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Archeology of Error: Tracing California's Summary Judgment Rule

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Archeology of Error: Tracing California's Summary Judgment Rule

Curtis E.A. Karnow*

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INTRODUCTION

"Agree, for the law is costly."

William Camden (1551-1623)

In June of 1992, one of California's Courts of Appeal decided another case which inadvertently illustrated the depths of irrationality to which summary judgment law in California has fallen. In *Do It Urself Moving & Storage v. Brown*,¹ the court, having concluded that the lower court properly excluded indispensable evidence as a penalty for discovery abuse, and that, consequently, the party would likely be nonsuited at opening statement, nevertheless reversed a grant of summary judgment—forcing the case to a concededly pointless trial.² As one commentator has noted, results similar to those reached in *Do It Urself* are not uncommon in California:

Defendants' summary judgment motions regularly are denied, often to the astonishment of counsel, even in the face of explicit admissions that the plaintiff has no evidence of an allegation critical to its claim Similarly, the plaintiffs' motions frequently are denied for failure to disprove an affirmative defense in support of which absolutely no evidence has been offered.

1. 7 Cal. App. 4th 27, 9 Cal. Rptr. 2d 396 (1992).

2. *Id.* at 38, 9 Cal. Rptr. at 402. Being relegated to trial in California is not a pleasant fate, and it is not cheap. Delays in many counties often force cases to ponder their lot for close to the full five year statutory limit before being assigned out to trial. *Cf.* CAL. CIV. PROC. CODE § 583.310 (West Supp. 1993). In the meantime, costs escalate. Or else the parties settle, often more to avoid the expensive wait than as a true reflection of the merits. *See generally* Stuart R. Pollak, *Liberalizing Summary Adjudication: A Proposal*, 36 HASTINGS L.J. 419, 426 *passim* (1985). In fiscal year 1990-91, over a million new cases were filed in California's superior courts, 1,090 per judicial position. 2 JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT 39 (1992). With 865 cases per judicial position disposed of in that time there is an enormous backlog of cases waiting for trial. *Id.* at 41. While both cases filed and cases disposed of have increased since the 1981-82 fiscal year, recently the first number has grown more rapidly and thus the net number of cases waiting for disposition has been growing since the 1988-89 fiscal year. *Id.* at 43 Fig. 3; *id.* at 57 Fig. 9.

In many situations, the opposing party has had ample opportunity to obtain favorable evidence, and it may be painfully obvious that this party will fail at trial. Nonetheless . . . the motion must be denied³

Do it Urself thus mandates a patently futile trial. Contrast this with the long-accepted rationale for the procedure: "The obvious purpose to be served by the summary judgment procedure is to expedite litigation by avoiding needless trials."⁴

The *Do It Urself* court relied on the general rule in California that it is insufficient for the defendant at summary judgment to note the established, proven, or stipulated lack of evidence on the part of a plaintiff, even where that lack of evidence will plainly lose the case for the plaintiff at trial.⁵ To win, the defendant must come forth with affirmative evidence disproving the plaintiff's case.⁶ The rule is the same where the plaintiff seeks to summarily adjudicate a defense as to which the defendant has the burden at trial. And all this in the face of the rule's plain purpose: to "penetrate through evasive language and adept pleading and ascertain the existence or absence of triable issues."⁷ *Do It Urself* cited just two sources for the general rule: a single case and the irrefutable R. Weil & I. Brown, *California Practice Guide, Civil*

3. Pollak, *supra* note 2, at 426.

4. *Cone v. Union Oil Co.*, 129 Cal. App. 2d 558, 562, 277 P.2d 464, 467 (1954). Much the same thought was expressed by Justice Cardozo: "The very object of the motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of trial." *Richard v. Credit Suisse*, 152 N.E. 110, 111 (N.Y. 1926).

5. *Do It Urself*, 7 Cal. App. 4th at 37-38, 9 Cal. Rptr. 2d at 401-02. See generally *Biljac Assoc. v. First Interstate Bank*, 218 Cal. App. 3d 1410, 1421, 267 Cal. Rptr. 819, 824-25 (1990).

6. *Do It Urself*, 7 Cal. App. 4th at 38, 9 Cal. Rptr. 2d at 402.

7. *Chem v. Bank of America*, 15 Cal. 3d 866, 873, 544 P.2d 1310, 1314, 127 Cal. Rptr. 110, 114 (1976).

Procedure Before Trial,⁸ which itself cites another recent case, *Chevron USA Inc. v. Superior Court*.⁹

How could California have developed such a plainly foolish rule? As I have noted elsewhere, the language of the current statute, Code of Civil Procedure 437c, plainly does not require this odd burden of proof.¹⁰ Regardless, courts constantly invoke this higher standard,¹¹ some local rules actually mandate it¹² (as if judges could fashion laws), judges and lawyers castigate it,¹³ but nothing explains the rule's rationale.

The federal system expressly discarded a rule similar to California's some years ago.¹⁴ In federal court, of course, the party with the burden at trial has the burden at the summary judgment motion stage.¹⁵ Federal courts impose this burden because they recognize the inherent pointlessness of letting a case clog up

8. R. WEIL & I. BROWN, CALIFORNIA PRACTICE GUIDE, CIVIL PROCEDURE BEFORE TRIAL § 10:243, at 10-59 (1992).

9. 4 Cal. App. 4th 544, 5 Cal. Rptr. 2d 674 (1992). The *Chevron* opinion cites two key sources: (i) the *Barnes* case, which is discussed below, and, in a classic example of the mutual admiration a society comprised of commentators and judges displays, (ii) the very same paragraph of the Weil and Brown text which cites the *Chevron* opinion, i.e., § 10:243. *Id.* at 553, 5 Cal. Rptr. 2d at 679.

10. Curtis Karnow, *Follow the Federal Lead on Summary Judgment*, 12 CAL. LAW. 67 (1989), reprinted in DAVID LEVINE ET AL., CALIFORNIA CIVIL PROCEDURE 237-38 (1991). The *Chevron* case (among other cases) baldly states that the rule *is* required by the statute. This assertion is taken up below in Section III of this Article. Since *Chevron* was decided, the Legislature has amended § 437c. The amendment is of uncertain effect: addresses, but does not resolve, the burden of proof issue discussed here. The burden remains on the defendant to show that an essential element of the plaintiff's claim cannot be established. CAL. CIV. PROC. CODE § 437c (n)(2) (West Supp. 1993). Following that showing, the burden shifts to the plaintiff to show that a "triable issue" still exists. *Id.* The effect of this language remains wholly unclear. For a discussion of the new amendment and other legislative attempts to modify the rule, see *infra* notes 194-197 and accompanying text.

11. Courts construe the papers of moving parties strictly, construe those of opposing parties liberally, and use the epithet "disfavored motion" to refer to the procedure. See, e.g., *Loving v. Tenneco West, Inc.*, 14 Cal. App. 4th 1272, 1276, 18 Cal. Rptr. 2d 504, 505 (1993).

12. See, e.g., ALAMEDA SUP. CT. R. 10.10(2)-(4); MARIN SUP. CT. R. 2.13(b)-(d), (q).

13. William J. Dowling, *Is There Any Hope for the Celotex Rule on Summary Judgment Motions in California?*, 26 U.S.F. L. REV. 493, 493 n.4, 494 n.8 (1992); WEIL & BROWN, *supra* note 8, at § 10:277; Karnow, *supra* note 10, at 67.

14. See *Celotex Corp. v. Catrete*, 477 U.S. 317, 323 (1986).

15. *Id.* at 322.

the system when one party or the other demonstrably cannot succeed at trial.¹⁶

In a fit of exasperation, I had another look at *Barnes v. Blue Haven Pools*,¹⁷ one of the classic cases on the subject, which was cited by both the *Do It Urself* and *Chevron* courts. This inquiry prompted me to read a series of other cases, a crazy-quilt of empty, cross-referenced citations by appellate courts, an important but unnoticed change in a California statute, and a cardinal error in the citation of pre-World War II cases. As it turns out, California's current rule on the burden of proof stems from an elementary mistake: courts continued to cite cases decided under a statute superseded in 1939, confused two types of burdens of proof, and in so doing, inadvertently made new, and probably wrong, law. This Article traces the error and tries to explain it.

The Article tells the story of how law is made. It does not trace the earthshaking developments on abortion, the First Amendment, or an issue that one would find in the newspapers, but rather the development of what might be called interstitial law.¹⁸ The issue of burden of proof on summary judgment is not the stuff of which prime time telecasts are made, but it makes a profound difference to litigants and to the cost of the judicial system. The doctrine proliferated out of the limelight, having gone unexamined and, because of that, is more pernicious.

16. See, e.g., *id.* at 327; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). See generally *The Supreme Court—Leading Cases*, 100 HARV. L. REV. 100, 250-258 (1986).

17. 1 Cal. App. 3d 123, 81 Cal. Rptr. 444 (1969).

18. That is to say, the slow accretion of procedural rules, almost invisible in the interstices of the development of substantive law.

I. THE LABYRINTH OF CITATIONS

"The law is a bottomless pit."

John Arbuthnot c. 1712¹⁹

It is a generally accepted conceit that the reason of law can be found if one will only trace antecedents back through the mists of time.²⁰ That archival venture is undertaken below, in part because that is all that contemporary cases such as *Do It Urself* accomplish to justify the burden of proof. Citation to citation, the authority for current law is traced back across half a century of California appellate decisions. But as Justice Holmes might have warned, such a journey cannot ultimately explain the law.²¹ Despite a wide range of factual backgrounds in the cases, facts pertinent to the issue of burden are never alluded to in the citing cases. Instead, groups of cases are mentioned by rote, the general rule is briefly announced, and the decision is declared. Most cases just cite more cases and never imply a rationale for the rule on burden of proof. Those that do allude to a reason simply cite the governing statute. But the statute has no answers.

Tracing these cases back does, however, provide one central insight. The exercise reveals a sudden, unexplained break from cases discussing the burden on *defendants'* motions for summary judgment to references to motions brought by *plaintiffs*.

Appellate authors often use string cites, as if there was safety in numbers. This Section of the Article follows the multi-stringed path as far as it can, and an indulgent reader must be assumed. Roughly two series of cases trace back to a very few cases decided in the late 1940s and early 1950s, when California lawyers started

19. This quote is also attributed to Jonathan Swift.

20. "The rational study of law is still to a large extent the study of history." Oliver W. Holmes, *The Path of The Law*, 10 HARV. L. REV. 457, 469 (1897).

21. Mocking the usual methods, Justice Holmes observes: "We follow [legal tradition] into the Year Books, and perhaps beyond them to the customs of the Salian Franks, and somewhere in the past, in the German forests, in the needs of the Norman kings. . . [But] it is revolting to have no better reason for a rule of law than so it was laid down in the time of Henry IV." *Id.* at 469.

to exploit summary judgment. Each of these two lines of authority radiates back in time from the 1969 *Barnes v. Blue Haven Pools* decision.²²

Barnes, indeed, sets out the rule dutifully applied by *Do It Urself*: even where it is manifest that a nonsuit will be ordered at trial, summary judgment *cannot* be ordered simply on the basis that a party with a burden of proof plainly has no evidence at all.²³ *Barnes* cites three cases as authority for the rule: *Canifax v. Hercules Powder Co.*,²⁴ *Kramer v. Barnes*,²⁵ and *McClary v. Concord Avenue Motors*.²⁶ Below, this Article will separately trace the first two cases. These lines converge around 1958 when *Southern Pacific Co. v. Fish*²⁷ was decided. The Article then follows the roots of case development back to the cardinal 1931 case of *Gardenswartz v. Equitable Life Assurance Society*.²⁸

But first, *Barnes*' use of the *McClary* case should be noted. While *McClary* addressed the sufficiency of the evidentiary record as a whole, the opinion did not address the issue of which party bears the burden to establish a "triable" issue. A triable issue of fact was *conceded* by the parties before the appellate court, and the case itself cites no precedent on the matter of burden at the motion phase.²⁹ Thus, *McClary* never should have been cited by *Barnes*; it decides nothing.

