THIRTY YEARS OF MOTION PRACTICE UNDER THE IOWA RULES—OR—TRAPS, PITFALLS AND OTHER HIDDEN DANGERS

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There is a great deal of law learning that is dry, dark, cold, revolting—but it is an old castle, in perfect preservation, which the legal architect, who aspires to the first honors of his profession, will delight to explore, and learn all the uses to which various parts used to be put; and he will better understand, enjoy and relish the progressive improvements of the science of modern times.

W. Wirt

I. Introduction

A. *Background*

The "new" Iowa Rules of Civil Procedure have been in effect lo these thirty years[1] and although the philosophy and express desideratum of the rules so far as pleading and motion practice in Iowa is concerned is "to secure a just, speedy and inexpensive determination of all controversies on their merits"[2] the rules also provide for various methods of summary disposition of unmeritorious claims and defenses. Throughout the existence of the rules, the Iowa court has, impliedly at least, adopted the position, true to the tradition of the Anglo-American system of adversary jurisprudence, that the selection and presentation of litigated issues is the responsibility of the parties.[3] That attitude, when taken with the court's unsympathetic view toward record errors of the parties[4] brings into sharp focus an underlying importance of motion practice under the rules. Thus, although the practice of resorting to specific pleadings and motions in order to gain tactical advantage over an

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[1] Actually 29 years as of July 4, 1972. *See* Iowa R. Civ. P. 1(b).

[2] Iowa R. Civ. P. 67 states: "All Common counts, general issues, demurrers, fictions and technical forms of action or pleading, are abolished. The form and sufficiency of all motions and pleadings shall be determined by these Rules, construed and enforced to secure a just, speedy and inexpensive determination of all controversies on their merits."

[3] The adversary system imposes upon the parties the responsibility of investigating the facts, framing the issues, calling and interrogating the witnesses; preserving the record for appeal and presenting issues on appeal. In some continental systems, these burdens are assumed at least in part by the judiciary.

[4] *See, e.g.*, Insurance Company of North America v. Sperry & Hutchinson Co., 168 N.W.2d 753 (Iowa 1969). *See also* Blackburn, *Survey of Iowa Law—Civil Procedure*, 19 Drake L. Rev. 129 (1969).

adversary may indeed be contrary to the overriding philosophy of rules practice,[5] a realistic appraisal suggests that such tactics lurk as a trap for the unwary, the results of which can be devastating.[6] It is the purpose of this article to examine the methods of disposition without trial under the Iowa Rules of Civil Procedure, principally of motions to dismiss,[7] applications for adjudication of points of law,[8] motions for judgment on the pleadings[9] and for summary judgment.[10] Because special appearances are neither pleadings[11] nor motions,[12] those cases which are adjudicated without factual trial upon jurisdictional grounds are excluded from this analysis. Also cases which are disposed of by default are excluded here.

B. *Rules Pleading Revisited*

It seems somewhat simplistic after 30 years experience with the rules to even suggest that an examination of motion practice presupposes a reexamination of the basic principles and development of modern pleading.[13] However, since one of the traditional purposes and functions of the pleadings is to frame the issues of litigation,[14] it can also be assumed that most matters to be disposed of would ordinarily be raised in the parties' contending statements. A short review of some basic truths of pleading seems warranted.

Iowa was an early pleading reform state, and, except for a brief period of time and in a limited way, never was bound to a system of common law pleading.[15] One of the features which distinguished code pleading from common law pleading was the reliance upon the pleaded facts, which liberated the court to grant relief upon any theory of substantive law applicable.[16] One of the earliest generally accepted reform documents contained the requirement

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[5] *See, e.g.*, Conley v. Gibson, 355 U.S. 41 (1957); Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944).

[6] A typical example is George v. Gander, 154 N.W.2d 76 (1967). Plaintiff's original notice stated that "the petition is now on file." However, it was mailed to the clerk's office and was not filed until after the sheriff had served the defendant. Defendant first appeared specially to attack jurisdiction, then abandoned the jurisdictional attack in order to seek dismissal under IOWA R. CIV. P. 55 which says, "If the petition is not filed as stated in the original notice, any defendant may have the case dismissed as to him, without notice . . . ." Thus, defendant by prohibiting the plaintiff from serving a new notice to establish jurisdiction or pleading over invoked the court's strict interpretation of Rule 55.

[7] IOWA R. CIV. P. 104(b).

[8] IOWA R. CIV. P. 105.

[9] IOWA R. CIV. P. 222.

[10] IOWA R. CIV. P. 237.

[11] IOWA R. CIV. P. 68.

[12] IOWA R. CIV. P. 69.

[13] *See* IOWA R. CIV. P. 230-36. *See also* IOWA R. CIV. P. 215.1.

[14] For another recent textual treatment of pleading problems under the rules *see* Loth, *Problems in Pleading Negligence*, 21 DRAKE L. REV. 215 (1972); Loth, *Res Ipsa Loquitur in Iowa*, 18 DRAKE L. REV. 1, 20 (1968). *See also* Jeffries, *Survey of Iowa Law—Civil Procedure*, 21 DRAKE L. REV. 268, 272-80 (1972).

[15] *See* COOK, HISTORY OF IOWA LAW OF CIVIL PROCEDURE 41 IOWA CODE ANN. 73 (West 1950).

[16] *See* Mentzer v. Western Union Tel. Co., 93 Iowa 752, 62 N.W. 1 (1895); F. JAMES JR., CIVIL PROCEDURE 66 (1965).

that the first contending statement contain a "statement of facts constituting the cause of action, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended;"[17] thus, the distinction between (and admonition against) pleading ultimate facts and pleading evidence or conclusions.[18] However, pleading facts completely barren of evidence or law suggested a discrimination beyond the talents of the average lawyer. Thus, certain compromises were inevitable. One such compromise permitted the pleading of conclusions if they were based upon operative facts.[19] Another and later compromise was the codification of certain "permissible" conclusions.[20] But the distinctions between fact and evidence, where facts alone were required, succumbed to the practice of verbosity,[21] which suggested the necessity of further reform. Hence, ultimately came the adoption of the Iowa Rules of Civil Procedure, which in their totality were patterned after the Federal Rules of Civil Procedure adopted in 1938.[22]

With respect to the requirements relating to the first contending statements, a distinction between the Federal Rule and the Iowa Rule became immediately apparent. It is said that the requirement of "fact" pleading was expressly and intentionally omitted from the Federal Rules, while it was expressly retained in Iowa Rule 70.[23] Thus, under the Iowa version of rules pleading, it is unlikely that there was any drastic change in the basic rules of fact pleading in the transition from the codes to the rules except as evidenced by a concerted attempt to avoid technicalities by minimizing the detail required and by making provisions relating to better organization as to form.[24]

It should not be assumed, however, that the rules govern all the requirements of pleading. Rule 1, for instance, expressly reserves exceptions to the operation of the rules where the rules themselves "expressly provide otherwise" and where statutes which were not affected provide different procedure in particular courts or cases.[25] Thus, some of the pleading requirements as to particular actions that existed before the code were retained. Indeed, throughout some of the statutes stalk the ghosts of common law pleading. For example, in the statutory action for replevin[26] it is still necessary to plead and prove the

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17 F. JAMES JR., CIVIL PROCEDURE 65 n.3 (1965).
18 *See* Miller v. Scholte, 191 N.W.2d 773 (Iowa 1971).
19 *Id.*
20 IOWA R. CIV. P. 98.
21 *See* F. JAMES JR., CIVIL PROCEDURE 66 (1965); CLARK, CODE PLEADING 226 (2d ed. 1947).
22 The Federal Rules of Civil Procedure were adopted on June 19, 1934, by an Act of Congress which authorized the Supreme Court to prescribe uniform rules of civil procedure. The Iowa Rules of Civil Procedure were adopted by the Iowa Supreme Court pursuant to authority granted by Acts 49th G.A., ch. 311, § 1 (1941). *See* IOWA CODE § 684.18 (1971). *See also* COOK, HISTORY OF IOWA LAW OF CIVIL PROCEDURE, 41 IOWA CODE ANN. 73 (West 1950); Vestal, *A Decade of Practice Under the Iowa Rules of Civil Procedure*, 38 IOWA L. REV. 439 (1953).
23 *See* 1 IOWA RULES CIVIL PROCEDURE ANNOTATED 442 (3d ed. 1970) (Comment); F. JAMES JR., CIVIL PROCEDURE 84 (1965).
24 *See* IOWA R. CIV. P. 70, 78, 79.
25 IOWA R. CIV. P. 1(a).
26 IOWA CODE § 643 (1971).

specific identity of the property to be replevied and one who cannot meet this burden must fail.[27]

There has been much verbiage with respect to the retention of the "cause of action" requirement under the Iowa rules and its deletion under the parent federal system.[28] It might be suggested that the federal court's interpretion that the federal rules are intended to serve the notice function when backed up by liberal rules of discovery is justified when one also considers that the jurisdictional amount in most federal civil litigation would justify the additional cost of discovery.[29] Under the more conventional rules, however, the pleadings should serve the notice function in yet another way; by giving some indication of the theory of the opponent's claim or defense,[30] thus eliminating surprise by artful pleading and by minimizing the necessity of expensive discovery proceedings.[31] This is especially true in a forum such as Iowa where much civil litigation is conducted in a court of general jurisidiction and where, in many cases of a minor nature, the economics of litigation do not always warrant the additional cost that extensive discovery requires. In addition, other traditional functions of the pleadings are to define the limits of litigation, to frame the issues and to preserve a proper record.[32] This is in keeping with the basic philosophy that under the American system of adversary jurisprudence, the parties set the parameters of litigation by choosing the issues, and by calling and interrogating the witnesses, thereby freeing the court to confine its talents to the process of decision making and defining the legal boundaries within which the facts may be presented or conversely, without which they may not.

Yet, the Iowa rules requirement that the pleader must plead a "cause of action" is not as harsh as it may seem by comparison. A fail-safe mechanism of amendment is available to the party who has a meritorious claim and who, by oversight or otherwise did not plead all the facts available which were necessary to relief.[33] It does not aid the party who has no more facts to

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27 *See* Lyons v. Shearman, 245 Iowa 378, 62 N.W.2d 196 (1954).

28 *See, e.g.*, 2A MOORE, FEDERAL PRACTICE 1704-05 (2d ed. 1968); F. JAMES JR., CIVIL PROCEDURE 84 (1965); CLARK, CODE PLEADING 146-48 (2d ed. 1947). The "cause of action" requirement is found in Rule 70. When testing the sufficiency of the petition by motion to dismiss, the "cause of action" is not determinative. It then becomes a question of whether the petition has stated a claim upon which "any relief can be granted." See Pride v. Peterson, 173 N.W.2d 549 (Iowa 1970).

29 *See* 28 U.S.C. § 1332 (1948). Conley v. Gibson, 355 U.S. 41 (1957); Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944).

30 Much of pleading and motion practice, when reduced to its least common denominator—is communication—apprising the opponent and the court of the nature of the claim, defense or objection. *See, e.g.*, Northwestern Nat'l Bank of Sioux City v. Steinbeck, 179 N.W.2d 471 (Iowa 1970).

31 *See* IOWA R. CIV. P. 141(c).

32 It has been said that the functions of the pleadings are: (1) to serve as a formal basis for the judgment to be entered; (2) to separate issues of fact from questions of law; (3) to give the litigants the advantage of the plea of res adjudicata if again molested; and (4) to notify the parties of the claims, defenses, and cross demands of their adversaries. *See* CLARK, CODE PLEADING 3 (2d ed. 1947).

33 IOWA R. CIV. P. 88. Any pleading may be amended before a pleading has been filed responding to it. *See also* FED. R. CIV. P. 15(a).

plead, nor does it aid the recalcitrant attorney who steadfastly refuses to plead further.[34] Thus, the interests of justice may, in the long run, be best served by disposing of unmeritorious claims in the quickest and most inexpensive way.[35]

The methods of response under the rules were also expanded. At common law, the methods of responding to pleadings were somewhat dualistic. One had the choice of pleading or interposing a demurrer, although the motion was available, but "insignificant."[36] Pleas were dilatory (by plea in abatement, as to the jurisdiction) or peremptory (in bar—or to the merits). The demurrer was, of course, the all purpose device used for challenging the legal sufficiency of the declaration or the proof and at its best, or worst, served as a most appropriate vehicle for testing the artistry of the common law pleader. The special demurrer attacked the substance of the pleading.[37] The dualism was somewhat similar under the codes,[38] although the function of the demurrer was expanded rather than limited.[39] Once the demurrer was filed, the pleader was thereafter precluded from pleading to the merits.

In apposition, however, the rules provided a pluralistic scheme of attack upon the pleadings, both against the petition and against the answer. First, the rules eliminated the demurrer and its successor motion as a pleading and confined the pleadings to the parties' contending statements, the petition, answer, and reply.[40] The defendant, if he chose to plead to the petition and not move against it, was permitted, and indeed required, to raise all the defenses that he had whether factual or legal[41] in his answer except those

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[34] *See, e.g.*, Van Camp v. McAfoos, 156 N.W.2d 878 (Iowa 1968).

[35] *See* note 61 *infra*.

[36] CLARK, CODE PLEADING 500 (2d ed. 1947).

[37] *Id.*

[38] It is said that the most significant pleading reform under the codes was to eliminate the dilatory plea as a separate pleading and the abolition of the demurrer as it formerly existed.

[39] At common law, objections to the court's jurisdiction by plea in abatement were made by dilatory pleas in the form of special demurrer. The Code provisions added the special appearance in place of the special demurrer as a means of attack upon the jurisdiction. *See* IOWA CODE § 11088 (1939). However, the demurrer was also retained as an alternative method. *See* IOWA CODE § 11109 (1939). The distinction lay in the fact that if special appearance was unsuccessful, the defendant could not plead further, but if he attacked the jurisdiction by demurrer and the demurrer was overruled, he was not precluded from pleading further. *Compare* IOWA CODE § 11088 (1939) *with* IOWA CODE § 11144 (1939). In addition, it appeared that under the later code provisions, the defendant could "split" his demurrer into one or more of several causes of action alleged against him. *See* IOWA CODE § 11143 (1939). A failure to demur, however, did not constitute an admission that the plaintiff's pleading was sufficient and apparently the attack upon the pleadings could be made at a later time, even during trial. IOWA CODE § 11145 (1939).

