INDIANA LAW JOURNAL

Volume 33 SUMMER 1958 Number 4

A RATIONALE OF SUMMARY JUDGMENT

JOHN A. BAUMAN†

I

Praise of the effectiveness of the motion for summary judgment in eliminating spurious claims and sham defenses has been widespread and even extravagant.[1] The more dismal picture of a procedure erroneously invoked in a considerable number of cases has failed to capture the attention of the commentators.[2] This is surprising, since the incorrect use of the summary judgment procedure obviously increases delay and expense in the final disposition of litigation and thus aggravates the very problem the procedure was devised to solve. If summary judgment is to retain its effectiveness as a procedure for speedy settlement of sham litigation, recognition of the limitations imposed upon its use by the Anglo-American system of procedure is essential. These limitations result directly from a basic postulate of the procedural law that issues of fact shall be

† Associate Professor of Law, Indiana University. Submitted in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University.

1. Asbill and Snell, *Summary Judgment Under the Federal Rules—When an Issue of Fact is Presented,* 51 MICH. L. REV. 1143 (1953); Bush, *Summary Judgment in California,* 36 COM. L.J. 569 (1931); CLARK, SUMMARY JUDGMENTS, A PROPOSED RULE OF COURT, THE JUDICIAL ADMINISTRATION MONOGRAPHS, SERIES A. (collected) 19 (1942); Clark, *The Summary Judgment,* 36 MINN. L. REV. 567 (1952); Ritter and Magnuson, *The Motion for Summary Judgment and Its Extension to all Classes of Actions,* 21 MARQ. L. REV. 33 (1936); Sheintag, *Summary Judgment,* 4 FORDHAM L. REV. 186 (1935). Note, 51 NW. U.L. REV. 370 (1956).

2. For statistics in state courts, consult NEW YORK JUDICIAL COUNCIL, 20TH ANNUAL REPORT (1954) pp. 97, 117, 125, and 140; WISCONSIN JUDICIAL COUNCIL, 1957 BIENNIAL REPORT, Table 8, pp. E-41—E-47. Statistics in the federal courts are even more revealing, not because of the percentage of cases in which the motion was denied, but because of the extremely limited application of the motion. Thus in the fiscal year 1956, 2,125 cases were terminated in the southern district of California, but in only 26 cases was a summary judgment requested, and of these 26 motions, 8 were denied; in the northern district of Illinois, 2,683 cases were terminated, 48 motions for summary judgment were filed of which 22 were denied; in Massachusetts, 1,480 cases were terminated, 39 motions were made and 14 were denied; and in the eastern district of Pennsylvania, 2,406 cases were terminated, 29 motions were filed and 7 were denied. (Statistics were provided through the courtesy of Mr. Will Shaforth, Chief of the Division of Procedural Studies and Statistics, Administrative Office of the United States Courts.)

resolved only after a trial.[3] Acceptance of this postulate means that the rules governing the summary judgment procedure must assure against encroachment upon a litigant's right to trial of disputed propositions of fact. Thus it has been stated that the essence of the theory underlying a motion for summary judgment is ". . . that there is no genuine issue of material fact to be resolved by the trier of the facts, and that the movant is entitled to judgment on the law applicable to the established facts."[4]

Since the existence of genuine issues of fact is the much mooted question raised when the summary judgment procedure is invoked, only a moment's reflection reveals that difficulty will arise in determining when there are "established facts." Once an agreement between the parties is reached as to the facts, the application of the summary judgment procedure presents little difficulty. Thus if facts are established either by pleadings,[5] or by stipulations and agreed statements of facts,[6] the only problem left for the court's decision is the determination of the controlling law, an admittedly judicial function. There are literally hundreds of cases

3. Bauman, *The Evolution of the Summary Judgment Procedure*, 31 IND. L.J. 329, 346-47 (1956).

4. 6 MOORE, FEDERAL PRACTICE § 56.04[2], at 2032 (1953).

5. Fletcher v. Bryan, 175 F.2d 716 (4th Cir. 1949); Fletcher v. Norfolk Newspapers, 239 F.2d 169 (4th Cir. 1956); Gentila v. Pace, 193 F.2d 924 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 943 (1952); Person v. United States, 112 F.2d 1 (8th Cir. 1940), *cert. denied*, 311 U.S. 672 (1940); Ford v. Hahn, 269 App. Div. 436, 55 N.Y.S.2d 854 (1st Dep't 1945).

6. United States v. Ryan, 124 F. Supp. 1 (D. Minn. 1954); Parks v. Atlanta Printing Pressmen, 248 F.2d 386 (5th Cir. 1957); Habel v. Travelers Ins. Co., 117 F.2d 337 (5th Cir. 1941); Walter W. Johnson Co. v. R.F.C., 230 F.2d 479 (9th Cir. 1956), *cert. denied*, 352 U.S. 832 (1956); Branson v. Fawcett Publications, 124 F. Supp. 429 (E.D. Ill. 1954); Parke Davis & Co. v. American Cyanamid Co., 207 F.2d 571 (6th Cir. 1953) (interrogatories, agreement that no issue of fact remains). A stipulation that the case should be decided on a motion for summary judgment, as distinguished from a stipulation of the facts of the case, is, of course, not an adequate basis for granting a summary judgment. Tucker, Bronson & Martin v. United Supply & Mfg. Co., 102 F. Supp. 805 (W.D. La. 1952). Equally ineffective are agreements reached by counsel that leave important factual questions disputed by the parties. Emerson v. National Cylinder Gas Co., 135 F. Supp. 268 (D. Mass. 1955). Even though the parties agree as to the facts, a summary judgment will be denied in cases where the public interest is best served by a full hearing. See Westinghouse Elec. Corp. v. Bulldog Electric Prod. Co., 179 F.2d 139 (4th Cir. 1950) (patent); Rea v. Rea, 124 F. Supp. 922 (D.D.C. 1954) (divorce); Hycon Manufacturing Co. v. H. Koch & Sons, 219 F.2d 353 (9th Cir. 1955), *cert. denied*, 349 U.S. 953 (1954) (patent). Agreement may result from express admissions made at the request of an opponent. See United States v. Adelman, 10 F.R.D. 417 (W.D. Mo. 1950). This problem is considered *infra* at note 141. Also to be distinguished are a group of cases in which the facts are determined by an administrative agency prior to review of the dispute in the courts. In such cases, factual disputes may be eliminated, leaving for judicial determination only a question of law. Examples are: Minkoff v. Payne, 210 F.2d 689 (D.C. Cir. 1953); Murray v. Folsom, 147 F. Supp. 298 (D.D.C. 1957); United States v. Stangland, 242 F.2d 843 (7th Cir. 1957); United States v. Watkins, 147 F. Supp. 786 (E.D. Ark. 1957); M. H. Renken Dairy Co. v. Wickard, 45 F. Supp. 332 (E.D.N.Y. 1942).

in which a court, on a motion for summary judgment, is called upon to resolve an issue of law involving the construction or effect of a written instrument, such as an insurance policy,[7] contract,[8] deed,[9] judgment,[10] or will;[11] or the application of a statute or regulation to agreed facts.[12] In these cases the court will frequently expressly state that the parties are not in dispute as to the facts, but only as to the applicable law.

Unquestionably the summary judgment procedure performs a useful

7. Sterneck v. Equitable Life Insurance Co., 237 F.2d 626 (8th Cir. 1956); Wibbleman v. Home Ins. Co., 194 F.2d 262 (6th Cir. 1952); Lloyd v. Franklin Life Ins. Co., 245 F.2d 896 (9th Cir. 1957); Kelly v. John Hancock Mut. Life Ins. Co., 136 F. Supp. 539 (S.D.N.Y. 1955), *aff'd*, 234 F.2d 656 (2d Cir. 1956); Trinity Universal Ins. Co. v. Woody, 47 F. Supp. 327 (D.N.J. 1942); Palmer v. Chamberlin, 191 F.2d 532 (5th Cir. 1951); Schifter v. Commercial Travelers Mut. Acc. Ass'n of America, 183 Misc. 74, 50 N.Y.S.2d 376 (Sup. Ct. 1944), *aff'd*, 269 App. Div. 706, 54 N.Y.S.2d 408 (2d Dep't 1945).

8. General Phoenix Corp. v. Cabot, 300 N.Y. 87, 89 N.E.2d 238 (1949); Spry v. Chicago Ry. Equipment Co., 298 Ill. App. 471, 19 N.E.2d 122 (1939); Dale v. Preg, 204 F.2d 434 (9th Cir. 1953); Repsold v. New York Life Ins. Co., 216 F.2d 479 (7th Cir. 1954); Severson v. Fleck, 148 F. Supp. 760 (D.N. Dak. 1957); Bethlehem Steel Co. v. Turner Construction Co., 2 N.Y.2d 456, 141 N.E.2d 590 (1957); *cf.* Huffman v. Ford Motor Co., 195 F.2d 170 (6th Cir. 1952), *rev'd*, 345 U.S. 330 (1953) (collective bargaining agreement); Columbia Hospital v. U.S. Fidelity & G. Co., 188 F.2d 654 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 817 (1951) (bond); Government of the Virgin Islands v. Gordon, 244 F.2d 818 (3d Cir. 1957) (effect of a written agreement).

9. Coutts v. J. L. Kraft & Bros. Co., 119 Misc. 260, 196 N.Y. Supp. 135 (Sup. Ct. 1922), *aff'd*, 206 App. Div. 625, 198 N.Y. Supp. 908 (2d Dep't 1923); McHenry v. Ford Motor Co., 146 F. Supp. 896 (E.D. Mich. 1956); Carrothers v. Stanolind Oil & Gas Co., 134 F. Supp. 191 (N.D. Tex. 1955); Wier v. Texas Co., 180 F.2d 465 (5th Cir. 1950); *cf.* Gibson v. Security Trust Co., 201 F.2d 573 (4th Cir. 1953) (trust); Star Apartment v. Martin, 204 F.2d 829 (5th Cir. 1953) (land contract); Fife v. Barnard, 186 F.2d 655 (10th Cir. 1951) (quiet title action).

10. Lyle v. Bangor & Aroostook R. R., 237 F.2d 683 (1st Cir. 1956), *cert. denied*, 353 U.S. 913 (1956); A.B.C. Fireproof Warehouse Co. v. Atchison, T. & S. F. Ry., 122 F.2d 657 (8th Cir. 1941); Fletcher v. Norstad, 205 F.2d 896 (4th Cir. 1953), *cert. denied*, 346 U.S. 877 (1953); Williams v. Great Western Sugar Co., 126 Colo. 497, 251 P.2d 912 (1953).

11. Board of National Missions v. Smith, 182 F.2d 362 (7th Cir. 1950); Sedgwick v. National Savings & Trust Co., 130 F.2d 440 (D.C. Cir. 1942); Wright v. Wright, 154 Tex. 138, 274 S.W.2d 670 (1955).

12. State *ex rel.* Salvesen v. City of Milwaukee, 249 Wis. 351, 24 N.W.2d 630 (1946) (civil service regulation); Maghan v. Board of Comm'rs of District of Columbia, 141 F.2d 274 (D.C. Cir. 1944) (*ibid.*); Mitchell v. Pilgrim Holiness Church, 210 F.2d 879 (7th Cir. 1954), *cert. denied*, 347 U.S. 1013 (1953); Beedy v. Washington Water Power Co., 238 F.2d 123 (9th Cir. 1956) (workmen's compensation act); Brodrick v. Gore, 224 F.2d 892 (10th Cir. 1955) (internal revenue code); Dillard v. Thompson, 5 F.R.D. 26 (W.D. La. 1945) (F.E.L.A.); Western Mercantile Co. v. United States, 111 F. Supp. 799 (W.D. Mo. 1953) (Federal Tort Claims Act); Ryan v. Scoggin, 245 F.2d 54 (10th Cir. 1957) (Civil Rights Act); Ginsberg v. Centennial Turf Club, 126 Colo. 471, 251 P.2d 926 (1952) (validity of statute authorizing pari-mutual betting). The application of the statute of limitations to agreed facts has been a particularly effective area for the operation of the summary judgment procedure. Burns v. Chicago, M., St. P. & P. R.R., 100 F. Supp. 405 (W.D. Mo. 1951), *aff'd*, 192 F.2d 472 (8th Cir. 1951); Emich Motors Corp. v. General Motors Corp, 229 F.2d 714 (7th Cir. 1956); Siegelman v. Cunard White Star, 211 F.2d 189 (2d Cir. 1955); Lewitsky v. Matson Navigation Co., 134 F. Supp. 441 (S.D.N.Y. 1955).

function in this area, though it may be noted in passing that such procedural devices as the motion for judgment on the pleadings, the agreed case, and stipulation practice were generally available to litigants in most states prior to the adoption of the summary judgment practice. It may certainly be said that the reform attempted by the institution of a summary judgment procedure was not directed toward situations where the parties themselves could arrive at an agreement as to the facts, and any beneficial effect in this area is simply the peripheral result of the new procedural device.[13]

The problem the summary judgment procedure attempts to solve arises when apparently genuine issues of fact are raised by the pleadings and when, consequently, the parties are not in agreement as to the factual basis of the dispute. The function of the motion for summary judgment is to determine if these apparent issues of fact raised by the pleadings are worthy of trial. If it is found that a trial will prove to be merely a formality because the decision must, as a matter of law, be for one party, the cost and delays of trial are to be eliminated as a matter of social policy and judicial economy. Thus the rules or statutes establishing a summary judgment procedure require the granting of the motion unless the existence of a "good defense,"[14] or a "triable issue,"[15] or a "genuine issue of fact"[16] is established. The imposition of the burden of establishing that such issues do or do not exist presents one of the most complex aspects of the summary judgment procedure.

To clarify the nature of the problem presented by the use of the summary judgment procedure, a comparison may be made with ordinary trial procedure. In ordinary litigation, the parties formulate issues of fact by pleadings or at pre-trial conferences. At the trial, the party upon whom the law imposes the burden of proof has the duty of coming forward with evidence and the further burden of persuading the tribunal that the disputed material propositions of fact have been proved by a preponderance of the evidence or whatever other quantum of proof the applicable law

13. Bauman, *supra* note 3.

14. ILL. REV. STAT. c. 110, § 181 (1949). The rule was subsequently changed in Illinois by the adoption of Federal Rule 56. See ILL. REV. STAT. c. 110, § 57 (1955). For a collection of statutes in the various states, see Korn and Paley, *Survey of Summary Judgment, Judgment on the Pleadings and Related Pre-trial Procedures,* 42 CORNELL L.Q. 483 (1957); FIRST PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE, 1957 REPORT OF THE TEMPORARY COMMISSION ON THE COURTS, NEW YORK, pp. 319-26.

15. CAL. CIV. PROC. § 437(c).

16. FED. R. CIV. P. 56(c).

requires. This latter burden is frequently described as the risk of non-persuasion.[17]

The summary judgment procedure ordinarily has no effect on the issue formulation stage of litigation, although Federal Rule 56 does permit a defendant to move for summary judgment without pleading an answer.[18] Significant changes are made, however, in the process of proof and persuasion. As stated above, the procedural law generally imposes on the party who supports the affirmative of an issue the burden of coming forward with evidence to establish propositions controverted by an opposing party's pleadings, and the further burden of establishing these propositions by a preponderance of the evidence. While these same two burdens are found in summary judgment proceedings, neither the imposition of the burdens nor the technique of satisfying them is the same.

Assuming that the party moving for summary judgment is the party upon whom rests the affirmative of an issue of fact, it would seem that he should be required to produce at least the same quantum of proof in support of his claim or defense as is required by the procedural law in an ordinary trial. Interestingly enough, the original provisions of Keating's Act, which restricted summary judgment to plaintiffs suing on commercial paper, had no such requirement.[19] The specially indorsed writ copied the bill of exchange which was the basis of the lawsuit, and no other proof was required as a basis for the motion. The Rules adopted pursuant to the Judicature Act of 1873 and 1875 added the requirement that a plaintiff verify the cause of action by affidavit and swear that there exists no defense to the action.[20] Thus in English practice the special indorsement of the writ pursuant to Order III, rule 6, verified in general terms by affidavit, supplies the proof needed to form the basis of the motion for judgment.[21]

In the United States when issues of fact are formed by the pleadings, summary judgment procedures require the moving party to support his claim or defense with evidence.[22] As the New York Court of Appeals

17. Note, MORGAN, MAGUIRE, AND WEINSTEIN, CASES AND MATERIALS ON EVIDENCE 406-08 (4th ed. 1957); Michael and Adler, *The Trial of an Issue of Fact*, 34 COLUM. L. REV. 1224, 1255-59 (1934); 9 WIGMORE, EVIDENCE §§ 2485-2489 (3d ed. 1940).

18. See FED. R. CIV. P. 56(b).

19. 18 & 19 Vict., c. 67 (1855).

20. 36 & 37 Vict., c. 66, Rule 7, and 38 & 39 Vict., c. 77, Order XIV.

21. ODGERS, PLEADING AND PRACTICE 58 (15th ed., Harwood 1955).

22. 6 MOORE, FEDERAL PRACTICE § 56.13[3] (1953). Statute and rules are collected in FIRST PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE, *op. cit. supra* note 14, at pp. 324-25. Federal Rule 56 permits a party to move for a summary judgment without affidavits, but the motion is then "functionally equivalent to a motion to dismiss for failure to state a claim." 6 MOORE, FEDERAL PRACTICE § 56.11[2], at 2063 (1953).

stated in the leading case of *Curry v. Mackenzie*,[23] on a motion for summary judgment ". . . there must be supporting affidavits proving the cause of action, and that clearly and completely, by affiants who speak with knowledge." Absent such evidence, the motion will be denied, not because the opposing party has produced controverting evidence raising a genuine issue of fact, but simply because there has been a failure of proof on the proponent's part.[24] To this extent, the burden of proof rule in summary judgment is analogous to the burden of proof rule in the regular trial procedure.

Unlike regular trial procedure, however, the party moving for a summary judgment has an initial burden of producing evidence that does not merely preponderate, but is sufficient to permit a favorable ruling as a matter of law.[25] Whether or not the evidence presented has attained this desired degree of persuasiveness is an issue of crucial importance. Since this same issue may be raised in a trial by a motion for judgment, for a directed verdict, or by other motions having an identical function, it is instructive to turn again to a consideration of the regular trial procedure.

In trial practice, a defendant moving for a directed verdict relies either on an absence of proof of some essential element of the plaintiff's case, or he argues that although there is some evidence favoring the plaintiff it is of such slight probative force that reasonable men can reach but one conclusion.[26] Infinite variations of this latter standard

23. 239 N.Y. 267, 269-70, 146 N.E. 375 (1925).

24. See also Mettler v. Phoenix Assur. Co., 107 F. Supp. 194, 195 (E.D.N.Y. 1952) ("It is, however, an entirely different proposition to contend, as the plaintiff does here, that general denials should be disregarded where the only basis for the plaintiff's claim is that contained in general allegations of his complaint, unsupported by any facts shown by affidavits or depositions."); Bridgeport Brass Co. v. Bostwick Laboratories, 181 F.2d 315 (2d Cir. 1950) ("sketchy record" prevented summary disposition); Goldman v. Summerfield, 214 F.2d 858 (D.C. Cir. 1954) (defendant-movant); Anderson v. United States, 182 F.2d 296 (1st Cir. 1950); Kelliher v. Kelliher, 101 Cal. App. 2d 226, 225 P.2d 554 (1950); Gellens v. Continental Bank & Trust Co. of New York, 241 App. Div. 591, 272 N.Y. Supp. 900 (1st Dep't 1934); Berick v. Curran, 55 R.I. 193, 179 Atl. 708 (1935). The moving party must also comply with all the procedural pre-requisites of the motion in order to succeed. Jacobs v. Korpus, 128 Misc. 445, 218 N.Y. Supp. 314 (Sup. Ct. 1926) (failure to verify defeats the motion).

25. See Steinberg v. Adams, 90 F. Supp. 604 (S.D.N.Y. 1950). It was by the application of this standard that attacks on the constitutionality of the summary judgment procedure were forestalled. See Dwan v. Massarene, 199 App. Div. 872, 192 N.Y. Supp. 577 (1st Dep't 1922); Hanna v. Mitchell, 202 App. Div. 504, 196 N.Y. Supp. 43 (1st Dep't 1922), *aff'd*, 235 N.Y. 534, 139 N.E. 724 (1923); Eisele v. Raphael, 90 N.J.L. 219, 101 Atl. 200 (1917); People's Wayne County Bank v. Wolverine Box Co., 250 Mich. 273, 230 N.W. 170 (1930); Cowan Oil & Refining Co. v. Miley Petroleum Corp., 112 Cal. App. (Supp.) 773, 295 Pac. 504 (1931).

26. BLUME, AMERICAN CIVIL PROCEDURE §§ 414-18 (1955); 9 WIGMORE, EVIDENCE § 2495 (3d ed. 1940); Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555, 574 (1950). In court tried cases, there is an equivalent test. See Blume, *id.* §§ 9-24, at 421; 5 MOORE, FEDERAL PRACTICE § 41.13[3] and [4], at 1043 (2d ed. 1951).

are found in the cases, but most courts have adopted a formula which excludes not only the idea of weighing evidence but even the consideration of rebutting evidence.[27] If, on the other hand, the party moving for a directed verdict is the proponent of an issue (either the plaintiff, or the defendant who relies on an affirmative defense) a much more difficult question is presented. To direct for the proponent means that issues of credibility have been resolved favorably for him. Since many courts hold that the credibility of testimonial evidence is for the jury, directed verdicts are generally denied to a proponent of proof except in cases where the supporting evidence is documentary.[28]

Thus in trial practice, when a defendant moves for the peremptory instruction of a verdict, the court at least purports to look only to the evidence of his adversary (the plaintiff) to determine if some element of proof is missing or, what amounts to the same thing, that the evidence produced is such that reasonable men could not find for the plaintiff on some material element of the case. On the other hand, when the proponent of the proof moves for a directed verdict, his own evidence must be evaluated for credibility, and the court then must not only accept this evidence as true, but also decide that reasonable men could only find that it is true.

Applying the directed verdict standards to the original types of cases in which summary judgment was authorized is illuminating.[29] Only the plaintiff was permitted to move for judgment and only in cases involving bills of exchange, promissory notes, and checks. In these cases, the plaintiff was capable of supporting his claim by documentary evidence, and hence the court was willing to resolve the issue of the authenticity of the document in favor of the plaintiff in the absence of controverting evidence from the defendant. Granting a motion for summary judgment in such cases is thus consistent with the decisions of courts upholding directed verdicts in cases where a proponent moves

27. FIFTEENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK 241, 281-82 (1949); 9 WIGMORE, EVIDENCE § 2495 (3d ed. 1940); *cf.* Blume, *Origin and Development of the Directed Verdict, supra* note 26, at 581.

28. Sunderland, *Directing a Verdict for the Party Having the Burden of Proof,* 11 MICH. L. REV. 198 (1913); Bobbe, *The Uncontradicted Testimony of an Interested Witness,* 20 CORNELL L.Q. 33 (1934); Rothschild, *Summary Judicial Power,* 19 CORNELL L.Q. 361 (1934); *see also* 9 WIGMORE, EVIDENCE § 2495, at 305 (3d ed. 1940).

No definite relationship can be established between the standards used to direct a verdict for a proponent and the standard used in the disposition of motions for summary judgment. A partial explanation may be found in the fact that few cases can be found in which a verdict is directed for a proponent, and, in addition, the area in which the motion for a directed verdict operates is now preempted by the summary judgment procedure.

29. See Bauman, *supra* note 3, at 338 and 350.

for a ruling as a matter of law on the basis of unimpeached documents.

The willingness of the courts to resolve issues of credibility in favor of the proponent in these cases finds its support in the reliability of the evidence available to the moving party to prove his case. Since summary judgment was restricted to cases involving bills of exchange, the supporting evidence, classified by Bentham as pre-appointed,[30] consisted of a document prepared prior to trial by both parties to embody their agreement in the event that any dispute should arise. Participation by both parties in the preparation and execution of the document lent it a high degree of credibility.[31] To discredit such documentary evidence, the opposing party was properly required to produce some affirmative evidence. If such evidence was not presented at the hearing of the motion, it was assumed that none was available and that the document was valid and provided a proper evidentiary basis for a summary judgment.