A. *The Canifax-de Echeguren-Family Services Circuit*

The classic case *Barnes v. Blue Haven Pools* relies on *Canifax*.³⁰ *Barnes* relies on *de Echeguren v. de Echeguren*³¹ to

22. *Barnes v. Blue Haven Pools*, 1 Cal. App. 3d 123, 81 Cal. Rptr. 444 (1969). *Barnes*, it will be recalled, is the central case authority for contemporaneous pronouncements of California's rule in *Do it Urself* and *Chevron. Id.*; see *supra* note 17 and accompanying text (discussing the relationship of the *Barnes* decision to the California rule).

23. *Barnes*, 1 Cal. App. 3d at 127-28, 81 Cal. Rptr. at 447.

24. 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).

25. 212 Cal. App. 2d 440, 27 Cal. Rptr. 895 (1963).

26. 202 Cal. App. 2d 564, 21 Cal. Rptr. 1 (1962).

27. 166 Cal. App. 2d 353, 333 P.2d 133 (1958).

28. 23 Cal. App. 2d Supp. 745 (1937).

29. *McClary*, 202 Cal. App. 2d at 565, 21 Cal. Rptr. at 2.

30. *Barnes*, 1 Cal. App. 3d at 127-28, 81 Cal. Rptr. at 447.

the effect that the defending party (i.e. the plaintiff, where the defendant seeks judgment) has no obligation to produce any evidence at all until the moving party proves every element necessary to sustain a judgment in defendant's favor.³² This is a classic statement of the California rule.

De Echeguren itself relied in turn on three cases: *House v. Lala*,³³ *Southern Pacific*, and *Gardenswartz*.³⁴ On the specific issue of burden, *de Echeguren* cites two cases: *Southern Pacific* and *Taliaferro v. Taliaferro*.³⁵

We will return to *Southern Pacific* below. Here, we briefly follow the *Taliaferro* cite. Without explanation, *Taliaferro* specifies two cases—the now-familiar *Southern Pacific* opinion and *Wuelzer v. City of Oakland*.³⁶ On the specific issue of the burden on summary judgment, *Wuelzer* just cites two other cases: *Gardenwartz* again (to which we will also return) and *Family Services v. Ames*.³⁷

With *Family Services*, we come to an important moment in these tangled references. *Family Services* involved an appeal by a defendant, not a plaintiff, from summary judgment.³⁸ In this con-

31. 210 Cal. App. 2d 141, 26 Cal. Rptr. 562 (1962).

32. *Canifax v. Hercules Powder Co.*, 237 Cal. App. 2d 44, 50, 46 Cal. Rptr. 552, 555 (1965).

33. 180 Cal. App. 2d 412, 4 Cal. Rptr. 366 (1960).

34. 23 Cal. App. 2d Supp. 745, 68 P.2d 322 (1937).

35. The court explained:

As stated in *Southern Pac. Co. v. Fish*, *supra*, "There first must be a sufficiently supportive affidavit before the defects of any counter affidavit, either of form or substance, need be examined. . . . (166 Cal. App. 2d at p. 366, emphasis added.) [T]he failure of a party to file a counter affidavit does not of itself entitle the moving party to summary judgment. [Citations.]' (*Taliaferro v. Taliaferro* (1960) 179 Cal. App. 2d 787, 791 [4 Cal. Rptr. 689, 691].)

de Echeguren, 210 Cal. App. 2d at 147, 26 Cal. Rptr. at 565.

36. 170 Cal. App. 2d 337, 338 P.2d 912 (1959).

37. 166 Cal. App. 2d 344, 333 P.2d 142 (1958). *Wuelzer* also mentions *Eagle Oil & Ref. Co. v. Prentice*, 19 Cal. 2d 553, 122 P.2d 264 (1942), for the general proposition that facts are not to be determined by summary judgment motion; the court is only meant to discern whether there is a factual dispute sufficient for a jury's evaluation. *Wuelzer*, 170 Cal. App. 2d at 339, 338 P.2d at 913. This, in turn, requires that the moving affidavits be construed strictly and opposing affidavits be construed "liberally." *Id.* at 339, 338 P.2d at 913. This accurate rendition of *Eagle Oil* is quite separate from *Wuelzer's* holding that the defending party may avoid summary judgment without presenting any evidence at all. *Id.* at 340-41, 338 P.2d at 914. The confusion between *Eagle Oil's* holding and that of *Wuelzer* is treated at length below. See *infra* notes 38-42 and accompanying text.

38. *Family Services*, 166 Cal. App. 2d at 346, 333 P.2d at 143.

text the court held that the plaintiff had to prove at the summary judgment stage every element of plaintiff's case.³⁹ That is, the requirement of this case is that the plaintiff—who after all has the burden of proof at trial—has exactly the same burden of establishing his case at summary judgment, before any requirement could be imposed on the defendant to respond. It is not remarkable to rule that a party must, in any context, prove the elements of the party's own claim. But plainly such a ruling does *not* support the proposition that *defendants* must disprove *plaintiffs'* case.

Family Services relied on a few cases: *Coyne v. Kremfels*,⁴⁰ *Gardenswartz*, and *Southern Pacific*. *Coyne* also involved an appeal by a defendant of summary judgment entered in the plaintiff's favor.⁴¹ Justice Traynor affirmed the judgment because the plaintiff had in fact established his case, and the defendant had not rebutted it.⁴² As we will see below, *Gardenswartz*, the other case relied on in *Family Services*, was importantly similar to *Coyne*. In both *Gardenswartz* and *Coyne*, the moving party that had the requirement of first establishing its case was, in fact, the plaintiff. And in both cases, of course, it was the plaintiff who had the burden at trial.

As we will see, *Gardenswartz* is the early case back to which many of these citation strings resolve. But before we focus on the ruling of the oft-cited *Gardenswartz*, there is another line of authority emanating back from the *Barnes* decision that requires tracing back through the miasma of time.

B. The Kramer-House-Southern Pacific Circuit

The attentive and caring reader will recall that *Barnes*, relied on by the *Do It Urself* and *Chevron* opinions, cited three cases, one of

39. *Id.* at 351-52, 333 P.2d at 146.

40. 36 Cal. 2d 257, 223 P.2d 244 (1950).

41. *Id.* at 258, 223 P.2d at 245.

42. The plaintiff filed affidavits showing entitlement to judgment and the defendant did nothing but point to the existence of a verified answer. *Id.* at 262-63, 223 P.2d at 247-48. The court held that a mere pleading, such as an answer, does not controvert evidence such as presented by the plaintiff in sworn affidavits. *Id.*

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which was *Kramer v. Barnes*.⁴³ *Kramer* repeats the current rule: Moving parties must provide “sufficiently supportive affidavits” before the court will examine any defects of counter-affidavits.⁴⁴ The *Kramer* court relies on three cases: *Southern Pacific v. Fish*,⁴⁵ *Snider v. Snider*,⁴⁶ and *House v. Lala*.⁴⁷ *Snider* itself is of no independent authority. It simply and directly relies on *House* and quotes from the text of the then-current Civil Code Section 437c governing summary judgment: The affidavits of the moving party “must contain facts sufficient to entitle . . . defendant to a judgment in the action”⁴⁸ What is “sufficient” is, of course, the issue.

In turn, *House* places central reliance on *Southern Pacific*, also invoking *Gardenswartz*.⁴⁹ *Southern Pacific* is relied on for the proposition that the “absence of counter-affidavits does not relieve the moving party of the burden of establishing the evidentiary facts of every element necessary to entitle the moving party to judgment.”⁵⁰

C. From *Southern Pacific* to *Gardenswartz*

Plainly, it is time to look at *Southern Pacific*. This case is relied on, directly or indirectly, by virtually every one of the cases cited so far.⁵¹ *Southern Pacific* reversed a summary judgment on the basis that the affidavits below did not contain admissible evidence.⁵² Contrary to the current rule,⁵³ the *Southern Pacific*

43. 212 Cal. App. 2d 440, 27 Cal. Rptr. 895 (1963).

44. *Id.* at 445, 27 Cal. Rptr. at 898.

45. 166 Cal. App. 2d 353, 333 P.2d 133 (1958).

46. 200 Cal. App. 2d 741, 19 Cal. Rptr. 709 (1962).

47. 180 Cal. App. 2d 412, 4 Cal. Rptr. 366 (1960).

48. *Snider v. Snider*, 200 Cal. App. 2d 741, 748, 19 Cal. Rptr. 709, 714 (1962).

49. *House*, 180 Cal. App. 2d at 416, 4 Cal. Rptr. at 368.

50. *Id.* at 416, 4 Cal. Rptr. at 368 (citing *Southern Pac. Co. v. Fish*, 166 Cal. App. 2d 353, 366, 333 P.2d 133, 141 (1958)).

51. See, e.g., *id.* at 416, 4 Cal. Rptr. at 368; *Kramer v. Barnes*, 212 Cal. App. 2d 440, 445, 27 Cal. Rptr. 895, 898 (1963); *Snider*, 200 Cal. App. 2d at 748, 19 Cal. Rptr. at 714; *Taliaferro v. Taliaferro*, 179 Cal. App. 2d 787, 791, 4 Cal. Rptr. 689, 692 (1960); *de Echeguren v. de Echeguren*, 210 Cal. App. 2d 141, 147, 26 Cal. Rptr. 562, 565 (1962).

52. *Southern Pacific*, 166 Cal. App. 2d at 366, 333 P.2d at 141.

53. See CAL. CIV. PROC. CODE § 437c(b), (d) (West Supp. 1993) (stating that evidentiary objections not made at a hearing are waived).

opinion held that a party (here, the plaintiff) could not waive objections to incompetent evidence, i.e. that such failures are eternally reviewable on appeal. More centrally, though, *Southern Pacific* stated the familiar rule: The moving affidavits (here filed by the defendants) must state facts covering every element necessary to sustain a judgment.⁵⁴ One case was relied on for this: *Kimber v. Jones*.⁵⁵

But *Kimber*, like *Family Services*, involved a *plaintiff* moving for summary judgment.⁵⁶ The court imposed on the plaintiff the burden to prove every element of his case before judgment, summary or otherwise, could be entered in his favor.⁵⁷ Two cases were alluded to in *Kimber*: *Coyne*⁵⁸ and *Hardy v. Hardy*.⁵⁹ We have seen *Coyne* before, and, like both *Kimber* and *Family Services*, *Coyne* involved a plaintiff moving for judgment.⁶⁰

However, the *Hardy* case, in which a defendant successfully moved for summary judgment, may be different from *Kimber*, *Family Services*, and *Coyne*. In *Hardy*, Justice Traynor affirmed the grant of summary judgment, holding that the defendant *had* indeed provided affidavits, and that the plaintiff had been unable to rebut them.⁶¹ Thus, the sufficiency of the moving party's evidence was not at issue. Instead, the California Supreme Court examined the *opposing* party's evidence—the plaintiff's—and found that the *plaintiff* could not prove his own case.⁶² Without explanation and in what is technically dicta, the opinion may suggest through its use of the word "party" instead of "plaintiff" that moving parties *in general*—plaintiffs or defendants—are obligated to shoulder some burden of proof, presenting at least some facts, regardless of what an opposing party can or cannot muster by way of evi-

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54. *Southern Pacific*, 166 Cal. App. 2d at 364, 333 P.2d at 140.
55. *Kimber v. Jones*, 122 Cal. App. 2d 914, 265 P.2d 922 (1954).
56. *Id.* at 915, 265 P.2d at 923.
57. *Id.* at 918, 919, 265 P.2d at 925.
58. *Coyne v. Krempels*, 36 Cal. 2d 257, 223 P.2d 244 (1950).
59. 23 Cal. 2d 244, 143 P.2d 701 (1943).
60. *Coyne*, 36 Cal. 2d at 258, 223 P.2d at 245.
61. *Hardy*, 23 Cal. 2d at 247-48, 143 P.2d at 703.
62. *Id.* at 247, 143 P.2d at 703.

dence.⁶³ This brief dicta could, therefore, be read as imposing on *defendants* the burden of disproving *plaintiffs'* cases. Justice Traynor refers only to the statute, Code of Civil Procedure section 437c.⁶⁴ Thus, other than the statutory citation taken up in Section III below, the *Hardy* line is a dead end.

