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The Summary Judgment In California:  
The Case for Judicial Reform

By Leon T. David*

The summary judgment has come of age. Once considered a novel procedure, under suspicion if not disfavor, it has pushed legal gamesmanship aside in the search for probable truth in civil litigation. The summary judgment procedure provides an early showdown in that search. It is well designed to unburden trial calendars by discovering and terminating unmeritorious litigation and by disposing of sham or vexatious litigation. Where there is no defense to a cause, the plaintiff may receive a speedy judgment. Similarly, where there is no cause, or the cause is ineffective, the defendant may receive early relief.

Summary judgment procedures have been embraced in the California statutes for almost fifty years. There have been over three hundred reported appellate decisions on the subject. Statutory

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changes in the procedure all have been directed toward enlarging its applicability and scope. The summary judgment statute has been the subject of commentaries by several writers. Pet, the litigant often hesitates to use the procedure. This hesitation is due in large part to the existence of folklore; namely, the summary judgment procedure is not favored by the courts, and making a motion for summary judgment is an exercise in futility

Although there have been many reversals of summary judgments by the appellate courts, there also have been an imposing array of affirmances. Professor John Bauman viewed this record and made the largely unwarranted assumption that successful motions for summary judgment were, in reality, sub rosa determinations of the relative weight of evidence. Predicted upon the apparent lack of predictability upon appeal, Bauman proclaimed the need for a standard. Judge Ernest J. Zack, after experience with summary judgments gained in a law and motion department, also has viewed the record. Unlike Professor Bauman, who did not propose concrete standards, Zack concluded that legislation was required to limit the oscillations of ostensibly judicial discretion in the application of the California summary judgment statute.

A further study of the mass of decisions reveals that most of the problems exposed by these writers can be resolved into one—the reversals of summary judgments by the appellate courts upon grounds which apparently contravene the express provisions of section 437c of the California Code of Civil Procedure. This article explores some of these decisions and reaches the conclusion that the California Supreme Court itself has not departed from the terms of section 437c. It is also concluded that the confusion in several


9. Id.
courts of appeal is the direct result of the denial of hearings by the supreme court in summary judgment cases of opposite polarity. If that is so, the remedy is clear. In any appropriate case, the supreme court could restate the governing principles and disapprove the decisions which are out of line. If there has been a departure from the directions of section 437c, it does not appear that the enactment of more legislation will be a remedy in the first instance. The judicial remedy is easier and quicker.

Completing our discussion, further suggestions will be set forth, both as to procedure and doctrine, which would help to make the summary judgment procedure consistent and effective for the purposes intended.

The Summary Judgment: An Overview

The appellate decisions reflect a wide range of legal controversies in which the summary judgment procedure has been employed. The

Code of Civil Procedure section 437c is now made applicable by its

terms to all actions and proceedings.\(^{11}\) Most significant is the extension of the procedure to actions for declaratory relief.\(^{12}\)

Although the summary judgment procedure is designed to determine whether there are factual issues to be tried, it also has become a useful method for determining issues of law upon stipulated or undisputed facts.\(^{13}\) Therefore, in evaluating the procedure, one should


13. Where there is no material fact to be tried, the matter is one of law, and the sole question is whether the claim of the moving party is tenable on the undisputed facts. It is the duty of the trial court to hear and determine the questions of law. In Burke Concrete Accessories, Inc. v. Superior Court, 8 Cal. App. 3d 773, 775, 87 Cal. Rptr. 619, 620 (1970), each party moved for summary judgment after the facts were stipulated, and the court demed both motions. The court was ordered upon remand of the case to determine the issue for one party or the other. See also General Motors Corp. v. City of Los Angeles, 5 Cal. 2d 229, 486 P.2d 163, 95 Cal. Rptr. 635 (1971), appeal dismissed, 404 U.S. 1008 (1972); Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 582, 588, 394 P.2d 548, 552, 39 Cal. Rptr. 708, 712 (1964);
not hastily conclude that reversals on appeal always are occasioned by
the trial court's failure to apply the statute properly. The reversal
has frequently rested upon important questions of law, many of them
questions of first impression. 14

The procedure has frequently been used to decide whether a
matter is res judicata, 15 whether a statute is unconstitutional, 16 or
whether an action is barred by the statutes of limitation. 17 In addition,
where the identity of a party charged, or his connection with the
circumstances upon which the cause of action is based is the question,
a motion for summary judgment has been effective to release one erro-
neously sued. 18

National Exhibition Co. v. City & County of San Francisco, 24 Cal. App. 3d 1, 100
Cal. Rptr. 757 (1972) (effect of ticket tax on rights of lessee of Candlestick Park);
Welf. & Inst'ns Code section 13700, relative to attendant care payments); Flournoy v.
State, 275 Cal. App. 2d 806, 80 Cal. Rptr. 485 (1969) (liability of state for concealed
hazard, icy bridge); Exchequer Acceptance Corp. v. Alexander, 271 Cal. App. 2d 1, 13,
76 Cal. Rptr. 328, 335 (1969) (where there are issues of law only, it is the duty of the
court to determine those issues); Jones-Hamilton Co. v. Franchise Tax Bd., 268 Cal.
App. 2d 343, 346, 73 Cal. Rptr. 896, 898 (1968) (constitutional validity of prepay-
ment provision in franchise tax law, all facts being agreed upon); McKay v. Riverside
County, 175 Cal. App. 2d 247, 345 P.2d 949 (1959) (where the sole question is
whether a cause of action is stated, it is not technically a summary judgment procedure,
but a question of law that can be raised at any time); Fidelity & Deposit Co. v.
Claude Fisher Co., 161 Cal. App. 2d 431, 327 P.2d 78 (1958); Dawson v. Rash,

(liability on the part of one who sold liquor to an intoxicated person, who thereafter
injured a person by drunk driving); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d
561, 70 Cal. Rptr. 97 (1968) (abolishing the social guest doctrine in relation to land
use and occupation); Desny v. Wilder, 46 Cal. 2d 715, 299 P.2d 257 (1956) (right to
recover for reasonable value of plaintiff's story used in a photoplay by defendant);
allegedly occasioned by explosion of a shell left by the National Guard on a public
firing range); Cox v. State, 3 Cal. App. 3d 301, 82 Cal. Rptr. 896 (1970) (state re-
sponsibility, damages from flood control project); Loveland v. City of Oakland, 69
Cal. App. 2d 399, 159 P.2d 70 (1945) (pension rights of a fireman's widow,
divorced, and then remarried).

15. E.g., Dryer v. Dryer, 231 Cal. App. 2d 441, 446, 41 Cal. Rptr. 839, 842
(1965); Smith v. City of Los Angeles, 190 Cal. App. 2d 112, 11 Cal. Rptr. 898
(1961).

(Cal. Welf. & Inst'ns Code section 13700 unconstitutional); Jones-Hamilton Co. v.
Franchise Tax Bd., 268 Cal. App. 2d 343, 73 Cal. Rptr. 896 (1968) (prepayment pro-
vision in franchise tax challenged by summary judgment procedure).

17 E.g., Wilson v. Bittick, 63 Cal. 2d 30, 403 P.2d 159, 45 Cal. Rptr. 31
(1965); Hopper v. Allen, 266 Cal. App. 2d 797, 72 Cal. Rptr. 435 (1968); Wilson v.

The California procedure also permits partial summary judgments. The judge may, by order, determine some of the issues and leave the remaining issues for determination at trial. The partial summary judgment can be a useful tool in judicial administration. Whereas other pretrial procedures define the controverted contents of the parties, the partial summary judgment refines the matter further by defining those issues upon which there is an evidentiary conflict. Section 437c requires that the final judgment shall “award judgment as established by the proceedings herein provided for.” This apparently negates the power of a trial court to disregard the partial summary judgment in later proceedings.

General Evidentiary Considerations

Although the language of the statute refers only to affidavits, the determination of a motion for summary judgment additionally may be predicated on other forms of evidence and evidentiary presump-

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(1971) (summary judgment for defendant, upon a showing it had no ownership or control of truck which allegedly injured plaintiff); Roman Catholic Archbishop v. Superior Court, 15 Cal. App. 3d 405, 93 Cal. Rptr. 338 (1971) (defendant who claimed damages for failure of a Catholic order in Switzerland to deliver a dog purchased by him, sought recovery from the archbishop of San Francisco on a alter ego theory); Chitwood v. County of Los Angeles, 14 Cal. App. 3d 522, 92 Cal. Rptr. 441 (1971) (county named defendant instead of Los Angeles County Flood Control District, the separate chargeable entity); Avey v. County of Santa Clara, 257 Cal. App. 2d 708, 65 Cal. Rptr. 181 (1968) (public agency not chargeable with traffic condition at site of injury); Knudsen v. Faubus, 199 Cal. App. 2d 659, 19 Cal. Rptr. 17 (1962) (potential liability defeated by showing that defendant's ownership of automobile was legally transferred prior to event); Gorham v. Taylor, 176 Cal. App. 2d 600, 1 Cal. Rptr. 546 (1959).

