INDEX

CITATIONS

621889—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 57

THE ASSOCIATED PRESS, PAUL BELLAMY, GEORGE FRANCIS BOOTH, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

No. 58

TRIBUNE COMPANY AND ROBERT RUTHERFORD McCORMICK, APPELLANTS

v.

THE UNITED STATES OF AMERICA

No. 59

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE ASSOCIATED PRESS, PAUL BELLAMY, GEORGE FRANCIS BOOTH, ET AL.

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM OF THE UNITED STATES ON THE QUESTION OF SUMMARY JUDGMENT

THE CHARACTER AND SCOPE OF THE UNDISPUTED FACTS

This case differs materially from the usual equity proceeding under the Sherman Act in that the basic agreement of the defendants; every change in the agreement from its inception; the parties to it; relevant facts as to the industry such as the history and character of the various news agencies (including AP) and the number, location, and circulation of all newspapers served by each of the three principal news agencies; the record of those admitted to or excluded from AP and the different categories into which applicants fell—were all capable of definite determination and were in fact established as undisputed through admission by the parties.

The defendants' answer as to the Government's complaint admitted most of the factual statements made therein and left open only a narrow area of disputed fact. The underlying facts which the parties deemed essential to decision were largely removed from controversy by requests for admissions and interrogatories. The answers filed to the Government's requests and interrogatories rendered undisputed many documents (such as reports of AP committees, resolutions of its board, letters by or to its officers, agreements by it) and much data of a statistical nature. Other facts which AP considered pertinent were rendered undisputed by the Government's answers to AP's request for admissions and interrogatories.

These various requests for admissions and interrogatories, together with the attached exhibits, comprise over 500 printed pages of the record.[1]

Evidence was also submitted in affidavit form by the Government (R. 974–1298, 1962–76) and by the defendants (R. 1299–1961), and AP submitted the depositions of 13 witnesses which it had taken on oral examination (R. 1980–2223).

Neither side raised any technical objection to the evidence offered by the other nor did the district court exclude upon technical grounds any proof presented on the motion. With controversy as to the underlying facts almost wholly removed by the procedural steps above outlined, the only effect of a trial in further elucidating the facts would have been to subject the affidavit evidence to the test of cross-examination. In effect, the Government's affidavit evidence was subjected to a much more drastic test. The defendants had ample opportunity to examine the Government's affidavits and to offer counter-affidavits, thereby raising a dispute as to any affidavit statement offered by the Government and eliminating it from consideration under the motion.

[1] These are: The Government's first and second requests for admissions and AP's answers (R. 158–433). The Government's interrogatories to AP and its answers (R. 433–486, 552–769), those to Tribune Company and McCormick and their answers (R. 487–551), and those to Bulletin Company and McLean and their answers (R. 773–794). AP's request for admissions and interrogatories to the Government and its answers (R. 801–955).

THE DEFENDANTS' POSITION AS TO MOTION FOR SUMMARY JUDGMENT

The defendants in the district court did not by motion, affidavit, or brief object to the motion for summary judgment upon the ground that this procedure would limit their ability to establish any defense upon which they relied or that they would be unable to present by affidavit facts essential to justify their opposition to summary judgment.[2] In effect the defendants have throughout the case accepted determination of the cause under the procedure for summary judgment, insisting upon the limitations which this procedure imposed upon proof of the Government's case, but at no time contending that the procedure is not adapted to trial of a cause of this kind or that the procedure handicapped their defense.

In the district court the brief for the Tribune defendants treated the questions before the court as questions of law and assumed at least *sub silentio,* that they grew out of undisputed facts. The AP brief contended (pp. 3–4) that facts essential to the Government's case were genuinely in issue. It did not contend that there were any facts upon which the defendants affirmatively relied which were not before the court and open to its consideration on the motion for summary judgment. No such question was raised by the

[2] Cf. Rule 56 (f) of Rules of Civil Procedure, *infra,* pp. 25–26.