Southern Pacific then must take us to its antecedent, *Gardenswartz*. As we saw previously, numerous cases invoked the 1937 *Gardenswartz* case as well as, i.e., *de Echeguren*, *Coyne*, *House*, *Wuelzer*, and *Family Services*.

Gardenswartz was actually decided by the appellate department of the Los Angeles Superior Court, reviewing a judgment from the municipal court. A small acorn as these things go. As the suspicious reader will have surmised, this case, like *Coyne*, *Kimber*, and others, involved the sufficiency of the *plaintiff's* showing in support of his motion for summary judgment.⁶⁵ The controlling statute at the time required affidavits containing "facts sufficient to entitle *plaintiff* to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity"⁶⁶ Under this rule, Superior Court Judge Shaw said that the court could *not* grant summary judgment for the plaintiff even if the defendants failed to file any evidence at all, and if the plaintiff's affidavits contained inadmissible testimony.⁶⁷

In *Gardenswartz*, the plaintiff had sued his insurance company on three disability policies.⁶⁸ The insurance company denied that he was disabled, but the municipal court entered judgment for the policyholder.⁶⁹ Judge Shaw, on appeal, found fatal flaws in evi-

63. *Id.* at 245, 143 P.2d at 702.

64. 1939 Cal. Stat. ch. 331, sec. 1, at 1671-72, *quoted in Hardy*, 23 Cal. 2d at 247, 143 P.2d at 702.

65. *Gardenswartz v. Equitable Life Assurance Soc'y*, 23 Cal. App. 2d Supp. 745 (1937).

66. 1933 Cal. Stat. ch. 744, sec. 27, at 1849 (emphasis added).

67. The plaintiff's papers were, in fact, held insufficient, because they were not directly relevant. Judge Shaw thought they were impermissibly directed to the "ultimate fact in issue," thus beyond the expertise of the proffered expert, and were too general. *Gardenswartz*, 23 Cal. App. 2d Supp. at 753.

68. *Id.* at 753.

69. *Id.* at 754.

dence presented by both the defendant and the plaintiff. Thus, because it was the plaintiff's burden to prove his case, the plaintiff's lack of evidence resulted in a reversal of the judgment. Judge Shaw pointedly did not find for the plaintiff, despite the fact that the defendants failed to file an adequate opposition to the summary judgment motion.⁷⁰

The *Gardenswartz* court cited only one other pertinent California case, also authored by Judge Shaw and again reviewing a judgment in the local municipal court. In *Cowan Oil and Refining Co. v. Miley Petroleum Corp.*,⁷¹ the court was also charged with reviewing the adequacy of affidavits filed in connection with the defendant's motion for summary judgment.⁷² Since the *Cowan* decision devotes most of its time to a discussion of constitutional issues outside the scope of this Article, the case is of little use to this analysis.⁷³

II. THE STATUTORY BACKGROUND

"Laws are like sausages. It's better not to see them being made."

Otto von Bismarck

The review of cases back to the early 1930s leads to the same place. Regardless of the route taken, in the end the reader is referred to the wording of the summary judgment statute. This Section reviews the development of the statute and addresses the proposition that California's summary judgment legislation imposes a burden of proof.⁷⁴

70. *Id.* at 754.

71. 112 Cal. App. Supp. 773 (1931).

72. *Id.* at 779-81.

73. *Cowan* unnecessarily spends much of its time endorsing the constitutionality of the procedure against the challenge that it deprives parties to their right to trial. *Id.* at 776. Almost 30 years earlier, the United States Supreme Court had approved the constitutionality of the technique. See *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 317 (1902).

74. See *supra* notes 10, *infra* notes 196-200 and accompanying text (discussing the impact of recent California legislation).

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A. A Plaintiff's Statute

Nothing in *Cowan* or *Gardenswartz* supports the proposition that defendants must shoulder the burden of *disproving* plaintiffs' cases, or the converse, namely, that plaintiffs need to shoulder the burden of *disproving* affirmative defenses. That particular issue was not considered by Judge Shaw in either of his opinions, because, before 1939, Code of Civil Procedure section 437c did not contemplate motions by defendants.⁷⁵ Under prior law, only plaintiffs were authorized to file the motions. In 1939, for the first time, the statute was revised to provide that "if it claimed that there is no defense to the action *or that the action has no merit*, on motion of either party [summary judgment may be ordered]."⁷⁶

A more informal proceeding had actually been authorized in California municipal courts in 1925, under then Code of Civil Procedure section 831f.⁷⁷ As then enacted, the statute allowed the

75. 1937 Cal. Stat. ch. 533, sec. 1, at 1545-46. See Comment, *The Work of the 1939 California Legislature*, 13 S. CAL. L. REV. 1, 7 (1939).

76. 1939 Cal. Stat. ch. 331, sec. 1, at 1671 (emphasis added).

77. The statute reads in pertinent part:

(3) At any time after issue of fact is joined, the court upon its own motion may, and upon written demand of any party shall, cite all parties to appear before the court at a time and place certain for summary proceedings.

Such citation may be served upon the party personally or upon his attorney of record. It must be served not less than five days before the return day.

Each party must appear personally, or by person or persons having knowledge of the facts and authorized in writing by such party to so appear, and with or without counsel as he may desire. If a party is an assignee of a cause of action, counterclaim or cross-complaint, in addition to any other person he shall procure the presence of the first assignor thereof or its agent making the assignment, if he be available. For any person whose presence is herein required, subpoena shall be issued by the clerk at the request of any party. If clear proof be made that no person having knowledge of the facts constituting the cause of action, defense, counterclaim or cross-complaint is available, the party may by his counsel, make the statement herein provided, in which case any other party at his option may make his statement by counsel only.

At such time, or other time or times to which the proceeding may be continued, the judge shall require the parties, or the person or persons appearing respectively on their behalf, to state under oath the facts upon which the respective claims and defenses of the parties are based. If a party is authorized by the provisions hereof to appear by counsel only, his counsel shall state the facts upon which his claim or defense is based. The court shall regulate the order of making the statements as justice requires.

Such statements, together with all that occurs at such examination, shall be taken down by a court reporter, and the notes of the court reporter, or transcript of such notes,

court, or either party, to move for summary judgment.⁷⁸ Upon such motion, the parties were required to attend court and state the facts supporting their respective claims. After hearing from both parties, the court would make its determination:

If from such statements it shall appear, without substantial conflict as to facts, that any party is entitled to judgment against any other party, the court shall cause such judgment to be entered forthwith.⁷⁹

This statute is silent regarding the allocation of the burden of proof on either party. The procedure was formalized in 1929 as Code of Civil Procedure section 831d.⁸⁰ Going back to tradition, this section expressly limited itself to plaintiffs. Plaintiffs could secure judgment if they presented admissible evidence showing their entitlement. Defendants could avoid summary judgment only if they met the plaintiff's material with contrary sworn facts.⁸¹

When this formalized procedure was first introduced in California in 1929 only certain motions in municipal court were

certified by the court reporter and the court and filed in the office of the clerk.

If from such statements shall appear, without substantial conflict as to facts, that any party is entitled to judgment against any other party, the court shall cause such judgment to be entered forthwith.

1925 Cal. Stat. ch. 436, sec. 1, at 946.

78. *Id.*

79. *Id.*

80. 1929 Cal. Stat. ch. 727, sec. 1, at 1343-45.

81. This statute, in pertinent part, stated:

[I]f it is claimed that there is no defense to the action, on motion of the plaintiff, supported by a verified complaint, or if not verified then by the affidavit of the plaintiff or of any other person having knowledge of the facts, the answer may be stricken out and judgment may be entered, in the discretion of the court, unless the defendant by affidavit shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend.

Such affidavit shall be made by the defendant, or by any other person, having knowledge of the facts, and shall set forth facts showing that the defendant has a good and substantial defense to the plaintiff's action . . . upon the merits . . . The facts so stated shall be the personal knowledge of the affiant, [and] shall be set forth in the affidavit with particularity

.....

Id.

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allowed.⁸² Superior courts were authorized to use the procedure in 1933.⁸³

The statute was renamed section 437c in 1933.⁸⁴ Later, in an article written to encourage the procedure's use, an author noted that summary judgment "has been a part of the English Law for decades, [but] its introduction into American jurisprudence has been comparatively recent."⁸⁵ The article contains a fine survey of the use of the procedure in California and across the United States, and, in each case discussed, plaintiffs are the presumed moving party.⁸⁶ This presumption followed from the then-current perception that plaintiffs' cases were generally meritorious, and that defendants often sought delay and abused the process of litigation so as to postpone the day of judgment.⁸⁷

B. Requirements of the Statute

When section 437c was amended in 1939 to allow defendants to move for summary judgment,⁸⁸ there were no other material

82. Comment, *supra* note 75, at 7.

83. *Id.*

84. 1933 Cal. Stat. ch. 744, sec. 27, at 1848-49.

85. Hilton H. McCabe, *Summary Judgment*, 11 S. CAL. L. REV. 436, 436 (1938).

86. McCabe did not refer to the four year period between 1925 and 1929 when both defendants and plaintiffs had an equivalent summary procedure available. *Id.* at 436. Most states (except Wisconsin) which allowed summary judgment in 1937 only allowed plaintiffs to make the motion. *See, e.g., Fuller v. General Accident Fire & Life Assurance Corp.*, 272 N.W. 839, 843 (1937). *See* Comment *supra* note 75, at 8. Another important survey of the period evaluated the law in various places in the British Empire, Canada, and 17 jurisdictions in the United States. In each, only the *plaintiff* was authorized to move for summary judgment. Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423 *passim* (1929).

87. Clark & Samenow, *supra* note 86, at 469-70 & n.324.

88. Perhaps, by this time, the Legislature had recognized that the cost of litigation had itself become a weapon in the armory of litigants, and that plaintiffs too could play off those costs to exact unreasonable settlements. In what may be the first suggestion of a *defense* summary judgment motion, an obscure footnote in a study undertaken on behalf of the Connecticut courts urges the courts to permit defendants to raise "issues of law, arising from the affidavit . . ." *Id.* at 471 n.326. The authors obliquely suggest that such a motion had been presaged by the Anglo-Saxon practice of "essoins." *Id.* at 469 n.323. This seems unlikely. Medieval courts accepted an *essoin* as a defendant's excuse not to appear and respond to a summons, but the effect was temporary: war, illness, absence beyond the seas, and "tempest" only postponed a defendant's obligation to respond. None of the excuses went to the merits of the dispute as do motions for summary judgment, or motions to strike pleadings as "sham." *See infra* notes 167-176 and accompanying text (discussing motions to strike

changes. This, in part, may have made it simple for courts to impose the same burden on moving plaintiffs and moving defendants: now both sides had to provide “sufficient” affidavits in order to win.