19. "If it appears that such defense applies only to a part of the plaintiff's claim, or that a good cause of action does not exist as to a part of the plaintiff's claim, or that any part of a claim is admitted or any part of a defense is conceded, the court shall, by order, so declare, and the claim or defense shall be deemed established as to so much thereof as is by such order declared and the cause of action may be severed accordingly, and the action may proceed as to the issues remaining between the parties. No judgment shall be entered prior to the termination of such action but the judgment in such action shall, in addition to any matters determined in such action, award judgment as established by the proceedings herein provided for. A judgment entered under this section is an appealable judgment as in other cases." CAL. CODE CIV. PROC. § 437c (West 1973). See, e.g., General Motors Corp. v. City of Los Angeles, 5 Cal. 3d 229, 486 P.2d 163, 95 Cal. Rptr. 635 (1971) (in a suit to recover taxes, the supreme court reversed a summary judgment, but ordered that a partial summary judgment be entered as to certain items); Taliaferro v. Taliaferro, 154 Cal. App. 2d 495, 316 P.2d 393 (1957); Murphy v. Kelley, 137 Cal. App. 2d 21, 32, 289 P.2d 565, 571 (1955) (entitled to recover personal property, although issue of damages was to be tried); Lee v. DeForest, 22 Cal. App. 2d 351, 71 P.2d 285 (1937) (segregate portions of claim barred by statute of limitations).
tions. These include admissions,\textsuperscript{20} depositions,\textsuperscript{21} requests for admissions,\textsuperscript{22} responses to interrogatories,\textsuperscript{23} transcripts of a previous trial\textsuperscript{24} and matters subject to judicial notice.\textsuperscript{25} The presentation of oral testimony at the hearing on the motion is disapproved.\textsuperscript{28}

It has been customary for the affidavit to carry the self-serving declaration that the affiant, if sworn as a witness, could testify competently to that which is set forth. Compliance with section 437c, however, is determined by the nature of the affiant's testimony\textsuperscript{27} Thus, he must state evidentiary facts within his personal knowledge. Statements that he has such evidence,\textsuperscript{28} believes such evidence exists,\textsuperscript{29} or that he will show certain facts by undisclosed evidence\textsuperscript{30} are insufficient. Nor may a party present evidence which would not be receivable at trial.\textsuperscript{31}

Affidavits from other actions\textsuperscript{32} or previous motions are acceptable.\textsuperscript{33} While a party is precluded by section 437c from using his


\textsuperscript{29} Avey v. County of Santa Clara, 257 Cal. App. 2d 708, 713, 65 Cal. Rptr. 181, 184 (1968).


\textsuperscript{33} Truslow v. Woodruff, 252 Cal. App. 2d 158, 165, 60 Cal. Rptr. 304, 308 (1967).
own pleadings as an affidavit, he may rely on those of his adversary to establish necessary facts.

The Affiant

As a general rule, the affiant may state only those evidentiary facts within his personal knowledge. However, Code of Civil Procedure section 437c provides:

When the party resisting the motion appears in a representative capacity, such as a trustee, guardian, executor, administrator, or receiver, then the affidavit in opposition by such representative may be made upon his information and belief.

While the code recognizes an exception to the requirement of personal knowledge for certain persons acting in a representative capacity, use of the exception is limited to the party resisting the summary judgment motion. As such, it has been of little importance in the reported decisions.

Although he represents his client, an attorney does not come within the exception. Affidavits filed by attorneys made upon information and belief are insufficient to raise a triable issue and are usually rejected as hearsay. Attorneys' affidavits have been successfully employed to bring before the court documents, judicial records, or other matters of which judicial notice may be taken.

34. Slobojan v. Western Travelers Life Inc. Co., 70 Cal. 2d 432, 437, 450 P.2d 271, 274, 74 Cal. Rptr. 895, 898 (1969). In Coyne v. Krempels, 36 Cal. 2d 257, 262, 223 P.2d 244, 247 (1950), the court stated that if one might use his own pleading, section 437c was nugatory.


41. Stafford v. Ware, 187 Cal. App. 2d 227, 228, 9 Cal. Rptr. 706, 707 (1960) (attorney's affidavit insufficient to raise any factual issue, but is sufficient to indicate
Of course, where the attorney has personal knowledge of the facts stated, his affidavit is acceptable.\textsuperscript{42}

There is no prohibition on using the affidavits of expert witnesses provided the general statutory requirements are met. Thus, the expert's competency must be established and his testimony must be based on facts personally observed or supported by the evidence.\textsuperscript{43}

When expert testimony is offered by one party, the court should afford the other a full opportunity to produce affidavits of experts in opposition.

\textbf{The Affidavit: Common Errors}

Frequently, motions for summary judgment have been denied because the litigants have failed to observe basic rules. A cause thus has been sent on to trial because affidavits failed to support all the essential elements of a cause of action or defense.\textsuperscript{44} Parties may

\begin{itemize}
  \item a former judgment, which could be considered as res judicata); Newport v. City of Los Angeles, 184 Cal. App. 2d 229, 234, 7 Cal. Rptr. 497, 501 (1960); cf. Jordan v. Canale Foods, Inc., 15 Cal. App. 3d 634, 637, 93 Cal. Rptr. 348, 350 (1971).
\end{itemize}
mistakenly think that if business records do not show a transaction, such omission supports the contention that the transaction did not occur.\textsuperscript{46} Similarly, a defendant may move hastily for summary judgment when his adversary’s personal answers to interrogatories reveal an ignorance of essential facts. Yet these facts may be within the personal knowledge of others.\textsuperscript{46} Also, an affidavit may destroy the claim of the very party producing it by showing facts or knowledge in derogation of the cause or defense.\textsuperscript{47}

The requirements of the Evidence Code are operative in summary judgment proceedings. Most notably, hearsay evidence in the affidavit is inadmissible.\textsuperscript{48} The presence of some hearsay in the moving party’s affidavit will not bar his victory if, disregarding the hearsay, competent evidence is tendered on all material issues.\textsuperscript{49} However, where an opposing party fails to file affidavits, he does not waive any deficiencies in the affidavits of the movant.\textsuperscript{50}

It is in meeting section 437c’s express evidentiary requirements for affidavits that the greatest difficulty is encountered. Only facts are acceptable. The affiants’ “conclusions, personal opinions and beliefs” are insufficient.\textsuperscript{51} Legal conclusions are inadmissible.\textsuperscript{52} An

\begin{itemize}
  \item 47. In Jordan v. City of Long Beach, 17 Cal. App. 3d 878, 95 Cal. Rptr. 246 (1971), the city showed that an alleged dangerous condition did not exist on its property, but a photograph submitted with the affidavit showed the condition to be on adjacent property. The city might have a duty to protect pedestrians from dangerous conditions on that property. In Romero v. County of Santa Clara, 3 Cal. App. 3d 700, 705, 83 Cal. Rptr. 758, 761 (1970), the plaintiff sought to assert an estoppel, but by affirmatively showing that defendant had relied upon the advice of an attorney, the plaintiff destroyed the basis for estoppel. In Weir v. Snow, 210 Cal. App. 2d 283, 26 Cal. Rptr. 868 (1962), the plaintiff’s attorney’s affidavit showed knowledge which started the statute of limitations running against his claim. Richter v. United Cal. Theatres, Inc., 177 Cal. App. 2d 126, 1 Cal. Rptr. 895 (1960) (plaintiff’s affidavit raised questions of the existence of the contract alleged in the complaint).
  \item 51. Colvig v. KFSO, 224 Cal. App. 2d 357, 36 Cal. Rptr. 701 (1964); Kramer
answering affidavit which is ambiguous, equivocal or conclusory will not serve to raise an issue; nor will allegations on information and belief concerning issues on which the affiant is chargeable with knowledge.\textsuperscript{53}

The difficulty is in distinguishing between facts and "ultimate facts" or conclusions. By definition a "conclusion" is the inference or deduction drawn from other basic facts. In pleading, a conclusion is rejected because it frequently fails to reveal the premises upon which it is based, making it difficult to controvert or admit. In evidence it is rejected both as a usurpation of the province of the trier of fact, and because it denies the adversary the chance to contest the facts upon which it is based. The same reasoning underlies the requirement of section 437c that the facts be stated with particularity.

Conceding that the distinction is not always easy to make, there is no lack of precedent or agreement in respect to many often encountered conclusions.\textsuperscript{54} An impediment to resolution of the problem is the practice of trial attorneys whereby witnesses are allowed without objection to testify using "popular conclusions."\textsuperscript{55} Allowing such statements of a witness that he was the "owner" of certain property, that he paid a certain bill, that it was "agreed," or that Y was his part-

\textsuperscript{53} See generally 32 C.J.S. Evidence § 453 et seq. (1964). Some common conclusions relate to agency, ownership, partnership, existence or sufficiency of title, consummation of sale, delivery of a deed, abandonment of rights, validity of an instrument, authority of an agent, boundaries, duty, excuse, indebtedness, payment, residence, whether or upon what conditions a contract was made, the effect, meaning or purpose of a document, and that a gift was made. See also 32 C.J.S. Evidence § 546 (1964) (in reference to negative statements).

ner, may expedite the trial process when the issues which they address are not material, but carried-over to affidavits, may pose serious problems of proof. On a motion for summary judgment there is no right to waive objections to incompetent evidence.\(^\text{56}\)

In the summary judgment procedure the moving party confronted with a conclusory affidavit should make his objections both orally and in writing. His adversary should request the opportunity to provide, if he can, any missing but necessary particulars in supplementary affidavits.

Such liberality should be more restricted when the plaintiff is the movant, as the code prescribes that he establish by competent affidavit every fact he is required to prove.\(^\text{57}\) Since he initiated the lawsuit, it is expected that he has the necessary evidence to support his allegations and the evidentiary details to support his “ultimate facts.”

Contrary to the rule announced in many of the early cases, it now is established that for a defendant to prevail upon a motion, it is only necessary that he establish the nonexistence of one essential element of the plaintiff’s cause. It is not necessary that he successfully contest all of the elements.\(^\text{58}\)

While it is established that a solely conclusory affidavit of the resisting party is insufficient to raise triable issues of fact, the liberality of some appellate decisions has tended, to a degree, toward abrogation of the code requirement. The patchwork of precedent, varying from appellate district to appellate district, and even between divisions in the same district, calls for close scrutiny.

**Affidavits of the Resisting Party**

The intent of section 437c clearly expressed in its text is that the same rule applies to both the resisting and the moving party: the affidavits shall set forth facts with particularity and shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto.

The opinion has been expressed by Judge Zack that the rule has become a “judicial casualty” when applied to the resisting party, due

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57. CAL. CODE CIV. PROC. § 437c (West 1973).
to the course of decisions in some courts of appeal. 59 Statements of conclusions of law, conclusions of fact and hearsay have been held sufficient to counter the moving party's affidavits. What perhaps is involved is the resolution of a claimed conflict between the evidentiary requirements of the code and a presumed judicial discretion.

