SUMMONS FOR IMMEDIATE RELIEF

One frequently finds a case in the law reports dealing with the circumstances in which a judicial discretion, created by statute, should be exercised. It is therefore somewhat surprising that one can search in vain for a decision throwing light on the type of case in which parties can avail themselves of a procedure which, although apparently unique to the South Australian jurisdiction, calls for the most careful consideration in the exercise of such a discretion. The explanation probably lies in the fact that most procedural questions are preliminary or merely subsidiary to the main issue and may be disposed of by consent or in chambers rather than in court, and therefore do not attract the attention of reporters as does the pronouncement of judgment in open court. Indeed, frequently the court gives no reasons when an order is made involving purely procedural questions.

Nearly seventy years ago the judges[1] of the Supreme Court of South Australia devised special rules entitled "Summons For Immediate Relief".[2] The substantive provision reads: "After the issue of a writ of summons the plaintiff or the defendant may apply to a judge for the relief or declaration which he claims, or to dispose of the action summarily."[3] A similar power has recently been invested in magistrates exercising local court jurisdiction.[4]

By this simply worded Rule extensive power has been given to South Australian courts to expedite the determination of issues. A literal reading of the rule would seem to authorise an application for summary relief, immediately after the issue of a writ, in almost every action brought. However, it is in practice reasonably well settled that the wide power given is to be used only in circumstances which "cry out like Caesar's wounds" for immediate judicial relief. That is to say, where the ordinary remedial procedure would cause real hardship. Procedure to obtain a form of summary relief in cases where the party can avail himself of the right to specially endorse his proceedings under Order 3 Rule 3 are well-known.[5] However, a summons for relief under Order 10 has proved an adequate and effective proceeding in those cases where parties have chosen this means in preference to the

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1. Way C.J., Boucaut and Bundey JJ.
2. Order LXIX, Rules 1-12; made October 1893 under the Supreme Court Act 1878.
3. Cf. Order XIX, Rules of Court 1913 as amended by the Rules of Court 1937. The present rule is in Rules of Court 1947, Order 10 Rule 1. Since 1937 a similar though limited power is given to the Master; he cannot try the action or make a final order unless either the parties consent or the party against whom the order is sought fails to satisfy the Master that he has a good defence See Order 10 Rule 9.
4. The Local Court power is contained in Rules 88-95 of the Consolidated Rules of Court. These were made pursuant to the Local Courts Act in February, 1957. Rule 88 is in similar terms to Order 10 Rule 1 of the Supreme Court rules.
5. See Order 14 Rules 1, 2, 4, 5, 7.

ordinary procedure,[6] as well as in those cases where the cause of action does not come within Order 3 Rule 3.

The manner of application under Order 10 is simple; the party applying takes out a summons (Form 90 in the First Schedule to the rules) applying for an order "that this action be disposed of summarily and the plaintiff (or defendant, as the case may be) be granted the relief claimed by him in this action", or words to that effect. It is also usual to apply for such further order as to the court may seem fit, and costs. The party must at the same time file and serve copies of affidavits which are intended to be used at the hearing.[7]

It is the content of such affidavit that requires the careful consideration of those advising an applicant to invoke this procedure, and this poses the question as to the type of case in which the procedure may be used.[8] The following comments are submitted as a guide to those confronted with the possible use of this procedure. They may also serve to highlight the true purpose behind this procedure.

First, this procedure is confined to cases where the party establishes that his need for relief is such that the court should intervene forthwith. Clearly such relief is not for the ordinary but for the unusual or exceptional case, where hardship may result in the event of no action being taken. The rule itself does not say so, but it is submitted that the discretion given could be exercised only on this basis.

Secondly, because it is an exceptional procedure it is usually appropriate only in that type of case where summary relief cannot be obtained under the ordinary rules of court and the applicant will otherwise be relegated to the procedure for obtaining an early trial, which may in busy jurisdictions be somewhat illusory. For this reason it is usually considered that the summons for immediate relief is most appropriate when equitable remedies are sought. However, one must remember that the rule is not restricted in its operation to any particular type of case, but merely to an action by writ of summons.