[40] IOWA R. CIV. P. 69.

[41] IOWA R. CIV. P. 72, 101, 103. Rule 72 provides that the answer specifically admit or deny each allegation or paragraph of the petition (presumably eliminating the general denial). *But see* Frederick v. Shorman, 259 Iowa 1050, 1055, 147 N.W.2d 478, 482 (1966) where the court said, "Under a general denial defendant may prove anything tending to show plaintiff's allegation is untrue. Thus in an action to recover property based upon a superior right or title proof of a gift to defendant may be made under a general denial." In addition, the rule requires the statement of any additional facts which were deemed to show a defense, thereby requiring the defendant to allege any

asserted by the motion to dismiss or by attack upon the jurisdiction raised by special appearance.[42] If he elected to move, his first, but perhaps not his wisest consideration, would be the motion to dismiss.[43] Other alternatives followed, generally raised after the issues were joined, including the application for adjudication of law points,[44] the motion for judgment on the pleadings[45] and the motion for summary judgment.[46]

If he elected not to move and respond by plea the rules were sufficiently flexible to contemplate that he could raise the same defenses in the answer without waiving any rights simply because he did not first move to dismiss.[47]

II. The Motion to Dismiss—Unloved and Unwanted Grandchild of the Common Law Demurrer

A. *A Comparison of the Motion to Dismiss and the Demurrer*

In the 1943 reform, the Supreme Court of Iowa adopted Rule 104 which provided in effect that every defense must be raised in the responsive pleading with certain noted exceptions; jurisdictional questions were thereafter to be raised by special appearance, filed before any other appearance;[48] failure to state a claim upon which any relief could be granted was to be raised by motion to dismiss, filed before the answer; and the sufficiency of any defense was to be raised by motion to strike.[49]

Although it is said that the motion to dismiss replaced the demurrer as the vehicle to challenge the legal sufficiency of the petition, when the motion and the demurrer are placed in apposition, there are many similarities worthy of note. Thus, both the demurrer and the motion to dismiss:

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affirmative defense that he relied upon, thereby diminishing the possibility of surprise at trial. Although eliminating surprise, it sometimes creates a dilemma of sorts for the defendant. *See, e.g.*, Murphy v. City of Waterloo, 255 Iowa 557, 123 N.W.2d 49 (1963), where plaintiff, a twelve year old girl was injured when she fell or was pushed from a sidewalk to the rocky edge of a creek bottom. It was the city's contention that at the time of the incident the plaintiff was not standing on city property, but was standing on private property. Plaintiff's allegation that she was standing on municipal property was met by denial. The court said: "if the defendant desires to have its theory of affirmative defense submitted in an instruction such affirmative defense must be raised in the answer." *Id.* at 566, 123 N.W.2d at 54.

[42] Iowa R. Civ. P. 66, 104.

[43] He may of course file a motion to strike (Rule 113), or a motion for more specific statement (Rule 112), or may combine either or both with the motion to dismiss. *See* Iowa R. Civ. P. 111.

[44] Iowa R. Civ. P. 105.

[45] Iowa R. Civ. P. 222.

[46] Iowa R. Civ. P. 237.

[47] *See* 2 Iowa Rules Civil Procedure Annotated 166 (3d ed. 1970) (Comment).

[48] A general appearance is any appearance except a special appearance. *See* Iowa R. Civ. P. 65.

[49] Iowa R. Civ. P. 104. Rule 104 (b) and (c) are patterned after Federal Rule of Civil Procedure 12(b) and (f) which provide that a complaint may be dismissed on motion for "failure to state a claim upon which relief can be granted" and upon motion the court may strike any "insufficient defense or any redundant, immaterial, impertinent or scandalous matter."

1. must be interposed before the answer or the plea to the merits;
2. admit all well pleaded facts, but not conclusions or inferences to be drawn therefrom;
3. raise an issue of law for the court's decision in advance of trial on the merits;
4. may not be aided by extrinsic evidence.[50]

The motion differs from the demurrer in that it is no longer the proper method to attack jurisdiction. Because of its other similarities to the demurrer, its effectiveness has been diminished and its worth is discounted "as unnecessary as the similar obsolete pleading of demurrer."[51] The reasons for this conclusion are numerous in light of the rules: (1) the motion is not always dispositive in view of the pleader's right to amend at any time before a responsive pleading is filed;[52] (2) it is confined to a limited class of cases where there is a "failure to state any claim upon which any relief can be granted";[53] (3) it lacks flexibility for the practitioner because it does not dispose of the plaintiff's case, but merely attacks the whole cause of action pleaded within a division;[54] (4) for the reason noted earlier, it has a tendency to "educate" the opponent as to the frailty of his claim, thereby precipitating an amendment;[55] (5) it is not and canot be aided by facts outside the record;[56] and (6) other methods which accomplish the above purposes are tactically more effective.[57]

B. *Amendments and Finality*

Rule 88 provides that any pleading may be amended at any time before a pleading has been filed responding to it. Since Rule 104(b) requires the motion to dismiss to be filed before the answer, the plaintiff who suffers a dismissal has two options; he may plead over by filing an amendment if there are any additional facts to plead, otherwise he may elect to stand on the record as made and to treat the order of dismissal as a final order for the purpose of appeal.[58]

One of the previous objections to the common law demurrer and its

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[50] Newton v. City of Grundy Center, 246 Iowa 916, 70 N.W.2d 162 (1955). *See also* IOWA R. CIV. P. 67 which provides: "All common counts, general issues, demurrers, fictions and technical forms of action or pleading, are abolished . . . ."

[51] Newton v. City of Grundy Center, 246 Iowa 916, 920, 70 N.W.2d 162, 164 (1955).

[52] *See* IOWA R. CIV. P. 88.

[53] Newton v. City of Grundy Center, 246 Iowa 916, 919, 70 N.W.2d 162, 164 (1955).

[54] *See* Bourjaily v. Johnson County, 167 N.W.2d 630 (Iowa 1969).

[55] IOWA R. CIV. P. 104(d). This rule requires the motion to be specific and to show wherein the petition is deficient. *See* Halvorson v. Schrubbe, 258 Iowa 314, 138 N.W.2d 856 (1965).

[56] *Compare* Jeffries v. Fraternal Bankers' Reserve Soc'y, 135 Iowa 284, 112 N.W. 786 (1907) *with* Bales v. Iowa State Highway Comm'n, 249 Iowa 57, 86 N.W.2d 244 (1957).

[57] *See* IOWA R. CIV. P. 105, 222, 237.

[58] *See* IOWA R. CIV. P. 86.

code counterpart as a plea was that it could be interposed for delay; in fact, as a plea in abatement, it earned the epithet, "dilatory." Rule 72, which permits the defendant to raise legal issues in his answer, and Rule 103 which requires that every defense, whether in bar or abatement be made in the answer (except those permitted by Rule 104) was presumed to have the effect of abolishing the demurrer as a dilatory plea and to serve the purpose of joining the issues at the earliest possible time.[59]

However, where the amendment is freely permitted as a matter of right before any responsive pleading is filed, some of the old problems incident to the use of the demurrer persist. It would appear that one of the basic purposes behind the common law and code demurrer and the modern motion to dismiss is essentially the same, *i.e.*, the termination of essentially unmeritorious actions before trial. As similar as the procedures are, it appears that the philosophy behind the rules change from demurrer to motion was essentially a prophylactic process, to cleanse the former practice of a high degree of technical and artful practice which had grown up around the demurrer, which practice oftentimes irrevocably foreclosed a litigant's rights due to a careless or less artful pleading. As bad as this practice had become at common law, it was eased somewhat thereafter during the code pleading era, when amendments were allowed after demurrer. It was then that the strategy of the demurrer became, not the strategy of finality, but the strategy of delay.[60] The same observation might be made as to the motion to dismiss.

Another problem directed to the use of liberal amendments is suggested. One of the merits of a system which provides for the early disposition of unmeritorious cases is that such a system frees the participants (including the lawyers) to handle more worthy cases. However, under the present rule which permits pleading without verification or sanction and which preserves the motion to dismiss in much the same form as the common law demurrer, with the added embellishment of the liberal amendment rule, a plaintiff with a doubtful claim on the facts may puff the facts in such a way as to delay the final disposition of the case thereby adding to the cost and diminishing the efficiency of the system.[61] It also permits the impetuous to plead

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[59] *See* 1 IOWA RULES CIVIL PROCEDURE ANNOTATED 462 (3d ed. 1970).

[60] *See* Pike, *Objections to Pleadings Under the New Federal Rules of Civil Procedure*, 47 YALE L.J. 50, 51 (1937).

[61] There are several aspects of the economics of unmeritorious litigation, but the assumption can generally be drawn that the longer a case proceeds the costlier it gets. Thus, an appellate review submitted upon a record made by a petition and motion to dismiss will be much less expensive in terms of transcripts and printing cost than one which is concluded at the close of the plaintiff's evidence. Yet another cost factor enters here. The Iowa court has taken the position that the motion to direct a verdict is disfavored and where there is any doubt in the trial court's mind, the judge should take the jury's verdict, then set the verdict aside on a motion for judgment notwithstanding the verdict under Rule 243. This is intended to conserve the efficiency of the trial process by avoiding two appeals. If the jury finds for the plaintiff and returns a verdict and the appellate court reverses, the verdict stands and a second trial is not needed. If the appellate court affirms, the matter is at an end. *See* Florke v. Peterson, 245 Iowa 1031, 65 N.W.2d 372 (1954). The practice is also favored in the federal courts. *See* Passwaters v. General

first and investigate later. Although there is no hard data available it may have the effect of delaying the decision to file until the eleventh hour, which creates other problems which consume court time.[62] The motion to dismiss does not cure this possibility and the liberal amendment rule may very well encourage one with a weak case to plead an exaggerated set of facts. Thus an anomaly is created—one who pleads based upon an honest appraisal of his facts may suffer a dismissal—one who puffs and amends may delay the final moment of truth and thereby encourage nuisance value settlements.[63]

To an extent, this kind of problem is alleviated by the comparable federal rule which permits the motion to dismiss to be treated as a motion for summary judgment where matters outside the pleading are presented to and not excluded by the court.[64] There are, however, certain classes of cases to which the summary judgment rule would not apply.[65]

C. *Failure to State a Claim Upon Which Any Relief Can be Granted*

Federal Rule 12(b), after which Rule 104 was patterned, states that a complaint may be dismissed for "failure to state a claim upon which relief can be granted."[66] Iowa Rule 104(b) differs slightly and states in effect that the petition may be dismissed on motion for "failure to state a claim on which *any* relief can be granted."[67] The distinctions may be minute, but it has been suggested that the federal rule permits dismissal on any of several grounds while the Iowa rule is limited to those petitions which show on their face that the plaintiff is not entitled to "any" relief.[68] The question is what significance should be given to the word "any." It has been interpreted as meaning that the petition should be dismissed only where "it appears to a certainty plaintiff would not be entitled to any relief under any state of facts which could be proved in support of claims asserted against him."[69]

Motors Corp., 454 F.2d 1270 (8th Cir. 1972). Thus, there are countervailing questions of judicial efficiency. It would seem that if the matter is not disposed of at pretrial, it must, in the ordinary case, go to verdict. *See* IOWA R. CIV. P. 344(f)(10). However, there is nothing that assures that pretrial disposition will be efficient. The appellate record in *Bauer v. Stern Finance Co.*, 169 N.W.2d 850 (Iowa 1969), a case disposed of by summary judgment, was three hundred twenty pages in length.

[62] There are many cases having to do with the inadequacy of the original notice to confer jurisdiction, which have been disposed of by rulings on special appearances. Many also involve statute of limitations issues. *See, e.g.*, White v. O'Neill, 164 N.W.2d 79 (Iowa 1969); Summerlott v. Goodyear Tire & Rubber Co., 253 Iowa 121, 111 N.W.2d 251 (1961).

[63] *See* note 56 *supra.*

[64] *See* FED. R. CIV. P. 12(b)(6).

[65] *See* note 188 *infra.*

[66] *See* FED. R. CIV. P. 12(b).

[67] *See* IOWA R. CIV. P. 104(b).

[68] Van Camp v. McAfoos, 156 N.W.2d 878 (Iowa 1968); Burd v. Board of Education of Audubon County, 260 Iowa 846, 151 N.W.2d 457 (1967); Halverson v. City of Decorah, 258 Iowa 314, 138 N.W.2d 856 (1965); Newton v. City of Grundy Center, 246 Iowa 916, 70 N.W.2d 162 (1955). *See also* 2 IOWA RULES CIVIL PROCEDURE ANNOTATED 167 (3d ed. 1970) (Comment).

[69] *See* authorities cited note 68 *supra.*

However, most of the cases cited in support of that conclusion are cases which reach the conclusion in the abstract.[70] Of course, the rule is a proper one and the insertion of the word "any" has significance in at least two aspects. Under a system based upon fact as pleading, where a pleader is required to state a cause of action a pleader alleges the facts relied upon, leaving the court to determine whether those facts give rise to *any* relief cognizable in law. But the same conclusion can be drawn without the intentional insertion of the word "any." A greater distinction would seem to lie in the philosophy underlying the functions of pleading as between the federal and state systems. The federal system is committed to the philosophy of "notice" pleading as opposed to fact pleading. In that system the traditional issues framing function is found elsewhere—in the discovery process and in the pretrial hearing.[71] The Iowa rules could accommodate such an interpretation,[72] except for certain limitations; Rule 70 still requires one to plead the facts "constituting the cause or causes of action asserted" while the federal rules permit a "statement of the claim showing that the pleader is entitled to relief." In addition, discovery by deposition as a matter of right in Iowa is limited to cases where the amount in controversy is in excess of $1,000.00.[73] Thus, for the purpose of uniformity any interpretation which would permit anything other than fact pleading must be found in other rules than the discovery process.

Another interpretation is suggested under the language of the rule which is more in keeping with procedural reform. The old distinctions between law and equity as separate courts are eliminated by statute and by rules.[74]

Indeed, the fusion of law and equity is apparent in Rule 70, in that there is one form of petition for a claim, whether it be at law or in equity. An action sounding in equity which is brought at law or an action cognizable at law which is brought in equity is not subject to dismissal, but is subject only to transfer to the proper docket.[75] Thus, the word "any" in Rule 104(b) is better interpreted to mean that if an action is brought at law and the pleader is entitled to "any" relief, be it at law or in equity, the action should not be dismissed upon motion.[76] This brings one to query whether, when

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[70] See LaMotte Independent School Dist. v. Jackson County Board of Education, 155 N.W.2d 423 (Iowa 1968) where the court ruled that where a doubtful pleading is challenged before issues are joined, doubt will be resolved against the pleader. In sustaining a motion to dismiss the court stated: "It is of course understood a party must plead ultimate facts, not mere legal conclusions alone." *Id.* at 425.

