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SUMMARY JUDGMENT: THE TEXAS EXPERIENCE

JOHN A. BAUMAN*

“There be (saith the Scripture) that turn judgment into wormwood; and surely there be also that turn it into vinegar, for injustice maketh it bitter, and delays maketh it sour.”

—Sir Francis Bacon, *Of Judicature*.

The purpose of a summary-judgment procedure is to secure a speedy adjudication of cases in which there is no genuine dispute as to the facts; the problem facing the courts in the administration of the rule is generally phrased as that of determining whether or not there is “any genuine issue as to any material fact.” If such an issue exists, the party opposing the motion is entitled to a full trial with all the common-law safeguards. Thus courts are confronted with two opposing policies. On the one hand, if there be no issue of fact in the case, a judgment on summary proceedings must be given in order to secure a speedy effectuation of rights, for otherwise the law’s delay makes the eventual judgment as sour as vinegar. On the other hand, neither party should be foreclosed if there are real issues to be tried, for in the absence of a full hearing, the wormwood of injustice may result.

This problem has been before the Texas courts since the promulgation of Rule 166a on March 1, 1950. Some compromise between the two opposing policies is inevitable. In summary judgment cases, it is basic to an understanding of the decisional process to know how this compromise is effected. For this purpose, a reiteration of the various “tests” invoked by courts furnishes little assistance, for the tests themselves have little or no fixed content. Therefore, it is suggested that the cases be examined with a view to comparing the problems of proof confronting a judge at a hearing of the motion with those arising upon full trial.

The procedural law places two burdens on a party who supports the affirmative of an issue: the burden of coming forward with evidence to establish propositions controverted by an opposing party’s pleadings, and the further burden of establishing these propositions by a preponderance of the evidence. The same two burdens are present in summary proceedings. Thus, if the movant for summary judgment has failed to produce evidence to support his claim, the motion will be denied, not because the opposing party has produced controverting evidence raising a “genuine issue of fact,” but simply because there has been a failure to meet the first of these two burdens.

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Acceptance by the Texas courts of this proposition is implicit in the many statements appearing in the cases to the effect that the plaintiff-movant has established a *prima facie* case. But there are indications that something more is expected of a moving party in a summary proceeding than is indicated by the familiar term "*prima facie*." In *Al & Lloyd Parker Co. v. Perkins*,¹ the plaintiff sought to recover money allegedly due him from the sale of his property by the defendants. In moving for summary judgment, the plaintiff relied on a contract which gave the defendants the option of buying the property themselves at a certain stated price or selling the property as the plaintiff's agent. In addition to the contract, the plaintiff produced certain advertisements and two letters written to the plaintiff by one of the defendants in which the word "commission" rather than "discount" was used. The court said that this evidence did not disclose "unequivocally" that the defendants were acting as agents and were hence subject to an accounting. Since the plaintiff's evidence was insufficient to meet his burden, a summary judgment was reversed on the appeal of the defendant. In another case, the court has stated that the burden on the moving party (whether plaintiff or defendant) is to establish the "non-existence" of a genuine issue of fact,² and in still another court ruled that the movant must make a "conclusive showing that no fact issue exists."³ These cases suggest that the party moving for summary judgment has a greater burden than simply establishing his claim or defense by a preponderance of the evidence. The implication is that he has the burden of establishing that his opponent has no case.

What import have these statements in summary dispositions? They seem to impose on the movant a burden of persuading a judge to a degree of conviction somewhat akin to that of "beyond a reasonable doubt" in criminal cases. In summary proceedings, the judge is to be convinced "conclusively" or "unequivocally" that no fact issue exists in a particular case. Yet judicial proof involves only probabilities. Logically speaking, a disputed proposition can never be established as true (unless admitted or judicially noticed), because of the inherently inadequate information about litigated matters of fact. This means that it is only feasible for a movant to establish that a certain proposition is highly probable. It is for the judicial tribunal to determine whether the required degree of probability has been attained. If the judge is convinced that it has been, he will grant the motion. Why? Because it is the policy of the state not to waste time on a trial if it is highly probable that the judge or jury could

¹ 251 S.W.2d 765 (Tex.Civ.App. 1952).

² *Lesikar v. Lesikar*, 251 S.W.2d 555 (Tex.Civ.App. 1952, error ref'd n.r.e. .

³ *Kaufman v. Blackman*, 239 S.W.2d 422 (Tex.Civ.App. 1951, error ref'd n.r.e.).

find only one way. Since judges must make this determination of probability by an exercise of human judgment, manifestly precision is impossible.

