Michigan Law Review

Volume 51 | Issue 8

1953

SUMMARY JUDGMENT UNDER THE FEDERAL RULES WHEN AN ISSUE OF FACT IS PRESENTED

Mac Asbill
Member, District of Columbia and Georgia Bars

Willis B. Snell
Member, District of Columbia Bar

SUMMARY JUDGMENT UNDER THE FEDERAL RULES—WHEN AN ISSUE OF FACT IS PRESENTED

Mac Asbill and Willis B. Snell†*

INTRODUCTION

RULE 56 of the Federal Rules of Civil Procedure[1] introduced to federal practice the summary judgment procedure, which had been developed previously in England and several of the states.[2] The scope of rule 56 is the broadest possible, since the rule provides that any party may move for a summary judgment in any type of civil action.[3] Rule 56(c) provides that the court shall grant a motion for summary judgment "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."

It is clear from this provision that the movant in order to obtain a summary judgment must show: (1) that there is no genuine issue as to any material fact in the case, and (2) that he is entitled to a judgment in his favor as a matter of law. The second of these requirements has not caused much difficulty; here generally the courts have borrowed a test with which they are familiar, holding that the movant to obtain summary judgment must show that he would be entitled to a directed verdict at trial (if the case were tried to a jury) on the basis of the undisputed facts.[4] It is rather the first of these two requirements which has caused conflict and uncertainty.

Since whether or not there is a genuine issue as to a material fact

* Member, District of Columbia and Georgia Bars.—Ed.

† Member, District of Columbia Bar.—Ed.

1 28 U.S.C. (1946) following §723c, Act of June 19, 1934.

2 For the history of summary judgment, see Clark and Samenow, "The Summary Judgment," 38 YALE L.J. 423 (1929). For a discussion of the procedure as developed in New York, see Shientag, "Summary Judgment," 4 FORD L. REV. 186 (1935).

3 Notes to the Rules of Civil Procedure prepared by The Advisory Committee on Rules for Civil Procedure, Rule 56 (1938). See Engl v. Aetna Life Ins. Co., (2d Cir. 1943) 139 F. (2d) 469 at 472; California Apparel Creators v. Wieder of California, Inc., (D.C. N.Y. 1946) 68 F. Supp. 499 at 507, affd. in part and appeal dismissed in part (2d Cir. 1947) 162 F. (2d) 893, cert. den. 332 U.S. 816, 68 S.Ct. 156 (1947).

4 Sartor v. Arkansas Natural Gas Corporation, 321 U.S. 620 at 624, 64 S.Ct. 724 (1944); Dyer v. Mac Dougall, (2d Cir. 1952) 201 F. (2d) 265 at 269; Vale v. Bonnett, (D.C. Cir. 1951) 191 F. (2d) 334 at 336; Hurd v. Sheffield Steel Corp., (8th Cir. 1950) 181 F. (2d) 269 at 271; Dewey v. Clark, (D.C. Cir. 1950) 180 F. (2d) 766 at 772, 774; Arnstein v. Porter, (2d Cir. 1946) 154 F. (2d) 464 at 470; Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co., (2d Cir. 1945) 147 F. (2d) 399 at 405, cert. den. 325 U.S. 861, 65 S.Ct. 1201 (1945); Ramsouer v. Midland Valley Railroad Co., (8th Cir. 1943)

clearly must be determined on a case to case basis,[5] only general principles can be gathered from the rule and the precedents. In each case, the judge must weigh the possible effect of a trial in open court to color, explain or contradict the evidence submitted to the court in writing on such a motion, usually in the form of ex parte affidavits, against (1) the desirability of avoiding a long and expensive trial which might produce nothing more to assist the court in reaching a decision, and (2) the danger that the threat of such a trial will be used as a type of harassment to coerce a settlement.[6]

When there are such important conflicting policy considerations, it is not strange to find different attitudes toward summary judgment, and conflicting statements and decisions by the courts. Thus we find the summary judgment procedure praised because it "has demonstrated its worth as a prompt, business-like and inexpensive method of disposing of a substantial amount of litigation," and the statement that "There is no more effective weapon in the arsenal of legal administration."[7] Judge Clark, Reporter of the Advisory Committee which drafted the Federal Rules, has referred to the "very valuable remedy of summary judgment."[8] On the other hand, trial judges were warned, by other judges of the same Court of Appeals for the Second Circuit of which Judge Clark is a member, that they "should exercise great care" in granting such motions, and that "time has often been lost by reversals of summary judgments improperly entered."[9] We are told also that the procedure should be "cautiously invoked,"[10] and that

135 F. (2d) 101 at 106. But cf. Fireman's Mutual Ins. Co. v. Aponaug Mfg. Co., (5th Cir. 1945) 149 F. (2d) 359 at 363. If the case is to be tried to the court rather than to a jury the directed verdict test would seem to have no direct application, but it would seem possible for the court to use the same standard by way of analogy. See note 15 infra.

[5] 3 MOORE, FEDERAL PRACTICE 3184 (1938). See Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co., (6th Cir. 1943) 137 F. (2d) 871 at 877, cert. den. 320 U.S. 800, 64 S.Ct. 431 (1944).

[6] "The purpose of the rule is to provide against vexation and delay which comes from the formal trial of cases in which there is not substantial issue of fact, and to permit expeditious disposition of cases of that kind." Broderick Wood Products Co. v. United States, (10th Cir. 1952) 195 F. (2d) 433 at 435-436. "The argument is of a piece with the whole action, which has no merit legally, morally or otherwise. There was no issue to try and the remedy of summary judgment is designed to bar exactly such opportunities for unjust exactions to escape the delay and expense of a trial." Altman v. Curtiss-Wright Corp., (2d Cir. 1941) 124 F. (2d) 177 at 180. See also 48 COL. L. REV. 780 (1948); 55 YALE L.J. 810 (1946).

[7] Shientag, "Summary Judgment," 4 FORD. L. REV. 186 at 186 (1935).

[8] Engl v. Aetna Life Ins. Co., (2d Cir. 1943) 139 F. (2d) 469 at 473.

[9] Doehler Metal Furniture Co. v. United States, (2d Cir. 1945) 149 F. (2d) 130 at 135. Cf. Bozant v. Bank of New York, (2d Cir. 1946) 156 F. (2d) 787 at 790.

[10] Associated Press v. United States, 326 U.S. 1 at 6, 65 S.Ct. 1416 (1945); Albert Dickinson Co. v. Mellos Peanut Co. of Illinois, (7th Cir. 1950) 179 F. (2d) 265 at 269; Preston v. Aetna Life Ins. Co., (7th Cir. 1949) 174 F. (2d) 10 at 14, cert. den. 338 U.S. 829, 70 S.Ct. 80 (1949).

"the power to pierce the flimsy and transparent factual veil should be temperately and cautiously used lest abuse reap nullification."[11] Furthermore, it is often stated that on such a motion, all doubts as to the existence of a factual issue must be resolved against the movant,[12] and that the court is critical of all papers of the movant, but not of those of the opposing party.[13]

It is necessary to keep in mind these contrasting approaches to summary judgment in considering what constitutes a genuine issue as to a material fact, since it is apparent that the attitude of the individual judge to the procedure as a whole often colors his holding on this point. In considering the general question of when a movant shows that there is a genuine issue as to a material fact, there are two principal subsidiary questions: (1) what is a fact which may be disputed so as to prevent a summary judgment, and (2) how a party shows that a genuine issue as to such a fact exists.

I. *What Is a "Fact" Which May Be Disputed*

A. *The Disputed "Fact" Must Be an Evidentiary Fact.* Usually there will be no trouble in determining whether a dispute as to a material fact exists. In the ordinary case, the dispute will be about evidentiary facts, and it is not difficult to determine whether or not a material evidentiary fact is disputed. Let us assume that in an action for damages for personal injuries allegedly caused by defendant's negligence, arising from the collision of two automobiles, plaintiff contends that defendant entered the intersection where the accident occurred without stopping for a stop sign; defendant contends that he did stop. Assuming that this fact is material to the question of liability, it is clear that there is here such an issue of fact as will prevent summary judgment; the trier of fact will have to decide on the basis of the conflicting evidence which party is correct.

[11] Avrick v. Rockmount Envelope Co., (10th Cir. 1946) 155 F. (2d) 568 at 571; Michel v. Meier, (D.C. Pa. 1948) 8 F.R.D. 464 at 471.

[12] E.g., Parmelee v. Chicago Eye Shield Co., (8th Cir. 1946) 157 F. (2d) 582 at 585 ("All reasonable doubts are to be resolved against" the movant); Bozant v. Bank of New York, (2d Cir. 1946) 156 F. (2d) 787 at 789 (the court must "take against [the movant] every question as to which there is the least doubt"); Walling v. Fairmount Creamery Co., (8th Cir. 1943) 139 F. (2d) 318 at 322 (on summary judgment "all doubts are resolved against" the movant); Weisser v. Mursam Shoe Corp., (2d Cir. 1942) 127 F. (2d) 344 at 346 (on summary judgment the opposing party must be given "the benefit of every doubt"); Newark Evening News Publishing Co. v. King Features Syndicate, Inc., (D.C. N.J. 1948) 7 F.R.D. 645 at 646-647 ("all doubts thereon must be resolved against the moving party"); Clair v. Sears, Roebuck & Co., (D.C. Mo. 1940) 34 F. Supp. 559 at 559 (a movant must show that he is entitled to summary judgment "beyond all doubt").

[13] 3 MOORE, FEDERAL PRACTICE 3189-3190 (1938); Wittlin v. Giacolone, (D.C. Cir. 1946) 154 F. (2d) 20 at 22.

It may be, however, that there is no dispute as to the evidentiary facts, but that there is a dispute as to the inferences of fact to be drawn from them. When this is the case, it may be that neither party is entitled to a judgment as a matter of law. Let us assume that in another action for damages for personal injuries, allegedly caused by defendant's negligence, which action also arose out of a collision of two automobiles, all of the evidentiary facts are agreed to; that is, there is no dispute as to the location of the automobiles, the speed at which they were traveling, the weather and traffic conditions, etc. The only question is whether under all the circumstances, defendant was negligent because of the speed at which he was traveling. It is entirely possible that here reasonable men could differ on the question of negligence; that is, conflicting inferences as to negligence are possible. Then, the trier of fact must draw the inferences, and summary judgment should not be granted,[14] because neither party is entitled to a judgment as a matter of law; neither party would be entitled to a directed verdict at trial.[15]

[14] Huff v. Louisville & Nashville R. Co., (5th Cir. 1952) 198 F. (2d) 347 at 349; Dulansky v. Iowa-Illinois Gas & Electric Co., (8th Cir. 1951) 191 F. (2d) 881 at 884; Stevens v. Howard D. Johnson Co., (4th Cir. 1950) 181 F. (2d) 390 at 394; Winter Park Telephone Co. v. Southern Bell Telephone & Telegraph Co., (5th Cir. 1950) 181 F. (2d) 341; Paul E. Hawkinson Co. v. Dennis, (5th Cir. 1948) 166 F. (2d) 61 at 63; Detsch & Co. v. American Products Co., (9th Cir. 1946) 152 F. (2d) 473 at 475; Ramsouer v. Midland Valley Railroad Co., (8th Cir. 1943) 135 F. (2d) 101 at 106.

