The historical context of summary judgment in South Africa: politics, policy and procedure

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Abstract

A fundamental defect of classical common-law procedure was its inability to test the factual basis of a defendant's defence without the issue being determined at a trial. As a result, the practice of sham pleading developed whereby a defendant raised a fictitious defence for the purposes of delay. Although Lord Brougham raised this matter in a speech addressed to the House of Commons in 1828, it was not until 1853 that he proposed a Bill to halt this abuse. Lord Brougham's Bill was premised on an adapted version of the summary diligence, a procedural mechanism borrowed from Scottish Law. The Bill was unfavourably received by the English legal profession who were suspicious of a Scottish innovation of Civilian origin. In response, Lord Keating introduced a competing Bill during the ensuing session, which was finally enacted in 1855 as the Summary Procedure on Bills of Exchange Act (18 & 19 Vict c 67), commonly dubbed as Keating's Act.

It is contended, that the summary judgment procedure as it has been received into our contemporary practice is the product of political expediency on account of the intense political lobbying and heated policy debates concerning the competing Bills. The resultant compromise produced an indigenous English summary mechanism that, when compared to summary proceedings of Civilian origin, indicates that the term "summary" was misused in its English procedural context because the summary procedure that it devised neither simplified the ordinary proceedings, nor ensured procedural guarantees nor did it promote the execution of judgment.

A further contention is that South African practice for many decades resisted the reception of the English model of summary judgment because it was not procedurally relevant at the time since provisional sentence proceedings, an executory procedure of Roman-Dutch origin, was entrenched in Cape practice and the other colonies. The eventual reception of the summary judgment procedure into South African civil procedural law

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has been both tardy and fragmented and not without controversy because of its potential for placing in jeopardy the procedural rights of defendants.

Outline and methodology

The date 24 October 2010 commemorates the 155th anniversary of the summary judgment procedure. Commonly known as Keating's Act, the Summary Procedure on Bills of Exchange Act[1] was enacted in 1855.[2] Since then, the summary judgment procedure has been incorporated into the procedural systems of all major Anglo-American jurisdictions,[3] including South Africa.[4] Central to the policy and procedure original to Keating's Act is the inception of a procedure that deviates from the ordinary proceedings for the expressed purpose of testing the factual basis of a defendant's defence on the assumption that the plaintiff has an unimpeachable claim and, in this manner, rectifies an defect inherent in the system of Anglo-American proceedings which, before the introduction of the summary judgment procedure, was unable to verify the basis of a defendant's defence without the issue being tested at a trial.

As a means of stimulating deeper understanding of our contemporary application of the summary judgment procedure, the historical approach to civil procedure has been adopted. By this method, the origin and subsequent line of development of a particular procedure or proceeding is traced through its various succeeding time frames for the purposes of understanding its intrinsic nature, structure and formative principles.

However, this approach is not entirely objective. The history surrounding the summary judgment procedure has been interpreted to prove the assumption that the summary mechanism that our procedural system inherited from English procedure is, in the final analysis, a product of political expediency on account of the conflicting versions of the bills submitted by Lords Brougham and Keating. The resultant compromise produced an indigenous English summary mechanism that, when compared to summary proceedings of Civilian origin, indicates that the term 'summary' was misused in its English procedural context because the summary procedure that it devised

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1 18 & 19 Vict c 67. The statute was repealed in 1883 by the Statute Law Revision and Civil Procedure Act, 1883 c 49 s 3, read with schedule.

2 In terms of s 1, the commencement date is stated as 24 October 1855.

3 See, for example: Australia: Federal Court Rules Order 20; Canada: Federal Rules r 213; United Kingdom: Civil Procedure Rules Part 24 r 24, Practice Direction 24; United States of America: Federal Rules of Civil Procedure r 56.

4 See the Uniform Rules of Court Rule 32 and the Magistrates' Courts Rules rule 14.

neither simplified the ordinary proceedings, nor did it promote the execution of judgment. A further assumption is that South African practice for many decades resisted the reception of the English model of summary judgment because it was not procedurally relevant at the time in that the provisional sentence proceeding, an executory procedure of Roman-Dutch origin, was entrenched in Cape practice. Moreover, the superior courts relied on their inherent jurisdiction to regulate an abuse of process whenever it was contended that a defendant had raised a *mala fide* defence.

In Part 2, the classical Civilian summary proceedings are briefly surveyed so as to establish an historical model with which to compare the English summary devise. The prevalence of sham pleading is identified in Part 3 as the motive for the resultant reform. Part 4 explores the political controversy surrounding the nature of this reform. The provisions of Keating's Act are analysed in Part 5 as the prototype for the summary judgment procedure. Part 6 deals with the manner in which the historical prototype was developed and extended under the Supreme Court of Judicature Acts, 1873 and 1875.[5] At this point, the doctrinal association between our contemporary mechanism and its English counterpart. Parts 7 and 8 analyse the historical context in which the summary judgment procedure was received into the South African procedural system, particular attention being given to the legal politics and judicial policy surrounding the summary judgment procedure.