Code of Civil Procedure section 437C reads:
the answer may be stricken out or the complaint may be dismissed and judgment may be entered, in the discretion of the court, unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. 60

Considered alone, these clauses indicate that the summary judgment might be denied, in the exercise of discretion, upon a showing of any sort which would impel the judge to send the cause on for trial. A considerable diversity of decisions in the appellate courts leads one to infer that this has indeed been the approach of some jurists.

The difficulty is that the "facts" upon which the decision is to be made are those required to be presented in affidavits. Further, the "facts" must be such that the affiant might competently testify to them if called as a witness at the trial. Liberal construction of such requirements cannot justify noncompliance with them.

The present provisions of Code of Civil Procedure section 437C regarding evidentiary requirements were derived from the former section 831(d)4. During the ten years before section 437C made the summary judgment procedure available in superior courts, the appellate department of the superior court was the court of last resort for municipal court appeals. In two decisions, the appellate department in Los Angeles County superior court established the principles concerning summary judgments.

In the first decision, Cowan Oil & Refining Co v Miley Petroleum Corp., 61 the court rejected the contention that the standard to be used in granting summary judgment should be based on cases dealing with "speaking motions" to strike sham answers or motions for judgment on the pleadings:

None of these cases, however, involve any such provision as that found in section 831d. That section provides an entirely new procedure, as far as the codes of our state are concerned, the purpose of which is to eliminate all issues which have no basis in

59. Zack, supra note 7, at 466.
60. CAL. CODE CIV. PROC. § 437C (West 1973) (emphasis added).
fact, no matter how well they may be pleaded in form. Under it, an answer may be stricken out, even though a perfect defense may be stated therein, unless the defendant by his affidavits shows facts to substantiate the defense.\textsuperscript{62}

Later, under section 437c, in \textit{Gardenswartz v Equitable Life Assurance Society},\textsuperscript{63} the court elaborated the rule:

Section 437c requires that affidavits presented on a motion for summary judgment, whether by plaintiff or defendant, set forth the facts \textit{"with particularity"} and show that such facts are within the personal knowledge of the affiant and that he can \textit{competently} testify thereto if sworn as a witness. Neither conclusions of law, nor conclusions of fact, nor so-called ultimate facts are sufficient to satisfy the requirements of this section. It requires the presentation in the affidavits of \textit{evidentiary facts} sufficient to show a cause of action or a defense, as the case may be.\textsuperscript{64}

Further refinement came in \textit{Krieger v Dennie}.\textsuperscript{65} There the court made it clear that it was not the function of the trial judge to determine wherein, amidst conflicting statements, lies the truth. The matter was not within the arbitrary discretion of the judge. If the jury's belief of evidence given by a competent witness could defeat plaintiff's claim at trial, his motion must be denied.\textsuperscript{66} (At this time, the defendant could not move for summary judgment.)

Later cases in the District Court of Appeal, Second District, took no issue with these pronouncements in applying section 437c.\textsuperscript{67} But in a subsequent case in that district, a summary judgment granted in the superior court became subject to the facile pen of Mr. Justice Moore. In \textit{McComsey v. Leaf},\textsuperscript{68} an action for repayment of a loan, the opposing affidavits did not dispute the payment of $7255 by the plaintiff to the defendant. The sum was used by defendant with plaintiff's evident approbation to build and equip a photographic studio. Thereafter the defendant married plaintiff's daughter. Later he was sued for divorce, and the plaintiff instituted the action to regain the sum. The defendant asserted that the advance was a gift in consideration of the marriage. In his affidavit he incidentally used conclusory terms such as \textit{gift}.

\textsuperscript{62} \textit{Id.} at 778, 295 P at 506.
\textsuperscript{64} \textit{Id.} at 754, 68 P.2d at 326.
\textsuperscript{66} \textit{Id.} at 780, 10 P.2d at 821.
\textsuperscript{68} 36 Cal. App. 2d 132, 97 P.2d 242 (1939).
It appears obvious that under the terms of section 437c the nature of the transaction was a disputed fact to be tried. The court restated the principle that the plaintiff's affidavit must be strictly construed, but added: "'An affidavit of defense, on the contrary, is to be liberally construed, and, if its terms reasonably warrant the inference that the defendant has a substantial defense to plaintiff's claim, summary judgment ought not to be entered.'"\(^{69}\) The requirements of Cowan and Gardenswartz were swept aside with a statement that their conclusions were not supported by the cases cited therein.

The dismissal of the Cowan and Gardenswartz statements regarding evidentiary requirements was not justified, however, since they were based squarely on the statute rather than case law. The quotation or citation of authorities therein was to show that the summary judgment procedure, novel to California, was known in other states. They were also used to support the constitutionality of section 437c, since issue, and not factual, determination was involved. Having mutilated the evidentiary requirements of the statute, the court held that there was compliance with its terms in this case. The nature of the money advance was in dispute, and this question required that the cause be tried. Thus, the actual holding of McComsey is that where the opposing evidentiary affidavits disclose a conflict in testimony which would be competent at trial, the inclusion of some conclusions of fact, law or ultimate fact in an affidavit does not vitiate it.

The court made another statement which seems to have generated erroneous conceptions concerning the statutory requirements:

Upon a consideration of these authorities and the statute, the better rule appears to be that to warrant a summary judgment there "must be a failure on the part of defendant to satisfy the court that there is any basis for his denial or any truth in his defense" and that unless the defendant does so fail, the case should proceed to a deliberate trial in the usual course.\(^{70}\)

Standing alone, this statement is not repugnant to the requirement of section 437c that such factors must be determined by the evidentiary statements in defendant's opposing affidavits.\(^{71}\) But in

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69. *Id.* at 140, 97 P.2d at 246-47, *quoting from* Wyatt v. Madden, 32 F.2d 838, 839 (D.C. Cir. 1929).


71. The dissent of Mr. Justice Marshall McComb perhaps suggests that there was
announcing "a better rule" than that stated in the statute, the court 
failed to heed another established principle: "In construing the statu-
tory provisions a court is not authorized to insert qualifying pro-
visions not included and may not rewrite the statute to conform to an 
assumed intention which does not appear from its language. The 
court is limited to the intention expressed."\textsuperscript{72}

Faced with a novel procedure which struck at the traditional 
roots of gamesmanship of the lawsuit, this appellate court sought to 
limit section 437c, substituting, or perhaps confusing, the wide latitude 
previously given the responding party in resisting a "speaking motion 
to strike" for the statutory evidentiary requirement of section 437c.\textsuperscript{78} 
The ghost of \textit{McComsey} still haunts some appellate and trial courts. 
An analysis of supreme court cases, however, indicates that the evi-
dentiary requirements of the statute have not been abrogated, and 
that these requirements apply equally to both the responding and 
the moving affidavits.

\textbf{Evidentiary Requirements Have Not Been 
Abrogated by the Supreme Court}

Referring to the evidentiary showing of the defendant, the supreme 
court in \textit{Eagle Oil \& Refining Co. v. Prentice}\textsuperscript{74} stated:

As we have seen it is not necessary that the averments be 
rigidly restricted to evidentiary matter. It may be that \textit{some} of 
the allegations or statements are somewhat in the nature of con-
clusions, but we are satisfied that \textit{facts within the knowledge of 
the affiants and to which they are competent to testify, are set 
forth with sufficient particularity}, and from which it appears that 
a bona fide defense to the action exists.\textsuperscript{75}

\textsuperscript{72} People v. One 1940 Ford V-8 Coupe, 36 Cal. 2d 471, 475, 224 P.2d 677, 
680 (1950).

\textsuperscript{73} Upon motions for judgment on the pleadings, if the \textit{answer} fairly construed 
suggests that the defendant may have a good defense, a motion for judgment should 
The court must treat the defendant's allegations as true, and must disregard plaintiff's 
allegations, whether there is a direct and specific denial or indirect denial by affirma-
tive allegation of contrary facts. MacIsaac v. Pozzo, 26 Cal. 2d 809, 161 P.2d 449 
(1945).

\textsuperscript{74} 19 Cal. 2d 553, 122 P.2d 264 (1942).

\textsuperscript{75} \textit{Id.} at 561, 122 P.2d at 268 (emphasis added).
A careful reading of the entire decision reveals that the case does not hold that evidentiary facts are not required in a responding affidavit. It does hold that, if that condition is met, the inclusion of some conclusions of fact or of law do not vitiate the response.

In *Coyne v Krempels,* the court stated unequivocally that:

Summary judgment for plaintiff is proper only if the affidavits in support of his motion state facts that, if proved, would be sufficient to sustain judgment in his favor, and defendant does not "by affidavit or affidavits show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact." 

In support the court cited section 437c and *Gardenswartz v Equitable Life Assurance Society,* rejected in *McComsey v Leaf.* The court added:

Since under that section [Cal. Code of Civ Proc. section 437c] "an answer may be stricken out, even though a perfect defense may be stated therein, unless the defendant by his affidavits shows facts to substantiate the defense" a failure to file affidavits showing such facts cannot be remedied by resort to the allegations or denials of a verified answer.

To hold otherwise would render the summary judgment procedure nugatory. In this statement, Chief Justice Traynor cited as authority *Cowan Oil & Refining Co v Miley Petroleum Corp.*, also disapproved of in *McComsey.*

The declaration of *Coyne* was repeated in *Stationers Corp v Dun & Bradstreet, Inc.* but the court added:

The aim of the procedure is to discover, through the media of affidavits, whether the parties possess evidence requiring the weighing procedures of a trial. In examining the sufficiency of affidavits filed in connection with the motion, the affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion.

*Stationers Corp* was a libel action in which summary judgment had been granted to the defendant. The defendant had asserted privilege for its publication of derogatory reports concerning plaintiff's fiscal operations and management, claimed probable cause to be

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76. 36 Cal. 2d 257, 223 P.2d 244 (1950).
77. *Id.* at 261, 223 P.2d at 246 (emphasis added).
79. 36 Cal. 2d at 262-63, 223 P.2d at 247
82. *Id.* at 417, 398 P.2d at 788, 42 Cal. Rptr. at 452.
lieve that the statements furnished to it by certain credit managers were true, and denied actual malice. But it appeared that the defendant had refused to disclose the names of its informants to plaintiffs. The supreme court determined that the defendant had thus reduced its assertions of good faith and absence of malice to an *ipse dixit* which was not probative and would not support the proof of probable cause necessary to prevail on the motion. In fact, the refusal to provide such information justified an inference in favor of appellants that there was an absence of good faith, possibly bearing upon the issue of lack of probable cause.

