Some Practical Suggestions on Defense Motions and Other Procedures Before Trial

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A PRIMARY objective of the defense trial lawyer should be to terminate the litigation successfully at the earliest possible stage of the litigation in a manner which will afford reasonable assurance of receiving favorable treatment in the event of an appeal. The accomplishment of this objective before trial on the merits is much to be desired. The law affords a variety of tools for the accomplishment of that end in appropriate cases. The practical usefulness of some of these implements is the main burden of this paper. Some suggestions as to when one of these tools may work if another is out of order may be worthwhile.

The practitioner starts with the premise that on the hearing of a demurrer the court is bound by the facts alleged in the pleading and is not entitled to consider facts presented to it through the medium of an affidavit.¹ But should he stop with that rule? Or are there other means available, in proper cases, to reach false allegations or facts not alleged in the complaint, either on demurrer or on motion and before trial on the merits? The answer to that question presents interesting possibilities to the practicing attorney.

1. *Initial Problem of Whether or Not to Make a Preliminary Move*

The pretrial moves discussed in this paper are aimed primarily at vulnerable complaints. To take advantage of such vulnerability by adjudication before trial on the merits is the goal. The question facing the practitioner is whether the complaint in hand is one which is reasonably certain to be defeated by the employment of one or another of the moves discussed herein. The decision of that preliminary question will consume many a perplexing hour of close study of the precise allegations of the complaint, the countervailing facts which can be presented by one or another of the methods discussed herein, and the governing rules of law. If, after a review of all the pertinent factors, counsel is still in substantial doubt as to whether one or another of these moves will be successful, then he should probably decide against making the preliminary move. He may otherwise simply educate his opponent into improving his pleading; or simply be wasting time. Yet numerous considerations must be weighed in this decision. If the probabilities are that the move will merely educate counsel for plaintiff into amending his complaint and that with an amendment any further move will be ineffective to prevent going to trial, then obviously the decision should be against making this preliminary move. It is a formula often fol-

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¹ *Mackay v. Clark Rig Bldg. Co.*, 5 Cal. App. 2d 44, 55, 42 P. 2d 341, 346 (1935). See also *Livermore v. Beal*, 18 Cal. App. 2d 535, 538, 64 P. 2d 987, 990 (1937).

lowed by experienced trial counsel that preliminary motions and demurrers should be avoided unless they can be employed with reasonable certainty of ending the lawsuit then and there. But even this is not a hard and fast rule. There may be times when counsel for the defense, by making a preliminary motion or filing a demurrer, can ascertain something of importance about the plaintiff's case which cannot otherwise be obtained except through deposition or other discovery process or in some cases could not be obtained at all before trial. It is a matter of experience and judgment as to whether the preliminary move should or should not be made.²

2. *Judicial Notice On Demurrer*

Not infrequently the simple allegations of a complaint may be so expanded through the use of judicial notice in proper cases that the true facts may be considered by the court before trial on the merits. Where appropriate, the use of this device allows a disposition of the case at the demurrer stage, thus saving the client expense in preparation for and actual trial of the case on the merits, as well as saving time of the court. Experienced counsel will always examine the pleadings with this possibility in mind.

A few illustrations will show the usefulness of this weapon.

Take a complaint in the short form of a quiet title action containing one or two pages with allegations that the plaintiff is the owner of the described parcel of real property, that the defendant claims an interest therein, with a prayer that the court decree defendant has no right, title or interest in the property. Nothing appears on the face of the complaint to show the true status of the title to the property. If the court could take notice of the actual title to the property, the following would appear: A quarter section of land is involved which is unpatented, public land of the United States. Application for an oil and gas lease thereon has been made to the Bureau of Land Management of the Department of the Interior upon which an oil and gas lease has been issued to defendant. Thereafter plaintiff applied for an oil and gas lease on the same land, and, after proper proceedings, the Bureau of Land Management denied plaintiff's application. Plaintiff intends to argue at the trial, though it does not appear in the complaint, that there was a defect in the prior oil and gas lease application and to assert that plaintiff is entitled to the issuance of an oil and gas lease. But none of these facts appear in the complaint as drawn. However, the applications, the oil and gas leases, and the correspondence in connection with them are official records in the Bureau of Land Management. Under California Code of Civil Procedure Section 1875(3) the court is entitled to notice them judicially if properly called to the court's attention. Counsel for defendants should, therefore, file a demurrer supported by copies of the applications and leases certified to by the proper authorities in the Bureau of Land Management. Defendant's demurrer should specify that the complaint fails to state a cause of action in that it appears through judicial notice that the United States has an interest in the property, is not a party