AP defendants in their assignment of errors [3] or in their briefs in this Court. The appendix to AP's reply brief in this Court setting forth (pp. 49–72) what is styled "Controverted Issues of Fact" is directed at a catalogue of various facts alleged to be *relied upon by the Government* and to be controverted. The Tribune defendants assigned error (assignment No. 12, R. 2652) to absence of trial of issues of fact "unmentioned in the findings of the court", but their briefs in this Court wholly disregard any such alleged error and discuss questions of law upon the premise that the material facts are undisputed.

ULTIMATE FACTS NOT IN DISPUTE ESTABLISHING THE ILLEGALITY OF THE MEMBERSHIP RESTRICTIONS

We shall set forth three ultimate facts as to which there is no genuine dispute and which, in our opinion, establish the illegality of the membership restrictions under the holding in *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission,* 312 U. S. 457, and many other cases. A wealth of wholly undisputed, specific facts gives content, meaning, and emphasis to these ultimate facts. Little purpose would be served by attempting to detail and document all relevant, undisputed specific facts. Those upon which the Gov-

[3] The relevant errors are Nos. 18, 19 and 20 (R. 2639), the most specific of which is that there was error "In holding that there was no genuine issue between the parties as to any material fact."

ernment primarily relies are referred to and documented in its brief. As there stated (p. 10), the specific facts referred to in the brief are undisputed.

We state below, first, a particular ultimate fact and, then, (a) the basis for asserting its undisputed character and (b) its legal connotation.

(1) *Each AP member agrees to limit his freedom of trade, in return for a like agreement by every other member, as to the news which is gathered and transmitted to him by his agent, AP, and as to the local news which he himself gathers.*

(a) This is written into the AP by-law agreement and is undisputed. The agreement as to news received from AP is found in Article VII, Section 5, of the by-laws (R. 77) and the agreement as to local news is found in Article VIII, Section 6 (R. 80).

(b) There is therefore established an agreement in restraint of commerce and the commerce restrained is concededly interstate.

(2) *Those against whom the agreement not to deal is directed are every non-member newspaper directly competing with a member.*

(a) This is undisputed. It is written into the AP by-law agreement by the totally different conditions for admission for newspapers competitive and those not competitive with a member. Competition is the one and only basis for differentiation of the applicants. That the two categories are set up solely to protect the competitive inter-

ests of the several members is written into the by-law agreement by the provisions that where the affected member or members waive objection to admission, this automatically shifts the applicant into the noncompetitive category.[4]

What the defendants strenuously contest in this litigation is that they be required to eliminate the competition of an applicant as a factor in passing upon his admission to membership. The very appeal taken by the defendants from the change in the by-law requirements ordered by the district court puts beyond dispute their purpose to restrain competition.

But were there otherwise any shadow of doubt as to purpose to restrain competition this is put beyond all dispute by the practice under the by-laws, as shown by the unchallenged findings of the district court on admissions and exclusions—1,884 admissions where there was no competition or a waiver of objection; six admissions, each under exceptional circumstances, where there was competition; and the further admitted fact that 95% of noncompetitive applicants have been elected and 95% of competitive ones rejected.[5]

(b) There is therefore established an agreement not to deal, entered into for the purpose of restraining competition.

[4] For references to the applicable provisions of the by-laws, see Govt. Br. pp. 23, 27–28, 62.

[5] For the record citations, see Govt. Br. pp. 24–26, 63.

621889—44——2

(3) *Denial of AP news service to a newspaper desiring it is a competitive handicap.*

(a) The facts establish this beyond dispute. It is asserted in AP's answer that AP membership gives a "competitive advantage over others" (R. 120). Unchallenged findings by the district court are that every newspaper of substantial size requires for its operation the news service of AP, UP, or INS (Fng. 38, R. 2611); that there are differences between the news reports of these three agencies (Fng. 67, R. 2615),[6] that most of the larger newspapers, as well as many smaller ones, find it desirable to, and do, obtain the news services of more than one of these agencies (Fng. 68, R. 2615–6); that AP ranks first in public reputation and esteem and first in expenditure for news, facilities, staff, newspaper subscribers, newspapers furnishing it with their local news (Fngs. 69, 84, R. 2616, 2618); that, on a circulation basis, 96% of morning papers and 77% of evening papers use AP service compared with respective percentages for UP subscribers of 64% and 65% (Fng. 85, R. 2618); that every one of the 64 exclusively morning newspapers published in the United States with a circulation of over 50,000, except the Chicago Sun, is an AP member using its service (Fng. 102, R. 2621); that an