Thus the postulate upon which rested the decisions of the cases arising under Keating's Act was that the plaintiff's assertions were to be accepted as true in the absence of controverting evidence. After the extension of the procedure to other categories of contract and creditor relationships, discrimination in the application of this basic principle was necessary. In these new types of cases, the transaction that forms the basis of the plaintiff's claim may never have been memorialized in a document. Even in cases where documentary evidence is available, it may not be sufficient in itself to establish the claim or defense; and, moreover, the well known statutory presumptions that ease the burdens of proof in the negotiable instrument cases are not available. Furthermore, in cases where documentary evidence exists, the methods of preparing the document may differ from the negotiable instrument cases, since in claims on accounts, for example, the document is prepared by only one party.[32]

The extension of summary judgment to new categories of cases thus led to a careful examination of the proof that the moving party was required to produce in support of his claim or defense. Given the judicial

30. 2 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, Book 4, c. 1, 435-53 (1827); BEST, THE PRINCIPLES OF THE LAW OF EVIDENCE § 31, at 19 (12th ed., Phipson 1922).

31. BENTHAM, AN INTRODUCTORY VIEW OF THE RATIONALE OF EVIDENCE, c. 15, pp. 68-71, in 6 THE WORKS OF JEREMY BENTHAM (Bowring ed. 1843); 1 MOORE, A TREATISE ON FACTS OR THE WEIGHT AND VALUE OF EVIDENCE § 11-12, at 17 (1908).

32. 3 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, Book 6, c. 2, § 1-2, 405-24 (1827).

bias in favor of pre-appointed evidence,[33] it is not surprising that the courts in examining the moving papers extend the postulate of Keating's Act to cover the new types of claims or defenses as long as the supporting proof is in the form of undisputed documents.[34] Thus the typical case in which a summary judgment is granted involves a negotiable instrument,[35] contract,[36] lease,[37] insurance policy,[38] book account,[39] or some defense such as release,[40]

33. See Arnstein v. Porter, 154 F.2d 464, 471 (2d Cir. 1945); Hanson v. Halvorson, 247 Wis. 434, 437, 19 N.W.2d 882 (1945) ("Hardly ever can a summary judgment be granted upon affidavits unless the issue raised by the pleadings undeniably depends upon documents set forth by copy in the affidavit of the moving party which are not impeached by an opposing affidavit."); Lederer v. Wise Shoe Co., 276 N.Y. 459, 464, 12 N.E.2d 544 (1938) (there is no reason to restrict summary judgment ". . . where a legal defense is established by documentary evidence or official record and there is no issue about the verity or conclusiveness of the proof."). For examples of defenses established by documentary proof, see notes 40-43 *infra,* and Robinson v. Henderson, 145 F. Supp. 463 (D.D.C. 1956) (diplomatic immunity); Schau v. Morgan, 241 Wis. 334, 6 N.W.2d 212 (1942) (charitable immunity); Hurd v. Sheffield Steel Corp., 181 F.2d 269 (8th Cir. 1950) (indispensable party).

34. Proof may actually be in the form of affidavits to comply with the governing procedural rules, see 1957 REPORT OF THE TEMPORARY COMMISSION ON COURTS, NEW YORK, *op. cit. supra* note 14, pp. 324-25, but the point is that at a trial documentary evidence would be available in support of the claim or defense. This was particularly true of the cases arising under Keating's Act. See note 19 *supra.* No precise definition of "documentary evidence" is made in the cases, but apparently included are any writings prepared prior to the litigation in the ordinary conduct of affairs, as distinguished from affidavits and depositions prepared solely for use at trial. See cases cited note 49 *infra.*

35. General Investment Co. v. Interborough Rapid Transit Co., 235 N.Y. 133, 139 N.E. 216 (1923); Hanna v. Mitchell, 202 App. Div. 504, 196 N.Y. Supp. 43 (1st Dep't 1922), *aff'd,* 235 N.Y. 534, 139 N.E. 724 (1923); Nutrena Mills v. Greer, 114 F. Supp. 156 (S.D. Mo. 1953); *cf.* United States v. Jones, 155 F. Supp. 52 (M.D. Ga. 1957) (guaranty); Brown v. C. Rosenstein Co., 120 Misc. 787, 200 N.Y. Supp. 491 (Sup. Ct. 1923), *aff'd,* 208 App. Div. 799, 203 N.Y. Supp. 922 (1st Dep't 1924) (letter of credit).

36. Mione Acres v. Chatmas Orchards, 277 App. Div. 425, 100 N.Y.S.2d 963 (3d Dep't 1950); Lindley v. Robillard, 208 Misc. 532, 144 N.Y.S.2d 33 (Sup. Ct. 1955); McDonald v. Amsterdam Bldg. Co., 232 App. Div. 382, 251 N.Y. Supp. 494 (3d Dep't 1931), *aff'd,* 259 N.Y. 533, 182 N.E. 169 (1932); Wilbur-Dolson Silk Co. v. William Wallach Co., 206 App. Div. 470, 201 N.Y. Supp. 465 (1st Dep't 1923); Gummed Tapes v. Miller, 155 F. Supp. 267 (E.D. Pa. 1957).

37. Wainscott v. Penikoff, 287 Ill. App. 78, 4 N.E.2d 511 (1936); Killian v. Welfare Engineering Co., 328 Ill. App. 375, 66 N.E.2d 305 (1946); Maltz v. Daly, 120 Misc. 466, 198 N.Y. Supp. 690 (1st Dep't 1923).

38. Killian v. Metropolitan Life Ins. Co., 225 App. Div. 781, 232 N.Y. Supp. 280 (4th Dep't 1928), *aff'd,* 251 N.Y. 44, 166 N.E. 798 (1929); Cleghorn v. Ocean Accident & Guarantee Corp., 216 App. Div. 342, 215 N.Y. Supp. 127 (2d Dep't 1926), *modified,* 244 N.Y. 166, 155 N.E. 87 (1926).

39. Manhattan Paper Co. v. Bayer, 147 Misc. 227, 263 N.Y. Supp. 720 (Sup. Ct. 1931) (account stated); Henry W. Cooke Co. v. Sheldon, 53 R.I. 101, 164 Atl. 327 (1933) (book account); Sea Modes v. Cohen, 309 N.Y. 1, 127 N.E.2d 723 (1955) (account stated); Rosenthal v. Halsband, 51 R.I. 119, 152 Atl. 320 (1930) (book account and note); Walker v. Woods, 334 Ill. App. 619, 79 N.E.2d 533 (1948) (account stated).

40. Ulibarri v. Christenson, 2 Utah 2d 367, 275 P.2d 170 (1954); Favole v. Gallo, 263 App. Div. 729, 30 N.Y.S.2d 878 (2d Dep't 1941), *aff'd,* 289 N.Y. 696, 45 N.E.2d 456 (1942); Schoenfeld v. Modern Silver Linen Supply Co., 279 App. Div. 49, 107 N.Y.S.2d 861 (1st Dep't 1951).

accord and satisfaction,[41] res judicata,[42] or the statute of limitations.[43] The willingness of the courts to accept the proof presented in support of the motion accounts for the success of summary judgment in this area. If controverting evidence is not produced in opposition to the motion, summary judgment is granted on the assumption that no dispute exists as to the facts.[44]

The acceptance of the trustworthiness of documents may be justified as previously shown, but the use of all types of documentary evidence raises problems that did not occur in the litigation involving bills of exchange. When a promissory note is the basis of the action, the claim is embodied in the document. Granting its authenticity, the instrument itself establishes the cause of action. Once summary judgment became available in other types of cases, additional problems are presented since even if the document is unimpeached, it may not prove the material facts of the claim or defense. For example, in a stockholder's derivative action against a bank for an alleged wrongful expenditure of money in settling a claim, defendant, in moving for a summary judgment, produced the corporate minute book showing that the directors approved the payment. Summary judgment was denied because the document, although accepted as a true record, merely established the fact of the expenditure and not its propriety.[45] Thus the party opposing the motion may not only attack the authenticity of the document, but may also contend that the document is not probative of the issue raised by the pleadings, a possibility not available to the opponent in cases arising under Keating's Act.[46] More-

41. Short v. J. R. Watkins Co., 122 F. Supp. 244 (D. Minn. 1954); Kirschbaum v. Dauman, 261 App. Div. 998, 26 N.Y.S.2d 646 (2d Dep't 1941), *rearg. denied*, 262 App. Div. 747, 28 N.Y.S.2d 156 (2d Dep't 1941).

42. Taylor v. Marcelle, 97 F. Supp. 35 (E.D.N.Y. 1951), *aff'd*, 199 F.2d 759 (2d Cir. 1952), *cert. denied*, 345 U.S. 935 (1952); Riley v. Southern Transp. Co., 278 App. Div. 605, 101 N.Y.S.2d 906 (3d Dep't 1951); Chapman v. Pollock, 148 F. Supp. 769 (W.D. Mo. 1957).

43. Chance v. Guaranty Trust Co. of New York, 173 Misc. 754, 20 N.Y.S.2d 635 (Sup. Ct. 1939), *aff'd*, 257 App. Div. 1006, 13 N.Y.S.2d 785 (2d Dep't 1939), *aff'd*, 282 N.Y. 656, 26 N.E.2d 802 (1940); Miller v. International Freighting Corp., 97 F. Supp. 60 (S.D.N.Y. 1951); Robinson v. Orem, 198 F.2d 86 (D.C. Cir. 1952); Silva v. Sandia Corp., 246 F.2d 758 (10th Cir. 1957); Brensinger v. Margaret Ann Super Markets, 192 F.2d 458 (5th Cir. 1951) (laches).

44. See cases cited notes 35-43 *supra*, and text at note 88 *infra*.

45. Levine v. Behn, 282 N.Y. 120, 25 N.E.2d 871 (1940).

46. Colonial Airlines v. Janos, 202 F.2d 914 (2d Cir. 1953) (accord and satisfaction); Zimmer v. Whiting-Buick, Inc., 274 App. Div. 967, 84 N.Y.S.2d 839 (4th Dep't 1948) (scope of a release); Lucio v. Curran, 284 App. Div. 1039, 135 N.Y.S.2d 880 (1st Dep't 1954) (release); Freedman v. Maguire, 110 F. Supp. 209 (S.D.N.Y. 1953), *modified*, 111 F. Supp. 171 (S.D.N.Y. 1953) (release and account stated); White v. Merchants Despatch Transp. Co., 256 App. Div. 1044, 10 N.Y.S.2d 962 (1st Dep't 1940) (corporate books); Luisoni v. Barth, 2 Misc. 2d 315, 137 N.Y.S.2d 169 (Sup. Ct. 1954) (letter). *Compare* Dumont v. Raymond, 49 N.Y.S.2d 865 (Sup. Ct. 1944), *aff'd*, 269 App. Div. 592, 56 N.Y.S.2d 592 (3d Dep't 1945), *with* Diamond v. Davis, 38 N.Y.S.2d 103 (Sup. Ct. 1942), *aff'd*, 265 App. Div. 919, 39 N.Y.S.2d 412 (1st Dep't 1942), *aff'd*, 292 N.Y. 552, 54 N.E.2d 683 (1944).

over, the documentary evidence in the new types of cases is not rigidly circumscribed in form as is a negotiable instrument, but may be open to varying interpretations. Thus parol evidence may be needed to resolve the ambiguities in the document, and if this evidence is either conflicting or involves issues of credibility, as it frequently does in contractual arrangements, summary judgment must be denied.[47] Lastly, the term "documentary evidence" is itself imprecise, and thus in a state such as New York where a defendant may move for summary judgment in any case where a defense is established by documents,[48] disputes may arise as to the proper classification of the supporting proof.[49]

Once a court decides that documentary evidence does establish the claim or defense, a summary judgment will be granted if the opponent fails to produce controverting evidence.[50] Thus in these cases, the burden of producing evidence attacking the verity and conclusiveness of the supporting evidence is shifted to the party opposing the motion. Because of the great value attached to documentary evidence by the courts, particularly in cases where the document resulted from mutual negotiation, as a contract or note, or from mutual commercial transactions, as an

47. Piedmont Hotel Co. v. A. E. Nettleton Co., 263 N.Y. 25, 188 N.E. 145 (1933) (lease); Farrand Optical Co. v. United States, 107 F. Supp. 93 (S.D.N.Y. 1952) (contract); Ocean Accident & Guarantee Corp. v. Aconomy Erectors, 224 F.2d 242 (7th Cir. 1955) (insurance policy); Gulf Power Co. v. Local Union Nos. 676 & 1078, 229 F.2d 655 (5th Cir. 1956) (collective bargaining contract); Brawer v. Mendelson Bros. Factors, 262 N.Y. 53, 186 N.E. 200, *amended*, 262 N.Y. 562, 188 N.E. 65 (1933) (meaning of "credit checking"); Boro Hall Corp. v. General Motors Corp., 164 F.2d 770 (2d Cir. 1947) (dealer's franchise); Walsh v. Walsh, 18 Cal.2d 439, 116 P.2d 62 (1941) (settlement agreement); Burns v. Jaffe, 148 F. Supp. 175 (N.D. Ill. 1956) (contract).

Problems of interpretation are even more acute when a contract is oral. See Cary v. U.S. Hoffman Machinery Corp., 148 F. Supp. 748 (D.D.C. 1957).

48. N.Y.R. Civ. Prac. 113.

49. Chance v. Guaranty Trust Co. of New York, *supra* note 43 (approving a very liberal definition of documentary evidence); Dietch v. Atlas, 140 N.Y.S.2d 859, 862 (Sup. Ct. 1955). See also Schusterman v. C. & F. Caterers, 192 Misc. 564, 77 N.Y.S.2d 718 (City Ct. 1948) (letter and agreement in writing); White v. Merchants Despatch Trans. Co., *supra* note 46 (corporate books); Luisoni v. Barth, *supra* note 46 (letter); Metropolitan Fuel Distributors v. Coogan, 277 App. Div. 138, 97 N.Y.S.2d 851 (1st Dep't 1950) (covenant in a lease); Schoenfeld v. Modern Silver Linen Supply Co., *supra* note 40 (written agreement); Bruhn v. Klein, 138 N.Y.S.2d 624 (Sup. Ct. 1955) (affidavit raising defense of the statute of frauds); *cf.* Brennan v. Plattsburgh Pub. Co., 1 App. Div. 2d 740, 146 N.Y.S.2d 764 (3d Dep't 1955) (deposition is not documentary evidence).

50. See cases cited notes 35-43, 49 *supra;* City of Zephyrhills, Florida v. R. E. Crummer & Co., 237 F.2d 338 (5th Cir. 1956) (note); U.S. v. Atlantic Basin Shipyard, 124 F. Supp. 354 (E.D.N.Y. 1954) (discharge in bankruptcy); Northern Pacific Ry. v. Associated Gen. Contractors, 152 F. Supp. 126 (D.N. Dak. 1957) (bill of lading and admission). English law provides defendant with the alternative of paying the amount of the claim into court as a condition for obtaining leave to defend. 18 & 19 Vict., c. 67, § 2 (1855); 38 & 39 Vict., c. 77, Order XIV, Rule 6; see Blaiberg v. Abrams, 77 L. T. Journal 255 (C.A. 1884); *In re* Ford, [1900] 2 Q.B. 211.

account, a high standard of proof is exacted.[51] This has led one writer to conclude, after a factual study of 250 New York cases, that the "judges weigh probabilities."[52] This is true in the sense that judges will not permit the authenticity of documents to be attacked by mere conclusions or generalizations.[53] Since the litigation concerns transactions in which the opponent participated or shares full knowledge, a mere repetition of pleaded denials fails to establish a triable issue of fact.[54] Equally ineffective is evidence inadmissible at a trial. Thus summary judgment will not be defeated by an opponent who relies on hearsay evidence[55] or proof varying the terms of a written contract.[56]

On the other hand, the opponent of the motion may produce documents, affidavits, or depositions containing detailed evidence directly contradicting the moving party's assertions,[57] or supporting some such

51. See Hanna v. Mitchell, 202 App. Div. 504, 196 N.Y. Supp. 43 (1st Dep't 1922), *aff'd*, 235 N.Y. 534, 139 N.E. 724 (1934); Ulibarri v. Christenson, *supra* note 40; W. E. Plechaty Co. v. Heckett Engineering, 145 F. Supp. 805 (N.D. Ohio 1956) (affidavits "cannot change what the . . . patent discloses"); Norwood Morris Plan Co. v. McCarthy, 295 Mass. 597, 4 N.E.2d 450, 107 A.L.R. 1215 (1936).

52. Cohen, *Summary Judgment in New York*, 32 COLUM. L. REV. 825, 853 n.38 (1932). Compare the statement of the English rule in ODGERS, PLEADING AND PRACTICE 66 (15th ed. Harwood 1955).

53. Tractor & Equipment Corp. v. Chain Belt Co., 276 App. Div. 551, 96 N.Y.S.2d 71 (1st Dep't 1950); McAnsh v. Blauner, 222 App. Div. 381, 226 N.Y. Supp. 379 (1st Dep't 1928), *aff'd*, 248 N.Y. 537, 162 N.E. 515 (1928); Schau v. Morgan, 241 Wis. 334, 6 N.W.2d 212 (1942); People's Wayne County Bank v. Wolverine Box Co., 250 Mich. 273, 230 N.W. 170, 69 A.L.R. 1024 (1930); Bertolf Bros. v. Leuthardt, 261 App. Div. 981, 26 N.Y.S.2d 114 (2d Dep't 1941); Dodwell & Co. v. Silverman, 234 App. Div. 362, 254 N.Y. Supp. 746 (1st Dep't 1932); Rodger v. Bliss, 130 Misc. 168, 223 N.Y. Supp. 401 (Sup. Ct. 1927); Rosenthal v. Halsband, 51 R.I. 119, 123, 152 Atl. 320 (1930).

54. General Investment Co. v. Interborough Rapid Transit Co., 235 N.Y. 133, 139 N.E. 216 (1923); Bower v. M. Samuels & Co., 226 App. Div. 769, 234 N.Y. Supp. 379 (2d Dep't 1929), *aff'd*, 252 N.Y. 549, 170 N.E. 138 (1929); Lee v. Graubard, 205 App. Div. 344, 199 N.Y. Supp. 563 (1st Dep't 1923); Maurice O'Meara Co. v. National Park Bank, 239 N.Y. 386, 146 N.E. 636, 39 A.L.R. 74 (1925); see Combined Bronx Amusements v. Warner Bros. Pictures, 132 F. Supp. 921 (S.D.N.Y. 1955).

55. See, *e.g.*, FED. R. CIV. P. 56(e); WIS. STAT. ANN. § 270.635(2) (1957); Ernst Seidelman Corp. v. Mollison, 10 F.R.D. 426 (S.D. Ohio 1950); Seward v. Nissen, 2 F.R.D. 545 (D. Del. 1942); Jameson v. Jameson, 176 F.2d 58 (D.C. Cir. 1949); Irving Trust Co. v. Orvis, 139 Misc. 670, 248 N.Y. Supp. 771 (Sup. Ct. 1931); Staten Island National Bank & Trust Co. v. Buccello, 2 Misc. 2d 1020, 146 N.Y.S.2d 448 (Sup. Ct. 1955); Moe v. Bank of the United States, 211 App. Div. 519, 207 N.Y. Supp. 347 (2d Dep't 1925).

56. Birgbauer v. Aetna Cas. & Sur. Co., 251 Mich. 614, 232 N.W. 403 (1930): Lion Brewery of New York City v. Loughran, 223 App. Div. 623, 229 N.Y. Supp. 216 (1st Dep't 1928); *In re* Lyman Richey Sand & Gravel Co., 42 F. Supp. 158 (D. Neb. 1941), *appeal dismissed sub nom.*, O'Leary v. Curtis, 129 F.2d 1021 (8th Cir. 1942), *rev'd in part*, 131 F.2d 240 (8th Cir. 1942); Ford v. Luria Steel & Trading Corp., 192 F.2d 880 (8th Cir. 1951).

57. Dwan v. Massarene, 199 App. Div. 872, 192 N.Y. Supp. 577 (1st Dep't 1922) (conditional delivery of a note); Atlas Investment Co. v. Christ, 240 Wis. 114, 2 N.W.2d 714 (1942) (defense denying plaintiff was a holder in due course); Munoz & Co. v. Savannah Sugar Refining Corp., 118 Misc. 24, 193 N.Y. Supp. 422 (Sup. Ct. 1922) ("exhaustive answer" directly contradicting plaintiff's assertions); Kaunitz v.

defense or claim as lack of authority to execute the document, misrepresentation, or mistake.[58] In such cases, the statements in the affidavits will be accepted as true,[59] and the resulting conflicts in the evidence will not be resolved in summary judgment proceedings.[60] Thus if the opponent of the motion does satisfy the burden imposed upon him by producing controverting evidence, a material issue of fact is raised and the case will be remitted for trial.

Occasional aberrations from this rule may be found. Thus in *Goldman v. Leeann Builders*,[61] it was said by way of dictum that the ". . . court may *weigh* the allegations, visualize the factual picture as it is fully set forth by all affidavits, judge the *inherent probabilities* and the *value* and *weight* and *convincing nature* of the sworn statements, and *decide how real is the defendant's denial of liability.*"[62] It is safe to say that appellate courts in New York have never accepted such a statement,[63] and that the grant of such power would be ruled unconstitutional as

---

Wheeler, 344 Mich. 181, 73 N.W.2d 263 (1955) (breach of contract by plaintiff and payment); Goldman v. Leeann Builders, 197 Misc. 228, 94 N.Y.S.2d 855 (Sup. Ct. 1950) (parol agreement governing payment).

58. Metropolitan Life Ins. Co. v. Bank of the United States, 259 N.Y. 365, 182 N.E. 18 (1932) (mistake); Ritz-Carlton Restaurant & Hotel Co. v. Ditmars, 203 App. Div. 748, 197 N.Y. Supp. 405 (1st Dep't 1922) (duress); Barrett v. Shanks, 300 Ill. App. 119, 20 N.E.2d 799 (1939) (fraud); Granite Trust Bldg. Corp. v. Great Atlantic & Pac. T. Co., 36 F. Supp. 77 (D. Mass. 1940) (lack of authority); Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 144 N.E.2d 387 (1957) (waiver); Gillum v. Skelly Oil Co., 149 F. Supp. 583 (W.D. Mo. 1957) (release). Releases have commonly been resisted on the ground of fraud or duress. Holzman v. Barrett, 192 F.2d 113 (7th Cir. 1951) (duress); Rizzuto v. U.S. Shipping Board Emergency Fleet Corp., 213 App. Div. 326, 210 N.Y. Supp. 482 (2d Dep't 1925) (*ibid.*); Camerlin v. New York Cent. R.R., 199 F.2d 698 (1st Cir. 1952) (fraud); Willett v. Chase National Bank, 219 App. Div. 41, 219 N.Y. Supp. 289 (1st Dep't 1926) (fraud and want of consideration). *Compare* plaintiff's evidence in resisting defendant's motion based on a release in Ulibarri v. Christenson, *supra* note 40 and Nahtel Corp. v. West Virginia Pulp and Paper Co., 141 F.2d 1 (2d Cir. 1944) (summary judgment granted), *with* Guerrero v. American-Hawaiian Steamship Co., 222 F.2d 238 (9th Cir. 1955) (summary judgment denied).

59. Gliwa v. Washington Polish Loan & Building Ass'n, 310 Ill. App. 465, 34 N.E. 2d 736 (1941); Whitaker v. Coleman, 115 F.2d 305 (5th Cir. 1940); Dempsey v. Langton, 266 Mich. 47, 253 N.W. 210 (1934); Union National Bank of Troy v. Corey, 93 N.Y.S.2d 35 (City Ct. 1949). See 6 MOORE, FEDERAL PRACTICE § 56.15 [4], at 2139-41 (1953).