[71] See cases cited note 5 *supra.*

[72] The Iowa rules of discovery are somewhat more restrictive than the federal discovery rules. *See* IOWA R. CIV. P. 141(a). *But see* IOWA R. CIV. P. 136 which provides various means of settling issues at pretrial conference. *See generally* Blair, *A Guide to the New Federal Discovery Practice,* 21 DRAKE L. REV. 58 (1971).

[73] IOWA R. CIV. P. 141(c).

[74] *See* IOWA CODE § 611 (1971); IOWA R. CIV. P. 67, 70.

[75] Dugdale Constr. Co. v. Operative Plasterers & Cement Masons Int'l, 257 Iowa 997, 135 N.W.2d 656 (1965); Newton v. City of Grundy Center, 246 Iowa 916, 70 N.W.2d 162 (1955).

[76] *See* cases cited note 75 *supra.*

an action is brought in equity and plaintiff has an adequate remedy at law, that traditional equity defense is not available to the defendant on motion.

D. *Partial Disposition*

In addition, the motion to dismiss lacks the flexibility of other available rules which may be drawn upon to mount a defense. The motion was never intended to effect partial disposition of a cause of action, but was intended as an attack upon a whole cause of action contained within a separate division.[77] It is not intended as a vehicle to single out the weakness of specifications within a division. This can best be illustrated hypothetically, taken from the typical modern automobile accident case. Assume that the plaintiff alleges in his petition that he was operating his vehicle upon the public highway and that immediately prior to the accident he was following the defendant, who was travelling in the same direction. Assume that the plaintiff also alleges that he started to pass the defendant, the defendant turned from a direct course on the highway, to the left, and into the path of the plaintiff. Assume that the plaintiff's specifications of negligence were that the defendant was negligent in that he:

a. turned his automobile from a direct course upon the public highway when such movement could not be made with reasonable safety;
b. failed to maintain a proper lookout;
c. failed to operate his automobile at a speed that would permit him to bring it to a stop within the assured clear distance ahead;
d. failed to give one half of the travelled way to an overtaking vehicle by turning to the right.[78]

From the example given, it is likely that specification "c" is subject to attack,[79] but not by the motion to dismiss, for the reason that it is a vehicle for testing the legal sufficiency of the petition as a whole, or of the cause of action contained within a division, and not for attacking specifications within a cause of action or division. The motion to dismiss will not reach into the petition to dispose of single specifications. There are other rules better intended to accomplish that purpose, namely the answer,[80] either standing alone or joined with an application for adjudication of points of law appearing on the face of the pleadings,[81] the motion to strike,[82] or at a later time, the motion to withdraw issues from the consideration of the jury,[83] made

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77 Bourjaily v. Johnson County, 167 N.W.2d 630 (Iowa 1969).

78 It is no longer necessary to plead the statutory violation in order to claim negligence per se. The court may take judicial notice of the statutory violation under IOWA R. CIV. P. 94. *See* Wilson v. Jefferson Transp. Co., 163 N.W.2d 367 (Iowa 1968).

79 *See, e.g.*, Monen v. Jewell Tea Co., 227 Iowa 547, 288 N.W. 637 (1939).

80 IOWA R. CIV. P. 72. The rule permits the pleading of questions of law in the answer.

81 IOWA R. CIV. P. 105.

82 IOWA R. CIV. P. 113.

83 The motion to withdraw from the consideration of the jury is a non-rule motion. However, it is commonly used as a method of piercing the pleadings. *See* 5 LOTH, IOWA FORMS, CIVIL PROCEDURE AND PRACTICE 242, 243 (1957).

prior to submission.[84]

E. *Educating the Opponent*

The motion to dismiss or the motion to strike the answer is unlike the demurrer in a way which makes it a less effective tactical ploy in the hands of the defense attorney. The common law demurer was not required to be specific and could be stated in the most general of terms,[85] thereby leaving the opponent to his own resources to discover wherein his pleading was ineffective. The motion to dismiss, and the corollary motion to strike the answer, on the other hand, require specificity[86] and require the movant to set forth wherein he claims the pleading attacked is deficient. In view of the observation that pleading and motion practice is, in the final analysis, little more than legal communication, the requirement of specificity is in keeping with the philosophy of modern pleading. Pleading should not be a game, the rewards of which are reserved for the most artful, but proper pleading and motion practice requires sufficient communication of theories and claims to serve the notice function incident to a proper administration of justice under the rules. The requirement of specificity serves that purpose but anomalously prompts the movant to seek other methods of attack, thereby adding to the obsolescence of the motion as a useful rule.

F. *Motion to Dismiss Not Aided by Facts Outside the Record*

Another feature of the motion to dismiss which often makes it inappropriate under the present wording of the rule as a vehicle for the final disposition of legal matters is the fact that it is not to be aided by facts outside the record except those of which the court may take judicial notice[87]—it is not to be used or interpreted as a "speaking demurrer"[88]—a demurrer which itself alleges facts to support it.[89]

There are at least two reasons for this, the first of which is found in the close relationship between the motion to dismiss and the common law demurrer. The motion to dismiss, like its predecessor at common law and under the codes, is intended merely to test the legal sufficiency of the pleadings and to inquire only whether there are sufficient facts stated therein to

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84 Motions for summary judgment or judgment on the pleadings are not necessarily appropriate to this example for the reason that this kind of case does not lend itself to unequivocal proof. *See* note 188 *infra.*

85 The form of the Code demurrer differed in Iowa from that of a common law demurrer in that it required a specific showing wherein the petition was defective, thereby accomplishing the same "educational" or "communicative" function of the modern motion to dismiss. For the form of the Code demurrer, *see* DEEMER, 1 IOWA PLEADING AND PRACTICE 755 (1914).

86 IOWA R. CIV. P. 104(d).

87 Bales v. Iowa State Highway Comm'n, 249 Iowa 57, 86 N.W.2d 244 (1957).

88 Dennis v. Bennett, 258 Iowa 664, 140 N.W.2d 123 (1966); Kester v. Traveler's Indemnity Co., 257 Iowa 1146, 136 N.W.2d 261 (1965); Raley v. Terrill, 253 Iowa 761, 113 N.W.2d 734 (1962). FED. R. CIV. P. 12(b) permits the court to consider matter outside the motion and to treat the motion as one for summary judgment.

89 *See* F. JAMES JR., CIVIL PROCEDURE 128 (1965).

entitle the plaintiff to any relief.[90] Thus, it tests only legal questions raised by pleaded facts. Facts outside the record are simply not germane to that purpose and intent.

Another reason which speaks strongly against permitting facts to be presented by a motion to dismiss has to do with the record keeping function of the pleadings. An example is found in a not untypical situation. Plaintiff alleges that it is a corporation, authorized to do business in the state of Iowa. Defendant attacks the plaintiff's right to sue in Iowa by motion to dismiss, which states the fact that the plaintiff is a foreign corporation and has not received a permit to do business in Iowa and is therefore precluded from maintaining the suit by reason of section 494.9 of the Iowa Code.[91] The rules provide that a motion is not a pleading[92] and if the proper distinction between motions and pleadings is to be maintained, the proper record of this defense can only be made in the pleadings and not by motion. What a lawyer alleges by motion is not a sufficient foundation for a factual determination[93] in the ordinary case. The proper record keeping function of the pleadings does not permit facts to be proven by mere contentions outside the pleadings unless permitted by specific rules which are intended for that purpose.

There are other ways of attacking the problem stated, but the motion to dismiss is not the proper one. The matter may be raised as an affirmative defense in the answer,[94] separately or followed by an application for adjudication of points of law appearing on the face of the pleadings,[95] and followed thereafter by the appropriate dispositive motion.[96] It may be raised by a motion for summary judgment,[97] which in effect does permit factual allegations in aid of the motion and which may be used to test the same question in a somewhat different way; by inquiring as to whether there is any factual issue remaining which, in the interests of speedy and efficient litigation, would warrant a trial on the merits.

III. Separate Adjudication of Points of Law

A. *Background*

More favored by courts and trial tacticians alike than the motion to dismiss the petition or to strike the answer is the separate adjudication of

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[90] Burd v. Board of Education of Audubon County, 260 Iowa 846, 151 N.W.2d 457 (1967); Newton v. City of Grundy Center, 246 Iowa 916, 70 N.W.2d 162 (1955).

[91] *See, e.g.*, Credit Industrial Co. v. Happel, Inc., 252 Iowa 213, 106 N.W.2d 667 (1960).

[92] Iowa R. Civ. P. 69.

[93] *See, e.g.*, Insurance Co. of North America v. Sperry & Hutchinson Co., 168 N.W.2d 753 (Iowa 1969).

[94] Iowa R. Civ. P. 72. *See also* Betz v. Sioux City, 239 Iowa 95, 30 N.W.2d 778 (1948).

[95] Iowa R. Civ. P. 105.

[96] *See* note 139 *infra.*

[97] Iowa R. Civ. P. 237.

points of law appearing on the face of the pleadings.[98] It is a procedural device which may be invoked upon the court's own motion or by application of a party. The adjudication derives from Rule 105, which has no federal rule counterpart[99] and is confined to the pretrial determination of legal issues and is not fact determinitive. It was unknown at common law other than as it may have been found in the demurrer. A rule of practice under the code procedures which served a similar purpose was the motion for judgment on the pleadings.[100]

Rule 105 serves at least three functions relating to rules pleading concepts. First, it lends viability to that part of Rule 72 which provides that questions of law may be raised as defensive allegations in the answer thereby providing a method of disposing of those questions before trial.

Another function of the motion is that it provides another of several back-up mechanisms to aid the issues framing function of the pleadings under the Iowa rules.[101] In operation it has the effect of isolating and

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[98] IOWA R. CIV. P. 105 states:

> The court may in its discretion, and must on application of either party, made after issues joined and before trial, separately hear and determine any point of law raised in any pleading which goes to the whole or any material part of the case. It shall enter an appropriate final order before trial of the remaining issues, adjudicating the point so determined, which shall not be questioned on the trial of any part of the case of which it does not dispose. If such ruling does not dispose of the whole case, it shall be deemed interlocutory for purposes of appeal.

[99] FED. R. CIV. P. 16(a) provides that: "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider (1) the simplification of the issues . . ."

The purpose of IOWA R. CIV. P. 105 appears to be issue framing and issue eliminating, since it can be argued that the rule itself is not dispositive. If viewed from this perspective, Federal Rule 16(a) may be the closest federal analogy to Iowa Rule 105.

The first use of the pretrial conference appeared in a circuit court in Michigan. Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 219 (1937) states: "Every issue which can in this way be withdrawn from the trial agenda will result in a net gain for all parties concerned, . . . diminish[ing] the risk of error by simplifying the proceedings. . . . If the admissions go far enough or the evidence is clear enough, no trial at all may be necessary.

In addition, it has been stated that if there is no triable issue left at the end of the conference, a judgment may be ordered. *See* Newman v. Granger, 141 F. Supp. 37 (D.C. Pa. 1956).

Rule 16 calls for the judge to issue a pretrial order which controls the subsequent course of the action and which in the ordinary case would include the issues not disposed of and therefore remaining for trial.

[100] Rule 105 probably received its genesis from the code practice cases of 1940 and earlier which treated questions of law on the face of the pleadings in the nature of a motion for judgment on the pleadings, even though the Iowa statutes did not contemplate such a motion. This arose from situations where the allegations in the answer raised no issues to be tried or where there was mutual consent of the parties. *See* Jasper Co. v. Stergois, 228 Iowa 601, 292 N.W. 855 (1940); Briley v. Board of Supervisors, 227 Iowa 55, 287 N.W. 242 (1939). However, in both of these cases a motion for judgment was deemed to be improper in that the corresponding pleading amounted in effect to a general denial and therefore raised issues of fact which must be tried.

[101] *See, e.g.*, IOWA R. CIV. P. 72 which permits the pleading of legal, as well as factual defenses. In National Farmer's Union Prop. & Cas. Co. v. Nelson, 260 Iowa 163, 168, 147 N.W.2d 839, 843 (1965) the court held that: "In ruling on the application for law points, only uncontroverted issues which present points of law may be determined. Unresolved factual issues prevent any judgment or determination of the whole case in

narrowing the real issues to be tried. By disposing of and by eliminating legal issues which have no merit, the parties are in a better position to confine the factual proof at trial to the issues which are really decisive in the case.

A third reason for the rule is that it serves the economy of the judicial process by providing a vehicle for pretrial disposition of purely legal matters. To this extent it serves some of the same purposes as the pretrial conference, which is written in the rules for the sole purpose of expediting litigation.[102]

B. *Inducing the Application of the Rule*

As noted, the rule is not intended to dispose of facts, but only points of law appearing on the face of the pleadings. In this context it should be assumed that the points of law would be raised by the answer or the reply, since the petition should be confined to a statement of the facts constituting the cause or causes of action asserted. This may best be explained by a hypothetical case.

Assume that plaintiff alleges that she was injured as a result of the tortious conduct of the defendant. Defendant, by his answer, alleges that at the time of the injury, the plaintiff and the defendant were husband and wife. Thus, the defense of interspousal immunity applies.[103] Plaintiff, by reply, denies the allegation. A clear denial of the allegation precludes adjudication as a matter of law under the rule, even though the proof may later entitle the defendant to a directed verdict.[104] However, assume the same facts, except that there is no denial in the reply. The facts stated in the answer stand admitted and the matter is ripe for adjudication of the point of law.[105] The foregoing examples are clear. However, assume that the defendant, in his answer, states that on the date in question, the plaintiff and the defendant were living together as husband and wife. That is not an allegation that they are husband and wife. Such an allegation may take additional facts to show whether or not the relationship is such as to create a marriage relationship which would give rise to the defense of interspousal immunity and in that case, the matter may not be subject to the application for separate adjudication of a point of law.

A similar example may be found in dealing with a problem involving

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such a hearing." The facts in *Nelson*, a case involving contribution, were controverted. The majority and dissenting opinions differed as to whether common liability had been established.