1. Equal Burdens: Treating Defendants Like Plaintiffs

It may be the statute’s failure to distinguish plaintiffs from defendants that explains why so many cases have assumed that California’s rule on the burden of proof was mandated by the statute. Case after case has simply relied on the statute’s wording to make the point that Justice Traynor made in *Hardy*: The statute is an adequate citation for the proposition at issue.⁸⁹ The *Chevron* case reasons that the “moving defendant is *statutorily* treated as a ‘plaintiff’ and hence must present sufficient facts to make out a *prima facie* case of non-liability.”⁹⁰ And in 1937, *Gardenswartz* itself relied expressly on the language of the statute to impose the burden of proof on the plaintiff moving for summary judgment.⁹¹ The key 1958 case of *Southern Pacific* writes that “of course” the statute makes no distinction between moving plaintiffs and the defendants, and then it imposes the same burden of proof on *any* moving party, as if the statute required the result.⁹² The fact that the statute does not expressly distinguish between moving plaintiffs and moving defendants is taken up by the state courts through the ensuing decades to justify their allocation of the burden of proof.⁹³

pleadings as shams). See generally 2 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 103-04 (3d ed. 1923); 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 560 (1895).

89. See *supra* notes 61-64 and accompanying text (discussing Traynor’s reasoning in *Hardy*).

90. *Chevron v. Superior Court*, 4 Cal. App. 4th 544, 552, 5 Cal. Rptr. 2d 674, 679 (1992) (emphasis added).

91. *Gardenswartz v. Equitable Life Assurance Soc’y*, 23 Cal. App. 2d Supp. 745, 754 (1937).

92. *Southern Pacific v. Fish*, 166 Cal. App. 2d 353, 366, 333 P.2d 133, 141 (1958).

93. See, e.g., *Biljac Assoc. v. First Interstate Bank*, 218 Cal. App. 3d 1410, 1421, 267 Cal. Rptr. 819, 825 (1990). *Biljac* relies on the venerable *Barnes v. Blue Haven Pools*, 1 Cal. App. 3d 123, 127, 81 Cal. Rptr. 444, 447 (1969).

However, the question of whether the statute determines the allocation of burden is *not* decided by the fact that the statute does not distinguish between moving plaintiffs and defendants. Federal law, has the same summary judgment procedures governed by a statute which, too, does not distinguish between plaintiffs and defendants.⁹⁴ Nevertheless, the United States Supreme Court decided *Celotex v. Catrett*⁹⁵ in direct conflict with the California construction, holding that plaintiffs opposing a summary judgment motion filed by defendants must shoulder the burden of proving their case, just as they would have to do at trial.⁹⁶ There are other rules, which do not on their face distinguish between plaintiffs and defendants, but which tolerate different evidentiary burdens.⁹⁷

In 1990, a California appellate decision, *Biljac Associates v. First Interstate Bank*,⁹⁸ expressly considered *Celotex*, but rejected it on the basis of state precedent.⁹⁹ In *Biljac*, bank customers had sued a group of lending institutions, accusing them of conspiring to raise and fix commercial lending rates, thereby eliminating competition.¹⁰⁰ The banks successfully moved for summary judgment in the trial court, winning a ruling that was affirmed on appeal.¹⁰¹

Biljac began the pertinent discussion by noting that the *Celotex* issue was never addressed by the parties, which is not surprising;

94. FED. R. CIV. P. 56.

95. 477 U.S. 317 (1986). True, litigants might have thought before *Celotex* that the wording of Rule 56 allocated the burden of proof on the moving party, regardless of whether the plaintiff or defendant was making the motion. Certainly, the Court in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-160 (1970), clearly imposed on moving *defendants* the burden of negating every possible basis for plaintiffs' suit. But without an intervening material change in Rule 56, *Celotex* impliedly—but unquestionably—rejected the *Adickes* rule.

96. *Celotex*, 477 U.S. at 322-23.

97. See, e.g., CAL. CIV. PROC. CODE § 630 (West Supp. 1993) (motion for directed verdict); *id.* § 629 (West 1976) (motion for judgment notwithstanding the verdict). More generally, any procedural or substantive rule of law silent on evidentiary burdens contemplates burdens that differ depending on the party. For example, statutes that define the bases for claims of contract breaches and torts, defenses and privileges, generally omit any allusion to the burden of proof or of coming forward with evidence. Yet their allocation of burdens is established by external rules, including statutes and court decisions, which expressly distinguish between plaintiffs and defendants.

98. 218 Cal. App. 3d 1410, 267 Cal. Rptr. 819 (1990).

99. *Id.* at 1421-22, 267 Cal. Rptr. at 825.

100. *Id.* at 1416, 267 Cal. Rptr. at 821.

101. *Id.* at 1416-18, 267 Cal. Rptr. at 822-23.

both sides had provided substantial evidentiary material.¹⁰² The *Biljac* majority confined itself to the citation of old cases such as *Barnes v. Blue Haven Pools*.¹⁰³ The concurring opinion also alluded to old cases, but went to suggest that California's rule is statutorily required.¹⁰⁴ The concurring opinion explained that Code of Civil Procedure section 437c is materially different from Federal Rule of Civil Procedure 56 in that a moving party in *California* (1) must contend "that the action has no merit or that there is no defense,"¹⁰⁵ and (2) the action may be defeated by adverse inferences reasonably deduced from the evidence.¹⁰⁶

In truth neither point distinguishes federal law, nor, therefore, *Celotex*. Under federal law, just as under California law, the moving party must establish entitlement to judgment, and under federal law, just as under state law, all reasonable inferences must be resolved in favor of the party opposing the motion.¹⁰⁷ Cases before and since *Biljac* have also noted the opposing state and federal standards, but have not questioned the rationale for the distinction.¹⁰⁸

102. *Id.* at 1421-22, 267 Cal. Rptr. at 824-25. The court's discussion of the federal rule is *dicta* which is pointless in view of the ruling sustaining summary judgment on the basis that defendants indeed negated plaintiffs' case, and proved the lack of a conspiracy. There was no room, therefore, for a meaningful application of *Celotex*, as there were no defects in the opposing affidavits on which to rule.

103. 1 Cal. App. 3d 123, 81 Cal. Rptr. 444 (1969). *Biljac* also cited *Pena v. W.H. Douthitt Steel & Supply Co.*, 179 Cal. App. 3d 924, 929, 225 Cal. Rptr. 76, 79 (1986); *Lee v. Electric Motor Div.*, 169 Cal. App. 3d 375, 382, 215 Cal. Rptr. 195, 197-98 (1985); and *Security Pacific Nat'l Bank v. Associated Motor Sales*, 106 Cal. App. 3d 171, 179, 165 Cal. Rptr. 38, 43 (1980).

104. *Biljac*, 218 Cal. App. 3d at 1435-45, 267 Cal. Rptr. at 834-41 (Kline, P.J., concurring).

105. *Id.* at 1441, 267 Cal. Rptr. at 838-39 (Kline, P.J., concurring) (citing Code of Civil Procedure section 437c(a)).

106. *Id.* at 1441, 267 Cal. Rptr. at 839 (Kline, P.J., concurring).

107. 6 MOORE'S FEDERAL PRACTICE § 56.15 [1-00], at 56-214 (1993); *id.*, § 56.15[8], at 56-344.

108. *University of S. California v. Superior Court*, 222 Cal. App. 3d 1028, 272 Cal. Rptr. 264 (1990); *AARTS Productions, Inc. v. Crocker Nat'l Bank*, 179 Cal. App. 3d 1061, 225 Cal. Rptr. 203 (1986).

2. The Burden of Producing an Affidavit

Thus, the impact of Code of Civil Procedure section 437c on the analysis here devolves to its mandate that "affidavits" be filed in support of summary judgment, regardless of who files the motion.¹⁰⁹ The affidavit requirement has been in the statute ever since the procedure was formalized in 1929 and through the 1939 amendment which made the technique available to defendants. Today, the statute refers to other forms of evidence as well.¹¹⁰ The issue, thus, becomes whether that requirement imposes the burden on the moving party the burden of negating the opposing party's case, regardless of the burden at trial.

This, apparently, is not a trivial issue. Those who maintain that the statute always imposes the burden on the moving party have their position strongly supported by the very case which established the contrary federal rule, *Celotex*. For there, Justice Rehnquist seized upon the fact that Federal Rule of Civil Procedure 56 expressly did *not* mandate the submission of affidavits by the moving party.¹¹¹ The absence of a specific mandate in Federal Rule of Civil Procedure 56 made it clear, said Justice Rehnquist, that a moving party had no burden to disprove the opposing party's case.¹¹² The converse would seem to flow thus: California's statute *does* mandate moving affidavits; therefore the burden must be on the moving party in the state courts.

However, there is no logical connection between the affidavit requirement and burdens on parties. There is no rational link

109. See, e.g., 1951 Cal. Stat. ch. 1737, sec. 53, at 4101-02; 1939 Cal. Stat. ch. 331, sec. 1, at 1671; 1937 Cal. Stat. ch. 533, sec. 1, at 1546; 1933 Cal. Stat. ch. 744, sec. 27, at 1849.

110. "The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." CAL. CIV. PROC. CODE § 437c(b) (West 1993).

111. Under Federal Rule of Civil Procedure 56, affidavits may be submitted at the option of the moving or defending party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

112. *Id.* at 323-24. Justice Rehnquist exercised a little legerdemain here. Contrary to his suggestion, the court below had not in fact ruled that a requirement of affidavits in FRCP 56 mandated the burden of proof. In truth, the court of appeal expressly held that affidavits were not required. The court of appeal simply assumed the "showing" required by FRCP 56 implied the introduction of some kind—any kind—of admissible evidence sufficient to negate the non-moving party's case. *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 185 n.12 (D.C. 1985).

between requiring an affidavit—as opposed to other evidentiary items such as depositions, interrogatory responses, admissions, documents, or other papers—and a burden of proof, any more than there is between the absence of an affidavit and the failure to sustain a burden. It is simply beyond question that burdens can be sustained or lost with or without affidavits. The issue on burdens of proof is simply whether sufficient admissible evidence of *any* nature is produced. Affidavits are not magic evidence. Indeed, as sworn but not cross-examined and often self-serving testimony, affidavits are less worthy than depositions or documents, such as contracts, created before the suit was filed.¹¹³

The reference to affidavits was used in the old California statutes as shorthand for “evidence,” admissible evidence generically, as opposed to the mere allegations of pleadings, which can be no more than the fantasy of lawyers. The other sections of the statute are, and have been, plainly designed to assure that the court will act on admissible evidence before judgment is entered.¹¹⁴ This follows because it was (and is) the point of the summary judgment—as opposed to the more venerable demurrers and motions to dismiss—to pierce the pleadings and evaluate the evidence.¹¹⁵ It was the courts’ authority to look *behind* the pleadings that distinguished the summary judgment procedure. And behind the pleadings, the law sees only evidence nothing else.