² See MOORE, MOTION PRACTICE AND STRATEGY 1-2 (Practicing Law Institute 1951).

to the action, has not consented to be sued, is an indispensable party to the action, and therefore there is a fatal defect in the complaint. The demurrer has been held to be well taken on that ground since the court may take judicial notice of all these official documents on file with the Bureau of Land Management.^{2a} Counsel for defendant in this case has saved the defendant considerable expense in preparation for trial and has saved the court the time which it would have taken to receive the evidence and to try the case on the merits.

Another illustration of the use of this device would be where a complaint is filed, which on its face does not show the circumstance, but nevertheless is barred by the statute of limitations due to the fact that plaintiff has known or is on notice of the facts out of which the cause of action arose for more than three years prior to the filing of the complaint. Take a stockholder's derivative action. Plaintiff has acquired stock in the corporation within three years preceding the filing of the complaint. The transactions with respect to which the defendants are charged, involving alleged fraudulent appropriation of corporate property or rights, occurred more than three years ago. Proxy statements setting forth sufficient of the facts upon which the present complaint is based to have put all the stockholders, including plaintiff's predecessor, on notice and on inquiry were filed with the Securities and Exchange Commission as required by the federal statute and were mailed to all stockholders of record four years before the filing of the complaint. Counsel for defendants should demur to the complaint, accompany the demurrer with certified copies of the proxy statements and other official records before the Securities and Exchange Commission of which the court may take judicial notice,^{2b} and, based upon that judicial notice, the court may determine that the stockholders as a group had knowledge or notice more than three years before the filing of the complaint and therefore the cause of action is barred by the statute of limitations.³ It is easy to imagine how much time and expense counsel for defendants have thereby saved in avoiding the necessity of preparing for a long trial. More important, they have saved the court a large amount of time which it would have taken to try the case on the merits but for the employment of this pretrial tactic.

Another type of case where this same approach can be made involves a common law plagiarism complaint. The complaint alleges the plaintiff's literary work, that defendant's motion picture, stage play, radio broadcast or television work, as the case may be, contains substantial portions which are similar to portions of the plaintiff's literary work; and that the defend-

^{2a} *Livermore v. Beal*, *supra* note 1.

^{2b} See *Livermore v. Beal*, *supra* note 1. This was done in *Findley v. Garrett*, 109 A.C.A. 161, 240 P.2d 421 (1952). The documents were used by the trial court in sustaining a demurrer without leave to amend, although the appellate court affirmed on other grounds.

³ *Cf. Findley v. Garrett*, *supra* note 2b (where trial court sustained a demurrer to a stockholder's suit on that, among other grounds, although the appellate court affirmed on another ground). See *Consolidated R. & P. Co. v. Scarborough*, 216 Cal. 698, 16 P.2d 268 (1932); *Earl v. Lofquist*, 135 Cal. App. 373, 378, 27 P.2d 416, 419 (1933).

ant has copied those portions from the plaintiff's work. A demurrer is filed under California Code of Civil Procedure Section 426(3), adopted in 1947. Under that procedure the court may review the plaintiff's literary work and the defendant's production. It may be established, by judicial notice,⁴ that the portions of the plaintiff's and defendant's works which are similar involve matters which are not merely in the public domain but are of historical facts, or scientific knowledge, or of the laws of nature, with respect to which neither the plaintiff nor anyone else possesses any property interest. Counsel in pending litigation have presented this type of issue on demurrer and while demurrers have been sustained in the trial courts, the matters now remain pending on appeal. The exact scope of the trial court's power under this procedure, new in California, though substantially the same as the procedure followed in federal courts for years,⁵ will no doubt be clarified when these pending cases⁶ are decided.