60. Dwan v. Massarene, *supra* note 57; Walsh v. Walsh, 18 Cal.2d 439, 116 P.2d 62 (1941); Bullard Gage Co. v. Saffady, 307 Mich. 296, 11 N.W.2d 895 (1943); Birkenfeld v. Ginsburg, 106 N.J.L. 377, 146 Atl. 176 (1929); Atlas Investment Co. v. Christ, *supra* note 57; Berick v. Curran, 55 R.I. 193, 179 Atl. 708 (1935).

61. 197 Misc. 228, 94 N.Y.S.2d 855 (Sup. Ct. 1950). The court denied summary judgment, finding a defense raised by the affidavits.

62. *Id.* at 231, 94 N.Y.S.2d at 859 (Sup. Ct. 1950).

63. Dwan v. Massarene, *supra* note 57; Bernstein v. Kritzer, 224 App. Div. 387, 231 N.Y. Supp. 97 (1st Dep't 1928); Berson Sydeman Co. v. Waumbeck Mfg. Co., 212 App. Div. 422, 208 N.Y. Supp. 716 (1st Dep't 1925). Compare, however, the language used by the court in Manhattan Paper Co. v. Bayer, 147 Misc. 227, 263 N.Y. Supp. 720 (Sup. Ct. 1931).

depriving the parties of a jury trial.[64] The accepted rule was clearly and forcefully stated in *Norwood Morris Plan Co. v. McCarthy*,[65] when the court said: "If the affidavit of defense shows a substantial issue of fact, a summary judgment should not be ordered even though the affidavit be disbelieved. If the affidavits on the one side and on the other are directly opposed as to the facts shown, the case must go to trial."[66]

The noteworthy factor in the cases just considered is the willingness of courts to accept the truthfulness of the moving party's proof in support of the motion. Primarily this results from the acceptability of documentary proof, but additionally, the authenticating and explanatory affidavit evidence concerns a transaction where knowledge is shared by both parties to the litigation. This accounts for the requirement that the opponent of the motion produce evidence showing the existence of an issue of fact. Because of the nature of the transactions being litigated, denial of information or knowledge is regarded as insufficient.[67] Only in rare cases will the motion be defeated by a claimed lack of knowledge, as when a note executed by a decedent is asserted against his estate.[68]

When supporting affidavit evidence has a more extensive purpose, and is used to establish material facts within the exclusive knowledge of the moving party, a more serious problem faces the courts. While it is obvious that such situations may arise in commercial litigation, cases of this type multiplied when the "shackels were stricken off"[69] the sum-

64. Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523, 19 N.E.2d 363 (1939). Compare Judge Fee's statement in New and Used Auto Sales v. Hansen, 245 F.2d 951, 954 (9th Cir. 1957) ("Here judgment was entered without the benefit of trial. There is no precedent for the action taken in the instant case. If there were precedent, it would be disapproved.").

65. 295 Mass. 597, 4 N.E.2d 450, 107 A.L.R. 1215 (1936).

66. *Id.* at 603. Compare the statements made by English courts in Jacobs v. Booth's Distillery Co., 85 L.T. 262 (H.L. 1901); Blaiberg v. Abrams, 77 L.T. Journal 255 (C.A. 1884).

67. Thus a denial of knowledge or information sufficient to form a belief about a transaction in which the opponent of the motion has personal knowledge is insufficient to defeat a motion for summary judgment. See Heiter v. Heiter, 2 Misc. 2d 904, 157 N.Y.S.2d 896 (Sup. Ct. 1956); Second National Bank v. Breitung, 203 App. Div. 636, 197 N.Y. Supp. 375 (1st Dep't 1922).

68. Woodmere Academy v. Moskowitz, 212 App. Div. 457, 208 N.Y. Supp. 578 (2d Dep't 1925). It has been held that lack of knowledge under these circumstances does not prevent a summary judgment unless a genuine effort has been made to ascertain the validity of the claim. Norwood Morris Plan Co. v. McCarthy, *supra* note 65. Obviously distinguishable are cases in which the plaintiff-movant proves his claims by a document, such as an insurance policy, *and* evidence within his exclusive possession. This problem is considered subsequently, see note 111 *infra*, but consult in addition, Dolge v. Commercial Casualty Ins. Co., 211 App. Div. 112, 207 N.Y. Supp. 42 (2d Dep't 1924), *aff'd*, 240 N.Y. 656, 148 N.E. 746 (1925).

69. Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 569 (1952). Moore states that there is no "theoretical or sound practical reason" for excluding summary judgment from any civil action. 6 MOORE, FEDERAL PRACTICE § 56.17, p. 2171 (1953). This is an oversimplification, since as has been shown, the extension of the procedure

mary judgment procedure by the adoption of Federal Rule 56. In the new categories of cases to which the procedure was made applicable, the supporting testimonial proof differs from testimony in commercial cases considered previously because it is casual and did not result from planned transactions where there was mutual participation by the parties. Events giving rise to tort claims, for example, are fortuitous, and thus the opponent of the motion may have little or no knowledge of the event giving rise to the litigation. Even when he has knowledge, it is certainly not the shared knowledge of a typical commercial undertaking. In negligence cases particularly, knowledge of the accident is at best haphazard and incomplete.

The reluctance of courts to accept testimonial proof in these cases is intensified by judicial distrust and suspicion of evidence presented in the form of affidavits or depositions. Affidavits have long been regarded as the poorest type of evidence, particularly in cases where the testimony is that of an interested witness, because the affiant is immunized from the test of cross-examination.[70] If the evidence is presented in the form of a deposition, this difficulty is partially overcome since an opportunity for cross-examination of the witness may be provided. Nevertheless, the right to cross-examination under these circumstances may be less valuable either because the deposition is taken by written interrogatories or because the examination is conducted before the opponent is fully aware of all aspects of the case.[71] Moreover, demeanor evidence is missing in all of these cases. The value of demeanor evidence may be minimized in cases where the proof supporting the motion consists of documents, but in determining the credibility of witnesses such evidence assumes a significance that makes courts reluctant to proceed without it.

Thus the nature of the transactions which gave rise to the litigation and the type of proof presented in support of the motion led courts to limit or abandon the postulate upon which rested the decisions under

---

presents problems of proof that never occurred when the remedy was restricted to bills and notes. On the other hand, restricting the procedure to stated classes of cases raises its own problems of classification. See Weinstein and Korn, *Preliminary Motions in New York: A Critique,* 57 COLUM. L. REV. 526, 527 n.7 (1957).

70. See 2 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, Book 3, c. 13, § 3, p. 276, 278 (1827) where he evaluates affidavits at ". . . the very lowest point of the scale of trust-worthiness." See also 2 MOORE, TREATISE ON FACTS OR THE WEIGHT AND VALUE OF EVIDENCE § 938-43, at 1094 *et seq.* (affidavit evidence) and § 1092, at 1225 (interested witnesses) (1908). Compare the comments in Lacy v. United States, 207 F.2d 352 (7th Cir. 1953) and Griffeth v. Utah Power & Light Co., 226 F.2d 661 (9th Cir. 1955) (dissenting opinion).

71. 2 MOORE, *op. cit. supra* note 70, §§ 963-67, at 1114. *Cf.* Bentham's comments on the older deposition practice in *An Introductory View of the Rationale of Evidence,* c. 11, §§ 2-3, at 36 in 6 THE WORKS OF JEREMY BENTHAM (Bowring ed. 1843).

Keating's Act. In its place, two discernible patterns of decisions developed. One group applies rules of construction to the supporting proof to determine its sufficiency to establish the material facts in controversy. Credibility is not directly questioned, and assuming the evidence to be true, the court questions its legal adequacy to establish the claim or defense.[72] The other pattern of decisions makes no such concession, but challenges not only the legal sufficiency of the evidence, but its credibility as well. This is generally accomplished by imposing upon the party moving for judgment the burden of establishing the facts of the controversy with some stated degree of probability.[73] There is no rigid adherence to either approach in a given jurisdiction, but the former method is employed chiefly in states where the summary judgment procedure is limited to certain categories of cases.

Courts utilizing the construction technique examine the supporting proof to determine if the evidence presented complies with the governing rules or statutes. In making this determination, the rule of construction applied is that the affidavits of the moving party are to be strictly construed, whereas the affidavits of the opponent are given a liberal construction to avoid an unjust deprivation of a full trial.[74] Thus to succeed on a motion for a summary judgment, a moving party must produce evidence sufficient to withstand a meticulous examination, and at the same time, convince the court that the opponent's proof, liberally construed, raises no material issue of fact. Evidentiary facts in the opponent's affidavits or depositions are accepted as true, of course, and if a material issue of fact is raised, the motion for judgment must be denied.[75]

As already indicated, courts experienced no difficulty in accepting affidavits detailing documentary evidence probative of the material facts of a claim or defense.[76] Thus the purpose of the construction technique was to meet the need for a standard testing the adequacy of evidence other than documents. In employing this method, affidavits are scrutinized to determine if they contain evidentiary facts rather than opinions, conclusions, hearsay, or other objectionable matter. Little difficulty is encountered in condemning as conclusory affidavits merely repeating

72. See text at notes 74-86 *infra.*

73. See text at notes 89-99 *infra.*

74. Eagle Oil & Refining Co. v. Prentice, 19 Cal. 2d 553, 122 P.2d 264 (1942); Weichman v. Vetri, 100 Cal. App. 2d 177, 223 P.2d 288 (1950); Wyatt v. Madden, 59 App. D.C. 38, 32 F.2d 838 (D.C. Cir. 1929); Berick v. Curran, 55 R.I. 193, 179 Atl. 708 (1935); Minuto v. Metropolitan Life Ins. Co., 55 R.I. 201, 179 Atl. 713 (1935); Soelke v. Chicago Business Men's Racing Ass'n, 314 Ill. App. 336, 41 N.E.2d 232 (1942). *But see,* Fisher v. Hargrave, 318 Ill. App. 510, 518, 48 N.E.2d 966 (1943).

75. See cases cited note 59 *supra,* and Barkhausen v. Naugher, 395 Ill. 562, 70 N.E.2d 565 (1946); Berick v. Curran, *supra* note 74.

76. See cases cited notes 34-44 *supra.*

statutory language that a claim "is founded on a contract express or implied."[77] As the specificity of affidavits increases, however, the more exacting becomes the task of determining whether they have the desired evidentiary quality. Thus in *Gardenswartz v. Equitable Life Assurance Society,*[78] recovery on an insurance policy depended upon proof of total disability. Summary judgment was denied to the plaintiff because the affidavit of his physician, stating the type of disease suffered by the plaintiff and that he was "disabled and unable to engage in any occupation . . . of financial value" was labeled mere opinion beyond the scope of testimony proper for a medical expert.[79]

As greater reliance is placed upon testimonial evidence of doubtful credibility, the readiness of the court to find such evidence inadequate correspondingly increases. This is accomplished by ruling that the statements in the affidavits are opinions, conclusions, or generalizations rather than evidentiary facts.[80] Supporting proof under these circumstances will be found inadequate although the opponent, as in the *Gardenswartz* case, fails to produce controverting proof. On the other hand, once the proof survives the court's scrutiny, it is accepted as establishing the facts, and the burden of producing evidence to show the necessity of a trial shifts to the opponent.[81]

In satisfying the burden thus imposed, the opponent of the motion theoretically is entitled to the benefit of the liberal construction rule, but in reality the ultimate decision turns upon the nature of the moving party's proof. Thus if the proof in support of the motion is largely documentary and has a high degree of credibility the opponent must produce convincing proof attacking the documents in order to sustain his burden.[82]

77. Berick v. Curran, *supra* note 74. See also Minuto v. Metropolitan Life Insurance Co., *supra* note 74.

78. 23 Cal. App. 2d 745, 68 P.2d 322 (1937). See also Low v. Woodward Oil Co., 133 Cal. App. 2d 116, 283 P.2d 720 (1955).

79. Gardenswartz v. Equitable Life Assurance Soc., *supra* note 78, at 753.

80. *Compare* Gardenswartz v. Equitable Life Assurance Soc., *supra* note 78; Coyne v. Krempels, 218 P.2d 125 (Cal. App. 1950); Weichman v. Vetri, *supra* note 74; Caswell v. Stearns, 257 Mich. 461, 241 N.W. 165 (1932), *with* the following decisions by the same courts in cases where the moving party relied on documentary evidence: Cone v. Union Oil Co. of California, 129 Cal. App. 2d 558, 277 P.2d 464 (1954); Gambord Meat Co. v. Corbari, 109 Cal. App. 2d 161, 240 P.2d 342 (1952) (account stated); Shea v. Leonis, 29 Cal. App. 2d 184, 84 P.2d 277 (1938); Killian v. Welfare Engineering Co., 328 Ill. App. 375, 66 N.E.2d 305 (1946); Walker v. Woods, 334 Ill. App. 619, 79 N.E.2d 533 (1948); Rosenthal v. Halsband, 51 R.I. 119, 152 Atl. 320 (1930); People's Wayne County Bank v. Wolverine Box Co., 250 Mich. 273, 230 N.W. 170 (1930); Smith v. Karasek, 313 Ill. App. 654, 40 N.E.2d 594 (1942).

81. See Coyne v. Krempels, 36 Cal. 2d 257, 223 P.2d 244 (1950); Cone v. Union Oil Co. of California, *supra* note 80; Gliwa v. Washington Polish Loan & Bldg. Ass'n, 310 Ill. App. 465, 34 N.E.2d 736 (1941).

82. See cases cited note 80 *supra* in which the movant supported his claim with documentary evidence.

In spite of the rule of liberal interpretation, controverting affidavits may be found inadequate by the simple expedient of labeling the statements conclusions or generalizations rather than evidence.[83] If the moving party's proof is less convincing, as in cases where he relies on his own testimony or has exclusive knowledge of the transaction, the burden of providing evidence may never shift to the opponent.[84] If the opponent nevertheless produces controverting affidavits, as frequently happens in these cases, the liberal construction rule applies, and one reads that the averments in such affidavits need not ". . . be rigidly restricted to evidentiary matter."[85]

The operation of this technique is strikingly illuminated by the opinions of the California District Court of Appeals and the Supreme Court in *Coyne v. Krempels.*[86] In that case, the plaintiff sought to recover $4,000 pursuant to an agreement entered into with the defendant whereby plaintiff was to sell the defendant's bus, keeping the excess above $4,500 as the agreed commission. Plaintiff asserted in his affidavit that he had procured four buyers who were willing to purchase the bus for $8,500, subject only to testing the bus, but that the defendant breached the contract by refusing to permit the examination. The defendant, relying solely on his verified answer, denied that plaintiff had buyers who were ready, willing, and able to perform, and, in addition, alleged affirmatively that the plaintiff himself had been guilty of a breach of the contract. The District Court of Appeals reversed a summary judgment for the plaintiff for two reasons: first, the affidavits filed by the plaintiff failed to substantiate his cause of action in that they omitted stating the names of the purchasers and proper notification of defendant; and second, the defendant's verified answer was sufficient to raise an issue for trial.

---

83. Cowan Oil & Refining Co. v. Miley Petroleum Corp., 112 Cal. App. 773, 295 Pac. 504 (1931); Shea v. Leonis, *supra* note 80; Gliwa v. Washington Polish Loan & Bldg. Ass'n, *supra* note 81; Rosenthal v. Halsband, *supra* note 80; Henry W. Cooke Co. v. Sheldon, 53 R.I. 101, 164 Atl. 327 (1933); People's Wayne County Bank v. Wolverine Box Co., *supra* note 80.

84. A good example is Gardenswartz v. Equitable Life Assurance Soc., *supra* note 78.

85. Eagle Oil & Refining Co. v. Prentice, 19 Cal. 2d 553, 122 P.2d 264 (1942). See also McComsey v. Leaf, 36 Cal. App. 2d 132, 97 P.2d 242 (1939); Baxter v. Szucs, 248 Mich. 672, 227 N.W. 666 (1929); Soelke v. Chicago Business Men's Racing Ass'n, 314 Ill. App. 336, 41 N.E.2d 232 (1942); Caswell v. Stearns, 257 Mich. 461, 241 N.W. 165 (1932). Compare the court's statement in finding the opponent's affidavits sufficient in Hartford Acc. & Indem. Co. v. Mutual Trucking Co., 337 Ill. App. 140, 85 N.E.2d 349 (1949) ("After a painstaking examination of the evidence we have reached the conclusion that Mutual introduced some evidence that tended to prove that Milliken had actual or apparent authority. . . .").

86. 218 P.2d 125 (1950), *rev'd*, 36 Cal. 2d 257, 223 P.2d 244 (1950).

On appeal, the summary judgment was reinstated by Supreme Court. That court found that the plaintiff's affidavits were sufficient to show the breach of contract by the defendant's refusal to permit demonstrations of the bus. The defendant's contention that the verified answer raised issues for trial precluding a summary disposition was unequivocally rejected by the Supreme Court on the ground that it would nullify the entire summary judgment procedure.

The case demonstrates the crucial effect of the decision as to the adequacy of the moving party's proof. As was mentioned, proof in support of the motion in the *Coyne* case consisted of affidavits setting out the written agreement and averring that the plaintiff had procured several buyers who agreed to purchase the bus, subject to its examination and demonstration.[87] The District Court of Appeals regarded this evidence as insufficient to support the motion for reasons stated previously and thus never faced the problem of determining the adequacy of the defendant's proof. The Supreme Court, however, decided that the supporting proof was adequate and hence the burden of coming forward with evidence was shifted to the defendant. Thus, given a favorable decision as to adequacy of the plaintiff's proof, controverting proof had to be produced to prevent judgment. Since the defendant relied solely on his verified answer, he failed to sustain his burden of proof even under the liberal construction rule and consequently suffered an adverse judgment.

In failing to discuss why the plaintiff's supporting proof had the desired persuasiveness, the Supreme Court decision in the *Coyne* case is representative of opinions in this area. Common factors found in cases where the supporting proof is deemed adequate are documentary evidence and transactions with knowledge mutually shared by the parties.[88] Since the decisional device of affidavit scrutiny is resorted to chiefly in states where summary judgment is restricted to contract-type relationships, the typical case involves a transaction in which there has been mutual participation by the parties. In such cases, it seems reasonable to accept the proof of the moving party when the opponent who shares knowledge of the event does not bother to produce controverting evidence. Once the element of shared knowledge is removed, as in the *Gardenswartz* case on the issue of total disability, the courts tend to find the proof inadequate

87. *Id.* at 218 P.2d 125, 127.

88. The factor of shared knowledge is present in the cases cited *supra* notes 35-43. See also Dodwell & Co. v. Silverman, 234 App. Div. 362, 254 N.Y. Supp. 746 (1st Dep't 1932), and cases where the statute of limitations is relied on as a defense and is not provable by documents. Carroll v. Pittsburgh Steel Co., 100 F. Supp. 749 (W.D. Pa. 1951); Deer v. New York Cent. R.R., 202 F.2d 625 (7th Cir. 1953); Corash v. Texas Co., 264 App. Div. 292, 35 N.Y.S.2d 334 (1st Dep't 1942).

even though no controverting proof is presented. If proof is produced by the opponent in such cases, it is given a liberal interpretation because of a distrust of the evidence relied on by the movant. Thus though the decisions are rationalized in terms of the adequacy of the affidavits, the determination of that question appears to rest ultimately upon the court's decision as to the credibility of the supporting proof. Since factors entering into this determination are seldom explicitly discussed in these opinions, the real basis of decision often remains obscure. Evaluation of these factors is therefore postponed and will be made in the discussion of the other method of decision which avowedly does concern itself with questions of credibility.

The significant feature of the other decisional pattern is its complete rejection of the postulate underlying Keating's Act. Because the evidentiary basis of cases not provable by documentary evidence is regarded with suspicion, great care is exercised to avoid the danger of denying a full trial to a worthy litigant. Thus the party moving for summary judgment is required to show not only that the supporting proof provides an adequate evidentiary basis for the motion, as in the previous cases, but also that such proof has the requisite degree of credibility. The imposition of this burden rests squarely on the court's doubt as to the reliability of the movant's own proof irrespective of the production of controverting proof by the opponent. The court in *Griffith v. William Penn Broadcasting Co.*[89] stated: "Defendant's failure to file a counter-affidavit to support its opposition to the motions is of no significance. . . . The burden rests upon plaintiff, the moving party, to establish the non-existence of a genuine issue of fact. . . . In the absence of a showing in the pleadings and depositions that, in the event the case should go to trial, there would be no competent evidence to support findings of fact in defendant's favor, plaintiff has not met his burden."

In accord with this case, Professor Moore states flatly that the moving party has the burden of "showing the absence of any genuine issue as to all the material facts. . . ."[90] Since as a practical matter it is impossible for the moving party to prove the non-existence of an issue of fact, the imposition of such a burden serves to warn litigants that summary judgments are to be entered only in cases where the movant's assertions as to the factual basis of the dispute have a high degree of probability.

89. 4 F.R.D. 475, 477 (E.D. Pa. 1945). See also Albert Dickinson Co. v. Mellos Peanut Co., 179 F.2d 265, 268 (7th Cir. 1950).

90. 6 MOORE, FEDERAL PRACTICE § 56.15[3], at 2123 (1953). The full implications of this statement are severely qualified by the discussion which follows, indicating ways in which a moving party can satisfy the burden of removing genuine issues of fact.

An even more cautious approach to summary judgment is found in Judge Jerome Frank's celebrated opinion in *Doehler Metal Furniture Co. v. United States*.[91] In this case the United States sought to recover damages for breach of a contract which provided that if the defendant failed to make agreed deliveries of furniture, the United States might terminate the contract and purchase similar materials in the open market, charging any cost in excess of the original contract price to the defendant. Pursuant to these provisions, the United States purchased furniture from another manufacturer and sought to recover from the defendant the excess amount paid. The new contract differed from the original in providing for liquidated damages in case of any delay in the delivery of the furniture. A summary judgment for the United States was reversed because of the failure to show that the liquidated damage clause in the second contract had not raised the price of the furniture and thus enhanced damages. Although no evidence was presented to the court showing that the clause had resulted in a higher price, Judge Frank, in placing on the moving party the burden of establishing all facts necessary for relief, made this oft-quoted observation: "A litigant has a right to a trial where there is the slightest doubt as to the facts. . . ."[92]

The *Doehler* case thus placed on the moving party the burden of convincing the court that there is not the "slightest doubt" as to the factual basis of the dispute, and since the United States had failed to establish that the liquidated damages clause did not affect the price of the furniture, this burden had not been met. Logically, of course, there will always be a "slight doubt" as to the facts, since judicial proof is a matter of probabilities.[93] The best that the movant can do in a contested lawsuit is to establish disputed propositions as highly probable. Thus the proposed standard of Judge Frank means that the evidentiary basis of the motion must have a high degree of probability. Since an estimate of probabilities can not be made with mathematical exactitude, the practical application of the standard requires the court to deny summary judgment in all but the most convincing cases.

The "slightest doubt" test of Judge Frank and the imposition of an additional burden on the movant in Professor Moore's formulation illustrate the repudiation by courts and commentators of a rule which requires the movant's evidence to be accepted solely because it is not

91. 149 F.2d 130 (2d Cir. 1945).
92. *Id.* at 135.
93. See CASTELL, A COLLEGE LOGIC 334 (1935); COHEN AND NAGLE, LOGIC AND SCIENTIFIC METHOD, c. VIII (1934); CARNAP, LOGICAL FOUNDATIONS OF PROBABILITY 176-77 (1950). *Cf.* Judge Frank's statements on this subject in COURTS ON TRIAL, c. III (1949) and LAW AND THE MODERN MIND, c. XII, at 116 (1930).

controverted by an opposing party. The issue of the credibility of the supporting proof presented at the hearing may itself be a sufficient reason for denying summary relief, simply because courts are unwilling to resolve such issues in the absence of cross-examination and demeanor evidence.[94]

This same result is frequently reached by the application of directed verdict standards to the evidence produced by the moving party in support of his motion for summary judgment.[95] As previously stated, the typical standard used in disposing of motions for directed verdicts precludes the court from resolving as a matter of law issues of credibility raised by testimonial evidence.[96] It follows that the application of such a standard to summary judgment proceedings supported by testimonial evidence prevents a favorable disposition of the motion since a court which refuses to rule as a matter of law even when the benefits of demeanor evidence and cross-examination are present will scarcely decide that such a disposition can be made when they are missing.[97]

A widely copied, but less specific standard was stated by the New York Court of Appeals in *Curry v. Mackenzie*.[98] To grant a motion for summary judgment, ". . . the court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried."[99] Obviously a standard phrased in such general langnage offers little to guide a court in determining when an issue of fact is genuine in a particular case. Yet its very generality permits a ruling that the supporting proof is insufficient to sustain the burden imposed on the moving party of convincing the court that the issues are feigned, as cases discussed subsequently will show.