[15] Rule 56 would seem to require this result, regardless of whether the trial is to a jury or to the court. However, it has been suggested that: "In a non-jury case if both parties move for summary judgment and the court finds that there are issues of fact but that the facts have been fully developed at the hearing on the motions, the court may proceed to decide the factual issues and give judgment on the merits. This of course amounts to a trial of the case and is not technically a disposition by a summary judgment." 3 BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE ¶1239 (1950).

See, also, Meikle v. Timken-Detroit Axle Co., (D.C. Mich. 1942) 44 F. Supp. 460. It would seem that regardless of whether or not both parties move for summary judgment, if the trial would be to the court, and the evidentiary facts are not disputed, but conflicting inferences are possible, that the court should be able to draw those inferences on the motion. In such a case, a trial would seem useless, since the court already has before it the facts that would be shown on trial. But such a result is possible under the present rule only if the requirement that the movant be entitled to judgment as a matter of law has a different meaning when the trial is to the court than when it is to a jury. See note 4 supra. There appears to be no justification for such a distinction.

Judge Frank in his concurring opinion in Dyer v. Mac Dougall, (2d Cir. 1952) 201 F. (2d) 265, states that the majority opinion in that case establishes a different rule for trials to a jury and trials to the court, in that it indicates that the appellate court will reverse a decision based only on demeanor evidence when the trial is to a jury, in order to preserve review of the disposition of a motion for directed verdict, but that the appellate court will not reverse such a decision when the trial is to the court, since there is then no motion for a directed verdict involved. No language in the majority opinion makes such a distinction; the case rather indicates that such demeanor evidence alone is not enough to sustain a decision for plaintiff, regardless of the method of trial.

Seaboard Surety Co. v. Racine Screw Co., (7th Cir. 1953) 203 F. (2d) 532, raises the question of whether summary judgment for plaintiff is proper in a suit for specific performance. The court held that it is not, on the basis that in such a suit, plaintiff is

But if one party is entitled to a judgment as a matter of law, a dispute as to inferences should not prevent summary judgment. In the hypothetical case above, it is possible that defendant's speed shows that he was negligent as a matter of law, so that on the facts presented, a verdict would have to be directed for plaintiff. In such a case, plaintiff is entitled to a judgment as a matter of law, and the dispute as to the inference of negligence should not constitute a dispute of fact so as to prevent a summary judgment. Rather, the issue of fact which prevents summary judgment should be limited to a dispute of an evidentiary fact. Judge Rutledge (while a member of the Court of Appeals for the District of Columbia Circuit) has best stated this rule:

> "There was conflict concerning interpretation of the facts and the ultimate conclusion to be drawn from them respecting intention. But there was none as to the facts themselves. In other words, the evidentiary facts were not substantially in dispute."[16]

The other cases which have considered this question agree that a dispute as to inferences to be drawn is not a dispute of fact which prevents summary judgment.[17]

The same rule should apply regardless of whether or not the fact to be inferred from the undisputed evidentiary facts could be an evi-

entitled only to appeal to the sound discretion of the court, and is not entitled to a judgment as a matter of law.

This is an extremely narrow interpretation of the language of rule 56, but it would appear that both of these problems presented by the requirement that the movant to obtain summary judgment must be entitled to a judgment as a matter of law could best be solved by a change in the language of the rule. See, for example, rule 42 of the May 1936 draft, infra note 45.

[16] Fox v. Johnson & Wimsatt, Inc., (D.C. Cir. 1942) 127 F. (2d) 729 at 736. The court continued at 737: "Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court. The court had before it all the facts which formal trial would have produced. Going through the motions of trial would have been futile." This language is ambiguous and can be taken to mean that when the trial would be to the court, the court can decide the case on summary judgment when conflicting inferences are possible. See note 15 supra. However, it seems that the court meant only that summary judgment is proper when the court must draw the conclusion because it follows as a matter of law.

[17] Keele v. Union Pacific R. Co., (D.C. Cal. 1948) 78 F. Supp. 678 at 679 ("if all of the basic facts are undisputed and the matter is one of interpretation or the reaching of a conclusion by the Court, the Court may grant a motion for Summary Judgment"); Northland Greyhound Lines, Inc. v. Amalgamated Association, (D.C. Minn. 1946) 66 F. Supp. 431 at 433 ("although the parties draw different conclusion from certain facts, there is no controversion of any material fact and therefore no genuine issue for trial"), appeal dismissed, (8th Cir. 1946) 157 F. (2d) 329; Read Magazine v. Hannegan, (D.C. D.C. 1945) 63 F. Supp. 318 at 319 (a summary judgment "is appropriate in a case in which the evidentiary facts are not substantially in dispute, and the conflict arises only concerning the ultimate conclusions to be drawn from uncontroverted facts"), affd. (D.C. Cir. 1946) 158 F. (2d) 542, reversed on other grounds, 333 U.S. 178, 68 S.Ct. 591 (1948); Otis & Co. v. Pennsylvania R. Co., (D.C. Pa. 1945) 61 F. Supp. 905 at 907 ("the Court has before it

dentiary fact. Certain facts, such as negligence, must always be proved by proving other facts from which they are to be inferred. On the other hand, certain facts may be proved by direct or circumstantial evidence. The existence of a conspiracy, for instance, can conceivably be shown by the direct evidence of an agreement entered in writing by the conspirators. However, in many cases, the existence of a conspiracy can be proved only by proving other evidentiary facts from which the conspiracy may be inferred.[18] That direct evidence could be presented should not matter. If in fact no direct evidence is presented, the court should determine whether the evidentiary facts from which the conspiracy is to be inferred in the particular case are in dispute; if they are not, then if from these undisputed evidentiary facts, the existence or the non-existence of the conspiracy follows as a matter of law, the court should grant a summary judgment for the appropriate party.[19] This rule seems to have been adopted by the few cases where the problem has arisen.[20]

B. *Credibility as an Issue of Fact.* Another question which has arisen is whether, when the moving party supports his motion by affidavits and/or depositions, the credibility of the witnesses whose testimony is thus presented constitutes an issue of fact which prevents summary judgment. If the party opposing a summary judgment in-

all the facts which a formal trial would produce and since this cause came on to be heard without a jury, and there is no substantial conflict concerning the evidentiary facts, but only as to the inferences to be drawn therefrom, this is a proper case for summary judgment"), affd. (3d Cir. 1946) 155 F. (2d) 522; Dickheiser v. Pennsylvania R. Co., (D.C. Pa. 1945) 5 F.R.D. 5 at 9 (summary judgment granted when "purported issues of fact" were "in reality, questions of law or ultimate conclusions of subjective facts to be deduced by the Court from facts which are not disputed"), affd. (3d Cir. 1946) 155 F. (2d) 266, cert. den. 329 U.S. 808, 67 S.Ct. 620 (1947); Heart of America Lumber Co. v. Belove, (D.C. Mo. 1939) 28 F. Supp. 619, affd. (8th Cir. 1940) 111 F. (2d) 535.

[18] E.g., Interstate Circuit, Inc. v. United States, 306 U.S. 208, 59 S.Ct. 467 (1939).

[19] It is generally held that when one party has made a motion for summary judgment the court may properly enter a summary judgment for the other party even though he made no motion himself. 3 MOORE, FEDERAL PRACTICE 3186 (1938); American Automobile Ins. Co. v. Indemnity Ins. Co. of North America, (D.C. Pa. 1952) 108 F. Supp. 221 at 224; Hennessey v. Federal Security Administrator, (D.C. Conn. 1949) 88 F. Supp. 664 at 668; Northland Greyhound Lines, Inc. v. Amalgamated Assn., (D.C. Minn. 1946) 66 F. Supp. 431 at 433, appeal dismissed, (8th Cir. 1946) 157 F. (2d) 329. And in Tripp v. May, (7th Cir. 1951) 189 F. (2d) 198 at 200, a summary judgment for plaintiff was affirmed when plaintiff made the motion orally at the hearing on defendant's motion, and thus without the 10 days' notice required by rule 56(c).

[20] Lindsey v. Leavy, (9th Cir. 1945) 149 F. (2d) 899, cert. den. 326 U.S. 783, 66 S.Ct. 331 (1946); United States ex rel. Ryan v. Broderick, (D.C. Kan. 1945) 59 F. Supp. 189, appeal dismissed, (10th Cir. 1945) 150 F. (2d) 1023. See Arnstein v. Porter, (2d Cir. 1946) 154 F. (2d) 464 at 469, where the court stated that copying of a musical composition could be proved by plaintiff by direct evidence or by evidence of both similarity and access, and that when there was no such direct evidence, summary judgment would be proper if there was no evidence of access.

tends to dispute facts by impeaching the witnesses of the movant, and so states, indicating the basis for such impeachment, there should be no doubt but that there is an issue of fact which requires a trial.[21]

The difficulty arises when the opposing party does *not* indicate any basis for impeachment, and stems from the case of *Arnstein v. Porter*[22] where Judge Jerome Frank of the Court of Appeals for the Second Circuit made clear his antipathy to the summary judgment procedure casting grave doubt on the usefulness of the procedure with language unnecessary to the decision in the case.[23]

The *Arnstein* case involved alleged infringement by Cole Porter of certain songs written by plaintiff. The issue on which the decision turned was whether there was sufficient evidence of copying by defendant to prevent summary judgment in his favor. Plaintiff sought to prove copying by proving similarity in the compositions and access to plaintiff's songs by defendant. Judge Frank held that there was a sufficient showing of similarity so that if there was enough evidence of access to permit the case to go to the jury, it could find copying. Plaintiff's deposition had been taken, and in this, he sought to prove access by statements to the effect that defendant's stooges had watched him, followed him, and lived in his apartment; that his rooms had been ransacked; that many of his works had been publicly performed. Defendant in his deposition denied access and copying. The trial court held that plaintiff's story was too fantastic to be believed, and granted a summary judgment for defendant.

Judge Frank (with Judge Learned Hand) reversed this decision, holding that there was an issue of fact because there was evidence of access sufficient for a jury to infer copying. Rather than deciding simply that the question of access was in dispute—a clear factual question—Judge Frank resorted to finding an issue of fact as to credibility:

> "If, after hearing both parties testify, the jury disbelieves defendant's denials, it can, from such facts, reasonably infer access. It follows that, as credibility is unavoidably involved, a genuine issue of material fact presents itself. With credibility a vital factor, plaintiff is entitled to a trial where the jury can ob-

[21] Cf. Firemen's Mutual Ins. Co. v. Aponaug Mfg. Co., (5th Cir. 1945) 149 F. (2d) 359 at 362-363, where the court found an issue of fact as to the credibility of an affiant of the party opposing the motion.

[22] (2d Cir. 1946) 154 F. (2d) 464.