Though in practice it would seem to be rare, there is authority for making application under Order 10 in an action in Negligence for damages for personal injuries. In *Sharon* v. *Remnant and Church*,[9]

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6. Particularly in actions for possession and mesne profits. See *Dienelt* v. *Mustor*, Supreme Court file no. 398 of 1962; *Thompson* v. *Waugh*, Supreme Court file no. 248 of 1962. In *Elders' Trustee* v. *Sach* [1944] S.A.S.R. 65, the plaintiff's claim as executor was for possession of a house and mesne profits, but the writ was not specially indorsed. The plaintiff proceeded to a final order under Order 10.
   The last-mentioned case, together with *Crowder* v. *Hilton* [1902] S.A.L.R. 82; *Murdoch's Case* [1950] S.A.S.R. 220 and *E. & W. Hackett Ltd.* v. *Oliver* [1952] S.A.S.R. 19, constitute the only reported cases in which this procedure has been used. Unfortunately, in none of these cases has the opportunity been taken to discuss the circumstances in which such procedure is appropriate.
7. See Rules 2 and 3. N.B., no statement of claim is required under this procedure. However, where the writ has been specially indorsed under Order 3 Rule 3 it will be attached to the writ.
8. Cf. Order 14 Rule 1 (1), where some direction is given as to the contents of the plaintiff's affidavit when applying for liberty to enter judgment or relief, etc. Under Order 10 the relief may be sought by affidavit alone and not on the statement of claim; the practitioner settling the affidavit has only the broad terms of Rule 1 for guidance when directing what facts should be included in the affidavit.
9. Supreme Court File no. 530 of 1960.

the writ and a statement of claim were issued on 11th April, 1960, claiming damages in respect of injuries suffered in an accident in September, 1959. Simultaneously with the issue of the writ the plaintiff took out a summons under Order 10 applying for an early date for trial, asking that the action be tried forthwith and that the notice of trial be dispensed with. On the 14th April His Honour Ross J. made an order for the action to be heard on the 20th April. As the time for entering an appearance had not elapsed at the time this summons was taken out, it would not have been possible to apply simply for an early trial. The reason for the plaintiff's application was stated in her affidavit to be that, as a Fulbright scholar working with the Education Department, she had been told by doctors that she had carcinoma of the kidney; she had no wish to undergo surgery in Australia and had booked a passage for her return to America later in April, so that the operation could be performed near her parents and relatives.

Order 10 procedure has also been used in a Nuisance action: *Caldwell* v. *Fisher*,[10] and in an action in Detinue where the writ was specially indorsed; *Freighters and Construction Holding Ltd.* v. *Newborne & Ward*.[11] In *Kalogramines* v. *Hustianos & Topunzakis*,[12] the plaintiff's claim was for damages and specific performance of a sale and purchase agreement. The writ was issued on 24th May, 1962, and a final order was made in the plaintiff's favour on 15th June, 1962.

Thirdly, this procedure is not a mere alternative to ordinary procedure. We have already seen one aspect of this when dealing with the first point above, but a good illustration is provided when a party claims equitable relief in an action by writ of summons where the defendant has not entered an appearance. The plaintiff may urgently require judgment and this necessitates giving speedy effect to his claim. If the claim does not come within Order 13, Rules 1-11, the plaintiff must proceed by way of motion for judgment.[13] It is important to remember that if the party not in default uses the ordinary procedure by way of motion for judgment he can always claim costs, but that he may not be able to do this if he decides to take out a summons for immediate relief and if the defendant subsequently enters an appearance and calls for a statement of claim. In such circumstances the plaintiff may have to pay costs of the summons under Order 10.[14]

Fourthly, this procedure can be adopted in respect of part only of a claim, so that an application will not fail merely because the applicant is unable to establish that immediate relief is called for in

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10. Supreme Court File no. 388 of 1958.
11. Supreme Court File no. 653 of 1962.
12. Supreme Court File no. 545 of 1962.
13. See Order 13 Rule 12, and after filing of the statement of claim relying on Order 27 Rule 10, the plaintiff can proceed under Order 40. When applying by way of motion, the procedure is contained in Order 52. If no appearance has been entered the plaintiff may deliver the statement of claim by filing same in the Master's office: see Order 67 Rule 4 (1).
14. See *Murphy* v. *Child*, Supreme Court file no. 286 of 1960.

respect of the whole of his claim.[15] It is submitted that this feature of the procedure is worth bearing in mind at all stages of the action because, although it has been pointed out that the relief sought must be shown to be of an urgency not envisaged by the ordinary procedure, it may be that the need for such relief arises during the interlocutory stages in an action, when perhaps considerable time has elapsed since the issue of the writ. As a general rule the application can be made at any stage of the proceedings, and at whatever stage it is made the need for such relief must be established. An example of an order for part of the claim is provided by *Presnail* v. *Lloyd, Petney & Ewers*,[16] dealt with below.