3. *Motion for Summary Judgment*

Little need here be said of when the motion for summary judgment may be effectively applied in appropriate cases to dispose of the litigation without the necessity for trial preparation or for trial on the merits. That is governed by the Code; and enough has already been written about such procedures. Stated simply, although the complaint on its face alleges a cause of action, and though the court may not take judicial notice or otherwise reach the true facts on demurrer, if there is no bona fide issue of triable facts, as demonstrated to the court's satisfaction by affidavits supporting and opposing the motion for summary judgment, made by qualified witnesses, the case may be disposed of finally on such a motion without the necessity of going to a trial on the merits.^{6a}

But there are definite limitations to the use of this type of a motion. It is not available in all classes of cases under our California practice,⁷ contrary to the practice in the federal courts.⁸ Thus, it is only available in California in actions for specified types of money demands, for foreclosure of liens, and other specified categories of actions. It is not available in suits for injunctions, for specific performance, for declaratory

⁴ *Roe-Lawton v. Hal E. Roach Studios*, 18 F.2d 126, 127 (S.D. Cal. 1927); *cf. Maddux v. Grey*, 43 F.2d 441, 442 (S.D. Cal. 1930).

⁵ *Wiren v. Shubert Theatre Corp.*, 5 F. Supp. 358, 363, *aff'd.*, 70 F.2d 1023 (S.D. N.Y. 1933); *Ornstein v. Paramount Productions, Inc.*, 9 F. Supp. 896, 897 (S.D. N.Y. 1935); *Caruthers v. R.K.O. Radio Pictures*, 20 F. Supp. 906 (S.D. N.Y. 1937). *Cf. Echevarria v. Warner Bros. Pictures*, 12 F. Supp. 632, 639 (S.D. Cal. 1935).

⁶ *Kurlan v. Columbia Broadcasting System*, 105 A.C.A. 460, 233 P.2d 936 (1951); *Weitzenkorn v. Lesser*, 104 A.C.A. 515, 231 P.2d 889 (1951). See *Stanley v. Columbia Broadcasting System*, 35 Cal.2d 653, 221 P.2d 73 (1950); *Golding v. R.K.O. Pictures, Inc.*, 35 Cal.2d 690, 221 P.2d 95 (1950).

^{6a} *Krieger v. Dennie*, 123 Cal. App. 777, 10 P.2d 820 (1932); *Bank of America v. Oil Well Supply Co.*, 12 Cal. App.2d 265, 55 P.2d 885 (1936); *Shea v. Leonis*, 29 Cal. App. 2d 184, 85 P.2d 491 (1938); *Walsh v. Walsh*, 18 Cal. 2d 439, 116 P.2d 62 (1941); *Eagle Oil & Ref. Co. v. Prentice*, 19 Cal.2d 553, 122 P.2d 264 (1942). See *Security-First Nat. Bank v. Cryer*, 39 Cal. App. 2d 757, 104 P.2d 66 (1940).

⁷ CAL. CODE CIV. PROC. § 437(c).

⁸ FED. R. CIV. P. 56 makes a motion for summary judgment available in any type of action.

relief, mandamus, certiorari, and others. Indeed, with the substantial percentage of complaints filed in our courts being based upon declaratory relief or seeking injunctive relief, it is obvious that in many cases this device is not usable. It is believed that there is no sound reason why the motion for summary judgment should be restricted to the specified types of cases set out in Section 437(c) of the Code of Civil Procedure, and that the legislature should amend it so as to make the procedure available in any type of action or suit,⁹ as under the federal rule.

The question then occurs: Is there any equivalent, nonstatutory device now available in California to accomplish, in those cases wherein motions for summary judgment are not permitted, the same pretrial results as under summary judgment? A demurrer will not accomplish that end, except where judicial notice comes into play, since facts outside the complaint cannot generally be considered on demurrer, and the facts as pleaded are generally deemed admitted for purposes of ruling on the demurrer. The office of the motion for summary judgment, or its equivalent, if there be an equivalent, is to bring to the court's attention incontrovertible facts not alleged in the complaint which show as a matter of law that plaintiff cannot prevail. Statute of limitations, discharge, *res judicata*, public domain in plagiarism suits and a host of other defenses may thus be shown on motion

⁹ In 1946, the State Bar Committee on Administration of Justice considered a proposal recommending that the State Bar sponsor an amendment to CAL. CODE CIV. PROC. § 437(c) so as to allow a motion for summary judgment to be made in any form of action in California, as is the case under FED. R. CIV. P. 56. That proposal was originally approved by the State Bar Committee. (1946 Report, 21 STATE B. J. 184-185.) Subsequently, the same Committee restudied the proposal and, by a divided Committee vote, concluded to disapprove the proposal. (Interim Report, March 8, 1947.) It is again being studied by the same Committee.

