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THE EVOLUTION OF THE SUMMARY JUDGMENT PROCEDURE

An Essay Commemorating the Centennial Anniversary of Keating's Act

JOHN A. BAUMAN†

I.

Delay in the disposition of litigation has been one of the enduring problems of the law. In the first English law book ever written for laymen, an explanation was sought for the "huge delays" that "withhold petitioners from their right" and impose "an intolerable burden of expense."¹ Notwithstanding extensive reforms in judicial administration, the law's delay remains a much mooted question today.² As one step toward the solution of this recurrent problem, Parliament, a century ago, enacted Keating's Act providing a summary judgment procedure to facilitate the collection of bills of exchange.³ The appearance of a summary judgment procedure in England in 1855 was not fortuitous; its enactment was the response to economic and social pressures that could be withstood no longer. These pressures came not from the legal profession, which was notoriously reluctant to make any changes in the existing system,⁴ but from laymen and in particular the newly ascendant mercan-

† Associate Professor of Law, Indiana University. Submitted in partial fulfillment of the requirements for the degree of Doctor of the Science of Law, in the Faculty of Law, Columbia University.

1. Fortescue, *De Laudibus Legum Anglie*, c. LII (c. 1470), reprinted in CHIMES, SIR JOHN FORTESCUE 131 (1942).

2. See, for example, VANDERBILT, *THE CHALLENGE OF LAW REFORM*, c. IV (1955); Shafroth, *The Federal Courts Need More Judges*, 37 J. AM. JUD. SOC'Y 10 (1953); Report of the Temporary Commission on the Courts (New York) 23 (1955). Statistics on the extent of this problem are collected in the Annual Report of the Director of the Administrative Office of the U. S. Courts 95-100 (1954) and Calendar Status Study, State Trial Courts of General Administration, Institute of Judicial Administration (1955).

3. Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 VICT., c. 67 (1855).

4. Dillon, *Bentham's Influence in the Reforms of the Nineteenth Century*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 492 (1907); Bowen, *Progress in the Administration of Justice During the Victorian Period*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516, 519 (1907). Lord Eldon's resistance to reform is recounted in 10 CAMPBELL, LIVES OF THE LORD CHANCELLORS 265-69 (5th ed. 1868). Of

tile group that found the delays and technicalities of common law procedure unendurable.⁵

Why the dissatisfaction of the merchants resulted in the enactment of a summary procedure at this particular time may best be understood from a historical perspective. For centuries merchants had little reason to resort to the common law courts for commercial litigation. Commerce was carried on at the borough fairs held pursuant to the King's franchise, and that franchise included the right to hold a fair or piepowder court.⁶ Other towns were authorized to conduct the staple trade, and these towns were privileged to hold courts to settle disputes by the law merchant "as to all things touching the staple."⁷ A summary procedure was the noteworthy feature of these courts.⁸ "Justice was administered as speedily as the dust could fall or be removed from the feet of the litigants. . . ."⁹ In addition to the assurance of quick settlement of disputes by expeditious court procedure, merchants received further aid from the system for enrolling recognizances of debts, established by the Statute of Acton Burnell (1283),¹⁰ the Statute of Merchants (1285),¹¹ and later by the Ordinance of the Staple (1353).¹² When a debtor defaulted on such obligations, his creditor was authorized to proceed by execution and levy on certain lands and chattels of his debtor without first instituting court

course some members of the bar played a prominent and effective part in securing the reform of procedure. See Holdsworth, *The Movement for Reforms in the Law (1793-1832)*, 56 L. Q. REV. 208 (1940).

5. Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725 (1926). See DAY, COMMON LAW PROCEDURE ACTS 11 (4th ed. 1872); 53 LAW MAG. OR Q. REV. 77, 79 (1855).

6. 23 SELDEN SOCIETY, in 1 SELECT CASES ON THE LAW MERCHANT vi-xxvi (Gross ed. 1908). Some boroughs had courts even when fairs were not being held. *Id.* at xx. For a discussion of the medieval fairs, see BEWES, THE ROMANCE OF THE LAW MERCHANT 93 (1923).

7. 23 SELDEN SOCIETY, *supra* note 6, at xxvii. See COKE, FOURTH INSTITUTE *237; Ward, *The Early History of the Merchant Staplers*, 33 ENG. HIST. REV. 297, 301 (1918); Brodhurst, *The Merchants of the Staple*, 17 L. Q. REV. 56 (1901), reprinted in 3 SELECT ESSAYS IN ANGLO-AMERICAN LAW 16 (1909).

8. 23 SELDEN SOCIETY, *supra* note 6, at xxv; 5 HOLDSWORTH, A HISTORY OF ENGLISH LAW 106 (1924); 3 BLACKSTONE, COMMENTARIES *32-33. I THE LITTLE RED BOOK OF BRISTOL 58 (Bickley ed. 1900) states that a summary procedure is one of the differences between the law merchant and the common law. ("[I]n genere primo quod celerius deliberat se ipsam.") For a discussion of the law merchant procedure in cases in the central courts see 46 SELDEN SOCIETY, in II SELECT CASES ON THE LAW MERCHANT xix (Hall ed. 1929).

9. 23 SELDEN SOCIETY, *supra* note 6, at xiv Cf. COKE, FOURTH INSTITUTE *272.

10. 11 EDW. 1 (1283).

11. 13 EDW. 1 (1285). A comprehensive study of this legislation may be found in PLUCKNETT, LEGISLATION OF EDWARD I, c. VI, at 138-50 (1949).

12. 27 EDW. 3, c. 9 (1353) (the effect of a recognizance in the staple).

proceedings to establish the debt.¹³ Obviously, this system provided an exceedingly effective method of debt collection.¹⁴

Subsequent developments altered this picture substantially. With increased wealth and the improvement in transport, fairs diminished in importance with a consequent withering of the piepowder courts.¹⁵ The competition of the newly developed device of the bill of exchange and promissory note resulted in a marked decline in the use of the statutory recognizance.¹⁶ Contributing to this decline was the disruptive effect of the Hundred Years' War on all credit transactions.¹⁷

As a result of these changes in commercial practice and because of the failure of the English to develop the early commercial courts,¹⁸ merchants found it necessary to resort to the common law and chancery courts for the settlement of mercantile disputes.¹⁹ As early as 1622, when Gerard Malynes published the first English treatise on the law merchant, the staple was regarded as the way "the course of Trade was managed heretofore."²⁰ Of the methods of determining mercantile controversies, Malynes found four: admiralty, arbitration, merchant's courts, and the civil or common law of the kingdom.²¹ Noting that the law merchant requires "brevitie and expedition," he stated that the procedure in admiralty, in the commercial courts, and by arbitration was brief and summary.²² But surprisingly his greatest plaudits were reserved for the common law courts in England. After several disparaging remarks about

13. 49 SELDEN SOCIETY, in III SELECT CASES ON THE LAW MERCHANT xxiv, lxxxv-lxxxvii (Hall ed. 1932); Ward, *supra* note 7, at 303-04; 2 BLACKSTONE, COMMENTARIES *160; MALYNES, CONSUETUDO, VEL LEX MERCATORIA, c. XX, at 496 (1622). "By that law (if once a man acknowledged himself [to] be indebted to a Merchant, and payed not his money at his day) without process, without pleading, without further sute or Judgement, the Merchant shall have present Execution against his Debtor, both for Body, Goods, and Lands." STONE, THE READING UPON THE STATUTE OF THE THIRTEENTH OF ELIZABETH TOUCHING BANKRUPTS 3 (1656).

14. 49 SELDEN SOCIETY, *supra* note 13, at xx-xxi. Lord Brougham suggested that this system was analogous to his proposed summary procedure. See note 71 *infra*.

15. 23 SELDEN SOCIETY, *supra* note 6, at xix; 3 BLACKSTONE, COMMENTARIES *33; BEWES, *op. cit. supra* note 6; 5 HOLDSWORTH, *op. cit. supra* note 8, at 91, 112.

16. 49 SELDEN SOCIETY, *supra* note 13, at xxvii. It has been suggested that these bonds may have been negotiable. Sayles, *A Dealer in Wardrobe Bills*, 3 ECON. HIST. REV. 268 (1931). For the development of the negotiable instrument, see Jenks, *The Early History of Negotiable Instruments*, 9 L. Q. REV. 70 (1893), reprinted in 3 SELECT ESSAYS ON ANGLO-AMERICAN LEGAL HISTORY 51 (1909); 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW 126-32 (1926). For its relation to the present subject, see note 48 *infra*.

17. 49 SELDEN SOCIETY, *supra* note 13, at xxvii.

18. 5 HOLDSWORTH, *op. cit. supra* note 8, at 148-54.

19. The change is strikingly illustrated by comparing the titles and cases cited in STATHAM, ABRIDGEMENT OF THE LAW (Kingelsmith transl. 1915) first published about 1490 with VINER, GENERAL ABRIDGEMENT OF LAW AND EQUITY (2d ed. 1791-1795).

20. CONSUETUDO, VEL LEX MERCATORIA, c. XX, at 495 (1622).

21. *Id.* at 443. See also c. XIV-XVII.