When California’s summary judgment law was formalized in 1929, affidavits were one of the few (and generally the only)

113. Words uttered and things created *before* the instigation of suit are worth more than affidavits in the sense that those earlier evidences (1) may not have been fabricated in contemplation of suit and (2) were not made with the careful and private assistance of counsel. Deposition evidence has the benefit of cross-examination by opposing counsel, and can come close to the quality and reliability of evidence made at trial.

114. For example, the affiant had to have “knowledge of the facts” and display “personal knowledge” (1929 and 1939 statutes). “Personal knowledge” is a requirement, and “affiant shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto.” 1939 Cal. Stat. ch. 331, sec. 1, at 1671-72; 1929 Cal. Stat. ch. 727, sec. 1, at 1343-44. The statute today also tolerates only admissible evidence. CAL. CIV. PROC. CODE § 437c(d) (West Supp. 1993).

115. *Weir v. Snow*, 210 Cal. App. 2d 283, 289, 26 Cal. Rptr. 868, 871 (1962); *Snider v. Snider*, 200 Cal. App. 2d 741, 747, 19 Cal. Rptr. 709, 713 (1962); *Maltby v. Shook*, 131 Cal. App. 2d 349, 355, 280 P.2d 541, 544 (1955); *Cone v. Union Oil Co.*, 129 Cal. App. 2d 558, 562, 277 P.2d 464, 467 (1954).

means of making pre-trial evidence available to the court,¹¹⁶ and the production of any more substantial evidence was tantamount to a trial.¹¹⁷ That is probably why the word "affidavit" was used in the legislation. California's first discovery code was not enacted until 1957.¹¹⁸ As late as 1961, the California Supreme Court was referring to "the new system" of statutorily permitted discovery.¹¹⁹ Before the code, parties could not propound interrogatories, requests for admissions, nor requests relating to the genuineness of documents.¹²⁰ Requests for production of documents were limited to those admissible at trial, not those (as under modern practice) likely to lead to the discovery of relevant material, and deposition practice was profoundly circumscribed.¹²¹

Although California authorized summary judgment before the federal courts, the jurisdictions had a similar discovery practice.¹²² In 1938, during the period when California first allowed defendants to ask for summary judgment on the basis of affidavits,

federal courts granted bills of discovery permitting a party to discover from its adversary evidence supporting the discovering party's case, but nothing else. In actions at law, no meaningful discovery was available apart from depositions to obtain or preserve testimony from witnesses who would not be available at trial. Discovery was considered anti-

116. This was generally considered to be true. "[T]he affidavit is practically the sole guarantee against perjury by the plaintiff," and, without it, plaintiffs were not entitled to summary judgment in the early use of that procedure in the United States. Clark & Samenow, *supra* note 86, at 430.

117. See generally *id.* at 430-31.

118. The law was enacted as Code of Civil Procedure § 2016 *et seq.*, effective January 1, 1958. 1957 Cal. Stat. ch. 1904, sec. 2, at 332124. See generally 2 BERNARD E. WITKIN, CALIFORNIA EVIDENCE § 1423, at 1402 (3d ed. 1986); David W. Louisell, *Discovery Today*, 45 CAL. L. REV. 486 (1957).

119. *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 376, 15 Cal. Rptr. 90, 99 (1961).

120. See 2 BERNARD E. WITKIN, *supra* note 118, § 1425, at 1404.

121. See generally Edward M. Ford, Jr., Note, *Procedure: Discovery: California and Federal Civil Procedure: Physical Examination of Parties: Admission of Facts and Genuineness of Documents*, 42 CAL. L. REV. 187, 193 (1954); Donald L. Edgar, Comment, *Discovery of Documents and Things: The Federal Rules and the California Law*, 42 CAL. L. REV. 829, 834 (1954).

122. Absent their own discovery statutes, federal courts generally relied on local state practice. WILLIAM SCHWARZER & LYNN PASAHOW, CIVIL DISCOVERY: A GUIDE TO EFFICIENT PRACTICE 3 (1988).

thetical to the customary method of trial by secrecy and surprise, and unnecessary for issue-narrowing, which was accomplished through highly technical pleading procedures.¹²³

In 1925, California's summary judgment procedure ensured admissible evidence by literally bringing the parties to court.¹²⁴ Their statements personally to the judge would provide the basis for deciding whether a trial was needed to resolve credibility problems. When out-of-court testimony was later allowed, requiring "affidavits" was the obvious way to ensure a similar admissibility.

Today, section 437c reads that the summary judgment "motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken."¹²⁵ But no one makes the absurd suggestion that this mandates the submission of each of those forms of admissible evidence. Correspondingly, the 1929 and 1939 statutes' affidavit requirements suggest no more than the requirement that admissible evidence be provided. Had they been available, that requirement could have been met with written discovery responses, depositions, admissions, and the like. The old affidavit requirement says no more about burden than does the federal statute's language. That federal language, too, contemplates some form of evidentiary support, i.e. affidavits or other evidence,¹²⁶ but the evidentiary requirement does not imply a burden of proof.¹²⁷

Thus, while it is true that (i) the statute fails to distinguish between plaintiffs and defendants, and (ii) moving "affidavits" are

123. *Id.* at 3. The authors describe the practice as of 1938, before the Federal Rules of Civil Procedure were adopted.

124. 1925 Cal. Stat. ch. 436, sec. 1, at 946.

125. CAL. CIV. PROC. CODE § 437c(b) (West Supp. 1993).

126. "A party supports his motion for summary judgment by affidavits *or* other evidentiary matter sufficient to show that there is no genuine issue as to a material fact." FED. R. CIV. P. 56 (Notes of Advisory Committee on Rules, 1963 Amendment, subdivision (e)).

127. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

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contemplated by at least the 1929 and 1939 versions,¹²⁸ neither fact about the statute determines the burden of proof. It follows that the decisions in *Chevron*, *Southern Pacific*, and the like are wrong when they suggest otherwise. The statute's wording does not support the holdings of those cases.

3. *The Burden to Seek and Destroy: Targeting the Non-Issue*

What then *does* the statute's language mandate a moving party to produce? The statute requires production equivalent to what *Celotex* suggested is required by parties moving in federal court.¹²⁹ The burden remains on any moving party to identify the pleadings and discovery which demonstrate the lack of a genuine issue of material fact.¹³⁰ The Supreme Court suggests that

[if] the burden of persuasion at trial would be on the *non-moving* party, the party moving for summary judgment may satisfy Rule 56's burden of production [by] . . . demonstrat[ing] to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the non-moving party's claim.¹³¹

This mandate to *identify* issues, and only this, is consistent with the original and current aims of the statute to seek and segregate

128. See *supra* notes 114-123 and accompanying text (discussing the 1929 and 1939 versions of section 437c).

129. See *supra* notes 95-96 and accompanying text (discussing the *Celotex* requirements).

130. *Celotex*, 477 U.S. at 323.

131. *Id.* at 331 (Brennan, J., dissenting). Justice Brennan dissented only from the result. In an opinion joined by the Chief Justice and Justice Blackmun, Brennan expressly agreed with the Court's legal analysis. *Id.* at 329. With four subscribing Justices endorsing Justice Rehnquist's opinion, seven Justices concurred on the reasoning of *Celotex*. Justice White's concurrence is obscure, although he too probably endorsed the Court's view. Justice Stevens filed a separate dissent. See *The Supreme Court—Leading Cases*, 100 HARV. L. REV. 100, 250-51 n.8 (1986).

triable issues.¹³² To be sure, both federal and state statutes literally require an *evidentiary* showing, one which pointedly ignores the pleadings. But “evidentiary” showings, as every defense lawyer knows, may be demonstrations of emptiness: the absence of proof, the failure of testimony, an unremembered fact.

By contrast, California custom shuts its eyes to that evidentiary demonstration: Judges do not want to hear that the other party has nothing to show the jury. Thus, judicial custom permits parties to stand by their possibly vacuous pleadings—only the invention of lawyers—with or without evidence. In so doing, California law defeats the fundamental purpose of summary judgment: To pierce and *test* the well-pleaded allegation¹³³ to discern if there is evidence to present to a jury.

III. THE MECHANICS OF ERROR

“Injustice is relatively easy to bear. What stings is justice.”

H.L. Mencken

In California, there is no case which expressly considers and decides that the same burden of producing evidence applied to plaintiffs shall be imposed on a defendant when the latter moves for summary judgment. The doctrine however was firmly entrenched by 1958 when *Southern Pacific* was decided. If the doctrine was not mandated by the statute, how could the courts have so unquestioningly adopted it?

The answer, I think, is that a related, but profoundly different, summary judgment burden of proof issue *was* expressly considered at the time, and was expressly done so in connection with the 1939

132. An early American commentary surveyed summary judgment practice in the British Empire, the United States, and portions of Canada. The commentary noted the requirement on a moving party in a manner similar to the text here: “Judgment may be entered summarily for the plaintiff . . . on motion setting forth his demand and his belief that there is no defense to it, unless the defendant, by counter-affidavit, shows that the facts are in dispute.” Clark & Samenow, *supra* note 86, at 423.

133. Dowling, *supra* note 13, at 497-98.

expansion of the statute. A second line of cases, which began with the 1942 *Eagle Oil & Ref. Co. v. Prentice*¹³⁴ opinion, addressed the weight to be given to moving and defending parties' evidence. As discussed below, the *Eagle Oil*-related rules, developed for plaintiffs moving for summary judgment, *did* logically translate to the subsequent, more general cases involving defendants moving for summary judgment. But then, the courts confounded the two types of burden, and, by 1958, finished by imposing *both* burdens of proof and production on defendants moving for summary judgment.

A. *A Diversion on Burdens of Proof*

California's Bernard E. Witkin, whose many and multi-volumed works are relied on with as much assurance as the Supreme Court's opinions, sets out the two types of burdens nicely:

The term "burden of proof" is often used loosely in two senses: (a) The secondary meaning of the burden of *initially producing* or *going forward* with the evidence. (b) The primary meaning of the burden of *proving the issues* of the case.

.....

The practical effect of the distinction is that (a) the burden of going forward or initially producing evidence calls *the judge's* powers into play, e.g., in ruling on a motion for nonsuit, while (b) the burden of proof in the fundamental sense operates when the case finally reaches *the jury* [citations].¹³⁵

The burden of going forward usually rests with the party who has the burden of proof,¹³⁶ but not always. One party may bear the

134. 19 Cal. 2d 553, 122 P.2d 264 (1942).

135. 1 BERNARD E. WITKIN, CALIFORNIA EVIDENCE § 127, at 113-14 (3d ed. 1986).

136. CAL. EVID. CODE §§ 500, 550 (West 1966).

burden of going forward at first; that burden having been met, it may be incumbent on the other party to then produce some evidence to refute the first showing; and that, in turn, may require the first party to produce further material, and so on, all without regard to which party finally must *convince the jury* as a matter of the burden of proof treated as the burden of persuasion, the primary sense of the notion.¹³⁷

The critical issue, however, is alluded to in the latter section of Witkin's quotation: Judges properly decide as a matter of law whether a party has adequately produced *some* evidence, but only triers of fact, such as juries, inquire whether a party has met the burden of proof (*qua* burden of persuasion). Only triers of fact decide whether a party has produced *enough* evidence.

In the context of a motion for summary judgment, the burden of proof on parties has to do with the first type of burden, the burden of production, on which judges are assigned decision-making power.¹³⁸ Plaintiffs who fail to come forward with evidence on their claims will lose at trial in both state and federal court, and will lose a summary judgment motion in federal court.¹³⁹ Our peculiar problem is that they very well may successfully defend a state summary judgment motion under California law.