Meaning of 'summary' in historical context

In order to expedite judgment, developed civil procedure systems have progressively devised procedural mechanisms that either attenuate or deviate from the ordinary contentious proceeding. The term 'summary' has been used to denote this type of proceeding. Historically, the nature and form of summary proceedings have varied according to the demands of practice in the different jurisdictions in which they have evolved and, as will be shown, differing connotations have been given to the term in the Civilian and Common-Law systems of procedure.[6]

Both historically and doctrinally, the notion of a summary proceeding originated in classical system of Continental civil procedure. More

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5 Section 1 of the Supreme Court of Judicature of 1875 (38 and 39 Vict c 77) provided that the Supreme Court of Judicature of 1875 was to be construed jointly with the Supreme Court of Judicature Act of 1873 (36 and 37 Vict c 66) and further provided that, when construed together with the Supreme Court of Judicature Act of 1873, 'may be cited as the Supreme Court of Judicature Acts, 1873 and 1875'.

6 See, further, McMahon 'Summary procedure: a comparative study' (1957) 31 *Tulane Law Review* 573.

specifically, under the Romano-canonical procedure, a decretal issued in 1306 by Pope Clement V introduced *Saepe Contingent*, commonly referred to as *Clementina Saepe*, which curtailed the formalism of the *solemnis ordo iudicorum* or ordinary canonical procedure.[7] Whereas the ordinary canonical proceedings were characterised by formality and circumlocutory procedures,[8] *Clementina Saepe* abridged the ordinary proceedings by replacing the written complaint with the plaintiff's oral statement of the cause; by admitting the principle of contingent cumulation whereby all the issues in a cause or defence were bound to be represented simultaneously irrespective of their relative importance; and lastly, allowing the judge a discretion in controlling the proceedings along with the competence to interrogate litigants.[9] Essentially, *Clementina Saepe* did not differ appreciably from the ordinary canonical proceedings. The marked difference was that the summary proceeding was conducted *simpliciter et de plano*, which entailed the elimination of the ritualistic and formalistic features of the ordinary proceedings while maintaining the procedural guarantees that ensured a fair trial.[10] Although under *Clementina Saepe* the ordinary proceedings were abridged, their fundamental 'remained materially complete'.[11]

The importance of *Clementina Saepe* is that it introduced the notion of summary proceedings that developed later in the *ius commune* system of civil procedure. As Engelmann puts it

> [T]he 'Clementina' contributed much to a better understanding of the distinction between necessary procedural steps and unnecessary formalism as also of the lines which should be drawn between the unlimited exercise of the parties' dispositive power, on the one hand, and the judicial directive power, on the other. So too, it pointed out the way in which the goal of the proceeding could be attained more speedily than before, without sacrificing any thoroughness of consideration.[12]

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7 See generally Engelmann (ed) *A history of continental civil procedure* (1969) at 494–497.

8 Engelmann n 7 above at 494.

9 *Id* at 494 496. See also Millar 'The formative principles of civil procedure I' 1923 *Illinois Law Review* 1 at 25–26 for the principle of 'contingent accumulation'.

10 Engelmann n 7 above at 495–496.

11 *Id* at 497.

12 *Id* at 497.

Summary proceedings became established practice in the classical procedural systems of, *inter alia*, France, [13] Germany[14] and Italy.[15]

The notion of a summary proceeding exemplified by *Clementina Saepe* prompted the development of a second form of the summary proceeding. Unlike *Clementina Saepe* that abridged the ordinary proceedings by simplification, the second form of summary proceedings was in the nature of an executory procedure that deviated substantially from the ordinary proceedings.[16] Although numerous variants of the executory procedure were developed in classical Civilian systems, the *instrumenta guarentigiata*[17] (literally, secured documents) proved to be the common strand that instigated the development of executory procedures, notably in Italy, France and Germany. The mediaeval Italian procedural system invented the *instrumenta guarentigiata* in terms of which the debtor acknowledged his indebtedness in writing and granted to his creditor the right to take execution of his property without a prior hearing; when the debtor defaulted, the court, upon the *ex parte* application of the plaintiff, granted execution against the debtor's property.[18] This later developed into the *processus executivus* or executory procedure, which was expressed by Italian jurists as *proceditur executive* signifying that the creditor's cause was proceeding by 'execution' as nothing intervened between the creditor's motion and the judicial hearing except the finding that the creditor was entitled to execution.[19] The *instrumenta guarentigiata* is parent to the *Executivprozess* in the classical German system;[20] in France this line of development culminated in an executory procedure eventually known as *namptissement*.[21] The most recognisable example from the South African perspective, is the *namptissiment* or *handvulling*,[22] identified in our contemporary system of civil procedure as provisional sentence proceedings.[23] Moreover, for present

