

## New York's Rules of Civil Practice Affecting Motions Directed to Pleadings: The Revision of 1944

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## NEW YORK'S RULES OF CIVIL PRACTICE AFFECTING MOTIONS DIRECTED TO PLEADINGS: THE REVISION OF 1944

**T**HE Rules of Civil Practice are subject to amendment by a majority of the Justices of the Appellate Division in the four departments.<sup>1</sup> But the Judicial Council is charged with the duty of recommending to said Justices "changes in the rules . . . which, in the judgment of the Council, would simplify and expedite or otherwise improve the administration of justice . . ." <sup>2</sup>

In 1944, the Rules of Civil Practice affecting motions directed to pleadings were revised by the Justices of the Appellate Division in several substantial respects. The revision was the culmination of a study which I prepared for and submitted to the Judicial Council in March, 1943. The study was based on an examination of Rules 102 to 112 and included proposals for numerous amendments of the Rules. Rule 113, affecting motions for summary judgment, was examined only with a view of correcting the form of several of its provisions, and only formal amendments were proposed.<sup>3</sup> Rule 90, affecting the formal requirements of pleadings and constituting the basis for motions to separately state and number causes of action, counterclaims and defenses, was examined but no amendment was proposed.

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<sup>1</sup> NEW YORK JUDICIARY LAW (1924) § 82.

<sup>2</sup> New York Laws 1934, c. 128, § 45, subd. (e).

<sup>3</sup> A general revision of Rules 113 and 114 was excluded from the scope of my study as specified by the Judicial Council. My own view is that a general revision of Rules 113 and 114 is desirable. It seems to me that Rule 113 should be broadened in scope and that much of its language should be simplified.

After circularization of confidential copies of the Study among the members of the Judicial Council and other interested persons, the Judicial Council considered and approved the amendments of the Rules, with little variation from the proposals as originally made in the Study, and recommended their adoption to the Justices of the Appellate Division.<sup>4</sup> The Justices of the Appellate Division adopted the amendments on July 31, 1944, to take effect September 15, 1944. In the ensuing part of this article, after making some preliminary observations on the nature of motions directed to pleadings, I shall set forth the amended Rules indicating matter deleted or added by the amendments, with brief comments on the changes effected.<sup>5</sup>

### I. THE NATURE OF MOTIONS DIRECTED TO PLEADINGS

On the whole, the Rules of Civil Practice affecting motions directed to pleadings seem to be well conceived. The motion to separately state and number causes of action, counterclaims and defenses (Rule 90), the motion to correct pleadings (Rule 102), and the motion to strike out matter contained in a pleading (Rule 103), are corrective motions. The immediate objective of a motion made pursuant to these Rules is the procurement of an amended pleading. Rules 104 to 112 are dismissal motions. The immediate objective of a motion made pursuant to these Rules is the striking of an answer or reply (Rule 104), the dismissal of a complaint or counterclaim (Rules 106 to 110), the striking of a defense consisting of new matter in an answer (Rule 109, Subdivision 6), the striking of a reply or a separate defense therein (Rule 111), and judgment on the pleadings (Rule 112).

I believe it desirable that matters of pleading be disposed of before trial in a court part constituted specially for hearing and determining motions. If claims are to be dismissed because of insufficiency of statement, or jurisdictional or other defects, such disposition should be made, if possible, at an early stage of the litigation.<sup>6</sup> Time should not be con-

<sup>4</sup> 10 REP. JUDICIAL COUNCIL (1944) 305-333.

<sup>5</sup> Much of what ensues is a résumé of what I wrote in the Study, and I have borrowed freely from the language which I there employed.