[23] An intra-court battle has been waged by the Court of Appeals for the Second Circuit concerning summary judgment. Judges Frank and Clark are respectively the leading exponents of the hostile and friendly attitudes toward rule 56. The other judges of this court have vacillated. The language of the various decisions of the court in summary judgment cases is impossible to reconcile. See for instance, notes 9, 31, 32, 109, 110, 111. See, also, 5 VAND. L. REV. 607 at 611-612 (1952).

> serve the witnesses while testifying. Plaintiff must not be deprived of the invaluable privilege of cross-examining the defendant—the 'crucial test of credibility'—in the presence of the jury. Plaintiff, or a lawyer on his behalf, on such examination may elicit damaging admissions from defendant; more important, plaintiff may persuade the jury, observing defendant's manner when testifying, that defendant is unworthy of belief."[24]

There follows an eloquent essay on the values of obtaining evidence by oral examination in open court.

Once we have accepted Judge Frank's premise that the evidence presented by plaintiff was sufficient for the issue of access (as well as that of similarity) to go to the jury, the decision seems correct, since an issue of fact was presented. Judge Clark, dissenting vigorously, said he did not believe that the evidence of similarity and access was sufficient to go to the jury, and indicated that he did not believe that the other members of the panel did either. He stated that the real basis for the decision was "a belief in the efficacy of the jury to settle issues of plagiarism, and a dislike of the rule established by the Supreme Court as to summary judgments."[25] He denounced the decision as an improper method of amending the rules.[26]

In order fully to understand the position of Judge Frank, it is necessary to consider also his later opinion in *Colby v. Klune*.[27] Here plaintiff sought to compel defendant to disgorge profits which defendant had made on a sale of stock. It was alleged that defendant had violated the Securities Exchange Act of 1934; whether there was such a violation turned on whether within the meaning of the act he was an "officer" of the corporation whose stock was involved. Both parties moved for summary judgment, and apparently both submitted affidavits. The trial court stated that there was no dispute between the parties as to the corporate duties of defendant[28] and granted a summary judgment for defendant. Judge Frank for the court of appeals reversed, holding that the trial judge had adopted a wrong definition of "officer." He then held that plaintiff should be allowed to produce

[24] Arnstein v. Porter, (2d Cir. 1946) 154 F. (2d) 464 at 469-470.

[25] Id. at 479.

[26] Id. at 479: "That is a novel method of amending rules of procedure. It subverts the plans and hopes of the profession for careful, informed study leading to the adoption and to the amendment of simple rules which shall be uniform throughout the country. Worse still, it is ad hoc legislation, dangerous in the particular case where first applied and disturbing to the general procedure."

[27] (2d Cir. 1949) 178 F. (2d) 872.

[28] "Klune's duties are not in dispute. Plaintiff has stated them as he finds them and moves for summary judgment upon them." Colby v. Klune, (D.C. N.Y. 1949) 83 F. Supp. 159 at 161.

oral testimony in open court, or other evidence, relevant under the correct definition of officer. The case might be explained on the basis that the affidavits submitted did not present sufficient evidence under the revised definition of officer adopted by the court of appeals to justify a judgment as a matter of law. That interpretation would mean that the reversal was because of a mistake of law, and had nothing to do with the credibility of the witnesses whose affidavits were submitted. However, such an interpretation is hard to reconcile with the language which follows immediately the statement that plaintiff should be allowed to produce further evidence:

> "For the affidavits do not supply all the needed proof. The statements in defendants' affidavits certainly do not suffice, because their acceptance as proof depends on credibility; and—absent an unequivocal waiver of a trial on oral testimony—credibility ought not, when witnesses are available, be determined by mere paper affirmations or denials that inherently lack the important element of witness' demeanor."[29]

There follows another lengthy essay on the virtues of trial in open court.

If this statement by Judge Frank were followed, then whenever a summary judgment must depend on facts presented by affidavit, the motion for summary judgment must be denied. Thus the provisions in rule 56 stating that affidavits are to be considered, and stating the requirements for such affidavits, are merely surplus words added to the Federal Rules for some unexplained reason.[30] For if we accept this case at face value, on the basis of the facts which can be drawn from the opinions of the trial court and of Judge Frank, neither party wished to contest credibility; from all that appears, there was no issue, genuine, phantom or potential, as to the evidentiary facts. But even though both parties agreed on the facts, and both wanted summary judgment on the basis of those facts, a trial was necessary, because Judge Frank wished to try the issue of credibility.

Thus this decision would seem to mean that summary judgment is possible only when the movant relies solely on documentary evidence, since Judge Frank finds an issue of credibility whenever the movant must rely on the testimony of a witness. It would not be a great extension of the case to say that a summary judgment is not possible even when documentary evidence is involved, since the trier of fact may question the credibility of the witness who identifies the documents and therefore may not accept such documents as genuine.

[29] Colby v. Klune, (2d Cir. 1949) 178 F. (2d) 872 at 873-874.
[30] Rules 56(c), 56(e).

Fortunately, the Second Circuit has not adhered to the extreme course indicated by these two cases. It is true that Judge Frank continues to talk of whether or not there is an issue as to credibility.[31] However, other panels of the Second Circuit have affirmed summary judgments in two cases where Judge Frank would be forced to find an issue as to credibility, if he followed his earlier decisions.[32] In both of these cases, the granting of summary judgment required that the court accept facts stated in affidavits of officers of the corporate defendants who moved for the summary judgments. In neither case was there a mention of the issue of credibility.[33]

In one of these two cases,[34] the panel consisted of Judges Learned Hand, Swan and Chase. It is interesting that it was Judge Learned Hand who with Judge Frank comprised the majority in the *Arnstein* case, and that Judges Learned Hand and Swan were the two who with Judge Frank comprised the unanimous panel in the *Colby* case. Thus both of the judges who have agreed with Judge Frank in reversing summary judgments on the basis that an issue of credibility is involved have subsequently voted to affirm summary judgments where, to be consistent, they would also have to find a question of fact as to credibility. Thus, although the *Arnstein* and *Colby* cases have not been expressly overruled, it seems that they should have little weight in the Second Circuit today in view of the later cases. Of course a new case, in which Judge Frank sat and was again able to convince at least one of his fellow judges as to the credibility question, could change this conclusion at any time.

The Supreme Court has also touched on the question of credibility in connection with summary judgment in *Sartor v. Arkansas Natural Gas Corporation.*[35] In a suit to recover on an oil and gas lease, the Court reversed a summary judgment on the basis that there was in the case an issue as to the fact of the market price or value of plaintiff's gas at the time and place of delivery. Defendant supported its motion for summary judgment with affidavits consisting of opinion

[31] Fleetwood Acres, Inc. v. Federal Housing Administration, (2d Cir. 1948) 171 F. (2d) 440 at 442; Dixon v. American Telephone & Telegraph Co., (2d Cir. 1947) 159 F. (2d) 863 at 864. Cf. Dyer v. Mac Dougall, (2d Cir. 1952) 201 F. (2d) 265 (concurring opinion).

[32] Wendelen v. Commander Larabee Milling Co., (2d Cir. 1951) 187 F. (2d) 732, affd. on the opinion of the district court (D.C. N.Y. 1950) 96 F. Supp. 92; Compania de Remorque y Salvamento, S.A. v. Esperance, Inc., (2d Cir. 1951) 187 F. (2d) 114.

[33] In Wendelen v. Commander Larabee Milling Co., (2d Cir. 1951) 187 F. (2d) 732, the court wrote no opinion since it affirmed on the opinion of the district court rendered by Judge Knight (D.C. N.Y. 1950) 96 F. Supp. 92.

[34] Compania de Remorque y Salvamento, S.A. v. Esperance, Inc., (2d Cir. 1951) 187 F. (2d) 114.

[35] 321 U.S. 620, 64 S.Ct. 724 (1944).

evidence as to this value, similar to opinion evidence given by the same affiants at a prior trial in the case as to market value at a different time, which evidence had been rejected by the jury. The basis for the reversal, it seems, was that the Court considered such opinion evidence inherently weak and not sufficient to entitle defendants to a judgment as a matter of law, especially since a jury had previously rejected similar evidence.

The Court, however, also indicated by the following quotation that there may be an issue of fact as to credibility whenever the witness is "interested": " '. . . the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.' *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 408."[36]

Since the Court does not discuss this quotation, it is hard to tell just what the Court intended. One court of appeals has stated: "We do not deem this reference by the Court to credibility as necessarily precluding summary judgment whenever interest in the result may be said to make credibility a factor."[37] The Court of Appeals for the Second Circuit emphasized that this case involved an evaluation of expert testimony,[38] and it seems to be correct that this is the primary factor in the Court's decision. The broad statement quoted from the *Sonnentheil* case was later rejected by the Supreme Court.[39] Certainly the courts in summary judgment cases have not adopted the rule that is suggested by the above quotation from the *Sartor* case.[40] If they did, the limitation on the summary judgment procedure would be a drastic one, since it is very likely that the parties having personal

[36] Id. at 628.

[37] Dewey v. Clark, (D.C. Cir. 1950) 180 F. (2d) 766 at 770.

[38] Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co., (2d Cir. 1945) 147 F. (2d) 399 at 405, cert. den. 325 U.S. 861, 65 S.Ct. 1201 (1945).

[39] "We recognize the general rule, of course, . . . that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view it is open to doubt. . . .

"It is true that numerous expressions are to be found in the decisions to the effect that the credibility of an interested witness always must be submitted to the jury, and that that body is at liberty to reject his testimony upon the sole ground of his interest. But these broad generalizations cannot be accepted without qualification. . . . In many, if not most, of them, there were circumstances tending to cast suspicion upon the testimony or upon the witness, apart from the fact that he was interested." Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209 at 216-217, 51 S.Ct. 453 (1931).

[40] E.g., Surkin v. Charteris, (5th Cir. 1952) 197 F. (2d) 77; Kam Koon Wan v. E. E. Black, Ltd., (9th Cir. 1951) 188 F. (2d) 558; Wendelen v. Commander Larabee Milling Co., (2d Cir. 1951) 187 F. (2d) 732; Compania de Remorque y Salvamento, S.A. v. Esperance, Inc., (2d Cir. 1951) 187 F. (2d) 114; Lincoln Electric Co. v. Linde Air Products Co., (6th Cir. 1948) 171 F. (2d) 223.

knowledge of the facts involved will be "interested" in the result as that term is used here.[41]

An analysis of these statements referring to credibility as an issue of fact indicates that they add only confusion to the law. Any attack on the credibility of a witness is significant only insofar as it affects the weight to be given by the trier of fact to the facts stated by that witness. If the opposing party does not contest the facts stated by the witness, he has no reason to attack the witness's credibility. Whenever there is an issue, actual or potential, as to credibility, there is a dispute as to an evidentiary fact as to which the witness testifies. Ordinarily, the opposing party will be able to present evidence to support his version of the disputed evidentiary fact. It is possible, however, that a defendant may have no such evidence and may plan to do nothing at trial except attack the credibility of plaintiff's witnesses in order to show that the plaintiff has failed to prove a claim. In this situation, there is a genuine, and not an imaginary, issue as to credibility, and in such a case defendant can show how he plans to attack credibility.[42] There is also still an issue as to the evidentiary facts, since defendant is disputing the truth of the witnesses' testimony. It would seem that only rarely will defendant have nothing on which to rely except an attack on credibility.