102 "Every issue which can in this way be withdrawn from the trial agenda will result in a net gain for all parties concerned. It will save time for the court and jury, . . . diminish the risk of error by simplifying the proceedings, and reduce the labor and cost of an appeal by curtailing the size of the record." Sunderland, *Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 219 (1937).

103 *See, e.g.*, Flogel v. Flogel, 257 Iowa 547, 133 N.W.2d 907 (1965).

104 *See* IOWA R. CIV. P. 216.

105 *See, e.g.*, Dungy v. Benda, 251 Iowa 627, 102 N.W.2d 170 (1960); Weik v. Ace Rents, Inc., 249 Iowa 510, 87 N.W.2d 314 (1958).

the defense of the statute of frauds.[106] Assume that plaintiff sues defendant for specific performance, based upon a contract for the sale of real estate. Plaintiff, under any rule of pleading is not required to anticipate defenses or defensive matters.[107] Defendant may elect to meet the evidentiary problem at the earliest possible time and to plead the statute of frauds as a defense, to the effect that the alleged contract was not signed by him. If there is no responsive allegation to take the matter out of the statute of frauds, such as possession or part performance,[108] the matter may well be treated as a question of law under Rule 105. However, if the plaintiff chooses to traverse the pleadings by reply and by pleading that there is part performance, defendant's advantage on the legal question is lost and a fact question is created.

C. *Tactical Reasons for Favoring the Rule*

Although it can be said as a general proposition, that an adjudication under Rule 105 would be raised by a legal, rather than a factual defense in an answer, this need not be so. It is possible that the foundation for a Rule 105 adjudication may be made even though there is a denial of the factual allegations of the petition.[109] One such situation is where the allegations of the petition would not permit a recovery, such as where it is clear that the statute of limitations has run. If the petition shows clearly on its face that the action is barred by limitations, the matter may be resolved as a matter of law by an adjudication under Rule 105, even though there is a denial of the factual allegations of the pleadings. However, it should be noted that this situation may be avoided by reply, if the plaintiff has additional facts to plead to avoid the statute.

There are several reasons for opting in favor of an application for adjudication of points of law appearing in the pleadings rather than filing a motion to dismiss[110] or a motion to strike the answer as not constituting a defense.[111] One of the reasons is that it is a more adaptable vehicle for disposing of a part of the opponent's claim or defense, while the motion to dismiss the petition or to strike the answer goes to the whole of the cause of action or defense as pleaded in a division, although Rule 113 provides for striking improper matter from a pleading.[112] It would seem that the 105

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106 IOWA CODE § 622.32 (1971).

107 Pride v. Peterson, 173 N.W.2d 549 (Iowa 1970); Cochran v. Independent School District of Broad Horn, 207 Iowa 1385, 224 N.W. 809 (1929); Reed v. Hollingsworth, 157 Iowa 94, 135 N.W. 37 (1912); Gelpke v. City of Dubuque, 68 U.S. 221 (1863).

108 *See, e.g.*, IOWA CODE § 622.33 (1971).

109 In the case of *Buckley v. Deegan*, 244 Iowa 503, 57 N.W.2d 196 (1953), an action for services rendered, plaintiff contended that Rule 105 may not be invoked where the facts are controverted. However, the court held from Rule 72, the answer can deny and still raise points of law appearing on the face of the instrument.

110 *See* IOWA R. CIV. P. 104(b).

111 IOWA R. CIV. P. 104(c).

112 IOWA R. CIV. P. 113 provides: "Improper or unnecessary matter in a pleading may be stricken out on motion of the adverse party."

adjudication may also, in the proper case, dispose of evidentiary matters before trial, thereby creating a similarity to other pretrial motions.[113] One of the advantages of this tactic is to avoid the possibility of interrupting the trial to settle legal matters and it also avoids the necessity of appearing obstructive before the jury. Additionally, if the evidentiary matter is crucial to the claim or defense, as may be a statute of frauds or a parol evidence problem, a pretrial determination may create a tremendous tactical advantage, and also serve the philosophical purpose of disposing of futile litigation at a minimum of cost to the participants.

Yet another reason which suggests the favoring of Rule 105 adjudications goes to the question of amendments. Rule 88[114] permits an amendment as a matter of right at any time before a responsive pleading is filed. Amendments thereafter are permitted upon application to the court and then only upon a showing that the amendment does not substantially change the claim or defense.[115] Thus, a petition, or for that matter an answer, after being successfully attacked by a motion to dismiss or a motion to strike respectively, may be amended, and if the pleader has further facts to add in order to mend his hold, he may do so. However, Rule 105 specifically permits the application for adjudication of points of law after the issues are joined and the pleadings traversed; therefore, any subsequent amendment must be by leave of court. This is best explained by example.

Assume a somewhat extreme, but not uncommon hypothetical situation where the plaintiff's claim is for medical malpractice based upon the claim that the defendant surgeon failed to remove surgical sponges after an operation. As suggested before, it is not incumbent upon the plaintiff to plead around anticipated defenses. Assume that the action is commenced at a time beyond two years after the operation but that the presence of the foreign bodies was not discovered until after the two year limitations has expired. Assume also that the court of the state has not passed upon the question in issue, *i.e.*, whether the statute would be extended in such a situation where the injury was not discovered until some time after the statute had run. Plaintiff must plead the facts which give rise to the cause of action. If defendant raises the statute in his answer, plaintiff will have the opportunity to reply,

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113 The motion in limine, a non-rule motion may be resorted to for the purpose of pretrial disposition of irrelevant evidence which would create prejudice against the movant. *See* Lewis v. Buena Vista Mut. Ins. Ass'n, 183 N.W.2d 198 (Iowa 1971); Baysinger v. Hanly, 261 Iowa 577, 155 N.W.2d 496 (1968); Wagner v. Larson, 257 Iowa 1202, 136 N.W.2d 312 (1965); Mead v. Scott, 256 Iowa 1285, 130 N.W.2d 641 (1964).

114 IOWA R. CIV. P. 88 states: "Any pleading may be amended before a pleading has been filed responding to it. The court, in furtherance of justice, may allow later amendments, including those to conform to the proof and which do not substantially change the claim or defense. The court may impose terms, or grant a continuance with or without terms, as a condition of such allowance.

115 Amendments were permitted prior to the adoption of the rules and the subject has prompted much appellate litigation. Today amendments are favored and motions to amend are subject to liberal interpretation. *See* Stanter v. Walnut Grove Prod., 188 N.W.2d 305 (Iowa 1971); Dailey v. Holiday Distrib. Corp., 260 Iowa 859, 151 N.W.2d 477 (1967).

alleging *the fact* that the injury was not discovered until after the effective date of the statute. Under Rule 102 the fact of discovery is denied by operation of law; this could have the effect of permitting the factual allegation, but laying the foundation for an adjudication as a question of law, *e.g.*, when the statute begins to run. Parenthetically, the motion to dismiss may not always be the appropriate method of meeting statute of limitations problems, as in the hypothetical case herein cited, unless, of course, the petition clearly shows that there is a limitations bar.[116]

D. *Finality*

One of the issues which has caused some concern in appellate litigation under Rule 105 adjudications is the issue of finality as interpreted under the rule. The difficulty seems to arise from the interpretation to be given the meaning of the word itself and the decisions seem to result in three different meanings being attributed to the concept of finality, two of which are attributable to the kinds of cases where disposition is partial and the other interpretation having to do with cases involving the question of whether the disposition is partial or complete.

1. *Fragmentary Disposition*

Where the case is fragmented by a partial disposition of the legal issues under a separate adjudication pursuant to Rule 105, the question of finality takes on a double entente. The precise language of the rule relating to fragmentary disposition is that, upon submission, the court "shall enter an appropriate *final* order before trial of the remaining issues, adjudicating the point so determined, *which shall not be questioned on the trial of any part of the case of which it does not dispose.* If such ruling does not dispose of the whole case, it shall be deemed interlocutory for the purpose of appeal." Thus, finality, in the context of fragmentation, as interpreted under that language may mean 1) finality for the purpose of the future conduct of the litigable issues of the case[117] and 2) finality in terms of the court's order and the court's inherent power to correct its own error by modification prior to final submission.[118] It does not mean finality for the purpose of appeal, and finality within this context is governed by Rules 331 and 332.[119]

Again we turn to the Statute of Frauds problem noted above. For the purpose of precluding and obtaining a pretrial order of its admissibility, defendant may elect to treat it somewhat in the same manner as a motion in limine and make an application as to whether or not the evidence would

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[116] *See* Pride v. Peterson, 173 N.W.2d 549 (1970).

[117] Berger v. Amana Society, 253 Iowa 378, 111 N.W.2d 753 (1961); Litchford v. Iowa-Illinois Gas & Elec. Co., 247 Iowa 947, 75 N.W.2d 346 (1956).

[118] Allied Mut. Cas. Co. v. Long, 252 Iowa 839, 107 N.W.2d 682 (1961).

[119] Hubbard v. Marsh, 239 Iowa 472, 32 N.W.2d 67 (1948). *See also* Wilson v. Corbin, 241 Iowa 593, 41 N.W.2d 702 (1950).

be admissible. Obviously, although the evidentiary question may be the heart of the plaintiff's case, it does not dispose of it if he can prove the contract by some other means or by showing an exception by reason of possession or part performance. Assume also that the court rules favorably for the defendant and finds that, under the Statute of Frauds, the evidence would be inadmissible. The case has not been finally disposed of; the ruling goes only to the evidence question involved.[120] Yet it is final for the purpose of that issue until the case is reversed.[121] Under the decisions, that ruling stands in the nature of the law of the case.[122]

On the other hand, this is not to say that the court may not correct its own error, as in other cases and can modify its ruling at any time prior to final submission.[123] But this reasoning is merely in keeping with a philosophy that trial judges are often required to make a yes or no decision with sometimes minimum notice and advice and should be able to correct their own errior.[124]

2. *Complete Disposition*

By its express language, Rule 105 is not self-dispositive in that it does not provide for a final judgment even though the court's adjudication may effectively dispose of the whole case. It does provide, however, that the court may consider any issue "*which goes to the whole . . . of the case.*"[125] The rule is silent as to whether an order which does dispose of the whole case is a final order. It contains no provision for the entry of judgment. Cases such as *Weik v. Ace Rents, Inc.*[126] and *Johannsen v. Steuart*[127] do not satisfactorily answer the question of finality where the order purports to dispose of "all of the issues of the case" and the prudent lawyer may be wary of the assumption that such an order is final.[128] The *Weik* case can be read in such a way as to suggest that if the application is ruled upon in favor of the applicant and disposes of the issues, those same issues need not be re-litigated in the hearing on a motion for judgment on the pleading, but that the motion for judgment on the pleadings is necessary to give the order finality. That interpretation is nothing more than suggesting that the order is the law of the case.[129] On the other hand, the *Weik* case can also be interpreted to mean that an order which disposes of the whole of the case is in fact dispositive and the motion for judgment on the pleadings is

120 Hubbard v. Marsh, 239 Iowa 472, 32 N.W.2d 67 (1948).
121 *See* cases cited note 116 *supra.*
122 *See* cases cited note 116 *supra.*
123 Allied Mut. Cas. Co. v. Long, 252 Iowa 829, 107 N.W.2d 682 (1961).
124 This is the basic philosophy underlying the motion for judgment notwithstanding the verdict. *See* Iowa R. Civ. P. 243.
125 Iowa R. Civ. P. 105.
126 249 Iowa 510, 87 N.W.2d 314 (1958).
127 260 Iowa 1140, 152 N.W.2d 202 (1967).
128 *See* Hubbard v. Marsh, 239 Iowa 472, 32 N.W.2d 67 (1948).
129 *See* cases cited note 116 *supra.*

mere surplusage.[130] *Johannsen* does nothing more than follow *Weik* on this point. Neither is this observation aided by Rule 219 which states that "every final adjudication of any of the rights of the parties in an action is a judgment." One comment suggests that Rule 219 is not determinitive as to what is final for the purpose of appeal.[131] The same conclusion may be drawn from Rule 105. What is final for the purpose of appeal is governed by Rules 331 and 332 and the cases interpreting them.[132] Although Rule 331 singles out other rules for "final" treatment, it makes no exception for Rule 105 applications and adjudications.

Perhaps lawyers are better advised, where there is doubt, to treat the matter as interlocutory, thus saving the possibility of submitting to two full-blown appeals.

E. *The Follow-Up Motion*

Assuming some validity to the observation that Rule 105 provides no self-executing method for the entry of judgment, and that the question of whether or not judgment is final is governed by Rules 331 and 332, and that the lawyer should follow-up with a proper motion to execute the *coup de grace* after a successful adjudication under Rule 105, the next subject of inquiry is: Which motion is best intended to suit that purpose?

Although there are cases in which a successful application by a defendant has been treated as a motion to dismiss,[133] it may be concluded that the motion to dismiss is particularly inappropriate, simply for the reason that a motion to dismiss under Rule 104(b) must be filed before the answer, and if the adjudication is made "after issues joined and before the trial" it is likely that the Rule 105 adjudication is premature. Other reasons also suggest that the motion to dismiss is inappropriate. The motion to dismiss is intended as a vehicle to attack the legal sufficiency of the petition.[134] To that extent it is intended to dispose of a whole cause of action as opposed to a divisible part.[135] On the other hand a Rule 105 adjudication may either operate as a rifle to zero in on and dispose of a part of a claim or defense,

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130 In *Weik v. Ace Rents, Inc.*, 249 Iowa 510, 513-14, 87 N.W.2d 314, 317 (1958), the court said: "The order under R.C.P. 105 was a final order which adjudicated in the trial court, that, under the facts pleaded, plaintiff had no right of recovery on either count of his petition. The reconsideration, in the subsequent hearing upon the motion for judgment on the pleadings, of the points of law already adjudicated, was unnecessary."

131 3 IOWA RULES CIVIL PROCEDURE ANNOTATED 323 (3d ed. 1970) (Comment).

132 With respect to the question of finality as a jurisdictional prerequisite to appeal under Rules 331 and 332, some problems arise which are sufficiently beyond the scope of this article to warrant textual treatment. Some general rules follow: Only the discretional part of the order is to be interpreted on the question of whether or not the order is final or interlocutory. Iowa Public Service v. Sioux City, 254 Iowa 22, 116 N.W.2d 466 (1962).