In the light of this analysis, the statements of the court quoted above become meaningful: they indicate that the burden on the moving party is to establish his case to such a high degree of probability that the judge is convinced that a trial would be a useless formality. There is thus involved a situation cognate to that of the party on whom rests the affirmative at a trial. That party has not only the burden of producing a preponderance of the evidence, but also the further burden of persuading the judge or jury that the evidence presented does preponderate. So in summary proceedings, the movant has the burden of producing evidence sufficient to indicate that a trial is unnecessary, and the further burden of persuading the judge that the evidence presented at the hearing does establish this point. On the other hand, the burden on the opponent is much simpler. In the first place, he need do nothing unless the movant has met the first of his two burdens. If the movant does arrive at this position, the opponent may then rely upon persuasion to establish that doubt remains as to the existence of a triable issue, or he may add evidence or information of his own. If the movant presents so strong a case that, in the absence of controverting evidence, a decision in his favor is required, obviously the opponent must produce evidence.

THE PLAINTIFF AS MOVANT

Assuming that the plaintiff, as moving party, does produce evidence sufficient, if unopposed, to require a finding favorable to him, the remaining question is the extent of the burden cast on the defendant to present at the hearing "information" sufficient to persuade the court that an issue of fact exists. If the defendant is permitted to rely solely on his pleading to sustain this burden, summary judgment proceedings are patently a mere dilatory maneuver; if the defendant is required to produce something more, the question then becomes that of the quantum or extent of the evidence or information that must be produced to prevent a summary disposition.

In several recent cases, the plaintiff has relied on deeds,⁴ contracts,⁵ or wills,⁶ and these documents were decisive of the rights of the parties. Moreover, the validity of the documents was not disputed. In such cases, the court has not hesitated to grant a summary judgment for the plaintiff

⁴ *Lesikar v. Lesikar*, 251 S.W.2d 555 (Tex.Civ.App. 1952, error ref'd n.r.e.).

⁵ *Rogers v. Watkins*, 249 S.W.2d 230 (Tex.Civ.App. 1952).

⁶ *Hester v. Weaver*, 252 S.W.2d 214 (Tex.Civ.App. 1952, error ref'd) (deed and will).

after resolving the legal question in his favor. Apparently the plaintiff's burden of establishing the non-existence of genuine issues of fact is sustained by the presentation of documents the validity of which is not disputed by the defendant; and although clearly, a fact issue could be raised by disputing the authenticity of the document, no such issue has yet been successfully raised in any of the Texas cases. In *Rogers v. Watkins*,⁷ the defendant admitted in his answer that a contract for the sale of land had been made prior to marriage, thus establishing that the realty in issue was not community property. In *Hester v. Weaver*,⁸ the court noted that the facts were not "seriously questioned," and that the only issue was a legal one of the interpretation of a clause in a deed.

In *Reserve Life Insurance Co. v. Buford*,⁹ the defendant did attempt to raise this issue. In that case, the plaintiff moved for summary judgment on the basis of a written contract and an affidavit establishing that he had complied with its terms. The defendant interposed a controverting affidavit in which he asserted that there had been a prior oral agreement between the parties which would prevent liability. In affirming a summary judgment for the plaintiff the court ruled that this evidence was inadmissible under the parol evidence rule. Thus, because of the rules of evidence, the contract stood admitted, and this contract and the plaintiff's affidavit were sufficient to satisfy the plaintiff's burden of proof. In another case, *Fonville v. Southern Materials Co.*,¹⁰ the defendant's affidavits were held to be insufficient because the court ruled that they contained only conclusions of law. Here the plaintiff had moved for a summary judgment foreclosing a special assessment lien. A prima facie case was proved by the presentation of copies of applicable ordinances and the paving certificate. The defendant contended that there had been no substantial compliance with the contract and that, therefore, the acceptance of the paving constituted a fraud upon him, supporting this defense by three affidavits which stated in substance that the paving was at no point as much as the seven inches in depth prescribed by the contract. In affirming a summary judgment for the plaintiff the court ruled that these statements were not evidentiary but were mere conclusions of no more probative force than the averments in the answer. There was thus no admissible evidence controverting plaintiff's prima facie case and the summary judgment was therefore affirmed.

In none of the above cases did the defendant produce admissible evidence to controvert the plaintiff's case. Thus it was unnecessary for the

⁷ 249 S.W.2d 230 (Tex. Civ. App. 1952).

⁸ 252 S.W.2d 214 (Tex. Civ. App. 1942, error ref'd).

⁹ 241 S.W.2d 973 (Tex. Civ. App. 1051, error ref'd).