In *Towne Development Co. v. Lee*, the rule was repeated:

A summary judgment is proper only if (1) the affidavits in support of the moving party are sufficient, strictly construed, to sustain a judgment in his favor and (2) the affidavits filed by the opponent, liberally construed, do not show facts deemed by the judge hearing the motion sufficient to present a triable issue.

Such facts under section 437c must be those to which the affiant can competently testify.

In *Desny v. Wilder*, the court stated:

> The better rule is that the facts alleged in the affidavits of the party against whom the motion is made must be accepted as true, and that such affidavits to be sufficient need not necessarily be composed wholly of strictly evidentiary facts.

The first part of this rule presupposes that there are facts alleged in the affidavits; the second indicates that the affidavits need not be composed wholly of evidentiary facts. That is, there must be evidentiary facts sufficient to controvert those properly stated in the moving affidavits. Otherwise, what is the issue to be tried?

Statements of the general rules in other cases remain consistent on evidentiary requirements. There is no indication that dicta regarding liberal construction of an opposing party's proof is meant to abrogate the long-established rule of *Coyne*.

Since the rights of both parties in a lawsuit are coequal, the

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83. 63 Cal. 2d 147, 403 P.2d 724, 45 Cal. Rptr. 316 (1965).
84. Id. at 148, 403 P.2d at 725, 45 Cal. Rptr. at 317
85. 46 Cal. 2d 715, 725, 299 P.2d 257, 261 (1956). This was an unconscious transfer of the rule applicable to motions for judgment on the pleadings. Cf. MacIsaac v. Pozzo, 26 Cal. 2d 809, 161 P.2d 449 (1945).
86. 46 Cal. 2d at 725, 299 P.2d at 26.
application of the evidentiary requirements, specified in Code of Civil Procedure section 437c, to both the moving and the resisting party is required by justice. The cases herein reviewed indicate that the supreme court decisions have not departed from the statute. The need for reaffirmation of the rule of *Eagle Oil & Refining Co. v Prentice*\(^{88}\) arises because the court has denied rehearing to many diverse and even opposing decisions of the appellate courts on the point at issue. Despite the rule that denial of a hearing is not necessarily equivalent to an affirmance, it is frequently so regarded.

It is hoped that the appellate courts will note and be guided by the frequent citation of *Snider v Snider*\(^{89}\) in recent decisions on the supreme court. The doctrine of that case is clearly that the language of section 437c applies to both parties. It holds that the test is whether the affidavit sets forth facts with particularly, and within the personal knowledge of the affiant. Liberal construction does not negative the requirement that the evidence in the affidavits be competent.\(^{90}\)

### Intrinsc Issues Demanding Trial

Judge Zack accurately observed that confusion and uncertainty in summary judgment law have been produced by the theory of some decisions that there are some intrinsic issues of fact which preclude application of the summary judgment procedure.\(^{91}\) Cases and commentators have at varying times proclaimed that negligence actions, serious or complex questions of law or fact, matters involving credibility of the affiants, and the interpretation of contracts cannot be resolved by summary judgment.

While in certain situations there may be some basis for these broad conclusions, such blanket pronouncements only serve to perpetuate the confusion. An examination of the basic doctrines involved and the questions arising on the motions can illuminate the operation of the summary judgment procedure in these areas.

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88. 19 Cal. 2d 553, 122 P.2d 264 (1942).
Negligence

In addition to issues of fact concerning what the parties did or did not do, negligence cases involve the standard of care required of the reasonable man under the particular facts of the case. Determining this standard (where not a matter of law), and its application to the conduct of the parties, is the function of the trier of fact. Thus, it would appear that the existence of these triable issues in a negligence case would preclude a full summary judgment.

Some negligence cases, however, do lend themselves to the procedure. When the issue is the identity of the party to be charged, summary judgment may be a proper method to secure dismissal by reason of the facts or by reason of nonresponsibility under the law. If the plaintiff’s own evidence shows that he is chargeable with contributory negligence or assumption of the risk as a matter of law, his opponent may secure judgment.

In any negligence case where the facts are uncontested and only issues of law relative to responsibility remain, the court may decide the motion. For example, in Premo v. Grigg, the court stated that when the existence of duty rests upon the reasonable foreseeability of harm, a jury question is presented unless reasonable minds could not differ. But if the facts are clear, a matter of law is presented. In Premo the court held that an intervening force was a superseding cause of the wrongful death sued on.

On the other hand, in medical malpractice cases, where various persons are responsible for different segments of service in diagnosis, treatment and care of a patient, complex issues as to proximate cause may arise. In this situation, there has been a reluctance to exculpate any single individual in the chain of interrelationships.

98. See Wozniak v. Peninsula Hosp., 1 Cal. App. 3d 716, 82 Cal. Rptr. 84

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Thus, while the general rule remains that due care under the circumstances is an intrinsic factual issue reserved for the trier of fact, it should not be hastily concluded that the mere assertion of negligence is sufficient to raise a triable issue.

**Serious and Complex Questions**

In *McComsey v Leaf*, the court sought, by way of dictum, to limit the scope of the summary judgment procedure. Quoting an out-of-state decision, the court made the unwarranted statement that the summary judgment procedure was never intended to be used in the determination of "serious questions." The amendment to section 437c, making it applicable to all actions and proceedings, provides a partial answer to the charge that "serious questions" were never to be resolved on a motion for summary judgment. But if in fact a judge does have discretion to withhold summary judgment because questions of law or fact are "serious," what is the test? Every case is serious to its litigants.

Although the dictum of *McComsey v Leaf* has been repeated and occasionally acted upon, it has never been sanctioned by the supreme court in considering the appropriateness of the procedure in cases involving "serious" legal questions. Nor does study of the case law establish that there is any legal limitation on the power of the courts to render summary judgment in cases involving complex

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100. "It never could have been, or in justice ought to have been the intention of those who framed our Practice Act and rules thereunder that the decision of such a serious question as this should be flung off on a motion for summary judgment." *Id.* at 137, 97 P.2d at 245.
103. For example, in Simmons v. Civil Ser. Employees Ins. Co., 57 Cal. 2d 381, 369 P.2d 262, 19 Cal. Rptr. 662 (1962), the plaintiff asserted and defendant denied any express or implied representations that a judgment debtor was covered by public liability insurance when he was not. The plaintiff claimed that he had relied on the motor vehicle department records, and that defendant had breached a statutory duty to advise the department of such noncoverage; that in reliance, he had sued and obtained an uncollectible judgment, and was therefore damaged to the extent of his litigation expenses. The court found it necessary to interpret the liability act, but then held that the issues of reliance and damage required trial. *See also* Corwin v. Los Angeles Newspaper Serv. Bureau, Inc., 4 Cal. 3d 842, 484 P.2d 953, 94 Cal. Rptr. 785 (1971) (an anti-trust case); McIvor v. Savage, 220 Cal. App. 2d 128, 33 Cal. Rptr. 740 (1963) (complex facts).
factual issues. The decisions holding such cases for trial often appear to stem from the difficulty of establishing all the necessary facts by affidavits, because of the magnitude of proof.\textsuperscript{104}

Where the legal effects of extensive factual interrelationships have to be assessed, based on considerable documentation, trial and appellate courts have recoiled from the task of determining precise triable issues. Consequently, they may hold that a determinative issue is contingent upon factual determinations which cannot be made upon the motion. Common examples are the issues of whether the aggregate conduct of the parties evidences the formation of a contract,\textsuperscript{105} or whether there are factors which support the exercise of the police power.\textsuperscript{106} Nevertheless, consideration of the cases in which the summary judgment procedure has been employed\textsuperscript{107} shows that serious and complex matters have been considered on motions for summary judgment.\textsuperscript{108}

The existence of issues may be so affected by interdependent facts that the trial or reviewing court is reluctant to unscramble on the basis of affidavits. When these facts are evaluated by a jury, a general verdict may be reached without specification of the details of proof, but upon trial by the court there must be findings of fact and conclusions of law on every facet of the material issues. The determination of whether there are triable issues of fact upon the motion for summary judgment is no less demanding of the judge. Hence, his inclination may be to hold the matter for trial.

Since all issues can be resolved at trial, there has been an assumption that no harm is done if trial is required, even if adequate analysis would show that a moving party is entitled to summary judgment or partial summary judgment. But justice delayed is justice denied. Trial in such instances requires needless expenditure of time and money by the litigant entitled to judgment and by

\textsuperscript{107} See cases cited note 10 \textit{supra}.
\textsuperscript{108} E.g., Spencer v. Hibernia Bank, 186 Cal. App. 2d 702, 9 Cal. Rptr. 867 (1960), \textit{cert. denied}, 368 U.S. 2 (1961) (suit alleging interest in a bank by successors in interest of ancestors who claimed to have been members of the bank's predecessor). See also cases cited notes 10 & 14 \textit{supra}.
the public which must underwrite the conduct of a trial. The judge thus has an affirmative duty to decide the motion and to grant a summary judgment if the moving party is entitled to it.\textsuperscript{109}

**Interpretation of Contracts**

In contract actions, the primary judicial doctrine is that the mutual intention of the parties is to be given effect. The written contract formalizes the expression of that intention; it provides the working basis for the relationship of the parties; it also inhibits any attempted equivocation or repudiation of the contract obligations.

A dispute over the existence or meaning of a contract involves questions both of fact and of law. But the duty of determining the legal effect of a written instrument is cast in the first instance upon the trial court.\textsuperscript{110} Thus, if the court determines that the instruments before it do not form a valid contract, the motion for summary judgment may be disposed of as a matter of law. For example, the question of whether two letters constituted an agreement for sale has been held to be a matter of law, not of fact.\textsuperscript{111} Similarly, summary judgments have been upheld on appeal where the trial court was required to determine whether a life insurance contract was in effect at the time of death\textsuperscript{112} or whether there existed a contract to create a trust.\textsuperscript{113} In addition, if the contract sued upon is illegal, the court may give summary judgment for the defendant as a matter of law\textsuperscript{114}.