Judge Frank's skepticism of the factual basis of the moving party's motion and his belief in the importance of demeanor evidence in judging the credibility of testimonial evidence has led him to find a "slight doubt" in almost all cases where proof supporting the motion is other than an unimpeached document. This position was stated most emphatically in *Colby v. Klune*,[100] where Judge Frank found the supporting affidavits

94. Colby v. Klune, 178 F.2d 872 (2d Cir. 1949); Moxley v. Atlantic Refining Co., 99 F. Supp. 499 (W.D. La. 1951).

95. Gifford v. Travelers Protective Ass'n of America, 153 F.2d 209 (9th Cir. 1946); Edward F. Dibble Seedgrower v. Jones, 130 Misc. 359, 223 N.Y. Supp. 785 (Sup. Ct. 1927); Meserole Securities Co. v. Dintenfass, 108 N.J.L. 298, 156 Atl. 465 (1931).

96. See notes 26-28 *supra*.

97. Fireman's Mut. Ins. Co. v. Aponaug Mfg. Co., 149 F.2d 359 (5th Cir. 1945); Ramsouer v. Midland Valley R. Co., 135 F.2d 101 (8th Cir. 1943).

98. 239 N.Y. 267, 146 N.E. 375 (1925).

99. *Id.* at 269-70

100. 178 F.2d 872, 873-74 (2d Cir. 1949).

inadequate ". . . 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." Thus Judge Frank, with a few exceptions noted subsequently, will resolve credibility issues in favor of the movant only when proof is in the form of unimpeached documents.[101]

Many courts do not formulate the rule so categorically, but find factors in the case which raise questions as to the credibility of the testimonial proof adduced in support of the motion. The presence of these factors, in conjunction with the testimonial nature of the proof, results in a ruling that the moving party has failed to sustain his burden of proving the non-existence of an issue of fact, the absence of a genuine issue of fact, or whatever other of the above standards the court chooses to apply.

One such factor, of an ancient if not honorable lineage, is that the proffered testimony is by an interested affiant.[102] In such cases, courts require the witness to testify in open court where his demeanor can be observed.[103] As the United States Supreme Court observed in *Sartor v. Arkansas Gas Corp.*,[104] interested witnesses should not be withdrawn from cross-examination, ". . . the best method yet devised for testing trustworthiness of testimony."

An interesting case illustrating this tendency is *Karpas v. Bandler.*[105] The plaintiff moved for a summary judgment in an action brought to recover on a promissory note. The defense interposed was that the note was delivered conditionally to one Goldberg and that plaintiff, a subsequent holder, had knowledge of this fact. Under these circumstances, New York law placed on the plaintiff the burden of proving that he was a holder in due course. In moving for summary judgment, plaintiff submitted affidavits denying any knowledge of the conditional delivery. Defendant's affidavits showed the original agreement between himself and Goldberg and that the plaintiff was a partner of Goldberg in a number of business transactions. Goldberg, in his affidavit, admitted

101. Arnstein v. Porter, 154 F.2d 464, 471 (2d Cir. 1946). See notes 138-39 *infra*.

102. See 1 MOORE, TREATISE ON FACTS OR THE WEIGHT AND VALUE OF EVIDENCE §§ 78-91, at 122-36 (1908); 5 JONES, EVIDENCE § 2127, at 3997; 6 *id.* § 2438, at 4825 (2d ed. 1926); 2 WIGMORE, EVIDENCE § 576 (1940).

103. Weiss v. Goldberger, 209 App. Div. 615, 205 N.Y. Supp. 1 (1st Dep't 1924); Moir v. Johnson, 211 App. Div. 427, 207 N.Y. Supp. 380 (4th Dep't 1925); Burt v. Bilofsky, 9 F.R.D. 299 (D.N.J. 1949); Farber v. DeBruin, 253 App. Div. 909, 2 N.Y.S. 2d 244 (2d Dep't 1938).

104. 321 U.S. 620 (1944). Compare the dissenting opinion of Stone, C.J., at 631.

105. 218 App. Div. 418, 218 N.Y. Supp. 500 (1st Dep't 1926).

that an agreement had been made not to discount the note at a bank. In reversing summary judgment the court said: "In the case at bar the plaintiff being an interested witness, a jury would not be bound to accept his testimony that he did not have knowledge of a conditional delivery of the note if there was in fact such a conditional delivery."[106] In the light of all of the evidence, the jury, ". . . might reject the plaintiff's testimony of lack of knowledge even though such testimony were not directly contradicted."[107]

The case is particularly interesting because of the contrast it provides with the ordinary case involving a promissory note. It has been shown that the New York courts accept the authenticity of documents and require the defendant to produce controverting evidence to raise an issue of credibility when an action is brought on a promissory note. But when the plaintiff must establish his case by the note *and* evidence within his exclusive knowledge, the court is willing to find an issue of credibility even in the absence of controverting evidence on the disputed issue. It seems difficult to quarrel with courts making this distinction, for there appears to be no reason for giving to a party moving for summary judgment an advantage he would not enjoy at a trial, and it is certainly true that at a trial the credibility of the testimony of an interested witness is not ordinarily resolved as a matter of law.

Closely related to the question of interest is the factor of movant's exclusive knowledge of the events and occurrences giving rise to litigation. We have seen that in cases where the evidence of the moving party relates to a mutual business transaction, courts are more willing to resolve the issues of credibility in favor of the movant in the absence of controverting evidence.[108] Contrariwise, courts are reluctant to foreclose a party summarily and deprive him of the opportunity of testing the credibility of witnesses in open court where knowledge is exclusively in possession of the movant.[109]

A typical application of this principle is made in cases where the court denies a summary judgment because of the failure of the moving party to make a full and fair disclosure of facts within his exclusive

106. *Id.* at 421.
107. *Ibid.*
108. See notes 83, 87 *supra.*
109. See Toebelman v. Missouri-Kansas Pipe Line Co., 130 F.2d 1016, 1022 (3d Cir. 1942); Commercial Credit Corp. v. Podhorzer, 221 App. Div. 644, 645, 224 N.Y. Supp. 505, 506 (1st Dep't 1927); Colby v. Klune, 178 F.2d 872, 874 (2d Cir. 1949) ("Particularly where, as here, the facts are peculiarly in the knowledge of the defendants or their witnesses, should the plaintiff have the opportunity to impeach them at a trial. . . ."); Suslensky v. Metropolitan Life Ins. Co., 180 Misc. 624, 43 N.Y.S.2d 144 (Sup. Ct. 1943), *aff'd,* 267 App. Div. 812, 46 N.Y.S.2d 888 (1st Dep't 1944).

knowledge.[110] Thus in *Brooklyn Clothing Corp. v. Fidelity Phenix Fire Insurance Co.*,[111] defendant's liability depended upon an oral agreement made between the plaintiff and one Fox. In moving for a summary judgment, plaintiff failed to make a full disclosure of the terms of this agreement, and defendant, who was without knowledge as to the arrangement made, simply denied the agreement on information and belief. A summary judgment for the plaintiff was reversed, the court ruling that the plaintiff should not be permitted to remove the witnesses from the test of cross-examination on the basis of such an unsatisfactory showing.

The significant aspect of this case is found in the court's conclusion that the moving papers were insufficient although the defendant's rebuttal consisted of little more than a plea of ignorance. The court was not required to resolve the problem of the defendant's duty to utilize available discovery devices since the testimonial proof of the plaintiff was itself insufficient.

Quite a different problem is presented when the moving party makes a full disclosure of all the evidence available to him. While a motion for summary judgment will not be denied simply because the opposing party claims ignorance,[112] the inability of the opponent to produce evidence because knowledge of the transaction is within the exclusive possession of the movant is a factor which may, either by itself or when weighed with all the other peculiar circumstances of the case, preclude a summary judgment.[113] Unlike the cases considered earlier, it is impossible for courts to indulge in a presumption of truth because of the opponent's failure to disclose controverting evidence, since these cases pre-suppose that the opponent cannot produce evidence in spite of diligent efforts. Under such circumstances, the issues of credibility raised by the movant's

110. Berger v. Rospond, 108 N.J.L. 268, 158 Atl. 472 (1932) (the affidavits presented by the movant appeared to suppress important facts); Templeton v. Borough of Glen Rock, 11 N.J. Super. 1, 77 A.2d 487 (1950) (failure to disclose material fact within its knowledge).

111. 205 App. Div. 743, 200 N.Y. Supp. 208 (2d Dep't 1923).

112. Hartman v. Time, Inc., 64 F. Supp. 671, 677 (E.D. Pa. 1946), *rev'd in part*, 166 F.2d 127 (3d Cir. 1947), *cert. denied*, 334 U.S. 838 (1948); Lata v. New England Mut. Life Ins. Co., 68 F. Supp. 542, 545 (S.D.N.Y. 1946); Electric Service Supplies Co. v. Consolidated Indemnity & Ins. Co., 111 N.J.L. 288, 168 Atl. 412 (1933); Bank of America National Trust and Savings Ass'n v. Oil Wells Supply Co., 12 Cal. App. 2d 265, 269, 55 P.2d 885, 887 (1936); Bishop v. Shaughnessy, 119 F. Supp. 62 (N.D.N.Y. 1950).

113. United States v. Gotham Pharmacal Corp., 1 F.R.D. 744, 745 (S.D.N.Y. 1941); Caswell v. Stearns, 257 Mich. 461, 241 N.W. 165 (1932); Friedman v. Friedman, 251 App. Div. 835, 296 N.Y. Supp. 714 (2d Dep't 1937); Joseph Horne Co. v. United States, 135 F. Supp. 549 (Ct. Cl. 1955); Christensen v. Hillman Periodicals, 107 F. Supp. 147 (S.D.N.Y. 1952); Public Adm'r of New York County v. Brownell, 115 F. Supp. 139 (S.D.N.Y. 1953).

own proof will be resolved only after a trial where demeanor can be observed and the proof tested by cross-examination, not as a matter of law on a motion for summary judgment.[114]

Exclusive knowledge on the part of the moving party is frequently found in cases where the contested issue is one involving some mental state such as fraud, good faith, intent, or probable cause in a malicious prosecution action.[115] Courts have been unwilling to have such issues resolved on the basis of paper affirmations, and have ruled that the movant must submit himself to cross-examination in open court regardless of whether or not the opposing party has produced controverting evidence.[116] In *Peckham v. Ronrico Corp.*,[117] plaintiff argued that the summary judgment procedure is never proper ". . . where fraud is alleged and the critical facts are in the possession of the moving party." In *Hatfield v. Barnes*,[118] the court stated: "Particularly on such issues as good faith, intent, and purpose, the bald declaration of a party by affidavit is not sufficient to resolve the issue in the face of a pleaded denial."

In these cases there is a justifiable judicial fear of the injustice which could result from judgment based on affidavits asserting facts that are, because of their nature, incapable of being effectively controverted.[119] Because the courts are unwilling to accept as true the assertions in the supporting papers of the moving party, summary judgments are denied

---

114. *Cf.* text at notes 30, 84, and 88 *supra.*

115. See, for example, Hummel v. Riordon, 56 F. Supp. 983 (N.D. Ill. 1944) (fraud); Callahan-Kelly Post Memorial Ass'n v. City of New York, 124 N.Y.S.2d 261 (Sup. Ct. 1953) (purpose); Alabama Great Southern R.R. v. Louisville & N. R.R., 224 F.2d 1 (5th Cir. 1955) (wantonness); Martin v. Greyhound Corp., 227 F.2d 501 (6th Cir. 1955), *cert. denied,* 350 U.S. 1013 (1955) (*ibid.*); Loew's, Inc. v. Bays, 209 F.2d 610 (5th Cir. 1954) (good faith); Libby v. L.J. Corp., 247 F.2d 78 (D.C. Cir. 1957) (*ibid.*); Hazelrigg v. American Fidelity & Cas. Co., 228 F.2d 953 (10th Cir. 1955) (*ibid.*); Clayton v. James B. Clow & Sons, 154 F. Supp. 108, 118 (N.D. Ill. 1957) (motive); United States v. Gardner, 244 F.2d 952 (9th Cir. 1957) (wilfulness); Bishop v. Shaughnessy, 119 F. Supp. 62 (N.D.N.Y. 1950) (intention); Cochran v. United States, 123 F. Supp. 362 (D. Conn. 1954) (*ibid.*); C. S. Hammond & Co. v. International College Globe, 146 F. Supp. 514 (S.D.N.Y. 1956) (copying). *Compare* cases involving violations of price regulations such as Forde v United States, 189 F.2d 727 (1st Cir. 1951); Fancher v. Clark, 127 F. Supp. 452 (D. Colo. 1954); and Bagby v. United States, 199 F.2d 233 (8th Cir. 1952), *with* the same type of case when plaintiff seeks to recover treble damages based on wilfulness. Hart v. Leihy, 122 F. Supp. 510 (W.D. Mo. 1954); Bryne v. United States, 218 F.2d 327 (1st Cir. 1955).

116. California Apparel Creators v. Wieder of California, 162 F.2d 893, 174 A.L.R. 481 (2d Cir. 1947), *cert. denied,* 332 U.S. 816 (1947); Avrick v. Rockmont Envelope Co., 155 F.2d 568 (10th Cir. 1946); Petrie v. Roberts, 242 Wis. 539, 8 N.W.2d 355 (1943), noted in Young, *Work of the Supreme Court,* 1944 WIS. L. REV. 141, 160-62.

117. 171 F.2d 653 (1st Cir. 1948).

118. 115 Colo. 30, 168 P.2d 552 (1946). *But cf.* Baum v. Martin, 335 Ill. App. 277, 81 N.E.2d 757 (1948).

119. See authorities collected in 1 MOORE, *op. cit. supra* note 102, § 100, at 149.

irrespective of the existence or persuasiveness of controverting proof. Since a court would ordinarily wish to have the advantage of demeanor evidence in judging credibility in these cases, and rarely, if ever, would rule for the proponent on such an issue as a matter of law at a trial, the reluctance to grant summary judgments in these cases is easily understood.

Doubt as to the credibility of testimonial proof may be compounded when the proof is voluminous and the factual basis of the dispute complicated. There are indications that in such cases, the courts are disposed to deny the motion and postpone decision until a verdict or findings can be made after a trial.[120] Similarly, such a doubt may lead to a denial of the motion when the court finds that the calendar permits a prompt trial of the dispute.[121]

Thus there are a number of factors affecting the credibility of supporting proof that may influence a court to deny a summary judgment even in the absence of controverting evidence. A fortiori, when the opponent does produce controverting proof raising factual questions, the resulting issues of credibility must be resolved at a trial.[122] Typically,

120. Heyward v. Public Housing Administration, 238 F.2d 689 (5th Cir. 1956); Mosbacher v. Basler Lebens Versicherungs Gesellschaft, 111 F. Supp. 551 (S.D.N.Y. 1951) (complex question of foreign law); Murphy v. Bankers Commercial Corp., 111 F. Supp. 608 (S.D.N.Y. 1953) (*ibid.*); Shultz v. Manufacturers & Traders Trust Co., 1 F.R.D. 451 (W.D.N.Y. 1940) (500 printed pages of testimony); Knapp v. Kinsey, 249 F.2d 797 (6th Cir. 1957); United States v. Bethlehem Steel Corp., 157 F. Supp. 877 (S.D.N.Y. 1958) ("The facts are complex and involved and require consideration of myriad details."); Zig Zag Spring Co. v. Comfort Spring Corp., 89 F. Supp. 410 (D.N.J. 1950) (voluminous record); Bozant v. Bank of New York, 156 F.2d 787 (2d Cir. 1946) ("complicated state of facts"); Ward v. Sampson, 391 Ill. 585, 63 N.E.2d 751 (1945) (summary judgment restricted to cases "simple in their nature"); see Kennedy v. Silas Mason Co., 334 U.S. 249, 257 (1948); Pacific American Fisheries v. Mulloney, 191 F.2d 137, 141 (9th Cir. 1951). A comment in 48 COLUM. L. REV. 780, 784 (1948) stated, "One study produced some slight evidence that summary judgment was most likely to be granted where the amount in controversy was small." The study referred to is Cohen, *Summary Judgment in New York,* 32 COLUM. L. REV. 825 (1932). A mere claim that the case is complicated is manifestly insufficient to defeat a summary judgment. See Gliwa v. Washington Polish Loan & Bldg. Ass'n, *supra* note 81, at 469; McClellan v. Montana-Dakota Utilities, 104 F. Supp. 46 (D. Minn. 1952), *aff'd,* 204 F.2d 166 (8th Cir. 1953), *cert. denied,* 346 U.S. 825 (1953); Hemler v. Union Producing Co., 40 F. Supp. 824, 834 (W.D. La. 1941), *rev'd,* 134 F.2d 436 (5th Cir. 1943). Compare the related problem of an indefinite factual background which also prevents a summary disposition. United States v. Beard, 144 F. Supp. 732 (N.D.N.Y. 1956).

121. Rockefeller Center Luncheon Club v. Johnson, 116 F. Supp. 437 (S.D.N.Y. 1953); United States v. Gotham Pharmacal Corp., 1 F.R.D. 744 (S.D.N.Y. 1941); Raitt v. Seltzer, 10 F.R.D. 48 (N.D.N.Y. 1950); Transcontinental Gas Pipe Line Corp. v. Borough of Milltown, 93 F. Supp. 287 (D.N.J. 1950).

122. Krausman v. John Hancock Mut. Life Ins. Co., 236 App. Div. 582, 260 N.Y. Supp. 319 (1st Dep't 1932); Miorin v. Miorin, 257 App. Div. 556, 13 N.Y.S.2d 705 (3d Dep't 1939); Croker v. Croker, 252 N.Y. 24, 345, 168 N.E. 450, 169 N.E. 408 (1929); McComb v. Aibel, 100 F. Supp. 752 (E.D.N.Y. 1951); Steinberg v. Adams, 90 F. Supp. 604 (S.D.N.Y. 1950); Christensen v. Hillman Periodicals, 107 F. Supp. 147 (S.D.N.Y. 1952). It is well settled that issues of fact cannot be resolved merely because both parties move for summary judgment. The leading case is Begnaud v. White, 170 F.2d 323 (6th Cir. 1948).

evidence of this sort is presented, but as indicated, supporting proof is not accepted solely because such controverting proof is missing,[123] and notwithstanding statements to this effect, no court has consistently applied any such categorical rule.[124] When credibility issues are raised by the supporting proof itself, there seems to be no particular reason in the policy of the summary judgment procedure to exact a full disclosure of evidence from the party opposing the motion.[125] Such evidence is not needed, and even if produced has no effect on the ultimate disposition of the motion, which will be denied solely because of the inadequacy of the supporting proof.

Once the significance of this is grasped, the seeming conflict in the opinions over the requirement that the opponent of the motion disclose evidence at the hearing becomes understandable. If proof substantiating a claim or defense is accepted as true, *all* courts require the party opposing the motion to produce evidence or suffer an adverse judgment. But some judges, notably Judge Frank, are unwilling to accept any proof short of unimpeached documents. Since in his view other proof is rarely adequate to support a judgment as a matter of law, there is no reason to make the motion for summary judgment ". . . a sort of rack or thumb-screw to bring about disclosure of evidence."[126] On the other hand, if the proof in support of the motion forms, as in the case of unimpeached documents, an adequate basis for a judgment as a matter of law, then the party opposing the motion is required to produce evidence to preclude judgment.[127] Other judges, notably Judge Charles E. Clark, do not adopt any such inflexible rule as to testimonial evidence, but consider the supporting proof in the light of the various factors previously discussed. Once this proof survives such an examination, it is accepted

123. See in particular cases cited note 89 *supra*. Cases such as Gifford v. Travelers Protective Ass'n, 153 F.2d 209 (9th Cir. 1946); Port of Palm Beach District v. Goethals, 104 F.2d 706 (5th Cir. 1939); and Engl v. Aetna Life Ins. Co., 139 F.2d 469 (2d Cir. 1939) are explainable on the basis of the nature of the supporting proof. See text and cases notes 131 and 136 *infra*. Orvis v. Brickman, 196 F.2d 762 (D.C. Cir. 1952); Surkin v. Charteris, 197 F.2d 77 (5th Cir. 1952), and Zampos v. United Smelting, Refining and Mining Co., 206 F.2d 171 (10th Cir. 1953) raise special problems discussed *infra*, notes 212, 229, 245. Radio City Music Hall Corp. v. United States, 135 F.2d 715 (2d Cir. 1943) does support such a rule, but it is not typical. Furthermore, the ruling was limited to cases in which the opponent had actually cross-examined the supporting witnesses.

124. Compare the statements in 6 MOORE, FEDERAL PRACTICE § 56.15[3], at 2132; § 56.15[5], at 2153 (1953).

125. There may be a policy of exacting a disclosure as a method of correcting a deficient pre-trial discovery procedure. See GOLDSTEIN, TRIAL TECHNIQUE § 208, at 145 (1935).

126. Madeirense Do Brasil S/A v. Stulman-Emrick Co., 147 F.2d 399, 407 (2d Cir. 1945), *cert. denied*, 325 U.S. 861 (1945).

127. See Arnstein v. Porter, 154 F.2d 464, 471 (2d Cir. 1945); Subin v. Goldsmith, 224 F.2d 753, 759-60 (2d Cir. 1955), *cert. denied*, 350 U.S. 883 (1955).

as true in the absence of controverting evidence. The court will then rule that the motion must be decided on the record before it, and not on one "potentially possible."[128] This has the effect of forcing the opponent to produce evidence or lose the case.

The difference in approach between Judge Clark and Judge Frank is illustrated neatly by the decision in *Madeirense Do Brasil S/A v. Stulman-Emrick Co.*[129] In that case, plaintiff sought to recover the balance due on a contract for the sale of lumber. Defendant counterclaimed for breach of a second contract between the same parties, and both moved for a summary judgment. The District Court found that the second contract had been breached and awarded damages to the defendant. On appeal, the court by Judge Clark affirmed the judgment. The uncontested facts established that the plaintiff had breached the contract. The district judge had accepted a statement in a letter written by the *plaintiff* as the sole evidence of the market price of the lumber, and in computing damages, added to this figure the freight charges as stated in this and other letters also written by the plaintiff. Judge Clark ruled that it was proper to accept the figures stated in these letters for the purpose of computing damages since the plaintiff had never challenged the accuracy of these figures by controverting evidence. Thus the case stood ". . . as though defendant had offered plaintiff's admissions, and plaintiff had then rested, with no contradiction or rebuttal of any kind, and had made its own motion for a directed verdict or peremptory instruction."[130] Judge Frank dissented, stating that the letter of the plaintiff did not constitute a binding admission but that conflicting inferences were possible. Having resolved this decisive point against the movant, it followed that a disclosure of evidence by the opponent was unnecessary since the proponent must in any case fail by reason of the inadequacy of his own proof.

Probably the opinion most frequently quoted in support of the argument that the opponent of the motion must take a full disclosure of evidence is Judge Clark's decision in *Engl v. Aetna Life Insurance Co.*[131] In that case, the defendant, the party moving for the summary judgment, supported his pleaded defense of misrepresentation by producing the insured's application for insurance showing the denial of previous physical examinations and the admission of the plaintiff that such an examination had in fact taken place. Since a full disclosure of the nature of this examination was prevented by the plaintiff's claim

128. Madeirense Do Brasil S/A v. Stulman-Emrick Co., *supra* note 126, at 405.
129. See note 126 *supra.*
130. *Id.* at 405.
131. 139 F.2d 469 (2d Cir. 1943).

of privilege, the New York statutory presumption made the misrepresentation material notwithstanding plaintiff's denial by affidavit. Rejecting plaintiff's argument that evidence could be withheld until trial, Judge Clark granted a summary judgment for the defendant, ruling that evidence must be produced at the hearing of the motion to enable the court "to pierce the allegations of fact" in the pleadings and determine if they are merely formal. Since Judge Clark was willing to accept the proof offered by the defendant as establishing the material facts of the defense, such a ruling is understandable in the context of this case. Here the insurance application and the admission of the plaintiff compelled a finding for the defendant as a matter of law because of the statutory presumption. Under these circumstances, the burden of explanation was quite properly shifted to the plaintiff, but the case is hardly authority for a requirement of full disclosure in every case where a movant supports a pleaded claim or defense with credible evidence.