¹⁰ 239 S.W.2d 885 (Tex. Civ. App. 1951, error ref'd n.r.e.).

court to reach a decision on the quantum of admissible evidence required of the defendant to establish a genuine issue of fact and so defeat the motion. In *Hurley v. Knox*,¹¹ the court faced this problem and announced that the evidence produced by the defendant must be of an amount sufficient to defeat a motion for an instructed verdict. The receiver of an insolvent insurance company brought an action to recover certain assessments pursuant to the provisions of an insurance contract allegedly held by the defendant in the insolvent insurance company. The plaintiff moved for summary judgment, supporting his motion with a certified copy of a class-suit judgment rendered against all persons holding policies in the company from December 1, 1939, to October 25, 1941, a deposition of an auditor establishing the amount of defendant's assessment, a notice filed by the defendant with the state industrial accident board that he had insured with the insolvent company, a similar notice filed by the company, a certificate of the secretary of the board that the notice was received and filed, a certified copy of the policy, another letter to the casualty company, and a notice of cancellation as of October 24, 1941. The defendant filed an affidavit by an agent of the company to the effect that the policy was presented to the defendant for approval, that defendant advised the agent that he did not want the policy, and that the policy was later cancelled. Summary judgment was granted the plaintiff, and the defendant appealed, contending that the agent's affidavit raised a fact issue. In affirming, the court ruled that a summary judgment would be granted only if the movant would on trial be entitled to a directed verdict. The court held that the affidavit was insufficient to defeat such a motion since an effective cancellation, as prescribed by the contract and the law, was never made. The dissenting judge thought that the case was not ready for summary judgment. He relied on the affidavit of the agent, the fact that his books, though available, were not audited, the absence of evidence establishing that the defendant had paid a premium, and the lack of any correspondence concerning the policy, which was cancelled the day before the books were submitted to the court for the receivership. These "facts," said the dissenting judge, raised a reasonable doubt as to whether or not there was an issue of fact before the trial court.

It is interesting to note that in all cases in which a summary judgment for the plaintiff has been affirmed, the motion was substantially supported by documentary evidence, and in all but one case, this evidence was quite uncontroverted by admissible evidence. Thus in these cases the plaintiff's evidence was of a type that is highly persuasive, and the defendant failed to make a showing sufficient to convince the court that a

¹¹ 244 S.W.2d 557 (Tex.Civ.App. 1951, error ref'd n.r.e.).

trial would be worthwhile. In the *Knox* case the defendant did produce some evidence, but the majority of the court ruled that, when measured against the documentary-type evidence relied on by the plaintiff, it was insufficient to defeat an instructed verdict. It is significant that in this case a dissenting opinion was filed, illustrating again the old truism that reasonable men can and do differ over what reasonable men can differ about.

In the cases considered next, the court reversed a summary judgment granted to the plaintiff by the trial court. The defendant therefore succeeded in convincing the appellate court that a triable issue of fact was present in the case. These cases are therefore, important because they disclose the manner in which the defendant succeeds in sustaining his burden of proof or persuasion under various circumstances.

In *Burtis v. Butler Bros.*,¹² the plaintiff sought to recover on an account, moving for a summary judgment on the basis of its verified, itemized accounts, the defendant's deposition, and the deposition of a subsequent purchaser of the store. The court, in reversing a summary judgment for the plaintiff, stated that this evidence was "in no sense conclusive" of the defendant's liability. Aside from this consideration the court stated that summary judgment could not be granted because there was a sworn denial of the account entitling the defendant to a trial pursuant to Rule 185.

A basic and fundamental policy consideration is here involved. Suppose that the defendant took the witness stand and denied that he had received the items listed in the account. Certainly there would be a triable issue of fact; namely, the delivery and acceptance of these items. Thus, the point involved, even in the absence of a rule such as Rule 185, is whether denials in an affidavit are sufficient to raise an issue of fact when those same denials in a pleading are not. This problem is not restricted to claims based on accounts; it is pervasive. It is also fundamental. It involves the basic policy issue of whether or not a complete showing by the defendant of all his evidence is required at the hearing of the motion.

That no such showing is required by the Texas courts is demonstrated by a number of decisions. Thus in *Knox v. Craven*,¹³ the plaintiff brought an action in trespass to try title to land. The plaintiff relied on certain deeds, plus an affidavit showing adverse possession for five years. The defendant filed an affidavit in which he denied that there were any cattle on the range during the winter of 1948-49, and the plaintiff contended in

¹² 243 S.W.2d 235 (Tex.Civ.App. 1951).