<sup>6</sup> (a) For criticism of theory underlying motions directed to pleadings, see

sumed at the trial to determine matters that could have been disposed of in a motion part.<sup>7</sup> It seems likewise desirable that opportunity be afforded to raise objections as to these matters in the form of motions rather than in the form of pleadings.<sup>8</sup>

## II. RULES OF CIVIL PRACTICE AS AMENDED BY THE 1944 REVISION, WITH BRIEF COMMENTS

### (a) Amendment to Rule 103

**Rule 103.** Striking out matter contained in a pleading. If any matter, contained in a pleading, be sham, frivolous, irrelevant, redundant, repetitious, unnecessary, impertinent or scandalous and may tend to prejudice, embarrass or delay the fair trial of the action,

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James A. Pike, *Objections to Pleadings Under the New Federal Rules of Civil Procedure* (1937) 47 YALE L. J. 50, 56. Pike's basic criticism of motions for judgment under the New York Rules of Civil Practice and the analogous provisions of New Jersey, Pennsylvania and Illinois, rests on the ground that these motions effect delay in reaching a determination of the claim on the merits.

Judge Charles E. Clark made a similar criticism of Section 45 of the Illinois Civil Practice Act of 1933, affecting motions directed to pleadings. Clark, *The New Illinois Civil Practice Act* (1933) 1 CHI. L. REV. 171. Judge Clark indicated his preference for the English practice of the "objection in law" which is heard before the trial *only* when the court concludes that a decision upon it will substantially dispose of the whole action. ENGLISH RULES UNDER THE JUDICATURE ACT, Order 25, Rules 1-4. His preference is based on the ground that "it does away with the dilatory results of an extra stage of argument and ruling, not determinative of the case." For reiteration of this preference, and his recommendation of an amendment of Rule 12 of the Federal Rules of Civil Procedure to conform with the English practice, see CHARLES E. CLARK, SIMPLIFIED PLEADING, JUDICIAL ADMINISTRATION MONOGRAPHS, Series A, Collected (1942) 100, 115.

(b) For comparison of New York and New Jersey provisions, see *Report of Joint Legislative Committee on Simplification of Civil Practice*, N. Y. LEG. DOC. NO. 111 (1919) 191.

(c) Under the Pennsylvania statute, the objection is raised by an "affidavit of defense". PA. STAT. ANN. (Purdon, 1931) tit. 12, §§ 385, 471, enacted 1915.

(d) Under Texas Rules of Practice and Procedure, effective September 1, 1941, objection may be made by motion or exception directed to pleadings. TEXAS RULES CIVIL PROC. (Vernon, 1942) Rules 90, 91.

(e) For discussion of early history of demurrer and its civil law counterparts, see Millar, *The Fortunes of the Demurrer* (1936) 31 ILL. L. REV. 429, (1937) *id.* 596.

<sup>7</sup> Pike observed that while it is true that in some instances rulings on the demurrer or on motion to dismiss disposed of the controversy without a trial of the facts, judicial statistics show that such cases are few. He referred to a survey of Connecticut cases, showing that in only 25 cases out of 363 in which a demurrer was filed, judgment was entered as a result. Pike, *Objections to Pleadings Under New Federal Rules of Civil Procedure, supra*, at 57.

It may be remarked that even such results point to the wisdom of preliminary disposition.

<sup>8</sup> Compare Rule 12, FEDERAL RULES OF CIV. PROC. (1937). For proposed

the court may order such matter [stricken] *struck* out, in which case the pleading will be deemed amended accordingly, or the court may order an amended pleading to be served omitting the objectionable matter.

*A general or specific denial or an affirmative defense contained in a verified or unverified answer or reply may be struck out where such denial or defense is sham. Affidavits may be used to determine whether matter contained in a pleading is sham.* (Matter in brackets is deleted; matter in italics is added.)

### Comment on Rule 103

Rule 103 is amended by adding a provision authorizing the use of affidavits to determine whether matter contained in a pleading is sham. The amendment removes the disuniformity of lower court opinions,<sup>9</sup> and settles the matter left undetermined by the Court of Appeals in *Fleischer v. Terker*.<sup>10</sup>

Rule 103 is further amended by adding a provision that a general or specific denial or an affirmative defense contained in a verified or unverified answer or reply may be struck out where such denial or defense is sham.

#### (b) *Amendment to Rule 104*

**Rule 104.** Sham or frivolous answer or reply. If an answer or reply be sham or frivolous the court may treat the pleading as a nullity and give judgment accordingly, or allow a new pleading to be served upon such terms as the court deems just.

*A verified or unverified answer or reply containing a general or specific denial or affirmative defense may be struck out if proved to be sham. Affidavits may be used to determine whether an answer or reply is sham.* (Matter in italics added.)