Fifthly, the Order 10 procedure may overlap to a greater or lesser extent with some alternative procedure, and this may be something which the Court will have to take into account in deciding the form of order to be made on the hearing of the summons. It is submitted that final orders would normally be made on an Order 10 application even though there is an alternative procedure, provided the alternative is only an alternative to part of the Order 10 application, and the need is established for granting the whole relief. An example illustrating this point occurs when a party is seeking some form of injunction. In all probability the party could seek an interim injunction upon giving the usual undertaking as to damages, but the period between the making of the order granting an interim injunction and trial may be such that the party seeking the injunction will be prejudiced, and his only hope would be to seek an early trial. However, the whole problem could well have been solved by applying under Order 10 in the first place.

This was in fact done in *Murdock's Garage* v. *Lindner*[17] and *James* v. *Carty*,[18] both of which actions related to alleged breaches of agreements containing restraint of trade clauses, and therefore required that the court construe the clauses. These actions were heard and disposed of within a very short time of the issue of the writ, and orders were made granting permanent injunctions, although in the former case the order was discharged on appeal to the High Court. In *Singer Sewing Machine Co. and another* v. *Godfreys Limited*[19] an action which is

15. Order 10 Rule 4 provides that a judge may make an order "that judgment be entered for the plaintiff (or defendant, as the case may be) for the relief claimed, or such portion thereof, or such other relief or declaration as may be just . . . " See also Rule 90, Local Court Rules.
16. Supreme Court file no. 1567 of 1959.
17. Supreme Court file no. 443 of 1950. The file shows that the writ, claiming injunctions, declaration and damages, was issued on 13th April, 1950, that on 20th April the plaintiff applied under Order 10, and that on 28th April the Court made the following order: "By consent this summons is adjourned into Court for hearing on Wednesday, 3rd May, next. The parties consenting to treat the hearing of this summons as the trial of the action. The defendant undertakes to give to the plaintiff particulars of any special defence which it be intended to raise immediately upon becoming aware thereof . . . " The plaintiff succeeded in the Supreme Court ([1950] S.A.S.R. 220), but judgment was reversed on appeal ((1950) 83 C.L.R. 628). It is interesting to note that the High Court delivered judgment on 21st November, 1950. i.e. just over seven months from the issue of the writ. If an interim injunction had been ordered and the case allowed to proceed to trial, the action probably would not have been heard by November.
18. Supreme Court file no. 47 of 1937.
19. Supreme Court file no. 912 of 1962.

still in the interlocutory stage, the plaintiff took out a summons for immediate relief to obtain injunctions, orders for account and damages for the infringement of a trade mark. Travers J. refused to make an order, the defendant having given an undertaking in writing. However, at a later stage the defendant took out a summons to strike out the claim or alternatively to be released from his undertaking. This was prompted by the plaintiff's application to add another party as plaintiff. Orders were made discharging the previous order and granting an interim injunction on the plaintiff giving the usual undertaking as to damages and to file a statement of claim within a specified period; finally, the parties were given general leave to apply. This had the effect of turning the applications into a summons for directions, which is provided for under Order 10,[20] though the application was by the defendant on a summons to strike out the claim.

Sixthly, the summons for immediate relief is most effectively used when the facts are not in issue, or there is a consent to part of the claim by the other party. In such cases the procedure can be used, where an expeditious hearing is desired, to obtain a final order of the Court. This has already been adverted to.[21] In *Presnail* v. *Lloyd, Petney & Ewers*[22] the plaintiff's claim was for money had and received, such money having been paid pursuant to a contract before it was cancelled. Subsequently, the first defendants were declared bankrupt. A month after the issue of the writ, the plaintiffs took out a summons for immediate relief, applying for payment by the second and third defendants to the plaintiffs of that part of the money which was being held by the second and third defendants. An order was made that judgment be entered for the plaintiffs in that amount but without prejudice to any other question in the action.