¹³ 248 S.W.2d 955 (Tex.Civ.App. 1952); cf. *Sidor v. Dreeben*, 236 S.W.2d 841 (Tex. Civ.App. 1951, error ref'd n.r.e.).

return that his title had matured prior to this time. The trial judge denied summary judgment, and the plaintiff sought a writ of mandamus to compel the judge to enter judgment on the motion. The court of civil appeals refused the writ, but added by way of dictum that there was no abuse of discretion since the defendant's affidavit established that the plaintiff's affiants were mistaken in their testimony as to the winter of 1948-49. This demonstrated the inaccuracy of plaintiff's affidavits and therefore justified the trial court's decision. It is permissible to conclude from this decision that where the plaintiff's case depends upon affidavits, and the defendant's affidavits cast doubt on the credibility of the plaintiff's affiants, a sufficient showing has been made to justify the denial of the motion for summary judgment. In other words, the plaintiff has failed to carry his burden of proof, whereas the defendant, by attacking the credibility of plaintiff's witnesses, succeeds in convincing the court that a trial would be worthwhile.

In *Penn v. Garabed Gulbenkian*¹⁴ the defendant pleaded misrepresentation and failure of consideration as defenses to an action brought to recover royalties provided for in a licensing agreement. In opposition to the plaintiff's motion for summary judgment, affidavits in support of these defenses were filed by the defendant. The plaintiff contended that these affidavits merely repeated the pleadings and hence were insufficient. The court nevertheless reversed a summary judgment for the plaintiff, stating that litigants have a "right to final trial 'where there is the slightest doubt as to the facts.'" Apparently, the repetition of the pleadings in the form of an affidavit raised this doubt.

This case raises several questions. The first is the meaning of the "slightest doubt" test. If a proposition can only be proved probable to some degree, there is always a slight doubt, never certainty. Thus the test, if logically applied, would preclude a judgment in every contested case. The test must therefore be applied practically and must mean that the proof offered by the movant must establish his claim or defense with a very high degree of probability.

Secondly, is the decision in the *Penn* case distinguishable from the decision in *Fonville v. Southern Materials Co.*,¹⁵ previously mentioned? In both cases the defense relied on by the defendant was a species of fraud, and in both cases the defense was substantiated by affidavits containing conclusions of law. Yet in the *Penn* case these conclusions were deemed adequate to raise triable issues of fact, whereas in the *Fonville* case the court ruled them insufficient. If the cases are distinguishable, the differ-

¹⁴ 243 S.W.2d 220 (Tex.Civ.App. 1951) *aff'd*, 252 S.W.2d 929 (Tex.Sup. 1952).

¹⁵ 239 S.W.2d 885 (Tex.Civ.App. 1951, error *ref'd* n.r.e.).

ence between them must be found in two particulars. First, the *Fonville* case involved very simple issues as compared to the complications raised by the royalty claim in the *Penn* case. Second, the nature of the proof offered by the parties differed in the two cases. The respective burdens imposed on the plaintiff and defendant are correlative. A very strong showing made by the movant requires a stronger showing by the opponent. In the *Fonville* case, the Texas law states that a prima facie case is established by the introduction of the paving certificate in evidence. Thus in the absence of controverting evidence, the plaintiff is entitled to judgment. On the other hand, no such conclusive showing was made in the *Penn* case for the obvious reason that the evidence was testimonial and did not compel belief. The defendant under these circumstances sustains his burden of persuasion by a lesser presentation of information to the court. In the *Penn* case, the defendant succeeded by merely repeating the conclusions from his pleading, with the addition of a statement that he had personal knowledge of these conclusions and was therefore competent to testify. In the *Fonville* case the defendant likewise repeated the pleading conclusions but nowhere asserted that his witnesses were competent to testify.

There have been a number of other cases in which the defendant has succeeded in defeating a motion for summary judgment though making scarcely any disclosure of evidence. In *King v. Rubinsky*,¹⁶ the defendant's pleading, to which the plaintiff filed no exceptions, was held to be sufficient to permit the defendant to go to trial. In *De La Garza v. Ryals*¹⁷ the defendant was granted a summary judgment on a counterclaim, the court ruling that the plaintiff's controverting affidavit was insufficient. This judgment was reversed on the ground that a triable issue was raised by the petition and an affidavit which stated: "This plaintiff *would show* the court. . . ." ^{17a} In still another case,¹⁸ involving an interpleader action, controverting evidence consisted of a sworn pleading and the form of an assignment. Stating that the movant must make a "conclusive showing that no fact issue exists," the court ruled that the beneficiary was entitled to a trial "of her *tender* of a genuine issue."^{18a}

There are two noteworthy features in all of these cases involving the "slightest doubt" test. First, the plaintiff's case is not supported wholly by documentary evidence but is largely dependent on testimonial evi-

¹⁶ 241 S.W.2d 220 (Tex.Civ.App. 1951). An added factor in this case was the erroneous exclusion of the defendant's affidavit.

¹⁷ 239 S.W.2d 854 (Tex.Civ.App. 1951, error ref'd n.r.e.). The trial court had also erroneously refused to grant the plaintiff leave to file an amended affidavit.

^{17a} Emphasis added.