133 *See, e.g.*, Allied Mut. Cas. Co. v. Long, 252 Iowa 829, 107 N.W.2d 682 (1961); Amundson v. Kletzing-McLaughlin Memorial Foundation College, 247 Iowa 91, 73 N.W. 2d 144 (1955).

134 *See* note 49 *infra*.

135 Bourjaily v. Johnson County, 167 N.W.2d 630 (Iowa 1969).

or it may operate as a scattergun to adjudicate the whole of a division within the pleadings.

It is conceivable, however, that if the application is made by and resolved in favor of the plaintiff and the issues are formulated by the petition and answer, without reply, the plaintiff could follow such an adjudication by a motion to strike the answer[136] as not constituting a defense. But, one of the same problems persists. Technically speaking, would an order striking the answer be dispositive of the case? It is a final order within that definition.[137] Obviously, under Rule 88 the defendant could amend with leave of court if there were other facts which could generate a defense.[138]

Equally inappropriate is the motion for summary judgment.[139] This conclusion is derived from the observation that the motion for summary judgment is intended to serve a purpose incompatible with the purpose of a Rule 105 adjudication. Summary judgment proceedings, although not intended to be fact determinative, may be aided by facts supplemental to the immediate record. The thrust of the inquiry under the summary judgment proceeding is merely to determine whether there is a fact question remaining which should be tried. It is not a rule intended to determine the legal sufficiency of a claim or defense.

The most appropriate method of disposing of the litigation after a successful adjudication of points of law lies with a motion for judgment on the pleadings under Rule 222.[140] Rule 222 is not intended to be fact determinitive except to the extent of disposing of uncontroverted facts stated in all of the pleadings. However, as a practical matter, the admission of controversial facts is rare, and is more apt to arise from oversight than design. Because the rule is intended to dispose of uncontroverted facts "stated in all the pleadings," the assumption must follow that when the matter is ripe for Rule 222, the issues are joined and that any uncontroverted facts under that state of the record raise legal issues which may be also adjudicated, but not disposed of, by a Rule 105 adjudication. A more cogent

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136 IOWA R. CIV. P. 104(c).

137 Defendant in such a situation has the option of amending, if he has a legal or factual allegation left which would constitute a defense. To that extent an order sustaining a motion to strike is not final. *See* IOWA R. CIV. P. 88. IOWA R. CIV. P. 86 treats the matter as a final adjudication, however, if he elects not to amend and to stand on the record so made. Herein however, lies a difference between an order which dismisses a petition and an order which strikes an answer. In the former, if plaintiff elects not to plead over he may treat the order as final; he is out of court. However, if the answer is stricken, the case is not finally disposed of. Defendant is merely exposed to judgment.

138 The author is torn between a choice of words here. "Revive" would seem inappropriate in view of the interpretation that an adjudicaton under Rule 105 operates in the nature of the law of the case. It would seem that a new issue, raised by new facts would be imperative. *See* cases cited note 116 *supra*.

139 IOWA R. CIV. P. 237.

140 IOWA R. CIV. P. 222 states: "Any party may, at any time, on motion, have any judgment to which he is entitled under the uncontroverted facts stated in all pleadings, or on any portion of his claim or defense which is not controverted, leaving the action to proceed as to any other matter of which such judgment does not dispose."

reason for selecting a motion for judgment on the pleadings as a dispositive motion is that Rule 222 specifically provides for the entry of judgment "on any portion of his claim or defense which is not controverted," thereby permitting fragmentary disposition, which is also within the purpose and intent of Rule 105.

F. *Creating Legal Issues in the Pleadings*

Since adjudications under Rule 105 are confined to the determination of legal issues appearing in the pleadings, some mention of the manner in which legal issues are raised for purposes of Rule 105 adjudications seems warranted. Traditional rules of pleading prohibit pleading evidence or conclusions in the petition.[141] However, modern rules practice, as exemplified by Rule 72 permits the answer to "raise points of law appearing on the face of the petition to which it responds."[142] Similarly Rule 73 permits the raising of points of law in the reply which appear on the face of the answer.[143] This is in keeping with the modern philosophy that justice will be better served by getting the matter to issue at the earliest possible time. Thus, Rule 105 and its provisions for adjudicating points of law is merely a procedural vehicle for adjudicating those legal issues. It is also suggested that Rule 105 adjudications are not aided by facts, as are motions for summary judgment.[144] However, some of the cases have turned on legal questions where facts, in the form of exhibits other than contracts are attached to the answer, which exhibits, where not responded to by denial in the reply, have created questions which have warranted the court to treat as proper for Rule 105 adjudications. Rule 91 provides that "every pleading referring to a contract must state whether it is written or oral." If the contract is the basis of the action or defense, it must be set forth in full.[145] This seems to be another rule compromise to the strict code pleading requirements prohibiting the pleading of evidence. The rule specifically refers to contracts. There is no rule providing for attachment of non-contractual evidentiary exhibits to the pleadings although evidence in support of a motion may be supplied by affidavit.[146]

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141 *See* note 18 *supra.*

142 IOWA R. CIV. P. 72 states: "The answer shall show on whose behalf it is filed and specifically admit or deny each allegation or paragraph of the petition, which denial may be for lack of information. It must state any additional facts deemed to show a defense. It may raise points of law appearing on the face of the petition to which it responds. It may contain as many defenses, legal or equitable, as the pleader may claim, which may be inconsistent. It may contain a counterclaim which must be in a separate division."

143 IOWA R. CIV. P. 73 states: "There shall be a reply to a counterclaim, and to new matter in an answer, responding thereto in the same manner that an answer responds to a petition, but not inconsistent with the petition. Points of law arising on the face of the answer may be raised by reply."

144 IOWA R. CIV. P. 237 provides for supplying facts by affidavit and counter-affidavit.

145 IOWA R. CIV. P. 91.

146 IOWA R. CIV. P. 116.

But a motion is not a pleading under the rules.[147] Yet, in *Olson v. Wilson & Co.*[148] several letters were attached as exhibits to the pleadings, thereby raising the issue of whether there was an accord and satisfaction as a matter of law, and in *Dungy v. Benda*,[149] a wrongful death action, an application and order for authority to compromise and settle a claim and a release were attached as exhibits to the pleadings. Similarly, in *Weik v. Ace Rents, Inc.*[150] a rental agreement was attached to the answer as an exhibit in defense to a lessee's claim of personal injury, thereby raising the legal question under Rule 105. It is to be noted that in none of the cases was there a denial of the factual or legal allegation which would preclude the court from treating the question as a matter of law and it may be well assumed that such a denial would merely have prolonged the hour of truth. However, it is difficult to escape the observation that the attaching of such exhibits, particularly in the form of letters, would be objectionable as pleading evidentiary facts and possibly subject to a motion to strike.[151] Such a tactic as attaching evidentiary material to a pleading is probably best reserved as a factual statement in aid of a motion for summary judgment.[152] On the other hand, one may indulge philosophically at least, in the comfort that the purpose and intent of Rule 105 is served by disposing of unmeritorious claims or defenses at the earliest possible opportunity.

It should be understood that once the legal issue is created, the Rule 105 adjudication is not treated as a motion,[153] but as part of the trial under Rule 176. Rule 176 states, in pertinent part "[a]n issue of fact arises on a material allegation of fact in a pleading which is denied in an adversary's pleading or by operation of law. *All other issues are issues of law which must be tried first.*"[154] Thus, the Rule 105 adjudication is really the rule which gives force and effect to the last sentence of Rule 176.

While one might assume that an application for adjudication of law points under Rule 105 is never germane where there is a denial of an issue in the adversary's pleading, that result does not necessarily follow for the reason that the answer or a reply may contain factual denials and still raise points of law which are subject to Rule 105 disposition.[155]

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147 IOWA R. CIV. P. 69.
148 244 Iowa 895, 58 N.W.2d 381 (1953).
149 251 Iowa 627, 102 N.W.2d 170 (1960).
150 249 Iowa 510, 87 N.W.2d 314 (1958).
151 IOWA R. CIV. P. 113. *See also* Hall v. Harris, 61 Iowa 500, 13 N.W. 665 (1883); Iowa Railroad Land Co. v. Sac County, 39 Iowa 124 (1874). *Compare* Hutchinson v. Des Moines Housing Corp., 248 Iowa 1121, 84 N.W.2d 10 (1957) *with* Evans v. Herbranson, 241 Iowa 268, 41 N.W.2d 113 (1950).
152 IOWA R. CIV. P. 237.
153 Bremer v. Journal Tribune Publishing Co., 247 Iowa 817, 76 N.W.2d 762 (1956). *But see* Kriv v. Northwestern Sec. Co., 237 Iowa 1189, 24 N.W.2d 751 (1946) indicating that an application under Rule 105, and a motion of summary judgment and for judgment on the pleadings may be joined.
154 IOWA R. CIV. P. 176 (emphasis added).
155 Buckley v. Dugan, 244 Iowa 503, 57 N.W.2d 196 (1953).

IV. Summary Judgment—The Paper Trial[156]

A. *History and Operation of the Rule*

The procedure of the common law abhorred "speaking" demurrers and motions[157] and by and large motion practice at common law and under the codes was confined to attacks upon the form, substance or sufficiency of the pleadings[158] thereby carefully avoiding any factual determination based upon pretrial hearings or proceedings. That prohibition still applies to most motions under the Iowa rules,[159] a notable exception to which is the motion for summary judgment which may be heard to speak.[160] This distinction lies in the procedure which permits the motion for summary judgment or the resistance to a motion for summary judgment to be aided by facts supplied by pleadings, affidavits, interrogatories or depositions. Yet a proper interpretation of that rule still suggests that the only available fact determining proceeding is the trial itself, since the motion for summary judgment is not, in any case, to be interpreted as fact determinitative, but is merely an inquiry into the limited question of whether a fact exists which would warrant a formal evidentiary trial.[161]

A form of summary judgment procedure appeared in restricted form in the code prior to the adoption of the rules.[162] However, the original rules version limited the benefit of the motion to the plaintiff and only then upon certain enumerated kinds of claims as where the claim was liquidated or otherwise ascertainable.[163]

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156 *See* Sherwood v. Nissen, 179 N.W.2d 336 (Iowa 1970).

Justice Uhlenhopp also aptly stated in *Gruener v. City of Cedar Rapids*, 189 N.W.2d 577, 580 that:

> Involved there is the basic purpose of summary judgment procedure. Every trial court has on its docket some pleaded claims and defenses which are actually without substance and exist only on paper. To obviate the labor and expense of trial to expose those empty vessels, summary judgment procedure was conceived. . . . Paper case and defenses can thus be weeded out to make way for litigation which does have something to it.

The justice might have added that such cases also exist in the files of lawyers because of the duty that the lawyer may feel toward the regular client, who exerts pressure upon the lawyer to come up with a miraculous result. Herein lies the case for candid and professional assessment and advice as to a case's true worth. Think of the possibilities for the alleviation of court congestion at the very source.

157 *See* F. James Jr., Civil Procedure 128 (1965).

158 *Id.*

159 *See, e.g.*, Credit Industrial Co. v. Happel, Inc., 252 Iowa 213, 106 N.W.2d 667 (1960). The modern attitude, particularly in the federal system, seems to be less rigid, however. *See also* Clark, Code Pleading 541, 542 (2d ed. 1947).

160 *Compare* Iowa R. Civ. P. 237 *with* Fed. R. Civ. P. 56. Iowa R. Civ. P. 237(e) permits oral testimony to supplement or oppose other affidavits. The Federal Rule 12(b)(6), motion to dismiss, when accompanied by matters outside the record functions as a motion for summary judgment.

161 *See* Sherwood v. Nissen, 179 N.W.2d 336 (Iowa 1970); Linderholm's Estate v. State Auto & Cas. Underwriters, 169 N.W.2d 561 (Iowa 1969).

162 *See* Iowa Code § 11608 (1939). The section is now Rule 239. Subsequent sections provided for notice and hearing. The "new" Rule 237 under the 1943 reform is patterned after the Connecticut statute. *See* 2 Cook, Iowa Rules Civil Procedure 695 (1951) (Advisory Committee Comment).

163 Iowa R. Civ. P. 237, 238 (1966). Some of the pre-amendment cases indicate

In 1967 the office and function of the rule was expanded by amendment to effect the following changes:

1. The summary judgment motion may be invoked in favor of any party;[164]
2. The movant may, but need not, support his motion with affidavits;
3. The rule makes mandatory provision for a hearing on the motion;[165]
4. In passing on the propriety of the motion the court is bound to consider the record as a whole, including the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits in support of and against the motion;[166]
5. The ruling on the motion may dispose of all or only a part of the case;
6. The rule sets forth the required form and substance of the affidavits;
7. It permits the court discretion in refusing to grant the motion where the movant's opponent can show by affidavit that he cannot present facts sufficient to justify his opposition. The rule also permits an alternative procedure of permitting a continuance;
8. Where affidavits are made in bad faith or for the purpose of delay, the court may impose sanctions, including the assessment of costs for attorney fees, and contempt citations.

Particular problems resulting from the later amendment will be discussed hereafter. Subsections (a), (b), (c) and (e) are so peculiarly intertwined that it seems necessary to discuss them together in terms of (a) the proper record requirements in support of or in resistance to the motion and (b) the tests upon which the court may base its interpretation upon the record so made. One thing seems abundantly clear; as in other instances the court is unsympathetic to record errors of counsel in laying the proper foundation for the interpretation under the rule.[167] One of the problems which has

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that the court's first inquiry was to determine whether the movant and the movant's contention were within the operational effect of the rule. *See, e.g.,* Petit v. Ervin Clark Const. Co., 243 Iowa 118, 49 N.W.2d 508 (1951); International Milling Co. v. Gisch, 256 Iowa 949, 129 N.W.2d 646 (1964).

[164] Bauer v. Stern Finance Co., 169 N.W.2d 850 (Iowa 1969). The pre-amendment rule applied only to plaintiffs. However, a person who asserted a claim against a plaintiff was considered a plaintiff within the meaning of the rule. Kriv v. Northwestern Sec. Co., 237 Iowa 1189, 24 N.W.2d 751 (1946). In *International Milling Co. v. Gisch,* 256 Iowa 949, 129 N.W.2d 646 (1964) it was held that the plaintiff was not within the pre-amendment rule which permitted a summary judgment against a defendant where defendant had filed a counterclaim because in that instance plaintiff was a defendant so far as the counterclaim was concerned and the former rule did not permit a summary judgment in favor of a defendant.