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13 *Id* at 692–698.
14 *Id* at 577–580.
15 *Id* at 492–494 497–502 791–794.
16 *Id* at 577–578 as to where these two groups of summary proceedings are distinguished according to the German scientific method.
17 *Id* at 10 (generally); 499 (Italy); 583 (Germany); 699 (France).
18 *Id* at 10 498–501.
19 *Id* at 498–501.
20 *Id* at 10 582–583.
21 See Nagel '*Vanwaar namptissement?*' (1981) 2 *De Jure* 312–317; Engelmann n 7 at 699–706.
22 Nagel n 21 at 317–323; 1 Menzies 'Prefatory remarks on provisional sentence' 5–9.
23 See the Uniform Rules of Court Rule 8; Magistrates' Courts Rules rule 14A.

purposes, the summary diligence of Scottish law may be singled out as another variant of the executory procedure.[24]

Continental procedure therefore devised two forms of summary proceeding:[25] the one condensed the ordinary proceedings, while the other deviated from the ordinary proceedings in order to achieve speedy execution. These establish a comparative basis for assessing the summary procedure indigenous to English procedural law, as embodied in the provisions of Keating's Act.

The notion of the abridgment of proceedings by means of a summary procedure was alien to common-law procedure. This may be attributed to the unique manner in which common-law procedure evolved. In the main, reference may be made to the jury system and the related rules of pleading that were devised to produce a single issue to facilitate a verdict by the jury.[26] Moreover, reasons may be sought in the classical common-law formulary system whereby substance and procedure were integrated in the forms of action, each having its own special mode of pleading.[27] A last reason was the English preoccupation with their ordinary proceedings.[28] The formalism, technicalities, and circumlocutory procedures characteristic of this system of procedure, provided ample opportunity for procedural abuses, one of which was the practice of sham pleading.

The underlying controversy: sham pleading

The onset of the problem may be traced to the piepowder courts and courts of staple, which functioned in the medieval English commercial milieu.[29] This period is characterised by a summary procedure administered by these courts whereby commercial disputes were expeditiously settled, as well as

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24 For the origin and practice of the summary diligence, see Thomson *A Treatise on the Law of Bills of Exchange, Promissory Notes, Bank-Notes, Bankers' Notes, and Checks on Bankers, in Scotland* (1836) at 550–551. See also text to ns 55–58 below for a synopsis of the procedure entailed.

25 Engelmann n 7 above at 577–578.

26 See Stephen *A Treatise on the Principles of Pleading in Civil Actions* (6 ed 1860) 122–126. See also Cappelletti, Merryman and Perillo *The Italian legal system* (1967) 127 for a brief description of the reasons for the differences between English procedure and Continental procedure on account of the jury system prevailing in the former.

27 See Koffler & Reppy *A handbook of common law pleading* (1969) 11 63–66.

28 This view is supported by Bauman 'The evolution of the summary judgment procedure' (1956) 31 *Indiana Law Journal* 329 at 346.

29 See Brodhurst 'The merchants of staple' 1901 *Law Quarterly Review* 58–62; Holdsworth *The history of English law* vol 5 (1966) 103–120; Bauman n 28 above at 330.

by the use of the statutory recognisance[30] of debt to facilitate mercantile transactions.[31] As a result of changed social circumstances and altered commercial practice, these courts fell into disuse.[32] Unfortunately, because of the expansion of the Common Law and Chancery jurisdiction during this period, the medieval courts were not replaced by commercial courts.[33] Consequently, the merchant class was forced to turn to the courts of Common Law and of Chancery for the settlement of commercial disputes.[34] The procedure of both these courts was protracted on account of highly technical rules of pleading that frustrated the merchant class in their endeavour to obtain swift judgment in order to take speedy execution for the recovery of debts. As Bauman remarks, one of the most obvious defects of the system was its inability to determine the factual basis of a dispute expeditiously without the necessity of a lengthy trial.[35]

However, the problem was more complex. The proceedings of the common-law courts were obstructed by a practice known as the fictitious or sham plea.[36] The sham plea was used as a means of gaining time within which a debtor could raise sufficient funds to satisfy a debt or alienate existing assets before a bankruptcy suit.[37] This objective could have been attained indirectly by the use of the special traverse,[38] or by raising purely formal objections on

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30 Recognisance, an obligation or bond acknowledged before and later enrolled in a court of record whereby the person so bound is obliged to perform a certain act, such as, pay a debt, keep the peace or otherwise; in terms of the Statute of Merchants of 1285, recognisances entered under this Act were known as 'statutes': Walker *The Oxford companion to law* (1980*)* at 1042 1187.

31 Bauman n 28 above at 330–331; Brodhurst n 29 above at 64–67; Holdsworth n 29 above at 106–108.

32 Bauman n 28 above at 331; Brodhurst n 29 above at 74–76.

33 Holdsworth n 29 above at 116–117.

34 Bauman n 28 above at 331–333.

35 *Id* at 333.