In the next Section, we will see that in an effort to allow juries to adjudicate burdens of proof in "the fundamental sense" (proof of issues), California judges abdicated their power to adjudicate burdens in the "secondary" sense (initial production of evidence).

B. Eagle Oil: Ensuring Juries That Hear Conflicts of Evidence

Around the time of the 1939 statutory amendments, there was express attention given not to the burden of production, the first type of burden, but to the burden of persuasion, the second burden: How much was enough evidence in the context of a summary judgment.

137. See generally *id.* §115 (West 1966).

138. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330-31 (1986) (Brennan, J., dissenting).

139. See, e.g., *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034-35 (D.C. Cir. 1988).

ment motion? Before 1939, when plaintiffs only made summary judgment motions, defendants were held to a "liberal" standard. They needed only to produce some evidence—and not much of that evidence had to be "strictly admissible"—to survive summary judgment.¹⁴⁰ Such treatment was necessary to preserve the right to trial by jury. The imposition of a more rigorous standard risked keeping from the trier of fact a case that defendants might win. That lenient treatment had been the rule in New York,¹⁴¹ whence came California's rule. The Constitution's right to a jury trial also required this same treatment.¹⁴²

A commentator, apparently the only one who looked forward to the implementation of the 1939 amendments, one Edward A. Mosk, considered whether this rule would apply when the then-new 1939 amendments became effective.¹⁴³ A "new problem" was thus posed: What would happen when *defendants* moved for summary judgment after 1939? Mosk's Note cited some cases from Wisconsin,¹⁴⁴ a state which had allowed defendants to move for summary judgment some years before California. In Wisconsin, following the express commandment of the state statute, the courts construed affidavits strictly against the moving party, and leniently in favor of the defending party [plaintiff *or* defendant].¹⁴⁵ This Wisconsin rule prompted Mosk to predict that "it would seem that

140. Edward A. Mosk, Note, *Procedure - Trial Practice - Summary Judgment - California Code of Civil Procedure, Section 437c*, 13 S. CAL. L. REV. 500, 523-25 (1940) (noting *McComsey v. Leaf*, 99 Cal. App. 677, 97 P.2d 242 (1940)). The implicit notion of not "strictly" admissible evidence may have some readers wondering: it seems a bit like being "slightly" pregnant. Pre-1939 cases suggest that hearsay, perhaps only once or twice removed (such as pleadings verified by counsel) might qualify as evidence not "strictly" admissible. The reversed court of appeal in *Celotex*, also thought that "evidence" not in admissible form, but perhaps "curable," might be enough to block summary judgment. *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 186 (D.C. Cir. 1985).

141. Looking to New York law, *Eagle Oil* noted that "[e]ven though the pleading itself be deemed insufficient, the motion must be denied if the affidavits show facts sufficient to constitute a defense entitling the pleader to defend. *Curry v. Mackenzie*, 239 N.Y. 267, 146 N.E. 375 (1925)." *Eagle Oil & Ref. Co. v. Prentice*, 19 Cal. 2d 553, 560-61, 122 P.2d 264, 268 (1942).

142. Mosk, *supra* note 140, at 524, 525 (citing *Fidelity & Deposit Co. v. United States*, 187 U.S. 315 (1902)).

143. *Id.*

144. *Id.* at 525 n.16 (citing *Fuller v. General Acc. Fire & Life Assurance Corp.*, 272 N.W. 839 (Wis. 1937)); *Prime Mfg. Co. v. A.F. Gallun & Sons Corp.*, 281 N.W. 697 (Wis. 1938); *Tregloan v. Hayden*, 282 N.W. 698 (Wis. 1938).

145. WIS. STAT. § 270.635 (1937).

. . . the California courts will reach the same logical conclusion as in Wisconsin.”¹⁴⁶

Mosk was right. In 1942, the *Eagle Oil* case decided just this issue, relying on three specific sources for its rule: Mosk’s commentary, the case he was noting, *McComsey v. Leaf*,¹⁴⁷ and the Wisconsin case he used, *Fuller*.¹⁴⁸ The *Eagle Oil* court concluded that “[i]t may further be said that the affidavits of the *moving party*, the plaintiff in this case, should be strictly construed and those of his opponent liberally construed.”¹⁴⁹ *Eagle Oil* actually arose under the older pre-1939 version of section 437c¹⁵⁰ but was written three years after the statute had been amended. Thus, the court was plainly aware that henceforth not only plaintiffs could move for summary judgment, and, presumably, that is why it used the inclusive phrase “moving party.”

Eagle Oil is plainly right. Both defendants and plaintiffs have jury rights, and, so long as a jury verdict is possible in one’s favor, summary judgment cannot be granted to the other. By 1949, the rule had expressly been applied to defeat defendants’ summary judgment motion,¹⁵¹ and it remains the law today.¹⁵²

Over the next few years, a variety of cases involving defendants’ motions for summary judgment found their way to the appellate courts.¹⁵³ But generally, the higher courts reversed defendants’ judgments because, as a result of admissible evidence from *both* sides, the case ought to have been submitted to the jury. For example, in *Gale v. Wood*, conflicting admissible affidavits on the meaning of a written agreement required a trial, hence a reversal of the summary judgment was granted to the defendants.¹⁵⁴

146. Mosk, *supra* note 138, at 525 (citing, *inter alia*, Fuller v. General Accident Fire & Life Assurance Corp., 272 N.W. 893 (1937)).

147. *McComsey v. Leaf*, 99 Cal. App. 677, 97 P.2d 242 (1940).

148. Fuller General Acc. Fire & Life Assur. Corp., 272 N.W. 839 (Wis. 1937).

149. *Eagle Oil v. Prentice*, 19 Cal. 2d 553, 556, 122 P.2d 264, 265 (1942) (emphasis added).

150. 1937 Cal. Stat. ch. 533, sec. 1, at 1545-46.

151. *Haumeder v. Lipsett*, 90 Cal. App. 2d 167, 176, 202 P.2d 819, 824 (1949) (relying on *Eagle Oil*).

152. Pollak, *supra* note 2, at 423 nn.15-16.

153. See, e.g., *Williams v. Reed*, 113 Cal. App. 2d 195, 197, 248 P.2d 147, 149 (1952); *Gale v. Wood*, 112 Cal. App. 2d 650, 651, 247 P.2d 67, 67-68 (1952).

154. *Gale*, 112 Cal. App. 2d at 657, 247 P.2d at 71.

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Such were routine implementations of *Eagle Oil*. However, not every use of *Eagle Oil* was so routine.

C. Eagle Oil Jumps the Tracks

One of these cases following *Eagle Oil*, *Williams v. Reed*,¹⁵⁵ cites a pivotal California Supreme Court case, *Arnold v. Hibernia Savings & Loan Society*.¹⁵⁶ *Williams* itself is innocuous; like *Gale*, discussed above, admissible evidence on both sides had been introduced, requiring trial on the merits and vacatur of the summary judgment.¹⁵⁷ But it is the citation to *Arnold* which leads to mischief and the unravelling of theretofore consistent and routine precedent.

Arnold treated the claims of putative successors-in-interest as “members” and “depositors” in a savings and loan institution.¹⁵⁸ The lower court had summarily dismissed the claims based on uncontested evidence that no credit balances existed, and hence that the plaintiffs had no claim as “depositors.”¹⁵⁹ The supreme court found a remaining issue on the plaintiffs’ status as “members” of the institution, however, and reversed.¹⁶⁰

As the court noted, the trial judge had acted *before* section 437c “was amended to authorize the dismissal of a complaint”¹⁶¹ But this did not stop the California Supreme Court from expressly using the newly amended section 437c—and thus interpreting it for posterity—to evaluate the propriety of the dismissal below. In so doing, *Arnold* conflated two wholly distinct legal tests: (i) the ancient doctrine governing the striking of sham pleadings with (ii) new summary judgment dismissals. As discussed below, a defendant’s motion to strike a pleading (i.e. a complaint) as *sham* must rely on evidence and is difficult to win. *Arnold* unthinkingly

155. 113 Cal. App. 2d 195, 248 P.2d 147 (1952).

156. 23 Cal. 2d 741, 146 P.2d 684 (1944).

157. *Williams*, 113 Cal. App. 2d at 206, 248 P.2d at 155.

158. *Arnold*, 23 Cal. 2d at 743, 146 P.2d at 685.

159. *Id.*

160. *Id.* at 743-44, 146 P.2d at 685-86.

161. *Id.* at 744, 146 P.2d at 686.

imported that standard into its analysis of the brand-new section 437c motion for summary judgment.¹⁶² Having noted that plaintiffs had no proof of a key fact—the existence of a crucial written assignment—the court wrote:

The theory of defendants apparently is that the trial court . . . was at liberty to infer from the proof . . . that plaintiffs would be unable to substantiate [the allegations]. [However, t]he rule is that before a court can strike a pleading as sham or dismiss a complaint under section 437c it must clearly appear that the allegations are false or that the action is without merit, and every reasonable doubt must be resolved in favor of the pleadings. (Continental [Bldg. & Loan] Assn. v. Boggess, 145 Cal. 30, 34, [78 P. 245, 247 (1904)], Eagle Oil & Ref. Co. v. Prentice, 19 Cal. 2d 553, 556, [122 P.2d 264, 265 (1942) (remaining citations ommitted)].¹⁶³

In other words, while it was apparently true that the plaintiffs would be unable to substantiate the allegations, the supreme court ruled it irrelevant to the motion at hand. This is clumsy reasoning. The only two cases cited by *Arnold*, *Continental*¹⁶⁴ and *Eagle Oil*,¹⁶⁵ do not concern the effect on a summary judgment motion where the plaintiffs have no evidence. However, in subsequent cases, *Arnold* was cited in the same breath as *Eagle Oil* for the general standards applicable to section 437c summary judgment motions.¹⁶⁶ Comparing *Arnold* with its two cited precedents, *Continental* and *Eagle Oil*, is worth a detailed review.

162. "The rule is that before a court can strike a pleading as sham or dismiss a complaint under section 437c it must clearly appear that the allegations are false or that the action is without merit . . ." *Id.* (emphasis added).

163. *Id.* at 744-45, 248 P.2d at 686.

164. *Continental Bldg. & Loan Ass'n. v. Boggess*, 145 Cal. 30, 34, 78 P. 245, 247 (1904).

165. *Eagle Oil & Ref. Co. v. Prentice*, 19 Cal. 2d 553, 556, 122 P.2d 264, 265 (1942).

166. *See, e.g.*, *Pianka v. State of California*, 46 Cal. 2d 208, 212, 293 P.2d 458, 461 (1956); *Hetzler v. Hahling*, 111 Cal. App. 2d Supp. 969, 970, 245 P.2d 377, 378 (1952); *Dorsey v. City of Los Angeles*, 132 Cal. App. 2d 716, 719, 282 P.2d 997, 999 (1955). Significantly, among other cases *Southern Pacific* itself relies on and couples *Arnold* with *Eagle Oil*. *See supra* note 50 and accompanying text (discussing *Southern Pacific*).