¹⁸ *Kaufman v. Blackman*, 239 S.W.2d 422 (Tex.Civ.App. 1951, error ref'd n.r.e.).

^{18a} Emphasis added.

dence. Second, under these circumstances the defendant is not compelled to produce at the hearing of the motion the evidence which he undoubtedly would have introduced had there been a trial. Thus it may be concluded that when the plaintiff relies on testimonial evidence, the defendant sustains his burden by indicating that there are issues which he may be able to substantiate (or dispute) by evidence at a trial. In effect, the defendant may make an offer of proof, which the court accepts as sufficient to sustain the burden imposed on him to show the existence of a triable issue of fact.

There are, of course, a number of cases in which the defendant has produced controverting evidence at the hearing of the motion. If this evidence is sufficient to defeat a motion for a directed verdict, a summary judgment is improper. Thus in *Govier v. Gunnels*,¹⁹ a case analogous to the *Fonville* case, where the plaintiff sought to foreclose a paving lien, the defendant filed affidavits and depositions by competent witnesses to the effect that the contract specifications had not been met. The court of civil appeals reversed a summary judgment for the plaintiff, stating:

"We are not able to state as a matter of law that there was no affirmative probative fact presented from which it might not be reasonably concluded that there was not a failure of substantial compliance. Affirmative probative evidence sufficient to raise a genuine issue as to a material fact, at least in Texas, to go to a jury, does not have to be sufficient to support the jury's verdict thereon."²⁰

In order to resist successfully a motion for summary judgment in this type of case, the opponent's showing, whether it be only an offer of proof or the evidence itself, should be specific and should state that the witnesses are qualified by personal observation. This distinguishes the *Govier* case from the *Fonville* case, since in the *Govier* case it was specifically asserted in the affidavits that the affiants had personal knowledge, whereas in the *Fonville* case it was never shown that the witnesses were competent to testify. Thus the court in the *Fonville* case simply refused to give any weight to mere assertions of opinion. Classifying these statements as "conclusions of law" as the court did in the *Fonville* case is not helpful however, for it introduces into summary proceedings the subtle distinctions between conclusions of law and evidentiary statements which have plagued the law of pleading and evidence for over one hundred years.

In *Simmons v. Wilson*,²¹ the plaintiff sought an accounting under a constructive trust relative to a certain oil and gas lease owned by the de-

¹⁹ 246 S.W.2d 339 (Tex.Civ.App. 1952).

²⁰ *Id.* at 342.

²¹ 250 S.W.2d 638 (Tex.Civ.App. 1952, error ref'd n.r.e.).

defendant. The case had previously been tried, and the jury had disagreed. The plaintiff sought summary judgment on the basis of the transcript of evidence in this trial. The court noted at the outset that “. . . if an instructed verdict upon the 1948 record could have been sustained, then the motion for summary judgment was properly rendered. . . .”²² The transcript contained testimony by the defendant that, after a conversation between the parties, the plaintiff stated that he would not go on with the joint venture. It was the contention of the plaintiff that even if this were true the defendant still owed a duty to his partner until the partnership affairs had been concluded, but the court felt that the testimony could mean that the plaintiff had taken the position that he should be completely counted out, and hence that the defendant owed no duty whatever to him. The court concluded that there was a triable issue of fact on this point.

The *Simmons* case is interesting because all of the testimony was before the court at the hearing of the motion. The triable issue of fact found by the court presumably was the inference to be drawn from the testimony. Thus where reasonable men may draw conflicting inferences from the testimony as to the ultimate fact, a summary judgment is improper. This result is mandatory in cases where there is a constitutional right to jury trial. In such cases, the plaintiff can win the motion only by convincing the court that there is only one permissible inference from the evidence.

Controverting evidence disputing some material proposition of fact is, of course, always sufficient to defeat summary judgment.

In some cases the court has contented itself with pointing out the evidentiary statements which it considered sufficient to raise a triable issue of fact, without bothering to state any particular test. Thus in *Hunt v. Southern Materials Co.*,²³ another action on a paving lien, the court held that an issue of fact was raised by the defendant's affidavit asserting that the property on which the plaintiff sought to enforce his lien was the defendant's homestead. The defendant was competent to testify to this fact, and the court therefore ruled that the affidavit was of sufficient probative force to raise an issue of fact. In *Whelan v. State*,²⁴ the plaintiffs sought to recover delinquent taxes based on a new valuation of certain oil and gas leaseholds. The defendants, in resisting the motion, contested the formula used in arriving at the new valuation. The court, observing that the remedy should “be temperately and cautiously applied,” found that the defendants were entitled to a trial on the merits. Since the

²² *Id.* at 639.

²³ 240 S.W.2d 400 (Tex.Civ.App. 1951, error ref'd).