Reasons in support of the proposal are: the motion is equally efficient to accomplish justice regardless of the form of action, when there is no triable issue of fact, and only a question of law presents itself. Numerous actions or proceedings are brought, not falling within the categories enumerated in § 437(c), such as suits for injunctions, for declaratory relief, for a judicial review of administrative orders, stockholders' derivative actions, etc. A large percentage of litigation involves declaratory relief, and yet such actions are not now subject to motions for summary judgment. It is illogical to allow such a motion in the limited classes of cases and deny it in these others. Parties are equally protected against a trial of fact issues in every type of action, since the court must be satisfied from the affidavits that there is no triable issue of fact. Our appellate courts have been extremely careful to safeguard the hearing of such motions to make sure that issues of fact are not present. Not only does the Federal Rule, which operates in all forms of actions, operate satisfactorily, but our California courts, as shown herein, permit a "speaking" motion which is nothing but a motion for summary judgment, even in those classes of cases not enumerated in § 437(c), and as this practice should, it is believed, be encouraged, it certainly argues strongly for enlarging the summary judgment statute to cover all cases.

Arguments against the proposal are: it tends to try cases on affidavits, without cross examination of witnesses, and thus fails to present true facts to the court. It deprives the opposing party of his right to cross examine, and to obtain, in some instances, the facts which would show there are triable issues of fact.

It is the author's belief, however, that the arguments against the proposal to widen the scope of the statute, are simply arguments against the use of summary judgment at all, since those arguments are equally applicable to the classes of actions enumerated in § 437(c). Since summary judgment procedure has been shown by experience to accomplish justice, carefully guarded as it is by the courts, those arguments against it must be rejected, it is respectfully believed.

for summary judgment.¹⁰ May these be raised in California by the device of the old "speaking" motion to dismiss?

4. *Motion to Dismiss*

Statutory motions to dismiss cover several situations such as failure to prosecute the action with reasonable diligence and within a statutory time,¹¹ or failure to furnish security for costs in designated types of actions.¹²

Apart from the statutory motions to dismiss, the question is whether under the California practice a "speaking" motion to dismiss is permissible in various types of situations, where a motion for summary judgment would be unavailable or demurrer ineffective, etc. The motion is "speaking" because it is supported by evidence furnished through an affidavit filed concurrently with the filing of the motion to dismiss. There are substantial indications that under California practice a speaking motion to dismiss may under varying circumstances be proper and effective to dispose of a case prior to trial. Obviously, there must be restrictions to its application, such as that the facts set forth in the affidavits must be incontrovertible, for if there is any material, genuine issue of fact the motion would be improper. In this respect, such a motion is governed by no less stringent restrictions than a motion for summary judgment, to which the Federal Rules liken it and by which it is governed.¹³

It is the belief of the author that this practice could be much more widely employed by counsel in varying types of situations.

(a) Lack of Jurisdiction

Lack of jurisdiction over the subject matter of the action, though not apparent from the face of the complaint, may be brought before the trial court by a speaking motion to dismiss. Lack of jurisdiction may be due to a variety of circumstances. An example is furnished by the filing of a complaint in the state court which actually involves the same property presently under control of the federal court through the filing and maintenance of a prior action involving the same cause and seeking the same relief. Where there is concurrent jurisdiction between the state and federal courts, it is a rule of comity that generally the court first acquiring jurisdiction of the property and the subject matter of the action will be recognized as having priority of jurisdiction and the subsequently filed action be dismissed for that reason. A motion to dismiss the complaint accompanied by an affidavit setting forth a copy of the complaint in the prior

¹⁰ Sight is not to be lost to the very useful procedure of CAL. CODE CIV. PROC. § 597, allowing trial of certain special defenses before trial on the merits. But that may involve trial preparation, or a jury trial, etc., which may be avoided if the moves mentioned in the text are available in the given case.

