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Procedure--The Sufficiency of the Record in Opposing a Motion for Summary Judgment

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A possible solution to this vexing question might be to allow the lessor the interest on the royalties in addition to the royalties themselves. If both were given as damages the lessor would still retain the interest in the event the lessee would take advantage of the offset provision.

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Procedure—The Sufficiency of the Record in Opposing a Motion for Summary Judgment

The government brought a civil antitrust suit against *D*, a truck manufacturer. The principal practices charged as violations of the Sherman Act, 15 U.S.C. § 1, 3 (1958), were limitations on the territories within which distributors could sell and limitations on the persons or classes of persons to whom they could sell. The government moved for summary judgment and filed depositions and exhibits in support of its motion. *D* filed a brief in opposition and alleged therein that the limitations were fair and reasonable and did not violate the Sherman Act. *D* filed no affidavits, depositions, or other evidence showing facts on which its allegations were based. The district court granted the motion. *D* appealed. *Held,* reversed. *D* made allegations concerning factual matters which were relevant to a decision on the merits. More economic and business data from which such limitations emerged must be shown before the court could determine whether the arrangement stifled competition or had any redeeming virtue. A dissenting opinion held that on the facts presented there was no genuine issue of fact and the moving party was entitled to a summary judgment. *White Motor Co. v. United States,* 83 Sup. Ct. 696 (1963).

"While it is true that every simile limps, the motion for summary judgment is not unlike the unveiling of a statute. The motion requires the opposition to remove the shielding cloak of formal allegations and demonstrate a genuine issue as to a material fact." *United States v. Dollar,* 100 F. Supp. 881, 884 (N.D. Cal. 1951). This statement succinctly states the real purpose of summary judgment procedure under Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c), 28 U.S.C. 5177 (1958), provides, *inter alia,* that a summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show

that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Such a judgment, if granted, operates as a final disposition of the case. *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 82 S.E.2d 588 (1954).

Summary judgment procedure was devised for promptly disposing of actions in which there was no genuine issue as to any material fact. In many cases no genuine issue of material fact exists, although such an issue was raised by the formal pleadings. 6 MOORE'S FEDERAL PRACTICE ¶ 56.04(1) (2d Ed. 1953). As such, Rule 56 was designed for a state of the proceeding where there were apparent issues of fact raised by the pleadings. *United States v. Daubendiek*, 25 F.R.D. 50 (N.D. Iowa 1959). It was intended to permit a party to pierce the allegations of fact in the pleadings and to obtain relief where facts set forth in detail in affidavits, depositions, and admissions on file show that there were no genuine issues of fact to be tried. *Engle v. Aetna Life Ins. Co.*, 139 F.2d 469 (2d Cir. 1943).

The Court in the principal case apparently overlooked the real purpose of summary judgment procedure. It reversed the lower court's decision granting a summary judgment on mere allegations of fact in D's brief opposing the motion. Several cases have held that mere paper denials and formal allegations of fact are insufficient to create a geninue issue of fact unless evidence is submitted in support of them. *Lawhorn v. Atlantic Refining Co.*, 299 F.2d 353 (5th Cir. 1962); *Koepke v. Fontenchio*, 177 F.2d 125 (9th Cir. 1949); *Christianson v. Gaines*, 174 F.2d 534 (D.C. Cir. 1949). A motion for summary judgment should not be denied merely because the opposing party may be able to prove, on trial, facts or conclusions alleged, but the opposing party must come forward with evidence at the time the motion is made which shows an issue of a material fact. *Cockrell v. Mechling Barge Lines, Inc.*, 192 F. Supp. (S.D. Tex. 1961).

Perhaps the underlying reason for reversing the lower court in the principal case was the nature of the case involved. Where issues of public moment are involved the practice has tended away from procedure based on affidavits and interrogatories. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948); *Eccles v. People's Bank*, 333 U.S. 426 (1948). The Court in the instant case apparently adopted the view of Mr. Justice Murphy's dissenting opinion in *Associated*

Press v. United States, 326 U.S. 1, 52 (1945). Clear and unmistakable proof is necessary in any Sherman Act violation, especially where a summary judgment is involved. This same general view is adopted in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). The Court has also held that vertical expansion such as that in the principal case was not a per se violation of the Sherman Act, but depends upon the motives and intent of the parties and its effect upon the market. *United States v. Columbia Steel Co.*, 334 U.S. 495, 525 (1948); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 173 (1948).