[6] AP's answer to the complaint states that "there is a material difference in the service furnished by AP" from that furnished by UP and INS (R. 124).

overwhelming proportion of UP and INS subscribers rely upon and utilize AP reports.[7]

The district court also found that restrictions imposed by AP "have hampered and impeded the growth of * * * newspapers competitive with members of The Associated Press" (Fng. 70, R. 2616). While the Tribune defendants assigned error to this finding (R. 2649–50), no error thereto was assigned by the AP defendants (R. 2636–39).

It is beyond any genuine dispute that deprivation of freedom to choose among a limited number of essential news services, and deprivation of the right to have the service which on so many tests ranks first, is a substantial competitive handicap. In addition, the AP members have incorporated into their by-laws a declaration that the right to AP service is a competitive advantage by evaluating such right at sums which, in the larger cities, range from nearly $200,000 to over $1,400,000 (see Govt. Br. pp. 29, 57–58). The

[7] Of UP morning subscribers, the circulation of those who are AP members is 10,701,498; of those not AP members, 835,706 (Fngs. 86, 91, R. 2618–9). Of INS morning subscribers, the circulation of those who are AP members is 4,149,929; of those not AP members, 18,627 (Fngs. 86, 93, R. 2618–9). Of UP evening subscribers, the circulation of those who are AP members is 16,781,020; of those not AP members, 4,980,109 (Fngs. 87, 97, R. 2619–20). Of INS evening subscribers the circulation of those who are AP members is 8,608,183; of those not AP members, 1,508,227 (Fngs. 87, 99, R. 2619–20).

amounts paid or offered for AP membership, comparable to AP's own evaluation, further put beyond dispute the substantial competitive handicap involved in lack of AP news service (Govt. Br. p. 59).

The question of competitive handicap is not brought within the realm of dispute by the fact that, over the years, a substantial number of papers have voluntarily substituted some other service for that of AP. Where an exclusory agreement handicaps nine out of 10 papers affected, the nine are none the less adversely affected notwithstanding that the tenth is not. Nor is the handicap rendered disputable by the fact that certain newspapers have achieved large circulations without AP service since such circulations may be achieved by superior management, free expenditure of money, or in other ways,[8] and some of the newspapers achieving success without AP service may fall into the class of those who find other news service adequate for their particular requirements.

(b) It is therefore established that the exclusory agreement of AP members is not only de-

[8] The report of the Special Committee of AP on the revision of its by-laws presented in April 1942 attributes the success which some nonmember newspapers have achieved to "superior management in other elements of the newspaper enterprise than those involving news service" (Pl. Req. for Adm. 36-c, Ex. 24 (R. 197, 275), admitted (R. 341, 429)).

signed to, but does, in fact, restrain the competition of newspapers excluded.

IF THE PRIMARY FACTS ARE UNDISPUTED IT IS FOR THE COURT TO DETERMINE IN AN EQUITY PROCEEDING, ON MOTION FOR SUMMARY JUDGMENT, THE ULTIMATE CONCLUSION TO BE DRAWN FROM THE UNDISPUTED PRIMARY FACTS

We have previously shown that the material, ultimate facts in this case are undisputed. But if the Court should disagree with this conclusion, it remains true that there is no dispute as to the primary or evidentiary facts. If the trier of the ultimate fact to be determined from undisputed, evidentiary facts is a jury, as where the question is whether the defendant exercised due care, this ultimate issue of fact must be left to the jury and summary judgment denied unless the facts are such as would require a directed verdict. But in an equity proceeding where the court must in any event itself determine the ultimate conclusion to be drawn from the primary facts, if they are undisputed there is no reason why the court should follow the futile procedure of denying the motion for summary judgment, adjourning to a later date, reconvening as a trial court, and then, as such trial court, resolving the ultimate fact from the undisputed primary facts. This was the holding in *Fox* v. *Johnson & Wimsatt,* 127 F. (2d) 729 (App. D. C.), where the court, in upholding

motion for summary judgment, said (pp. 736–737), speaking through Justice Rutledge:

> There was conflict concerning interpretation of the facts and the ultimate conclusion to be drawn from them respecting intention. But there was none as to the facts themselves. In other words, the evidentiary facts were not substantially in dispute. * * * Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court. The court had before it all the facts which formal trial would have produced. Going through the motions of trial would have been futile.