22. *Ibid.*

delay in the Chancery Court,²³ Malynes observed that in the common law courts, "men are to reduce the state or issue of their cause upon one pre-emptorie exception to bee tried by the verdict of twelve men, whereby matters are determined with expedition."²⁴ Nowhere in Europe have they discovered "so just and so well devised a means . . ." for speedily resolving disputes.²⁵

Subsequent commentators on the law merchant, *e.g.*, Charles Molloy,²⁶ Giles Jacob,²⁷ and Wyndham Beawes,²⁸ were content to cite applicable decisions of the law courts without comment on the utility and effectiveness of the common law procedure. John Marius, however, refused to discuss legal actions at all since the "right dealing Merchant doth not care how little he hath to do in the Common Law, or things of that nature. . . ."²⁹

Turning to the publications of non-legal writers, one quickly discovers that common law procedure did not enjoy for long the praise Malynes gave to it and that the delays in chancery became even more aggravated.³⁰ Writing in 1740, the winner of a Chancery suit lasting thirteen years found legal expenses so great that he quoted Hannibal [*sic*] to the effect that "a few more such Victories would undo him."³¹ In 1741, another writer advised a prospective litigant to arbitrate rather than sue at law: "The Law, my good Friend, I look upon, more than any one Thing, as the *proper* Punishment of an over-hasty and preverse Spirit. . . ."³² A correspondent reported that in debtor's prison there could be purchased for a six pence a book of instructions "wherein it was pointed out to debtors how to harass creditors."³³ The debt collection

23. *Id.* at 467. (The delay was occasioned by the method employed by the Chancellor to inform himself of the customs of the merchants.)

24. *Id.* at 472.

25. *Id.* at 462.

26. DE JURE MARITIMO (7th ed. 1722).

27. LEX MERCATORIA (2d ed. 1729).

28. LEX MERCATORIA REDIVIVA (1761).

29. ADVICE CONCERNING BILLS OF EXCHANGE 3 (1700), reprinted in the Appendix to ROBERTS, THE MERCHANTS MAP OF COMMERCE (4th ed. 1700).

30. See notes 31-33 *infra* and 1 GENTLEMAN'S MAGAZINE 100 (1731); 20 *id.* 219 (1750). For additional sources see Sunderland, *supra* note 5.

31. 10 GENTLEMAN'S MAGAZINE 388, 397 (1740). "For while their Purses can dispute, There's No End of th' immortal suit."

32. 11 GENTLEMAN'S MAGAZINE 34 (1741). Illustrative of this writer's impression of the law courts is his story of observing at the assizes a sign representing on one side a man all in rags wringing his hands with a label reading "he had lost his suit," and on the other side "a Man that had not a Rag left, but stark naked, capering and triumphing, That he had carry'd his Cause. . . ."

33. 92 GENTLEMAN'S MAGAZINE 638 (Pt. 1, 1822). In order to cause creditors the greatest expense and the most delay, debtors were given the following advice:

"When arrested and held to bail, and after being served with a declaration, you may plead a general issue, which brings you to trial the sooner of any

system was designated in a Parliamentary report as a "glaring defect in our commercial jurisprudence."³⁴

No doubt some of the delay in the disposition of litigation could be attributed to the increased business of the courts,³⁵ but there were defects in the prescribed procedure which contributed substantially to this result.³⁶ In the Chancery Court, the glaring defect was the time consuming procedure for taking testimony by written deposition.³⁷ In the common law courts, pleading was the chief offender. At the time Malynes expressed his admiration for common law pleading, the change from informal oral pleas to the system of written pleadings had just been completed.³⁸ As that system developed, it became increasingly complex and technical, and this factor, in conjunction with the shift of responsibility for the truth of the pleading away from counsel, caused difficulties.³⁹ Because the highly technical rules governing pleading were rigidly enforced, a case might be dismissed for some defect in form irrespective of the merits of the case.⁴⁰ The more significant defect in the system was its failure to provide a method of determining the factual basis of a pleading prior to trial.⁴¹ It was this weakness that unscrupulous lawyers advised debtors to exploit.⁴² By pleading fictitious defenses to an action

plea that you can put in; but if you want to vex your plaintiff, put in a special plea. . . .'

By following the procedure suggested in this pamphlet, the debtor incurs expenses of £30 10/ whereas the creditor's costs are £314. The author of the pamphlet concluded with the observation that a debtor following the prescribed procedure will "most likely . . . hear no more of the business."

34. Third Report by the Commissioners Appointed to Inquire into the Practice and Proceedings of the Superior Courts of Common Law 147 (1831). See also 47 H. COMM. J. 640 (1792) (report and evidence before a committee appointed to inquire into the practice and effect of imprisonment for debt); 21 H. COMM. J. 892 (1732) (an inquiry into delays resulting from the fees charged by numerous officials of the courts).

35. 45 EDINBURGH REV. 458, 462, 466 (1827). Cf. 46 BLACKWOOD, EDINBURGH MAGAZINE 754 (1839) (statistics on population and trade).

36. Bowen, *supra* note 4; Odgers, *Changes in Procedure and in the Law of Evidence*, in A CENTURY OF LAW REFORM 203 (1901).

37. PARKES, HISTORY OF THE COURT OF CHANCERY 453-58, 561-67 (1828); 2 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 181-86 (1827). See also Birrell, *Changes in Equity, Procedure, and Principles*, in A CENTURY OF LAW REFORM 177 (1901).

38. Holdsworth, *The Development of Written and Oral Pleading*, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 614, 631 (1908).

39. *Id.* at 631.

40. See HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING § 63, at 64 (1897); POUND, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. (Pt. I) 395, 408 (1906). It has been suggested that the failure of Roman law to develop a summary procedure may be attributed to the great flexibility of procedure prior to the absolute monarchy. WENGER, INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE § 32, at 324 (Fiske transl. rev. ed. 1940).

41. Sunderland, *Modern Procedural Devices*, in FIELD CENTENARY ESSAYS 83, 85 (1949).

42. Third Report by the Commissioners Appointed to Inquire into the Practice and Proceedings of the Superior Courts of Common Law 147, 222 (1831).

for debt or on commercial paper, a debtor obtained certain advantages. Not only did he discourage his creditor by the prospect of great expense, but the resulting delay gave the debtor additional time either to secure sufficient funds to satisfy the debt or to dissipate the existing funds available for payment prior to a bankruptcy.⁴³ This practice of false pleading for the purpose of delay was common, and was in fact accepted by the common law courts so long as the plea was of the ordinary type.⁴⁴

To remedy at least some of the evils resulting from sham pleading, Lord Brougham, in 1828, proposed the adoption of the Scottish summary procedure for actions brought on notes, bonds, and bills of exchange.⁴⁵ In support of the proposal, he stated that "whenever a strong presumption of right appears on the part of a plaintiff, the burthen of disputing his claim should be thrown on the defendant. This I would extend to such cases as bills of exchange, bonds, mortgages, and other such securities. In those cases I think the plaintiff should be allowed to have his judgment, upon due notice given, unless good cause be, in the first instance, shown to the contrary, and security given to prosecute a suit for setting the instrument aside. This is a mode well known in the law of Scotland. . . ."⁴⁶ The origin of the procedure proposed by Lord Brougham requires mention of certain continental developments.

As in England, the commercial interests on the continent demanded some method of collecting debts quickly, and this demand was met at an early time by the development of the executory procedure in Italy.⁴⁷ This procedure permitted a creditor to apply *ex parte* to the court for execution in cases where the debtor acknowledged the debt in writing and

43. 19 Jurist (Pt. 2) 59 (1855); 25 L. T. 209 (1855).

44. 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 306-07 (1926); STEPHENS, PLEADING § 228, at 430-31 (Andrew's ed. 1894); 1 CHITTY, PLEADING 541-45 (11th Am. 1851).

45. *The Present State of the Law*, delivered on February 7, 1828, 18 PARL. DEB. (N.S.) 127 (1828); 2 LORD BROUGHAM'S SPEECHES 287 (1838). For an analysis of this speech see Holdsworth, *The Movement for Reforms in the Law (1793-1832)*, 56 L. Q. REV. 340 (1941).

46. 18 PARL. DEB. (N.S.) 127, 179 (1828).

47. ENGLEMANN, A HISTORY OF CONTINENTAL CIVIL PROCEDURE 497 (Millar transl., 7 Continental Legal History Series 1927). By borrowing certain legal concepts from Roman law, lawyers developed the documentary procedure from the Lombard custom of *pignoratio* which permitted a type of distraint by a creditor upon the goods of a debtor without judicial action. The conditions of this custom are prescribed in the Laws of Rothari § 245-57, reprinted in II TROYA, CODICE DIPLOMATICO LONGOBARDO 259-72 (1853). See also 6 HODGKIN, ITALY AND HER INVADERS 210 (2d ed. 1916); and CALISSE, A HISTORY OF ITALIAN LAW 765-66 (8 Continental Legal History Series 1928). The need of creditors for some such procedure is indicated by the fact that there was in use in Alexandria until the fourth century a somewhat similar procedure. See Wenger, *op. cit. supra* note 40, at 328-30.

granted to the creditor the right to execution without a hearing.⁴⁸ The cognate practice in English law was confession of judgment by warrant of attorney,⁴⁹ and a similar practice existed at this time in Scotland.⁵⁰ The development of the executory procedure in France⁵¹ and Holland⁵² extended the remedy to actions on debts acknowledged by certain specified public or private documents. Characteristically, these procedures resulted in an immediate judgment for the plaintiff if the validity of the document was not attacked.⁵³ In France, only certain specified defenses were permitted to actions on public documents, and under certain circumstances, the defendant was required to post security.⁵⁴ In Holland, on the other hand, the plaintiff was required to post security as a prerequisite to a final judgment.⁵⁵

These continental procedures were familiar to Scotsmen since the political feuds with the English sent Scottish students to the continent to pursue their legal studies.⁵⁶ During Tudor times, French universities

48. ENGLEMANN, *op. cit. supra* note 47. The adoption of an executory procedure in Italy closely paralleled the development in that country of the concept of the negotiable instrument. See note 16 *supra*.