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1. Ancient Antecedent: The Motion to Strike Sham Pleadings

Continental recites a very high standard for striking pleadings. Under that case, the pleadings must be “unquestionably false and not pled in good faith” to allow a plaintiff to win.¹⁶⁷ Such motions were rarely granted. If the opposing party could suggest the existence of any evidence at all to support his case, the court could not strike his pleadings (whether they were an answer or complaint), and would allow the case to proceed.¹⁶⁸ More to the point, such motions to strike required an affirmative showing of a vexatious litigant, with the substantial burden of proof resting on the moving party.¹⁶⁹

At the time *Arnold* was decided, the *Continental*-type motion to strike pleadings as sham¹⁷⁰ was the only method defendants had to “go behind the pleadings” and have complaints dismissed on grounds other than defects appearing on the face of the pleading. These *Continental* motions were so-called “speaking” motions, that is, motions which depended on matters of fact not apparent on the pleadings or by way of judicial notice.¹⁷¹ They were generally

167. *Continental*, 145 Cal. at 34, 78 P. at 247.

168. See generally CHARLES E. CLARK, HANDBOOK ON THE LAW OF CODE PLEADING 380 n.162 (1928); *Rhea v. Hackney*, 157 So. 190 (Fla. 1934); *Doppelt v. Raeden*, 192 N.Y.S. 835, 836 (1922).

169. Citing classic tomes on pleadings and purporting to apply the generally accepted test, the Florida Supreme Court required proof of sham—“falsity in fact”—to be “indisputable,” in addition to a showing that the pleading was “interposed principally for delay or other unworthy motive” and (perhaps emphasizing the first requirement of “falsity”) that there was no reasonable expectation that the allegations could ever be sustained. *Rhea*, 157 So. at 194. The strict standard is quite old. Eighteenth century English practice required affirmative proof that the pleading was not only untrue but also vexatious and calculated to create unnecessary delay and expense. 1 JOSEPH CHITTY, A TREATISE ON THE PARTIES TO ACTIONS, AND PLEADING 574 & n.(e) (7th Am. ed. 1837). Today the test is not far different. *Professional Real Estate Investors v. Columbia Pictures Indus., Inc.*, 61 U.S.L.W. 4450 (U.S. May 3, 1993) (No. 91-1043) (providing that in the context of immunity for antitrust purposes, sham pleading is one which (i) no reasonable litigant could realistically expect to succeed, and (ii) is a function of subjective motive to abuse the process for ulterior, malicious ends).

170. “A pleading which is good in form but false in fact is sham. It differs from a ‘frivolous’ pleading, which on its face presents no claim or defense.” CLARK, *supra* note 168, at 380 n.162, 386. *Accord Rhea v. Hackney*, 157 So. 190, 194 (Fla. 1934). See generally *Doppelt v. Raeden*, 192 N.Y.S. 835, 836 (1922).

171. *Continental*, 145 Cal. at 34, 78 P. at 247. See generally CLARK, *supra* note 168, at 554 n.194; *Rhea*, 157 So. at 194; *Doppelt*, 192 N.Y.S. at 836.

known as “speaking demurrers.”¹⁷² These motions were “condemned, both by the common law and the Code system of pleading.”¹⁷³ Such speaking motions were allowed in California in 1939 and, as such, involved the production of affidavits, that is, evidence *de hors* the pleadings. Evidence of vexatious, bad faith litigation so proved by defendants would result in the complaint’s dismissal unless controverted by the plaintiff’s evidence.¹⁷⁴

Thus, these venerable speaking motions appeared to behave very much like the defendants’ summary judgment motions, which had just been legitimized by the 1939 amendments to section 437c: both types went behind the pleading, both were based on affidavits, and both tested whether the case ought to have been before the courts in the sense of having supporting evidence. In this light, *Arnold*’s equating the two types of motions is understandable, and indeed other authorities saw as natural the transition from (i) the motion to strike a pleading as sham to (ii) the new summary judgment motion procedures.¹⁷⁵ But, as a consequence of the conflation of these two types of motions, defendants in section 437c motions bore the stringent and affirmative burden of showing plaintiffs’ cases to be “clearly . . . false.”¹⁷⁶

In *Arnold*, the plaintiffs apparently could not produce a key piece of evidence, a written assignment, which carried or lost the

172. See BLACK’S LAW DICTIONARY 1397 (6th ed. 1990).

173. *Ellis v. Perley*, 157 S.E. 29, 30 (1931). Such a motion was castigated as one “which from the earliest days has been held to be bad.” *Steel v. Levy*, 127 A. 766, 767 (1925). See also JOHN ADAMS, *THE DOCTRINE OF EQUITY* 335-36 & n.4 (8th ed. 1890); 1 EDMUND ROBERT DANNIELL, *PLEADING AND PRACTICE OF THE HIGH COURT OF CHANCERY* 588 & n.7 (6th Am. ed. 1894). See also *Teeter v. Veich*, 57 A. 160 (1904); *Ivins v. Jacob*, 60 A. 1125 (1905); *Foss v. People’s Gas Light & Coke Co.*, 89 N.E. 351 (1909); *Ferris v. Union Sav. Bank*, 165 S.E. 450 (1932); *Preston A. Blair Co. v. Rose*, 51 P.2d 209, 212 (1935); *Metro. Life Ins. Co. v. Perrin*, 183 So. 917, 920 (1938); *Town of Randolph v. Lyon*, 175 A. 1, 2 (1934); *Whaley v. First Nat’l Bank of Opp*, 155 So. 574, 575 (1934).

174. *Cunha v. Anglo California Nat’l Bank*, 34 Cal. App. 2d 383, 390-91, 93 P.2d 572, 575-77 (1939); *Crowley v. Modern Faucet Mfg. Co.*, 44 Cal. 2d 321, 324-25, 282 P.2d 33, 35-36 (1955) (citing *Cunha*). See generally *supra* note 169 (citing *Chitty on Pleading and Rhea*).

175. *Clark*, *supra* note 168, at 554. See generally *Clark & Samenow*, *supra* note 86, at 444 (commenting on early New York practice). Ironically, an early California summary judgment decision expressly and properly rejected the attempt to conflate summary judgment procedures with motions to strike sham pleadings. *Cowan Oil & Ref. Co. v. Miley*, 112 Cal. App. Supp. 773, 778, 295 P. 504, 506 (1931).

176. *Arnold v. Hibernia Sav. & Loan Soc’y*, 23 Cal. 2d 741, 744, 146 P.2d 684, 686 (1944).

day. The inference was, therefore, that the plaintiffs would be unable to substantiate their allegations at trial.¹⁷⁷ Of course defense counsel were not capable of meeting the *Continental* test bearing on unquestioned falsity and bad faith. Thus, despite the plaintiffs' plain failure of proof, the defendants lost their motion.¹⁷⁸

Arnold ends with a long quotation from *Eagle Oil* to the effect that summary judgment is a "drastic" remedy and affidavits filed by defendants should be construed liberally to preserve rights to jury trials.¹⁷⁹ *Arnold* refers to *Eagle Oil* as direct precedent, and, as a result of confusion with the very strict standard of *Continental*, assumes that *Eagle Oil* bars the issuance of summary judgment in defendants' favor even where plaintiffs cannot produce key evidence.¹⁸⁰ In fact, *Eagle Oil* says nothing of the sort (it bars summary judgment for the plaintiff when the plaintiff fails to prove his case). Only the *Continental* decision suggests such an analysis, but with reference to a wholly different type of motion.¹⁸¹

In the same year that *Arnold* was decided, the California Court of Appeal decided *Gibson v. De La Salle Institute*.¹⁸² Just as the court in *Arnold* had assumed that the defendants had to disprove the plaintiff's case, so too the parties in *Gibson* conceded the same

177. *Id.*

178. *Id.* at 744-45, 146 P.2d at 686.

179. The court explained:

The issue to be determined by the trial court in consideration of a motion thereunder is whether or not defendant has presented any facts which give rise to a triable issue or defense, and not to pass upon or determine the issue itself, that is, the true facts in the case If that were not true, controversial issues of fact would be tried upon affidavits by the court and not a jury. Because the procedure is summary and presented on affidavits without the benefits of cross-examination, a trial by jury and opportunity to observe the demeanor of witnesses in giving their testimony, the affidavits filed on behalf of the defendant should be liberally construed to the end that he will not be summarily deprived of the full hearing available at a trial of the action and the rights incident thereto. The procedure is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact.

Id. at 745, 146 P.2d at 686 (citing *Eagle Oil*, 19 Cal. 2d at 555-56, 122 P.2d at 264).

180. In the year before *Arnold*, the same court issued dicta suggesting that *any* moving party bore the burden of producing evidence; this may have assisted the conflation I have noted in *Arnold*. *Hardy v. Hardy*, 23 Cal. 2d 244, 143 P.2d 701 (1943).

181. See *supra* notes 164-167 and accompanying text (discussing the *Continental* decision).

182. 66 Cal. App. 2d 609, 152 P.2d 774 (1944).

presumption.¹⁸³ That concession saved the court from having to decide the matter. After a full and fair explanation of *Eagle Oil*,¹⁸⁴ the court immediately segued, as night follows day and as if *Eagle Oil* led inexorably to the necessity for it, into the recitation of the defendant's concession that the *defendant* would not be entitled to summary judgment unless *his* affidavits contain sufficient "facts" to win.¹⁸⁵ *Gibson* then reversed a summary judgment previously entered in the defendants' favor.¹⁸⁶

2. *The Impact on Eagle Oil*

These transitional cases, *Gibson* and *Arnold*, did not confront the basic question of whether *Eagle Oil* *actually* requires a moving party defendant to affirmatively muster the facts sufficient for judgment. Only a combination of *obiter dicta*, parties' concessions, and hasty segues combined to establish *Eagle Oil* as precedent for the proposition that defendants must disprove plaintiffs' case in a summary judgment context. No California court explicitly allocated such a burden to defendants. By 1958, however, the defendants' requirement to come forward with disproving evidence was enshrined as gospel by the *Southern Pacific* decision.¹⁸⁷ True, *Eagle Oil* was good precedent for rules of liberal construction of affidavits, but not for all the substantive propositions on burden allocation for which it was ultimately cited.

The segue from *Eagle Oil* to the latter rule on burden is well illustrated in a case handed down over twenty years after *Eagle Oil*. In *Stationers Corp. v. Dun & Bradstreet, Inc.*, the supreme

183. *Id.* at 618, 152 P.2d at 779-80.

184. *Id.* at 617-18, 152 P.2d at 779-80.

185. "It is conceded by respondent [defendant] in its brief that a motion for a summary judgment may not be granted except on affidavits in favor of the moving party [here, the defendant] containing facts sufficient to entitle him to judgment in his favor." *Id.* at 618, 152 P.2d at 780.

186. *Id.* at 629, 632, 152 P.2d at 785, 787. Defendants' concession in *Gibson* never mattered. Both plaintiffs and defendants submitted comprehensive affidavits establishing their interpretation of a contract. The case was finally decided (over dissent) against defendants and remanded on the basis that plaintiffs had established a factual dispute. The ruling had nothing to do with the necessity *vel non* for defendants to affirmatively disprove plaintiffs' case.

187. *Southern Pacific Co. v. Fish*, 166 Cal. App. 2d 353, 366, 333 P.2d 133, 141 (1958).

