

The appeal was heard by MACLAREN, MAGEE, and HODGINS, J.J.A., and MIDDLETON, J.

J. F. Boland, for the appellants.

W. J. Elliott, for the plaintiffs, the respondents.

The judgment of the Court was delivered by MIDDLETON, J.:—
The plaintiffs sued by a writ of summons which was specially endorsed. The defendants, as required by Rule 56, filed an affidavit, but the affidavit filed did not disclose any defence whatever upon the merits, nor did it set out any facts and circumstances sufficient to entitle the defendants to defend the action. Thereupon the plaintiffs moved for judgment under Rule 57, filing an affidavit verifying their cause of action. No further affidavit was filed in answer.

The defendants rely upon certain technical objections, which appear to us to be entirely ill-founded.

First, it is said that the plaintiffs were not entitled to move for judgment without having cross-examined upon the affidavit filed by the defendants.

We do not think that this is the effect of the Rule. Upon an affidavit being filed, the plaintiff, if he sees fit, may cross-examine, or, if he sees fit, he may move for judgment upon the ground that the affidavit does not upon its face disclose a defence.

The whole policy of the Rule is to relieve the plaintiff from the obligation of proceeding in the dark and compelling him to launch a motion before he has ascertained by the defendant's oath whether the defendant has any bonâ fide defence which he desires to urge, and without the further opportunity of testing the bona fides of the defendant by cross-examination upon his affidavit.

Another objection taken was to the filing of an affidavit by the plaintiffs. The Rule does not make any change in the practice laid down in *Jacob v. Booth's Distillery Co.*, 85 L.T.R. 262. Upon a motion under this Rule the Court does not attempt to determine facts in issue upon controversial affidavits. The fate of the motion depends upon what the defendant himself sets up; and, while it may not be necessary for the plaintiff to file any affidavit, the fact that he has filed an affidavit pledging his belief in his own claim is certainly unobjectionable.

The appeal fails and must be dismissed with costs.