Since whenever there is an issue of credibility there is also a genuine issue as to a material, evidentiary fact, that dispute as to the evidentiary fact is enough to preclude summary judgment, without resort to talk of credibility and long accompanying essays defending trial in open court and laboring the importance of the appearance of witnesses before the trier of fact in order to get at the truth, when the parties do not dispute what the truth is. Talk of credibility as an issue of fact when the opposing party does not specifically rely on it is superfluous and only beclouds the true question of whether there is a genuine issue as to an evidentiary fact.[43]

II. *How a Party Shows that an Issue of Fact Exists*

Assuming now that a motion for summary judgment will be granted unless there exists a genuine issue as to a material, evidentiary

[41] In the Sartor case, 321 U.S. 620, 64 S.Ct. 724 (1944), the Court found the following affiants to be "interested": officers of the corporate defendant, individuals "with interests apparently similar to those of the defendant," officers of a corporation defending similar suits brought by plaintiff and others, and officers of corporations "with similar interests as the defendant."

[42] This situation will probably arise, if at all, when the facts are peculiarly within the knowledge of the movant. When that is true, the opposing party also has available rule 56(f). See notes 107 to 115 infra.

[43] See 99 UNIV. PA. L. REV. 212 at 218 (1950). Of course, a party may want to raise

fact, the next question to consider is on what basis the court should decide whether there is such an issue. We are often told that the purpose of the summary judgment procedure is to determine whether there is a genuine issue of fact, but not to decide such an issue, once one is found to exist.[44] The usefulness of the procedure, then, depends on how effective it is to pierce formalities and get down to the facts of the case to determine whether in truth an issue of fact exists.

The two questions here are what papers the court should consider in determining whether there is a factual issue, and then, on the basis of the papers considered, what is sufficient in them to show an issue of fact.

A. The Papers Submitted on the Motion, and Not the Pleadings, Should be Used to Determine the Existence of an Issue of Fact. It would seem clear that if the summary judgment procedure is to be effective it must be held that when other papers are submitted in support of the motion, that the pleadings are not sufficient to raise an issue of fact.[45] It may be held that an issue of fact is raised either (1) by an allegation and a denial of it in the pleadings or (2) by an allegation in the pleadings and an inconsistent statement in an affidavit of the other party. Either holding seriously limits the effective-

an issue specifically as to credibility, as that may be the easiest way for him to show that there is a genuine issue of fact. If he presents sufficient material to raise such a question on the motion, it should be enough to prevent summary judgment. See note 21 supra.

[44] 3 MOORE, FEDERAL PRACTICE 3175, 3184 (1938); Chappell v. Goltsman, (5th Cir. 1950) 186 F. (2d) 215 at 218; Hazeltine Research, Inc. v. General Electric Co., (7th Cir. 1950) 183 F. (2d) 3 at 7; Hunter v. Mitchell, (D.C. Cir. 1950) 180 F. (2d) 763 at 764; Frederick Hart & Co., Inc. v. Recordgraph Corp., (3d Cir. 1948) 169 F. (2d) 580 at 581; Parmelee v. Chicago Eye Shield Co., (8th Cir. 1946) 157 F. (2d) 582 at 585; Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co., (6th Cir. 1943) 137 F. (2d) 871 at 877, cert. den. 320 U.S. 800, 64 S.Ct. 431 (1944); Ramsouer v. Midland Valley Railroad Co., (8th Cir. 1943) 135 F. (2d) 101 at 103; Miller v. Miller, (D.C. Cir. 1941) 122 F. (2d) 209 at 212.

[45] It is true that rule 56(c) states that summary judgment shall be rendered if the "pleadings, depositions, and admissions on file, together with the affidavits, if any" show no genuine issue as to a material fact. It would seem that this reference to the pleadings should be construed to mean that they are to be used in determining what the case is about, the contentions of the parties, what facts, if any, are admitted therein and whether the movant is entitled to judgment as a matter of law, and not to determine whether there is an issue of fact as to any of these contentions. Otherwise, the rule is clearly ineffective. It is interesting to compare with the rule as adopted the language which appeared in the earlier drafts submitted by the Advisory Committee. In the draft submitted in May, 1936, rule 42 provided for a "Motion for Summary Judgment upon Pleadings, Depositions and Admissions." This rule provided as follows:

> "Any party may make a motion, upon grounds specified therein, for a judgment in his favor upon the pleadings, depositions and admissions on file in respect to any or all of the matters involved in the action, upon notice to all other parties to be affected thereby. Any adverse party may file affidavits in opposition thereto, and the Court in its discretion permit either party to take and file depositions or to present oral testimony. If the Court finds from such pleadings, depositions, affidavits and testimony that there is no substantial issue of fact affecting the right

ness of the summary judgment procedure. Each will be considered in turn.

When suit is filed against him, defendant has several alternatives (disregarding objections he can make to the form of the complaint): (1) he can fail to appear; (2) he can move for dismissal on some ground other than the merits of the case; (3) he can file a motion to dismiss for failure to state a claim upon which relief can be granted; (4) he can file an answer denying some or all of the material allegations of the complaint, with or without alleging affirmative defenses; (5) he can file an answer, setting forth one or more affirmative defenses, without a denial of any allegation in the complaint; (6) he can file an answer, admitting all material allegations of the complaint but stating no affirmative defense; (7) he can move for summary judgment.

If defendant follows one of the first three courses, the Federal Rules provide other procedures to be followed, and a motion for summary judgment is inappropriate. If defendant does nothing, plaintiff is entitled to a default judgment under rule 55. If defendant wishes to make a motion to dismiss, either for failure to state a claim upon which relief can be granted or for some reason not going to the merits, he should make the motion under rule 12(b).

of the moving party to judgment and that he is entitled to a judgment, it shall give judgment accordingly."

Rule 43 provided for a "Motion for Summary Judgment upon Affidavits." Paragraph (a) provided the rule for such a judgment for a claimant:

"Any party seeking to recover upon a claim, counterclaim or crossclaim may, at any time after serving the pleading presenting the claim, move for a summary judgment in his favor thereon. Such judgment shall forthwith be rendered if the motion is supported by affidavits setting forth facts which, on their face, would require a decision in his favor as a matter of law, unless the adverse party shall present opposing affidavits setting forth substantial evidence in denial or in avoidance thereof."

Part (b) of the rule provided a similar test for a motion made by the defending party. In the draft submitted in April, 1937, Rule 38(c) provided as to summary judgments:

"The motion shall be served at least 10 days before the time specified for the hearing. Unless the adverse party prior to the day of hearing serves opposing affidavits setting forth facts sufficient to constitute a denial or avoidance, the judgment sought shall be rendered forthwith if (1) the pleadings of the moving party and also (2) the depositions and admissions on file together with the affidavits, if any, attached to or served with the motion show upon their face that, except as to the amount of damages, there is no genuine issue as to any material fact and that he is entitled to a judgment as a matter of law."

It can be seen that the language in each of these drafts would remove the uncertainty which has arisen under rule 56(c) and make it clear that the pleadings cannot raise an issue of fact. There is no indication that these changes in language were intended to change the substance of the rule in such a way that the pleadings would raise an issue of fact or that the opposing party would not have to present his evidence on the motion. The changes were apparently made merely as a matter of form. Of course, if the moving party bases his motion only on the pleadings, the court can look only to the pleadings to determine whether there is an issue of fact. See American Airlines, Inc. v. Ulen, (D.C. Cir. 1949) 186 F. (2d) 529 at 531. But when the movant relies solely on the pleadings, it seems that the proper motion is either a motion to dismiss under rule 12(b) or one for judgment on the pleadings under rule 12(c).

If defendant follows the fourth course, and denies certain allegations of the complaint, then obviously the pleadings alone will raise an issue of fact.[46] If he follows the fifth course, and relies entirely on affirmative defenses, facts stated to support these defenses will stand denied by plaintiff,[47] and thus the pleadings will still raise an issue of fact.

If defendant follows the sixth course it means that although he is willing to fight the case to the extent of filing an answer he does not contend that plaintiff has not stated a cause of action, and does not dispute the facts stated, and thus presents no defense at all.[48] Even in this unlikely situation summary judgment is not necessary, since plaintiff can then make a motion for judgment on the pleadings under rule 12(c).[49]

Thus if the pleadings alone are sufficient to raise an issue of fact, summary judgments will be useful only when defendant follows the seventh course and moves for summary judgment before filing his answer, as he may do.[50] However, there appears to be no intent so to limit defendant's use of the procedure to cases where he has not filed an answer. Furthermore, since plaintiff cannot move for summary judgment until 20 days after the suit is filed,[51] unless defendant so moves before that time, plaintiff could in most cases never make the motion at all, unless defendant so moved also, since the answer must be filed within 20 days unless an extension of time is obtained.[52] Since the motion is clearly available to plaintiff as well as defendant [53] and since no time limit is imposed by the rule, it would obviously be erroneous to limit its effectiveness so that plaintiff could not take advantage of it, unless defendant happened to obtain an extension of time to file his answer or moved for summary judgment. There is absolutely no indication that the summary judgment procedure was intended to be lim-

[46] Defendant may also under rule 8(b) state in his answer that "he is without knowledge or information sufficient to form a belief as to the truth of an averment." This rule specifically states that such a statement has the effect of a denial.

[47] Plaintiff under rule 7(a) must file a reply only when defendant sets up a counterclaim (unless the court orders one in other cases), but under rule 8(d), "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

[48] Piuma v. United States, (9th Cir. 1942) 126 F. (2d) 601 at 603, cert. den. 317 U.S. 637, 63 S.Ct. 28 (1942).

[49] Rule 12(c) provides that "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."

[50] Rule 56(b).

[51] Rule 56(a). The only exception is when the adverse party so moves before the end of the 20 days.

[52] Rule 12(a). Until amended as of March 19, 1948, rule 56(a) provided that a claimant could not move for summary judgment until a responsive pleading had been filed.

[53] See note 2 supra.

ited to where no answer has been filed, and the exact opposite is clearly indicated by the rules. [54]

If it is held that allegations in the pleadings cannot be controverted by the moving papers on the motion for summary judgment, it means that the motion can be used only as a demurrer or as a way to present an affirmative defense, since if well pleaded allegations stand admitted on the motion, the motion cannot be granted unless the complaint fails to state a claim upon which relief can be granted [in which case a motion should be made under rule 12(b) (6)], or unless accepting the truth of the allegations, there are other facts which prevent a recovery, in which case defendant should plead them, and if they are undisputed, move for a judgment on the pleadings under rule 12(c). The summary judgment procedure is effective and serves a separate useful purpose only when it can be used to pierce allegations in the pleadings and show that the facts are otherwise than as alleged. It cannot be effective if the party can prevent a summary judgment by stating his sham claim or defense in such a way that the moving papers cannot show its falsity.[55]

There is another fact to be considered in determining whether the pleadings alone, or with the moving papers, raise an issue of fact. Rule 56(e) states certain requirements for affidavits submitted for or against a motion for summary judgment; they must be made on the personal knowledge of the affiant; they must set forth facts admissible in evidence; they must show affirmatively that the affiant is competent to testify as to the matters stated therein. None of these requirements exists for pleadings. Under the Federal Rules, it is not even necessary that the pleadings be verified,[56] and it often happens that they are not.[57] It would seem proper to require that an affidavit, meeting the rather strict requirements of rule 56(e), could be rebutted, so as to raise an issue of fact, only by another paper meeting the same requirements.[58] If statements not made on personal knowledge, not admis-

[54] E.g., rules 56(a), 56(b), 12(c).