36 Millar *Civil procedure of the trial court in historical perspective* (1952) at 237.

37 Bauman n 28 above at 330–331; Holdsworth *The history of English law* vol 9 (3ed 1966) 306.

38 *Special traverse*, in common-law pleading, a variety of the plea comprising two parts, the first consisting an affirmative allegation while the second, part of a traverse (identified in our contemporary system of pleading as 'confession and avoidance'): Walker n 30 above at 1168. *Traverse*, in regard to a pleading or affidavit, means to deny an allegation of fact: Walker n 30 above at 1231. See also Sutton *Personal actions at common law* (1929) at 170–177. Identified in our contemporary system of pleading as 'confession and avoidance'; the association is notional since, in the classical common-law system of pleading, confession and avoidance was effect by means of a special plea in the context of a specific form of action whereas in the modern system of fact pleading an affirmative defence is raised in respect of a specific allegation of fact contained in the opposite party's pleading.

technical points of procedure.[39] However, what could have been indirectly secured in this manner, could be directly achieved by raising a fictitious defence by means of a sham plea.[40] The courts were powerless to rectify this situation as the system knew no procedural devise by which a plaintiff could prove the fraudulent nature of a defence until the issue had been taken on trial.[41] Serjeant Stephen succinctly summed up the situation

> ALL PLEADINGS OUGHT TO BE TRUE While this rule is recognised, it is at the same time to be observed, that in general there is no means of enforcing it, because regularly there is no proper way of proving the falsehood of an allegation till issue has been taken, and trial had upon it. Persons engaged in vexatious defences have taken advantage of this difficulty by resorting to the practice of what is called *sham pleading*, that is, pleading, for the mere purpose of delay, a matter which the pleader knows to be false.[42]

Plaintiffs were not entirely at the mercy of unscrupulous defendants, however. In appropriate instances, a demurrer[43] could be raised to test the legal sufficiency of a plea.[44] Unfortunately, the weakness of the demurrer was that it did not go behind the pleadings as it had to be taken *ex facie* the opposite party's pleading.[45] A defendant could run a gauntlet of demurrers without ever having to prove the substance of his defence. Neither the demurrer nor any other procedural devises[46] were capable of preventing the

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39 See, further, Holdsworth n 37 above at 306–307.

40 *Ibid*.

41 Stephen n 26 above at 347.

42 *Ibid*.

43 *Demurrer*, in common-law pleading, a plea by one litigant that the other litigant's pleadings did not entitle him to succeed and that the pleader himself was entitled in law to succeed on the facts alleged and admitted by the other litigant and that the pleader was content to rest on that plea; essentially the litigants were at issue on a point of law only, which the court had to decide after argument (doctrinally associated in our contemporary system of pleading with the 'exception'): Walker n 30 above at 350–351. See also Sutton n 38 above at 107–121.

44 Sutton n 38 above at 107 states: 'In certain cases it must be admitted that this (raising a demurrer) was the best, the cheapest, and most efficient way of obtaining the required decision, for, as we well know, cases frequently occur in which there is really no dispute as to the facts, and the only point at issue between the parties is what is the legal result of those facts.'

45 See Koffler and Reppy n 27 above at 384–385; Sutton n 38 above at 111–113. Stephen n 26 at 59 explains the rule as follows: '… a demurrer is never founded on a matter collateral to the pleading which it opposes, but arises *on the face of the statement itself*: … thus, if the declaration in Assumpsit omit to mention upon what consideration the promise was made, it is an objection to which that statement, *on the face of it*, is subject, and which should consequently be taken by way of demurrer.' (own italics)

46 For instance, by means of a motion *non obstante veredicto* an unsuccessful plaintiff could apply that judgment be entered in his favour despite the fact that the issue raised

abuse of process perpetrated by defendants as a tactical ploy to gain time before the inevitable enforcement of judgment. Consequently, by means of sham pleading, defendants could raise innumerable 'paper' issues to delay judgment, thereby thwarting their creditors who sought a swift recovery of debts.[47] As time passed, fictitious pleading was no longer confined to claims for debt but was commonly practised.[48] As the move toward procedural reform commenced shortly after the turn of the eighteenth century, the need to devise a procedural mechanism that arrested an abuse of process by testing the procedural validity of a defence, was proposed.

Politics and procedure

The procedural journey of the summary judgment procedure commenced in 1828. On the seventh of February of that year, Lord Brougham,[49] in a wide-ranging speech on procedural reform addressed to the House of Commons,[50] proposed a summary procedure for actions brought on notes, bonds and bills of exchange. Because of its significance for the future development of the summary judgment procedure and further analysis, the words of Lord Brougham are cited verbatim:

> … whenever a strong presumption of right appears on the part of the plaintiff, the burden of disputing his claim should be thrown of 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.[51]

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by a plea in confession and avoidance had been found in favour of the defendant on the grounds that the facts pleaded in avoidance of the plaintiff's claim confessed by the plea were not sufficient in law. See, further, Sutton n 38 above at 131–132; Koffler and Reppy n 27 above at 577–578.

47 See Casson and Dennis *Odgers' Principles of pleading and practice in civil actions in the High Court of Justice* (22 ed 1981) 71.

48 Bauman n 28 above at 334.

49 Brougham, Peter Henry, 1st Lord Brougham and Vaux (1778–1868); called to the Scottish Bar in 1800 and then to the English Bar in 1808; entered Parliament in 1810, lost his seat in 1813 but returned to the House of Lords in 1816; renowned for this speech to the House in 1828 on the reform of law, which resulted in the appointment of two commissions; became Lord Chancellor in 1834 and, after his dismissal in 1834, he sat in the House of Lords and the Judicial Committee; after 1850, assisted by two lay lords, he undertook the appellate work of the House of Lords: Walker n 30 at 155.