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amendment of same, see CHARLES E. CLARK, SIMPLIFIED PLEADING, JUDICIAL ADMINISTRATION MONOGRAPHS, Series A, Collected (1942) 100, 115. For brief comments on instant revision, see Charles E. Clark, Book Review (1944) 44 COL. L. REV. 457, 459.

<sup>9</sup> See the following selected cases: *Stafford v. John W. Cowper Co., Inc.*, 256 App. Div. 894, 9 N. Y. S. (2d) 109 (4th Dep't 1939); *Bomar v. Pasinsky*, 254 App. Div. 322, 5 N. Y. S. (2d) 21 (1st Dep't 1938); *Socony-Vacuum Oil Co., Inc. v. City of N. Y.*, 247 App. Div. 163, 287 N. Y. Supp. 288, 294 (1st Dep't 1936), *aff'd*, 272 N. Y. 668, 5 N. E. (2d) 385 (1936); *Purdy v. McGarity*, 262 App. Div. 623, 30 N. Y. S. (2d) 966, 969 (3d Dep't 1941).

<sup>10</sup> 259 N. Y. 60, 181 N. E. 14 (1932).

## Comment on Rule 104

Rule 104 is amended by adding a provision authorizing the use of affidavits to determine whether an answer or reply is sham.<sup>11</sup> The right to use such affidavits was denied in the First Department but was recognized in the other Departments.<sup>12</sup> The amendment settles the matter left undetermined by the Court of Appeals in *Fleischer v. Terker*.<sup>13</sup> The amendment settles the matter in accord with what is believed to be the sounder view. Parties should not be compelled to try issues created by an answer or reply, which by affidavit, is proved to be sham.<sup>14</sup> The amendment is in line with the recognized practice in this state on motions for summary judgment pursuant to Rule 113.

Rule 104 is further amended by adding a provision that a verified or unverified answer or reply containing a general or specific denial or affirmative defense may be struck out if proved to be sham.

## (c) Amendment to Rule 105

**Rule 105.** Motion addressed to pleading. A notice of motion under rules one hundred and two, one hundred and three or one hundred and four must be [noticed] served within twenty days from the

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<sup>11</sup> A motion under Rule 104 is made upon the pleading as a whole and not upon any separate part thereof. *Gise v. Brooklyn Society for Prevention of Cruelty to Children*, 262 N. Y. 114, 186 N. E. 412 (1933).

<sup>12</sup> See the following selected cases:

*First Department*—*Monica Realty Corp. v. Bleecker*, 229 App. Div. 184, 241 N. Y. Supp. 290, 292 (1st Dep't 1930); *Rozjenblitt v. Polish Trans-Atlantic Shipping Co., Ltd.*, 162 Misc. 251, 293 N. Y. Supp. 79 (N. Y. City Ct. N. Y. Co. 1936).

*Second Department*—*Brod v. Supreme Dress Co., Inc.*, 243 App. Div. 622, 276 N. Y. Supp. 526 (2d Dep't 1935); *Hudson County Nat. Bank v. Gardiner*, 241 App. Div. 766, 270 N. Y. Supp. 484 (2d Dep't 1934); *Roman Ornamental Plastering Corp. v. Fidelity & Deposit Co.*, 239 App. Div. 848, 264 N. Y. Supp. 377 (2d Dep't 1933); *Flushing Manor, Inc. v. Hotkin*, 234 App. Div. 716, 253 N. Y. Supp. 55 (2d Dep't 1931); *Liberty Investing Corp. v. Huntington Investing Corp.*, 224 App. Div. 867, 231 N. Y. Supp. 798 (2d Dep't 1928); *Zaveloff v. Zaveloff*, — Misc. —, 37 N. Y. S. (2d) 46 (Sp. T. Kings Co. 1942).

*Third Department*—*Ballard v. Knapp*, 152 Misc. 215, 273 N. Y. Supp. 25, 27 (Sup. Ct. Schuyler Co. 1934).

<sup>13</sup> 259 N. Y. 60, 181 N. E. 14 (1932).