[55] The ridiculous lengths to which this rule can be carried are shown by Alamo Refining Co. v. Shell Development Co., (D.C. Del. 1949) 84 F. Supp. 325 at 328, where the court refused to grant a summary judgment for a defendant, because of a conflict in its affidavit with an allegation in the complaint, although the court found that plaintiff's own affidavits showed that the allegations of the complaint were not true. Summary judgment was later granted, after an amended complaint, without the allegations in question, had been filed. Alamo Refining Co. v. Shell Development Co., (D.C. Del. 1951) 99 F. Supp. 790 at 797.

[56] Rule 11.

[57] See Albert Dickinson Co. v. Mellos Peanut Co. of Illinois, (7th Cir. 1950) 179 F. (2d) 265 at 268.

[58] Williams v. Kolb, (D.C. Cir. 1944) 145 F. (2d) 344. Here the court held that general allegations in a complaint were insufficient to raise an issue of fact when defendant

sible in evidence, and not sworn to are sufficient to rebut the affidavits submitted, it is useless to require the formalities for the affidavits submitted on the motion, especially with respect to the counter affidavits. Even if the pleadings are verified, it would seem questionable that this is enough to overcome the objections to such a procedure, since the other requirements of rule 56(e) probably are not met.[59]

For these reasons, it should be clear that on a motion for summary judgment, when the moving party, in papers filed in support of the motion, states the material facts, a denial of such facts (if they were stated previously in the pleadings), or an allegation of inconsistent facts, in the pleadings, should not prevent a summary judgment. Judge Clark has stated:

> "[T]he history of the development of this procedure shows that it is intended to permit 'a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, and admissions on file show that there are no genuine issues of fact to be tried.' 3 Moore's Federal Practice 3175 . . . . Hence we have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment. . . ."[60]

There are many cases similarly holding that "general"[61] or "formal"[62] allegations, denials or issues in the pleadings, do not prevent a summary judgment.

Unfortunately, there is also a considerable amount of authority to the effect that the pleadings can raise an issue of fact. Some of these cases hold that allegations of fact in the pleadings cannot be contro-

made detailed statements of fact in affidavits, since plaintiff's general allegations did not meet the requirements of rule 56(e).

[59] But cf. Albert Dickinson Co. v. Mellos Peanut Co. of Illinois, (7th Cir. 1950) 179 F. (2d) 265 at 268, where the court said: "However, we do not think that an inflexible rule should be established that in every case the adverse party be penalized right out of court for not filing an opposing affidavit, especially where such party has already verified, under oath, [in the pleadings] many of the important allegations and statements of fact which would be included in such an affidavit." The summary judgment granted in this case was reversed on the basis that the trial court used the wrong legal standard in determining whether there was infringement of a trade-mark.

[60] Engl v. Aetna Life Ins. Co., (2d Cir. 1943) 139 F. (2d) 469 at 472-473.

[61] Compania de Remorque y Salvamento, S.A. v. Esperance, Inc., (2d Cir. 1951) 187 F. (2d) 114 at 117; Schreffler v. Bowles, (10th Cir. 1946) 153 F. (2d) 1 at 3, cert. den. 328 U.S. 870, 66 S.Ct. 1366 (1946); Williams v. Kolb, (D.C. Cir. 1944) 145 F. (2d) 344; Chapman v. United States, (8th Cir. 1943) 139 F. (2d) 327 at 331. See Vale v. Bonnett, (D.C. Cir. 1951) 191 F. (2d) 334 at 336; Dewey v. Clark, (D.C. Cir. 1950) 180 F. (2d) 766 at 772.

[62] Koepke v. Fontecchio, (9th Cir. 1949) 177 F. (2d) 125 at 127; New York Life Ins. Co. v. Cooper, (10th Cir. 1948) 167 F. (2d) 651 at 655, cert. den. 335 U.S. 819, 69 S.Ct. 41 (1948); Schreffler v. Bowles, (10th Cir. 1946) 153 F. (2d) 1 at 3, cert. den. 328 U.S. 870, 66 S.Ct. 1366 (1946); Battista v. Horton, Myers & Raymond, (D.C. Cir.

verted by affidavits,[63] while others hold that a denial in a pleading of an allegation in a prior pleading raises an issue of fact.[64] In a decision reversing a summary judgment, the point has been stated with oversimplicity as follows:

> "In the case at bar, the Corporation alleged in its complaint that it bore the burden of the tax and that its dealings with the Sales Company were at arm's length. The Commissioner in his answer denied these allegations. This presented sharp, clear issues of fact."[65]

Despite such language, the decisions in some of these cases seem correct, since in some, the papers filed on the motion apparently also showed an issue of fact,[66] and in others, there were no papers other than the pleadings before the court, so that there was no way for the court to pierce the allegations of the pleadings.[67]

A possible method to reconcile many, if not most, of the cases, is on the basis that "formal" or "general" allegations or conclusions are not sufficient to raise an issue of fact, but that evidentiary facts stated

1942) 128 F. (2d) 29 at 30; Fletcher v. Krise, (D.C. Cir. 1941) 120 F. (2d) 809 at 812, cert. den. 314 U.S. 608, 62 S.Ct. 88 (1941); Michel v. Meier, (D.C. Pa. 1948) 8 F.R.D. 464 at 471. See Vale v. Bonnett, (D.C. Cir. 1951) 191 F. (2d) 334 at 336; Dewey v. Clark, (D.C. Cir. 1950) 180 F. (2d) 766 at 772; William J. Kelly Co. v. Reconstruction Finance Corporation, (1st Cir. 1949) 172 F. (2d) 865 at 866; Miller v. Miller, (D.C. Cir. 1941) 122 F. (2d) 209 at 212.

[63] Chappell v. Goltsman, (5th Cir. 1950) 186 F. (2d) 215 at 218; Nickelson v. Nestles Milk Products Corp., (5th Cir. 1939) 107 F. (2d) 17 at 19; Bascom Launder Corp. v. Farny, (D.C. N.Y. 1950) 10 F.R.D. 421 at 423; Leigh v. Barnhart, (D.C. N.J. 1950) 10 F.R.D. 279; Postel v. Caruso, (D.C. N.J. 1949) 86 F. Supp. 498 at 500; Alamo Refining Co. v. Shell Development Co., (D.C. Del. 1949) 84 F. Supp. 325 at 328. Cf. Farrall v. District of Columbia Amateur Athletic Union, (D.C. Cir. 1946) 153 F. (2d) 647 at 648. See Harris v. Railway Express Agency, Inc., (10th Cir. 1949) 178 F. (2d) 8 at 9; Reynolds Metals Co. v. Metals Disintegrating Co., (3d Cir. 1949) 176 F. (2d) 90 at 92; Rogers v. Girard Trust Co., (6th Cir. 1947) 159 F. (2d) 239 at 241, 242; Purity Cheese Co. v. Frank Ryser Co., (7th Cir. 1946) 153 F. (2d) 88 at 89; Furton v. City of Menasha, (7th Cir. 1945) 149 F. (2d) 945 at 946, cert. den. 326 U.S. 771, 66 S.Ct. 176 (1945); Hummel v. Wells Petroleum Co., (7th Cir. 1940) 111 F. (2d) 883 at 886; Greenleaf v. Brunswick-Balke Collender Co., (D.C. Pa. 1947) 79 F. Supp. 362 at 365.

[64] Landy v. Silverman, (1st Cir. 1951) 189 F. (2d) 80 at 82; Garrett Biblical Institute v. American University, (D.C. Cir. 1947) 163 F. (2d) 265 at 266; Parmelee v. Chicago Eye Shield Co., (8th Cir. 1946) 157 F. (2d) 582 at 585; M. Snower & Co. v. United States, (7th Cir. 1944) 140 F. (2d) 367 at 369; Campana Corp. v. Harrison, (7th Cir. 1943) 135 F. (2d) 334 at 336.

[65] Campana Corp. v. Harrison, (7th Cir. 1943) 135 F. (2d) 334 at 336.

[66] Furton v. City of Menasha, (7th Cir. 1945) 149 F. (2d) 945 at 947, cert. den. 326 U.S. 771, 66 S.Ct. 176 (1945); Campana Corp. v. Harrison, (7th Cir. 1943) 135 F. (2d) 334 at 336.

[67] Landy v. Silverman, (1st Cir. 1951) 189 F. (2d) 80 at 82; Garrett Biblical Institute v. American University, (D.C. Cir. 1947) 163 F. (2d) 265 at 266-267; Parmelee v. Chicago Eye Shield Co., (8th Cir. 1946) 157 F. (2d) 582 at 584; Purity Cheese Co. v. Frank Ryser Co., (7th Cir. 1946) 153 F. (2d) 88 at 89. And in Harris v. Railway Express Agency, Inc., (10th Cir. 1949) 178 F. (2d) 8, the court affirmed a summary judgment in spite of its language, apparently on the basis that the complaint was legally insufficient.

specifically in the pleadings when disputed by other papers do raise an issue of fact.[68] However, some cases holding that the pleadings when considered alone or with the affidavits do not raise an issue of fact do not speak in terms of general or formal allegations, denials or issues.[69] Nor does it seem correct to make any such distinction. The issues may be just as sham and unreal with specific allegations as with general ones. The Federal Rules provide for simplified pleading, with general allegations being sufficient; it should not be possible to prevent summary judgment merely by pleading more specifically than required by the Federal Rules. The language of the cases cited above stating that general or formal allegations, denials or issues do not prevent summary judgment should be taken only to characterize the type of issues raised by any pleading, and not to limit the holding of the case to a situation where there are only general allegations, and impliedly establish another rule when the pleadings are more specific.

In many of the circuits in which the court of appeals has held or stated that the pleadings raise an issue of fact, there are also holdings or statements to the contrary. In the Seventh Circuit, in the first case in which the court held that the pleadings raised an issue of fact,

[68] "Thus if a fact be averred in the complaint and contradicted in the affidavit, the latter version cannot be accepted by the court for the purposes of a motion to dismiss. On the other hand, of course, if the averment in the complaint is a mere conclusion or a vague generality without specification, and the affidavit asserts facts which are undisputed, and it thus appears that there is in truth no genuine issue of fact, the court may act upon that premise." Farrall v. District of Columbia Amateur Athletic Union, (D.C. Cir. 1946) 153 F. (2d) 647 at 648.

This case involved a motion to dismiss, supported by an affidavit, which the court apparently treated as a motion for summary judgment.