\textsuperscript{109} Bank of America v. Superior Court, 4 Cal. App. 3d 435, 84 Cal. Rptr. 421 (1970); see Burke Concrete Accessories, Inc. v. Superior Court, 8 Cal. App. 3d 773, 87 Cal. Rptr. 619 (1970), in which both parties moved for summary judgment, and both motions were denied. Under a writ of mandate, the cause was remanded with instructions to decide for one or the other.


The question of whether or not a valid contract exists may also present issues of fact. For example, situations where a contract is attacked for failure of consideration, or where a contract was allegedly induced by fraud, involve questions of law and of fact. Even claims such as these must be supported by competent affidavits. If the evidentiary support is not offered, the court may properly enter summary judgment on the contract.115

The greatest difficulties arise where there is a dispute as to the terms of a contract. One starts with the proposition that where there is no conflict over the terms of a contract and where there is no ambiguity as to meaning, the effect of the contract is a matter of law for the court to decide.116 By way of contrast, where the contractual relations of the parties have been established by a long course of dealing between them, the terms of the contract can only be established by trial.117 In any event, where the terms of the contract are not in dispute and the parties have stipulated to the


117. California Lettuce Growers v. Union Sugar Co., 45 Cal. 2d 474, 289 P.2d
applicable facts, the court has an absolute duty to grant a summary judgment.\textsuperscript{118}

In \textit{Masterson v Sine},\textsuperscript{119} Chief Justice Traynor states the rule that when the parties have agreed to a written contract as the complete and final embodiment of the terms of the agreement, parol evidence cannot be used to add to or vary its terms. When only part of the agreement is so integrated, the rule applies to that part, but parol evidence is admissible to establish the terms of the balance of the contract. Thus, the crucial issue is whether, as a matter of law, there has been such integration, that is, whether the parties intended the document to be the exclusive embodiment of their agreement.\textsuperscript{120} By the declarations contained therein, the document itself may help to resolve these questions.\textsuperscript{121}

If there is a collateral oral agreement, not required to be in writing to comply with the Statute of Frauds, it cannot be said that the contract is integrated.\textsuperscript{122} However, since the written contract supersedes prior negotiations, evidence of the prior negotiations may not be used to contradict the written instrument.\textsuperscript{123} Thus, in the absence of fraud or imposition, a party is bound by the instrument he signs.\textsuperscript{124} Parol evidence is not admissible to show the parties meant something different. In the event there is an ambiguity of meaning, however, parol evidence is admissible.

A careful analysis of the appellate decisions leads one to reject the premise that the power to grant summary judgment in contract interpretation cases is precluded on the assumption that intrinsic issues of fact always exist. For example, in \textit{Walsh v Walsh},\textsuperscript{125} a property settlement agreement provided for support of the "child or children" of the parties. An adopted son who had reached his majority sued for

\textsuperscript{118} Burke Concrete Accessories, Inc. v. Superior Court, 8 Cal. App. 3d 773, 87 Cal. Rptr. 619 (1970).

\textsuperscript{119} 68 Cal. 2d 222, 436 P.2d 561, 65 Cal. Rptr. 545 (1968).

\textsuperscript{120} Larsen v. Johannes, 7 Cal. App. 3d 491, 506, 86 Cal. Rptr. 744, 753 (1970).

\textsuperscript{121} See Larsen v. Johannes, 7 Cal. App. 3d 491, 86 Cal. Rptr. 744 (1970).


\textsuperscript{123} Buffalo Arms, Inc. v. Remler Co., 179 Cal. App. 2d 700, 4 Cal. Rptr. 103 (1960).


\textsuperscript{125} 18 Cal. 2d 439, 116 P.2d 62 (1941).
continuance of support. Upon a motion for summary judgment, it was held that an issue was raised as to whether the words “child or children” limited payments under the agreement to the minority of the beneficiary or whether they were words of description which merely identified the beneficiary. It was held that the parties should have a full opportunity upon trial to show by parol the meaning intended. In reaching this decision, the supreme court stated:

Thus, in passing upon a motion for summary judgment, the primary duty of the trial court is to decide whether there is an issue of fact to be tried. If it finds one, it is then powerless to proceed further, but must allow such issue to be tried by a jury unless a jury trial is waived.\footnote{126}

Under the facts of the case, the phrase “powerless to proceed” rested upon the tendering of opposing interpretations of the language in question. Contrary to Judge Zack's position, it is not here concluded that summary judgment is prohibited to a party who by affidavit offers evidence to resolve the ambiguity, where the opponent takes no issue with the interpretation or offers none on his behalf.\footnote{127} Thus, in \textit{Wilson v Wilson},\footnote{128} the defendant moved for summary judgment. Plaintiff likewise moved for summary judgment and tendered a construction of the property settlement agreement which was not controverted. While the court indicated that counsel had agreed during oral argument that there was no material issue of fact, there is no hint that the issue as to consideration ipso facto required trial. The court held as a matter of law that the legal obligation for the support of minors provided the consideration and affirmed a summary judgment for the plaintiff.

Likewise, in \textit{Hardy v. Hardy},\footnote{129} the issue also was the proper construction of a property settlement agreement. It was stipulated that if the defendant's interpretation of the terms of the agreement was correct, summary judgment should be granted to him. The defendant set forth pertinent provisions of the agreement in his affidavit and averred that the explicit terms of the agreement set forth the intention of the parties. The plaintiff's affidavit referred to a deposition to establish the circumstances concerning the agreement and offered a construction of the agreement, which if adopted, would have made it void for uncertainty. Despite this attempt to raise a triable issue, the court found the terms of the agreement to be explicit and upheld it.

\footnote{126}{\textit{Id.} at 441, 116 P.2d at 64.}
\footnote{127}{Zack, \textit{supra} note 7, at 455.}
\footnote{128}{54 Cal. 2d 264, 352 P.2d 725, 5 Cal. Rptr. 317 (1960).}
\footnote{129}{23 Cal. 2d 244, 143 P.2d 701 (1943).}
Thus, the mere existence of a conflict in the interpretation of a contract does not ipso facto leave the court "powerless to proceed."

Since the trial court has the duty of interpreting a contract, this inspection alone may indicate important ambiguities that must be resolved before judgment can be given.\textsuperscript{130} The parties themselves may not have perceived the lacunae at the time of the hearing on the motion and may not have covered the matter in their affidavits. Furthermore, where the trial court makes an interpretation as a matter of law, the appellate court asserts the right to make an independent construction.\textsuperscript{131} Thus, there are instances in which the appellate court, in reversing a summary judgment, has postulated factual issues which have passed unperceived by the litigants and the trial court.\textsuperscript{132}

For example, in \textit{Crescenta Valley Moose Lodge No. 808 v Bunt},\textsuperscript{133} a suit was brought for specific performance of a contract to purchase realty. The deposit receipt relied upon made the transaction "subject to approval of all other licensing agencies." The summary judgment was reversed, since this phrase was ambiguous, both as to the identity of the agencies, and as to the party for whose benefit the clause was inserted.

In \textit{Blaustein v Burton},\textsuperscript{134} the Richard Burtons were sued by a producer for breach of contract. The producer claimed a right to compensation for use of his idea in the Burton's production of \textit{The Taming of the Shrew}.\textsuperscript{135} Upon defendants' motion for summary judgment, both parties filed depositions and affidavits. The summary judgment for defendants was reversed on appeal; the court held that there was a triable dispute as to the contract, and since both of the opposing interpretations were reasonable, trial was required. Likewise, there was a dispute as to whether the "idea" had been disclosed

\textsuperscript{130} See D.E. Sanford Co. v. Cory Glass Coffee Brewer Co., 85 Cal. App. 2d 724, 194 P.2d 127 (1948), wherein the court delineated the issues that had to be met, and held that they had not been.

\textsuperscript{131} E.g., Norlen Inv. Co. v. Minskoff, 251 Cal. App. 2d 534, 59 Cal. Rptr. 484 (1967).


\textsuperscript{135} Cf. Desny v. Wilder, 46 Cal. 2d 715, 749, 299 P.2d 257, 277 (1956) (a factual issue, rather than one of law, was presented as to whether defendants used plaintiff's story synopsis, or developed one of their own independently).
in confidence, which also presented a triable issue. One commentator maintained that the court did not determine whether there was a triable issue on the affidavits, but held instead that a parol evidence issue is not properly considered upon a motion for summary judgment. This contention is rebutted by a careful reading of the decision itself.

In construing contracts or other documents and in considering the evidentiary matters submitted upon a motion for summary judgment, trial judges have been rebuked for apparently trying the facts, rather than making the sole determination of whether there are issues upon which the conflicting evidentiary assertions must be tried. However, some appellate court decisions appear to reflect the same vice.

It is to be expected that when one of the litigants claims an ambiguity, he will bring it to the attention of the court with an appropriate affidavit. When the court discovers a possible ambiguity which has not been asserted by a party, the matter should be continued to permit the parties to assert their understanding. What is unclear to the court may be perfectly clear to the parties, and the further affidavits may disclose no controversy and hence no triable issue.

One party's unilateral declaration that there is a material ambiguity does not determine the matter. The court must find that the language in question reasonably permits the interpretation claimed to have been the mutual intention of the parties. In any case, one must reject the premise that in the interpretation of contracts, intrinsic issues of fact exist which in all cases negative the power to grant a summary judgment.