49. Millar, *The Formative Principles of Civil Procedure I*, 18 ILL. L. REV. 1, 8 (1923); see 1 TIDD, PRACTICE *591 (1828); 3 BLACKSTONE, COMMENTARIES *304, *397. As early as 1201, long before the recognition of the promissory note, there was in common use in England a type of recognizance in which the borrower confessed judgment and nothing remained to be done by the lender but levy execution. 2 POLLOCK AND MAITLAND, THE HISTORY OF ENGLISH LAW 204 (2d ed. 1898). It has been said that this "executory contract" was used as security in lending "large sums of money." *Id.* This was a practice distinct from the Statute Merchant discussed previously. *But cf.* 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 20 n. 40 (rev. ed. 1940). After the promissory note became legally enforceable, Chitty states that the note with a warrant of attorney became "one of the most usual collateral securities on loans of money. . . ." 2 CHITTY, PRACTICE 334 (1st Am. from 1st Eng. 1835). The failure of Malynes, Jacobs, or Beawes to mention the cognovit note is no doubt attributable to the late date at which such notes became legally acceptable. The cognovit note is said to be obsolete in England today. 19 HALSBURY, LAWS OF ENGLAND § 526, at 224 (2d. ed. 1935).

50. 1 BELL, COMMENTARIES ON THE LAW OF SCOTLAND 4 (5th ed. 1826); 1 BELL, PRINCIPLES OF THE LAW OF SCOTLAND § 68, at 30 (5th ed. 1860); see illustrative cases in 17 MORISON, DICTIONARY OF DECISIONS 14988-96 (1806).

51. ENGLEMANN, *op. cit. supra* note 47, at 699-706. Notaries were required to keep a register of contracts they had executed, and all such documents were enforceable by the executory process.

52. 2 VAN LEEUWEN, COMMENTARIES ON ROMAN-DUTCH LAW, Bk. IV, c. XV., at 120-22 (Kotzé transl. 2d ed. 1921). This Dutch documentary procedure, called *Nanptissement*, was allowed in actions brought on public documents, or in cases where defendant was sued on his own signature.

53. See 2 VAN LEEUWEN, *op. cit. supra* note 52, at 121; ENGLEMANN, *op. cit. supra* note 47, at 700 (actions on private documents).

54. ENGLEMANN, *op. cit. supra* note 47, at 701. Payment, release, or extension of time were the only defenses permitted.

55. 2 VAN LEEUWEN, *op. cit. supra* note 52, at 121-22, and Bk. IV, c. xxvii, at 220. Defenses to this proceeding are described in Bk. V, c. XIX, at 468-69.

56. At the outbreak of the war of independence, the law of Scotland was closely akin to English law and there was a Scottish version of Glanvil's book. 1 POLLOCK AND MAITLAND, *op. cit. supra* note 49, at 222-24. *Cf.* COKE, FOURTH INSTITUTES, c. 75.

were the most popular, but with the waning of French influence following the Reformation, Scotsmen journeyed instead to Leyden or Utrecht for their legal education.⁵⁷ Thus it is not surprising to find that Scotland in 1681 found it necessary "for the flourishing of trade" to enact a summary procedure on foreign bills of exchange.⁵⁸ The effect of this legislation was to extend the existing Scottish practice based on the debtor's consent to immediate execution (expressly stated in an instrument) to all actions on foreign bills of exchange, regardless of actual consent.⁵⁹ It is reasonable to suppose that this extension was patterned on the familiar French and Dutch law, particularly since the preamble recited that the purpose of the statute was to "conforme to the custome of other parts."⁶⁰ Subsequent legislation strengthened the remedy and extended it to other instruments, and it became known in Scottish law as "summary diligence."⁶¹

A brief description of the procedure established by this legislation is instructive. If a bill or note is dishonored by non-payment or non-acceptance, and a protest is registered in the books of Council and Session or in the books of a Sheriff Court within six months after that date, the holder is entitled to the ordinary methods of execution on judgments.⁶² Protection against false claims is afforded defendants by a procedure for staying execution. Thus a creditor may proceed by registration and obtain an order charging the debtor to pay within six days, but the

57. Walton, *The Relationship of the Law of France to the Law of Scotland*, 14 JURID. REV. 17 (1902); Gardner, *French and Dutch Influences*, in THE SOURCES AND LITERATURE OF SCOTS LAW 226 (The Stair Society 1936); *The Legal System of Scotland*, 66 SOL. J. 48 (1921); 4 HOLDSWORTH, A HISTORY OF ENGLISH LAW 248 (3d ed. 1945). It was estimated that 1600 Scottish law students studied at Leyden University between the years 1600 and 1800. In 8 CAMPBELL, *op. cit. supra* note 4 at 233, in observing that Lord Brougham's legal education was at the University of Edinburgh, the following comment is made:

According to ancient usage, he ought to have been sent to prosecute his legal studies at the University of Leyden; but since the time of Boswell . . . the tuition of foreign jurists has been considered unnecessary to qualify for the Scottish bar. . . .

See also Mitchell, *Scottish Law Students in Italy in The Later Middle Ages*, 49 JURID. REV. 19 (1937).

58. ACT OF PARL., 1681, c. 20.

59. 1 BELL, COMMENTARIES ON THE LAW OF SCOTLAND 4 (5th ed. 1826).

60. Bell's statement [53 LAW MAG. OR Q. REV. 77, 79 (1855)] that the decree of registration is based on the *Actio Judicata* of the Roman law is not inconsistent with this statement, since the executory procedure itself was developed from Roman law concepts. See ENGLEMANN, *op. cit. supra* note 47, at 498-99.

61. ACT OF PARL., 1696, c. 36 (procedure extended to inland bills and precepts); 12 GEO. 3, c. 72, § 42 and 43 (defined the rights and liabilities of parties to the bill).

62. GLOAG AND HENDERSON, INTRODUCTION TO THE LAW OF SCOTLAND 299-300 (5th ed. 1952); 1 BELL, COMMENTARIES ON THE LAW OF SCOTLAND 4, 387 (5th ed. 1826); 1 BELL, PRINCIPLES OF THE LAW OF SCOTLAND § 343-44, at 126 (5th ed. 1860); LORIMER, HANDBOOK OF THE LAW OF SCOTLAND § 1605, at 388 (6th ed. 1894).

debtor in turn may obtain a suspension of the charge or a "sist of diligence." This is accomplished by the debtor filing with the court a note of suspension setting forth the charge and the reasons why he believes it should be suspended.⁶³ Ordinarily he must furnish "caution" (security) for the principal sum demanded plus expenses, although this is discretionary with the court.⁶⁴ If the note of suspension is passed, the case goes to the court for trial, and pending the hearing, execution is suspended. If the note is refused, execution proceeds as in the ordinary case.⁶⁵

Lord Brougham, a member of the Scottish bar, was of course familiar with the success of this remedy in Scotland, and as might be expected he considered the possibility of its use in English procedure. Though he first proposed such a reform for England in 1828, it was not until 1853 that he submitted to Parliament a bill incorporating the Scottish practice.⁶⁶ This measure was approved by the House of Lords, but was allowed to die in the House of Commons.⁶⁷ The bill was reintroduced in the next session of Parliament, but this time a competing measure was advocated by Keating, a member of Parliament from Reading.⁶⁸ In the debates on the bill Brougham pointed out the defectiveness of the existing English practice and noted that the proposed measure was already a part of the law in some form in France, Holland, Belgium, and the Italian States, as well as Scotland.⁶⁹ That the procedure was a boon to commerce and trade was shown by statistics establishing that execution was suspended in less than one per cent of the cases employing sum-

63. See 1 BELL, COMMENTARIES ON THE LAW OF SCOTLAND 387 (5th ed. 1826); 1 BELL, PRINCIPLES OF THE LAW OF SCOTLAND § 276, at 100, and Bk. IV, § 2272-90, at 842-49 (5th ed. 1860).

64. *Ibid.*

65. 12 GREEN, ENCYCLOPEDIA OF THE LAW OF SCOTLAND 206 (Chisholm ed. 1899). The court considers the matter and passes or refuses the note "as may seem just." *Id.* at 211. When caution is furnished, the note of suspension is usually passed. *Id.* at 217. For illustrative cases see *Ross v. Millar & Baird*, 4 Scot. Jur. 163 (1831) (forgery, suspension without caution); *Kechans v. Barr*, 21 Sess. Cas. (4th Ser.) 75 (1893) (denial of signature, suspension without caution); *Renwick v. Stamford, Spalding, and Boston Banking Co.*, 19 Sess. Cas. (4th Ser.) 163 (1891) (fraud, suspension with caution).

66. 131 PARL. DEB. (3d ser.) 618 (1854).

67. See 136 PARL. DEB. (3d ser.) 494-95 (1854-1855); 53 LAW MAG. OR Q. REV. 77 (1855).

68. 136 PARL. DEB. (3d ser.) 494 (1854-1855) (Lord Brougham's bill); 136 PARL. DEB. (3d ser.) 1263 (1854-1855); 137 PARL. DEB. (3d ser.) 1274 (1855); 138 PARL. DEB. (3d ser.) 2292, 2330 (1855). Sir Henry Keating was a member of the English bar and later a judge. See 30 D.N.B. 275 (1892). The basic method incorporated in Keating's bill was suggested by Mr. Thomas Lott in Third Report by the Commissioners Appointed to Inquire into the Practice and Proceedings of the Superior Courts of Common Law 147, 148.