See also Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd., (9th Cir. 1950) 185 F. (2d) 196 at 205, cert. den. 340 U.S. 943, 71 S.Ct. 506 (1951); Dewey v. Clark, (D.C. Cir. 1950) 180 F. (2d) 766 at 772; Michel v. Meier, (D.C. Pa. 1948) 8 F.R.D. 464 at 470-471. Many of the cases cited in note 63 supra state that "well pleaded" facts cannot be controverted. These courts may mean merely that facts stated specifically in a pleading cannot be controverted. However, under the federal rules, conclusions are well pleaded; e.g., Form 9 appended to the rules. See Clark, "Summary Judgments," 2 F.R.D. 364 (1942). This reference to "well pleaded" facts apparently is carried over from the old demurrer, for purposes of which well pleaded facts stood admitted. Such reference is confusing and improper here since the summary judgment procedure is more than a demurrer.

[69] American Airlines, Inc. v. Ulen, (D.C. Cir. 1949) 186 F. (2d) 529 at 531-532; Creel v. Lone Star Defense Corp., (5th Cir. 1949) 171 F. (2d) 964 at 966-967, reversed on other grounds, 339 U.S. 497, 70 S.Ct. 755 (1950); McCombs v. West, (5th Cir. 1946) 155 F. (2d) 601 at 602; Brooks v. Utah Power and Light Co., (10th Cir. 1945) 151 F. (2d) 514 at 516; Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co., (6th Cir. 1943) 137 F. (2d) 871 at 877, cert. den. 320 U.S. 800, 64 S.Ct. 431 (1944); Hisel v. Chrysler Corp., (D.C. Mo. 1951) 94 F. Supp. 996 at 1003; United States ex rel. Ryan v. Broderick, (D.C. Kan. 1945) 59 F. Supp. 189 at 192, appeal dismissed, (10th Cir. 1945) 150 F. (2d) 1023. See Albert Dickinson Co. v. Mellos Peanut Co. of Illinois, (7th Cir. 1950) 179 F. (2d) 265 at 267; Cohen v. Eleven West 42nd Street, Inc., (2d Cir. 1940) 115 F. (2d) 531 at 532. See also Yankwich, "Summary Judgment Under Federal Practice," 40 CALIF. L. REV. 204 at 211, 221 (1952); 99 UNIV. PA. L. REV. 212 at 214-215, 229 (1950).

affidavits which were submitted also conflicted, and themselves raised an issue of fact.[70] A later case blindly followed the language of this case even though affidavits presenting an issue of fact were not filed,[71] and other cases have reached the same result.[72] But the most recent decision on the point in this circuit indicates a changed view, although the summary judgment granted by the lower court was reversed; the court said by way of dictum:

> "It will be noted that the pleadings present a number of genuine issues of material facts. Of course the allegations of fact in the pleadings may be pierced by proceedings for a summary judgment under Rule 56"[73]

The holdings of the Fifth Circuit appear to be in conflict.[74] In the First Circuit, there is a holding that the pleadings raise an issue of fact[75] and dictum to the contrary.[76] On the other hand, there are holdings that they do not in the Sixth[77] and Tenth Circuits[78] and dictum to the contrary in each.[79] The Court of Appeals for the District of Columbia has also held both ways on this question.[80] But it has now adopted an intermediate policy based on a case to case determination of whether or not the pleadings do more than present a

[70] Campana Corp. v. Harrison, (7th Cir. 1943) 135 F. (2d) 334.

[71] M. Snower & Co. v. United States, (7th Cir. 1944) 140 F. (2d) 367 at 369.

[72] In Furton v. City of Menasha, (7th Cir. 1945) 149 F. (2d) 945, cert. den. 326 U.S. 771, 66 S.Ct. 176 (1945), apparently affidavits submitted also raised issues of fact. Purity Cheese Co. v. Frank Ryser Co., (7th Cir. 1946) 153 F. (2d) 88, stated that facts alleged in the pleadings must be taken as true and relied for this statement on cases involving motions to dismiss and for judgment on the pleadings under rules 12(b)(6) and 12(c): Galbreath v. Metropolitan Trust Co., (10th Cir. 1943) 134 F. (2d) 569 at 570; Art Metal Construction Co. v. Lehigh Structural Steel Co., (3d Cir. 1940) 116 F. (2d) 57 at 58. These cases obviously have nothing to do with the summary judgment procedure which is designed to pierce the allegations of the pleadings.

[73] Albert Dickinson Co. v. Mellos Peanut Co. of Illinois, (7th Cir. 1950) 179 F. (2d) 265 at 267.

[74] Compare Chappell v. Goltsman, (5th Cir. 1950) 186 F. (2d) 215 at 218; Nickelson v. Nestles Milk Products Corp., (5th Cir. 1939) 107 F. (2d) 17 at 19, with Creel v. Lone Star Defense Corp., (5th Cir. 1949) 171 F. (2d) 964 at 966-967, revd. on other grounds, 339 U.S. 497, 70 S.Ct. 755 (1950); McCombs v. West, (5th Cir. 1946) 155 F. (2d) 601 at 602.

[75] Landy v. Silverman, (1st Cir. 1951) 189 F. (2d) 80 at 82.

[76] William J. Kelly Co. v. Reconstruction Finance Corporation, (1st Cir. 1949) 172 F. (2d) 865 at 866.

[77] Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co., (6th Cir. 1943) 137 F. (2d) 871 at 877, cert. den. 320 U.S. 800, 64 S.Ct. 431 (1944), reh. den., 321 U.S. 803, 64 S.Ct. 634 (1944).

[78] New York Life Ins. Co. v. Cooper, (10th Cir. 1948) 167 F. (2d) 651 at 655; Schreffler v. Bowles, (10th Cir. 1946) 153 F. (2d) 1 at 3, cert. den. 328 U.S. 870, 66 S.Ct. 1366 (1946); Brooks v. Utah Power & Light Co., (10th Cir. 1945) 151 F. (2d) 514 at 516.

[79] Rogers v. Girard Trust Co., (6th Cir. 1947) 159 F. (2d) 239 at 241, 242; Harris v. Railway Express Agency, Inc., (10th Cir. 1949) 178 F. (2d) 8 at 9.

[80] Compare Garrett Biblical Institute v. American University, (D.C. Cir. 1947) 163 F. (2d) 265 at 266-267; Farrall v. District of Columbia Amateur Athletic Union, (D.C.

formal issue; in *Dewey v. Clark*[81] the court reviewed its prior decisions on the point and came to the conclusion that:

> "There may be no genuine issue even though there is a formal issue. Neither a purely formal denial nor, in every case, general allegations, defeat summary judgment. On this point the cases decided by this court must rest on their own facts rather than upon a rigid rule that an assertion and a denial always preclude the granting of summary judgment. Those cases stand for the proposition that formalism is not a substitute for the necessity of a real or genuine issue. Whether the situation falls into the category of formalism or genuineness cannot be decided in the abstract."[82]

The Eighth Circuit has apparently adopted a similar position. It has held that a "general denial of allegations in the complaint, unsupported by any statement of facts admissible in evidence" does not raise an issue of fact[83] and that summary judgment may be used to strike "sham claims and defenses," but that it cannot be used when the pleadings raise a "genuine issue of fact."[84] How the court can determine the genuineness of the issue of fact raised by the pleadings without looking at, and deciding on the basis of, the papers which are submitted on the motion is difficult to see. Thus these courts seem to be holding in effect that the court must go beyond the pleadings to determine whether there is an issue of fact.

The Court of Appeals for the Third Circuit apparently has held that the pleadings considered with the moving papers can raise an issue of fact, but the court seems to have been trapped into its holding without considering the issue fully. In *Frederick Hart & Co. v. Recordgraph Corporation,*[85] the trial court granted a motion to dismiss under rule 12(b)(1), on the basis that no controversy existed at the time the complaint was filed. Defendant submitted affidavits in support of the motion, and plaintiff submitted counter affidavits. Defendant also moved for summary judgment but apparently no decision was reached on this motion by either court. The court of appeals reversed on the basis that there was an issue of fact raised by the affi-

Cir. 1946) 153 F. (2d) 647 at 648, with Williams v. Kolb, (D.C. Cir. 1944) 145 F. (2d) 344; Battista v. Horton, Myers & Raymond, (D.C. Cir. 1942) 128 F. (2d) 29 at 30; Fletcher v. Krise, (D.C. Cir. 1941) 120 F. (2d) 809 at 812, cert. den. 314 U.S. 608, 62 S.Ct. 88 (1941).

[81] (D.C. Cir. 1950) 180 F. (2d) 766.

[82] Id. at 772. This language was quoted with approval in Vale v. Bonnett, (D.C. Cir. 1951) 191 F. (2d) 334 at 336.

[83] Chapman v. United States, (8th Cir. 1943) 139 F. (2d) 327 at 331.

[84] Parmelee v. Chicago Eye Shield Co., (8th Cir. 1946) 157 F. (2d) 582 at 585.

[85] (3d Cir. 1948) 169 F. (2d) 580. See 99 UNIV. PA. L. REV. 212 at 215 (1950).

davits; it also stated: "An affidavit cannot be treated, *for purposes of the motion to dismiss*, as proof contradictory to well pleaded facts in the complaint."[86] Nothing was stated as to whether the pleadings are sufficient to raise an issue of fact on a motion for summary judgment.

Then the court was presented with the case of *Reynolds Metals Co. v. Metals Disintegrating Co.*[87] This case involved a motion to strike the complaint on the basis that it was sham and false. The trial court refused to grant this motion (which it discussed as a motion for summary judgment), holding that under the *Hart* case it could not consider anything outside the pleadings to show the falsity of an allegation in the complaint even though plaintiff's depositions showed the falsity.[88] The trial court disagreed with the *Hart* case and most of its opinion is devoted to a criticism of an entirely erroneous view of the holding of that case, which had no application here. The *Hart* case involved a motion to dismiss where the affidavits actually raised an issue of fact. The entire discussion of this point in the *Reynolds* case was unnecessary, since the court granted an alternative motion by defendant to strike the complaint as insufficient in law on its face. The court of appeals affirmed. The court seemed primarily concerned with justifying what the district court said was its holding in the *Hart* case, and did not analyze that case to see what it actually did hold. The court did not mention summary judgment as such, but did state:

> "If the truth or falsity of allegations in pleadings may be adjudicated in advance of a trial through the technique of filing affidavits, it is to be expected that eventually the courts will have to develop pre-pre-trial procedures; for pre-trial proceedings such as those favored by the court below are likely to inspire all too many carefully-drafted written statements escaping the clarifying processes of cross-examination and delaying prompt disposition of cases. We are satisfied that pre-trial proceedings are intended to determine what the issues are, and not to invade the trial function of resolving those issues."[89]

It is difficult to imagine how the court can determine what the true issues are under this decision, if it is impossible to pierce the allegations of the complaint. It is hoped that the court will re-examine the problem with a fuller understanding of the factors involved. Unfortunately, several district courts in the Third Circuit have interpreted

[86] Id. at 581. Emphasis added.
[87] (3d Cir. 1949) 176 F. (2d) 90.
[88] Reynolds Metals Co. v. Metals Disintegrating Co., (D.C. N.J. 1948) 8 F.R.D. 349.
[89] Reynolds Metals Co. v. Metals Disintegrating Co., (3d Cir. 1949) 176 F. (2d) 90 at 92.

these cases to hold that the pleadings can raise an issue of fact so as to preclude summary judgment.[90]

B. *What the Opposing Party Must Do to Raise an Issue of Fact.* The next question to be determined is how the opposing party is to raise an issue of fact if the pleadings alone are insufficient. Let us assume that the court will hold that the pleadings do not raise an issue of fact, and that the movant has stated facts, in affidavits and any other papers filed in support of the motion, which, if not controverted, would be sufficient to justify a summary judgment in his favor. The opposing party can then do one of several things: (1) he can do nothing; (2) he can himself make a motion for a summary judgment, supported by counter affidavits; (3) he can state that there is an issue of fact and that he intends to show the contrary of what movant has stated, by evidence introduced at trial; (4) he can merely state that the facts are to the contrary; (5) he can state that he cannot present the facts, since they are exclusively within the knowledge of the movant; (6) he can state facts contrary to those stated by the movant. Each of these possible courses will be discussed in turn.