Evidence in Control of the Adverse Party

The problems arising when an opposing party is unable to make

138. In Glasband v. Sun State Music Dist., Inc., 265 Cal. App. 2d 413, 71 Cal. Rptr. 482 (1968), the court sent the cause back, with the remark that it did not know what the true facts were. The same approach is indicated in Barnes v. Blue Haven Pools, 1 Cal. App. 3d 123, 81 Cal. Rptr. 444 (1969). The court sent back the cause, stating that on the basis presented the court was "none the wiser" whether the pool was negligent constructed or not. The court apparently reviewed the evidence, rather than simply making a search for issues.
a showing were anticipated by the court in *Gardenswartz v Equitable Life Assurance Society* 139

[T]here might be cases where the court, in the exercise of its discretion, should deny a motion for summary judgment even though the defendant was unable to make a showing as the statute requires. Such a case might be where the facts of the defense were not within the defendant's knowledge and other persons who knew or claimed to know refused to make affidavits to be used in opposition to the motion. 140

Where there are two parties to a transaction, it may be assumed that each has equal knowledge of the facts and can fully respond to the contentions of the other. Is a motion for summary judgment to be denied if there are facts presented by the one party which the other cannot intrinsically controvert? Is there any assurance that upon trial he would have any more or different evidence on the issue? 141

The recent case of *Freidberg v Freidberg* 142 grappled with this problem. In an action to set aside a property settlement agreement on the ground that the husband had failed to make full disclosure of community assets, the wife contended that due to her mental state of complete dependence upon what her husband told her, she had been induced to execute the agreement. Perhaps the dependence could have been controverted by affidavits concerning specific events or courses of conduct, but the court concluded that there could be no summary judgment as to her mental state, since it was entirely locked within her consciousness.

The suggestion conveyed in *Gardenswartz* justifies this position; when the cause moves into an area for which the code section makes no express provision, the discretion of the court is properly exercised in sending the case on for trial. Further support is found in the Code of Civil Procedure section 187 143 Where the code does not point the way, a court may adopt any suitable procedure or mode of proceeding most conformable to the code. 144

On the other hand, in a declaratory relief action filed by a trustee in bankruptcy, the trustee asserted the invalidity of a homestead filed

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143. CAL. CODE CIV. PROC. § 187 (West 1954).
by a wife. Each party filed a motion for summary judgment. The trustee claimed that the wife did not reside in, nor did she occupy, the premises at the time of filing. The wife alleged details of a domestic situation, claiming that she had left home temporarily to protect herself and her children, and that she had returned pursuant to an order to show cause. The trustee contended that he had no personal knowledge of the details of the domestic life of the wife, and that, based on his want of information or belief, he was unable to make a response. This was held to be insufficient, as the trustee had made no showing of his inability to obtain the information. The trustee had failed to show why the husband's affidavit could not have been secured.

The court in *Southern Pacific Co. v. Fish* stated that a party without personal knowledge of the facts should at least present an affidavit by someone who knows the facts of his own knowledge. Failing that, he should name such other persons who know or claim to know facts and who refuse to make affidavits, and set forth what each one knows or claims to know.

**Is Trial Necessary to Test Credibility?**

Another special case was considered in *Harding v. Purtle*. In a three car collision plaintiff Harding, driving the first car, was hit from behind by Purtle, who was hit by McDougal. In the trial court Purtle secured a summary judgment against Harding. The appellate court reversed. Based on the depositions of both parties, the court indicated that there was a triable issue, that is, whether Purtle had followed too closely. As previously indicated the evaluation of conduct in relation to the exercise of due care always involves a triable issue; the trier of fact determining the standard of care applicable to the circumstances.

Unfortunately, the court in this case went further. It indicated that the issue of due care might depend on a factual issue of which Purtle was the only witness. He was the only one who knew whether in the impact his foot slipped from the clutch or he took it away. Therefore, the court said, the case should be tried so that upon cross-examination his credibility might be tested. No one had questioned

his credibility in relation to the motion; but with a citation to Professor Bauman the issue was thrust into the decision.

Barring the improbable, the court hearing the motion has nothing to do with credibility under the accepted doctrines. If one assumes that the moving party has established every element by his prima facie proof, does the discretion of the court in passing on the motion nevertheless extend to holding the case for trial, because on trial, through cross-examination or otherwise, the witness or testimony on material issues might be deemed incredible?

Repeatedly the courts have stated the rule, as in Kelly v Liddicoat:

> [A]ppellants do not challenge the sufficiency of the respondent's showing, on the motion. Their failure to file affidavits or otherwise oppose the motion indicates that they were entirely unable to make the showing of a substantial and meritorious defense as required by section 437c, and this language found in Bank of America etc. Assn. v Oil Well Supply Co., 12 Cal. App. (2d) 265, 270 [55 P.2d 885], seems to be particularly applicable to this case: "It was the defendant's privilege, under section 437c of the Code of Civil Procedure to set forth the claim, by proper averments, that there was available at least the semblance of a defense; having failed to do this the trial court justly concluded that there was no defense to the action."

This rule has not always been strictly followed. An attempted distinction has been made on the basis that in the cases following the rule the opponents of the motion had parity of knowledge. This distinction has not provided a meaningful test. Summary judgment has been granted even though the responding party was in a position where he could not establish his cause or defense because factual knowledge was not available to him. The rationale may well be that if

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148. Bauman, supra note 6, at 351.
154. See Schessler v. Keck, 138 Cal. App. 2d 663, 292 P.2d 314 (1956). As against defendant's motion, supported by detailed affidavits concerning all dealings with alleged co-conspirators, plaintiff's general charges of conspiracy to slander were held insufficient. The court observed that from plaintiff's affidavits and briefs, she could not competently testify to the constituent facts because she did not know them. There was no showing they existed at all.
a respondent cannot muster the facts to resist the motion he would not be able to do any better upon trial. In any event, the difficulty of getting evidence from one's adversaries is not now a matter of serious excuse since various discovery methods are available. The logical view is developing that since discovery is available, the claim that facts are solely in the possession of the adverse party is not a ground for denying summary judgment, particularly where there is no showing of an attempt to procure them.

The court in *Buffalo Arms, Inc. v. Remler Company* stated that section 437c of the Code of Civil Procedure antedated discovery procedures by twenty-five years. Thus, discovery should make the summary judgment procedure more useful than it had been. When discovery makes it perfectly plain that there is no substantial issue to be tried, the summary judgment is available for the prompt disposition of the case. If a motion for summary judgment is denied on the ground that discovery is not complete, this denial does not bar a subsequent motion.

Some unfounded conclusions apparently may be drawn from *Stationers Corp. v. Dun & Bradstreet, Inc.* where the facts were in the control of an adverse party. The defendants were sued for libel per se because of credit reports concerning the plaintiff. The falsity of the reports was established by the affidavits before the court. The issue centered upon the defendants' claim of privilege, based upon probable cause to believe the truth of the reports and the absence of malice. The defendants' information had come from four credit managers. Plaintiff sought their names by discovery but these were refused by the defendants. By withholding this evidence, the defend-

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155. In *Estate of Niquette*, 264 Cal. App. 2d 976, 71 Cal. Rptr. 83 (1968), the plaintiff's affidavits showed no facts which he knew to establish undue influence in the execution of a will, aside from opportunity, and indicated he didn't know anyone who did. Dismissal of this action by summary judgment was proper.

156. *CAL. CODE CIV. PROC. §§ 2016, 2030-34, 2036 (West Supp. 1973)* (depositions, written interrogatories and requests for admissions). In *Bank of America v. Oil Well Supply Co.*, 12 Cal. App. 2d 265, 270, 55 P.2d 885, 888 (1936), an action was brought on a guaranty of a note for the principal amount less the payments made. The defendant said the only way they could determine the amount due was from plaintiff's books. The court disregarded this, since it was not shown there had been any request for a continuance to get the inspection.


158. 179 Cal. App. 2d 700, 4 Cal. Rptr. 103 (1960).


ants did not carry the burden of showing probable cause and absence of malice upon the motion, and a summary judgment in their favor was reversed.\(^{161}\)

This case does not hold that summary judgment is improper where the material evidence is in the control of the adverse party. Without revealing the names, the statement of Dun & Bradstreet that "some persons told us" was hearsay in the first instance. Although it would still have been hearsay if the names had been revealed, the witnesses perhaps could have been produced. To defend the suit the defendants necessarily would have had to reveal the sources of their information. Choosing not to reveal the names to protect their sources of credit information, there was no defense and they were liable in damages. Such conduct was a calculated risk.

In \textit{Frye v Felder}\(^{162}\) the issue stated by the court was whether a trial court should grant a motion for summary judgment on the basis of facts alleged in plaintiff's uncontradicted declaration, which facts the defendant is in no position to deny, but where the plaintiff's own declaration raises a grave question concerning his credibility\(^{163}\)

The court answered this question in the negative. The credibility issue was brought into the case by the appellate court. However synthetic the credibility issue may have been on the facts, the question still exists as to what a trial court should do when the moving party's uncontradicted affidavits entitle him to judgment, but the lack of contradiction is due to the inability of the resisting party to contest them. Is he going to be any better off when the cause comes to trial? It is presumed that if he has facts to contest the moving party's assertions, he will, and must, assert them.\(^{164}\)

Admittedly, the \textit{ratio decidendi} of \textit{Frye v Felder} is that the trial judge should deny the motion and hold the case for trial any time a question of credibility is raised. But if that is the rationale, it is submitted that no test for determining what is to be deemed an incredible or questionable affidavit can be devised. Repeatedly the courts have refused to consider questions of credibility on the hearing of a motion


\(^{163}\) \textit{Id.} at 136, 54 Cal. Rptr. at 628.

\(^{164}\) Cf. Southern Pac. Co. v. Fish, 166 Cal. App. 2d 353, 333 P.2d 133 (1958) (where movant's affidavit was made upon information and belief, it was insufficient to support summary judgment, even though the facts were in the hands of the adverse party).
for summary judgment, unless demonstrably outrageous sham is evident.\textsuperscript{165}

In a suit for libel, \textit{Swope v. Moskovitz},\textsuperscript{166} defendant moved for summary judgment. The plaintiff averred he had no personal knowledge of the statements but identified the informants. The defendant then presented affidavits of the informants testifying that they had not made the statements. Plaintiff responded, unavailingly, that he believed the statements were made. Summary judgment was granted. Similarly, affidavits averring an inability to rebut due to a lack of knowledge have been ineffective to raise triable issues.\textsuperscript{167}

When the appellate court decides to give the losing party another chance\textsuperscript{168} by determining that a question of credibility is involved, one can expect that on remand the one in whose favor the issue was raised is likely to make full use of it by saying to the jury, “The appellate court said it doubted the truth of Mr. Jones’s testimony, and so may you, ladies and gentlemen.”