69. 135 PARL. DEB. (3d ser.) 1361 (1854); 136 PARL. DEB. (3d ser.) 494 (1854-1855).

mary diligence in Scotland.⁷⁰ Opposition was extensive; it ranged from the contention that there were no frivolous defenses or delays in this type of case to the complaint that Brougham's sole objective was to supply another political job—that of registrar.⁷¹ Since the proposed system of registration was foreign to English law, there is no doubt that English lawyers viewed with suspicion, if not with downright hostility, this Scottish innovation.⁷² Keating remarked "that the introduction of Scottish law was unnecessary, as tending only to encumber and clog the wheels of justice."⁷³ The proposals of Brougham and Keating were referred to a select committee composed of lawyers and merchants, which, after hearing the evidence of lawyers, bankers, and merchants, recommended for passage Keating's bill, deeming it "unadvisable to introduce a new system of procedure if the forms of the English law could be made available for the object in view. . . ."⁷⁴

Keating's Act, entitled the Summary Procedure on Bills of Exchange Act (1855), became effective on October 24, 1855.⁷⁵ It had a generally favorable reception from the bar since it was regarded as "comparatively moderate and reasonable" when compared to the "startling measure proposed by Lord Brougham."⁷⁶ Brougham himself acquiesced in the passage of the act in order not to impede the adoption of this reform still longer.⁷⁷

The procedure thus established required the plaintiff to obtain a specially indorsed writ warning the defendant that judgment would be entered against him unless he obtained leave to appear within twelve days after the service of the writ.⁷⁸ Leave to appear and defend was to be

70. 131 PARL. DEB. (3d ser.) 620 (1854); 132 PARL. DEB. (3d ser.) 362 (1854).

71. 137 PARL. DEB. (3d ser.) 1249 (1855). See also 135 PARL. DEB. (3d ser.) 1361 (1854). The latter citation is to Brougham's defense of the measure. Besides refuting the arguments made in Commons, he noted the similarity of his proposal to the old statutory recognizances in these words:

The process, six centuries ago, under statutes merchant and statutes staple, was exactly the summary diligence now desired, by which the debtor's person, land, and goods were answerable, without any action; and this, in all cases of debt acknowledged. Had bills of exchange, therefore, existed in Edward the First's time, to them this summary execution would of course have been applied. (P. 1364).

72. 19 JURIST (Pt. 2) 59-60 (1855).

73. 137 PARL. DEB. (3d ser.) 1267 (1855).

74. 19 JURIST (Pt. 2) 67, 214 (1855); 25 L.T. 67 (1855).

75. 18 & 19 VICT., c. 67 (1855).

76. 54 LAW MAG. OR Q. REV. 388 (1855); 25 L.T. 209 (1855); 19 JURIST (Pt. 2) 389 (1855).

77. 139 PARL. DEB. (3d ser.) 951-52 (1855); 25 L.T. 186 (1855).

78. 18 & 19 VICT., c. 67, § 1, Schedule A (1855).

"A special indorsement is a statement of claim and should be so headed. It should be signed by the counsel or solicitor who drafted it, or by a duly authorized clerk of such solicitor. It must contain full particulars with dates and items sufficient to inform the defendant specifically what is the claim that is made against him, so that he may be able to make up his mind whether he will pay or fight. It must also state all material facts

granted either upon defendant paying into court the amount demanded by the writ, or when affidavits disclosed a defense to the action or facts the judge considered sufficient to require a trial.⁷⁹ Thus Keating's Act differed from the proposal of Lord Brougham in two important particulars: first, the English procedure, in avoiding the Scottish system of registration, postponed the entry of judgment until after the date set for the hearing of the motion; and second, Scottish summary diligence assumed that the creditor was entitled to execution against his debtor's property unless the debtor suspended execution by furnishing security, whereas Keating's Act required the posting of security as only one of several alternatives available to a defendant who asked leave to defend an action prior to the entry of judgment.

The extension of Keating's Act to other types of cases is a familiar story. The rules of court established by the Supreme Court of Judicature Act, 1873,⁸⁰ and 1875,⁸¹ extended the summary judgment procedure incorporated in Order XIV to actions for debts and liquidated sums of money by permitting specially indorsed writs in all such cases.⁸² Later amendments expanded the procedure to include actions by landlords for the recovery of possession of land, actions to recover the possession of a specific chattel, cases where plaintiff claims possession of property forming a security for the payment of money, and claims for specific performance of contracts in writing for the sale or purchase of property.⁸³ In accordance with a recommendation of the Hanworth Committee in

necessary to constitute a complete cause of action." ODGERS, PLEADING AND PRACTICE 47 (Harwood ed. 15th ed. 1955). For a discussion of the purpose of special indorsements and a comparison with writs not so indorsed, see 16 JURIST (Pt. 2) 369-70 (1852).

79. 18 & 19 VICT., c. 67, § 2 (1855). For a discussion of summary judgment procedure in England see ODGERS, *op. cit. supra* note 78, at c. 5.

80. 36 & 37 VICT., c. 66, Rule 7 of the Schedule. The extension of the summary judgment procedure was recommended by the Judicature Commission. See Judicature Commission, *First Report*, 25 PARLIAMENTARY PAPERS 1, 11 (1868-1869).

81. 38 & 39 VICT., c. 77, Order III, r. 6, and Order XIV. The procedure established by Order XIV requires the plaintiff to verify the cause of action and swear that in his belief there is no defense to the action. This additional requirement was recommended by the Judicature Commission in conjunction with the suggested extension of the summary judgment procedure, and was not found in Keating's Act. Judicature Commission, *First Report*, 25 PARLIAMENTARY PAPERS 3, 11 (1868-1869).

82. "In all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, cheque, or other simple contract debt or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt, or on a guaranty, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note, or on a trust, the writ of summons may be specially indorsed. . . ." 38 & 39 VICT., c. 77, Order III, r. 6 (1875).

83. GREENBAUM AND READE, THE KING'S BENCH MASTERS AND ENGLISH INTERLOCUTORY PRACTICE 76-79 (1932).

1933,⁸⁴ the procedure was extended still further to include all actions in the Queen's Bench division except actions for libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage, and actions in which fraud is alleged by the plaintiff.⁸⁵ The specific exclusions were based on the Committee's belief that the summary judgment procedure was not appropriate for certain types of cases.⁸⁶

Twenty years later, the Evershed Committee, accepting the limitation on the Order XIV summary judgment procedure, recommended a new procedure to complement Order XIV in cases where summary judgment is not available because of the existence of a genuine defense to the action.⁸⁷ To expedite the disposition of such cases, the committee proposed the adoption of a rule permitting the plaintiff to apply to the court by affidavit for a trial without pleadings.⁸⁸ The Committee believed that if this "new approach" were confined to suitable cases, a considerable saving in time and money could be effected.⁸⁹ In discussing the classes of cases to which this new procedure should apply, the Committee suggested that it be limited to actions in which the sole or principal question is one of law or the construction of a document.⁹⁰ To be spe-

84. Business of Courts Committee, *Interim Report*, March 1933, par. 15-17, printed in X GREAT BRITAIN, HOUSE OF COMMONS, SESSIONAL PAPERS (1932-1933). The amendment made Order XIV coextensive with the "New Procedure" of Order XXXVIII A. The "New Procedure" was an attempt to expedite trial by requiring a summons for directions to be returned before a judge, the restriction of jury trial, and the abridgement of the time limitations for taking procedural steps. This procedure was subsequently abandoned on the recommendation of the Royal Commission on the Despatch of Business at Common Law 1934-1936, *Final Report*, par. 140-43, at 50-51. For a discussion of these developments, see Millar, *A Septennium of English Civil Procedure, 1932-1939*, 25 WASH. U.L.Q. 525 (1940).

85. This change is commented on in 77 SOL. J. 476 (1933).

86. Business of Courts Committee, *Interim Report*, March 1933, par. 15-17, printed in X GREAT BRITAIN, HOUSE OF COMMONS, SESSIONAL PAPERS (1932-1933). As illustrations of the type of case considered inappropriate for Order XIV, the committee specifically mentioned actions for libel and for the recovery of damages in "running down" cases.

87. Committee on Supreme Court Practice and Procedure, *Final Report*, par. 94, at 33 (1953). As an integral part of the proposed "new approach," the committee recommended the extension of the originating summons procedure in use in the Chancery Division of the High Court. See par. 84-90, at 30-32, and Appendix IV. For cases in which the new approach was not appropriate, the committee recommended a strengthening of the summons for directions. *Id.* at par. 80, at 29. Order XXX, providing for the "Summons for Directions," was accordingly amended in 1954. See ANNUAL PRACTICE 477. Order XXX (1956). For comment on this procedure, analogous to American pre-trial orders, see 98 SOL. J. 598 (1954) and ODGERS, *op. cit. supra* note 78, at c. 17.

88. Committee on Supreme Court Practice and Procedure, *Final Report*, par. 95, at 34 (1953). See also Appendix V.

89. *Id.* at par. 92, at 33; par. 96, at 34. This recommendation had the support of the commercial community. See *id.* at par. 86-88, at 31-32; par. 90, at 32.

90. *Id.* at par. 98-99, at 35-36.

cifically excluded were personal injury actions and those cases excluded from the Order XIV summary judgment procedure.⁹¹

The recommendation of the Committee was given effect in 1954 by the adoption of Order XIV B, entitled "Trial without Pleadings."⁹² Described as a "major experiment,"⁹³ the rule provides that in cases commenced by a specially indorsed writ, plaintiff may apply to the court by summons for a trial without pleadings. The summons must be supported by an affidavit summarizing the issues between the parties and indicating the reason for the contention that pleadings are unnecessary. Defendant must answer by affidavit within 14 days from the service of the summons stating his defense and any reason he may have for not submitting the case for trial without further pleadings. At the hearing of the summons, the master may order the case to stand for trial on the basis of the affidavits, but if he is not satisfied that the case is a proper one for the new procedure, he may either dismiss the summons or give other suitable directions.