(1) If the opposing party does nothing, it seems clear that there can be no issue of fact (unless the pleadings are held sufficient to raise the issue). Thus it has been held that when no counter affidavits are filed there is no issue of fact[91] and the court must take as true the statements of fact in the moving affidavits.[92] It has also been held that "the opposing party must sufficiently disclose what the evidence will be to show that there is a genuine issue of fact to be tried."[93] However, on the other hand, it has also been held that the

[90] Dimet Proprietary Limited v. Industrial Metal Protectives, Inc., (D.C. Del. 1952) 109 F. Supp. 472 at 476; Rolle Manufacturing Co. v. Marco Chemicals, Inc., (D.C. N.J. 1950) 92 F. Supp. 218 at 220; Leigh v. Barnhart, (D.C. N.J. 1950) 10 F.R.D. 279; Postel v. Caruso, (D.C. N.J. 1949) 86 F. Supp. 498 at 500; Alamo Refining Co. v. Shell Development Co., (D.C. Del. 1949) 84 F. Supp. 325 at 328. See Seaboard Surety Co. v. Permacrete Construction Corp., (D.C. Pa. 1952) 105 F. Supp. 349 at 350.

[91] Allen v. Radio Corporation of America, (D.C. Del. 1942) 47 F. Supp. 244 at 245; Cf. Stahly, Inc. v. M. H. Jacobs Co., (7th Cir. 1950) 183 F. (2d) 914 at 916, cert. den. 340 U.S. 896, 71 S.Ct. 239 (1950).

[92] Lauchert v. American S.S. Co., (D.C. N.Y. 1946) 65 F. Supp. 703 at 707; Winrod v. McFadden Publications, Inc., (D.C. Ill. 1945) 62 F. Supp. 249; Seward v. Nissen, (D.C. Del. 1942) 2 F.R.D. 545 at 546. Cf. Foster v. General Motors Corp., (7th Cir. 1951) 191 F. (2d) 907 at 912, cert. den. 343 U.S. 906, 72 S.Ct. 634 (1952); Morris v. Prefabrication Engineering Co., (5th Cir. 1950) 181 F. (2d) 23 at 25; Gifford v. Travelers Protective Association of America, (9th Cir. 1946) 153 F. (2d) 209 at 210. See 99 UNIV. PA. L. REV. 212 at 220 (1950).

[93] Surkin v. Charteris, (5th Cir. 1952) 197 F. (2d) 77 at 79. *Accord:* Gifford v. Travelers Protective Association of America, (9th Cir. 1946) 153 F. (2d) 209 at 211; Rotling v. Dodwell & Co., (2d Cir. 1945) 152 F. (2d) 100 at 101; Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co., (2d Cir. 1945) 145 F. (2d) 399 at 404, cert. den.

failure to file counter affidavits is not decisive, especially when the pleadings are verified.[94] Assuming that the facts stated are sufficient to justify a judgment for the movant as a matter of law, the judgment should be entered if the other party presents nothing to contradict the facts.[95]

(2) If the opposing party also moves for summary judgment, it is held that it does not necessarily follow that summary judgment should be granted, since there may still be an issue of fact.[96] This ruling seems clearly to be correct for the reason stated by Judge Frank:

> "It does not follow that, merely because each side moves for a summary judgment, there is no issue of material fact. For, although a defendant may, on his own motion, assert that, accepting his legal theory, the facts are undisputed, he may be able and should always be allowed to show that, if plaintiff's legal theory be adopted, a genuine dispute as to a material fact exists."[97]

However, it by no means follows that a summary judgment can never be entered when both parties seek one. The test should still be the same, i.e., the court should determine what evidentiary facts are undisputed by the papers submitted on the motion and decide whether on the basis of the facts undisputed by the other party either is entitled to a summary judgment.[98]

(3) A statement by the opposing party that he will present evidence to contradict the moving papers at trial should clearly not be sufficient to prevent a summary judgment. If it were sufficient, it would be simple to nullify the usefulness of the procedure. Judge Clark, in the leading case on the point, has written:

> "In the present case we have from the plaintiff not even a denial of the basic facts, but only in effect an assertion that at

325 U.S. 861, 65 S.Ct. 1201 (1945); Hisel v. Chrysler Corp., (D.C. Mo. 1951) 94 F. Supp. 996 at 1003. *Contra:* Hoffman v. Babbitt Bros. Trading Co., (9th Cir. 1953) 203 F. (2d) 636 at 638.

[94] Albert Dickinson Co. v. Mellos Peanut Co. of Illinois, (7th Cir. 1950) 179 F. (2d) 265 at 268.

[95] Gray v. Amerada Petroleum Corp., (5th Cir. 1944) 145 F. (2d) 730. This is the result a court will reach unless it follows Judge Frank and invents an issue as to credibility.

[96] Begnaud v. White, (6th Cir. 1948) 170 F. (2d) 323; Garrett Biblical Institute v. American University, (D.C. Cir. 1947) 163 F. (2d) 265; Walling v. Richmond Screw Anchor Co., (2d Cir. 1946) 154 F. (2d) 780, cert. den. 328 U.S. 870, 66 S.Ct. 1383 (1946).

[97] Walling v. Richmond Screw Anchor Co., (2d Cir. 1946) 154 F. (2d) 780 at 784, cert. den. 328 U.S. 870, 66 S.Ct. 1383 (1946).

[98] Walling v. Richmond Screw Anchor Co., (2d Cir. 1946) 154 F. (2d) 780 at 784, cert. den. 328 U.S. 870, 66 S.Ct. 1383 (1946); Read Magazine v. Hannegan, (D.C. D.C. 1945) 63 F. Supp. 318 at 319, affd. (D.C. Cir. 1946) 158 F. (2d) 542, reversed on other grounds, 333 U.S. 178, 68 S.Ct. 591 (1948).

trial she may produce further evidence, which she is now holding back, to controvert the legal deduction from the New York statute and decisions that the conceded misrepresentations of the application are material. If one may thus reserve one's evidence when faced with a motion for summary judgment there would be little opportunity 'to pierce the allegations of fact in the pleadings' or to determine that the issues formally raised were in fact sham or otherwise unsubstantial. It is hard to see why a litigant could not then generally avail himself of this means of delaying presentation of his case until the trial. So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions."[99]

In a later decision affirming a summary judgment, Judge Clark stated that if plaintiff had facts to support the general allegations of the complaint, "its affidavit should have been full and precise on the point to prevent summary judgment against it."[100] The rule is sometimes stated in the form of saying that the burden is placed on the opposing party to produce sufficient evidence to show that a summary judgment is not proper:

"The rule should not be used by the court for the trial of disputed questions of fact upon affidavits, but when it is invoked by either party to a case and a showing is made by the movant, the burden rests on the opposite party to show that he has a plausible ground for the maintenance of the cause of action alleged in his complaint, or if a defendant, that he has a ground of defense fairly arguable and of a substantial character."[101]

[99] Engl v. Aetna Life Ins. Co., (2d Cir. 1943) 139 F. (2d) 469 at 473; Chandler Laboratories, Inc. v. Smith, (D.C. Pa. 1950) 88 F. Supp. 583 at 586. Cf. Griffin v. Griffin, 327 U.S. 220 at 236, 66 S.Ct. 556 (1946), reh. den. 328 U.S. 876, 66 S.Ct. 975 (1946); Willingham v. Eastern Airlines, (2d Cir. 1952) 199 F. (2d) 623 at 624; Ludlow Mfg. & Sales Co. v. Textile Workers Union of America, (D.C. Del. 1952) 108 F. Supp. 45 at 52; California Apparel Creators v. Wieder of California, Inc., (D.C. N.Y. 1946) 68 F. Supp. 499 at 508, affd. (2d Cir. 1947) 162 F. (2d) 893, cert. den. 332 U.S. 816, 68 S.Ct. 156 (1947); 48 COL. L. REV. 780 at 780-781 (1948). The earlier drafts of the summary judgment rule made this requirement quite clear. See note 45 supra.

[100] Nahtel Corp. v. West Virginia Pulp & Paper Co., (2d Cir. 1944) 141 F. (2d) 1 at 3.

[101] Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co., (6th Cir. 1943) 137 F. (2d) 871 at 877, cert. den. 320 U.S. 800, 64 S.Ct. 431 (1944). *Accord:* Egyes v. Magyar Nemzeti Bank, (2d Cir. 1948) 165 F. (2d) 539 at 540; Radio City Music Hall Corp. v. United States, (2d Cir. 1943) 135 F. (2d) 715 at 718; Port of Palm Beach District v. Goethals, (5th Cir. 1939) 104 F. (2d) 706 at 708. Cf. Garcia v. United States, (Ct. Cl. 1952) 108 F. Supp. 608 at 613. *Contra:* Hoffman v. Babbitt Bros. Trading Co., (9th Cir. 1953) 203 F. (2d) 636 at 638, where the court states: "The Hoffmans [the parties opposing the motion] were under no duty of submitting their evidence to the court upon affidavits. . . ."

These statements should not be taken to mean that the opposing party must disclose all of his evidence; he must disclose only enough to show a real issue as to at least one material fact. However, he should be sure to present enough to make obvious the genuineness of some issue and its materiality in the case.

The requirement that the opposing party disclose at least some of his evidence clearly seems just, and it certainly is essential to the effective use of the summary judgment procedure. Judge Frank, however, in a dissenting opinion, objected to this requirement as an indirect method of discovery which employs "a threat of summary judgment as a sort of rack or thumbscrew to bring about disclosure of evidence."[102] It has been said that Judge Frank adopted this view in his decision in *Arnstein v. Porter*,[103] and that "The gravamen of this theory of summary judgment [stated in the *Arnstein* case] is that to resist the motion a party need not produce his evidence, but need only indicate that it is possible that such evidence may be available."[104] This interpretation of the case does not seem to be correct, since the opinion indicates that plaintiff had disclosed, by affidavit and deposition, all of his evidence, and since the court decided on the basis that the evidence submitted was sufficient to present an issue of fact.