50 For a summary of Brougham's speech, see Holdsworth "The movement for reforms in law (1793–1832)" 1941 *Law Quarterly Review* 340.

51 See *Speeches of Henry Lord Brougham* vol 2 (1838) 391.

The rudimentary principles of our summary judgment procedure are evident in this passage. It is instructive that in his speech, Lord Brougham broached a fundamental principle that was later to form the basis of the summary judgment procedure through his assertion that 'whenever a strong presumption of right appears on the part of the plaintiff, the burden of disputing his claim should be thrown on the defendant'. Moreover, the defendant may show good cause to the contrary, or furnish security to enter into the ordinary proceedings. Lastly, the proposed procedure is limited to a specific class of liquid claims.

In his concluding remark, Lord Brougham made a statement that, as will be shown,[52] was set to prove contentious both politically and on grounds of policy

> This is a mode well known in the law of Scotland, and would put an end to all those undefended causes, which are now attended with such great and useless expense, as well as injurious delay to the parties and the public.[53]

Lord Brougham's reference to '… a mode well known in the law of Scotland…' needs to be explored. Probably on account of his having been a member of the Scottish bar,[54] Brougham advocated a Scottish procedure known as the 'summary diligence'.[55] This procedure entailed the registration of a protest within six months after a bill or note had been dishonoured, thereby entitling the holder thereof to immediate execution of judgment.[56] The debtor was afforded the opportunity to stay execution on a 'sist of diligence'[57] upon providing security, set in the discretion of the court, based on the contention that the plaintiff's claim was false and, pending the hearing, execution was suspended.[58]

Apart from political resistance to Lord Brougham's proposal, technical considerations deeply rooted in the common-law system of procedure, militated against it. In contradistinction to the Civilian system of procedure,

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52 See text to ns 67–76 below.

53 *Speeches of Henry Lord Brougham* n 51 above at 391.

54 See, further, n 49 above.

55 *Diligence*, a generic term in Scottish law for the forms of procedure by which a creditor could obtain payment for a debt, normally on the basis of a decree of court for payment: Walker n 30 at 359. For further details, see Bell *A dictionary of the law of Scotland* vol 1 (3 ed 1826) at 441–445.

56 See Thomson n 24 at 550–551. See also Bauman n 28 above at 336.

57 *Sist*, in Scottish procedure describes the measure used to stop the progress of a case for a period of time: Walker n 30 at 1145. See also Bell n 55 above at at 443

58 Bauman n 28 above at 337.

classical common-law procedure was unable to devise a procedural mechanism for the expeditious determination of the factual basis of a controversy.[59] Every allegation, either of fact or of law, had to be brought to issue and the sufficiency of these issues tested at a trial.[60] This explains Millar's statement: 'At common law … there was no proceeding of a clearly civil nature to which the term [summary] could be applied'.[61] Mainly the ordinary proceedings predominated without any major concession to a collateral form of an abridged procedure that applied generally to a broad class of litigants.[62] Because of the absence of an acceptable procedural analogue within the system of common-law procedure, the proposal for a summary procedure became politicised. Lord Brougham's proposal for the Scottish summary diligence might have been used as a point of departure, but this too was regarded as being foreign to English common-law procedure and hence the proposal for its reception was part of the controversy.[63]

Some three decades passed before Lord Brougham once again raised issue concerning the introduction of a summary procedure. During the intervening period, the reform of English procedure had already commenced under the Hillary Rules of 1834.[64] Moreover, it is notable that Lord Brougham's proposal was made a year after the commencement of the Common Law

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59 Bauman n 28 above at 333.

60 See Stephen n 38 above at 73 96 121–122 126–127 in regard to the production of issue in the common-law system of pleading. On 126 he states: 'On the whole … it is conceived that the chief objects of the system of pleading are these – *that the parties be brought to issue*, and that the issue so produced be *material* and *certain* in its quality.' Once more on 116 the 'production of issue' is described: 'The pleadings … are so conducted, as always to evolve some question, either of fact of law, disputed between the parties, and mutually proposed and accepted by them as the subject for decision; and the question so produced is called the *issue*. As the object of all pleading or judicial allegation is to ascertain the subject for decision, so the main object of that system of pleading established in the common law of England, is to ascertain it by the production of an *issue*.' See also Koffler and Reppy n 27 above at 13–14. See in particular, Sutton n 38 above at 72–106 for an in-depth treatment regarding the production of issue.