While the order promulgated does accept the proposal of the Evershed Committee to exclude from the "new approach" personal injury and road accident cases in addition to those cases excluded from Order XIV,⁹⁴ no attempt is made to define the type of case for which this procedure is appropriate. It has been suggested that the procedure is best suited for friendly actions or test cases⁹⁵ and cases where a question of law or construction is involved.⁹⁶ In this connection, it should be noted that the new procedure is available in the Chancery Division by reason of the amendment to Order III permitting special indorsement of writs in any action in the Chancery Division.⁹⁷ The result of the amendments is that with the exception of personal injury and road accident cases, the new procedure applies to the same type of cases as does the summary judgment procedure but the two procedures are "mutually exclusive in intention."⁹⁸ The new procedure of Order XIV B provides an alternative summary

91. *Id.* at par. 99, at 35.

92. ANNUAL PRACTICE 1956. Order XIV B is discussed in 99 SOL. J. 157-58 (1955) and ODGERS, *op. cit. supra* note 78, at 76-78.

93. 99 SOL. J. 157 (1955).

94. Order XIV B specifically excludes actions for personal injuries based on negligence, nuisance, or breach of duty, for damage to a vehicle in a road accident, and any action for death arising under the Fatal Accidents Act or Carriage by Air Act.

95. 99 SOL. J. 158 (1955).

96. ANNUAL PRACTICE 208 (1956).

97. Order III, r. 6, *id.* at 16.

98. 99 SOL. J. 157 (1955).

remedy in cases where summary judgment is not available because of the existence of factual issues for trial.⁹⁹

Thus after a century of development, further expansion of Keating's Act has come to at least a temporary standstill.¹⁰⁰ While its growth was spectacular, it is well to remember that the remedy has always been limited to plaintiffs in certain types of cases. The amendment of the Hanworth Committee extending the procedure to "all other actions" in the Queen's Bench Division seems broad, but the remedy has actually been used in only one "running-down" case, *Dummer v. Brown*,¹⁰¹ where the Court of Appeals, by a split decision, affirmed a summary judgment for the plaintiff in an action brought under Lord Campbell's Act, earning the disapproval of at least one commentator in so doing.¹⁰²

II.

Since the procedure adopted in the United States was substantially the same as that found in England, the identical difficulty of sham pleading was encountered here. From the earliest time, states wrestled with the problem, devising various methods to remedy this weakness in the system of pleading. Typically, two methods were employed. One was the motion to strike as sham; the other was the requirement of verification. The former failed not only because of the high standard of proof required,¹⁰³ but also because many states adhered to the rule that a general denial could not be struck.¹⁰⁴ The verification device was used in various ways: some states requiring all pleadings to be verified,¹⁰⁵ some requiring verification of the defendant's plea only,¹⁰⁶ and still others

99. "Little use has so far been made of this procedure and in view of its attendant risks and possibility of delay this is hardly surprising." ODGERS, *op. cit. supra* note 78, at 78.

100. Prior to 1954, summary judgment was available in the Chancery Division in actions for the specific performance of contracts in writing for the sale or purchase of property. See Order XIV A. This order was amended in 1954 to permit the use of summary judgment in cases where the contract is not in writing, and where there are alternative claims for damages, for rescission, or for the forfeiture or return of a deposit. 99 SOL. J. 141 (1955). The 1954 amendment of Order III, rule 6 to permit the special indorsement of writs in any action in the Chancery Division has the effect of extending the summary judgment procedure to all actions in that court. It has been stated, however, that "in practice, from the very nature of the actions dealt with, it is but rarely resorted to." ODGERS, *op. cit. supra* note 78, at 330.

101. 1 All E. R. 1158 (1953).

102. Note, 70 L. Q. REV. 22 (1954).

103. The inference of falsity must be "irresistable." See 1 CHITTY, PLEADING *568 (16th Am. 1876). Note, 72 Am. Dec. 521-22 (1886).

104. "The general denial, at least when verified, cannot be struck out as sham on motion." POMEROY, CODE REMEDIES § 561, at 914 (5th ed. 1929). Compare *Wayland v. Tysen*, 45 N.Y. 281 (1871), with *Coykendall v. Robinson*, 39 N.J.L. 98 (1876).

105. N.Y. Code of Procedure § 133 (1848).

106. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 238 (1952).

requiring verification only in particular types of cases.¹⁰⁷ Experience with verification has not been favorable because the requirement tends to degenerate into a mere formality.¹⁰⁸

In addition to these conventional devices, some states attempted at a very early time to develop true summary procedures.¹⁰⁹ The Virginia notice and motion for judgment procedure had its inception in a statute enacted in 1732, was greatly enlarged by the Code of 1849, and applies today to all common law actions.¹¹⁰ By utilizing this procedure, notice and motion for judgment are substituted for the writ and complaint required by the ordinary procedure. This resulting simplification of pleading and notice requirements eliminates delays incident to the ordinary procedure in arriving at issue.¹¹¹ Since a trial is contemplated and the right to a jury is preserved, the Virginia procedure is free from the usual criticisms directed at summary judgment procedures based on denial of a fair hearing.¹¹² Resembling the Evershed Committee's "new approach" more closely than the Order XIV summary judgment procedure, the motion for judgment practice has had great success in Virginia and establishes the potentialities of this approach to the problem of eliminating delays.

Aside from these early American innovations, summary judgment procedures in the United States had their source in English practice.¹¹³ Agitation for the adoption of the English reform emphasized the needs of the commercial community and the ineptitude of the ordinary pro-

107. See, e.g., IND. ANN. STAT. § 2-1033 (Burns 1946); TENN. CODE ANN. § 20-924 (Off. Ed. 1956). (A defendant may deny the execution of a written instrument only by a pleading under oath.)

108. See, MICHAEL, ELEMENTS OF LEGAL CONTROVERSY 536-40 (1948); Marshall v. Rowe, 126 Neb. 817, 254 N.W. 480 (1934); Institute on Federal Rules, Washington, D. C. 52 (A.B.A. 1939).

109. Millar, *Three American Ventures in Summary Civil Procedure*, 38 YALE L. J. 193 (1928).

110. *Id.* at 221. See also Fowler, *Virginia Notice of Motion Procedure*, 24 VA. L. REV. 711 (1938); Rules of the Supreme Court of Virginia, Rule 3:3 (1954).

111. Millar, *Three American Ventures in Summary Civil Procedure*, 38 YALE L.J. 193, 213 (1928).

112. VA. CODE § 8-211 (Supp. 1954). See *Preston v. Salem Improvement Co.*, 91 Va. 583, 22 S.E. 486 (1895).

113. Excluded from the present discussion are various summary procedures applicable to particular types of litigation, e.g., landlord and tenant cases, or actions brought against public officials. Also excluded is a consideration of various calendar practices used to expedite particular classes of litigation. For a compilation of the summary judgment procedures available in the various states, now somewhat outdated, see Clark and Samenow, *The Summary Judgment*, 38 YALE L. J. 423 (1929). See also VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 219-20 (1949).

For a discussion of the influence of English reformers in America, see Williamson, *Bentham Looks at America*, 70 POL. SCI. Q. 543 (1955); Dillon, *supra* note 4, at 507 n. 1; Reppy, *The Field Codification Concept*, in FIELD CENTENARY ESSAYS 7, 18-21 (1949).

cedure to satisfy them.¹¹⁴ States adopting summary procedures limited the remedy to stated types of cases in accordance with the English model.¹¹⁵ While these procedures were constantly amended to include new types of cases, a completely unlimited summary judgment procedure was unknown prior to the adoption of Federal Rule 56 in 1938.¹¹⁶ That rule permits either the plaintiff or defendant to apply for summary judgment in any type of case.¹¹⁷ The availability of summary judgment is not dependent upon the nature of the action, but rather upon the determination that no genuine issue of fact exists for trial.¹¹⁸

Thus Keating's Act reached its ultimate extension, not in England, but in the United States by the adoption of Federal Rule 56. Particularly pertinent is the failure of the Evershed Committee to recommend a completely unrestricted summary judgment procedure. Cognizant of the need for procedural reform to eliminate expense and delay in the courts and to meet the growing competition of arbitration in the settlement of commercial disputes,¹¹⁹ the committee proposed to meet the problem by strengthening the summons for directions, and by proposing a new summary procedure permitting a trial without pleadings. Thus the approach to the problem of delay in England emphasizes the use of the alternative

114. Field, *Report of the Special Committee*, 8 A.B.A. REP. 323, 334-35, 362 (1885). David Dudley Field urged the adoption of the English summary judgment procedure in cases involving bills of exchange and other obligations to pay a definite sum of money.

See Rodenback, *The Reform of The Procedure in the Courts of the State of New York*, 34 N.Y. STATE BAR ASS'N REP. 354, 462 (1911). The New York Board of Statutory Consolidation varied in its recommendation between a rule providing for summary judgment generally and a rule providing for the procedure only in stated cases as in the English practice. See Report of the Board of Statutory Consolidation of the State of New York 14, Appendix 179 (1912); 1 *id.* at 23, 127, 212, 393 (1915); 5 *id.* at 89 (1919).

Judge Finch bluntly stated that summary judgment "is nothing but a process for the prompt collection of debts. . . ." Finch, *Summary Judgment Procedure*, 17 AM. JUD. SOC'Y 180, 181 (1934). In urging the extension of the procedure to cases involving mortgage foreclosures, Judge Finch stated that "many lenders have been so delayed by answers raising fictitious issues that they have resolved never again to lend money on mortgage. This attitude, unless corrected, will go a long way toward hampering and hurting those interested in the development of real estate." Finch, *Extension of the Right of Summary Judgment*, 4 N.Y. STATE BAR ASS'N BULL. 264, 266 (1932).