(4) The opposing party may do a little more, and actually state that he denies the facts stated in the moving affidavits. It has been held that mere legal conclusions in affidavits are not sufficient to prevent a summary judgment.[105] And it has been held that plain denials are not sufficient:

> "Under this rule mere denials, unaccompanied by any facts which would be admissible in evidence at a hearing, are not sufficient to raise a genuine issue of fact. . . . Plaintiff, presenting no facts in support thereof, merely denies the existence of the license, thus raising no issue."[106]

It would seem that in this case, the affiant who made the denial had no personal knowledge of the facts involved. However, if the party making the opposing affidavit does have personal knowledge, it would seem that such a denial should be sufficient, especially if that is all

[102] Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co., (2d Cir. 1945) 147 F. (2d) 399 at 407, cert. den. 325 U.S. 861, 65 S.Ct. 1201 (1945).

[103] (2d Cir. 1946) 154 F. (2d) 464.

[104] 55 YALE L.J. 810 at 812 (1946). See, also, MOORE, FEDERAL PRACTICE (1938). 1951 Supp., p. 45, n. 2.

[105] Chapman v. United States, (8th Cir. 1943) 139 F. (2d) 327 at 331.

[106] Piantadosi v. Loews, Inc., (9th Cir. 1943) 137 F. (2d) 534 at 536. *Accord:* Wilkinson v. Powell, (5th Cir. 1945) 149 F. (2d) 335 at 337. Here the denials were in answer to a request for admission of facts.

that he can do. For instance, the moving party may allege that the other party entered an oral agreement, and the defense is that he did not. It might be difficult in such a situation to produce any evidence other than a mere denial. The opposing party should in such a situation show as much as he can, and if he can make a denial only, he should have to state the circumstances and state why he can do no more.

(5) If the opposing party contends that the facts are peculiarly within the knowledge of the movant, so that he cannot present them on this motion, he should invoke rule 56(f), which gives the court discretion to deny the motion or to allow the opposing party a chance to take depositions or use other methods of discovery.[107] He should be required to state fully the reasons why he cannot present the facts. It has been held that a simple statement that certain unspecified facts essential to justify opposition to the motion are particularly within the exclusive knowledge of the movant is not sufficient to prevent summary judgment when the opposing party has not shown what attempts were made to get such facts.[108]

Summary judgments have been denied when the facts were shown to be peculiarly within the movant's knowledge, although usually without specific reference to the provisions of rule 56(f). Thus a summary judgment was denied defendant when the issue was whether defendant's directors had exercised "honest business judgment."[109] The directors denied that they had not, but the court would not accept these denials as conclusive, and allowed a trial, since the proof of their motive would have to come largely from cross-examination.[110] Judge Learned Hand has cautioned district courts against summary judgments in complicated cases, "especially . . . when the plaintiff must rely for his case on what he can draw out of the defendant."[111] And it has also been held that:

[107] Rule 56(f) provides that "should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." See 3 MOORE, FEDERAL PRACTICE 3188-3189 (1938); 99 UNIV. PA. L. REV. 212 at 222-223 (1950); 48 COL. L. REV. 780 (1948); Shientag, "Summary Judgment," 4 FORD. L. REV. 186 at 213 (1935).

[108] Hartman v. Time, Inc., (D.C. Pa. 1946) 64 F. Supp. 671 at 677-678, vacated in part and remanded on other grounds, (3d Cir. 1947) 166 F. (2d) 127, cert. den. 334 U.S. 838, 68 S.Ct. 1495 (1948).

[109] Fogelson v. American Woolen Co., (2d Cir. 1948) 170 F. (2d) 660 at 662.

[110] But cf. Compania de Remorque y Salvamento, S.A. v. Esperance, Inc., (2d Cir. 1951) 187 F. (2d) 114 at 117, where the question was whether defendant had violated its duty as a fiduciary and a summary judgment in its favor was affirmed.

[111] Bozant v. Bank of New York, (2d Cir. 1946) 156 F. (2d) 787 at 790.

> "In cases where the information with reference to a claimed fraudulent transaction rests exclusively within the knowledge of the participants, . . . it is apparent that it would be inequitable and unjust for the court to grant a motion for a summary judgment upon the affidavit of the defendant where the opposing party has no means to successfully meet the facts alleged in the affidavit."[112]

It seems clear that some such limitation on the use of the summary judgment procedure is necessary in order to prevent injustice. However, this rule should be applied so as to prevent summary judgments only in very unusual cases. Ordinarily a party can obtain before trial what he intends to produce at trial. He will probably be unable to produce any evidence at all to show a dispute of fact only if he intends to base his entire case on cross-examination. A plaintiff cannot rely on cross-examination exclusively to prove his case.[113] A defendant may rely only on cross-examination to show that plaintiff's witnesses are not telling the truth, or are not to be believed, but it would still seem to be a rare case in which this would be the defendant's entire case.

In most cases, it would be possible for the opposing party to get the facts through the broad discovery procedures of the Federal Rules. This is illustrated by a case in which plaintiff was forced to draw its evidence largely from the officers of defendant. The court affirmed a summary judgment, since in that case the depositions of the officers had been taken, and thus they had been cross-examined;[114] but Judge Learned Hand stated in the opinion that the argument that a summary judgment was unfair would have had much force if the motion had been decided on affidavits alone.[115] By using discovery before the motion, or by the judge's ordering it under rule 56(f), most objections that the facts are within the exclusive knowledge of the movant can be met without defeating the summary judgment.

(6) The last situation to be considered is where the opposing party introduces affidavits or other papers which clearly contradict the

[112] Hummel v. Riordan, (D.C. Ill. 1944) 56 F. Supp. 983 at 987. Cf. Toebelman v. Missouri-Kansas Pipe Line Co., (3d Cir. 1942) 130 F. (2d) 1016 at 1022.

[113] Cf. Dyer v. Mac Dougall, (2d Cir. 1952) 201 F. (2d) 265. Here the court held that plaintiff cannot avoid a summary judgment (or directed verdict) merely by relying on demeanor evidence, although the court did say such evidence could theoretically support a rational verdict.

[114] Radio City Music Hall Corp. v. United States, (2d Cir. 1943) 135 F. (2d) 715. And in Dyer v. Mac Dougall, (2d Cir. 1952) 201 F. (2d) 265, the court affirmed a summary judgment after plaintiff neglected to use an opportunity given him by the trial court to take the depositions of defendant's affiants.

[115] Radio City Music Hall Corp. v. United States, (2d Cir. 1943) 135 F. (2d) 715 at 718.

moving papers. It is often stated that a summary judgment should be granted if the evidence presented in opposition "is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force."[116] It should be clear that if taking the disputed facts to be established against the movant he still is entitled to a judgment as a matter of law, a summary judgment should be entered:

> "On a motion for summary judgment, where the facts are in dispute, a judgment can properly be entered against the plaintiff only if, on the undisputed facts, he has no valid claim; if, then, any fact asserted by the plaintiff is contradicted by the defendant, the facts as stated by the plaintiff must, on such a motion, be taken as true."[117]

It is conceivable that contrary evidence presented would be "in its nature too incredible to be accepted by reasonable minds." But it would seem to be true only in very rare cases.[118] Judge Frank in *Arnstein v. Porter*[119] cautions against granting a summary judgment on the ground that the opposing evidence sounds incredible, and this warning seems wise.[120] Certainly, in the great majority of cases, a party should not be deprived of a trial of the facts on the sole basis that his story seems strange or unusual.

Conclusion

Courts have adopted varying attitudes toward the summary judgment procedure. However, in spite of the opposition of some judges, the procedure is being employed and is serving a useful purpose; the

[116] Whitaker v. Coleman, (5th Cir. 1940) 115 F. (2d) 305 at 306; Vale v. Bonnett, (D.C. Cir. 1951) 191 F. (2d) 334 at 336; Dewey v. Clark, (D.C. Cir. 1950) 180 F. (2d) 766 at 772; Minor v. Washington Terminal Co., (D.C. Cir. 1950) 180 F. (2d) 10 at 12; Miller v. Miller, (D.C. Cir. 1941) 122 F. (2d) 209 at 212.

[117] Zell v. American Seating Co., (2d Cir. 1943) 138 F. (2d) 641 at 642, reversed on other grounds, 322 U.S. 709, 64 S.Ct. 1053 (1944). *Accord:* Lewis v. Atlas Corp., (3d Cir. 1946) 158 F. (2d) 599 at 600.

[118] But cf. Sabin v. Home Owners' Loan Corp., (10th Cir. 1945) 151 F. (2d) 541, cert. den. 328 U.S. 840, 66 S.Ct. 1011 (1946). Here on a motion for summary judgment by defendant, plaintiff tried to avoid a former judgment which defendant contended was res judicata, on the basis that the judge who entered the judgment was overreached by defendant HOLC, which had a mortgage on his home on which he was in default. The court held that this issue too had been raised before, and decided, and also that the charge was "too gauzy to present a substantial question."

[119] (2d Cir. 1946) 154 F. (2d) 464 at 469.

[120] "If evidence is to be always disbelieved because the story told seems remarkable or impossible, then a party whose rights depend on the proof of some fact out of the usual course of events will always be denied justice simply because his story is improbable." Marston v. Dresen, 85 Wis. 530 at 540, 55 N.W. 896 (1893), quoted in Arnstein v. Porter, supra note 119, at 469.

very volume of cases in which opinions are written shows the wide use of the procedure.

The main controversy about the procedure has centered on determining how to decide whether there is a genuine issue as to a material fact. There is an issue of fact only when an evidentiary fact is disputed and not when only inferences are disputed.

In order to assure the effectiveness of the procedure, it must be held that when other papers are presented in support of the motion, the pleadings considered alone or in conjunction with such papers are not sufficient to raise an issue of fact. In spite of a number of cases to the contrary, most circuits today seem to accept this as the correct rule. In order to raise an issue of fact the opposing party should be forced to present sufficient evidence to show the existence of the issue; a mere statement that such an issue exists and that evidence will be presented at trial should not be sufficient. In rare cases, it may be that the opposing party cannot present his evidence on such a motion; in that situation, he should explain why he cannot, and if his explanation is sufficient, the court, under rule 56(f), should order discovery or, if necessary, deny the motion. If the opposing party raises an issue of fact, summary judgment should still be granted if taking the disputed facts against the movant, he is entitled to a judgment as a matter of law. But if this is not the case, the court should be very reluctant to conclude that the opposing party's evidence is too incredible to believe, since otherwise a party who is actually entitled to a trial may be denied one.

If these general rules are applied by the courts with discernment and care, the summary judgment procedure, without unjustly depriving a party of a trial, can effectively eliminate from crowded court calendars cases in which a trial would serve no useful purpose[121] and cases in which the threat of a trial is used to coerce a settlement.

[121] Judge Frank, in Colby v. Klune, (2d Cir. 1949) 178 F. (2d) 872 at 873, stated: "The way to eliminate that congestion [of trial dockets] is by the appointment of a sufficient number of judges, not by doing injustice through depriving litigants of a fair method of trial." Summary judgment deprives no one of a trial, when a trial is useful. Judge Frank's answer to the summary judgment procedure overlooks entirely the delay, inconvenience and expense of a useless trial in the particular case, no matter how many judges are available at once to start the trial.