponded with the titling, as it was called, under the Maryland practice prior to 1856, and with the praecipe as used under the English common law practice. It was an authorization to the clerk for docketing and issuing the summons. Thus after 1856, all actions at law, with the exception of ejectment, replevin, attachment and scire facias, were begun by issuing, upon the written order of the plaintiff or of his attorney, a writ of summons by the clerk of the court where the suit was brought, under the seal of the court. This process, directed to the sheriff, commanded him to summon the

[9] Md. Laws 1852, Ch. 177, sec. 1. Cf. Md. Code (1939) Art. 75, sec. 39.

defendant to appear to the action, on the day named in the writ, to answer the complaint against him. The provisions of the Act of 1856[10] required that the writ disclose the purpose for which the defendant was summoned; however the Court of Appeals held that this appeared sufficiently accomplished if it contained a notification to the defendant that he was to appear and answer a suit or action against him.[11] When the defendant entered his appearance, the plaintiff was laid under a rule to declare. If the plaintiff, being laid under "rule narr" failed to comply, he was deemed to be in default and liable to have his action dismissed by a judgment of non pros. Once the plaintiff had properly declared the defendant was then laid under "rule plea."

The commencement of an action at law by titling is, of course, the exception rather than the rule under present day practice, and the practice of instituting an action at law by the filing of a declaration has become the method ordinarily used. From the plaintiff's viewpoint, instituting suit by filing a declaration has ordinarily certain advantages. He is at once in a position to obtain judgment by default unless the "rule plea" is complied with; he runs no risk of subjecting himself to a judgment of non pros for failure to file his "narr"; he is not under the necessity of making two separate services upon the defendant, first of the writ and second of the declaration. Amendments, if found necessary, can now be made freely, so that it would seldom if ever be true that filing a declaration at the time suit is instituted would be either difficult for or disadvantageous to the plaintiff. Mr. Poe, Maryland's authority on Pleading and Practice, in recognition of these reasons, makes the following statement in regard to commencement of actions: "An experience of some years warrants the recommendation that wherever it can conveniently be seasonably

[10] Cf. Md. Code (1939) Art. 75, sec. 153 ("* * * in which shall be stated the purpose for which he is summoned; * * *").

[11] Ritter vs. Offutt, 40 Md. 207, 210 (1874) where suit was commenced by a memorandum to the clerk requesting issuance of a writ of summons.

prepared, the declaration should be filed at the time the suit is instituted, and that the practice of bringing suits upon a memorandum or titling merely should never be followed when it can reasonably be avoided."[12] From the defendant's point of view, the commencement of an action by the filing of a declaration, or a rule which requires the declaration to be filed before process will issue, places him in the position of having immediate information as to the cause of action which he is called upon to defend and thereby an opportunity to act quickly in preserving his evidence. Such a practice would also put it out of the power of a defendant to claim at a subsequent stage of the case that the proceedings were a surprise to him. Further, such a practice makes for uniformity with the practice in equity.[13]

Practice Elsewhere. Under the present Federal Rules of Civil Procedure, an action is commenced by filing a complaint; summons forthwith issues, the summons and complaint being served together.[14] The practice in the different states varies.[15] In a number of the code states,

[12] 2 Poe, Pleading and Practice (5th ed. 1925) p. 60; (4th ed. 1906) p. 67; (3rd. ed. 1897) p. 66.

[13] Md. Code (1939) Art. 16, sec. 164 (General Equity Rule 4) "No order or process shall be made or issued upon any bill, petition, or other paper, until such bill, petition, or other paper, together with all the exhibits referred to as parts thereof, be actually filed with the Clerk of the Court. * * *".

[14] Federal Rules of Civil Procedure (1938) Rules 3 and 4.

[15] See, 1 Moore's Federal Practice under the New Federal Rules (1938) p. 218, fn. 2 "The following survey of state statutes indicates the number of states which adopt the following methods (some states have alternative methods) of commencing actions:

(1) filing a complaint, 14.
(2) praecipe, 3.
(3) service of summons, 21.
(4) filing a complaint or service of summons, 4.
(5) filing a complaint and causing a summons to issue thereon, 8.
(6) notice and motion for judgment, 2".