For an early indication that merchants were dissatisfied with pleading in the law courts, see 7 HUNT, MERCHANTS' MAGAZINE 534 (1842) (pleading was "worse than useless" and is often "the instrument of direct and palpable wrong").

115. See Clark and Samenow, *supra* note 113. The procedure adopted in some states did permit defendants to avail themselves of the summary judgment procedure. See, e.g., Rules 107, 108, 113, N.Y. Rules of Civil Practice.

116. Institute on Federal Rules, Washington, D. C. 179 (A.B.A. 1939); *id.* New York, N.Y. 264; *id.*, Cleveland, 295 (A.B.A. 1938).

117. FED. R. CIV. P. 56(a) and (b).

118. FED. R. CIV. P. 56(c).

119. Committee on Supreme Court Practice and Procedure, *Final Report*, par. 86-90, at 31-32 (1953).

and interrelated devices of specially indorsed writs, summary judgment, trial without pleadings, and the summons for directions.¹²⁰ The reliance on alternative procedures as well as the limitation on the scope of the summary judgment procedure in England when compared with the rule applying in the federal courts in the United States invites a consideration and appraisal of the function and effect of summary judgment in expediting and settling litigation.

III.

Summary procedures have been classified into two groups.¹²¹ In the first are those that do not vary appreciably from the ordinary procedure, but expedite litigation by eliminating all formalities and by shortening the time limitations for taking various procedural steps.¹²² Implicit in this type of procedure is the distinction between those procedural steps considered essential and indispensable to a fair hearing and those that are unnecessary and formalistic.¹²³ The famous *Clementina Saepe* of 1306, in ordering causes to be heard "*simplicitur et de plano*" established a summary procedure of this type.¹²⁴ Because it demonstrated that a distinction could be made between necessary and ritualistic procedural steps, it had an important influence on the development of procedure on the continent.¹²⁵ In the second group are those procedures that vary drastically from the ordinary ones.¹²⁶ The French executory procedure, previously mentioned, was of this type since the defendant was precluded from asserting any defenses except those particularly specified.¹²⁷ Thus the summary effect was obtained by arbitrarily limiting the scope of the law suit itself.

The English summary judgment procedure does not fit this neat scheme of classification. It neither eliminates formalities nor limits defenses; instead its function is to determine at a pre-trial hearing whether there is an adequate factual basis for the proposed plea of the defendant. As previously noted, English procedure had developed no method of preventing false pleading prior to this time, and the summary procedure was designed to remedy that defect.¹²⁸ At the hearing of a motion for sum-

120. 98 SOL. J. 598 (1954); ODGERS, *op. cit. supra* note 78, at c. 17, at 243.

121. ENGLEMANN, *op. cit. supra* note 47, at 577-78.

122. *Ibid.*

123. *Id.* at 497.

124. *Id.* at 578, 494.

125. *Id.* at 497. See also, WESSELS, HISTORY OF ROMAN-DUTCH LAW 132, 143 (1908).

126. ENGLEMANN, *op. cit. supra* note 47, at 578.

127. See text at note 54 *supra*.

128. DAY, *op. cit. supra* note 5; Finch, *Summary Judgments under the Civil Practice Act in New York*, 49 A.B.A. REP. 588, 590 (1924); AM. JUD. Soc'y, Bull. XIV, at 99 (1919).

mary judgment, the court decides whether a defense is genuine or fictitious. Judgment will be ordered for plaintiff without trial if the defense is found to be fictitious, but if the defendant succeeds in convincing the court that a genuine defense to the action exists, a trial governed by the ordinary procedure is held.¹²⁹ Thus the procedure is summary only because the court may order judgment for the plaintiff without the necessity of a trial.

Several features of this procedure deserve attention. In the first place, it is significant that the innovations affect only pre-trial procedure and that no attempt has been made to alter the ordinary method of trial. Traditionally the mode of trial in the common law courts was characterized by the oral testimony of the witness in open court, cross-examination of that witness by the adverse party, and a resolution of the factual issues by a verdict of the jury.¹³⁰ At just what point in English legal history these characteristics became established, no one can say with certainty.¹³¹ Once established, however, the superiority of this system over that of the civil law (derived from the canonical inquisition) was asserted by leading commentators who considered the problem.¹³²

The respect given to the ordinary trial procedure in England necessarily limits the application of the summary judgment remedy to pre-trial procedures. The reformers who drastically revised pre-trial procedures, liberalized or abolished rules of evidence, and even eliminated the right to a jury trial in some cases, were unwilling to interfere with the fundamental tenet of the common law trial that evidence is to be

129. ODGERS, *op. cit. supra* note 78, at 58-60; GREENBAUM AND READE, *op. cit. supra* note 83, at c. VII.

130. 4 BLACKSTONE, COMMENTARIES *373-*376.

131. THAYER, PRELIMINARY TREATISE ON EVIDENCE 123 (1898). It is common knowledge that the English institution of jury trial developed out of the Frankish inquest (*id.* at 50), but the reason for the difference in the development of the inquest in France and England has been called "one of the grand problems in the comparative history of the two nations." 2 POLLOCK AND MAITLAND, *op. cit. supra* note 49, at 604, n. 1. Wigmore fixes the date of the establishment of the right of cross-examination at the beginning of the 1700's. 1 WIGMORE, EVIDENCE § 8, at 237 (3d ed. 1940).

132. See Fortescue, *De Laudibus Legum Anglie*, c. XXVI, *op. cit. supra* note 1, at 59; 3 BLACKSTONE, COMMENTARIES *379-*381; BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, Bk. II, c. IX and Bk. III, c. XX (1827). Cross-examination is the "greatest legal engine ever invented for the discovery of truth." 5 WIGMORE, EVIDENCE § 1367, at 29 (3d ed. 1940).

The advantage of the English trial system over that which prevails in France where the court is deprived of demeanor evidence, is described in 2 GARSONNET AND CÉZAR-BRU, TRAITÉ DE PROCÉDURE 588-89 (3d ed. 1912). The *procès-verbal* (the written statement of the evidence) used in ordinary French trial procedure is termed "*froid et incolore*."

It is interesting to observe that the present Italian code of civil procedure now makes provision for the examining judge to note anything in the demeanor of the witness which might effect credibility. C. PR. C. 207, FRANCHI-FEROCCI, QUATTRO CODICE (1946). See Hammelmann, *Rules of Evidence Under the New Italian Codes*, 29 J. COMP. LEG. & INT'L LAW 39, 42 (3d series, Pts. III & IV, 1947).

given by witnesses in open court subject to cross-examination.¹³³ Where ordinary trial procedure is not accorded this high favor, it is to be expected that a summary procedure will assume quite a different form. French trial procedure affords an interesting illustration. The ordinary French trial procedure places great emphasis on documentary evidence.¹³⁴ Even in cases where testimony by witnesses is admissible, no *viva voce* evidence is presented in court during the trial of ordinary cases. In such situations, an order is obtained for an inquest (*enquête*), and the witness is summoned to appear before a judge-delegate authorized to conduct the examination.¹³⁵ While the parties to the litigation are permitted to be present at the inquest, they may not directly question the witness¹³⁶ but may only submit questions to the judge who actually conducts the inter-

133. For general discussions of English procedural reforms see Chorley, *Procedural Reform in England*, in FIELD CENTENARY, ESSAYS 98 (1949) † JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 55-68 (1940).

Cf. Royal Commission on the Despatch of Business at Common Law 1934-1936, *Final Report*, par. 228, at 78 (1936). "English law starts from the general principle that facts should be proved by a witness produced in court and subjected to cross-examination. Evidence by written declaration or affidavit is distrusted. We do not question the soundness of this principle. On an important point seriously disputed it is highly unsatisfactory to be obliged to act on evidence which is not given in court and subjected to cross-examination. But in most cases there are points which a judge could decide with confidence on an affidavit, a certificate from a public body, company or officer, or even on an unsworn declaration or a statement in a book of reputation." *Id.* at par. 229-34, at 78-79. The Commission recommended that the trial court be given discretion to admit all documents that came into existence prior to the trial as well as affidavit evidence, but in the latter case, the court could require the production of the deponent for cross-examination.

The "new approach" of the Evershed Committee uses affidavits merely to define issues, "leaving the claim and defence to be established by oral evidence at the trial." Committee on Supreme Court Practice and Procedure, *Final Report*, par. 100, at 36 (1953). The Evershed Committee rejected as inappropriate the continental system of trial (*id.* at par. 251, at 85-86) but, in an effort to reduce the cost of trials, endorsed the use of documentary evidence in place of testimony of witnesses whenever possible. *Id.* at par. 256, at 87. The recommendations of the Committee are summarized in par. 320, at 105-07.

134. C. CIV. 1341, CODES FRANÇAIS USUELS (1952); AMOS AND WALTON, INTRODUCTION TO FRENCH LAW 347 (1935). Specifically excluded from article 1341 are commercial matters, and article 1348 excepts such obvious cases as torts, quasi-contracts, and lost instruments. Article 1347 makes a further exception in cases where there is a "beginning of written proof" (*commencement de preuve par écrit*). This refers to situations where a party can produce a writing emanating from the party against whom it is sought to be used which tends to establish the alleged fact as probable. The strictness of the requirement of written proof has been mitigated still further by article 336 of the Code of Civil Procedure which now provides that in cases where a party has been summoned for interrogation, and does not appear or refuses to answer questions asked of him, it can be considered as equivalent to a beginning of proof under the conditions of article 1347. For an enlightening collection of cases and authorities on these problems, see VON MEHREN, MATERIALS ON COMPARATIVE LAW, C-3-1 to C-3-3 (temp. ed. 1954).