²⁴ 252 S.W.2d 271 (Tex.Civ.App. 1952).

ultimate disposition of this case turned upon the valuation of the property, and since the defendant's affidavit attacked the formula used in making this valuation, the court concluded that there was a triable issue on this point.

THE DEFENDANT AS MOVANT

The preceding cases have established that the requirement that the defendant produce evidence in order to defeat a motion for summary judgment has not been one difficult of satisfaction. Different considerations are present when it is the defendant who moves for summary judgment. The defendant occupies a defensive position: he merely wishes to be let alone; it is the plaintiff who is seeking some affirmative action from the court. Because of the different position occupied by the defendant, it is to be expected that the courts apply different standards when he is the moving party.

Before considering the burden placed on the plaintiff to produce evidence to defeat a motion for summary judgment, a group of cases involving only questions of law should be mentioned. In these cases the parties themselves are in agreement as to the decisive facts, or the facts are incorporated in documents the validity of which is not disputed. There is disagreement only on the law that should be applied to the facts. Under these conditions a summary judgment will be granted if the court agrees with the movant's version of the law. Thus where the defendant moves for summary judgment on the basis of orders or judgments of the court,²⁵ or undisputed deeds,²⁶ the court will grant judgment if the defendant's version of the law is deemed to be the correct one.

Suppose the defendant moves for summary judgment, supporting his motion with evidence, but the plaintiff wholly fails to substantiate his claim with any evidence. If the defendant's evidence is sufficient to establish a defense, the Texas cases hold that the plaintiff must produce evidence at the hearing of the motion or suffer an adverse judgment. He will not be heard to say that his pleading establishes a genuine issue of fact, or that the evidence will be produced subsequently at the trial; he

²⁵ *Butler v. Summers*, 253 S.W.2d 418 (Tex.Sup. 1952) (order of probate court), *Fitzgerald v. Bonham*, 247 S.W.2d 265 (Tex.Civ.App. 1952, error ref'd n.r.e.) (order appointing guardian); *Clark v. Barr*, 239 S.W.2d 114 (Tex.Civ.App. 1951) (final order of probate court); *cf. Anderson v. Heights State Bank*, 244 S.W.2d 374 (Tex. Civ.App. 1951, error ref'd) (application of probate code to undisputed facts).

²⁶ *Willoughby v. Jones*, 251 S.W.2d 508 (Tex.Sup. 1952), *rev'ing* 245 S.W.2d 341 (Tex.Civ.App. 1951) (judgment of foreclosure and deeds); *cf. Mecorn v. Thompson*, 239 S.W.2d 847 (Tex.Civ.App. 1951, error ref'd n.r.e.) (plaintiff claimed fraudulent alteration of deed: court held that provision allegedly altered was written into deed by the law).

must come forward with evidence at the hearing of the motion. Thus it is seen that the plaintiff's position differs materially from that of the defendant. His burden of persuading the court that there are triable issues in the case can be satisfied only by the presentation of evidence at the hearing of the motion.

This is illustrated by *Rolfe v. Swearingen*.²⁷ In that case the defendant moved for summary judgment on the basis of three volumes of affidavits, corporate records, and documents. The plaintiff filed nothing to controvert this evidence but sought to rely either on the pleadings or on the argument that evidence could be produced at a trial. The court rejected the latter argument, and as to the former stated that "Such a holding will sound the requiem to a rule that has hardly been christened."²⁸ Summary judgment for the defendant was therefore affirmed, since his evidence, being uncontroverted, established that there was no fact issue for trial.

The *Rolfe* case, where the plaintiff had pleaded a good cause of action but suffered an adverse judgment because his pleading was not substantiated by evidence, is to be distinguished, however, from cases where the court rules that even if the allegations in the complaint are accepted as true, the plaintiff could not succeed. In *Schroeder v. Texas & Pacific Ry.*²⁹ a summary judgment for the defendant was affirmed because the court ruled that, even if the plaintiff could substantiate his pleading with evidence, as a matter of law he could not succeed on any of the three theories pleaded. This decision is correct under the circumstances of the *Schroeder* case, since it appeared that in that situation there was no basis for recovery on any theory of law; it would be incorrect if some theory not pleaded were available and the plaintiff at the hearing substantiated this theory with evidence.

If the plaintiff does present information to the court at the hearing, there remains the question of evaluating it to determine if it is sufficient to defeat the motion. For example, in *Pentecost v. Travellers Ins. Co.*³⁰ the plaintiff sought to set aside a mortgage foreclosure sale. The defendant was granted a summary judgment on the basis of evidence showing competitive bidding, which the plaintiff had observed, and a sale for cash. The court ruled that the facts were undisputed, and that the plaintiff's cause consisted of ". . . conclusions and deductions of their own, and nothing else. . ."³¹ In effect the decision was that the plaintiff must pro-

²⁷ 241 S.W.2d 236 (Tex.Civ.App. 1951, error ref'd n.r.e.); *accord*, *Lynch v. Crockett Independent School District*, 244 S.W.2d 564 (Tex.Civ.App. 1951).