Mr. Justice Harlan's dissenting opinion in *Poller v. Columbia Broadcasting System, Inc., supra*, and Mr. Justice Clark's dissenting opinion in the principal case take the position that Rule 56 does not indicate that it is to be used any more "sparingly" in antitrust litigation than in other types of civil cases. To disagree with their position would be to refute the purpose of Rule 56. Once the moving party for summary judgment has introduced evidence which clearly shows that a genuine issue of fact does not exist, the opposing party must meet the movant's evidence with a showing of facts, in detail and with precision, sufficient to raise a genuine issue of material fact. A formal denial of the movant's evidence or general allegations by the opposing party in a brief, without facts presented to support them, should not prevent the awarding of a summary judgment. *United States v. Daubendiek, supra.* The opposing party to a motion for summary judgment in an antitrust suit should be required to show evidence of a genuine issue of fact as in other civil actions to keep within the purpose of the rule.

Since the principal case was decided, Rule 56 has been amended. The amendment to subsection (e) makes it clear that pleading allegations cannot, in themselves, create a genuine issue of fact when summary judgment is sought. 31 F.D.R. Adopted Amendments, No. 4 p. 17 (January, 1963). The Court intimates in the instant case that a contrary decision would have been reached if the amendment had been effective when the motion for summary judgment was made.

Rule 56 of the West Virginia Rules of Civil Procedure is the same as the Federal Rule prior to its amendment. W. Va. R.C.P. 56. In the only case decided in this state since the adoption of the Rules in which a summary judgment was involved, the court indicated it will give a literal interpretation to Rule 56. In *Petros v.*

Kellas, 122 S.E.2d 177 (W. Va. 1960), the court stated that, to resist a motion for summary judgment, the opposing party must present some evidence to indicate that the facts are in dispute and that the mere contention that the issue is disputable is not sufficient.

Although Federal Rule 56 applies to all civil cases, the courts have been reluctant to use summary judgment procedure in many instances, particularly where an issue of public moment was involved. *Poller v. Columbia Broadcasting System, Inc., supra; Kennedy v. Silas Mason Co., supra; Pacific American Fisheries v. Mullaney,* 191 F.2d 137 (9th Cir. 1951). These decisions stem from the reluctance of the judiciary to get away from the open court and the fact that the credibility of witnesses cannot be effectively examined by affidavits and depositions. *Sartor v. Arkansas Gas Corp.,* 321 U.S. 620 (1944); Note, 99 U. PA. L. REV. 212 (1950-51). The amendment to Rule 56 of the Federal Rules has apparently eliminated the problem. Such an amendment would not appear necessary in West Virginia as the court has indicated it will require the opposing party to present facts to oppose the motion for summary judgment and mere allegations would be insufficient. To hold otherwise would be to avoid the primary purpose of the rule.

Sterl Franklin Shinaberry

Sales—Persons Protected by Warranties Under the Uniform Commercial Code—Employee of Buyer Held Not Protected

P, a bartender of a fraternal lodge, was injured by flying glass when an unopened bottle of carbonated soda water exploded as it was standing behind the bar. The soda was bottled, sold and delivered by *D* to *P's* employer. *P* sued for breach of implied warranties of fitness and merchantability. The trial court sustained *D's* demurrer to the complaint. *Held,* affirmed. The manufacturer's implied warranties of fitness and merchantability does not extend to an employee of the purchaser under UNIFORM COMMERCIAL CODE § 2-318. *Hochgertel v. Canada Dry Corp.,* 187 A.2d 575 (Pa. 1963).

The decision of the instant case may have great impact in West Virginia, due to the West Virginia Legislature's recent passage of the Uniform Commercial Code. The issue now is, will the West Virginia Court extend warranties to third party beneficiaries beyond the provisions of the Code?