61 See Millar 'Three American ventures in summary civil procedure' 1928 *Yale Law Journal* 193 at 194.

62 Millar n 51 above at 194; McMahon n 6 above at 573.

63 See, further, text to ns 67–76 below.

64 See the Civil Procedure Act of 1833 (3 & 4 William IV c 42), its provisions being more fully applied in the Rules that came into operation in the Hilary Term of 1834, commonly known as the Hilary Rules. For the text of the Hilary Rules, see 2 C & M 1–30; 149 Eng Rep 651at 663. In broad outline, the purpose of the Hilary Rules was to restrict the use of the general issue and extend the system of special pleading. See Holdsworth 'The new rules of pleading of the Hilary Term, 1834' 1923 *Cambridge Law Journal* 261–278 especially at 270–273. See also Baker *An introduction to English legal history* (2 ed 1979) 78–79; Sutton n 38 at162–168.

Procedure Act of 1852[65] which, *inter alia*, initiated the abolition of the forms of action.[66] In 1853, Lord Brougham proposed a bill incorporating an adapted form of the summary diligence, contending that it was based upon similar summary procedures in France, Holland, Belgium and the Italian states.[67] The bill was approved by the House of Lords but defeated in the House of Commons. During the ensuing session, the bill was reintroduced but in this instance Sir Henry Keating proposed a competing version of the procedure to accommodate the legal profession which regarded Brougham's proposal with suspicion as it introduced the foreign notion of registration and was regarded as an unnecessary Scottish innovation.[68] The matter was referred to a select committee. After hearing evidence, the select committee recommended Keating's proposal for passage.[69] In 1855, the Summary Procedure on Bills of Exchange Act[70] was passed by parliament.[71]

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65 15 & 16 Vict c 76.

66 S 3 of the Common Law Procedure Act 15 & 16 Vict c 76 (1852) abolished the forms of action for the purposes of pleading in the following terms: 'It shall not be necessary to mention any Form or Cause of Action in any Writ of Summons, or in any Notice of Writ of Summons, issued under the Authority of this Act.' S 3 did not directly abolish the forms of action but rather prohibited the use of the forms of action for the purposes of pleading. To state the matter differently: the forms of action still remained as the embodiment of substantive principles but the process of pleading was no longer restricted to the procedural requirements of a particular form of action. See, further, Sutton n 38 at 197–199; Koffler and Reppy n 27 above at 58. Practically speaking, the manner whereby the forms of action were abolished was by means of the introduction of an intricate system of endorsements and special endorsements initiated under the provisions of s 25 of the Common Law Procedure Act of 1852 that were extended under the provisions of rr 3 7–8 contained in the schedule to the Judicature Act 36 & 37 Vict c 66 (1873). The Judicature Act 38 & 39 Vict c 77 (1875) dealt with endorsements extensively and in the minutest detail under the provisions of Order II r 1 read with Order III rs 1–8 contained in sch 1 to the Act as well as the form of such endorsements contained in appendix A parts 1–2 annexed to sch 1. An endorsement for the purposes of pleading refers to a writ of summons in a superior court which was and still must be endorsed with a statement of the claim made or the remedy or relief sought: Walker n 30 at 613; Lely *Wharton's Law Lexicon* 7ed (1883) 405.

67 Bauman in n 30 above at 337. For the interrelationship between the Scottish procedure and its counterpart in Continental procedure, see also Bauman in n 30 above at 333–336.

68 The essence of the underlying political debate and policy considerations are succinctly stated in the Notes to the Preamble of the statute: '… It was urged upon the legislature to treat dishonoured bills as *quasi* judgments; but this foreign practice, which seems to be based upon no sound principle whatever, the legislature refused to adopt.' See Day *The Common Law Procedure Acts and Statutes relating to the Practice of the Superior Courts of Common Law and Rules of Court with Notes* (3ed 1868) 328.

69 Bauman n 28 above at 337–338.

70 18 & 19 Vict c 67.

71 In *The Legal Observer, and Solicitors' Journal* (May 1855–October 1855) 50 at 106 in the weekly edition dated Saturday, 9 June 1855, the report of the Metropolitan and Provincial Law Association provides a concise description of the passage of the various bills and their implications: 'This (Brougham's) Bill was passed by the House of Lords, and read twice in the House of Commons, where, however, it did not get through

The competing bills were intensely debated in the law journals published during this period. *The Law Chronicle*[72] jibbed at Lord Brougham as follows

> The most sweeping of the two measures has been defeated, but not without a fearful howl by Lord Brougham, and a threat on his part to renew at some future time his exertions to get the legislature to adopt his favourite clauses.

Although the political innuendo is obvious, attention needs to be given to the phrase '[t]he most sweeping of the two measures'. In the context of information contained in other journals, this phrase seemingly refers to the length and complexity of Lord Brougham's bill, as well as technical procedural issues. Lord Brougham's bill was cumbersome and complicated. This is evident from a full length article (37 pages) published in the *Law Magazine*,[73] which came out in support of Brougham. From a detailed analysis of Brougham's bill, it becomes evident that the bill consisted of twenty-seven primary clauses that mainly replicated summary diligence in a form adapted to the exigencies of English practice. By comparison, upon its enactment, Keating's Act is marked by its technical simplicity, comprising eleven sections, including the short title.[74]

The other more telling interpretation of 'sweeping' could be attributed to a procedural problem encountered in Brougham's bill, which required either the registration or notarising bills of exchange and promissory notes in accordance with Scottish practice. *The Legal Observer*[75] carried a report of the Metropolitan and Provincial Law Association in which objections of a

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committee. It has this year (1855) been again introduced by Lord Brougham, and passed by the House of Lords; but in the House of Ccommons it had to compete with another Bill, which had already been brought in by Mr Keating and Mr Mulling; by which actions upon dishonoured bills and notes may be commenced by writ of summons in a slightly different form; and to such an action no defence is to be allowed, except after obtaining the leave of the Judge. The (Keating's) Bill possesses many advantages over Lord Brougham's, and is exposed to none of the serious objections which have been pointed out by the Committee.'

