DRAPER, J.—I think the objection as to the first summons having been taken out is going further than the authorities warrant. The application was not heard nor in any way disposed of, the summons never having been proceeded on and the plaintiff having notice it would not be proceeded on. It does not fall within the rule that the court will not allow a party to succeed on a second application, who has previously applied for the very same thing, without coming properly prepared, and who failed in consequence. If the defendant had applied to amend the summons in order to re-serve it, I think the amendment would have been allowed, and I see no substantial difference.

2nd. I also think the objection too rigid, though I should be very glad to see a settled practice to mark all papers attached to an affidavit with some letter or figure and to refer to them by such letter or figure in the affidavit, and also that the commissioners administering the oath should certify on each paper attached that it is the paper referred to in the affidavit by the letter or figure it bears. But I am not aware that such a strictness has been held necessary, and therefore I shall not give weight to this objection.

3rd. I agree that the affidavit is defective in stating a service of copy of the plea. It should state on whom the service was made, and not leave it to conjecture whether it was a true copy or not; and if I felt that the non-service of a copy, where the original has been filed, entitled the plaintiff to sign judgment, I should certainly think this affidavit