Summary judgment should not be denied because the case presents an important, difficult or complicated question of law. 3 Moore, *Federal Practice,* Section 56.04. The Rule sets its own standard. Where it appears that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" summary judgment must be granted. Rule 56 (d) providing for partial relief is a clear indication that the summary judgment procedure applies to complicated cases. See *Meikle* v. *Timken-Detroit Axle Co.,* 44 F. Supp. 460, 462 (E. D. Mich.).

ANALYSIS OF THE ALLEGED "CONTROVERTED ISSUES OF FACT" SET FORTH IN THE APPENDIX TO AP'S REPLY BRIEF

The AP contention is that various statements in the Government's brief involve controversial, factual questions. We submit that the contention is almost wholly based upon misinterpretation of the Government's position or statements or upon failure to distinguish between essential and nonessential facts. We further submit that nothing to which AP refers puts in genuine dispute the ultimate facts which we have previously set forth in this memorandum.

At the outset AP refers to page 8 of its reply brief, where it asserts that the Government's statement that AP has an effective monopoly is a disputed issue of fact. But the Government's statement (Br. p. 86) was merely that AP has an effective monopoly of furnishing news by a particular type of organization—one which is composed of and controlled by newspapers representing every shade of opinion and section of the country. None of the facts referred to in the AP reply brief (pp. 8–10) brings this statement into dispute.

Substantially the same matter is discussed in the AP reply brief (pp. 51–53) under the heading "No 'Unique' Value". The Government's statement was not that the AP news has unique value because its reports are uniquely free from

bias, but that the character of the organization gives its reports unique value. In so far as the character of the organization furnishes valuable assurance of impartiality, such statement is rested on an allegation of the complaint which the defendants have admitted, on statements in AP's answer to the complaint (Govt. Br. pp. 86, 100) and on the affidavit of AP's long-time president put in evidence by AP (Govt. Br. p. 100, n. 99).

Under the heading "Alleged Benefits and Advantages from AP Membership" (pp. 49–50) AP deals with the ultimate fact previously stated and discussed herein (*supra,* pp. 8–10), that denial of AP news service to a newspaper desiring it is a competitive handicap. None of the underlying facts on which we rely is alleged to be in dispute. The substance of AP's contention is that this ultimate fact must be regarded as in genuine dispute in the absence of still other underlying undisputed facts, such as that lack of AP membership has prevented a newspaper from starting or continuing in operation or has caused its discontinuance or that AP news reports are superior to any other. But these facts go to the question whether AP news service is essential to a newspaper's success, not whether inability to obtain this service is a competitive handicap.

Under the heading "Circulation and Advertising" (pp. 53–54) AP asserts that it is not established beyond dispute that there is any correlation

between a newspaper's receipt of AP reports and its achieving greater circulation and advertising. The Government made no such statement in its brief and the matter is not a disputed issue of fact.[9]

Under the heading "Financial Resources" (pp. 54–55) AP refers to the Government's statement that AP has unlimited power to assess its members for cost of operation whereas UP and INS must rely on their own resources. AP's discussion of this statement concerns only its significance, not the fact that it is undisputed.

Under the heading "Vast and 'Intricately Reticulated' Service" (p. 55) AP asserts that this also characterizes the services of UP and INS. The Government has not asserted the contrary and there is no disputed issue.

Under the heading "Daily Wordage" (pp. 55–56) AP refers, not to any statement by the Government, but to its mention of the undisputed fact that AP's subsidiary had asserted in a widely distributed pamphlet that AP furnishes more words in its news reports than all other American news agencies combined (Govt. Br. p. 37, n. 37). The fact of such assertion is undisputed.