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court reversed a summary judgment entered on behalf of defendants accused of libel and slander:

In examining the sufficiency of affidavits filed in connection with the motion, the affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. Such summary procedure is drastic and should be used with caution so that it does not become a substitute for the open trial method of determining facts. [Citations to *Eagle Oil*, *Snider*, and section 437c.] Thus, the trial court was justified in granting the motion here only if the declarations filed in support of it, strictly construed, contain facts sufficient to entitle the [moving party] defendants to judgment, and those of the plaintiffs, liberally construed, show that there was no issue of fact to be tried.¹⁸⁸

The opinion is of Justice Mosk, the younger brother of commentator Edward A. Mosk who wrote his considered commentary a quarter of a century earlier. Up to the word "Thus," Justice Mosk faithfully repeats the *Eagle Oil* doctrine and carries out his older brother's 1940 prediction on the direction of California law.¹⁸⁹ But thereafter, as if it were but part of a single principle and logically compelled by the liberal construction rule of *Eagle Oil*, Justice Mosk appears to impose on the defendants the burden of coming forward with evidence sufficient to secure judgment in their favor: Judgment for the defendants is proper only if their declarations "contain facts sufficient to entitle" them to judgment.

188. *Stationers Corp. v. Dun & Bradstreet, Inc.*, 62 Cal. 2d 412, 417, 42 Cal. Rptr. 449, 452, 398 P.2d 785, 788 (1965).

189. See *supra* notes 142-144 and accompanying text (discussing Edward A. Mosk's prediction).

Justice Mosk makes a jump that his brother did not consider and certainly did not endorse.¹⁹⁰

But it seems a short distance, a narrow jump, from liberally construing plaintiffs' declarations—declarations which after all need not wholly contain admissible evidence¹⁹¹—to premitting the need for evidence altogether. An exaggeratedly “liberal” evaluation of affidavits, exaggerated beyond logic, would permit the affidavits not to be filed at all by the nonmoving party.

A narrow jump, yet that short distance is of the essence. *Eagle Oil*, for example, was decided to ensure that cases with factual disputes got before a jury.¹⁹² The modern doctrine exemplified by *Do it Urself* and *Barnes* guarantees that cases without factual disputes will be sent to the bewildered jury, there only to have the judge direct the verdict. *Eagle Oil* ultimately rests on the constitutional requirement that only juries, not judges,¹⁹³ may decide the burden of proof *qua* burden of persuasion,¹⁹⁴ but modern doctrine conflates this with the other sense of “burden of proof” and bars judges from pre-trial action on a party's failure to produce *any* evidence necessary for success at trial.

The narrow jump from having some evidence to none is often the distance between winning and losing the case: thus, it is not a little thing. It is a difference that is clear to those who have seen

190. As the pre-1965 cases cited in this Article make clear—especially *Southern Pacific*—Justice Mosk is not inventing law here, but simply repeating what had by then become holy writ. The plaintiffs in *Stationers* actually conceded that they had no evidence of malice, an essential element of their claim. *Stationers*, 62 Cal. 2d at 419, 421, 42 Cal. Rptr. at 454-55, 398 P.2d at 790-91. The Court was swayed when it learned that the defendants had declined to assist the plaintiffs' efforts to secure the key evidence, which was peculiarly in the province of the defendants (although it appears that no court had ordered the defendants to comply with the plaintiffs' request). *Id.* at 421, 42 Cal. Rptr. at 455, 398 P.2d at 791. By contrast, in a case decided with *Celotex*, the United States Supreme Court, 20 years later, held that evidence of malice, even if generally in the hands of defendants, must be produced by plaintiffs to avoid summary judgment. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 256 (1986). Significantly, *Anderson* endorsed the classic *Eagle Oil* standards (though not by that name) of liberal construction of the papers defending against summary judgment. *Id.* at 255.

191. See *supra* note 140 and accompanying text (discussing the Edward A. Mosk Note and *Catrett v. Johns Manville*).

192. *Eagle Oil & Ref. Co. v. B.H. Prentice*, 19 Cal. 2d 553, 555-56, 122 P.2d 264, 265 (1942).

193. Of course when a jury is waived and the matter tried to the court, the judge sits as a trier of fact and decides if she is persuaded by the evidence.

194. *Eagle Oil*, 19 Cal. 2d at 555-56, 122 P.2d at 265.

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California's summary judgment rule in all its glory. Superior Court Judge Stuart Pollak has no quarrel with the *Eagle Oil* doctrine, faithfully noting the requirement that opposing affidavits be liberally construed so as to ensure access to juries for those who have the evidence to present.¹⁹⁵ But Judge Pollak emphatically urges the destruction of the rule enforced in i.e. *Do It Urself*, *Barnes*, and *Chevron*.

D. A Legislative Riposte

Difficulties with California's summary judgment procedures have encouraged some legislative activity¹⁹⁶ and various legislative proposals from the Bar.¹⁹⁷ Since the 1992 *Chevron* decision, one proposal has become law. A version of A.B. 2616 was enacted into law as an amendment to section 437c, adding a new subsection (n), which alludes to the burden of proof on summary judgment.¹⁹⁸

But the statute remains opaque. It still places the burden of showing that a cause of action has "no merit" on the defendant moving for summary judgment.¹⁹⁹ Once that is done, the burden would shift to the plaintiff to show that "triable issue" exists. While many interpretations of the new language are conceivable, it

195. Pollak, *supra* note 2, at 423. See also *Anderson*, 477 U.S. at 255.

196. See, e.g., A.B. 2616, introduced February 11, 1992, as amended; A.B. 498, as amended March 30, 1993 (imposing new standards of appellate review, and requiring party opposing motion to set for facts showing a triable issue); A.B. 2010, as amended July 9, 1992 (would have imposed joint "meet and confer" requirement on counsel prior to filing motions); S.B. 1409. As the text notes, a version of A.B. 2616 was enacted into law, but these other efforts were not enacted.

197. The State Bar Standing Committee for the Administration of Justice has proposed new language harmonizing state and federal law. Committee Agenda Item 92-11, on file with the State Bar. The San Diego County Bar Association has sought State Bar approval to push for amendments which would allow a court to summarily adjudicate (i) the effect of any writing and (ii) liability even when the amount of damages is uncertain. ITEMS PROPOSED, STATE BAR CONFERENCE OF DELEGATES (1993).

198. See CAL. CIV. PROC. CODE § 437c (West Supp. 1993).

199. Section 437c(n)(2), in pertinent part, provides: "A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense . . . Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue . . . exists . . ." *Id.* § 437c(n)(2) (West Supp. 1993).

probably will have the effect of continuing the imposition on moving defendants to demonstrate a negative, that there is no evidence of an essential element. The second tier of the test—imposing on plaintiffs the burden of showing a “triable issue”—is not clear: Presumably, plaintiffs would then show that they *did* have evidence, which would suggest that defendants could not possibly have met *their* burden in the first place.²⁰⁰ That, of course, suggests an internal contradiction in the new statutory wording, which is likely to be resolved by courts continuing to decide cases as they have. While the new amendment appears to recognize the problem discussed in this Article, it does not solve the problem.

IV. CONCLUSION

“History is a set of lies agreed upon.”

Napoleon Bonaparte

Summary judgment was derived from a mid-Nineteenth century British procedure outside the common law.²⁰¹ Upon introduction in the United States, the procedure soon ran into constitutional challenges.²⁰² The 1937 Wisconsin decision in *Fuller* called it a “harsh remedy,”²⁰³ and modern California courts have repeated a tattered caution against the “drastic” procedure.²⁰⁴ As this Article has shown, that caution derives from the application of the original rule, one which would grant plaintiffs relief without a trial. In those circumstances, the cases unanimously and properly required a plaintiff to assume the same burden at summary judgment as he would have at trial.

200. *Id.* § 437c(n).

201. Bills of Exchange Act, 18 & 19 Vict. c. 67 (1855). *See generally* Clark & Samenow, *supra* note 85.

202. *See, e.g.*, *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 317 (1902).

203. *Fuller*, 272 N.W. at 843.

204. *See, e.g.*, *Hoosier v. Randa*, ___ Cal. App. 4th ___, 17 Cal. Rptr. 2d 518, 520 (1993); *Hepp v. Lockheed-California Co.*, 86 Cal. App. 3d 714, 717, 150 Cal. Rptr. 408, 410 (1978); *Miles Lab., Inc. v. Superior Court*, 133 Cal. App. 3d 587, 593, 184 Cal. Rptr. 98, 102 (1982).

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In 1939, the legislature allowed defendants to seek summary judgment as well. The momentum of opinion created while plaintiffs only might seek summary judgment motions carried over past the 1939 change which authorized defendants' motion. Under *Eagle Oil*, both moving plaintiffs and defendants were burdened, properly, with having their papers strictly construed, and those of opposing parties interpreted with great generosity. The courts imported another burden on moving parties: the burden of establishing each element necessary to sustain the judgment. This burden made sense for moving plaintiffs, but not for moving defendants. Looking back for the authority for the latter burden on moving defendants, one finds only cases imposing it on plaintiffs. In the mid-1940's, there are a few cases in which defendants' burden to prove the case (i.e. to disprove the plaintiff's claims) is assumed. That onus was falsely equated with the *Eagle Oil* burden, perhaps as the result of the *Arnold* case, which just says it is so, conflating motions for summary judgment with motions to strike sham pleadings. Or perhaps the burden to disprove plaintiffs' case was the result of the thinking in *Hardy*, which invokes the statute. But *Eagle Oil* does not decide what *Arnold* says, and the statute does not specify the burden.

By 1958, the two burdens had merged and defendants moving for summary judgment were required to produce proof negating plaintiffs' case in chief. Contrary to the original rule, now parties at motion hearings need to assume a burden they do not have at trial: the burden of disproving an unsupported case.

Those pining for a change in California's summary judgment law have suggested amendments to the statute.²⁰⁵ But problems in the law heretofore are the byproduct of judges, not legislators;

205. Even Judge Stuart Pollak, who so persuasively decries current California law, believes that a statutory amendment is needed to fix the problem. Pollak, *supra* note 2, at 429. While Judge Pollak is wrong in his apparent assumption that the burden of proof problem inheres in the statute, he may be right from a practical point of view: The sort of blind adherence to bad law found in appellate opinions such as *Chevron* suggests turning one's attention to another branch of government. See *supra* notes 194-197 and accompanying text. Judge Pollak himself later declined—with reluctance, we might assume—to endorse the federal rule announced in *Celotex*, and was roundly complimented by his superiors for his forbearance. *Biljac Associates v. First Interstate Bank*, 218 Cal. App. 3d 1410, 1422, 1443-44, 267 Cal. Rptr. 819, 825 (1990).

and judges have the power to change the law. Cases such as *Chevron* are wrong to hold the legislature wholly responsible by the suggestion that the allocation of the burden of proof is statutorily mandated.

Confounded by circular string cites, rough logic, and ancient conflated doctrines on the burden of proof, the patient reader may think that California courts would never, never grant a defendant's summary judgment motion.

That is not quite true. In a case even more recent than *Chevron*, the court of appeal treated a student's claim that his rights were violated when he was "detained" for psychiatric examination. On receipt of a failing grade in income taxation, the student had told his professor, "You are a dead man," followed by placing a chicken carcass with a knife through it outside the professor's door.²⁰⁶ The appellate court actually approved the trial court's grant of summary judgment.²⁰⁷

206. *Taback v. Regents of the University of California*, (Cal. Ct. App. 1992) (unpublished opinion on file at the *Pacific Law Journal*).

207. "Appellant contends (1) he should have gotten higher grades in his classes at the University of California-Berkeley, and his rights were violated when he received grades such as a B rather than an A in physical education, and a B-plus rather than an A-minus in English; and (2) he should not have been detained for psychiatric observation in the fall of 1982, when he began to engage in irrational, delusional and threatening behavior—such as telling a professor who gave appellant a failing grade in income taxation, 'You are a dead man,' followed by placing a chicken carcass with a knife through it outside the professor's door. The trial court granted summary judgment. We affirm the trial court's ruling." Slip op. at 1.