[165] *See* Iowa R. Civ. P. 237(c). *See also* Northwestern Nat'l Bank of Sioux City v. Steinbeck, 179 N.W.2d 471 (Iowa 1970).

[166] Sherwood v. Nissen, 179 N.W.2d 336, 339 (Iowa 1970); Hanna v. Iowa State Liquor Control Comm'n, 179 N.W.2d 374 (Iowa 1970).

[167] *See generally* Allied Concord Financial Corp. v. Hawkeye Lumber Co., 172 N.W.2d 264 (Iowa 1969) where the inconsistency of the plaintiff's claim and the inadequacy of its motion were sufficient to preclude a favorable ruling on its motion for

confronted the litigants is to fully understand when the fact question remains and when the case may be disposed of summarily as a matter of law. Herein lies a fleeting similarity to the motion to dismiss, the similarity however being confined to the proposition that legal issues under the rules are raised by demonstrated facts. However, when discussing that analogy in the context of the motion to dismiss, the demonstrated facts are there found in the petition, while in the motion for summary judgment the demonstrated facts are found in the record as a whole.[168] Record requirements can be categorized as the adequacy of the record to sustain the motion for summary judgment and the adequacy of the record to resist the motion.[169] In addition, it would appear that the cases which interpret the rule on the question of the adequacy of the motion and supporting documents in support of or in resistance to the motion may be categorized into two generic classes: (1) those which do or do not lend themselves to unequivocal proof and (2) those where the issues have a tendency to shift and to become constrictive by reason of the intercession of the motion and its supporting documents.

B. *The Record to Support the Motion*

As stated in *Sherwood v. Nissen*,[170] the party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required.

The rule provides that a person making the motion may move with or without supporting affidavits. This much, standing alone, would lead to the assumption that in a proper case a movant may be entitled to a summary judgment based upon the undenied allegations of a petition or answer as the case may be.[171]

It is not inconceivable that a summary judgment could be entered upon issues created by the pleadings alone. An example may be stated somewhat hypothetically, taken however, after the facts in *Wright v. Peterson*.[172] Plaintiff rented a residence house from the defendant. After a period of occupancy, the gas heater exploded, injuring the plaintiff. The defense was that the plaintiff assumed the risk. The defense of assumption of

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summary judgment. *See also* Petit v. Ervin Clark Const. Co., 243 Iowa 118, 49 N.W.2d 508 (1951).

[168] Iowa R. Civ. P. 237(e). *See also* Hanna v. Iowa State Liquor Comm'n, 179 N.W.2d 374 (Iowa 1970); Bauer v. Stern Finance Co., 169 N.W.2d 850 (Iowa 1969).

[169] *See* Sherwood v. Nissen, 179 N.W.2d 336 (Iowa 1970).

[170] *Id.*

[171] It appears that no Iowa case to date has clearly held. However, *Continental Illinois Nat'l Bank v. Security State Bank*, 182 N.W.2d 116 (Iowa 1970) seems to stand for the proposition that the fact question of whether a plaintiff was a holder in due course could be raised by the pleadings, in addition to the other parts of the record in the whole case.

[172] 259 Iowa 1239, 146 N.W.2d 617 (1966).

risk is based upon the plaintiff's knowledge and appreciation of a dangerous condition. Assume then that the plaintiff alleged facts sufficient to constitute negligence. Assume also that the defendant answers in one division only and alleges that: "the defendant denies that (he was negligent) and alleges that the plaintiff assumed the risk incident to his injuries." It could be argued that the defendant, by alleging in one division that he denied the plaintiff's allegations of negligence and that the plaintiff assumed the risk, is in effect pleading a negative pregnant,[173] which amounts to an ineffective denial and therefore an admission that a dangerous condition existed and that the plaintiff knew of it, appreciated it and proceeded accordingly. A summary judgment may be appropriate to dispose of the undenied allegation,[174] leaving the trial to proceed on the limited question of whether the plaintiff did in fact have sufficient knowledge to appreciate the danger, and of course such other matters necessary to recovery, such as proximate cause and damages. In any event, the court would not be concerned with the quality of the proof in support of or in resistance to the motion.

Although pleadings under the rules, except in certain cases, need not be verified,[175] a mere denial of an allegation in a pleading does not necessarily arrest the possibility that a summary judgment will be entered. Neither is a mere denial sufficient to resist it. These observations are justified and fully explained by recalling the nature of the pleadings and the functions of the summary judgment proceeding. Much of pleading and motion practice is communication—apprising the court and the other party of the claim or defense.[176] But the pleadings are merely the parties' contending statements. They do not amount to proof and can seldom be considered as such.[177] Yet an undenied allegation is admitted and relieves the party of the proof on that fact. A claim or defense which finds no support in the substantive law will not preclude the entry of summary judgment, even though pleaded,[178] since a summary judgment proceeding is an attempt to avoid useless trials by inquiring as to whether an actual and factual issue exists to support a legal

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173 It has been said that negative pregnants are in general opposed to the theory and spirit of the codes. CLARK, CODE PLEADING 590 (2d ed. 1947). *But see* Callanan v. Williams, 71 Iowa 363, 32 N.W. 383 (1887). *See also* Nelson v. Iowa-Illinois Gas & Elec. Co., 160 N.W.2d 448 (Iowa 1968), where the court approved a dismissal based upon a special appearance where there were inconsistent claims pleaded in one division where one claim was jurisdictional.

174 *See* IOWA R. CIV. P. 237. This rule specifically permits the judgment to dispose of part of the case.

175 IOWA R. CIV. P. 80.

176 In *Northwestern Nat'l Bank of Sioux City v. Steinbeck*, 179 N.W.2d 471 (Iowa 1970), the court said that the purpose of the affidavit in opposition to a motion for summary judgment is to apprise the court of the existence of a substantial issue of fact made in good faith.

177 The word "seldom" is used advisedly. *See* In re Estate of Malli, 260 Iowa 252, 149 N.W.2d 155 (1967).

178 *See* Jensen v. Voshell, 193 N.W.2d 86 (Iowa 1971); Bjornsen Constr. Co. v. Whitmer & Sons, 254 Iowa 888, 119 N.W.2d 801 (1963) where the court held that execution and delivery of a note imports consideration and the defense that defendants received nothing of value is insufficient in law to avoid the motion.

claim which would warrant a trial.[179] Thus an unverified pleading is merely intended to put a person upon his proof on an issue, but not to resolve it. It would appear then that the safest way for the movant to expose the question, if one is to rely for his record upon the pleading as proof of a fact, is by verified pleading which at least rises to the status of an affidavit.[180]

An affidavit should be sufficient to support the motion in the absence of a proper resistance.[181] But it should also be remembered that the court is simply not to be placed in the position of weighing the facts as between counter-contending evidentiary exhibits, even though there may concededly be a gradation of testimonial quality in the various kinds of supporting documents or proofs contemplated by the rule. An affidavit may be the weakest form of evidence, because it would ordinarily be self-serving and not subject to the rigors of cross-examination.[182] An interrogatory, however, is the result of an inquisitorial process and may be offered as evidence in the trial of a case.[183] Likewise, a deposition has the quality of testimonial proof.[184] Yet for the purpose of the motion each may stand on equal ground in the limited inquiry as to whether there is a litigable issue of fact remaining, since the court is bound to consider the record as a whole.[185]

The person seeking the summary judgment by motion must, of course, solve the fact-law dichotomy in favor of eliminating all factual issues. The recent case of *Jensen v. Voshell*[186] provides a somewhat typical example of the kind of case where the issues change and become restricted by reason of the motion and its supporting documents. The action was to establish paternity. Plaintiff, anticipating a statute of limitations defense alleged that the defendant had acknowledged the paternity in writing which would avoid the limitation by reason of section 675.3 of the Iowa Code. Defendant moved for summary judgment, attaching to his motion four letters, upon which plaintiff relied, the letters having been previously obtained by discovery. To this the plaintiff responded, setting forth facts tending to show the paternity. However, the court noted that for the purpose of the motion, paternity was no longer the pivotal issue of the case, the question was now confined to the application of the statute of limitations as raised by the question of whether the defendant had acknowledged the paternity in writing. Judging the correspondence in that light, the court was justified in finding that the letters did not demonstrate that the alleged acknowledgment of paternity was clear and unequivocal as a matter of law and therefore the matter was properly disposed of by summary judgment proceedings.

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179 Bauer v. Stern Finance Co., 169 N.W.2d 850, 853 (Iowa 1969); Humboldt Livestock Auction, Inc. v. B & H Cattle Co., 261 Iowa 419, 428, 155 N.W.2d 478, 484 (1967).

180 Northwestern Nat'l Bank of Sioux City v. Steinbeck, 179 N.W.2d 471 (Iowa 1970); American State Bank v. Leaver, 261 Iowa 124, 153 N.W.2d 348 (1967).

181 *See* note 186 *infra*.

182 *See* International Milling Co. v. Gisch, 237 Iowa 1189, 24 N.W.2d 751 (1946).

183 IOWA R. CIV. P. 121.

184 IOWA R. CIV. P. 144.

185 *But see* Bauer v. Stern Finance Co., 169 N.W.2d 850 (Iowa 1969).

186 193 N.W.2d 86 (Iowa 1971).

C. *The Record in Resistance to the Motion for Summary Judgment*

When a litigant is faced with a motion for summary judgment he has two options, both of which deserve serious consideration; he may rely upon the insufficiency of the movant's record or he may resist the motion by counter-proof in the form of affidavits or otherwise. In either case "the opposing party takes a perilous course by insufficiently resisting a motion for summary judgment."[187] Thus the matter of resistance takes on a more serious aspect than the decision to invoke the motion. If the movant fails to obtain a favorable ruling on the motion he can always proceed to trial on the merits—nothing is lost except advantage; but if the opposing party fails to properly resist he runs the risk of losing all and his only remedy may be appeal, which often has proven futile.

With respect to the first option above, the resisting party should stand moot only in the case where he is assured that the facts do not lend themselves to unequivocal proof. *Sherwood v. Nissen*[188] is such a case. Here the defendant was the son-in-law and tenant of Aikman. Plaintiff made some improvements to the property during the lifetime of the owner. The suit was to foreclose a mechanic's lien, brought against the executrix of the owner's estate, the question being whether or not the tenant had acted as the owner's agent and whether or not the charges claimed by plaintiff were the reasonable value of the work. The court stated that the facts there stated, the authority of the agent and the reasonable value of the services were not the kind of facts which lend themselves to unequivocal proof and therefore that was not the kind of case which lends itself to the application of the summary judgment rule. As a general rule negligence cases fit this classification because such questions as the reasonable man, proximate cause and negligence are not such as lend themselves to unequivocal proof.[189]

Assuming that the election is made to resist, the rule specifically provides that when a motion for summary judgement is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations of his pleadings, but his response must set forth specific facts showing that there is a fact issue to be tried, and this may not be done by the mere denial of his pleading alone. Thus, the burden is upon the defendant to make the proper record in resistance. He too, is faced with the fact-law problem. If all the facts that he sets forth in his supporting documents are not sufficient in law, he cannot survive the motion. *Credit Industrial Co. v. Happel, Inc.*,[190] a pre-amendment case, provides another typical example of a case where the issues shift and become constricted by the summary judgment proceeding. Plaintiff sued on trade acceptances and filed

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187 Sherwood v. Nissen, 179 N.W.2d 336 (Iowa 1970).
188 *Id.*
189 *See* IOWA R. CIV. P. 344(f)(10); Kennedy v. Bennett, 261 F.2d 20 (8th Cir. 1958); Sherwood v. Nissen, 179 N.W.2d 336 (Iowa 1970).
190 252 Iowa 213, 106 N.W.2d 667 (1960).

a motion for summary judgment supported by affidavit which alleges the belief, as was then possible, that there was no defense against the claim. The defense was that the plaintiff was a foreign corporation and had not obtained a permit to do business in the State of Iowa and was therefore barred from maintaining the action under section 494.9 of the Code of Iowa.[191] The court held that the provision in the defendant's resistance was not applicable because section 494.9 could not apply to transactions in interstate commerce. Thus, there was no real issue of fact as diclosed by the affidavit in resistance. The ultimate turning point on this kind of case thus turns on a changed issue created by the motion and the resistance—that being not whether the defendant has a defense to the trade acceptance, or whether the plaintiff had a permit to do business in Iowa, nor for that matter whether the plaintiff could maintain an action in Iowa, but on the limited question of whether section 494.9 could place any restraint upon interstate commerce. That is purely a legal issue and if all other fact issues are eliminated by a resolution of that question, the summary judgment is appropriate, since the constitutional issue transcends any factual issue that the defendant could raise by affidavit.

A later case where the constitutional issue did not transcend the summary judgment proceedings, and which aptly points up the dilemma of the resistor's options is *Bauer v. Stern Finance*.[192] Plaintiff sued defendant for conversion of cattle. The defendant deposed plaintiff, who refused to divulge the whereabouts of certain other mortgaged cattle, on the grounds that his answers might incriminate him. Defendant moved for summary judgment on the grounds that the pleadings, depositions and admissions on file did not create a fact question for the determination of the trier of fact. The majority of the court held that the plaintiff had the right not to incriminate himself, but that an interpretation of Rule 237 really was confined to the issue of whether or not a fact question remained. Justice Rawlings dissented on the ground that Rule 237 should never take precedence over the plaintiff's fifth amendment rights against self-incrimination. Justice Becker filed a separate dissent, contending that the matter should have been resolved by invoking the procedural sanctions of Rule 134[193] and that the substitution of the summary judgment proceedings for the sanctions imposed for failing to comply with discovery proceedings changed the issue in the case.

Beyond those concerns expressed in the dissenting opinions, there is yet another feature of the *Bauer* decision which deserves comment in light of

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191 IOWA CODE § 494.9 (1971) states: "No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured such permit." However, might the matter have also been resolved on the question of whether a trade acceptance is a "contract" within the meaning of the statute? *Compare* Credit Industrial Co. v. Happel, Inc., 252 Iowa 213, 106 N.W.2d 667 (1960) *with* Jensen v. Voshell, 193 N.W.2d 86 (Iowa 1971).

192 169 N.W.2d 850 (Iowa 1969).