<sup>14</sup> This was substantially the point made by the court in *People v. McCumber*, 18 N. Y. 315, 324 (1858) wherein the court allowed affidavits to establish that the answer was sham. The following comment of the court on the power to strike is significant:

"This power should be carefully exercised, and not extended beyond its just limits, as above mentioned. It is a power simply to inquire

service of the pleadings to which the motion is addressed. The time to make such motion shall not be extended unless notice of at least two days of an application for such extension be given to the adverse party. (Matter in brackets deleted; matter in italics added.)

#### Comment on Rule 105

Rule 105 is amended by conforming the language of the Rule affecting the time for making of a motion pursuant to Rules 102, 103 and 104, to the language of Rules 106, 107, 109, 110 and 111. The amendment makes it clear that the notice of motion shall be *served* within twenty days from the date of service of the pleadings to which the motion is directed, and that the *motion need not be made returnable* within twenty days from the date of service of the pleading.

#### (d) Amendment to Rule 106

**Rule 106.** Motion for judgment [; when the defect appears on face of complaint] *on the complaint*. [Within twenty days after] *After* the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint, or one or more causes of action stated therein, where it appears on the face thereof:

1. That the court has not jurisdiction of the person of the defendant.
2. That the court has not jurisdiction of the subject of the action.
3. That the plaintiff has not legal capacity to sue.
4. That there is another action pending between the same parties for the same cause.
5. That the complaint does not state facts sufficient to constitute a cause of action.

*A notice of motion specifying an objection set forth in subdivisions 1, 3 or 4 hereof shall be served within twenty days after the service of the complaint. A notice of motion specifying an objection*

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whether there is in fact any question to be tried, and if there is not, but the defence is a plain fiction, to strike out the fictitious defence. When a defendant, on a motion to strike out his defence as sham, supports it by an affidavit stating specially the grounds of it, he cannot, as a general rule, be deprived of the benefit of a trial of it in the ordinary mode; a case for striking out does not exist." (Page 325.)

A contrary position was taken by the court in *Wayland v. Tysen*, 45 N. Y. 281 (1871).

set forth in subdivisions 2 or 5 hereof may be served at any time prior to trial. (Matter in brackets deleted; matter in italics added.)

### Comment on Rule 106

#### *Modification of Title*

Rule 106 is amended by modifying the title to "motion for judgment on the complaint." The amendment more accurately describes Rule 106, and thereby distinguishes Rule 106 from its complementary Rule 107. The distinguishing feature between Rule 106 and Rule 107 is that under Rule 106 the defendant moves for judgment *on the complaint*, while under Rule 107 the defendant moves for judgment on the complaint *and affidavit*. A corresponding amendment is made of the title of Rule 107.<sup>15</sup>

#### *Modification of Time Limitation*

Rule 106 is amended by making the twenty-day time limitation inapplicable to the following objections:

- (a) That the court has not jurisdiction of the subject of the action. Subdivision 2.
- (b) That the complaint does not state facts sufficient to constitute a cause of action. Subdivision 5.

As to such objections, the amendment provides that the notice of motion may be served at any time prior to trial. The former time limitation affecting the two stated objections conflicted with Section 279 of the Civil Practice Act which provides that such objections are not waived by failure to raise the same before trial. The amendment conforms Rule 106 to Section 279.

#### (c) *Amendment to Rule 107*

**Rule 107.** Motion for judgment [; When the defect does not appear on face of complaint] *on the complaint and affidavit*. [Within twenty days after] *After* the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint, or one or more causes of action stated therein, on the complaint, and *an affidavit* stating facts tending to show:

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<sup>15</sup> The titles of Rules 109 and 110 have been correspondingly treated.



1. That the court has not jurisdiction of the person of the defendant.
2. That the court has not jurisdiction of the subject of the action.
3. That the plaintiff has not legal capacity to sue.
4. That there is another action pending between the same parties for the same cause.
5. That there is an existing final judgment or decree of a court of competent jurisdiction rendered on the merits, determining the same cause of action between the parties.
6. That the cause of action did not accrue within the time limited by law for the commencement of an action thereon.
7. That the claim or demand set forth in the complaint has been released.
8. That the contract on which the *cause of action* is founded is unenforceable under the provisions of the statute of frauds.
9. That the cause of action did not accrue against the defendant because of his infancy or other disability.