Finally, in some cases one of the parties finds that court action may be a complete waste of time and money because the other party will have disposed of all his assets before judgment and bankruptcy proceedings may not be worth the powder and shot. This is especially the case when the applicant has first had to undertake a Supreme Court action in order to establish a right to proceed in the Bankruptcy Court. It is submitted that this type of problem can often be effectively dealt with by the use of Order 10. In *James N. Kirby Sales Pty. Ltd.* v. *John Van-Houten (trading as Van-Houten T.V. Sales & Service)*[23] the plaintiff's claim was for a large sum of money, being the price of goods sold and delivered to the defendant. In an affidavit in support of the claim, facts were set out by the plaintiff's general manager relating to the nature of the claim, the occasions on which payment had been demanded, the amount that remained unpaid, that the defendant's general manager was believed to have left the State and, finally, that there were moneys standing to the general account of the

20. See Rule 7.
21. *Murdock's Case* and *James's Case*: notes 13, 14 supra. See also the powers of the Master: note 3 supra.
22. See note 12.
23. Supreme Court file no. 1282 of 1959. See also *Radio Corporation* v. *Stein* (no. 539 of 1962), where the plaintiff obtained judgment after the issue of the writ by way of summons for relief. In this case the claim was for moneys due by the defendants pursuant to a guarantee in respect of goods sold and delivered to a third person.

defendant at a certain bank in Adelaide. By summons taken out on the day the writ was issued, the plaintiff sought an order for summary disposal of the claim, or alternatively that the moneys in the bank be retained until the final disposal of the action.

The summons was made specially returnable for the following day, when an order was made as follows: " . . . the Plaintiff by its solicitor undertaking to abide by any order the Court or a Judge thereof may make as to any damages in case the Court or a Judge should hereafter be of opinion that the Defendant shall have sustained any by reason of this order which the Plaintiff ought to pay and also undertaking to accept one day's notice of application to discharge the injunction and the order hereby granted and made it is ordered and directed that the Defendant its servants and agents be restrained from withdrawing from the accounts of the Defendant or the accounts of Van-Houten T.V. Sales and Service at the . . . Bank and at the . . . Bank . . . any sum or sums of money standing to the credit of any of the said accounts at the said Banks or any branches thereof to which the said accounts may have been transferred until the final disposal of this action or until further order. . . . " A further order was made restraining the banks, branches and any authorized officer of same from paying any sum, etc., to the defendant or any person, etc., pending the final disposal of the action. In such a case, liberty to apply is an essential part of the order. After the sequestration orders had been made in the Bankruptcy Court, the above order was discharged on the plaintiff's application, but the Order 10 procedure had protected the plaintiff for the time being in shielding the asset, even though the plaintiff may not have been the ultimate recipient of the whole of the asset in the bankruptcy proceedings.[24]

Even if the plaintiff fails to achieve a final order on the summons, the Court usually makes some order which has the effect of determining exactly the interlocutory steps, thus preventing the normal delays that occur at this stage. The summons for directions does not appear to be extensively used other than in will interpretation cases, or cases involving similar issues, but an unsuccessful application under Order 10 will usually result in an order which is of some benefit to the party applying.

In the Local Court similar principles apply so far as this procedure is concerned, although in practice it would seem that it is most effective in cases where the plaintiff has proceeded by special summons, and the defendant has entered an appearance and filed an affidavit of merits. In such a case the plaintiff, if the relief sought is urgent, can press home his claim by use of this procedure without waiting for trial, as he would have to do once the affidavit of merits had been accepted at the Local Court Office, which would be the usual case. This is often an effective way of testing the affidavit of merits. Of

24. Another case in which Order 10 procedure was used to obtain funds in a bank account is *Elder's Executor Co.* v. *A.N.Z. Bank* (Supreme Court file no. 1692 of 1956). The plaintiff brought his claim as executor in respect of money deposited by the deceased under an assumed name. On proof of the depositor's identity, the court made an order for judgment for the plaintiff in his claim. The action was by specially indorsed writ and a defence was filed. A final order was made on the plaintiff's affidavits.

course the procedure in the Local Court is not confined to cases where a special summons has been used, but can be used at any stage "after the issue of the summons. . . . "[25]

Nothing has been said of the defendant's course when he receives a summons for relief. All that can be said is that it depends on the type of claim, and the sufficiency of the claim and affidavit in support. However, the defendant is usually well advised to file an affidavit, which should be carefully drawn to ensure that only those circumstances relevant to the principles discussed above are dealt with.

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25. Rule 88, Local Court Rules.

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