²⁸ *Rolfe v. Swearingen*, *supra*, note 27 at 240.

²⁹ 243 S.W.2d 261 (Tex.Civ.App. 1951).

³⁰ 238 S.W.2d 978 (Tex.Civ.App. 1951).

³¹ *Id.* at 980. Compare this case with *Fonville v. Southern Materials Co.*, 239 S.W.2d 885 (Tex.Civ.App. 1951, error ref'd n.r.e.).

duce admissible evidence and that mere opinions were insufficient to satisfy the burden imposed on him.

Other cases hold that the plaintiff has the burden of producing evidence sufficient to defeat a motion for a directed verdict.³² In *Arlington Heights Appliance Co. v. Gordon*³³ evidence produced by the plaintiff was held insufficient to meet this burden. There the plaintiff sought to recover two television sets from the defendant, asserting that the latter acquired the sets from a thief, or in the alternative that there had been a conspiracy to gain possession through fraud. The first count was dismissed on the ground that the plaintiff's own evidence established that there had been a sale to the alleged thief on credit. On the second count, plaintiff's only evidence of a conspiracy was that the alleged thief had visited defendant's store several times and that the defendants had purchased a suit of clothes from him which later proved to be stolen. This evidence was deemed insufficient to defeat a motion for a directed verdict.

The *Gordon* case is important in indicating the length to which courts in Texas have gone in imposing a burden on the plaintiff to produce evidence. This type of case is exceedingly difficult to prove, yet on the basis of the defendant's affidavit denying knowledge of Vincent's conduct the plaintiff was foreclosed, in a summary hearing, from any opportunity to test these denials by cross-examination in open court. He was foreclosed because he could not produce affirmative evidence establishing the conspiracy at the hearing.

*Richards v. Smith*³⁴ goes even further. In that case Richards brought a bill of review seeking to set aside a judgment. It was shown that Richards had listed his home for sale with one Gragg and that Gragg had agreed to pay Smith \$1,000 if Smith effected a sale of the property. Richards was aware of this arrangement. Smith procured a sale of the property and recovered a judgment against both Gragg and Richards for the \$1,000 commission. It was this judgment which Richards sought to set aside. The defendant was granted a summary judgment on the basis of the affidavits filed by both parties. In his affidavit, the plaintiff stated that he had not appeared at the pre-trial hearing or trial of the case because the defendant's lawyer had told him that it would not be necessary. Because of his failure to appear at the pre-trial conference, no notice of the time the case was set for trial was ever given Richards. In affirming the summary judgment, the court of civil appeals stated that a judgment

³² *McKay v. Dunlop*, 244 S.W.2d 278 (Tex.Civ.App. 1951, error ref'd, n.r.e.); *Arlington Heights Appliance Co. v. Gordon*, 244 S.W.2d 337 (Tex.Civ.App. 1951); cases cited note 35, *infra*.

³³ 244 S.W.2d 337 (Tex.Civ.App. 1951).

³⁴ 239 S.W.2d 724 (Tex.Civ.App. 1951, error ref'd n.r.e.).

would not be set aside when the failure to obtain a fair presentation resulted from the negligence, inadvertence, or mistake of the party seeking the relief. Here judgment was taken against the plaintiff, said the court, because he had negligently relied on the agent, Gragg, to represent him at the pre-trial and trial. The dissenting judge was of the opinion that there was an issue as to whether a person of ordinary care would rely on the statement of the defendant's attorney. The opinion emphasized that no notice of trial was ever served on Richards.

If the court's duty is merely to determine whether or not an issue of fact exists, it seems that an issue was raised by the plaintiff's affidavit in this case and that what the court actually did was to resolve that issue against the plaintiff. Were it not for the Texas rule concerning jury trials, the explanation could be found in the fact that this was an equity proceeding where trial would be by the court. Objection to summary proceedings in equity cases is based on the fact that the evidence is presented in the form of written documents. This deprives the court of two tests of credibility considered important in common-law trials: demeanor evidence and cross-examination in open court.