*A motion specifying an objection set forth in subdivisions 5, 6, 7, 8 or 9 may be made under this rule whether or not the defect appears on the face of the complaint.*

*A notice of motion specifying an objection set forth in subdivisions 1, 3, 4, 5, 6, 7, 8 or 9 hereof shall be served within twenty days after the service of the complaint. A notice of motion specifying an objection set forth in subdivision 2 hereof may be served at any time prior to trial. (Matter in brackets is deleted; matter in italics is added.)*

### Comment on Rule 107

#### *Modification of Title*

Rule 107 is amended by modifying the title to "motion for judgment on the complaint and affidavit". The amendment more accurately describes Rule 107, and thereby distinguishes Rule 107 from its complementary Rule 106.

#### *Verbal Changes*

1. Rule 107 is amended by conforming the language of the introductory sentence of Rule 107 to the language of the introductory sentence of Rule 110 by inserting the word "an" before "affidavit".

2. Rule 107 is amended by conforming the language of subdivision 8 thereof affecting the statute of frauds, to the language of subdivisions 5, 6 and 9 of Rule 107 and the corresponding provisions of subdivision 5 of Rule 110. In these subdivisions, the phrase "cause of action" appears. Subdivision 8 now correspondingly refers to the "cause of action" and not to the "action".

#### *Modification of Time Limitation*

Rule 107 is amended by making the twenty-day time limitation prescribed in Rule 107 inapplicable to the objection that the court has not jurisdiction of the subject of the action. Subdivision 2. As to such objection, the amendment provides that the notice of motion may be served at any time prior to trial. The former time limitation affecting the stated objection conflicted with Section 279 of the Civil Practice Act which provides that such objection is not waived by failure to raise the same before trial. The amendment conforms Rule 107 to Section 279.

#### *Clarifying Use of Motion*

Rule 107 is amended by adding the clarifying provision that a motion specifying an objection set forth in subdivisions 5, 6, 7, 8 or 9 may be made under this Rule, whether or not the defect appears on the face of the complaint.

#### *(f) Amendment to Rule 109*

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

1. That the court has not jurisdiction of the subject of the counterclaim.
2. That the defendant has not legal capacity to recover on the counterclaim.
3. That there is another action pending between the same parties for the same cause.
4. That the counterclaim is not one which may be properly interposed in the action.

5. That the counterclaim does not state facts sufficient to constitute a cause of action.

6. That the defense consisting of new matter is insufficient in law. *If upon a motion made pursuant to this subdivision, it shall appear that the complaint does not state facts sufficient to constitute a cause of action, the court hearing the motion may dismiss the complaint, and in its discretion allow the plaintiff to amend the complaint upon such terms as are just even in the absence of a cross-motion therefor.*

*A notice of motion specifying an objection set forth in subdivisions 2, 3 or 4 hereof shall be served within twenty days after the service of the answer. A notice of motion specifying an objection set forth in subdivisions 1, 5 or 6 hereof may be served at any time prior to trial.*

*A person not a party to an action who is served with an answer pursuant to section two hundred and seventy one of the Civil Practice Act, may serve notice of motion to dismiss the counterclaim contained therein, specifying an objection set forth in subdivisions 1, 2, 3, 4, or 5, hereof, as if he had been named a defendant in the action by the plaintiff. (Matter in brackets is deleted; matter in italics is added.)*

### Comment on Rule 109

#### *Modification of Time Limitation*

Rule 109 is amended by extending the ten-day time limitation for service of a notice of motion to dismiss a counterclaim, to twenty days. Confusion arose from the former disuniformity in the time limitation for making a motion addressed to a pleading. Rules 106 and 107 affecting a motion addressed to a complaint allowed *twenty* days for making the motion. But Rules 109 and 110, affecting a motion addressed to an answer allowed only *ten* days for making the motion. This disuniformity had no reasonable basis, and was inconsistent with the time limitation prescribed in analogous situations.<sup>16</sup>

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<sup>16</sup> Rule 105 affecting motions to correct a complaint, answer or reply allows twenty days for making such motion. The provisions of the Civil Practice Act affecting periods for service of original pleadings uniformly allow twenty days for service of a complaint, answer or reply. CIV. PRAC. ACT §§ 257, 263, 273. The provisions of the Civil Practice Act affecting amendments, of course, allow the service of amended pleadings—complaint, answer or reply—within twenty days after the service of a notice of motion addressed to the pleading. CIV. PRAC. ACT § 244.