The relationship between the opponent's duty to make a disclosure of his evidence and the proper application of Federal Rule 56(f) is apparent.[132] If a court is unwilling to rule that the supporting proof provides an adequate evidentiary basis for judgment, Rule 56(f) does not become operative.[133] Since the proponent of the motion fails because of the inadequacy of his own proof, the burden of producing evidence or explaining its absence never shifts to the opponent. Federal Rule 56(f) and its cognates in state practice do not become operative until the moving party satisfies his burden and the duty of producing evidence shifts to the opponent.[134] Of course the opponent may very properly rely on Rule 56(f) to explain the absence of controverting evidence even

132. Rule 56(f) reads: "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."

133. Moore believes that such situations are "limited." 6 MOORE, *op. cit. supra* note 124, § 56.24, at 2344. *But see,* cases cited note 134 *infra.*

134. *Compare* the limited function of Rule 56(f) in the following cases in which summary judgment was denied: Peckham v. Ronrico Corp., 171 F.2d 653 (1st Cir. 1948); Sarkes Tarzian v. United States, 240 F.2d 467 (7th Cir. 1957), *reversing,* 140 F. Supp. 863 (S.D. Ind. 1956); Slagle v. United States, 228 F.2d 673 (5th Cir. 1956); Auto Specialties Manufacturing Co. v. Hyde Park Iron Works, 15 F.R.D. 89 (E.D.N.Y. 1953); *with* the treatment accorded the rule in the following cases in which a summary judgment was granted: Foster v. General Motors Corp., 191 F.2d 907 (7th Cir. 1951), *cert. denied,* 343 U.S. 906 (1951); Lata v. New England Mut. Life Ins. Co., 68 F. Supp. 542 (S.D.N.Y. 1946); Hartmann v. Time, Inc., 64 F. Supp. 671 (E.D. Pa. 1946), *rev'd in part,* 166 F.2d 127 (3d Cir. 1947). Sears, Roebuck & Co. v. American Plumbing & Supply Co., 19 F.R.D. 329, 23 F.R. Serv. 56, c. 41, Case 3 (E.D. Wis. 1956) did require the defendant to resort to Rule 56(f) to justify his opposition to a motion for summary judgment although issues of credibility were involved in the plaintiff-movant's own proof.

though the court would not grant the motion in the absence of such a showing, and this is undoubtedly the safest practice.[135] Nevertheless, failure to invoke Rule 56(f) does not in itself provide a reason for granting a motion for summary judgment.

The success of a motion for summary judgment thus depends initially upon the favorable resolution of issues of credibility raised by the proof presented in support of the motion. If a court finds issues of credibility in the supporting evidence itself, a summary judgment is denied irrespective of the production or non-production of evidence by the opponent of the motion. This is true, notwithstanding judicial pronouncements to the effect that the moving party's version of the case is to be accepted in the absence of controverting proof. Examination of these cases reveals that this precept is principally applied in cases where the supporting evidence is a written contract or some other form of documentary evidence.[136] Courts have been willing to accept the supporting proof in such cases, not only because of the reliability of the evidence, but also because the opponent of the motion shares knowledge of the transaction giving rise to the litigation and can be expected to present evidence if a genuine controversy as to facts exists.[137] When litigation does not involve mutual transactions and the supporting proof is testimonial, courts are unwilling to apply any such rule. Judge Frank, of course, finds issues of credibility whenever proof falls short of unimpeached documents. Exceptions to this rule are restrictive in the extreme.

135. Hummel v. Riordon, 56 F. Supp. 983 (N.D. Ill. 1944); Shultz v. Manufacturers & Traders Trust Co., 30 F. Supp. 443 (W.D.N.Y. 1939), 32 F. Supp. 120 (W.D. N.Y. 1940); Loew's, Inc. v. Bays, 209 F.2d 610 (5th Cir. 1954); Colley v. Igoe, 8 F.R. Serv. 56, c. 41, Case 9 (D.N.J. 1945). Distinguish the related question of granting additional time to an opponent to produce controverting evidence. See Goldboss v. Reimann, 44 F. Supp. 756 (S.D.N.Y. 1942); Toebelman v. Missouri-Kansas Pipe Line Co., 41 F. Supp. 334 (D. Del. 1941), *rev'd in part,* 130 F.2d 1016 (3d Cir. 1942); Hoffman v. Lamb Knit Goods Co., 37 F. Supp. 188 (W.D. Mich. 1941); Ulen v. American Airlines, 7 F.R.D. 371 (D.D.C. 1947); Poole v. Gillison, 15 F.R.D. 194 (E.D. Ark. 1953).

136. Jefferson Gardens v. Terzan, 216 Wis. 230, 257 N.W. 154 (1934); Rabe v. Metropolitan Life Ins. Co., 1 F.R.D. 391 (D. Mass. 1940); Maltz v. Daly, 120 Misc. 466, 198 N.Y. Supp. 690 (Sup. Ct. 1923); Nolte v. Nannino, 107 N.J.L. 462, 154 Atl. 831 (1931); Danenhower v. Birch, Jr., 97 N.J.L. 193, 116 Atl. 786 (1921); Hoof v. John Hunter Corp., 193 N.Y. Supp. 91 (Sup. Ct. 1922); and cases cited note 123 *supra. But see,* Nardo v. Favazza, 110 A.2d 676, 679 (Md. 1955).

137. See text following note 88 *supra.* American Ins. Co. v. Gentile Bros. Co., 109 F.2d 732 (5th Cir. 1940), *cert. denied,* 310 U.S. 633 (1940); Board of Public Instruction for the County of Hernando, State of Florida v. Meredith, 119 F.2d 712 (5th Cir. 1941), *cert. denied,* 314 U.S. 656 (1941); Ortiz v. National Liberty Ins. Co. of America, 75 F. Supp. 550 (D.P.R. 1948); Piantadosi v. Loew's, Inc., 137 F.2d 534 (9th Cir. 1943).

Only if both parties waive oral testimony,[138] or if testimony is unavailable because of the death of a witness[139] has Judge Frank indicated that the summary judgment procedure is permissible. In courts not adhering to Judge Frank's rigid standards, the moving party employs various techniques to remove the credibility issues inherent in testimonial proof.[140] It is of the utmost importance for the opponent of the motion to understand these methods, since a failure to present explanatory or controverting evidence under these circumstances results in a judgment for the moving party.

The favorite technique for avoiding credibility issues is to secure admissions for the opponent, and then move for judgment on the basis of this evidence. In the discussions of the *Madeirense* and *Engl* cases, it was shown that Judge Clark relied on admissions to justify the summary judgment, and this device has been employed in a number of other cases.[141] Typical of these cases is *Johnsons Warehouse v. Yangtze Trading Corp.*[142] Defendant was granted a summary judgment on a counterclaim for breach of a contract to store certain goods. The court's action was based on an admission contained in a letter written by plaintiff to defendant which stated, "We exceedingly regret that this was not placed in our buildings, as we agreed to do. This is definitely our error and we do not intend to escape our responsibility."[143] An affidavit of the plaintiff asserting that the letter was drafted without first investigating the matter was ignored by the court.

This method is particularly effective in the area where the legal

138. Colby v. Klune, 178 F.2d 872, 873 (2d Cir. 1949). In Sharpe v. Great Lakes Steel Corp., 9 F.R.D. 691 (S.D.N.Y. 1950), the district judge, heeding Judge Frank's admonition, interrogated counsel and got the equivalent of a waiver of oral testimony.

139. Campbell v. American Fabrics Co., 168 F.2d 959 (2d Cir. 1949).

140. To be distinguished are the numerous cases in which the fact finding function is placed in the hands of some administrative official or agency. See note 6 *supra*.

141. Bayuk Cigars v. Moshassuck Transp. Co., 105 F. Supp. 511 (S.D.N.Y. 1952); United States v. Kellert, 101 F. Supp. 698 (D. Conn. 1951) (admissions pursuant to Federal Rule 36); General Beverages v. Rogers, 216 F.2d 413 (10th Cir. 1954); Jeffress v. Weitzman, 221 F.2d 542 (D.C. Cir. 1955); Bennett v. Flanigan, 220 F.2d 799 (7th Cir. 1955); S.M.S. Manufacturing Co. v. United States-Mengel Plywoods, 219 F.2d 606 (10th Cir. 1955); McKinzie v. Huckaby, 112 F. Supp. 642 (W.D. Okla. 1953): Williams Mfg. Co. v. Prock, 184 F.2d 307 (5th Cir. 1950); Crisler v. Illinois Central R. Co., 196 F.2d 941 (5th Cir. 1952); Durasteel Co. v. Great Lakes Steel Corp., 205 F.2d 438 (8th Cir. 1953); Jeffe v. Monarch Life Ins. Co., 123 F. Supp. 173 (D. Conn. 1954); Sears, Roebuck & Co. v. American Plumbing & Supply Co., *supra* note 134 (partial summary judgment); Hunt v. Pick, 240 F.2d 782 (10th Cir. 1957) (admissions established laches); Knoshaug v. Pollman, 148 F. Supp. 16 (D.N. Dak. 1957), *aff'd*, 245 F.2d 271 (8th Cir. 1957); Fremon v. W. A. Sheaffer Pen Co., 111 F. Supp. 39 (S.D. Iowa 1953), *aff'd*, 209 F.2d 627 (8th Cir. 1954); Walsh v. Chicago Bridge & Iron Co., 90 F. Supp. 322 (N.D. Ill. 1950); Aktiengesellschaft der Harlander v. Lawrence Walker Cotton Co., 60 N.M. 154, 288 P.2d 691 (1955).

142. 100 F. Supp. 107 (S.D.N.Y. 1951).

143. *Id.* at 108.

duty owed by the defendant is defined in relation to some particular classification of the plaintiff as trespasser, licensee, invitee, or guest. For example, in *Field v. Sisters of Mercy of Colorado,*[144] plaintiff sought to recover for injuries sustained in a fall in the lobby of a hospital operated by the defendants. On the basis of the deposition of the plaintiff and admissions obtained in a pre-trial conference, a summary judgment was granted for the defendant. In affirming the judgment, the court classified plaintiff as a licensee, ruled that the duty imposed on the defendant was to refrain from wilfully injuring the plaintiff, and held that the plaintiff's deposition established that there was no breach of that duty.

The credibility issue was avoided in this case by relying on the plaintiff's own testimony obtained by the defendant through discovery procedures to establish the factual basis of the action. The court then classified the plaintiff in a particular category and defined the duty owed, an admittedly judicial function. The plaintiff's own evidence proved that the duty as thus defined had not been breached and hence that judgment might be entered for the defendant as a matter of law. Similar results have been reached in cases of trespassers,[145] guests,[146] and gratuitous passengers.[147] Thus the category system, originally developed as a method of judicial control to protect landowners from the feared irresponsibility of juries,[148] serves an identical function in the summary judgment cases by permitting a disposition as a matter of law without a trial of the issues.

In negligence cases where the moving party does not have the advantage of the precisely defined duties of the category system, but must prove compliance or non-compliance with the generalized standard of reasonable care, a ruling as a matter of law is much more difficult. Not only is it much harder to get any significant agreement as to the facts, but, in addition, even when the facts are undisputed, the inference of negli-

144. 126 Colo. 1, 245 P.2d 1167 (1952). See also Barrett v. Faltico, 117 F. Supp. 95 (E.D. Wash. 1953); Lauchert v. American S.S. Co., 65 F. Supp. 703 (W.D.N.Y. 1946). Whether defendant's conduct does constitute a breach of the duty owed may be a jury question. Concho Const. Co. v. Oklahoma Natural Gas Co., 201 F.2d 673 (10th Cir. 1953); Jacob v. Pennsylvania R.R., 203 F.2d 290 (6th Cir. 1953).

145. Hollinghead v. Carter Oil Co., 221 F.2d 920 (5th Cir. 1955); *cf.* Hahn v. United States Airlines, 127 F. Supp. 950 (E.D.N.Y. 1954) (admission by defendant of a trespass permitted entry of summary judgment for plaintiff).

146. Allen v. Keck, 212 F.2d 425 (8th Cir. 1954); Warner v. Lieberman, 154 F. Supp. 362 (E.D. Wis. 1957); *cf.* MacMaugh v. Baldwin, 239 F.2d 67 (D.C. Cir. 1956).

147. Alderman v. Baltimore & Ohio R.R., 113 F. Supp 881 (S.D.W. Va. 1953); *cf.* Hufner v. Erie R.R., 26 F. Supp. 855 (S.D.N.Y. 1939) (employer's liability limited to wilful or wanton misconduct of employee toward a passenger).

148. GREEN, JUDGE AND JURY 128 n.56 (1930).

gence in these cases is ordinarily left for the jury.[149] Nevertheless, it may still be possible for the movant to get a summary judgment by establishing a standard of conduct as a matter of law.

Statutory regulations afford a good illustration of this possibility. A regulation of the Civil Aeronautics Board requires a commercial air transport to travel at a certain altitude over mountains. Violation of such a regulation is negligence per se, and a jury would be so instructed. If the defendant admits in discovery proceedings that a flight plan was approved which called for the airplane to fly at less than the approved minimum altitude, a trial is unnecessary and a summary disposition is proper. The defendant's own testimony, taken in conjunction with the admitted physical facts of the accident, establish the factual basis of the litigation, and these facts conclusively show a failure to comply with the applicable standard of conduct.[150]

In other cases, the required standard of care may result from court decisions. Thus driving into the side of a train known to be across an intersection is negligence as a matter of law. Under such circumstance, in *Zamora v. Thompson*,[151] defendant moved for a summary judgment based on proof of plaintiff's contributory negligence. Defendant had taken the plaintiff's deposition, and in answer to the question, "When you first saw the train, it was on the crossing?", the plaintiff replied, "That is right." The court ruled that the plaintiff is bound by his own testimony based on personal observation when he did nothing to retract, modify, or explain it. This testimony established that the plaintiff ran into the side of a train which he knew was across the highway and since such conduct is negligence as a matter of law, the court was able to rule for the defendant without submitting the issue of contributory negligence to a jury.

Fatal admissions may be found in the opponent's letter or in controverting proof,[153] but as these cases indicate, the effectiveness of this method of avoiding issues of credibility depends in large measure upon an extensive pre-trial discovery procedure. Utilization of these procedures may reveal damaging admissions, but a summary judgment will not be granted unless the admission is conclusive. Thus if plaintiff's

149. See cases cited note 169 *infra* and Sauter v. Sauter, 244 Minn. 482, 70 N.W.2d 351 (1955); Roucher v. Traders & General Ins. Co., 235 F.2d 423, 424 (5th Cir. 1956).

150. American Airlines v. Ulen, 186 F.2d 529 (D.C. Cir. 1949). See also Hartsell v. Hickman, 148 F. Supp. 782 (W.D. Ark. 1957).

151. 250 S.W.2d 626 (Tex. Civ. App. 1952). See also Lindgren v. Sparks, 239 Minn. 222, 58 N.W.2d 317 (1953).

152. Zamora v. Thompson, *supra* note 151, at 628.

153. See cases cited note 141 *supra*, particularly Bennett v. Flanigan and Crisler v. Illinois Central Ry.

deposition merely fails to support his pleaded claim without making a fatal admission showing its invalidity, it has been held that summary judgment will not be granted since the plaintiff is not required to prove his case at a pre-trial hearing.[154] Moreover, the court will carefully examine an allegedly fatal admission to be certain that it really is conclusive.[155] Thus Judge Frank in the *Madeirense*[156] case found that conflicting inferences could be drawn from a letter which Judge Clark regarded as conclusive on the disputed issue of damages.

If a conclusive admission on a material issue is made in a deposition, it is reasonable to shift the burden of producing explanatory evidence to the opponent if he is to avoid a summary judgment. Thus in the *Zamora* case, the Texas court granted a summary judgment only after carefully stating that the plaintiff had failed to explain or modify his original testimony. Preservation of the deponent's right to explain damaging admissions in summary judgment proceedings affords a litigant an equivalent opportunity to that provided at a trial where adverse testimony may be explained by later questioning.

If in addition to damaging admissions or other weaknesses in the opponent's proof, the court finds that the facts relating to the material issue in dispute are peculiarly within the knowledge of the party opposing the motion, the court is much more willing to grant a summary judgment.[157] In one such case, *Herzog v. Des Lauriers Steel Mould Co.*,[158] the issue raised was whether defendant had actively participated in a prior suit and was therefore bound by the judgment. The only evidence that the plaintiff, the moving party, could produce was that the attorney for the defendant had actively participated in the presentation of the prior action. Defendant filed no counter-affidavits, but contented itself with an attack on that part of the plaintiff's affidavits made without personal knowledge. In granting a summary judgment, the court said: "It is uncontradicted that counsel for defendant in this present proceeding actually

154. Pelon v. Becco, 253 Wis. 278, 34 N.W.2d 236 (1948); Southern Rendering Co. v. Standard Rendering Co., 112 F. Supp. 103 (E.D. Ark. 1953); William Goldman Theatres v. Twentieth Century-Fox Film Corp., 151 F. Supp. 840 (E.D. Pa. 1957); *cf.* Huff v. Louisville & Nashville R.R., 198 F.2d 347 (5th Cir. 1952).

155. Traylor v. Black, Sivalls & Bryson, 189 F.2d 213 (8th Cir. 1947); Caylor v. Virden, 217 F.2d 739 (8th Cir. 1955); Coe v. Riley, 160 F.2d 538 (5th Cir. 1947); Hartsell v. Hickman, *supra* note 150.

156. See note 129 *supra*.

157. See Frank, J., in Dixon v. American Tel. & Tel. Co., 159 F.2d 863, 864 (2d Cir. 1947), *cert. denied*, 332 U.S. 764 (1947); Lawson v. American Motorists Ins. Corp., 217 F.2d 724 (5th Cir. 1954); River Plate & Brazil Conf. v. Pressed Steel Car Co., 227 F.2d 60 (2d Cir. 1955); Fehr v. General Accident Fire & Life Assur. Corp., 246 Wis. 228, 16 N.W.2d 787 (1944); *cf.* Sucknow Borax Mines Consol. v. Borax Consolidated, 185 F.2d 196, 205 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951).

158. 46 F. Supp. 211 (E.D. Pa. 1942).

participated actively in the trial of that action. Since it would have been so simple a matter for the defendant to have created a genuine issue as to the party whose interests were actually being represented by Mr. Goshorn in that proceeding and as to who had undertaken to pay his fee for his services therein, and since defendant studiously avoided doing so, I feel that this court should not be required to relitigate the issues."[159]

The possession of knowledge by the opponent justifies shifting the burden of producing evidence just as in the cases considered previously where the parties shared knowledge of commercial transactions. In addition, however, there are other factors in these cases attesting to the authenticity of the proof offered by the moving party. In the *Herzog* case, this was found in the undisputed fact that defendant's lawyer actively participated in the prior trial. It may be found in admissions of the opponent or in the type of evidence offered by the movant. Thus in *United States v. 162 10/12 Cases,*[160] the United States offered, in support of its motion for judgment of forfeiture of whiskey concealed to avoid the payment of taxes, the report of government investigators, a guilty plea in a criminal prosecution, copies of the tax returns of the owner of the whiskey, and an admission by him that he had lied to the officers. In granting the summary judgment the court observed that since all relevant information was in the owner's hand, he could not remain silent and rely on cross-examination and demeanor.

As the above case indicated, courts have asserted that the statements of a "responsible public official" must be accepted as true in the absence of controverting evidence.[161] While this rule may be supportable on its own merits, the cases again either have the additional factor of knowledge peculiarly within the hands of the opponent of the motion, or involve a situation where it is apparent that the court believes the plaintiff, the opponent of the motion, will be unable to produce evidence substantiating his claim. The latter factor presents a distinct problem which will be discussed subsequently.[162]

A less frequent but well recognized method of avoiding an issue of credibility utilizes the familiar "incontrovertible physical facts" test applied by courts in justifying directed verdicts.[163] An example is *Miller*

159. *Id.* at 213-14.

160. 138 F. Supp. 820 (S.D.N.Y. 1956).

161. Kantarof v. Orsecki, 102 F. Supp. 196 (S.D.N.Y. 1952); Morgan v. Sylvester, 125 F. Supp. 380 (S.D.N.Y. 1954); *cf.* Morgan v Null, 120 F. Supp. 803 (S.D.N.Y. 1954).

162. See Part II, *infra.*

163. See Bornscheueur v. Consolidated Traction Co., 198 Pa. 332, 334, 47 Atl. 872 (1901); MacDonald v. Pennsylvania R.R., 348 Pa. 558, 36 A.2d 492 (1944).

v. Union Pacific Railroad Co.,[164] where plaintiff sought to recover for injuries sustained in a collision at a railway crossing having an admittedly unobstructed view. In opposing the motion of the defendant for a summary judgment based on contributory negligence, an affidavit filed by the plaintiff asserted that he had stopped and looked before he had attempted to cross the right of way. In granting the summary judgment for the defendant, the court ruled that under applicable law plaintiff was ". . . presumed to have seen what was clearly visible."[165] Thus he must have either failed to look, or disregarded what he saw, and in either case, he was guilty of negligence as a matter of law. In this situation, the proponent is able to shift the burden of producing evidence by relying on the physical facts of the occurrence to establish the affirmative defense. In attempting to satisfy the burden thus imposed, the opposing party faces the familiar rule that evidence may be disregarded if it conflicts with the established physical facts.[166]

There are other cases in which the court shifted the burden of producing evidence to the opponent although apparently the credibility issue of the movant's proof was not avoided by any of the factors previously mentioned.[167] Of these cases, *Thomas v. Mutual Benefit Health and Accident Ass'n*,[168] involves an interesting question. In that case, Judge Clark required the defendant to take depositions or use other discovery procedures to determine the truthfulness of plaintiff's assertion that a loss was not covered by other insurance, ruling that it was not enough to doubt the accuracy of plaintiff's deposition. While the case does represent the well-known view of Judge Clark that there must be a full disclosure of proof at the hearing of a motion for summary judgment, the burden of pleading and proof on the asserted issue of fact appeared to rest on the

164. 196 F.2d 333 (10th Cir. 1952). *Cf.* Miller v. Aitkin, 160 Neb. 97, 69 N.W.2d 290 (1955). (In addition to the physical facts of the accident, the court relied on the plaintiff's own deposition in ruling that there was contributory negligence as a matter of law).

165. Miller v. Union Pac. R.R., *supra* note 164, at 334-35.

166. See Bornscheueur v. Consolidated Traction Co., *supra* note 163; Danks v. Pittsburgh Ry., 328 Pa. 356, 195 Atl. 16 (1937).

167. See Radio City Music Hall Corp. v. United States, *supra* note 123. Such familiar cases as Sanders v. Nehi Bottling Co., 30 F. Supp. 332 (N.D. Tex. 1939); Clare v. Farrell, 70 F. Supp. 276 (D. Minn. 1947); and Compania De Remorque y Salvamento v. Esperance, 187 F.2d 114 (2d Cir. 1951) involve granting summary judgment to a defendant. Special considerations applying to this situation will be developed in Part II.

168. 220 F.2d 17 (2d Cir. 1955). In the opposite situation, where plaintiffs have failed to produce cvidence supporting alternative theories of recovery, decisions are in accord with that reached in the *Thomas* case. See Edward B. Marks Music Corp. v. Continental Record Co., 222 F.2d 488 (2d Cir. 1955), *cert. denied*, 350 U.S. 861 (1955); Virginia Metal Prod. Corp. v. Hartford Acc. & Indem. Co., 219 F.2d 931 (2d Cir. 1955); Trinity Universal Ins. Co. v. Woody, 47 F. Supp. 327 (D.N.J. 1942).

defendant. While the formal pleading issues are not controlling in a summary judgment proceeding, if the plaintiff-movant supports his cause of action with undisputed evidence and there is neither pleading nor proof of an asserted affirmative defense, judgment may be entered on the assumption that no such defense exists, just as the case would be at a trial. Even Judge Frank has not indicated that a plaintiff would have to disprove all affirmative defenses in order to remove the "slightest doubt."