¹¹ CAL. CODE CIV. PROC. §§ 581, 581(a-c), 583. See Comment, 36 CALIF. L. REV. 465 (1948).

¹² CAL. CODE CIV. PROC. § 1037; *Meade County Bank v. Bailey*, 137 Cal. 447, 70 Pac. 297 (1902).

¹³ FED. R. CIV. P. 12(b). See Comment, 36 CALIF. L. REV. 465, 469 (1948).

action showing that its cause and relief are similar to that set forth in the pending action should result in the granting of such a motion.¹⁴

Another type of case in which this could be presented to the state court would be a complaint alleging a cause of action under the federal antitrust laws, with regard to which there is a conflict of authority as to whether or not the federal courts have exclusive jurisdiction. Although the complaint does not disclose that it is based upon a federal statute, if the fact could be shown on a motion to dismiss accompanied by an affidavit, the complaint would be dismissed,¹⁵ provided the court follows those decisions holding that federal courts have exclusive jurisdiction of such actions.

Still another type of situation in which this speaking motion to dismiss would be proper to show lack of jurisdiction in the state court would be where the plaintiff's complaint was based upon a literary work which, though the complaint does not show it, has been copyrighted under the act of Congress. Defendant's motion to dismiss accompanied by an affidavit setting forth the United States copyright on plaintiff's work would demonstrate that the state court lacks jurisdiction, since exclusive jurisdiction of copyright infringement cases is vested in the federal courts.¹⁶ The case would have to be dismissed since the only court having jurisdiction would be the federal court.¹⁷

(b) *Sham and Frivolous Actions*

Where the complaint is amended several times without the plaintiff being able to state a cause of action, and where the defendant is in possession of *undisputed* facts which can be presented on a motion to dismiss accompanied by an affidavit setting forth facts showing that the action is sham and frivolous, dismissal is proper. Apart from any statute, the court has inherent power to consider on motion to dismiss an imposition upon its time of that character. In a well considered opinion, a district court of appeal, with petition for hearing denied by the supreme court, determined

¹⁴ Cutting v. Bryan, 206 Cal. 254, 274 Pac. 326 (1929), motion to dismiss granted and affirmed. Declaratory relief action filed in Siskiyou County Superior Court on January 6, 1927, concerning ownership of mining claims. Defendant filed a motion to dismiss the action, supported by an affidavit setting forth another action commenced several months before in the federal court in California between the same parties and others seeking an adjudication of the same question, urging that the United States District Court had acquired sole jurisdiction over the property and that the property was in the hands of a federal receiver. The facts set out in the affidavit were uncontested, and the trial court granted the motion to dismiss. The court held that on the general rule of comity the court which first takes the subject matter of a litigation into its control for the purpose of administering the rights in relation to specific property thereby obtains jurisdiction to the exclusion of the exercise of a like jurisdiction by other tribunals. The supreme court affirmed the order of the trial court granting the motion to dismiss.

¹⁵ Exclusive jurisdiction: See General Talking Pictures Corp. v. De Marce, 203 Minn. 28, 279 N.W. 750 (1938); *Contra*: Guiterman v. Pennsylvania R. Co., 48 F.2d 851 (E.D.N.Y. 1931); Hand v. Kansas City Southern Ry. Co., 55 F.2d 712 (S.D.N.Y. 1931).

¹⁶ Loew's Inc. v. Superior Court, 18 Cal. 2d 419, 427, 115 P.2d 983, 987 (1941); Caruthers v. R.K.O. Radio Pictures, *supra* note 5; Underhill v. Schenck, 201 App. Div. 46, 50, 193 N.Y.S. 745, 748 (1922).