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[9] The Government's statement, referred to by AP, that no large paper relies solely on INS is not of much importance but is nevertheless undisputed (Fngs. 103, 104, R. 2621). The affidavit evidence quoted by AP goes to another point, whether a large newspaper could, as distinguished from does, rely for news-agency reports solely on INS.

Under the headings "Foreign News", "Domestic News", "News Pictures", and "Features and Comics" (pp. 56–59) AP refers to claims of various other agencies that they furnish excellent service in these respects. The Government has not contended that the contrary is established and there is here no disputed issue of fact. But it should be noted that AP does not deny that in the domestic field it has, because of the obligation of its member newspapers to report to it exclusively their local news, means for obtaining a wider and more complete news coverage than any other news service.

Under the heading "No 'Privileged Class'" (pp. 59–64) AP discusses a single phrase used in the *amicus* brief filed by Field Enterprises, Inc. Whether the undisputed facts referred to in that brief (p. 11) as making AP members a privileged class in American journalism is a mere matter of nomenclature, not a disputed issue of fact.

Under the heading "Sporadic Local Situations" (p. 64) AP questions the relevancy, not the undisputed character, of the Governent's statement that in a number of communities there are substantial barriers to the services of all of the three news agencies, AP, UP and INS.

Under the heading "Decline in Number of Newspapers" (pp. 65–68) AP does not question the undisputed character of the Government's statement that the number of newspapers has

been steadily declining. It points to factors other than inability to obtain AP service as having contributed to or caused such decline. The Government did not assert the contrary and there is here no disputed issue of fact.

Under the heading "Alleged Injury to the Public Interest from Denial of Membership to AP Competitors" (pp. 68–69) AP discusses what it asserts are unspoken factual premises which underlie the *ratio decidendi* of the district court. We submit that the facts upon which that decision is premised are indisputable—that the AP combination is designed to and does impose barriers, difficult to overcome, against receipt of AP service by a competitor of a member; that a newspaper is limited in its ability to fulfill its function of furnishing news, information and opinion to the public if it is thus prevented from obtaining news reports of all the three leading agencies or is prevented from choosing that agency which it believes best suited to its needs and which, of the three, is the most widely acclaimed and used. The only further premise which might be said to underlie the decision is that interstate trade and commerce is better served when it is carried on free from restriction of competitive opportunity effected by combination and agreement than when it is not so free. This involves simply the policy of the rule which Congress laid down to govern national trade and the courts are not free to pass

independent judgment upon the wisdom of this rule (*Northern Securities Co.* v. *United States,* 193 U. S. 197, 337). Cf. *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, 397; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 221–222. The Sherman Act "is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results." *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 49.

Under the heading "The Assertion that Exclusiveness is not an Essential Element of Value in News" (pp. 69–71) AP attacks a statement in the Government's summary of argument referring in condensed form to the position elaborated later (Br. pp. 94–96) which is, not that AP news does not have greater value to a newspaper which receives it exclusively than to one which does not, but that its news has always been highly valued and sought by newspapers not entitled to receive it exclusively, and that to eliminate the right to bar a competitor from AP news does not introduce a new or untried principle into the structure of AP. None of the facts to which the Government refers in this connection is alleged by AP to be in dispute.

Under the heading "The Assertion That a 'Unitary' Organization, Such as UP and INS, is bet-

ter than a Cooperative Because Its Interests Would Lie in 'Expanding its Newspaper Clientele' " (pp. 71–72) AP attacks the Government's statement that, in a field where there is a present member, the paramount consideration given under the AP by-laws to protection of the competitive interests of the several members is a bar to an expansion of its newspaper clientele, a bar which is absent in the case of a stock corporation organized for profit. The fact that stock corporations such as UP and INS have in some cases [10] deemed it in their interest to enter into partially exclusory contracts does not bring the Government's statement into dispute.

THE QUESTION OF THE ANALOGY OF INTERCHANGE OF CREDIT INFORMATION

At the argument, the Chief Justice raised the question whether decisions under the Sherman Act had not upheld the validity of an agreement by competing manufacturers to collect and exchange credit information and to withhold such information from all outside competitors. We believe that the Chief Justice had in mind certain aspects of the decision in *Cement Manufacturers Protective Assn.* v. *United States,* 268 U. S. 588. In view of the importance which appeared to attach to the question, we venture to consider it briefly here.