Although credibility issues may be avoided, it does not necessarily follow that judgment may be entered as a matter of law merely because the evidentiary facts are undisputed. In cases where there is a right to jury trial, the ultimate facts to be inferred from the agreed evidentiary facts might still present an issue for trial. Not only in tort cases,[169] but in contract cases as well,[170] summary judgment has been denied because reasonable men could draw conflicting inferences from undisputed evidence. If the court rules that reasonable men could draw but one conclusion from the conceded evidentiary facts, the question again becomes one of law on well-recognized principles and the case is proper for a summary judgment.[171]

When the inference to be drawn from the facts is for the court rather than a jury, a different rule prevails. Assuming that there is no dispute as to the evidence, a number of courts have decided that the judge may dispose of the case summarily by drawing inferences as to the material facts without the formality of a trial.[172] This is permissible only in cases

169. Lavin v. Goldberg Building Material Corp., 274 App. Div. 690, 87 N.Y.S.2d 90 (3d Dep't 1949); Pierce v. Ford Motor Co., 190 F.2d 910 (4th Cir. 1951), *cert. denied*, 342 U.S. 887 (1951); see United States v. General Ry. Signal Co., 110 F. Supp. 422, 425 (W.D.N.Y. 1952); Ramsouer v. Midland Valley R.R., 135 F.2d 101, 106 (8th Cir. 1943). *Compare* Elmer v. Chicago & N.W. Ry., 257 Wis. 228, 43 N.W.2d 244 (1950), *with* Petri v. Roberts, 242 Wis. 539, 8 N.W. 2d 355 (1943).

170. See cases cited note 47 *supra* and Stevens v. Howard D. Johnson Co., 181 F.2d 390, 394 (4th Cir. 1950); Sarkes Tarzian, Inc. v. United States, 240 F.2d 467 (7th Cir. 1957); Winter Park Tel. Co. v. Southern Bell Tel. & Tel. Co., 181 F.2d 341 (5th Cir. 1950); Bertlee Co. v. Illinois Publ. & Print Co., 320 Ill. App. 490, 52 N.E.2d 47 (1943); Federal Terra Cotta Co. v. Margolies, 215 App. Div. 651, 211 N.Y. Supp. 876 (1st Dep't 1925); Frazier v. Glenns Falls Indemnity Co., 278 S.W.2d, 388 (Tex. Civ. App. 1955).

171. Rogers v. Great-West Life Assur. Co., 138 F.2d 474 (8th Cir. 1943); R. I. Recreational Center v. Aetna Casualty & Surety Co., 177 F.2d 603 (1st Cir. 1949).

172. Fox v. Johnson & Wimsatt, 127 F.2d 729 (D.C. Cir. 1942); Tripp v. May, 189 F.2d 198 (7th Cir. 1951); Otis & Co. v. Pennsylvania R. Co., 61 F. Supp. 905 (E.D. Pa. 1945), *aff'd*, 155 F.2d 522 (3d Cir. 1946); Dickheiser v. Pennsylvania R. Co., 5 F.R.D. 5 (E.D. Pa. 1945), *aff'd*, 155 F.2d 266 (3d Cir. 1946), *cert. denied*, 329 U.S. 808 (1947). *But see*, United States v. Dollar, 196 F.2d 551, 552-53 (9th Cir. 1952). *Compare* Seaboard Surety Co. v. Racine Screw Co., 203 F.2d 532 (7th Cir. 1953) (holding that specific performance was discretionary and therefore could not be granted on motion for summary judgment), *with* Dale v. Preg, 204 F.2d 434 (9th Cir. 1953) (granting specific performance). Summary judgment cannot be granted unless the court has be-

where the evidentiary facts are not disputed. Apparently no distinction is made between court and jury-tried cases in determining the existence of issues of credibility, for it is equally important in both cases to have the benefit of demeanor evidence and cross-examination in open court.[173]

No discussion of summary judgment is complete without consideration of the notorious standard of the Third Circuit first propounded in *Frederick Hart & Co. v. Recordgraf Corp.*[174] The court there stated that: "It is well-settled that on motions to dismiss and for summary judgment, affidavits filed in their support may be considered for the purpose of *ascertaining whether an issue of fact is presented, but they cannot be used as a basis for deciding the fact issue.* An affidavit cannot be treated, for purposes of the motion to dismiss, as proof contradictory to well-pleaded facts in the complaint."[175]

Literally applied, the rule in the *Hart* case precludes a summary judgment in every case where pleadings form issues of fact for trial irrespective of the proof offered by the moving party in support of his motion for summary judgment. Thus summary judgment in the Third Circuit is a very much restricted procedure, limited to cases where there is agreement as to the facts. When the parties stipulate or otherwise agree as to the facts,[176] or present to the court an issue of law involving the interpretation of a contract,[177] a summary judgment is permissible.

---

fore it all of the evidence from which the inference of ultimate fact is to be made. See McComb v. Southern Weighing & Inspection Bureau, 170 F.2d 526 (4th Cir. 1948).

173. See Colby v. Klune, 178 F.2d 872, 878 (2d Cir. 1949); Parish v. Awschu Properties, 247 Wis. 166, 174-75, 19 N.W.2d 276 (1945).

174. 169 F.2d 580 (3d Cir. 1948). The court relied on two earlier cases decided by the Court of Appeals for the District of Columbia—Farrell v. District of Columbia Amateur Athletic Union, 153 F.2d 647 (D.C. Cir. 1946), and Garrett Biblical Institute v. American University, 163 F.2d 265 (D.C. Cir. 1947). All three cases were correctly decided because issues of fact were raised by controverting evidence. It was therefore unnecessary for the court to rely on this unfortunate rule in reaching a decision in these cases.

175. Frederick Hart & Co. v. Recordgraf Corp., 169 F.2d 580, 581 (3d Cir. 1948).

176. R.F.C. v. Foust Distilling Co., 103 F. Supp. 167 (M.D. Pa. 1952); Schwob v. International Water Corp., 136 F. Supp. 310 (D. Del. 1955); Abramson v. Delrose, 132 F. Supp. 440 (D. Del. 1955) (partial summary judgment); *cf.* St. Louis Fire and Marine Ins. Co. v. Witney, 96 F. Supp. 555 (M.D. Pa. 1951) (interpreting application of the provisions of an insurance contract to undisputed facts); Hemmerle v. Hobby, 114 F. Supp. 16 (D.N.J. 1953) (referee's findings); United States v. St. Paul-Mercury Indemnity Co., 194 F.2d 68 (3d Cir. 1952) (interpretation of bond provisions, facts undisputed); United States v. Carpenter, 147 F. Supp. 768 (W.D. Pa. 1957) (validity of an order, facts undisputed); United States v. Logan Co., 147 F. Supp. 330 (W.D. Pa. 1957) (issue raised became moot).

177. New Wrinkle v. John L. Armitage & Co., 238 F.2d 753 (3d Cir. 1956); American Auto Ins. Co. v. Indemnity Ins. Co. of North America, 108 F. Supp. 221 (E.D. Pa. 1952) (insurance policy); Shafer v. Reo Motors, Inc., 205 F.2d 685 (3d Cir. 1953); Glade Mountain Corp. v. R.F.C., 200 F.2d 815 (3d Cir. 1952); Woods v. Golt, 92 F. Supp. 325 (D. Del. 1950); Wildlife Preserves v. Algonquin Gas Transmission Co., 113 F. Supp. 112 (D.N.J. 1953); Von Mailath v. Order of Daughters, 117 F. Supp.

Occasionally, the motion is used as a substitute for a motion for judgment on the pleadings.[178] In other cases, a strict application of the rule prevents a summary disposition of the case although the opponent of the motion does nothing but rely on his pleadings.[179]

The dissatisfaction of the district courts with this rule is evidenced by the almost constant attempts made to distinguish or ignore the *Hart* case. Thus in *Wise v. Universal Corporation,*[180] a summary judgment based on a contract and affidavit was granted to the defendant although this evidence was contrary to "well pleaded" allegations in the complaint. In *Vanity Fair Mills, Inc. v. Cusick,*[181] a summary judgment was granted to the plaintiff on the defendant's well-pleaded counterclaim although the supporting proof was solely affidavit evidence. The *Vanity Fair* case is particularly interesting because the district judge gave a new interpretation to the *Hart* case. Contrary to what everyone thought, the court ruled that: "The Hart case goes no further than to require that in the search for fact issues the court must also consider those facts contained in the pleadings and cannot require that they be reiterated in affidavit form. The Hart case is not authority for the proposition for which the defendants seek to use it— that the conclusory allegations of the counterclaim, denied by plaintiff, raise fact issues foreclosing the grant of summary judgment. The Hart case merely broadens the area in which the search for fact issues must be made; it in no way impairs the principle that specific, basic facts must be alleged and controverted before the 'genuine' issue contemplated by Rule 56 arises. This requirement is of

93 (W.D. Pa. 1953); Motor Terminals v. National Car Co., 92 F. Supp. 155 (D. Del. 1949); Smith v. McDonald, 116 F. Supp. 158 (M.D. Pa. 1953); Louis Stern Sons v. Adolph Gobel, 113 F. Supp. 853 (D.N.J. 1953); *cf.* Rohm & Haas Co. v. Permutit Co., 114 F. Supp. 846 (D. Del. 1953) (act of infringement charged in the complaint admittedly occurred *after* the lawsuit was filed); see F.A.R. Liquidating Corp. v. Brownell, 209 F.2d 375 (3d Cir. 1954). If the contract is ambiguous, a summary judgment may not be granted. See Rolle Mfg. Co. v. Marco Chemicals, 92 F. Supp. 218 (D.N.J. 1950).

178. United States v. Cless, 150 F. Supp. 687 (M.D. Pa. 1957); *cf.* Hackensack Water Co. v. North Bergen Tp., 103 F. Supp. 133 (D.N.J. 1952), *aff'd,* 200 F.2d 313 (3d Cir. 1952) (want of federal jurisdiction); Carroll v. Pittsburg Steel Co., 103 F. Supp. 788 (W.D. Pa. 1952) (statute of limitations); Pollack v. City of Newark, 147 F. Supp. 35 (D.N.J. 1956), *aff'd,* 248 F.2d 543 (3d Cir. 1957) (complaint drafted by a layman).

179. See in particular Leigh v. Barnhart, 10 F.R.D. 279 (D.N.J. 1950); United States v. Bernauer, 10 F.R.D. 400 (D.N.J. 1950); Dimet Proprietary, Ltd. v. Industrial Metal Protectives, Inc., 109 F. Supp. 472 (D. Del. 1952); Michel v. Meier, 8 F.R.D. 464 (W.D. Pa. 1948); F.A.R. Liquidating Corp. v. Brownell, 209 F.2d 375, 379 (3d Cir. 1954).

180. 93 F. Supp. 393 (D. Del. 1950). See also United States v. Krasnov, 143 F. Supp. 184 (E.D. Pa. 1956), *aff'd,* 355 U.S. 5 (1957); (*Hart* case does not apply to undisputed documentary evidence); Sauters v. Young, 118 F. Supp. 361 (W.D. Pa. 1954) (letters).

181. 143 F. Supp. 452 (D.N.J. 1956).

course not satisfied by the generalities contained in the counterclaim."[182]

While giving credit to Judge Forman for a good try, it is impossible to reconcile this interpretation of the *Hart* case with the explanation of it given for the benefit of another New Jersey district judge by the Third Circuit in *Reynolds Metal Co. v. Metals Disintegrating Co.*[183] There the court specifically stated that the truth or falsity of pleading allegations could not be determined by a pre-trial proceeding. The report of the Advisory Committee on Rules for Civil Procedure recommending a change in Federal Rule 56 is certainly premised on this interpretation of the holding of the *Hart* case.[184]

In adhering to the accepted interpretation of the rule of the *Hart* case the Third Circuit has received a full measure of criticism if not downright abuse in legal periodicals[185] as well as from the Advisory Committee itself.[186] Clearly, the rule as stated ignores the history of the summary judgment procedure, for historically Keating's Act was precisely designed to eliminate a trial in cases where the pleadings did form factual issues for trial.[187] In the court's anxiety to prevent injustice by denying a trial to a worthy litigant, the progress of a century of procedural reform was ignored. A real problem exists in guarding against the use of the procedure to unjustly deny a litigant a trial, but what the Third Circuit failed to discern is that the solution to this problem lies in a proper discrimination between types of cases and methods of proof, and not in the adoption of a blanket policy denying summary judgment in every case adequately pleaded.

The dangers of the Third Circuit rule as a precedent may be over emphasized, however.[188] Condemnation of the *Hart* case has been so universal that it is at least doubtful that any other circuit will accept the decision as controlling. While the case has been cited many times, in the

182. *Id.* at 458. It is significant that in both the *Vanity Fair* and *Wise* cases, the moving party was the defendant of the claim and it was clearly established that the claim could not be supported by proof. On this point, see also Van Brode Milling Co. v. Kellogg Co., 132 F. Supp. 330 (D. Del. 1955) and Lewis v. Clarence Coal Mining Co., 130 F. Supp. 909 (M.D. Pa. 1955). The significance of this factor is explored in Part II.

183. 176 F.2d 90 (3d Cir. 1949).

184. Note to RULE 56, REPORT OF PROPOSED AMENDMENTS TO THE RULE OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, October, 1955.

185. Wright, *Rule 56(e): A Case Study on the Need for Amending the Federal Rules*, 69 HARV. L. REV. 839, 843 (1956); Asbill & Snell, *Summary Judgment Under the Federal Rules—When an Issue of Fact is Presented*, 51 MICH. L. REV. 1143, 1159-65 (1953); Note, 99 U. PA. L. REV. 212, 214-15 (1950); Note, 51 NW. U.L. REV. 370, 375 (1956).

186. See REPORT, *supra* note 184.

187. See Bauman, *supra* note 3.

188. Wright, *supra* note 185, at 854-57.

cases examined in which the rule is quoted, there existed independently of it adequate grounds for a denial of the motion.[189]

II

Thus far no consideration has been given to the order of proof imposed by the procedural law and the effect that it may have on the disposition of a motion for a summary judgment. Both plaintiff and defendant have been regarded as proponents of an issue of fact with identical problems of proof. In an ordinary trial, however, the defendant need do nothing until the plaintiff has sustained his burden of proving all the material propositions constituting his claim.[190] Thus a defendant's burden of proof at trial is conditioned upon the ability of the plaintiff to sustain his burden, and the defendant may win a lawsuit solely because of the plaintiff's failure to sustain that burden. The effect given to this factor in disposing of defendant's motion for summary judgment remains to be considered.

Suppose a defendant moves for a summary judgment on the basis of a denial of one of the material propositions of fact constituting the plaintiff's case. What quantum of evidence must the defendant produce to satisfy the court that there is no disputed issue of fact? While it seems clear that the defendant ". . . cannot push the other party out of court by swearing he has no case,"[191] suppose the pleaded denial is supported by affidavits and depositions tending to establish the non-existence of an essential fact. Standards employed in ordinary trial procedure are inappropriate to test the adequacy of such proof, since these standards are designed to provide a preliminary test of the sufficiency of plaintiff's evidence. Thus the defendant must satisfy a standard, unique to summary judgment proceedings, that requires proof of the "absence of any genuine issue" as to a material fact, or, perhaps, that there is not the "slightest doubt" as to the disputed facts. If the defendant's proof fails

189. The decisions in the *Farrell* and *Garrett* cases, *supra* note 174, were limited to their facts by Dewey v. Clark, 180 F.2d 766 (D.C. Cir. 1950), which in effect repudiated the rule in the District of Columbia. The decisions of Judge Delehant in United States v. Association of Am. Railroads, 4 F.R.D. 510 (D. Neb. 1945); Andrews v. Heinzman, 9 F.R.D. 7 (D. Neb. 1949); and Chenault v. Nebraska Farm Products, Inc., 107 F. Supp. 635 (D. Neb. 1952), appear to follow the Third Circuit rule, but are as readily explainable on the basis of the court's unwillingness to accept the credibility of the moving party's evidence in these cases. The same comment can be made with reference to Thomas v. Martin, 8 F.R.D. 638 (E.D. Tenn. 1949); Hoffman v. Babbitt Bros. Trading Co., 203 F.2d 636 (9th Cir. 1953); John W. Shaw Advertising, Inc. v. Ford Motor Co., 112 F. Supp. 121 (N.D. Ill. 1953); and Gunn v. Association of Cas. & Surety Executives, 16 F.R. Serv. 713 (E.D. Tenn. 1951).

190. Michael & Adler, *The Trial of an Issue of Fact*, 34 COLUM. L. REV. 1224, 1256-59 (1934).

191. Belanger v. Hopeman Bros., 6 F.R.D. 459 (S.D. Me. 1947).

to satisfy the prescribed standard, may plaintiff safely ignore the motion, or notwithstanding the deficiency in defendant's proof, will a court impose on the plaintiff the burden of disclosing his evidence? If the burden of presenting evidence is imposed on the plaintiff, either because the defendant's proof has the required persuasiveness or for some other reason, must the plaintiff produce sufficient evidence to establish a prima facie case, as he would in an ordinary trial, or is it sufficient for the plaintiff to merely raise doubts as to the credibility of defendant's proof? The answers to these questions have produced a considerable divergence of opinion in the administration of the summary judgment procedure.

Arnstein v. Porter,[192] a familiar case, is a good introduction to the problems involved. Plaintiff brought an action charging the defendant with infringement of plaintiff's copyrights to several musical compositions. After depositions were taken by both parties, defendant moved for summary judgment on the basis of these depositions and certain affidavits. In his affidavit, defendant categorically denied that he had heard or seen the plaintiff's music. Plaintiff filed a controverting affidavit asserting that his music had been played and heard by many people, that defendant had stooges watching plaintiff, and that some of his musical compositions had been stolen. No positive proof was presented, however, establishing that the defendant had actually had access to the compositions. A district court granted a summary judgment for the defendant, and on appeal, the Court of Appeals reversed the judgment. Speaking for the majority, Judge Frank stated that summary judgment was not proper if there was the slightest doubt as to the facts and that the correctness of an order granting summary judgment depended upon whether a trial judge could properly have directed a verdict for the movant at the close of a trial. Having previously decided that there were slight similarities between the compositions, it was held that a summary judgment for the defendant would be proper on the issue of copying only if there had been no access to plaintiff's compositions. Since the affidavits were conflicting on this point, an issue of credibility was involved and thus a material issue of fact was formed for trial. Rejecting the argument that plaintiff must produce evidence, Judge Frank stated: "It will not do, in such a case, to say that, since the plaintiff, in the matter presented by his affidavits, has offered nothing which discredits the honesty of the defendant, the latter's depositions must be accepted as true."[193] Judge Clark, in a caustic dissenting opinion characterizing the

192. 154 F.2d 464 (2d Cir. 1946).

193. *Id.* at 471. Compare the opinion upholding a summary judgment for defendant in Haynes v. Felder, 239 F.2d 868, 876-77 (5th Cir. 1957) (where a tenuous claim to a fund was rejected for lack of proof).

decision as "anti-intellectual," asserted that the motion was properly granted since the similarities in the compositions were trivial and the plaintiff had failed to produce any positive evidence of access worthy of submission to a trier of fact.

The opinion is interesting because the defendant produced all of the evidence available to him. He denied copying and he denied access. Although it is possible to find a conflict between the affidavits of the parties, plaintiff's evidence failed to establish a prima facie claim against the defendant and tended to prove only that access by some person was possible. Applying the directed verdict test, Judge Frank denied summary judgment principally because the proof of the defendant need not have been believed by a jury. Since defendant's proof was not accepted as true, the court did not require the plaintiff to produce evidence either for the purpose of attacking the credibility of defendant's proof or to establish a prima facie case. Thus the effect of the decision was to deny a summary judgment to a defendant because supporting proof in the form of testimonial evidence failed to satisfy the standard prescribed for decisions as a matter of law. Since Judge Clark found no significant similarities in the compositions, he decided that the defendant had sustained his burden, and thus he would require the plaintiff to produce evidence establishing the existence of the claim in order to prevent a summary disposition of the case.

The *Arnstein* case not only illustrates the difficulty faced by the defendant in satisfying the burden of proof imposed upon him by Judge Frank and his adherents, but also lays bare the decisive nature of the determination of the adequacy of that proof. It is not significant that a plaintiff-opponent has failed to sustain his burden of proof, or even that he has failed to produce evidence at all, until the defendant's own evidence satisfies whatever standard the court chooses to apply to it. Thus in the *Arnstein* case, the defensive position of the defendant is ignored and the supporting proof is subjected to standards identical with those applied to the proof of a proponent-movant discussed in Part I. Failure to produce sufficient evidence to satisfy the standard imposed results in a denial of the motion.[194]

Under what circumstances does the defendant satisfy the burden im-

194. See also, Subin v. Goldsmith, 224 F.2d 753 (2d Cir. 1955), *cert. denied,* 350 U.S. 883 (1955); Alvado v. General Motors Corp., 229 F.2d 408 (2d Cir. 1956), *cert. denied,* 351 U.S. 983 (1956); *cf.* Steinberg v. Adams, 90 F. Supp. 604, 608 (S.D.N.Y. 1950) ("Here, however, if I should decide that plaintiffs have not sustained the burden of proof, it does not follow that defendants can get summary judgment. They can not get summary judgment, as distinguished from judgment after trial, unless they meet the 'slightest doubt' test. That they have not accomplished.")

posed upon him and shift the burden of going forward with the evidence to the plaintiff? No precedents can be found in English practice to help in answering this question, for the English procedural rules have always restricted summary judgment to plaintiffs.[195] New York practice, on the other hand, is instructive since it does permit the defendant to move for summary judgment in any case in which a defense is established by documentary evidence,[196] and the term "defense" is interpreted to include everything that defeats the plaintiff's claim. Hence in New York a defendant relying solely on a negative defense may move for summary judgment if the denial can be substantiated by documentary evidence.[197] A preliminary question as to the conclusiveness of such evidence remains for the court's resolution,[198] of course, but when the defendant does support his denial with documentary evidence, the court accepts the proof as establishing, prima facie, a defense to the action.[199] The plaintiff is then left with no alternative but to attack the verity of the documents if he is to resist the motion successfully.[200] Suppose, for example, a case in which the issue of insolvency is material, and the defendant moves for summary judgment on the basis of its books showing that it is not insolvent. By deciding that the books are conclusive on this issue, the court eliminates other questions from the hearing of the motion. The burden of producing evidence is shifted to the plaintiff, who must produce "some" evidence attacking the verity of the books or lose.[201] There is no indication in the cases that a plaintiff has the further burden of substantiating his claim with evidence,[202] however logical such a requirement may be. Thus these cases are decided on the same principles that govern the cases previously considered where a proponent of an issue relied on documents in moving for summary judgment and demonstrate again the readiness of courts to find that unimpeached documentary evi-

195. ANNUAL PRACTICE, 1956, Order XIV & XIVB; Bauman, *The Evolution of the Summary Judgment Procedure*, 31 IND. L.J. 329, 341 (1956).

196. N.Y.R. CIV. PRAC. 113, amended March 14, 1932, June 15, 1933, and Sept. 15, 1944. See Lederer v. Wise Shoe Co., 276 N.Y. 459, 12 N.E.2d 544 (1938), and Part I, notes 48-49 *supra*.

197. Levine v. Behn, 282 N.Y. 120, 25 N.E.2d 871 (1940). See APPLETON, NEW YORK PRACTICE 178-79 (4th ed. 1953).

198. See, *e.g.*, Levine v. Behn, *supra* note 197 and cases cited note 46 *supra*.

199. White v. Merchants Despatch Transp. Co., 256 App. Div. 1044, 10 N.Y.S.2d 962 (4th Dep't 1939); see Dunckel v. Parsons, 274 App. Div. 539, 544, 86 N.Y.S.2d 543, 548 (3d Dep't 1948).