¹⁷ Loew's Inc. v. Superior Court, *supra* note 16 (where a motion to dismiss was granted on that ground).

that the code provisions for dismissal of actions under specified circumstances were not exclusive of the court's power to consider motions to dismiss and that a court has inherent power to grant a motion to dismiss based upon uncontroverted facts showing that the action is sham and frivolous.¹⁸

(c) *Forum Non Conveniens*

Where a transitory cause of action is filed in a superior court of this state, wherein both plaintiff and defendant are residents of another state, based upon a transaction which arose in the state of residence of the parties, and where all the witnesses are present and the records are kept in the state of residence, the question arises as to whether the local court will entertain such action or whether a motion to dismiss should be entertained and granted. This problem involves the doctrine of forum non conveniens, a most interesting and complicated concept which has been given elaborate consideration elsewhere.¹⁹

A typical case which has frequently arisen involves a complaint based upon the Federal Employers' Liability Act brought by an injured railroad employee or his personal representative. Assume the accident occurred in Missouri; the railroad has its principal office in Missouri; the witnesses to the accident all reside in Missouri; and the records of the accident are kept in Missouri. Nevertheless, the complaint is filed in the Superior Court of San Francisco City and County where the railroad has an office and where service may be had. Prior to 1950 it was assumed, and indeed held by the California Supreme Court, in *Leet v. Union Pacific R. R. Co.*,²⁰ that, in view of prior decisions of the United States Supreme Court,²¹ a superior court in this state has no power to dismiss the complaint on the grounds of forum non conveniens. As the result of a 1948 amendment to the Judicial Code, a change of venue is permitted in actions in the federal courts where the interests of justice and convenience of witnesses require it.²²

¹⁸ *Cunha v. Anglo-California Nat. Bank*, 34 Cal. App. 2d 383, 389, 93 P. 2d 572, 575 (1939); Comment, 36 CALIF. L. REV. 465 (1948). The court there said: "That a motion to dismiss is proper practice is settled law but in each case the question arises whether the specific facts presented to the court constitute grounds for an order of dismissal. Therefore the defendants had the right to make, and the trial court had jurisdiction to hear and determine, the motion to dismiss. As the court had jurisdiction to entertain the motion the defendants had the right to support their motion with affidavits." In that case plaintiff failed to file any counter-affidavit or otherwise refute or contest the facts set forth in defendant's affidavit in support of its motion to dismiss. It is believed to be essential that the facts relied upon in support of the motion to dismiss be uncontroverted—similar to the principle governing a motion for summary judgment.

¹⁹ *United States v. Nat. City Lines*, 334 U.S. 573 (1948), 337 U.S. 78 (1949); *Koster v. Lumbermens Mutual Co.*, 330 U.S. 518 (1947). Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 421 (1947); Brancher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947).

²⁰ 25 Cal. 2d 605, 155 P. 2d 42 (1944).

²¹ *Baltimore & Ohio R. R. Company v. Kepner*, 314 U.S. 44 (1941); *Miles v. Illinois Central R. R. Co.*, 315 U.S. 698 (1942).

²² Section 1404(a) of the Judicial Code adopted in 1948. See *United States v. Nat. City Lines*, *supra* note 19; *Ex parte Collett*, 337 U.S. 55 (1949).

The Los Angeles County Superior Court Law and Motion Department determined that the prior cases had been set at large and granted a motion to dismiss as forum non conveniens in a Federal Employers' Liability Act case.²³ Thereafter, the United States Supreme Court remanded a case to a Missouri state court which had refused to apply forum non conveniens in a personal injury suit brought under the Federal Employers' Liability Act in the state court and held that in so far as federal law was concerned the state court is free to apply its own doctrine of forum non conveniens even in Federal Employers' Liability Act cases. Justice Frankfurter said in that case that nothing in the earlier cases prevents a state court from applying the local doctrine of forum non conveniens even without the adoption of the new federal change of venue statute.²⁴

The way is therefore open at the present time in Federal Employers' Liability Act cases to make a motion to dismiss forum non conveniens and the trial court would seem to have power to grant such motion despite the former ruling of our supreme court in the *Leet* case.

There are, of course, types of cases other than FELA suits, in which the doctrine of forum non conveniens may properly be presented to the trial court. It would seem that, in any proper case involving a transitory cause of action arising in another state, between citizens of the state in which the occurrence arose, and where the witnesses and the records are located in the other state, the superior court will have power to grant, and in its discretion in the interests of justice may grant, such a motion to dismiss. There are a number of problems involved in exercising such a discretion even in an otherwise proper case, such as the question of whether the statute of limitations would have run before a new suit could be brought in the state of residence, or whether service of process may be obtained over the defendant or defendants in the state of residence, and so on.