Rule 109 is further amended by making the prescribed time limitation inapplicable to the following objections:

- (a) That the court has not jurisdiction of the subject of the counterclaim. Subdivision 1.
- (b) That the counterclaim does not state facts sufficient to constitute a cause of action. Subdivision 5.
- (c) That the defense consisting of new matter is insufficient in law. Subdivision 6.

As to such objections, the amendment provides that the notice of motion may be served at any time prior to trial. The former time limitation affecting the three stated objections conflicted with Section 279 of the Civil Practice Act which provides that such objections are not waived by failure to raise the same before trial.<sup>17</sup> The amendment conforms Rule 109 to Section 279.

#### *Elimination of Necessity of Cross-Motion*

Rule 109 is amended by adding a provision that upon a motion to strike out a defense consisting of new matter as insufficient in law, the court may not only deny the plaintiff's motion if a complaint is bad, but may also dismiss the complaint, even though the defendant has not made a cross-motion therefor. The amendment renders prior contrary holdings obsolete.<sup>18</sup>

#### *Implementation by Persons Impleaded Pursuant to Section 271*

Rule 109 is amended by adding a provision enabling a person not a party to an action who is served with an answer pursuant to Section 271 of the Civil Practice Act to serve a notice of motion to dismiss the counterclaim as if he had been named a defendant in the action by the plaintiff. The amendment renders *Stokes v. Ottoman American Develop-*

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<sup>17</sup> See *Halleran v. Manzione*, 166 Misc. 679, 3 N. Y. S. (2d) 181 (Sup. Ct. Orleans Co. 1938) (motion to strike out defenses on ground of insufficiency may be made even at the trial).

<sup>18</sup> *Bernard v. Chase Nat. Bank*, 233 App. Div. 384, 253 N. Y. Supp. 336 (1st Dep't 1931); *West Washington Cut Meat Center, Inc. v. Solomon*, 260 App. Div. 741, 24 N. Y. S. (2d) 209 (1st Dep't 1940).

ment Co.<sup>19</sup> obsolete. This amendment was not included in my original proposals for amendment, and does not appear in the Recommended Amendments to the Rules of Civil Practice as set forth in the Tenth Annual Report of the Judicial Council. I drafted the proposal subsequently, and it was adopted and included in the amendments of the Rules by the Justices of the Appellate Division.

(g) *Amendment to Rule 110*

**Rule 110.** Plaintiff's motion [; when defect does not appear on face of answer] *on the answer and affidavit*. [Within ten days after] *After* the service of the answer, the plaintiff may serve notice of motion for judgment dismissing a counterclaim on the [pleadings] *answer* and an affidavit *stating facts* tending to show:

1. That the court has not jurisdiction of the subject of the counterclaim.

2. *That the defendant has not legal capacity to recover on the counterclaim.*

[2.] 3. That there is another action pending between the same parties for the same cause.

4. *That the counterclaim is not one which may be properly interposed in the action.*

[3.] 5. That there is an existing final judgment or decree of a court of competent jurisdiction rendered on the merits determining the same cause of action between the parties.

6. *That the cause of action did not accrue within the time limited by law for the commencement of an action thereon.*

[4.] 7. That the claim or demand set forth in the counterclaim has been released.

[5.] 8. That the contract on which the cause of action alleged in the counterclaim *is founded* is unenforcible under the provisions of the statute of frauds.

9. *That the cause of action did not accrue against the plaintiff because of his infancy or other disability.*

*A motion, specifying an objection set forth in subdivisions 5, 6, 7, 8 or 9 may be made under this rule whether or not the defect appears on the face of the answer.*

*A notice of motion specifying an objection set forth in subdivisions 2, 3, 4, 5, 6, 7, 8 or 9 hereof shall be served within twenty days*

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<sup>19</sup> 132 Misc. 125, 228 N. Y. Supp. 728 (1928), *aff'd*, 224 App. Div. 833, 231 N. Y. Supp. 895 (1st Dep't 1928).