200. See N.Y.R. CIV. PRAC. 113. The complaint may be dismissed unless the plaintiff produces evidence "sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence. . . ." See cases cited notes 40-43, and note 50 *supra*.

201. White v. Merchants Despatch Transp. Co., *supra* note 199. See Deitch v. Atlas, 140 N.Y.S.2d 859, 861 (Sup. Ct. 1955).

202. See cases cited note 201 *supra* and Rule 113, *supra* note 200.

dence satisfies the burden of proof imposed on the moving party.[203] Even Judge Frank has recognized this possibility.[204]

Some of the most fascinating problems in the application of the summary judgment procedure arise when the defendant's supporting proof is not documentary, but, as in the *Arnstein* case, testimonial. Again it is possible to judge such proof by the same standards applied to the proof of a proponent-movant, and this is precisely what Judge Frank did in the *Arnstein* case.[205] Even if the extreme standards of Judge Frank are not followed, courts may find triable issues raised by the supporting proof itself.[206] Thus defendants who must support denials with testimonial evidence frequently resort to the techniques developed in Part I for avoiding objectionable issues of credibility.[207] In cases where both parties have participated in and share knowledge of the transaction which gave rise to the litigation, a court may find that the plaintiff's failure to offer evidence substantiating the claim is a sufficient guarantee of the truthfulness of the defendant-movant's proof.[208] As might be expected, however, the typical method of proceeding is to support the motion with damaging or conclusive admissions of the plaintiff obtained in discovery proceedings.[209] Once the supporting proof is found to comply with applicable standards, the burden of producing evidence shifts to the plaintiff, who must produce evidence sufficient to raise triable issues of fact if the motion is to be defeated.[210]

Thus the defendant-movant relying on negative defenses may satisfy the burden of proof imposed on him either by presenting documentary evidence in support of the motion or by resorting to the methods discussed

---

203. See text at note 50 *supra*. For additional authority consult Miller v. United States, 144 F. Supp. 734 (S.D. Ga. 1956) (court martial record); Brooks v. Pennsylvania R. Co., 187 F.2d 869 (2d Cir. 1951), *cert. denied*, 342 U.S. 837 (1951) (bill of lading and letter); Marion County Cooperative Ass'n v. Carnation Co., 214 F.2d 557 (8th Cir. 1954) (records); Chambers & Co. v. Equitable Life Assurance Soc., 224 F.2d 338 (5th Cir. 1955) (written instruments); Hisel v. Chrysler Corp., 94 F. Supp. 996 (W.D. Mo. 1951) (letters and exhibits).

204. Subin v. Goldsmith, *supra* note 194, at 759-60; Arnstein v. Porter, *supra* note 192, at 471.

205. See text in Part I at notes 89-99 *supra* and Colby v. Klune, 178 F.2d 872, 873 (2d Cir. 1949).

206. Mitchell v. McCarty, 239 F.2d 721 (7th Cir. 1957) (issues raised by affidavits preclude summary judgment); Ellison v. Anderson, 74 So. 2d 680 (Fla. 1954) (admissions failed to remove the issue of speed).

207. See text in Part I at notes 141-68 *supra*.

208. Wolfe v. Union Transfer & Storage Co., 48 F. Supp. 855 (E.D. Ky. 1942).

209. See, *e.g.*, Burgert v. Union Pac. R.R., 240 F.2d 207 (8th Cir. 1957); Walder v. Paramount Public Corp., 132 F. Supp. 912 (S.D.N.Y. 1956); Ortiz v. National Liberty Ins. Co. of America, 75 F. Supp. 550 (D.P.R. 1948); Payne v. B-Line Cab Co., 382 S.W.2d 342 (Ky. 1955); Northern v. Elledge, 72 Ariz. 166, 232 P.2d 111 (1951); Stevens v. Anderson, 75 Ariz. 331, 256 P.2d 712 (1953).

210. See cases cited notes 208, 209 *supra*.

in Part I for avoiding objectionable credibility issues in testimonial evidence. As an alternative to these familiar techniques, a court might adopt a policy of accepting the truthfulness of defendant's supporting proof if the plaintiff fails to present controverting evidence at the hearing of the motion. Adoption of such a policy means that credibility issues inherent in the defendant's supporting proof are to be resolved in his favor and that summary judgment may be based thereon unless the plaintiff discloses evidence substantiating the claim.

Maltby v. Shook,[211] demonstrates the operation of such a policy. In that case, plaintiff sought to recover money paid by his assignor on checks made payable to Royal Machine Works, and endorsed by Shook, its bookkeeper. Plaintiff alleged that Shook had authority to endorse the checks and that Royal was negligent in not detecting the falsification of its records. Defendants, the owners of Royal, denied liability, and moved for summary judgment on the basis of their affidavits denying the authority of Shook to endorse the checks and the affidavit of the firm's accountant that there were no signs of irregularities in the books kept by Shook. Plaintiff's opposing affidavit was made by his attorney, who stated not only that there were indications in defendants' depositions that Shook had authority, but also that a secretary of Royal had stated that Shook was a partner in Royal. The court, in affirming judgment for the defendants, ruled that plaintiff's proof was inadequate because the affidavit was not made on personal knowledge and contained hearsay evidence. Defendants' evidence was sufficient to support a judgment whereas plaintiff failed to show the existence of a good cause of action by competent evidence.

Another case of this type is *Orvis v. Brickman*.[212] Plaintiff sought to recover damages for false imprisonment against a number of persons including certain hospital authorities. Applicable law precluded recovery against such persons unless it was shown that they had knowledge of the plaintiff's presence in the hospital. Two doctors moved for summary judgment supported by affidavits in which each doctor denied that he had knowledge of the presence of the plaintiff until after receipt of the court order of commitment. This order was received within a few hours after the plaintiff arrived at the hospital. Plaintiff filed no opposing affidavits contradicting the doctors' assertion of lack of knowledge, nor did plaintiff resort to discovery devices. Instead an argument was made, based on *Arnstein v. Porter*,[213] that the moving affidavits were insufficient be-

211. 131 Cal. App. 2d 349, 280 P.2d 541 (1955).
212. 95 F. Supp. 605 (D.D.C. 1951), *aff'd*, 196 F.2d 762 (D.C. Cir. 1952).
213. 154 F.2d 464 (2d Cir. 1946).

cause they were self-serving, and because the facts were peculiarly within defendants' knowledge. Hence it was contended that plaintiff should have the opportunity of cross-examining the witnesses in open court with their credibility determined by a jury in the light of this examination. The district judge granted a summary judgment. He pointed out that the results of an adverse examination under Rule 43(b) would be speculative and that the application of the directed verdict test (which was analogized to a motion at the end of the *plaintiff's* case) to the facts presently before the court would result in a decision for the defendants. The court also indicated its belief that the defendants' story could not be challenged, and that, in any case, the plaintiff had two years in which to attack that story by use of the discovery procedures.

This judgment was affirmed in the Court of Appeals.[214] In the first place, that court held as a matter of law that the doctors were not liable for the interim detention under the circumstances of this case. Secondly, the court ruled that there was no genuine issue of fact. By implication, the court agreed with the district judge that in this case there was no right to rely on cross-examination of the defendants when no attempt was made to utilize discovery procedures.

Thus unlike *Arnstein v. Porter*[215] and the cases considered previously, the court in the *Shook* and *Brickman* cases accepted the proof offered by the defendant, shifted the burden of presenting evidence to the plaintiff, and required him to produce sufficient competent evidence to show the existence of a good cause of action. Is there any justification for this particular method of decision? If there is, it must be found in the position of the defendant in moving for summary judgment, as compared to that of a plaintiff upon whom the procedural law imposes the burden of proof. When a plaintiff moves for a summary judgment and the court decides that the proof offered in support of the motion is either quantitatively or qualitatively inadequate, there is no reason to look to the opponent's proof because the plaintiff is entitled to judgment only if his own proof is legally sufficient. On the other hand, the defendant may win a lawsuit either because his proof is so persuasive that the court resolves issues of credibility in his favor, or because the plaintiff's proof is inadequate to establish a prima facie case. Thus when a defendant produces credible evidence that substantiates a negative defense, the court may be justified in requiring the plaintiff to produce sufficient evidence to show that a cause of action exists. This approach permits a court to justify a summary judgment for the defendant either because the court believes that

214. 196 F.2d 762 (D.C. Cir. 1952).
215. 154 F.2d 464 (2d Cir. 1946).

the issues of credibility may be resolved in defendant's favor as a matter of law, or because the court requires the plaintiff to present at the hearing of the motion proof sufficent to show the existence of a cause of action, and the plaintiff fails to meet this requirement.

As the *Arnstein* case shows, Judge Frank fails to differentiate between plaintiff and defendant, but applies the same principle to both.[216] Thus no disclosure of proof is required of the plaintiff if a question of credibility is raised by defendant's proof. In *Maltby v. Shook,*[217] and *Orvis v. Brinkman,*[218] on the other hand, the plaintiff was required to produce evidence showing the existence of a cause of action and the court granted an adverse judgment as a penalty for his failure to do so even though questions of credibility inhered in the defendant's proof.

While such a ruling has considerable merit because of the defensive posture of a defendant-movant, courts are unwilling to extend the requirement of a full disclosure of proof by plaintiffs to all situations. Consider, for example, a negligence case in which the defendant simply produces affidavits substantiating his pleaded denials. In *Thomas v. Martin,*[219] plaintiff pleaded a good claim for negligence which defendant denied. He moved for a summary judgment, supporting the denials with affidavits of several persons. These affidavits, if believed, would defeat the plaintiff's case. The court, in denying the motion, stated that a summary judgment could not be sustained if there was a substantial issue. "Affidavits making denial of allegations of negligence clearly set forth in a complaint are evidence that there exists an issue of fact."[220] In other words, a mere repetition of denials in affidavit form fails to shift to the plaintiff the burden of presenting evidence sufficient to verify his claim. In stating that the affidavits demonstrate that issues of fact exist, the court must mean the credibility of those denials presents issues for trial.

In a similar case, *Hanson v. Halvorson,*[221] the Wisconsin court reversed a summary judgment for the defendant although the plaintiff produced no proof establishing the defendant's negligence. The court ruled that summary judgment is to be denied ". . . where it does not appear from the affidavits that no circumstances exist that tend to support an inference of essential ultimate fact contrary to that contended for by the movant, nor when it does not appear that the conclusive effect claimed

216. See text following note 193 *supra,* and cases cited note 194 *supra.*
217. 131 Cal. App. 2d 349, 280 P.2d 541 (1955).
218. 196 F.2d 762 (D.C. Cir. 1952).
219. 8 F.R.D. 638 (E.D. Tenn. 1949).
220. *Id.* at 638.
221. 247 Wis. 434, 19 N.W.2d 882 (1945).

for the affidavits by the movant cannot be destroyed by cross-examination."[222]

Suppose instead of a simple verification of denials in such cases, the defendant resorts to the full panoply of discovery devices. Such was the method of attack employed by the defendant in *Dulansky v. Iowa-Illinois Gas & Electric Company*.[223] Plaintiff sought to recover damages in a wrongful death action, alleging that a bus operated by the defendant's employee struck and killed the plaintiff's intestate. After extensive pretrial discovery proceedings, defendant moved for a summary judgment on the basis of affidavits, interrogatories, and admissions tending to establish that the decedent had not been struck by the bus, but had fallen under it. In granting the motion, the court stated that the party opposing the motion must ". . . disclose the existence of facts which genuinely controvert the material facts established by the movant."[224] But here not a scintilla of evidence was produced to show that the defendant had struck the plaintiff's intestate, and if a scintilla had been produced, ". . . under Iowa law even a scintilla of evidence is not enough to make an issue for the jury."[225] If this record had been submitted to an Iowa court, a directed verdict for the defendant would have to be granted at the close of the plaintiff's case. No triable issue was presented here because even if the defendant's evidence were disbelieved, the plaintiff had failed to produce sufficient evidence to get to the jury.

The interesting premise in the district court's decision is its statement that when the defendant makes a full disclosure of his evidence controverting negligence, plaintiff must produce evidence sufficient to get to a jury or lose. Credibility is ruled out as an issue because the burden of producing evidence is shifted to the plaintiff who at this point must produce evidence sufficient to avoid a directed verdict or lose irrespective of defendant's proof.

The Court of Appeals reversed the judgment for the defendant for two reasons.[226] First the court believed that the evidence submitted by the defendant was open to varying interpretations and a jury might reasonably infer that the accident was not the result of a fall, but that the boy was struck by the bus. Moreover, the evidence of the defendant's driver and the sole passenger was submitted in the form of affidavits, and the court ruled that the truthfulness of their assertions ought to be tested by cross-examination. Second, the burden of proof was on the

222. *Id.* at 437.
223. 10 F.R.D. 566 (S.D. Iowa 1950).
224. *Id.* at 577-78.
225. *Id.* at 579.
226. 191 F.2d 881 (8th Cir. 1951).

movant (the defendant) and not the plaintiff, to show that there was no genuine issue of fact for trial, and this was not clearly established. Thus the Court of Appeals focused its attention on the defendant's burden of proof without considering the adequacy of plaintiff's own proof. The court ruled that from defendant's proof an inference of negligence could reasonably be drawn, or in the alternative, that such proof was insufficient to establish the non-existence of a fact issue. As a result, the burden of producing evidence never shifted to the plaintiff, and therefore the insufficiency of his proof was not significant.

Obviously, the decisions in these three cases did not follow the principle of the *Shook* and *Brickman* cases. Instead of granting judgment for the defendant because of the failure of the plaintiff to produce evidence establishing the existence of a prima facie case, the court directed its attention to the defendant's proof and denied judgment because that proof failed to measure up to the standards applied by the court.[227] Why the court chose not to apply the method of decision used in the *Shook* and *Brickman* cases is the significant question, since an ability to shift the burden of producing evidence to the plaintiff offers a defendant an exceptional opportunity of success on a motion for summary judgment.

Before attempting to answer this question, the precise nature of the inquiry involved should be clarified. In the cases under examination, the defendant failed to avoid objectional credibility issues by the use of documents, admissions, or other accepted devices, but instead presented testimonial evidence of interested witnesses in support of the motion. The plaintiff, in opposing the summary judgment, failed in all of these cases to present evidence establishing the claim, but only in the *Shook* and *Brickman* cases did the court proceed beyond the defendant's supporting evidence to question the adequacy of the plaintiff's proof. Thus the problem is to discover if the latter two cases are in some way distinguishable from the *Thomas, Halvorson,* and *Dulansky* cases.

Postulating a full disclosure rule in the jurisdictions deciding the *Shook* and *Brickman* cases would provide an easy answer to the problem, but unfortunately it is by no means clear that any such simple solution is

227. See also, Albert Dickinson Co. v. Mellos Peanut Co., 179 F.2d 265 (7th Cir. 1950) (trade-mark infringement); Vale v. Bonnett, 191 F.2d 334 (D.C. Cir. 1951) (negligence); William Goldman Theatres v. Twentieth-Century, 151 F. Supp. 840 (E.D. Pa. 1957) (anti-trust action); Austin Theatre v. Warner Bros. Pictures, 139 F. Supp. 727 (S.D.N.Y. 1955) (conspiracy to restrain distribution of films); Hoffman v. Babbitt Bros. Trading Co., 203 F.2d 636 (9th Cir. 1953) (abuse of process); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 110 A.2d 24 (1954) (fraudulent conspiracy); see Galanis v. Proctor & Gamble Corp., 153 F. Supp. 34, 38 (S.D.N.Y. 1957) (misappropriation of an idea); *cf.* Carantzas v. Iowa Mutual Ins. Co., 235 F.2d 193 (5th Cir. 1956) (declaratory judgment of liability pursuant to an insurance policy); Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950) (breach of contract).

consistently supported by the cases in these jurisdictions.[228] The answer must therefore be sought in the nature of the cases themselves. In both cases, plaintiff's success in the litigation depend upon his ability to produce evidence establishing facts that were within the peculiar knowledge of the defendant, and in both cases, the defendant categorically denied by affidavit or deposition these material facts. There are unmistakeable indications in the *Shook* and *Brickman* cases that the court believed that under these circumstances, considering the fact that no controverting proof was presented, plaintiff would be unable to prove his case. On the other hand, in the *Thomas, Halvorson,* and *Dulansky* cases, it was never established by the defendant that plaintiff would have any difficulty in presenting evidence supporting his claim. Defendant's evidence, if believed, merely supported an inference that he was not negligent.

A much more difficult case to distinguish is *Surkin v. Charteris,*[229] since that case involved an accident similar to the one litigated in the *Dulansky* case. In the *Surkin* case, the defendant moved for a summary judgment on the basis of affidavits tending to prove that the bicycle on which the plaintiff was riding struck the car driven by the defendant, and that the plaintiff fell against the vehicle sustaining the injuries that were the basis of the action. Defendant's testimony that he was struck by the plaintiff was not controverted by other testimony nor by the circumstantial evidence of the collision. In affirming a summary judgment for the defendant, the Court of Appeals stated that ". . . it is true, as contended by the appellant, that the moving party's affidavits may disclose such issues [of fact] but, in the instant case, we think the defendant's affidavits affirmatively disclose there is clearly no issue as to any material fact and that the defendant was not negligent in any particular and is entitled to judgment as a matter of law."[230] Having accepted the adequacy of defendant's proof, the court characteristically rationalized the result by shifting its attention to the plaintiff's proof, stating that ". . . the opposing party [the plaintiff] must sufficiently disclose what the evidence will be to show that there is a genuine issue of fact to be tried."[231]

Why did the court in the *Surkin* case exact from the plaintiff precisely what the 8th Circuit Court of Appeals refused to require in the *Dulansky* case? The distinguishing factor again appears to be the court's belief that the plaintiff could not prove negligence in the *Surkin* case

228. See the California cases cited notes 80, 81 *supra,* and Dewey v. Clark, 180 F.2d 766 (D.C. Cir. 1950).

229. 197 F.2d 77 (5th Cir. 1952).

230. *Id.* at 79.

231. *Ibid.*

because he ran into the defendant. The circumstantial evidence supported this conclusion, whereas in the *Dulansky* case, the court found conflicting inferences possible on this precise issue. Thus the evidence offered by the defendant in the *Dulansky* case, even if believed, failed to convince the court that the accident occurred without negligence, and hence the court never proceeded to a consideration of the inadequacy of the plaintiff's controverting proof.

The success of the defendant in these cases thus appears to turn upon his ability to produce sufficiently convincing evidence to show the court that the plaintiff will probably be unable to sustain his burden of proof at a trial. The absence of evidence in support of the claim confirms the court's judgment and compels the conclusion that no benefit is to be gained from postponing the disposition of the case until trial merely to permit the plaintiff to default for lack of proof at that time.[232]

The determination of the sufficiency of defendant's evidence for this purpose manifestly involves a nice question of judgment. Whether the nature and type of action commenced by the plaintiff influences a court in making that judgment presents a problem worth investigation. No such distinction was found in the cases examined previously where the proponent of the issue was the moving party since the policy against resolving issues of credibility raised by testimonial proof is pervasive. In the cases presently under consideration, however, issues of credibility are not involved, but instead, the question is whether the court should grant the defendant's motion for summary judgment in a particular case because of the plaintiff's failure to present substantiating evidence.

Wrongful death actions provide a useful starting point for this inquiry. The favorable judicial attitude toward such actions is indicated by the rule that ". . . in a death case a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can

232. Compare the following cases in which defendant was granted a summary judgment with the cases cited note 227 *supra*. Wilkinson v. Powell, 149 F.2d 335 (5th Cir. 1945) (F.E.L.A.); Appolonio v. Baxter, 217 F.2d 267 (6th Cir. 1954) (oral contract to make a will); United States v. 31 Photographs, etc., 156 F. Supp. 350 (S.D.N.Y. 1957) (forfeiture for obscenity); United States v. 373.70 Carats of Cut, Etc. Diamonds, 148 F. Supp. 618 (E.D.N.Y. 1957) (forfeiture); United States *ex rel.* Ryan v. Brodcrick, 59 F. Supp. 189 (D. Kan. 1945) (*qui tam* action); Johnston v. Rodis, 151 F. Supp. 345 (D.D.C. 1957) (malpractice); Fontenot v Stanolind Oil & Gas Co., 144 F. Supp. 818 (W.D. La. 1956), *aff'd*, 243 F.2d 574 (5th Cir. 1957) (workmen's compensation act coverage); Clare v. Farrell, 70 F. Supp. 276 (D. Minn. 1947) (libel); Continental Cas. Co. v. Belknap Hardware & Mfg. Co., 281 S.W.2d 914 (Ky. 1955) (breach of warranty); Holland v. Lansdowne-Moody Co., 269 S.W.2d 478 (Tex. Civ. App. 1954) (conversion); Brown v. Navarre, 64 Ariz. 262, 169 P.2d 85 (1946) (joint tenancy); Holcomb v. United States, 146 F. Supp. 224 (Ct. Cl. 1956), *cert. denied*, 352 U.S. 935 (1956) (claim for back pay); *cf.* Carantzas v. Iowa Mutual Ins. Co., *supra* note 227 (dissenting opinion).

himself describe the occurrence."[233] One way of furthering this policy is to deny summary judgment motions at the instance of the defendant even though plaintiff fails to present evidence in support of the claim. While there are cases, including *Dulansky v. Iowa-Illinois Gas & Electric Company,*[234] which may be regarded as supporting such a rule, there are also situations in which a defendant can succeed on a motion for summary judgment nothwithstanding the favorable treatment accorded the plaintiff, as will be seen shortly.[235] Compare with these cases actions of fraud where a strict burden of proof is imposed on the plaintiff.[236] Despite the fact that the plaintiff fails to present any evidence, a court may deny summary judgment for defendant merely to preserve for the plaintiff the right to "probe the conscience of the moving party."[237] In other fraud cases, the nature and persuasiveness of defendant's proof is such that plaintiff's failure to produce evidence will result in a summary judgment for the defendant.[238]

Consider finally a stockholders' derivative suit. Such actions are not regarded with favor by courts or legislatures,[239] and this attitude is reflected in the quantum of proof required of a plaintiff to succeed in these actions.[240] Implementation of this policy in summary judgment cases would take the form of a requirement that plaintiff substantiate his

233. Noseworthy v. City of New York, 298 N.Y. 76, 80, 80 N.E.2d 744, 746 (1948); *cf.* Whitaker v. Borntrager, 233 Ind. 678, 122 N.E.2d 734 (1954); Note, MORGAN, MAGUIRE, AND WEINSTEIN, CASES AND MATERIALS ON EVIDENCE 433 (4th ed. 1957).

234. See note 226 *supra.* See also Estepp v. Norfolk & W. Ry., 192 F.2d 889 (6th Cir. 1951); Ramsouer v. Midland Valley R. Co., 135 F.2d 101 (8th Cir. 1943).

235. McGuire v. McCollum, 116 A.2d 897 (Del. 1955), *infra* note 249. *Cf.* cases where plaintiff relies on *res ipsa loquitur* to establish negligence and the court rules that the doctrine is inapplicable. Johnston v. Rodis, 151 F. Supp. 345 (D.D.C. 1957); Sanders v. Nehi Bottling Co., 30 F. Supp. 332 (N.D. Tex. 1939). Lauchert v. American S.S. Co., 65 F. Supp. 703 (W.D.N.Y. 1946) illustrates the use of the "category" system to defeat recovery in a death action See note 148 *supra.*

236. Johnson v. Johnson, 172 N.C. 530, 90 S.E. 516 (1916).

237. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 110 A.2d 24 (1954); Loew's, Inc. v. Bays, 209 F.2d 610 (5th Cir. 1954). Compare the opinion of the district court and the court of appeals in Sarnoff v. Ciaglia, 165 F.2d 167 (3d Cir. 1947), *reversing,* 7 F.R.D. 31 (D.N.J. 1947).

238. Knoshaug v. Pollman, 148 F. Supp. 16 (D.N. Dak. 1957), *aff'd,* 245 F.2d 271 (8th Cir. 1957). *Cf.* Melioris v. Morgenstern, 269 App. Div. 1028, 58 N.Y.S.2d 885 (1st Dep't 1945) (plaintiff conceded that he had no proof). These two cases illustrate situations in which defendant does not rely solely on testimonial evidence, but succeeds in shifting the burden of producing evidence to the plaintiff by the presentation of admissions or documentary evidence.

239. Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York,* 32 CALIF. L. REV. 123 (1944); Hornstein, *Problems of Procedure in Stockholders' Derivative Suits,* 42 COLUM. L. REV. 574 (1942); Hornstein, *New Aspects of Stockholders' Derivative Suits,* 47 COLUM. L. REV. 1 (1947).

240. Hays, *A Study of Trial Tactics: Derivative Stockholders' Suits,* 43 COLUM. L. REV. 275, 277-78 (1943); Blaustein v. Pan American Petroleum Co., 174 Misc. 601, 679-83, 21 N.Y.S.2d 651 (Sup. Ct. 1940), *rev'd,* 263 App. Div. 97, 31 N.Y.S.2d 934 (1st Dep't 1941), *aff'd,* 293 N.Y. 281, 56 N.E.2d 705 (1944).

pleading allegations with evidence in order to defeat the motion. There are cases taking just that position,[241] but this attitude toward stockholders' suits may conflict with other and more fundamental policies. Since a plaintiff relies largely on evidence drawn from the defendants in these cases, some courts, and particularly the Second Circuit, find in this factor a sufficient reason for denying summary judgment to a defendant even though the plaintiff fails to produce evidence substantiating his claim at the hearing of the motion.[242]

Thus support in the cases for the proposition that the imposition of the duty to produce evidence depends upon the type of case is inconclusive. Other factors may be equally or more important in determining whether a court will turn to an examination of the plaintiff's proof. Thus the existence of facts within the peculiar knowledge of the defendant may have the effect of precluding a summary judgment just as in cases considered previously where a proponent had exclusive knowledge.[243] This is true even in cases where a strict burden of proof is imposed upon the plaintiff and notwithstanding the fact that he has failed to produce any evidence in support of the claim. The curious feature of the *Shook* and *Brickman* cases is that this factor had quite a different effect and was influential in convincing the court that the plaintiff would be unable to prove his claim and that a trial would therefore serve no useful purpose.[244] In the *Surkin* case, on the other hand, evidence of the accident was not within the exclusive possession of the defendant but was equally available to the plaintiff. Shifting the burden of explanation to the plaintiff was based on the court's conclusion that the defendant's version of the accident, verified by the circumstantial evidence supplied by the point of impact, raised a sufficient doubt as to the negligence of the

241. Wohl v. Miller, 145 N.Y.S.2d 84, 89 (Sup. Ct. 1955); Diamond v. Davis, 38 N.Y.S.2d 103, 115 (Sup. Ct. 1942), *aff'd*, 265 App. Div. 919, 39 N.Y.S.2d 412 (1st Dep't 1942), *aff'd*, 292 N.Y. 552, 54 N.E.2d 683 (1944); Dickheiser v. Pennsylvania R. Co., 5 F.R.D. 5 (E.D. Pa. 1945), *aff'd*, 155 F.2d 266 (3d Cir. 1946), *cert. denied*, 329 U.S. 808 (1947); Lopata v. Handler, 37 F. Supp. 871 (E.D. Okla. 1941); Rolfe v. Swearingen, 241 S.W.2d 236 (Tex. Civ. App. 1951) (class action); *cf.* Martin Foundation v. Phillips-Jones Corp., 280 App. Div. 981, 116 N.Y.S.2d 468 (2d Dep't 1952); Abrams v. Allen, 36 N.Y.S.2d 170 (Sup. Ct. 1942), *aff'd*, 266 App. Div. 835, 42 N.Y.S.2d 641 (1st Dep't 1943); Otis & Co. v. Pennsylvania R.R., 61 F. Supp. 905 (E.D. Pa. 1945), *aff'd*, 155 F.2d 522 (3d Cir. 1946); Mullins v. De Soto Securities Co., 45 F. Supp. 871 (W.D. La. 1942), *rev'd in part*, 136 F.2d 55 (5th Cir. 1943).

242. Subin v. Goldsmith, 224 F.2d 753 (2d Cir. 1955), *cert. denied*, 350 U.S. 883 (1955), 40 MINN. L. REV. 608 (1956); Fogelson v. American Woolen Co., 170 F.2d 660 (2d Cir. 1948); Colby v. Klune, 178 F.2d 872 (2d Cir. 1949); see Toebelman v. Missouri-Kansas Pipe Line Co., 130 F.2d 1016, 1022 (3d Cir. 1942).

243. See notes 109, 113 *supra*.

244. See also Green Bay Auto Distributors v. Willys-Overland Motors, 102 F. Supp. 151 (N.D. Ohio 1951), *aff'd*, 202 F.2d 151 (6th Cir. 1953); *but cf.* Loew's, Inc. v. Bays, 209 F.2d 610 (5th Cir. 1954); Bellak v. United Home Life Ins. Co., 211 F.2d 280 (6th Cir. 1954).

defendant to exact evidence from the plaintiff sufficient to show the existence of issues for trial.

Thus the nature and reliability of the defendant's proof, the failure of the plaintiff to present supporting evidence in the particular type of case before the court, and the peculiar or exclusive knowledge of the defendant are all factors to be evaluated in determining the disposition of the motion. Opinions will differ as to the weight or effect to be given to the various factors in a particular case, but the basis of the decision to grant a summary judgment to the defendant in these cases remains constant: the court is convinced that the plaintiff will be unable to prove the claim at a trial.

Instead of merely producing evidence tending to establish the plaintiff's inability to prove a claim as in the cases just considered, a defendant may go further and establish conclusively that evidence on a material issue is unavailable to *either* party. Again, as a consequence of the burden of proof rule, judgment must be entered for the defendant and against the plaintiff. *Zampos v. United Smelting, Refining and Mining Co.*,[245] is an excellent example of this situation. Plaintiff sought to recover for damage caused to his property by floodwaters from the defendant's mine. In the complaint, it was alleged that the water accumulated in the mine as a result of defendant's negligence. In moving for summary judgment, defendant proved by affidavits and depositions that the mine was abandoned, that defendant's mine was but one of a number of abandoned mines in the area, that there were over six hundred miles of tunnels and hundreds of openings, that it was impossible to inspect this particular mine because of physical conditions, and that no similar flood had ever occurred. Considering this evidence, the Court of Appeals stated that if the case ". . . had been tried to the court or a jury and evidence had been introduced tending to establish all of the facts set forth in all of the affidavits and depositions, the cause or contributing causes of the flood, or the source from which the flood water came, would have been solely a matter of speculation or conjecture."[246] Just as in the *Surkin* case, the court added that ". . . where the moving party presents affidavits, or depositions, or both, which taken alone would entitle him to a direct verdict, *if believed,* and which the opposite party does not discredit as dishonest, it rests upon that party at least to specify some opposing evidence that he can adduce which may reasonably change the result."[247] (Emphasis added.)

245. 206 F.2d 171 (10th Cir. 1953).
246. *Id.* at 175.
247. *Id.* at 174.

The explanation for the court's scrutiny of the plaintiff's proof is found in the factual situation that gave rise to the litigation, and which was admitted.[248] There were a number of mines, and it was physically impossible to inspect the tunnels. Admittedly the fact of causation could not be proved by the plaintiff, and would remain speculative. This prevented the plaintiff from establishing his claim, and obviated the necessity of a trial. Thus in the *Zampos* case, the admitted facts of the occurrence established conclusively that the plaintiff could not sustain his burden of proof.

A more striking case illustrating the court's reliance on this factor is *McGuire v. McCollum*.[249] Plaintiff brought a wrongful death action against defendant for the death of her husband who was struck on the highway by a car driven by the defendant. There were no eyewitnesses except the defendant who testified that he was driving his car about fifty miles per hour and was passing another car when he suddenly saw decedent two or three feet directly ahead of the left headlight. Although the brakes were applied immediately, defendant was unable to avoid striking the decedent. This version of the events was uncontradicted and was supplemented by police reports. There were no witnesses to the decedent's movements prior to the accident. In ordering a summary judgment for the defendant, the court held that even if defendant had been speeding, there was no evidence to show that speed was the cause of the accident. Since the burden of proving causation was on the plaintiff, the court ruled that a trial in this case would place a useless burden on the parties because lack of evidence left the issue of causation speculative. In this case ". . . all known witnesses have been fully examined and cross-examined; every known fact is in the record; no material contradictions have been pointed out; and no evidence has been developed upon which a jury could reasonably find for the plaintiff."[250]

The *McGuire* case again confirms the significance of the burden of proof rule and the defensive position of the defendant in moving for a summary judgment. It was unnecessary for the court to accept the defendant's version of the accident in order to grant the motion for judgment. Of paramount importance was the admitted fact that no witness could be produced to establish causation. The decisions in the *Zampos* and *McGuire* cases have the effect of shifting the burden of

248. In less peculiar circumstances, the 10th Circuit has little difficulty in discovering an issue of fact. See in particular Avrick v. Rockmont Envelope Co., 155 F.2d 568 (10th Cir. 1946) criticized by Melville, *Summary Judgment and Discovery: The Amended Rules Will Add to Their Usefulness*, 34 A.B.A.J. 187, 189-90 (1948).

249. 116 A.2d 897 (Del. 1955).

250. *Id.* at 901.

producing evidence to the plaintiff, since the judgment is based on the insufficiency of the plaintiff's proof. Yet the court focuses its attention on the plaintiff's proof (or absence of it) because evidence developed by the defendant and admitted by the plaintiff establishes conclusively that necessary proof of material facts in the claim will not be available.

A court may be persuaded to examine the adequacy of the plaintiff's proof in still another situation developed by the defendant's supporting evidence. Rather than establishing the unavailability of evidence, as in the two prior cases, defendant may present in support of the motion the testimony of *all* witnesses to the transaction. If all of the available evidence is flatly contradictory to the material allegations of fact constituting the plaintiff's claim, a decision as matter of law seems possible. Suppose, for example, that a plaintiff brings an action for slander claiming that defendant told A and B that plaintiff was a blackmailer. Plaintiff, having the burden of proof, calls as witnesses the defendant, who denies that he said the alleged defamatory words, and A and B, who deny that they heard the words. Is defendant entitled to a directed verdict? An issue as to the credibility of the witnesses' testimony is certainly raised. The trier of the facts need not believe defendant or A or B. Logically, if they disbelieve the witnesses, they must believe that the words were spoken and heard. May a disbelief of witnesses supply the proof plaintiff needs to establish his case? Unlike the situation where a disbelief of proponent's witnesses results in a decision against the proponent, the question raised here is whether a disbelief of the only witnesses of the occurrence may be used to prove the proponent's case. The courts have ruled that in such a situation the defendant is entitled to a directed verdict or its equivalent in court tried cases. "Mere disbelief of denials of facts which must be proved is not the equivalent of affirmative evidence in support of those facts."[251]

The facts stated above were involved in *Dyer v. MacDougall*,[252] where defendant moved for a summary judgment on the basis of affidavits and depositions denying the slanderous words were spoken or heard. Summary judgment for the defendant was affirmed. Judge Learned Hand conceded that the demeanor of witnesses is part of the evidence, and that a finding that testimony is false may be a finding of the truth of the contrary of the story. Nevertheless, at trial a verdict would have to be directed against the plaintiff, for otherwise there could

251. Cruzan v. New York Central & Hudson River R.R., 227 Mass. 594, 116 N.E. 879 (1917). See also cases cited in 1 MOORE, TREATISE ON FACTS OR THE WEIGHT AND VALUE OF EVIDENCE, *op. cit. supra* note 95, § 131, at 177-78 (1908). Note, MORGAN, MAGUIRE, AND WEINSTEIN, CASES AND MATERIALS ON EVIDENCE 406-08 (4th ed. 1957).

252. 201 F.2d 265 (2d Cir. 1952).

be no effective review of the trial judge's disposition of defendant's motion for a directed verdict for the reason that the denial of a directed verdict in such a situation is based solely on demeanor evidence and this evidence disappears on the appeal. Since an appellate court has only the record, the decision of the trial judge must be supported by the record. Here, on the record, there is of course no affirmative evidence whatever for the plaintiff.

Judge Frank, in a concurring opinion, rejected Judge Hand's opinion for two reasons. First, Judge Frank believed that Judge Hand's rule made distinction between a jury and a court-tried case, and that as a result, the judge's power to grant a summary judgment might vary depending upon whether the case was to be tried by a court or a jury. Judge Frank found such a distinction unwarranted by Rule 56. Second, he believed that the directed verdict test excluded from the judge's power the right to pass on credibility. In passing on a motion for a directed verdict, the judge assumes that the jury will believe all evidence including demeanor evidence, favorable to the opponent of the motion. Thus there is no basis in directed verdict practice for Judge Hand's distinction, since demeanor evidence is not a factor in the disposition of these motions.

Judge Frank refused to adopt an "invariable rule" that a defendant is entitled to judgment (apparently either by motion for a directed verdict or summary judgment) in cases where plaintiff can only offer as evidence the testimony of defendant which is "flatly and unswervingly against the plaintiff" because the judge or jury may be convinced that the defendant is a liar. In this case, however, the alleged slander was denied by the defendant and the two persons whom plaintiff asserted had heard it; and plaintiff's own suit publicized the slander. "In these peculiar circumstances, the plaintiff should not have the chance at a trial to discharge his burden of proof by nothing except the trial court's disbelief in the oral testimony of witnesses all of whom will deny that the alleged slanderous statement was made."[253]

Two comments may be made about these opinions. The ruling of Judge Hand that the decision of the trial judge on a motion for a directed verdict must be supported by the record should not be interpreted to mean that a ruling as a matter of law must be made for a plaintiff solely because his *affirmative proof* is uncontradicted. Such a rule has never been applied to directed verdicts,[254] and, as has been demonstrated, certainly does not apply in the disposition of a motion for summary judgment.

253. *Id.* at 272.

254. Globe Indemnity Co. v. Daviess, 243 Ky. 356, 47 S.W.2d 990 (1932); *cf.* Kelly v. Jones, 290 Ill. 375, 125 N.E. 334, 8 A.L.R. 792 (1919). See authorities cited note 28 *supra.*

In the concurring opinion, Judge Frank argues that there should be no "invariable rule" against finding for the plaintiff under the circumstances of *Dyer v. MacDougall,* but he fails to cite cases which permit a plaintiff to win without presenting affirmative evidence proving the material facts of the claim. It is exceedingly doubtful if any such cases can be found.

A review of the cases thus reveals that when a defendant moves for summary judgment on the basis of testimonial evidence supporting negative defenses courts have been willing to shift their attention to the plaintiff's proof in three types of situations: [1] cases in which the defendant produces evidence sufficient to convince a court that plaintiff will probably not be able to establish his claim at a trial; [2] situations in which defendant conclusively establishes that proof of a material fact is not available to either party; and [3] where defendant produces all of the evidence available and that evidence is completely disprobative of the material facts constituting the claim.

Differentiation of the cases in the first group from those in the second turns on the fact that in the latter cases, the movant establishes to the court's satisfaction at the hearing of the motion that evidence in support of some material fact in the case is unavailable to the plaintiff. While this may be true in fact of cases in the first group, it is not established at the hearing of the motion. If the physical facts of the occurrence permit an inference favorable to the plaintiff,[255] or if defendant's evidence does not conclusively establish the unavailability of proof, the case is not properly classified in the second group. Nevertheless, the evidence may be sufficiently convincing to persuade a court to require the plaintiff to present evidence in support of the claim; in other words, the case might still be classified in group one.

More difficulty is experienced in distinguishing the third group of cases from those in the first, as may be seen from a comparison of the facts in *Dyer v. MacDougall* with *Orvis v. Brickman.* The basis of distinction lies in the fact that in the third situation the defendant produces *all* of the evidence that is available to either party to establish the facts. No such showing is made by the defendant in the first group of cases, as may be seen from defendant's proof in the *Shook* and *Brickman* cases. Undoubtedly the proof of defendant is convincing, since the court does require the plaintiff to substantiate his case, but it does not purport to be all of the evidence that is available to establish the material facts.

A court may require disclosure of evidence from a plaintiff in one or more, but not all, of the three situations listed above. Infringement

255. *Cf.* Whitaker v. Borntrager, 233 Ind. 678, 122 N.E.2d 734 (1954).

cases offer a neat illustration of the differences that may then result. Suppose plaintiff brings an action for a declaratory judgment that its patent does not infringe defendant's patent, and alleges in the complaint that defendant, through its agent X, stated to Y, a customer of the plaintiff, that defendant intended to institute a lawsuit against plaintiff and its customers for infringement. If defendant moves for summary judgment on the basis of affidavits of both X and Y denying the conversation, a situation similar to the *Dyer* case results.[256] Summary judgment for the defendant would be entered by courts recognizing either the first or third categories.

Suppose instead, the plaintiff alleges the following: "That plaintiffs are informed and believe . . . that defendant, through its employees and agents, has informed the trade and prospective customers of plaintiff, . . . that the composition coating produced by plaintiff . . . constitutes an infringement of said patent . . . and that litigation would be instituted by defendant against plaintiff . . . or its customers for infringement of such patent. . . ." Defendant moves for summary judgment on the basis of eleven affidavits. Ten of the affidavits are made by defendant's officers who deny making the threat of an infringement action against plaintiff, and the eleventh affidavit states that these ten men are the only persons who could have made such a threat. No controverting evidence is presented by the plaintiff. Is a genuine issue of fact raised for trial? In this situation, the District Court in *Dimet Proprietary, Ltd. v. Industrial Metal Protectives, Inc.*,[257] denied summary judgment on the basis of the rule enunciated by the Third Circuit Court of Appeals in the *Hart* case. It is interesting, however, to speculate what the reaction of Judge Frank and Judge Hand would be, since the affiants were interested witnesses, and the defendant failed to produce evidence from plaintiff's customers denying that the threat was communicated. Considering the generality of the allegations in the complaint defendant undoubtedly was unable as a practical matter to secure such evidence, but as a result the case clearly falls without the rationale of the *Dyer* case.[258] On the other hand, courts adhering to the policy of the first category of cases as exemplified by the *Shook* and *Brickman* cases could find the defendant's proof sufficiently persuasive to require positive proof in support of the claim in order to defeat a summary judgment.

The *Dimet* case also affords an instructive insight into the relation-

256. *Cf.* Frederick Hart & Co. v. Recordgraf Corp., 169 F.2d 580 (3d Cir. 1948), *reversing*, 73 F. Supp. 146 (D. Del. 1947). See discussion note 174 *supra*.

257. 109 F. Supp. 472 (D. Del. 1952).

258. *Cf.* Hoffman v. Bobbitt Bros. Trading Co., 203 F.2d 636, 638 (9th Cir. 1953), where the court distinguished the *Dyer* case on this precise ground.

ship existing between generalized pleading and the motion for summary judgment. Insofar as generalized pleading is authorized by rules of procedure, and summary judgment is restricted as in the *Dimet* or *Dyer* cases, the defendant's opportunity to terminate the litigation prior to trial is narrowly limited. Lack of specificity in the pleading will be regarded as "not a fatal defect" subject at most to a motion to make more definite.[259] On the other hand, if the court is skeptical of the existence of a valid claim and regards the generalized allegations as based merely on suspicions and conjecture, the motion for summary judgment can be used as a device for compelling particularization of the claim by the presentation of evidence. The stockholders' derivative suits illustrate this use of the procedure,[260] and there are other cases.[261]

Cases in which a defendant moves for summary judgment on the basis of negative defenses thus reveal that the same problems of credibility plaguing proponents are met and that the same techniques for avoiding these issues are utilized. In addition, the operation of the burden of proof rule affords courts an opportunity for granting summary judgments based on the inadequacy of the plaintiff's proof. No court seems to have adopted a policy of requiring a plaintiff to make a disclosure of evidence sufficient to substantiate the cause of action in every case,[262] but instead, courts require defendant to present facts establishing or at least indicating that plaintiff will be unable to prove his claim at a trial. The adoption of a full disclosure policy has merit, since unlike a plaintiff, a defendant may always get a favorable judgment solely because the plaintiff has failed to shoulder his burden of establishing a prima facie claim. Requiring the plaintiff to disclose the factual basis of his claim thus provides an opportunity for finally settling the litigation without the delay and expense of trial.[263] Since the plaintiff is only expected to show that there is a genuine factual basis for the claim, the danger of depriving a worthy litigant of trial is minimal.[264] While the presentation of proof in every such case may burden the plaintiff with additional ex-

259. Austin Theatre v. Warner Bros. Pictures, 139 F. Supp. 727 (S.D.N.Y. 1955).

260. See note 241 *supra.*

261. See cases cited note 232 *supra,* particularly United States *ex rel.* Ryan v. Broderick, 59 F. Supp. 189 (D. Kan. 1945); and Wilkinson v. Powell, 149 F.2d 335 (5th Cir. 1945).

262. Although as mentioned earlier, in some states the motion *may be* used as a substitute for a defective discovery procedure. See note 125 *supra.*

263. In the *Dyer* case, an argument can be made that it would have been less expensive for the defendant to proceed to trial.

264. "The party who would carry the burden of proof at the trial is obliged, in resisting the motion, to demonstrate only that his claim is backed by admissible evidence in those particulars specifically singled out by the moving party." Clayton v. James B. Clow & Sons, 154 F. Supp. 108, 112 (N.D. Ill. 1957).

pense, the disclosure that results may eliminate or at least mitigate equally costly discovery proceedings that are commonly employed in preparing for trial, and if a trial is ultimately avoided, a saving of money may actually be effected.

Conclusion

A review of the evolution and development of the summary judgment procedure reveals that enthusiasm for a speedy settlement of suits has always been restrained by the accepted principle of Anglo-American procedure that proof of issues of fact shall be by witnesses in open court subject to cross-examination. The decisions reached in the cases demonstrate the extraordinary concern of courts to safeguard the right to trial, however much this basis of the decisions may be obscured by constant repetition of vague generalizations, meaningless formulas, and talismanic words. Concern for this right first manifested itself by the restriction of summary judgment to certain limited classes of cases because it was thought that in these cases the need for a trial could be easily determined. With the advent of an unlimited summary judgment procedure, the unjust deprivation of trial is avoided by imposing a burden on the moving party of establishing the absence of any genuine issue of fact for trial.

The message of the decisions for a party preparing a motion for summary judgment is plain and unmistakeable. His task is to convince the court that his statement of the case represents the actual facts of the transaction or event generating the litigation. Hence he has the burden of establishing the credibility of his evidence to a degree calculated to induce a court to conclude that a trial would be a useless formality. A moving party sustains this burden most successfully when he is able to substantiate his case with documentary evidence. Courts willingly accept such evidence because a trial is not considered worthwhile merely to present authenticating witnesses. If testimonial evidence is required either exclusively or in addition to documentary proof to establish material facts, the movant must face up to the rule that the credibility of such evidence is ordinarily determined only after a trial. Thus some method must be devised for removing issues of credibility in the supporting proof and establishing the resulting wastefulness of a trial. Summary judgment may also be granted to a defendant relying on negative defenses because of the failure of the plaintiff to present evidence substantiating the claim at the hearing of the motion. If this possibility is not available, and if issues of credibility cannot be removed, summary judgment will not be granted, and unless the procedure is to be used as a substitute for

discovery or simply as a delaying tactic, it had best be forgotten.

Since the summary judgment procedure is thus restricted to situations where it can be shown that there are no issues of fact deserving of trial, the area in which the motion operates is an exceedingly narrow one. In speedily settling spurious litigation within that area, the effectiveness of the summary judgment procedure is a matter of history. Without denying for a moment its usefulness and importance, the boast that it is the "most effective weapon in the arsenal of legal administration"[265] seems hard to reconcile with any realistic appraisal of the procedural scheme. Courts still consider the conventional mode of trial a superior technique for resolving factual issues. All efforts to substitute for trial the hearing of a motion for summary judgment have been frustrated. Since courts have refused to extend the procedure beyond its narrow confines, the role of summary judgment in the battle against court congestion is necessarily a minor one. Major reliance must be placed on other procedures and other methods if much needless delay in the final disposition of litigation is to be avoided.

265. Sheintag, *Summary Judgment*, 4 FORDHAM L. REV. 186 (1935).