The Reporter's survey of state statutes, as of 1946, indicates the following methods for beginning the suit (some states have alternative methods):

(a) filing a complaint, petition, statement of claim, 12.
(b) praecipe or memorandum requesting issuance of process, 3 (includes Maryland.)
(c) service of summons, 6.
(d) filing complaint or service of summons, 3.
(e) filing complaint, petition, statement of claim and causing summons to issue, 10.
(f) making, issuance of a writ, summons, etc., 14 (two states in this group also permit suit to be begun by "notice and motion for judgment").

an action is commenced by the service of summons prepared and signed by the plaintiff or his attorney, either accompanied by or without the complaint, depending upon the jurisdiction; under this system, no papers need be filed with the court, except on demand of the opposing party, unless and until the court is required to take some action.[16] Generally, the practice elsewhere provides for instituting suit by service of summons, with or without the complaint, or by filing a complaint, with or without issuance forthwith of summons. Federal Rule 4, as originally proposed by the Advisory Committee, did not provide for issuance of summons forthwith upon the filing of the complaint, but upon request of the plaintiff at any time after filing. In two jurisdictions, viz., Delaware and Florida, suits may be instituted by methods corresponding to the Maryland practice of bringing suit upon a memorandum or titling, as by a praecipe requesting issuance of process.[17]

The Question of Limitation. The question as to when an action at law is commenced, within the meaning of the statute of limitations, has been variously decided. In some states,[18] the Statute of Limitations itself settles the question. In Maryland our Statute of Limitations is

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[16] See Report of the Advisory Committee on Rules for Civil Procedure (1937) 5.

[17] Pennsylvania permits certain actions to be commenced by application for a writ of capias ad respondendum, however, the Reporter has placed Pennsylvania in group (f), see fn. 15.

[18] The following references are not exhaustive but merely for purposes of illustration: Ala. Code (1940) 7-43, 7-182 (the first provision provides that the filing of the complaint shall constitute the commencement of the action for purposes of limitations, the second, that civil actions must be begun by the filing of the summons and complaint); Calif. Civil Proc. Code (Deering 1941) sec. 350, 405 (action is commenced for purposes of limitations when complaint filed and suits are commenced by filing a complaint); Fla. Stat. Ann. (1943) sec. 47.01, 95.01 (though suits are begun by praecipe requesting issuance of process under section 47.01, for purposes of the statute of limitations the delivery of the process to the proper officer for service is deemed the commencement of the action); N. Y. Civil Prac. Act (Clevenger's Prac. Manual 1945) secs. 16, 17 (action is begun by service of summons; for purposes of limitations when summons served); Wisc. Stat. (1941) secs. 330.39, 330.40 (same as NY practice); North Dakota Rev. Code (1943) vol. III, secs. 28-0138, 28-0501 (same as NY practice).

silent but in Logan vs. State, use of Nesbit,[19] the Court of Appeals said: "It is well settled that for the purpose of preventing the running of the Statute of Limitations the impetration of the original writ is deemed the commencement of the suit."[20] This holding is in accord with the general rule that where the Statute of Limitations is silent on the matter, the action is deemed commenced when the writ is issued.[21]

[19] 39 Md. 177, 190 (1874). Cf. United States vs. Lyle, 10 G. & J. 326 (1838) apparently holding that the running of the Act of Limitations was arrested by the docketing of an action (by titling), with directions to the clerk to issue the necessary process, whether such process issued or not.

[20] Ballentine, Law Dictionary (1930) 612, defining "impetration" as: "The obtaining of a thing by request or petition". See also Webster's New International Dictionary, Unabridged (2nd ed. 1942) 1249.

[21] 2 Wood, Limitations (4th ed. 1916) 1485.

JUDGMENTS BY CONFESSION RULE 1. (Amendment)

The recommended amendments to the existing Judgments by Confession Rule 1, are felt to be desirable in interests of clarity. The insertion of the new matter is not a change of substance but is merely for the purpose of clarification. The Explanatory Notes on the General Rules of Practice and Procedure (February 25, 1941), contain a study of this aspect of Maryland procedure.

GENERAL EQUITY RULES 1 AND 11.
(Revision)

Note to Rule 1. The deletions from this rule were made necessary because of the changes made in the recommended General Equity Rule 11. One change making the first Monday of the months designated (in Baltimore City) the commencement of the term is effected. This conforms to the practice heretofore existing in the counties.

Note to Rule 11. The proposed revision of General Equity Rule 11 is recommended so as to make the language of this rule coincide as nearly as possible with the phraseology of the recommended Law rules on Commencement of Actions and Time for Pleading.

> *Note to subdivision (4).* Although this subdivision requires the plaintiff to furnish the Clerk of the Court with one copy of his bill or other original pleading for each defendant it is not intended to require the furnishing of the exhibits attached to the bill or other original pleading.
>
> *Note to subdivision (5).* For a statement as to default for failure to comply with the requirements as to time allowed for pleading, see existing General Equity Rule 15.

See the Reporter's Notes to the recommended Law Rule on Commencement of Actions and Time for Pleading.

PRESS OF
THE DAILY RECORD COMPANY
11-15 E. SARATOGA ST.
BALTIMORE, MD.