In several other cases, the defendant has been given a summary judgment on the basis of the plaintiff's own testimony, where this evidence failed to establish a prima facie case. Thus in *Fowler v. Texas Employers' Insurance Ass'n*³⁵ the plaintiff brought an action to recover workmen's compensation for an injury allegedly incurred in the course of employment. A summary judgment was granted the defendant on the basis of the plaintiff's deposition and three affidavits. At the hearing of the motion, the plaintiff produced no further proof, although on appeal it was asserted that further proof was available. The court of civil appeals affirmed the judgment, ruling that the plaintiff must produce evidence at the hearing and that in the absence of evidence the defendant's uncontroverted affidavits are to be accepted as true. The court applied the directed verdict test to this evidence, ". . . treating as true the evidence which is favorable to Mrs. Fowler, indulging in her favor all inferences that can reasonably be drawn from the evidence and resolving all doubts against the insurance carrier."³⁶ When the evidence was so considered the court ruled as a matter of law that the plaintiff had terminated her employment for the day and had shifted her status from employee to customer.

The significant point in the *Fowler* case is again the weight of the burden placed on the plaintiff: he must produce evidence showing the existence of a prima facie case which would entitle him to get to a jury,

³⁵ 237 S.W.2d 373 (Tex.Civ.App. 1951, error ref'd); accord, *Zamora v. Thompson*, 250 S.W.2d 626 (Tex.Civ.App. 1952, error ref'd).

³⁶ *Fowler v. Texas Employers' Ins. Ass'n*, *supra*, note 35 at 375.

and this evidence must be produced at the hearing of the motion, otherwise the burden of persuading the court that there is an issue worth trying is not sustained.

In only a few cases has a summary judgment for the defendant been reversed. In *Small v. Lang*³⁷ a summary judgment for the defendant on one count of a complaint was reversed because of the defendant's admission that he owed money to the plaintiff. The defendant's own evidence was thus held inadequate to sustain the burden placed upon the moving party of establishing that no triable issue of fact existed. In *Haley v. Nickels*³⁸ the court stated merely that affidavits were conflicting on the issue of whether or not the plaintiff was contributorily negligent. Thus an issue of fact on this point was raised by the evidence presented at the hearing. In *Anderson v. Breeding*³⁹ the plaintiff sought to recover compensation for services rendered by him in selling certain oil and gas properties. The defendant was granted a summary judgment on the ground that the plaintiff had no license. In reversing the judgment, the court of civil appeals ruled that there was an issue of fact as to whether or not this transaction was exempt from the licensing statutes.

CONCLUSIONS

Certain trends or patterns are clearly discernible from the above examination of the Texas decisions:

First, either the plaintiff or the defendant may be awarded a summary judgment when the evidence adduced in support of his claim or defense consists of undisputed documentary evidence. This is, of course, the minimal position that may be taken if the summary judgment rule is to have any effect at all.

Second, when the plaintiff, as moving party, substantiates his case by testimonial evidence, generally speaking the defendant need make only such a showing at the hearing of the motion as will raise a suspicion that an issue of fact exists. Such a misgiving may be raised by persuading the court that conflicting inferences may be drawn from the evidence or that the credibility of the plaintiff's witnesses is questionable, or by producing controverting evidence. If the plaintiff establishes a prima facie case with documentary evidence, the defendant must produce controverting evidence. If such evidence is produced, the plaintiff will be granted a summary judgment.

³⁷ 239 S.W.2d 441 (Tex.Civ.App. 1951, error ref'd n.r.e.).

³⁸ 235 S.W.2d 683 (Tex.Civ.App. 1950).

³⁹ 250 S.W.2d 467 (Tex.Civ.App. 1952) *rev'd*, 254 S.W.2d 377 (Tex.Sup. 1953).

Third, when the defendant moves for summary judgment and produces evidence supporting a defense, the plaintiff must come forward with evidence substantiating his claim. If this evidence is not produced, the defendant's evidence will be accepted as true. The quantum of evidence required of the plaintiff is that sufficient to establish a prima facie case and thus insure the defeat, at a trial, of a motion for a directed verdict.

Any evaluation of these conclusions must be based on the underlying policies involved in the application of the remedy. Manifestly, the Texas courts have been zealous (perhaps over-zealous) in protecting the defendant from any injustice that might result from summary dispositions. Permitting the defendant to defeat the motion with little more than a pleading is questionable practice, since the plaintiff has a right to a prompt disposition when there is no fact issue involved in the case, and since the presence of a fact issue can be determined only by compelling the defendant to make a disclosure of his evidence. On the other hand, the courts have not been nearly so solicitous where plaintiffs are concerned. There is a danger here that in certain types of cases, where the plaintiff relies on evidence drawn from the defendant, the requirement of producing evidence sufficient to establish a prima facie case will defeat the plaintiff unjustly. Full utilization of discovery procedures may be a partial answer to this objection. Finally, any test or standard, no matter how exact in statement, is applied in a particular case by a judge in the exercise of his discretion, and since this is a matter of human judgment, precision or exactitude is impossible. The judge is always subject to the pressure of competing policies. Success in making a correct compromise between them is measured by the Baconian ideal: the ultimate judgment must be neither bitter nor sour.