*after the service of the answer. A notice of motion specifying an objection set forth in subdivision 1 hereof may be served at any time prior to trial.*

*A person not a party to an action who is served with an answer pursuant to section two hundred and seventy one of the civil practice act, may serve notice of motion to dismiss the counterclaim contained therein, specifying an objection set forth in any of the subdivisions hereof, as if he had been named a defendant in the action by the plaintiff.*

Rule one hundred and eight shall apply to the determination of the motion. (Matter in brackets is deleted; matter in italics is added.)

### Comment on Rule 110

#### *Modification of Title*

Rule 110 is amended by modifying the title to "plaintiff's motion on the answer and affidavit." The amendment more accurately describes Rule 110, and thereby distinguishes Rule 110 from its complementary Rule 109. The amendment is similar to the amendments made in the titles of Rules 106 and 107. The distinguishing feature between Rule 109 and Rule 110 is that under Rule 109 the plaintiff moves for judgment *on the answer*, while under Rule 110 the plaintiff moves for judgment on the answer *and affidavit*.

#### *Verbal Changes*

Rule 110 is amended by conforming the language of the introductory sentence of Rule 110 to the language of the introductory sentence of Rule 107. The language of subdivision 8 (formerly subdivision 5) is made to conform to the language of the corresponding provision of subdivision 8 of Rule 107. The words "is founded" were added. They were apparently inadvertently omitted from the Rule.

#### *Modification of Time Limitation*

1. Rule 110 is amended by making the time limitation prescribed in Rule 110 inapplicable to the objection that the court has not jurisdiction of the subject of the counterclaim. Subdivision 1. As to such objection, the amendment pro-

vides that the notice of motion may be served at any time prior to trial. The former time limitation affecting the stated objection conflicted with Section 279 of the Civil Practice Act which provides that such objection is not waived by failure to raise the same before trial. The amendment conforms Rule 110 to Section 279.

2. Rule 110 is amended by extending the ten-day time limitation for service of a notice of motion to dismiss a counterclaim (excepting jurisdiction of the subject of the counterclaim), to twenty days. This is in accord with the amendment to the complementary Rule 109.

*Conformation of Rule 110 to Rules 107 and 109  
Respecting Grounds of Motion*

Rule 110 is amended by adding the following four grounds for making a motion directed to a counterclaim to the five grounds formerly specified in Rule 110:

- (a) That the defendant has not legal capacity to recover on the counterclaim. Subdivision 2.
- (b) That the counterclaim is not one which may be properly interposed in the action. Subdivision 4.
- (c) That the cause of action did not accrue within the time limited by law for the commencement of an action thereon. Subdivision 6.
- (d) That the cause of action did not accrue against the plaintiff because of his infancy or other disability. Subdivision 9.

The inclusion of the stated grounds effects conformity with Rules 107 and 109. Rules 109 and 110 affect motions addressed to counterclaims much in the manner that Rules 106 and 107 affect causes of action alleged in a complaint. A comparative study of these Rules showed that some of the grounds specified in Rules 107 and 109 did not appear in Rule 110. Some of the omissions were natural. Others were inexplicable.<sup>20</sup> The addition of the four stated grounds in Rule 110 effects conformity with Rules 107 and 109.

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<sup>20</sup> PRASHKER, *CASES AND MATERIALS ON NEW YORK PLEADING AND PRACTICE* (2d ed. 1937) 757.

*Implementation by Persons Impleaded  
Pursuant to Section 271*

Rule 110 is amended by adding a provision enabling a person not a party to an action who is served with an answer pursuant to Section 271 of the Civil Practice Act to serve a notice of motion to dismiss the counterclaim as if he had been named a defendant in the action by the plaintiff. The amendment conforms to the amendment made to Rule 109, and renders *Stokes v. Ottoman American Development Co.*<sup>21</sup> obsolete. This amendment was not included in my original proposals for amendment, and does not appear in the Recommended Amendments to the Rules of Civil Practice as set forth in the Tenth Annual Report of the Judicial Council. I drafted the proposal subsequently, and it was adopted and included in the amendments of the Rules by the Justices of the Appellate Division.