135. C. PRO. 252-94.

136. C. PRO. 276.

rogation.¹³⁷ At the conclusion of the testimony, the judge-delegate directs the preparation of a written deposition (*procès verbal*) which is submitted to the tribunal trying the case.¹³⁸ The court's decision will be based on these written depositions and any pertinent documentary evidence the parties may have submitted.¹³⁹

The notable feature of French summary procedure is that it eliminates this cumbersome inquest procedure in cases where testimony of witnesses is required. Though the examination of the witness retains the name *enquête*, the testimony is given in open court before the judges who are to decide the case.¹⁴⁰ The summary procedure also eliminates all unnecessary pre-trial procedures including the necessity of resorting to conciliation.¹⁴¹ Thus its purpose is to free certain cases, because of their importance, urgency, or simplicity, from the expense and delay of the ordinary procedure.¹⁴² Because of the necessity for speed in the settlement of commercial litigation, an even more expeditious procedure prevails in the French commercial courts.¹⁴³ Pleadings are practically eliminated,¹⁴⁴ the restriction on testimonial evidence is not applicable,¹⁴⁵ and witnesses are examined in open court as in the summary procedure.¹⁴⁶ Both of these procedures obtain their "summary" effect merely by eliminating all formalities that might impede the expeditious settlement of the litigation.

137. C. PRO. 273.

138. CUCHE, *PRÉCIS DE PROCÉDURE CIVILE ET COMMERCIALE* 561 (Vincent ed. 9th ed. 1946); Tyndale, *The Organization and Administration of Justice in France, With an Outline of French Procedure with Respect to the Production of Evidence*, 13 CAN. B. REV. 655, 657-58 (1935).

139. Hamson, *Civil Procedure in France and England*, 10 C.A.M.B. L. J. 411, 417-18 (1950); 73 L. T. 395 (1882). Trial procedure in Italy is essentially the same as that in France. See Sereni, *Basic Features of Civil Procedure in Italy*, 1 AM. J. COMP. LAW 373, 378-84 (1952).

140. 2 GARSONNET AND CÉZAR-BRU, *op. cit. supra* note 132, at 750-52; CUCHE, *op. cit. supra* note 138, at par. 460, at 573-74, and par. 248, at 333-34.

141. 2 GARSONNET AND CÉZAR-BRU, *op. cit. supra* note 132, at 745.

142. 2 GARSONNET AND CÉZAR-BRU, *op. cit. supra* note 132, at 741. See C. PRO., art. 404. The summary procedure is limited to appeals from justices of the peace, uncontested suits, cases where the amount of money involved is small, and cases that require urgent action.

143. 2 GARSONNET AND CÉZAR-BRU, *op. cit. supra* note 132, at 644. In France, the commercial code governs enumerated acts of commerce. See C. COM., art. 632, 633; AMOS & WALTON, *op. cit. supra* note 134, at c. XIV. Litigation involving these acts of commerce is within the jurisdiction of the commercial courts. C. COM., art. 631.

144. C. PRO., art. 415-16. See 2 GARSONNET AND CÉZAR-BRU, *op. cit. supra* note 132, at 645-47.

145. C. CIV., art. 1341; C. COM., art. 109, 2 GARSONNET AND CÉZAR-BRU, *op. cit. supra* note 132, at 671.

146. C. PRO., art. 432. See 2 GARSONNET AND CÉZAR-BRU, *op. cit. supra* note 132, at 680-82.

The method adopted in France to avoid delay focuses attention on the second and salient characteristic of the English procedure. Though operationally the summary judgment remedy is a pre-trial procedure and has no effect on a trial if one is ordered, functionally its purpose is to eliminate a trial in the absence of a proper showing by the defendant. Nothing like this is attempted by the French summary procedure, which preserves all essential procedural steps and contemplates a full hearing of the case. Moreover, in the mandate-type summary procedure presently authorized by German law for actions to recover liquidated sums or a definite quantity of fungibles, defendant is similarly protected.¹⁴⁷ The court's order of judgment for the plaintiff is conditioned on the failure of the defendant to appear and defend.¹⁴⁸ Once a defense is interposed, it may be heard as in an ordinary proceeding.¹⁴⁹ In the European countries studied the only remaining vestige of the old executory procedure which actually precluded defendant from asserting defenses to an action is the practice relating to certain public or notarial documents evidencing a liquidated demand. Upon default, in such cases, the holder of the document is entitled to execution without any court action.¹⁵⁰ The validity of the agreement embodied in such an instrument is presumed, and though it is possible for the defendant to rebut the presumption of validity, such actions are difficult and rare.¹⁵¹

147. There are two summary procedures in German law which are of interest. The first is a special procedure called *Urkunden und Wechselprozess* for the speedy collection of checks and bills of exchange. Proof must be by documentary evidence only, but if the defendant is unable to establish a defense by such evidence, a subsequent hearing may be had in which every type of evidence is admissible. See 2 MANUAL OF GERMAN LAW, par. 120-21, at 66-67 (Great Britain Foreign Office, 1952). The other type of summary procedure called *Mahnverfahren* is available in cases where the plaintiff demands a definite sum of money or a definite quantity of fungibles. *Id.* at par. 122, at 67.

A similar summary procedure is found in the Italian law called *procedimento d'ingiunzione*. This procedure is limited to liquidated claims for money, goods, or fungibles provided that they are provable by documentary evidence. C. Pr. C. 633. Provision is made for the defendant to appear and defend. See ENGLEMANN, *op. cit. supra* note 47, at 831-32.

148. 2 MANUAL OF GERMAN LAW, *op. cit. supra* note 147, at par. 123, at 57.

149. *Ibid.*

150. In France, the obligee obtains a copy of the notarial act known as a "*grosse*" which means that it has the "*formule exécutoire*." See AMOS AND WALTON, *op. cit. supra* note 134, at 21; Smithers, *The French Notariat*, 3 PA. B. A. Q. 13 (1930); Smithers, *History of the French Notarial System*, 60 U. OF PA. L. REV. 19, 32-33 (1911) and A.B.A., ANNUAL BULLETIN, Comparative Law Bureau 15 (1912).

For a discussion of German law on this point, see Schlesinger, *The Notary and the Formal Contract in Civil Law*, Report, LAW REVISION COMM'N OF N.Y. 403, 413 (1941).

For a discussion of the notarial system in Italy, see Del Russo, *The Notary Public in the Civil Law of Italy*, 20 GEO. WASH. L. REV. 524, 548-50; De-Besse, *The Notarial System in Italy*, A.B.A., ANNUAL BULLETIN, Comparative Law Bureau 32, 40-42 (1912).

151. In France, the attack must be made in a special proceeding called *inscription de faux*. In Germany, the attack may be made in an ordinary proceeding, but as a matter

Because the function of the English summary judgment procedure is limited to determining whether or not a trial is necessary, it involves a problem of judgment that simply does not exist in the French and German procedures. Those procedures afford defendant an opportunity to appear and defend if he desires, but the English procedure is specifically designed to preclude a defendant from trial if he fails to show the existence of a genuine defense at a pre-trial hearing of the plaintiff's motion for judgment. If the defendant does establish that the case involves material issues of fact, the court is prohibited from deciding them, since such issues are to be resolved not on the basis of the affidavits presented at the hearing but in an ordinary trial where the demeanor of the witness may be observed and testimony may be subjected to cross-examination. Obviously in a procedure of this type, the determination of the existence of a genuine defense involves an exacting task of judgment.

Because of the delicate nature of the decisional process in summary judgment cases, the limited application of the procedure in England is understandable. The remedy must be restricted to cases where the court may safely determine even in the absence of demeanor evidence that plaintiff is entitled to judgment without a trial. Recognizing this problem, Lord Brougham's original proposal in 1828 restricted the summary procedure to cases where there was "a strong presumption of right" as in actions on bills of exchange or bonds, and this limitation was incorporated into Keating's Act. The success of Keating's Act may be attributed in large measure to the legal doctrine governing the type of case to which it applied. The negotiable instrument has been described as a "courier without luggage," because in order for the instrument to be negotiable the obligation is severely circumscribed as to form. Moreover, the proof of the plaintiff's case is aided by statutory presumptions,¹⁵² and the available defenses are limited by the substantive law.¹⁵³ In actions on negotiable instruments, when plaintiff establishes his claim by the production of the instrument, and the defendant fails to attack its validity or substantiate any other defense, the court is justified in ordering judgment for the plaintiff.

When the procedure is extended to other debt collection situations, more complex obligations and more extensive defenses are possible than was the case with negotiable instruments. Nevertheless, the sum-

of practice, it is rarely successful. See authorities above and Schlesinger, *supra* note 150, at 413.

152. See, e.g., N.I.L. § 24 and § 59.

153. BRITTON, BILLS AND NOTES, c. 4 (1943).

mary procedure operates successfully in this area because many of these transactions can be established by documentary evidence that will be accepted by the court as valid when not impeached by controverting evidence of the defendant.