72 *The Law Chronicle: monthly journal, containing treatises on various branches of the law, notes of leading cases and statutes, short notes on legal new, legislative measures, and other matters of interest to the profession vol II* (June 1855–June 1856) at 63.

73 *The Law Magazine: or Quarterly Review of Jurisprudence* vol XXII new series; vol LIII of the old series (February–May 1855) at 83–89.

74 For an analysis of Keating's Act, see 5 below.

75 *The Legal Observer, and Solicitors' Journal* in n 69 at 106. In passing, it is noted that the words '…and that upon a certificate of such registration, execution might issue, unless the defendant obtained an order from a Judge permitting his to defend the action upon an affidavit of merits.', indicates similarities with provisional sentence proceedings. For provisional sentence proceedings, see text to ns110–114 below.

technical nature were raised, as is evident from the lengthy but functional quote below

> … an attempt was made last year to extend to England a form of procedure which has long been extant in Scotland, under the title of 'Summary Diligence.' For this purpose a Bill was introduced into the House of Lords by Lord Brougham, providing that dishonoured Bills of Exchange and promissory notes, having been protested according to the existing practice with foreign bills, should be registered in a new office in the Common Pleas, to be created for that purpose; and that upon a certificate of such registration, execution might issue, unless the defendant obtained an order from a Judge permitting him to defend the action upon an affidavit of merits.
>
> In the opinion of the committee this procedure is liable to very serious objections. Instead of simplifying the actual practice, it provides an entirely new procedure, and rendering necessary all the expense of a new Registry Office and staff of officers.
>
> The entire expense of notarial protest would be useless in every case which should ultimately be defended. On the other hand, in all undefended causes, its effect would be to transfer from solicitors to notaries and important branch of Common Law business.

The Law Review [76] raised an interesting point in favour of Brougham's bill on the matter of the harmonisation of Scottish and English procedure in respect of the prosecution of dishonoured bills of exchange and promissory notes, as follows

> It [Brougham's bill] assimilated the law of England and Scotland, and was called for by the united voice of all the great mercantile bodies both in London and provincial towns. … If those amendments [moved by Brougham to Keating's bill] had been added to the Bill now passed, … the laws of the two countries would have been the same, and creditors would have had the option of either taking the course provided by the Common Law Procedure Act, as improved essentially, or the more summary and effectual course, known for above a century in Scotland, where there is the same option given, but the more summary proceeding is always preferred.

History has strange twists as the statute was dubbed 'Keating's Act'. Although Sir Henry Keating's competing version of the proposal was finally

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[76] *The Law Review, and Quarterly Journal of British and Foreign Jurisprudence* vol XXII (May 1855–August 1855) at 499 and 450–451.

enacted, it is unfortunate that only his name should be associated with this statute as it was Lord Brougham who had laboured arduously for this reform.

Procedural prototype

Keating's Act represents an elementary model of the summary judgment procedure.[77] An analysis of its provisions shows a notional association with the contemporary South African form of the summary judgment procedure. The intent of the statute was to provide a remedy for '… *bona fide* holders of dishonoured bills and promissory notes [who] are often unjustly delayed and put to unnecessary expense in recovering the amount thereof by reason of frivolous and fictitious defences to actions thereon …'.[78] However, initially the remedy was limited in its scope as it was restricted to liquid documents in the nature of bills of exchange and promissory notes.[79] Second, its procedural form was as yet immature. The plaintiff obtained a writ of summons that was specially endorsed[80] with the statement of his demand and according to the form prescribed in Schedule A.[81] Thereafter, the plaintiff filed an affidavit that confirmed personal service of the writ and incorporated an endorsement of the statement of his demand as well as a copy of the instrument concerned.[82]

The defendant in turn was obliged to respond by applying for leave to defend within twelve days from the date service of the writ.[83] Leave to defend might be granted upon the defendant '… paying into court the sum endorsed on the writ, or upon affidavits satisfactory to the judge, which disclose a legal or equitable defence, or such facts as would make incumbent upon the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the judge may seem fit.'[84]

Notable in both sections 1 and 2 is the extensive discretion granted to the court to regulate the procedure. This is also evident in section 3 which provides that, after judgment, the court or judge could set aside the judgment and, when necessary stay or set aside execution, and give leave to the defendant to enter into the main proceedings '… if it shall appear to be