193 IOWA R. CIV. P. 134. This rule provides for various sanctions for failure to aid in discovery.

the question relating to a proper resistance to the motion for summary judgment. The majority seemed to justify its decision on the ground that the refusal to testify, for whatever reason, may be interpreted as an admission which precludes the existence of any genuine issue of fact upon which plaintiff could rely in support of his petition. True, an admission is an evidentiary fact, treated as circumstantial evidence and as such could certainly be treated, when examining the record as a whole, in the same light as an affidavit or testimony under oath by deposition or interrogatory. However, the question which remains unanswered is: is it sufficiently conclusive as to preclude the existence of an issue of fact and particularly so when weighed against the supportive documents of the movant. Certainly if it is merely evidence, and is not conclusive, it places the court in the position of weighing the evidence as between opposing statements of fact, which it does not ordinarily want to do.

Another problem is created however, by the treatment of the refusal as an admission for the purpose of eliminating the question of fact. The silence here is not in the nature of assertive conduct which is in response to an issue raised by the pleadings in the case, nor is it conduct in response to a question but is conduct which is responsive only to the plaintiff's assertion of what he thought to be a valid constitutionally protected right. Although that takes on real importance in the context of Justice Rawlings' dissent, it is also important on the question of whether the plaintiff was treated more harshly at pretrial than he would have been at trial. The court has previously taken the position that a person accused of a crime had the right to remain silent, because of his constitutional right but silence in a civil case may be interpreted as an admission.[194] This consideration seems important in light of a later discussion by the court that "in determining his burden, the analogy between a motion for directed verdict and a motion for summary judgment is helpful."[195] Certainly plaintiff would not have been required to prove his case at trial by his testimony alone, and he could presumably elect whether he wished to take the stand at all in order to prove a prima facie case for conversion, subject of course, to the defendant's right to call him as its witness.

The 1967 amendment permits the court to consider the record as a whole in determining whether a fact question exists. Thus, it was the whole record and not the resistance that saved the defendant in *Northwestern National Bank of Sioux City v. Steinbeck*.[196] The action was by a bank against a husband and wife on two promissory notes secured by land mortgages. The defendant alleged in her answer that "the signing of the . . . [notes] was

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194 McGulphin v. Bessmer, 241 Iowa 1119, 43 N.W.2d 121 (1950).

195 Sherwood v. Nissen, 179 N.W.2d 336 (Iowa 1970). *See also* 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 133 (Wright ed. 1958). As to the issue of admissions, *see* Allen v. Lindeman, 259 Iowa 1384, 148 N.W.2d 610 (1967); Amana Soc'y v. Selzer, 250 Iowa 380, 94 N.W.2d 337 (1959). *But see* State v. Cotton, 240 Iowa 609, 33 N.W.2d 880 (1948); State v. Weaver, 57 Iowa 730, 11 N.W. 675 (1882).

196 179 N.W.2d 471 (Iowa 1970).

involuntary and obtained by duress and undue influence." In her affidavit of resistance she said that she was unaware that the instruments included her homestead; she was not so informed by the plaintiff, but she was informed by them that she must execute the instruments. The court held that these statements, taken alone, did not state sufficient facts to raise a factual issue, but that her answer to an interrogatory did. The *Steinbeck* decision seems somewhat difficult to reconcile when the pleading and affidavit statements are compared with the statements contained in the answer to the interrogatory.[197] Reduced to its simplest terms, defendant contended that she was a victim of duress and undue influence. To support that statement she stated only that she did not understand the language and that she was advised by the plaintiff's agent that she must sign the instrument which affected her homestead. In the light of other cases involving the proper facts to support an allegation of undue influence it would seem that the defendant's statement falls somewhat short of creating a fact question on those issues.[198]

D. *Interpreting the Sufficiency of the Record*

Prior to the adoption of the 1967 amendment, a person defending against the motion was required to resist with "affidavits showing facts which the court deemed sufficient to permit him to defend." In *Eaton v. Downey*,[199] a pre-amendment case, the court was confronted with reconciling the statements of two distinguished writers on the subject with respect to the manner in which the affidavits of defense should be interpreted. One of the interpretations was that the court had considerable discretion in determining whether the affidavits were sufficient and that the affidavits "need not show every element of a technically sufficient defense, but only enough to indicate the good faith of the defense claimed."[200] The writer by explanation, indicated that it was his interpretation that the rule was passed to avoid sham or frivolous defenses and that a showing of good faith defense obviated that. The other commentator had suggested that the defendant must "disclose the exact facts he expects to prove in making his defense, with suitable affidavits of evidentiary facts."[201] The court, however, reached a compromise between

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197 Defendant's answer to interrogatory contained the following language, in pertinent part: "at the time of the execution of the instruments, the plaintiff's employee and agent informed me that I would be responsible . . . for alleged debts of the . . . company, and that I must execute the instruments; that as a result of not understanding the language and being unaware that the homestead was part of the instrument, and not being informed so by plaintiff's agent . . . through fear and duress and undue influence, as aforesaid, and not being advised that said instrument included her homestead and that she was fully within her rights not to execute said instrument, the instrument was executed . . . ."

198 *See* Gray v. Shell Petroleum Corp., 212 Iowa 825, 237 N.W. 460 (1931); Frick v. Kabaker, 116 Iowa 494, 90 N.W. 498 (1902).

199 254 Iowa 573, 118 N.W.2d 583 (1962).

200 Loth, *Trial and Judgment*, 29 IOWA L. REV. 35, 44 (1943).

201 Joiner, *Determination of Controversies Without a Factual Trial*, 32 IOWA L. REV. 417, 426 (1947).

the two extremes by indicating that the two writers were talking about two different things, the former referring to the nature of the defense (good faith) and the latter to the manner in which the defense must be raised (by evidentiary facts). Thus the court adopted a somewhat conciliatory rule that "[i]f a real good faith defense is shown by the affidavit the motion for summary judgment should be denied, whether it is shown by evidentiary or ultimate facts."[202]

Later, in *Humbolt Livestock Auction, Inc. v. B. & H. Cattle Co.*, it was held that the sufficiency of the affidavit in resistance should be judged by the rules of pleading. Here the court said:

> A pleader must plead the ultimate facts in the case. He cannot plead conclusions by themselves. Thus a good affidavit must consist of the statement of the *ultimate or evidentiary* facts in the case and, when so stated, the affiant has a right to state his conclusion based upon those facts. If such facts are not stated, a mere conclusion of the affiant will not be taken as a good faith defense and a summary judgment is required by our rule.[203]

It is interesting to note that the court adopted the words "ultimate or evidentiary" when describing the requisite facts necessary to withstand the motion. This raises the further question of whether the court meant "ultimate or evidentiary" to be synonymous or whether they are intended to be interpreted in the disjunctive.

In the *Steinbeck* case the court held that the facts stated are to be judged by the rules of pleading and may be determined by a showing of ultimate facts. The court went on to say:

> We are also satisfied, since the adoption of the revised rules courts are required to apply those rules to statements in pleadings, admissions, depositions, answers to interrogatories, and affidavits, if any, which are called to the attention of the court by way of a resistance to the summary judgment motion. Thereafter, if by an examination of such records any allegations asserting evidentiary facts appear which if found to be true would constitute a good defense to the action, we hold the court under this rule must assign the matter for trial and should not sustain the motion for summary judgment.[204]

Such a statement diminishes the importance of the difference between ultimate facts and evidentiary facts in the context of the summary judgment rule. This conclusion stems from the amendment which permits the court, in passing upon the sufficiency of the resistance to look at the record as a whole. Evidentiary facts may very well be found in the admissions, interrogatories and depositions while affidavits may be based upon conclusions if the conclusions are supported by ultimate facts. Pleadings, if they are to be a part of the record in resistance, should be judged by the rules of pleading, thereby permitting conclusions if based upon operative facts.

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202 254 Iowa at 578, 118 N.W.2d at 586.
203 155 N.W.2d 478, 485 (Iowa 1967) (emphasis added).
204 Northwestern Nat'l Bank of Sioux City v. Steinbeck, 179 N.W.2d 471 (Iowa 1970).

V. Motion for Judgment on the Pleadings

The motion for judgment on the pleadings[205] was codified for the first time by the court formulated 1943 rules. Although several cases mentioned that there was "no warrant under the (Iowa) statutes" for the motion for judgment on the pleadings prior to that date, where the parties were agreeable by consent or otherwise, submission of the issues in this manner was a somewhat common practice. In the absence of a precise statutory authority, however, there were similar statutes whereby an uncontroverted claim could be adjudicated on the basis of the pleadings.[206] Yet the practice of using the motion for judgment on the pleadings prior to the adoption of the rules was never overtly sanctioned by the Iowa supreme court even though the court was aware of its use, and on appeal the court sometimes disposed of cases on the judgment on the pleadings theory, apparently for want of challenge by the parties, despite the lack of statutory authority.[207]

The basic thrust of the motion for judgment on the pleadings is that the adversary's pleadings are insufficient to establish a claim or a defense as a matter of law. Accordingly, the motion has been referred to as a form of "speaking demurrer" for the reason that the speaking facts are found in, but restricted to, the uncontroverted facts appearing in the pleadings.[208] It has been treated as a common law demurrer by the Iowa supreme court which has stated that the motion for judgment on the pleadings and the motion to strike the answer have "some kinship and the grounds for each are basically similar."[209] There is in the motion for judgment on the pleadings a striking resemblance to the demurrer, the motion to dismiss and the motion to strike the answer, in that each tests the legal sufficiency of the pleading to which it responds. The motion for judgment on the pleadings has been frowned upon as a procedural substitute for the demurrer, and therefore it is presumably the modern counterpart to the demurrer, the motion to dismiss or to strike the answer.[210] The apparent rationale for this criticism when applied in the context of the Iowa rule seems to rest on the ground that amendments should be freely permitted where the facts are truly in dispute in order to secure a just result, and tactics which cut

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205 Iowa R. Civ. P. 222 states: "Any party may, at any time, on motion, have any judgment to which he is entitled under the uncontroverted facts stated in all the pleadings, or on any portion of his claim or defense which is not controverted, leaving the action to proceed as to any other matter of which such judgment does not dispose.

206 *See, e.g.*, Iowa Code § 11574 (1939).

207 There are several common motions which are recognized by the courts but which are not expressly authorized in the rules. The most recent to appear is the motion in limine, which attacks anticipated irrelevant and prejudicial evidence before trial. *See, e.g.*, Lewis v. Buena Vista Mut. Ins. Ass'n, 183 N.W.2d 198 (Iowa 1971); Wagner v. Larson, 257 Iowa 1202, 136 N.W.2d 312 (1965); Mead v. Scott, 256 Iowa 1285, 130 N.W.2d 641 (1964). Another of such motions is the motion to withdraw issues from the consideration of the jury. *See* Wilson v. Corbin, 241 Iowa 593, 41 N.W.2d 702 (1950).

208 *See* Joiner, *Determination of Controversies Without a Factual Trial*, 32 Iowa L. Rev. 417, 420 (1947).

209 Evans v. Herbranson, 241 Iowa 268, 273, 41 N.W.2d 113, 117 (1950).

210 Clark, Code Pleadings 555 (2d ed. 1947).

off the pleader's opportunity to amend where the facts are indeed disputed are contrary to the philolosphy of modern rules practice. Thus, it is a favored device only when all allegations of fact are admitted on the various pleadings,[211] and the only questions are those of law.[212]

A. *Applicability*

The motion is properly used and should be granted when the parties agree on the facts and one is entitled to judgment as a matter of law or when the parties agree to all but immaterial allegations not constituting a valid claim or defense.[213]

The following examples are illustrative:

1.	Petition:		Answer:	
	alleges	A,	admits	A,
		B,		B,
	and	C.	and	C.

Thus, all material facts are conceded and without controversy. Plaintiff's motion for judgment on the pleadings would present a question of law as to whether he was entitled to judgment.[214]

2.	Petition:		Answer:		
	alleges	A,	admits	A,	
		B,		B,	
	and	C.		C,	
			and alleges	D,	that plaintiff's allegations A, B and C do not constitute a claim because of the intercession of the statute of limitations.[215]
3.	Petition:		Answer:		
	alleges	A,	admits	A,	
		B,		B,	
		C,		C,	but
	and	D.	denies	D	and claims that that allegation is immaterial or alleges an ultimate question of law.[216]

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[211] *Id.* One using the Iowa rules may suggest "or" instead of "and" in view of other methods available to dispose of questions of law prior to trial. *See* IOWA R. CIV. P. 105 and the discussion *supra.*

[212] *See* IOWA R. CIV. P. 105.

[213] *See* Note, *Amendment by Resisting Party After Motion for Judgment on the Pleadings Has Been Granted,* 41 IOWA L. REV. 123 (1955).

[214] *See* Note, *Effect of Motion for Judgment on the Pleadings on the Opponent's Allegations of Fact,* 38 IOWA L. REV. 548, 550 (1953). *See also* Evans v. Herbranson, 241 Iowa 268, 41 N.W.2d 113 (1950).

[215] *But see* note 207 *supra. See also* Pride v. Peterson.

[216] *See* note 210 *supra.*

4. Petition:		Answer:	
alleges	A,	alleges	X,
	B,		Y,
and	C.	and	Z.

In the fourth illustration, there is no denial, so the matter stands admitted.[217]

Since the applicability of the motion for judgment on the pleading is confined to situations where the facts are undisputed, the motion has become a little-used procedural device.[218] This may be due in part to the orderly process by which the rules, if followed, are designed to create and define the issues. The rules specifically require that every pleading shall be separated into numbered paragraphs, each of which shall contain, as nearly as may be, a distinct statement.[219]

This rule of form, if complied with, has a tendency to eliminate confusion in the pleadings and to aid in avoiding the kind of inadvertance which could result in an involuntary admission which could give rise to the application of the rule. Since this device is a motion for judgment and because it can be made at any time, even after issues are joined, or for that matter, after the evidence is closed, an inadvertant admission or a failure to deny a material fact could have disastrous results.

However, the argument can be made that the rule is not intended as a trap for the unperceptive or unwary pleader[220] and its principle justification in the rules is to serve another important function—that of speeding litigation to an early, efficient and inexpensive conclusion by eliminating issues upon which there is no factual dispute or issues that can easily be resolved upon a point of law, thereby simplifying the judicial task.[221] However, other rules may be better designed to accomplish that purpose.[222] The motion for judgment on the pleadings may find its greatest utility in the role of a back-up mechanism for the separate adjudication of points of law under Rule 105.