In order to avoid such implications upon retrial, one court added to its decision, reversing a summary judgment:

\begin{quote}
In consideration of this case, we have been limited to an inquiry whether the ultimate facts which might be found from the allegations of the affidavits show the existence of any triable issue. The evidence adduced at the trial may support none of the possible
\end{quote}

\textsuperscript{165} In \textit{Stirton v. Pastor}, 177 Cal. App. 2d 232, 234, 2 Cal. Rptr. 135, 136 (1960), the court stated that whether the allegations were true or made in good faith was not a matter for the court. But in \textit{Schoener v. Waltman}, 125 Cal. App. 2d 182, 270 P.2d 543 (1954), involving a claim of homestead, the court said: “The second point rests on the contention that the trial court should have assumed that defendant and his former wife were actually living on the premises as husband and wife 10 days after they had been divorced, and the wife was then the spouse of another. The facts upon which this amazing contention is based are ‘such stuff as dreams are made on’ and too unrealistic to constitute a controversy between fact and fiction.” \textit{Id.} at 183, 270 P.2d at 544. In \textit{Boscus v. Bohlig}, 173 Cal. 687, 162 P 100 (1916), a traverse to a money claim for work was made, declaring on information and belief that the work was of no value. The court stated that this “is so paltry as to amount to nothing at all.” \textit{Id.} at 689, 162 P at 101-02. The denial upon information and belief “of certain matters which must have been within the knowledge of the defendants is an indulgence ‘in playful frivolity not consistent with the solemnity of sworn pleadings in a court of justice,’” \textit{Id.} The court stated further that a positive denial is necessary where the pleader has knowledge or means of acquiring knowledge, which might enable him to traverse or admit the facts alleged, or show how it happens he is destitute of knowledge concerning such facts. \textit{Id.}

\textsuperscript{166} 253 Cal. App. 2d 514, 61 Cal. Rptr. 277 (1967).

\textsuperscript{167} Michelman v. Frye, 238 Cal. App. 2d 698, 48 Cal. Rptr. 142 (1965).

fact conclusions suggested in this opinion, or may warrant findings
not suggested here. Our decision in no way limits the trier of
the facts, but merely determines that the case cannot be disposed
of on a motion for summary judgment.169

In *Reida v Lund*170 the court stated that cases may arise where
knowledge of events is so confined in the bosom of a declarant that
proof to controvert it is difficult to come by and of necessity is ex-
cused. But this rule was held inapplicable to that case where the
party asserting presumptive knowledge of a person's mental state and
propensities could have secured the names of available witnesses.

The rulings in the *Harding* and *Frye* cases were paraded before
the court in *Jordan v Canale Foods, Inc.*171 The plaintiff had alleged
that the defendant was a member of a joint venture which owned or
operated a truck which struck him. The defendant showed by com-
petent, detailed affidavits that it had no relationship either to the own-
er or the operator of the truck. The plaintiff contended that critical
facts only known to the defendant were in issue, and that therefore
the case should have been sent to trial. The court, with the affida-
vits and depositions before it, held that there was no special question
of credibility except self-interest, which is always involved. Signifi-
cantly, it held that there was no showing in the counteraffidavits
that the plaintiff could prevail at trial by attacking credibility or other
means. Since the statutory requirements were met, the defendant's
motion for summary judgment was held to have been properly grant-
ed.

Professor Bauman concluded in his article on summary judgment
in California that unresolved credibility issues are inherent in the
summary judgment procedure.172 He questioned whether the test
should be less demanding than that applied to similar uncontested
evidence on a motion for a directed verdict. "Thus to direct a
verdict for the plaintiff requires that the court favorably resolve the
issues of credibility inherent in his testimonial proof."173 This faulty
analogy seems to infect the approach and the conclusions advanced.
In California law the judge, in directing a verdict, does not "resolve

971-72 (1959); accord, *Roth v. Guardian Thrift & Loan*, 162 Cal. App. 2d 320, 327
172. *Bauman, supra* note 6, at 367.
173. *Id.* at 349.
the issues of credibility" inherent in the testimonial proof. As in failing to deny the allegations of a complaint, the well-pleaded allegations are admitted, and the defendant who presents no evidence admits the truth of the plaintiff's evidence. When that evidence covers the necessary elements of the cause, the plaintiff is entitled to judgment.

Professor Bauman finds that a number of summary judgments may be based upon undisputed documented evidence, because the courts "willingly accept as true undisputed documentary evidence." This does not, however, indicate that the court makes a determination of credibility, since in most instances the substantive law makes those determinations for all parties.

Bauman's summation was:

"The conclusion derived from this review of the cases is that the determination of the credibility of the supporting proof is the major problem facing a court in the disposition of a motion by a plaintiff for summary judgment . . . . The more highly valued the proof of the plaintiff, the greater the burden is imposed on the defendant to produce evidence showing that a genuine issue of fact exists."

This conclusion does not withstand close scrutiny. The host of the cases demonstrates that the courts are concerned with issue determination. The credibility or evidence is not weighed; instead its competency is considered. If prima facie competent evidence on the one side vis à vis prima facie competent evidence asserted by the other is in conflict on material issues, that conflict is reserved for the trier of fact to determine.

Professor Bauman suggested that there are many cases where knowledge of the facts "is fortuitous and not shared, and where the absence of controverting proof could not reasonably be the basis for an inference that the plaintiff's version of the occurrence is a true one." He continues, "thus, to avoid incorrect decisions, the acceptance of the truthfulness of the supporting proof must be restricted to cases in which courts are willing to resolve credibility issues as a matter of law."

175. Bauman, supra note 6, at 351.
176. See, e.g., CAL. EVID. CODE § 664 (West 1966) (official duty regularly performed); id. § 1532 (official record of recorded writing).
177. Bauman, supra note 6, at 355.
178. Id. at 356.
179. Id. at 359.
that as a matter of law the court must give full effect to the uncon-
dicted affidavits.\textsuperscript{180}

Bauman overlooks the settled proposition that a witness is pre-
sumed to speak the truth. The testimony by affidavit is given under
oath or under the penalties for perjury. Under California Penal
Code section 118a,\textsuperscript{181} one who makes an affidavit that he will testify
before any competent tribunal "in any particular manner, or to any
particular fact, and in such affidavit willfully and contrary to such
oath states as true any material matter which he knows to be false,
is guilty of perjury."\textsuperscript{182} His subsequent testimony "in any action in-
volving the matters in such affidavit contained, which is contrary to
any of the matters in such affidavit contained, shall be prima facie
evidence that the matters in such affidavit were false."\textsuperscript{183}

Finally, Bauman contends that the acceptance of the truthfulness
of supporting documents must be restricted to cases where credibility
is a matter of law, such as those involving affidavits of public officials
or public documents.\textsuperscript{184} Examination of the cases shows that in
many instances the actual basis of decision rests upon the fact that
the public officers concerned, acting within their legal discretion,
were protected from suit for the results of such discretionary acts.\textsuperscript{185}
Such suits often involve statutory construction, as in quo warranto
where, for instance, the object is to test the validity of an annexation.
Upon summary judgment the facts may be presented by affidavit,
but the issue may hinge solely upon construction of the statute to
be applied.

Should the inability to respond impede the summary judgment pro-
cedure? Upon trial it frequently happens that a party is not able to con-
trive the evidence against him. Nevertheless, he still is bound ac-
cordingly. The same condition attaches to the motion for summary

\textsuperscript{180} Taliaferro v. Coakley, 186 Cal. App. 2d 258, 261. 9 Cal. Rptr. 529, 531
(1960); cf. Snider v. Snider, 200 Cal. App. 2d 741, 750, 19 Cal. Rptr. 709, 715
2d 663, 292 P.2d 314 (1956) (opponent filed affidavit but it did not contradict mov-
\textsuperscript{182} Id.
\textsuperscript{184} Bauman, supra note 6, at 359.
(supervisors acting within their discretion in constructing a bridge across a slough); Pacific Inter-Club Yacht Ass'n v. Richards, 192 Cal. App. 2d 616, 13 Cal. Rptr. 730
(1961).
judgment. On such a motion, the party is required to make the same prima facie showing on his own behalf that he would make at trial. If he does not present facts on the motion for summary judgment, how can it be held that he has competent evidence to produce? Since the expansion of discovery procedures, the idea that it is unfair to require this proof when the factual evidence rests with others should no longer prevail. If one has had the opportunity for discovery and has not pursued it, he should no longer claim a concession. If the facts legitimately lie with the adverse party or others, the cases make it abundantly clear that depositions, interrogatories, and requests for admissions can reveal the evidence. If the litigant has not had time to secure the necessary facts, a legitimate request for continuance of the motion for summary judgment should be honored.

Litigants can be expected occasionally to seek relief from a summary judgment upon the theories expounded by Bauman and those decisions which have relied upon them. It is perhaps significant that although the supreme court since Frye v. Felder has summarized the rules applicable to summary judgments in a number of cases, the Frye doctrine has not been included.

Recommendations

The most basic reform could be effected easily by the courts themselves or by the Judicial Council. They could provide that motions for summary judgment be heard in court sessions set aside for that purpose, with adequate time allotted before and after the hearing for the court to consider the documentation in depth. In all but the metropolitan courts, motions for summary judgment are carried on the regular law and motion calendar among perhaps twenty or twenty-five matters scheduled for hearing on law and motion day. The court may not see the file for more than a few seconds before the hearing, and the need to go on with the regularly scheduled calendars which follow may well preclude the detailed study required.