(h) *Amendment to Rule 111*

**Rule 111.** Motion on reply. [Within ten days after] *After* service of a reply, the defendant may [move] *serve notice of motion* to strike out the reply, or a separate defense therein, on the ground that it is insufficient in law upon the face thereof.

*A notice of motion specifying the objection herein set forth may be served at any time prior to trial.* (Matter in brackets is deleted; matter in italics is added.)

Comment on Rule 111

*Elimination of Time Limitation*

Rule 111 is amended by eliminating the time limitation formerly applicable to a motion to strike out a reply or a separate defense therein on the ground that it is insufficient in law upon the face thereof. The time limitation conflicted with Section 279 of the Civil Practice Act which provides that such objection is not waived by failure to raise the same before trial. The amendment conforms Rule 111 to Section 279.

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<sup>21</sup> Note 19, *supra*.



*Verbal Change*

Rule 111 is amended by conforming the language of the Rule with the language of Rules 106, 107, 109 and 110. The words "serve notice of motion" appearing in Rules 106, 107, 109 and 110 were substituted for the word "move" formerly appearing in Rule 111.

*(i) Amendment to Rule 113*

**Rule 113.** Summary judgment. When an answer is served in an action,

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

[The] *the* complaint may be dismissed or answer may be struck out and judgment entered in favor of either party on motion upon the affidavit of a party or of any other person having knowledge of the facts, setting forth such evidentiary facts as shall, if the motion is made on behalf of the plaintiff, establish the cause of action sufficiently to entitle plaintiff to judgment, and if the motion is made on behalf of the defendant, such evidentiary facts, including copies of all documents, as shall fully disclose defendant's contentions and show that his denials or defenses are sufficient to defeat plaintiff, together with the belief of the moving party either that there is no defense to the action or that the action has no merit, as the case may be, unless the other party, by affidavit or other proof, shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to

a trial of the issues. [If upon such motion made on behalf of a defendant it shall appear that the plaintiff is entitled to judgment, the judge hearing the motion may award judgment to the plaintiff, even though the plaintiff has not made a cross-motion therefor.] *If upon such motion, it shall appear that the opposing party is entitled to judgment, the judge hearing the motion may award judgment, even in the absence of a cross-motion therefor.*

If the plaintiff or defendant in any action set forth in subdivisions 3, 4 or 5 hereunder shall fail to show such facts as may be deemed, by the judge hearing the motion, to present any triable issue of fact other than the question of the amount of damages for which judgment should be granted, an assessment to determine such amount shall forthwith be ordered for immediate hearing to be tried by a referee, by the court alone, or by the court and a jury, whichever shall be appropriate. Upon the rendering of the assessment, judgment in the action shall be rendered forthwith.

When in any [actions in cases] *action* set forth in subdivisions 6, 7 [and] *or* 8 hereunder the judge hearing the motion has been convinced that there is no preliminary triable issue of fact, the court shall forthwith render an appropriate judgment or order and thenceforth the action shall proceed in the ordinary course.

[Where] *When* an answer is served in any action, *whether or not of the character specified above*, setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established prima facie by documentary evidence or official record, the complaint may be dismissed on motion unless the plaintiff by affidavit, or other proof, shall show such facts as may be deemed by the judge hearing the motion, sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record.

This rule shall be applicable to counterclaims, so that either party may move with respect to the same as though the counterclaim were an independent action. The court in its discretion may provide for the withholding of entry of judgment until the disposition of the issue in the main case.

*This rule shall be applicable as between co-defendants.*

This rule shall be applicable to all pending actions. (Matter in brackets is deleted; matter in italics is added.)

### Comment on Rule 113

Rule 113 is amended by authorizing the court to grant a motion for summary judgment in instances where such mo-

tion is authorized, irrespective of the party who made the motion and even in the absence of a cross-motion therefor. Rule 112 affecting motions for judgment on the pleadings contains a similar provision.

The amendment to Rule 113 includes several verbal and miscellaneous changes.

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