(d) Statute of Limitations

If facts exist which bar plaintiff's cause of action by lapse of the period of limitations, and if such facts can be established by affidavit and cannot be controverted by counter-affidavit, so that there is no triable issue of fact thereon, then it would seem to be proper practice to make a motion to dismiss supported by such affidavit and that the court would have power to make a final determination on such motion, even though the facts presented in the affidavit do not appear on the face of the complaint.²⁵

(e) Res Judicata

Seldom will it appear on the face of the complaint that the plaintiff's cause of action has already been adjudicated by a final judgment in another action. Nevertheless, where it is a fact that there has been a prior adjudication, in order to avoid a trial on the merits, counsel for the defend-

²³ *Jergins v. A.T.&S.F. Ry. Company* (Los Angeles Superior Court, April 1950).

²⁴ *Missouri Ex Rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950).

²⁵ *Cf. Cunha v. Anglo-California Nat. Bank*, *supra* note 18.

ants may file a motion to dismiss supported by an affidavit setting forth a certified copy of the judgment in the prior action and in that event will be entitled to have his motion to dismiss granted.²⁶

(f) Plaintiff Has Failed to Do Equity

It is suggested that another example of the usefulness of the motion to dismiss would be in a case where, though the complaint does not allege the circumstance, the plaintiff has been guilty of a failure to do equity, where the relief he seeks is equitable, and where such circumstances would, if known to the court, bar relief. Of course, the facts must be established without any possibility of contradiction by the affidavits supporting the motion to dismiss. It cannot be stated too strongly that if there is any genuine, triable issue of fact shown by the affidavits, then the motion to dismiss would not properly lie.

Take a partition action in which the plaintiff seeks to have a partition of joint tenancy property held between himself and a former wife. Though the complaint for partition does not disclose such circumstance, it is a fact that the plaintiff owes money under a judgment running in favor of his former wife and has not paid any part thereof. It may be proper to file a motion to dismiss the complaint in such partition action, accompanied by an affidavit setting forth, for example, the fact that plaintiff has failed to pay the prior judgment running in favor of the ex-wife. It has been recently held by a district court of appeal that in such case plaintiff's failure to do equity defeats his right to obtain a partition decree, although that case is still pending for final determination by the supreme court.²⁷ Assuming that the supreme court finally decides that such failure to do equity defeats the right to a partition decree under such circumstances, it would then seem that proper practice permits the issue to be raised by a motion to dismiss supported by an affidavit showing plaintiff's failure to do equity, and if that fact can be incontrovertibly established, the motion may, it is suggested, properly be granted. This would seem to be true, even though a motion for summary judgment would not lie under the present California summary judgment statute, since partition actions are not among the types of actions in which summary judgment procedure is presently permissible.

(g) Where Deposition Establishes Plaintiff Has No Cause of Action

It is suggested that a motion to dismiss supported by an affidavit and accompanied by plaintiff's deposition may properly lie, for example, where plaintiff's deposition taken after the filing of the complaint, discloses that plaintiff concedes certain absolutely essential facts without which he cannot maintain his action. If there is no reasonable ground for supposing

²⁶ *Olwell v. Hopkins*, 28 Cal. 2d 147, 168 P. 2d 972 (1946); *Best v. Fitzgerald*, 81 Cal. App. 2d 965, 185 P. 2d 377 (1947). Comment, 36 CALIF. L. REV. 465, 467 (1948).

²⁷ *Lazzarevich v. Lazzarevich*, 108 A.C.A. 170, 171, 238 P. 2d 614, 615 (1952) (petition for hearing granted by supreme court and now pending).

that plaintiff has been either mistaken or that his testimony can be explained by written evidence, and therefore the court is satisfied that the facts are uncontroverted, it would seem proper to present the issue on motion to dismiss and that the motion should be granted. Indeed, this procedure has been employed in the federal courts under the federal rule permitting a speaking motion to dismiss which, since 1948, is given the effect of a motion for summary judgment and is ruled upon in accordance with summary judgment proceedings.