[10] UP, with 981 domestic newspaper subscribers, has only 215 asset-value contracts (Fngs. 51, 106, R. 2613, 2621).

In the *Cement* case the members of a trade association of cement manufacturers made monthly reports of all accounts of customers two months or more overdue, giving the names and addresses of delinquent debtors and the general status of these accounts, but without "any comments concerning names appearing on the list of delinquent debtors" (see p. 599). The limited character and scope of the agreement is clearly stated in the opinion. The Court said (pp. 599–600):

> The Government neither charged nor proved that there was any agreement with respect to the use of this information, or with respect to the persons to whom or conditions under which credit should be extended. The evidence falls far short of establishing any understanding on the basis of which credit was to be extended to customers or that any co-operation resulted from the distribution of this information, or that there were any consequences from it other than such as would naturally ensue from the exercise of the individual judgment of manufacturers in determining, on the basis of available information, whether to extend credit or to require cash or security from any given customer.

The *Cement* case also considered the validity of rules of the association designed to obtain for the use of the individual members full information concerning the making and carrying out of

specific job contracts. These were contracts providing for sale of cement for future delivery for use in a particular construction job specified in the contract. By the practice in the trade they were mere options to purchase, but binding obligations to sell, so that a purchaser, by making contracts with several manufacturers for a single construction job, could, if he obtained delivery under all such contracts following a price advance, defeat the purpose of the contracts and perpetrate what amounted to a fraud upon the sellers. This Court in holding that the defendants' activities did not violate the Sherman Act said (pp. 603–604):

> * * * in our view, the gathering and dissemination of information which will enable sellers to prevent the perpetration of fraud upon them, which information they are free to act upon or not as they choose, cannot be held to be an unlawful restraint upon commerce, even though in the ordinary course of business most sellers would act on the information and refuse to make deliveries for which they were not legally bound.[11]

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[11] In *Swift & Co.* v. *United States*, 196 U. S. 375, 394–395, referred to in the *Cement* case (p. 604), the decree of the district court, which this Court affirmed, enjoined the defendants from conspiring to restrain interstate commerce in fresh meats by establishing rules for giving credit to dealers which have the effect of restricting competition, but it was provided that the decree should not prohibit establishing credit rules "where such rules in good faith are calculated

In the *Cement* case there was not, as there is here, an agreement not to deal—the agreement embraced only the joint procuring of information. The facts are analogous to the present situation only to the extent that the agreement of AP members provides for procuring news through a joint agent and for pooling news collected by individual members. If this had been the limits of the agreement it would not now be under attack; indeed the judgment below does not in any respect prohibit or interfere with these aspects of the members' agreement. What was not present in the *Cement* case and is present here is an agreement not to deal, having the purpose and effect of restraining competition. No exclusion of rival manufacturers from the trade association was involved in the *Cement* case, much less an exclusion for the purpose of restraining their competition. Even as to customers who were delinquent in payment and those who overbought under specific job contracts, there was no agreement not to deal.

To render an agreement relating to credit information even partially analogous to the present case, there would have to be a combination by the principal members of an industry to pool such information, to exclude therefrom those who compete with members of the combining group, and

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solely to protect the defendants against dishonest or irresponsible dealers."

an actual advantage in trade resulting from such exclusion.

CONCLUSION

The Government submits that all material facts are established beyond dispute and that, on these facts, the judgment of the district court should be affirmed with the modifications requested in the Government's brief. The Government believes that there is thus no occasion to remand the cause to the district court for the trial of any issue of fact,—a course which it is assumed would be followed if the Court were to conclude that any fact essential to decision is in genuine dispute.

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DECEMBER 1944.

APPENDIX

RULE 56 OF RULES OF CIVIL PROCEDURE—SUMMARY JUDGMENT

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not

rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) *When Affidavits are Unavailable.* 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.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

U. S. GOVERNMENT PRINTING OFFICE: 1944