Problems of the greatest complexity arise in the unlimited type summary procedure introduced by Federal Rule 56, because in cases established by testimonial proof, Anglo-American law, unlike the civil law, has always attached the highest value to demeanor evidence and cross-examination in determining the credibility of witnesses. Suppose the plaintiff moves for summary judgment in an action to recover damages resulting from a fraudulent misrepresentation. Even in the absence of controverting proof, granting the motion involves the favorable resolution of issues of credibility raised by the testimonial evidence of the plaintiff's own witnesses. Since such evidence is ordinarily presented in the form of affidavits or depositions at the hearing of the motion, the court must reach its decision as to credibility without the benefit of demeanor evidence and probably without the test of cross-examination. Nevertheless, the language of Federal Rule 56 clearly implies that the court has at least some power to determine such questions of credibility.

Of course questions of credibility are also involved in cases established by documentary evidence, since ordinarily the document must be authenticated by witnesses.¹⁵⁴ While such cases are distinguishable from cases established solely by testimonial evidence,¹⁵⁵ the basic question of policy applies to *all* types of cases. That question is the extent of the power of a court to determine issues of credibility without the benefit of demeanor evidence. The question is not avoided simply because Federal Rule 56 fails to mention credibility, and instead states a test in terms of the existence of a genuine issue of fact. Since questions of credibility certainly can present issues of fact for trial, a court must determine which questions of credibility do raise genuine factual issues that must be reserved for trial. Moreover, the solution to the problem cannot be found in the directed verdict test, because the judge in directing a verdict in an ordinary trial does have the benefit of demeanor evidence.

In considering this question, the original evil that Keating's Act was designed to remedy should be recalled. Debtors without any defense to

154. *But cf.* Asbill and Snell, *Summary Judgment Under the Federal Rules When an Issue of Fact is Presented*, 51 MICH. L. REV. 1143, 1151-54 (1953). In England if the liberal rules of evidence recommended by the Evershed Committee are adopted, there may be *no* authenticating witnesses in some cases. See Committee on Supreme Court Practice and Procedure, *Final Report*, par. 256, at 87 (1953).

155. See WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* § 324, at 805 (3d ed. 1937); 3 BENTHAM, *op. cit. supra* note 132, at Bk. V, c. XV, § IV (1827).

an action on bills and notes pleaded falsely in order to delay their creditors. It was rightly thought by the proponents of the reform that such defendants would be reluctant to appear in court unless a defense could be factually substantiated.¹⁵⁶ This factor, in conjunction with the type of obligation to which the procedure applied, explains the success of Keating's Act. As the scope of the procedure was constantly expanded, not only was it less likely that the motion would be uncontested, but also the question of whether defendant was entitled to a trial becomes more complex. Since the rules state no standard other than variations of the vague formulation in Federal Rule 56 that the motion may be granted if there is "no genuine issue as to any material fact," the court is expected to exercise the wisdom of Solomon to separate the sham from the genuine issues of fact.¹⁵⁷

Finally, the burden imposed on trial courts by a summary procedure of the type authorized by Federal Rule 56 is unique. The European procedures studied make no attempt to preclude the defendant from a trial, but achieve their summary effect by eliminating pre-trial and trial formalities.¹⁵⁸ The Virginia notice and motion practice has a similar objective, and it is significant that the English are moving in this direction by the "new approach" of the Evershed Committee. The committee drafting the Federal Rules reduced pre-trial formalities, provided for pre-trial orders to reduce expense and delay, and in addition, permitted the use of the summary judgment procedure in all types of cases. The danger inherent in this extension of summary judgment is that a court may deny a trial to a litigant in a case involving real issues of fact. Because of the extreme caution exercised by courts in the application of the rule, no doubt this danger is seldom realized, but the use of the summary judgment procedure in cases where it is not appropriate does result in still more delay

156. See Brougham's argument in 131 PARL. DEB. (3d ser.) 619 (1854); 137 PARL. DEB. (3rd ser.) 1254 (1855); 53 LAW MAG. OR Q. REV. 77, 100-06 (1855). For statistics indicating the extent of defaults in cases commenced by specially indorsed writs, see Business of Court Committee, *Interim Report*, March 1933, X GREAT BRITAIN, HOUSE OF COMMONS, SESSIONAL PAPERS, par. 18 (1932-1933).

157. Cf. Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 578-79 (1952). "There is no desire to minimize the problem before the courts, trial as well as appellate. . . . What is needed is the application of common sense, good judgment, and decisive action, on the one hand, not to shut a deserving litigant from his trial and, on the other, not to allow harassment of an equally deserving suitor for immediate relief by a long and worthless trial. Formulas or cliches will not help, and the announcement of rolling precedents will only embarrass in the future."

158. This is obviously true of the French summary and commercial procedures. Even if the defendant appears and defends in the German mandate procedure, "a considerable amount of writing is rendered unnecessary. . . ." 2 MANUAL OF GERMAN LAW, *op. cit. supra* note 147, at par. 124, at 68.

in the disposition of litigation.¹⁵⁹ Thus a reform originally adopted to eliminate delay may not only fail to reach its objective, but may actually intensify the very condition it was meant to alleviate.

IV

The constant motivating force behind the development of the summary procedure was the demand of the commercial community for a rapid, effective method of debt collection. In Europe, response to this demand resulted in the institution of the executory procedure (in Italy) and the subsequent development of modern mandate and documentary procedures. Debt collection was just as important to the English merchant as to his continental brother. During the Middle Ages, secure in his own peculiar law, the *lex mercatoria*, protected by his own courts applying a summary procedure, and favored with the additional advantage of the system of statutory recognizances, the English merchant happily exclaimed: "Let me have the Staple Bill, and with one hundred nobles in my cash chest, I can do business to the same amount as if I had a thousand."¹⁶⁰ Later, when the piepowder courts and the statutory recognizances fell into disuse, and the law merchant was absorbed by the common law, that "brevitie and expedition" required for the disposition of commercial litigation was lost forever.¹⁶¹

Dissatisfaction with the delays and technicalities of the procedure in the law courts eventually resulted in many reforms in judicial administration, including the summary judgment procedure. The high regard of the medieval merchant for the Staple Bill finds its counterpart in the welcome the modern business community extended to the efficient method of debt collection provided by the summary judgment procedure. The adoption of a summary judgment procedure, stated a writer in the *Commercial Law Journal*, is "a justification for an increased expansion of credits and a guarantee that liquid assets shall not . . . be converted into frozen assets."¹⁶²

159. Cf. Clark, *Summary Judgments, A Proposed Rule of Court*, THE JUDICIAL ADMINISTRATION MONOGRAPHS, Series A (collected) 19, 22 (1942). "Possible abuses of the new practice do not seem to involve dangers of denial of the jury-trial right, as was apparently feared originally. Indeed, as text writers have suggested, the courts have been, if anything, overhesitant in granting the relief. . . . Dangers, if any, are likely to be of a different nature and to involve not injustice, but conceivably waste motion. If the procedure is resorted to regularly in cases where there is only a remote possibility that the judgment will be granted, it is possible that a practice may develop somewhat comparable to the old dilatory motions and demurrers which tended to delay, rather than promote, adjudication."

160. 8 COLLECTED WORKS OF SIR R. PALGRAVE 255, as quoted in 49 SELDEN SOCIETY, *supra* note 13, at xiii.

161. 9 ENCYC. SOC. SCI. 270, 273 (1937).

162. Bush, *Summary Judgments in California*, 36 COM. L. J. 569 (1931).

Although debt collection has always been a prominent factor in the work of inferior courts, this in no sense minimizes the importance of the summary judgment reform for courts of general jurisdiction. It is apparent, however, that the summary judgment procedure is not adapted to solving the problem of delay in the settlement of most commercial litigation, for such disputes typically involve numerous and complicated issues of fact. Recognizing that this is true, there remains a serious question whether any reform of judicial administration will ever succeed in placating the business community. In observing that a growing volume of commercial litigation was settled outside the law courts by arbitration, the Peel Report in 1938 stated the reasons for this situation: "This preference of the commercial community for the settlement of their disputes by arbitration is due, no doubt, to its greater freedom from appeals; its informality, privacy and friendly atmosphere; the saving of the great expense of copying documents; and, above all, to the fact that the issue is determined speedily and on a fixed date, arranged to suit the convenience of the maximum number of the parties concerned in the dispute."¹⁶³ Accepting these reasons as valid, a businessman may still prefer arbitration to a legal action even if all the suggested reforms in procedure are adopted. Although the recommendations in the Evershed report may result in less delay in the pre-trial stages of litigation, and calendar practice and evidentiary rules may be reformed, the complete informality and privacy of arbitration cannot be duplicated in a law court, and to insure a "friendly atmosphere" in a court of law would require not a reform but a miracle.

The effectiveness of an unlimited summary judgment procedure in reducing delay in the disposition of litigation presents a serious question. Basically, the problem involved is the formulation of a workable standard for trial courts to apply in determining the existence of issues of fact for trial. When the summary judgment procedure was narrowly restricted to actions for liquidated debts, this need was minimized. The extension of the procedure to new classes of cases intensifies the need for a standard while at the same time the already difficult task of formulating it is further complicated. Failure to articulate intelligible standards in jurisdictions where a completely unlimited summary judgment procedure is permissible results in wasted judicial effort and added delay to litigants in settling disputes, for vague standards inevitably lead to the utilization of the procedure in cases for which it is not suitable. In addition such standards increase the danger of an erroneous decision

163. Royal Commission on the Despatch of Business at Common Law 1934-1936, *Final Report*, par. 70, at 31 (1936).

which will unfairly deprive a litigant of a common law trial. In the last analysis, the contribution of the summary judgment procedure to the solution of the problem of delay must be measured against the background of a working system of judicial procedure consisting of numerous, interrelated rules. In reflecting on Federal Rule 56 in this context, one wonders if the words of Coleridge are not appropriate: "Every reform, however necessary, will by weak minds be carried to an excess, that itself will need reforming."