(h) Wider Use of Motions to Dismiss Is Advocated

The speaking motion to dismiss, it is submitted, should be much more widely employed by trial counsel and should be generously received by the courts in this state. The instances in which motions to dismiss have been made, granted and sustained on appeal are numerous enough as indicated by the foregoing discussion. It is, therefore, suggested that the ingenuity of trial counsel should be more frequently employed in a wider adaptation of this motion to new and varying types of cases as they arise.

(i) Amendment of Code

The place of the speaking motion to dismiss in our California practice makes it a bit absurd to retain the present narrow summary judgment statute. If the latter were broadened so as to permit its use in every type of action, then, at the same time, a statutory or court-rule change should be made so as to govern the speaking motion by the same considerations which govern the motion for summary judgment, as provided for in the recent change in the Federal Rule.²⁸

5. *Reaching A Common Count or Quiet Title Count on Demurrer*

Where there are several causes of action stated in the complaint, the allegations in one of which are in detail, and the allegations in the others are on the short form of the frequently used "common count" or "quiet title," the latter might appear to be invulnerable on demurrer or motion since a demurrer will generally not lie to a common count. Nevertheless, the court may consider the facts stated in the first cause of action as if also set forth in the common count or quiet title count; and if a demurrer is sustained to the former, it may likewise be sustained as to the common count or quiet title count, or the court may grant a motion to strike the common count or quiet title count. Perhaps the better practice would be to move to strike such count at the same time the general demurrer to the prior count is filed, since a demurrer is generally held ineffective to reach the common count, though the practice in this regard is not hard and fast.²⁹

²⁸ FED. R. CIV. P. 12(b). See Comment, 36 CALIF. L. REV. 465, 469 (1948).

²⁹ Gutterman v. Gally, 131 Cal. App. 647, 653, 21 P.2d 1000, 1003 (1933) (motion to strike second cause of action based on common count, where demurrer sustained to first cause of action pleading facts in detail); Hays v. Temple, 23 Cal. App. 2d 690, 73 P.2d 1248 (1937), (demurrer sustained); Harris v. Kessler, 124 Cal. App. 299, 12 P.2d 467 (1932); Earl v. Lofquist, *supra* note 3, (quiet title count, demurrer sustained); Wellman v. Security-First Natl. Bank, 108 A.C.A. 302, 311, 238 P.2d 679 (1951) (dictum); Rose v. Ames, 53 Cal. App. 2d 583, 589, 128 P.2d 65, 68 (1942) (demurrer sustained); Godby & Sons v. Deane, 108 A.C.A. 246, 251, 238 P.2d 676, 678 (1951) (demurrer sustained).

6. *Motion for Judgment on the Pleadings*

Little need be added concerning this motion. It is frequently employed by counsel as a pretrial move. The court rules do not place any time limit upon the making of this motion. It is sometimes made prior to trial in the law and motion department. At other times, counsel will wait until the case is assigned to a trial department and make the motion for judgment on the pleadings before the trial judge just before trial on the merits would otherwise commence. It may be made at such later stage of the proceedings after a general demurrer has been overruled in the law and motion department.

Since the motion for judgment on the pleadings is governed by the same rule as controls decision of a general demurrer to the complaint,³⁰ namely whether a cause of action is stated in the complaint, the question arises, what practical value does this motion serve and why is counsel not restricted to a general demurrer? The answer is that it is a well established practice; and it is useful on occasions. Counsel may justifiably believe that the judge in the law and motion department erred in overruling his demurrer, and, since the judge in the trial department is not bound by the ruling in the law and motion department, counsel obviously has another opportunity of prevailing before another judge, and brings the matter on by way of a motion for judgment on the pleadings. Again, some counsel, whether rightly or wrongly, employ this motion just before trial on the merits commences, rather than by demurring in the pleading stages, because of the tactical advantage that may possibly be present, and because allowance of an amendment at that stage may possibly be not so readily granted.

CONCLUSION

There is enough recognition in the California decisions of the speaking motion to dismiss to conclude that its use in proper cases is good practice. This use should be more widely employed in all types of actions. That being the case, it is urged that its statutory equivalent, the motion for summary judgment, should be available in all forms of action in this state and hence the bar should sponsor legislation carrying this into effect by amendment to Code of Civil Procedure Section 437(c).

³⁰ Gill v. Curtis Publishing Co., 38 A.C. 277, 279, 239 P.2d 630, 631 (1952).