The first step taken by a judge in determining a motion for summary judgment is to study the pleadings to determine the issues to which the affidavits are directed. He also determines what admissions have been made as they are always considered upon the

motion. Under the present system, how well is he able to do this? In a multijudge court like the Contra Costa County Superior Court, such motions with other law and motion matters are assigned day-by-day to all civil trial departments. They are heard and disposed of, along with default dissolution cases, in the period between nine o'clock and the assigned trial calendar at ten o'clock. There are only brief moments during which the judge can glance through the files in advance. With a trial in progress, there is scant time to devote to the review of pleadings, the careful scrutiny of affidavits, depositions or other documents properly received upon a motion for summary judgment. Upon hearing the judge too often may demand of counsel, "Is there a triable issue; point it out if you can." Such reliance upon counsel can be sadly misplaced. A trial court hearing a motion for summary judgment under the circumstances indicated will tend to deny it, not because the merits of the motion may be doubtful but because the judge has not had time to consider the affidavits carefully. He fears that hidden questions of fact may be embodied therein. "If on appeal, it appears that some factual issue exists which has been overlooked or disregarded by the trial court, it is the duty of an appellate court to reverse the summary judgment."

In the Superior Court of Los Angeles County central district there have been two full time law and motion departments. Files are produced two or more days before a hearing, and a research assistant is available to assist in studying difficult matters of law and to organize the material submitted on the motion. A system of tentative determination of law and motion matters, announced to counsel upon arrival for the calendar, helps to clear the calendar by reducing unnecessary

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192. Id. at 244, 56 Cal. Rptr. at 180.
oral arguments. Hence, the motions for summary judgment may receive adequate presentation, consideration and study. Any problem created by the filing of responding affidavits at the time of hearing can be met by appropriate continuances.\textsuperscript{193}

This system is not impeached by the fact that many of the summary judgments granted by this trial court have been overturned. In relation to the volume of cases passed upon, it may be asserted confidently that over a ten year period the ratio of summary judgment reversals to the total is small. As a matter of judicial administration, time is well spent if trial court time has been preserved for meritorious matters by eliminating cases which should have been decided by summary judgment.

The second reform, like the first, rests in the hands of the courts in the first instance. Too little attention has been paid to the adequate employment of the partial summary judgment. It may well be that on a motion for summary judgment the moving party makes an adequate showing as to many issues but fails to establish completely the right to the judgment. The court can declare the elements of proof upon which there is no triable issue and by order limit the trial to the disputed issues found to exist. Trial time would be cut down by limiting a case to essentials.\textsuperscript{194}

Third, there is great need for reiteration by the supreme court of the necessary standards pertaining to the sufficiency of affidavits under section 437c. Although the supreme court has not deviated from the statute nor have several courts of appeal, there are still too many cases recognizing noncomplying affidavits of resisting parties. Confusion has been created by the supreme court's denial of hearings to decisions of opposite polarity upon this question. The matter could be most expeditiously resolved by the supreme court if in the first appropriate case the full language of \textit{Eagle Oil \& Refining Co. v. Prentice}\textsuperscript{195} were reiterated as the full statement of the principle, together with any necessary emphasis that resisting affidavits must contain evidentiary facts to raise issues requiring trial.

Fourth, the rule that the allegations of the opposing affidavits are to be considered true should be abrogated. Better still, all reference to such presumptive truth should be dropped, since truth or

\textsuperscript{193} A local court rule requiring the filing of responding affidavits in advance of the date set for the hearing has been held unauthorized. Albermont Petroleum, Ltd. v. Cunningham, 186 Cal. App. 2d 84, 9 Cal. Rptr. 405 (1960).

\textsuperscript{194} See text accompanying note 19 \textit{supra}.

\textsuperscript{195} 19 Cal. 2d 553, 122 P.2d 264 (1942).
falsity is not a question to be determined upon the motion for summary judgment. A credibility issue should not be suggested to inhibit the procedure.

Fifth, since provisions for extensive discovery are now available, the failure or inability of the party resisting the motion for summary judgment to controvert evidence allegedly under the control of the adverse party does not and should not result in denial of a motion for summary judgment if otherwise sufficient. This presupposes that there has been a reasonable opportunity for discovery by the responding party, or that having such opportunity, he did not make use of it or is still unable to controvert the showing made.

There will be occasions when an eager plaintiff, without waiting for an answer, will launch a motion for summary judgment which finds the defendant surprised and unprepared. Faced with this situation the tendency of some courts has been to deny the motion out of hand, since it may later be renewed.\textsuperscript{196} A better procedure would be to grant the responding party a reasonable time in which to present his opposition, upon proper request, and to continue the motion in the meantime.\textsuperscript{197} Again, if the discretion of the court hearing the motion cannot be relied upon to take such action, the Judicial Council by rule might well provide for such continuances. Judge Zack has urged that legislative provisions make one continuance a matter of right.\textsuperscript{198}

Sixth, a jurisprudential study is needed. Its purpose would be to determine the eventual outcome in the trial court after an appellate court has reversed a summary judgment and remanded the cause for trial. Has the party overturning the summary judgment done any better or has the net result been settlement of the cause? To evaluate the summary judgment procedure, we need basic data. How many such judgments have been granted and denied in both the municipal and superior courts for which such data can be obtained? How many have been appealed to the appellate departments of our superior courts? What is the record of affirmances and reversals there? It would be hoped that such data not only would implement our knowl-

\textsuperscript{196} In Aguirre v. Southern Pac. Co., 232 Cal. App. 2d 636, 43 Cal. Rptr. 73 (1965), an earlier motion for summary judgment had been dismissed by the trial judge on the ground that discovery was not complete. This would appear to be within the discretion of the judge, conferred by section 437c.

\textsuperscript{197} See Whitson v. LaPay, 153 Cal. App. 2d 584, 589, 315 P.2d 45, 49 (1957) (several continuances granted for filing of affidavits).

\textsuperscript{198} Zack, supra note 7, at 478.
edge of the administrative efficacy of the summary judgment, but perhaps would permit some conclusions about the justice of the procedure.

Finally, it is suggested that both academically and practically, the possible interrelationship of the partial summary judgment and the procedures for the trial of separate issues should be studied.

These suggestions are made with humility and deep respect. They rest upon several years of experience in law and motion departments, where as a judge there was no reluctance to apply section 437c in cases deemed applicable. In matters of opinion, others with like experience may very well differ, but the subject matter of the procedure needs continual and careful reconsideration.

**Conclusion**

Beginning with an early case, an admonition was given that the summary judgment procedure was drastic and to be used with caution. This warning has been frequently restated in the cases. Unfortunately the term "drastic" seems to have been used as a synonym for "arbitrary," and though "summary" relates to the absence of delay it has been considered in the same light. The purpose of the admonition, as established by the supreme court, is to remind judges that issue determination, not fact determination, is the purpose of the procedure, "so that it does not become a substitute for the open trial method of determining facts."

If true, the folklore that the summary judgment procedure was disfavored by the courts would have led to its repeal long ago, instead of its expansion and increased use. The number of summary judgments entered, the wide range of subject matter involved, the expansion of the procedure to embrace reciprocal motions by plaintiff and defendant, the enlargement of its scope to include all action and proceedings, and the compulsion of the writ of mandate dispel that folklore. No longer can the judge hearing the motion rely on a broad discretion to deny it because he has neither the time nor the patience, in the midst of a crowded law and motion calendar, to probe the niceties of the affidavits in establishing a triable issue of fact. After almost fifty years of application of summary judgment

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procedures, prejudices have given way to the necessities of the courthouse.

The present volume of cases before the trial courts puts a great demand upon them to make full use of the available screening procedures to terminate unmentionable cases, to discourage the perpetual litigant and to eliminate sham causes and defenses. The courts are increasingly aware that while the termination of a lawsuit may be drastic to a plaintiff, it is concurrently beneficial to a defendant who is as entitled to be relieved of a bad lawsuit as a plaintiff is to maintain a good one. Moreover, it is an imposition upon the court and the public to send a case on for trial when it is apparent upon a motion for summary judgment that there is no substantial issue to be tried.

The variations in decisions in the appellate courts are undoubtedly the result of the exercise of the discretion assumed by the courts to exist under section 437c. Judge Zack concludes in his magnificent exorcism of the ghosts of the past that this discretion is now an illusion. But discretion is always "legal discretion," and late cases remind judges and litigants that there are limits. Discretion confined ceases to be discretion.

The courts themselves can re-examine the doctrines of construction and conform decision to a uniform pattern. There is evidence that the supreme court in construing section 437c in late cases has already moved along this path as have some courts of appeal. The prime purposes of issue determination should not be clouded by extraneous importation of issues of credibility. But for those instances in which the statute is not clearly adapted to define material issues of fact through the affidavits of the parties, it should be recognized that a sound discretion still inheres in the court.

Judge Zack had advocated an elaborate statutory procedure to force objections based upon the content of, or alleged insufficiencies of affidavits into the open at the trial court level, making mandamus the only method of review. This solution perhaps would create complications which might not justify the pains.

The remedy even now is in the power and discretion of the trial judge. If upon hearing the motion it appears that the affidavits of either party contain conclusions or hearsay, rendering them ineffective, the deficiency can be pointed out by a short written mem-

orandum; leave to file amended or supplemental affidavits can then be granted to comply with the requirement of section 437c that the statements be made with particularity. The opposing party can be given a similar opportunity to respond to the amendments or supplements. If without an adequate excuse a party afforded such opportunity does not, or will not, supply such amendment or supplement, the court can well conclude that he cannot.203

The future stabilization of summary judgment procedures seems bound up in the question of judicial preparation. The purpose is not only to relieve litigants of sham causes or defenses at an early stage but also to free the courts of unmeritorious cases, in order that justice may be done to other cases.204

Justice has no price tag. The cost of the court system is mounting. But surely the taxpayer also has an interest in winnowing out unmeritorious causes or defenses, and in expediting the determination of meritorious causes.

Every expedition of cases through the courts, consistent with just determinations, must be employed. Those whose controversies are of the types traditionally submitted to courts for decision are turning away already, where speedier determinations are promised by administrative procedures, or arbitration. Courts and lawyers should conclude that the summary judgment procedure is a most important tool in California jurisprudence, for litigants, lawyers and the overburdened courts.