B. *Timing*

It would be assumed that the motion for judgment on the pleadings would normally be made after the answer or reply, when the pleadings are

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217 In narrative form, this illustration is exemplified by reference to pleading of legal excuse. Assume that the plaintiff pleads facts, which if not denied, would give rise to a statutory violation, or negligence per se. *See* Kisling v. Thierman, 214 Iowa 911, 243 N.W. 552 (1932). Defendant has no defense, but alleges legal excuse. Assume that his defense is that the icy conditions of the road on which he was driving prevented him from obeying the statute. *See* Luppes v. Harrison, 239 Iowa 880, 32 N.W.2d 809 (1948).

218 *See* Vestal, *A Decade of Practice Under the Iowa Rules of Civil Procedure*, 38 IOWA L. REV. 439, 461 (1953).

219 IOWA R. CIV. P. 79.

220 *See* note 207 *supra*.

221 *See, e.g.*, Joiner, *Determination of Controversies Without a Factual Trial*, 32 IOWA L. REV. 417, 422 (1947).

222 *See* 3 IOWA RULES CIVIL PROCEDURE ANNOTATED 395, 396 (1970).

traversed and the issues are joined. However, Rule 222 provides that the motion may be made at any time. It would seem that this should not be intended to preclude a plaintiff from pleading any additional facts in his reply by way of avoidance, even though the defendant may have raised an issue of law in his answer. Thus it would seem that a proper interpretation would be that "any time" means any time after the issues are joined and issues of law appear in the pleadings as framed which may dispose of all or part of the case.[223] There is some risk if one delays the attack until after evidence is offered. In the usual case where the motion is reserved and presented after trial and where no point of law was previously raised on the pleadings, the pleadings are construed liberally in favor of the pleader and against the movant, and the pleadings are given every reasonable intendment and inference.[224] In *Thoman v. Harris*,[225] there is language indicating that even though matters alleged in a petition or answer are not denied, those admissions must be taken advantage of at the time of trial or they are waived. This however, would seem to be inconsistent with the clear dictate of Rule 222 which expressly provides that the motion *can* be made at any time.[226] The matter is then one of interpretation and not of timeliness.

C. *Interpretation under the Rule*

The motion for judgment on the pleadings cannot be treated as a true speaking demurrer and there is no provision for considering matters or allegations not appearing in the pleadings.[227] Herein lies a principle distinction between the motion for judgment on the pleadings and the motion for summary judgment under Rule 237.[228] Herein also lies a distinction between the motion for judgment on the pleadings under the Iowa rule and the motion under Federal rule 12(c) which permits matters outside the record on such a motion to be considered and treated as a motion for summary judgment.[229] There are some aspects of the motion for judgment on the

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223 FED. R. CIV. P. 23(c) provides that the motion may be made "[a]fter the pleadings are closed . . . ."

224 Wilson v. Corbin, 241 Iowa 593, 41 N.W.2d 702 (1950).

225 236 Iowa 889, 20 N.W.2d 22 (1945).

226 Cases where the attack has been reserved have met with little success for the movant. In *Hamill v. Joseph Schlitz Brewing Co.*, 138 Iowa 138, 115 N.W. 943 (1908) the plaintiff entitled his motion a "motion for judgment on the record" which included the testimony adduced, and was made after a general and special finding for the defendant and after the plaintiff was granted a new trial. The motion was denied. In *Friedman v. Colonial Oil Co.*, 236 Iowa 140, 18 N.W.2d 196 (1945) the motion attempted to attack an instruction without a new trial. The motion was denied. The court refused to rule on whether a motion for judgment on the pleadings after trial was even available.

227 IOWA R. CIV. P. 222. *See also* Crom v. Henderson, 182 Iowa 89, 165 N.W. 397 (1917).

228 *Compare* IOWA R. CIV. P. 222 *with* IOWA R. CIV. P. 237.

229 *See* FED. R. CIV. P. 12(c). Nevertheless, the Iowa court has achieved a similar result by approving a stipulation between the parties to the effect that the trial court could make a binding ruling, subject to the parties' rights of appeal, based upon the plaintiff's application for adjudication of law points, the pleadings, a stipulation of facts and

pleadings which, in terms of interpretation, make it similar to the motion to dismiss. If presented before trial the allegations are considered in the light most favorable to the movant.[230] Additionally, the court considers all well pleaded facts or allegations of the pleadings as admitted, even though the moving party has previously denied or controverted the allegations.[231] Herein lies a variance to the motion to dismiss, even though the interpretive rule that "all well pleaded facts are taken as true for the purpose of the motion" is nearly identical when stated in the abstract. However, the motion to dismiss is filed before the answer and attacks the legal sufficiency of the petition.[232] The motion for judgment on the pleadings, on the other hand, seeks out uncontroverted facts stated "in all the pleadings" thereby creating the legal issue for the determination of the court. Thus, the question which appears is whether if the facts are indeed uncontroverted for the purpose of the motion, a party is thereafter bound by any "admissions" created by that rule of construction. This question is raised where there is a denial of the motion for judgment on the pleadings. Is the admission of general probative value, or it is limited to the purpose of ruling on the motion?[233] There is broad dicta which suggests that such facts are admitted and accepted,[234] that the movant admits[235] or concedes,[236] and that the facts are accepted as a verity.[237] Such language lends support to the probative effect of such admissions although no Iowa case appears to be directly in point on the precise issue.[238] A better conclusion results, however, from the nature of the motion itself and its close similarity to the motion to dismiss. It is suggested that the motion for judgment on the pleadings is merely a second chance to raise the same objection which was passed over by pleading rather than filing a motion to dismiss[239] or where the opportunity is not presented by the petition. For example, if the plaintiff's claim is clearly

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answers to interrogatories. *See* Mechanicsville Trust & Savings Bank v. Hawkeye Sec. Ins. Co., 158 N.W.2d 89 (Iowa 1968). *See also* City of Creston v. Center Milk Products Co., 243 Iowa 611, 51 N.W.2d 463 (1952) where the introduction of evidence by the plaintiff was held not to be reversible error. Also in *Evans v. Herbranson*, 241 Iowa 268, 41 N.W.2d 113 (1950) the court apparently considered the allegations of the pleadings, together with the statements of counsel made in argument in the lower court proceedings, all of which were sufficient to overcome a pleaded denial.

230 Nall v. Iowa Elec. Co., 246 Iowa 832, 69 N.W.2d 529 (1955); Evans v. Herbranson, 241 Iowa 268, 41 N.W.2d 113 (1950); Decker v. American Univ., 236 Iowa 895, 20 N.W.2d 466 (1945).

231 Evans v. Herbranson, 241 Iowa 268, 41 N.W.2d 113 (1950).

232 *See* cases cited note 68 *supra.*

233 *See* Note, *Effect of Motion for Judgment on the Pleadings on the Opponent's Allegations of Fact*, 38 IOWA L. REV. 548, 566 (1933).

234 Evans v. Herbranson, 241 Iowa 268, 41 N.W.2d 113 (1950).

235 Decker v. American Univ., 236 Iowa 895, 20 N.W.2d 466 (1945).

236 Independent School Dist. No. 1 of Grand River Twp. v. Independent School Dist. of Grand River, 216 Iowa 1013, 250 N.W. 192 (1933).

237 Lloyd E. Clarke, Inc. v. City of Bettendorf, 158 N.W.2d 125 (Iowa 1968).

238 Two federal courts of appeal appear to be split on the subject. In *M. Snower Co. v. U.S.*, 140 F.2d 367 (7th Cir. 1964) the court held that the admission is solely for the purpose of ruling on the motion. In *Noel v. Olds*, 149 F.2d 13 (D.C. Cir. 1945) the District of Columbia Circuit held otherwise.

239 *See* F. JAMES JR., CIVIL PROCEDURE 229 (1965).

barred by limitations, defendant may have several options, two of which are to move to dismiss, or to answer, alleging the legal defense, if need be, and following with the motion for judgment on the pleadings. On the other hand, if the plaintiff's claim is not barred by limitations on its face, thereby precluding an adjudication by motion to dismiss, the defendant has the opportunity to plead additional facts showing that defense, which in the absence of a reply denying the fact, could give rise to the motion for judgment on the pleadings. In any event, the rule that the facts are to be taken as true should only be a rule which gives probative effect to the admission which would have the effect of destroying the usefulness of the rule. In addition, it has been said that the motion for judgment on the pleadings applies where the controversy centers on the legal effect to be accorded the pleaded facts, rather than on proof of the facts themselves.[240] This gives further strength to the argument that a rule of interpretation should not be given probative effect.

Finally, the interpretation to be given the facts upon submission of the motion should be considered in light of the philosophy of rules practice, which is to be construed to "secure a just, speedy and inexpensive determination of all controversies on their merits."[241]

D. *Finality for Appeal*

One question which remains is whether an order sustaining a motion for judgment on the pleadings is a final order from which a losing party may take an appeal as a matter of right. By now it should be elementary that appeals may be taken as a matter of right only from "final judgments and decisions of courts of record . . . ."[242] It should also be obvious that if a motion for judgment on the pleadings is overruled, the order overruling it would be interlocutory for the reason that the case is not finally disposed of, and appeal in such a case would only be available at the will of and upon application to the supreme court.[243] One commentary, however, suggests that "[a] ruling sustaining the motion, without a judgment actually entered, is probably interlocutory for purposes of appeal."[244] The matter is complicated by Rule 227 which mandates that "all judgments and orders must be entered on the record of the court and clearly specify the relief granted or the order made." However, a strict reading of Rule 222 suggests that "any party may, on motion . . . have judgment to which he is entitled under the uncontroverted facts stated in all the pleadings." The motion is not a motion for an order—but is a motion for judgment. There are many cases in support of the proposition that a judgment is not finalized until

240 *Id.*
241 IOWA R. CIV. P. 67.
242 IOWA R. CIV. P. 331.
243 IOWA R. CIV. P. 332.
244 3 IOWA RULES CIVIL PROCEDURE ANNOTATED 395, 396 (3d ed. 1970).

entered of record.[245] But Rule 331, having to do with appeals from final adjudication, is not confined to judgments, but includes "decisions." Thus, the question of finality is best determined by reference to Rule 331 and relates to the question of whether the order or decision finally adjudicates the rights of the parties.[246] Thus the question of finality within this context should rightly turn on the nature of the order or decision and not on the technical nature of the judgment entry.[247]

Finality is then related, as in the case of the motion to dismiss, to amendability. In view of the fact that Rule 222 permits the motion to be made at any time, it must be assumed that it can be made at any time before the issues are joined. One could not assume that a motion for judgment on the pleadings at that point should be interposed to extinguish a party's right to plead. It could also be assumed that Rule 67[248] lodges sufficient discretion in the trial court to permit an amendment after the court's ruling on a motion for judgment on the pleadings. This supposition is supported by the case of *Connor v. Thompson Construction Co.*[249] which somewhat summarily disposed of the finality issue. Plaintiff sued defendant for negligent construction from which a fire resulted. A part of the contract disclaimed liability for fires. After various applications and motions, the defendant moved for judgment on the pleadings. There was no resistance to the motion and it was sustained. The court rather peremptively stated accordingly that judgments on the pleadings are deemed final judgments from which appeal may be taken. The court cited Rule 86 and *Cover v. Koeper*[250] ostensibly on the grounds that a party who does not plead over elects to stand on the record so made. It would therefore seem that amendability is the precursor of finality. Amendability should depend upon whether the omission of a material allegation of fact which would affect the claim or defense is merely inadvertant or whether it is nonexistent. It would seem that in

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[245] *See* Moreno v. Vietor, 156 N.W.2d 305 (Iowa 1968); Street v. Stewart, 226 Iowa 960, 285 N.W. 204 (1939); Garretson v. Altomari, 190 Iowa 1194, 181 N.W. 400 (1921).

[246] *See* Johnson v. Iowa State Highway Comm'n, 257 Iowa 810, 134 N.W.2d 916 (1965); Wilson v. Corbin, 241 Iowa 226, 40 N.W.2d 472 (1950); In re Swanson's Estate, 239 Iowa 294, 31 N.W.2d 385 (1948).

[247] There is dictum in *Moreno v. Vietor*, 156 N.W.2d 305 (Iowa 1968) which, stated in the abstract, is to the effect that an appeal will lie where a judgment has been entered of record. The court cited *Wilson v. Corbin*, 241 Iowa 226, 40 N.W.2d 472 (1950); *Street v. Stewart*, 226 Iowa 960, 285 N.W. 204 (1939) and *Hoffman-Bruner Granite Co. v. Stark*, 132 Iowa 100, 108 N.W. 329 (1906) in support of that proposition. All of those cases which bear on that issue have to do with the entry of judgment after a jury verdict or after the jury was directed to return a verdict. Those issues are indeed controlled by Rule 223 which states: "The clerk must forthwith enter judgment upon a verdict when filed, unless it is special, or the court has ordered the case reserved for future argument or consideration."

[248] IOWA R. CIV. P. 67 states: "All common counts, general issues, demurrers, fictions and technical forms of action or pleading, are abolished. The form and sufficiency of all motions and pleadings shall be determined by these rules, construed and enforced to secure a just, speedy and inexpensive determination of all controversies on their merits." *See also* IOWA R. CIV. P. 88.

[249] 166 N.W.2d 109 (1969).

[250] 258 Iowa 35, 137 N.W.2d 594 (1965).

the latter case the ruling on the motion for judgment on the pleadings should be final.

VI. Conclusion

The rules of civil procedure provide multiple methods of attack upon deficient and ineffective pleadings. When the philosophy, as well as the function, of pleading and motion practice is fully understood, the rules provide a simple and versatile method of expeditiously disposing of unmeritorious litigation. The rules, when so understood and employed, functionally serve the judicial economy and the administration of civil justice. Unfortunately experience indicates, however, that there are occasional times when some meritorious litigation succumbs in the labyrinth of confusion brought about by a failure to appreciate that motion practice is still a viable part of civil litigation. In the latter case the ends of justice are seldom served and all prior attempts at procedural reform become an exercise in futility, which ultimately results in a regression to the vices of outmoded procedures long past.

SURVEY OF IOWA LAW

IOWA CRIMINAL LAW

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