77 See, generally, Bauman n 28 above at 338–339; Millar n 36 above 239.
78 See Preamble.
79 See s 1.
80 See, further, n 66 above.
81 See s 1.
82 See s 1 read with schedule A.
83 See s 2.
84 *Ibid.*

reasonable to the court or judge so to do, and on such terms as the court or judge may seem fit.' Lastly, the statute conferred competence on the Queen-in-Council to extend its provisions '… to all or any court or courts of record in *England* or in *Whales* …'.[85]

An immediate observation is that the historical prototype of English summary procedure is distinct from the summary proceedings of classical Civilian procedure. Under *Clementina Saepe,*[86] the ordinary canonical proceedings were simplified and abridged to expedite proceedings yet they preserved the participative procedural rights of both the plaintiff and defendant.[87] In contrast, the English prototype was neither directed at procedural economy, nor did it protect procedural guarantees. Instead, its sole purpose was to interrupt the ordinary proceedings so as to prevent an abuse of process, thereby terminating a defendant's participative rights unless a defendant paid security or disclosed 'a legal or equitable defence, or such facts as would make it incumbent upon the holder to prove consideration or such other facts as the Judge may deem sufficient to support the application'.

Moreover, by comparison to the classic Civilian executory procedures,[88] the English prototype is not executory in nature but rather provides a procedural remedy aimed at piercing the defence raised by a defendant. The English prototype also differed structurally from the Civilian executory models. Whereas the classic Civilian executory procedures were autonomous and plenary in their application, the English summary mechanism was dependant on and contingent to the ordinary proceedings. However, through the influence of the summary diligence, a notional link with *instrumenta guarentigiata*[89] is evident in that the English prototype confined its remedy to a limited category of 'secured claims' in the class of bills of exchange and promissory notes.

Consequently, although Brougham's proposal for the introduction of the summary diligence was defeated, what was introduced into English procedure was an adapted model of a Civilian-type summary procedure. This

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85 See s 9. In terms of s 10, it was provided that the Act would not be extended to Ireland and Scotland. Under the County Courts Act 19 & 20 Vict c 108, the provisions of the principal Act were extended to apply in the county courts.

86 See n 7 above.

87 See text to ns 8–10 above.

88 See n 16 above.

89 See text to ns 17–18 above.

accounts for the differing connotations of the term 'summary' in the respective Anglo-American and Continental procedural systems.

Despite its shortcomings, Keating's Act established a procedural prototype that formed the basis for the further extension and development of the summary judgment procedure.

Extension and development

Keating's Act was amplified under Rule 7 of the schedule to the Supreme Court of Judicature Act of 1873.[90] However, Rule 7 was short lived and was superseded by Order XIV Rules 1–6 of the first schedule to the Judicature Act of 1875.[91] The wording of Order XIV closely followed that of its predecessor.[92] The principal provisions that extended Keating's prototype are contained in Order XIV Rule 1 as follows

> Where the defendant appears on a writ of summons specially endorsed, under Order III., Rule 6, the plaintiff may, on affidavit verifying the cause of action, and swearing that in his belief there is no defence to the action, call upon the defendant to show cause before a Court or Judge why the plaintiff should not be at liberty to sign final judgment for the amount so endorsed, together with interest, if any, and costs; and the Court or the Judge may, unless the defendant, by affidavit or otherwise, satisfy the Court or Judge that he has a good defence to the action on the merits, or disclose such facts that the Court or the Judge may think sufficient to entitle him to be permitted to defend the action, make an order empowering the plaintiff to sign judgment accordingly.

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90 36 & 37 Vict c 66.

91 38 & 39 Vict c 77.

92 For the sake of completeness and for purposes of comparison, the provisions of r 7 are set out as follows: 'In all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money, payable by the defendant … the writ of summons may be specially endorsed with the particulars of the amount endorsed with the particulars of the amount sought to be recovered.In the case of non-appearance by the defendant where the writ of summons is so specially endorsed, the plaintiff may sign final judgment for any sum not exceeding the sum endorsed on the writ … but it shall be lawful for the Court or any Judge to set aside or vary such judgment upon such terms as may seem just.Where a defendant appears on a writ of summons so specially endorsed, the plaintiff may, on affidavit verifying the case of action, swearing that in this belief there is no defence to the action, call upon the defendant to show cause before the Court or Judge why the plaintiff should not be at liberty to sign final judgment … and the Court or Judge may, unless the defendant, by affidavit or otherwise, satisfy the Court of Judge that he has a good defence to the action on the merits, or disclose such facts as the Court or Judge may think sufficient to entitle him to be permitted to defend the action, make an order empowering the plaintiff to sign judgment accordingly.

Before commenting on Order XIV Rule 1, certain aspects that are possibly obscure need clarification. The word 'appears', in relation to the defendant, signified the intention of the defendant formally to defend the action.[93] A 'writ of summons' indicates that the summary judgment procedure was applied in the context of action proceedings.[94] The requirement that the writ of summons had to be specially endorsed[95] under Order III Rule 6, is of particular importance. Under section 1 of Keating's Act, the summary judgment procedure applied only in respect of bills of exchange and promissory notes; Rule 7 under the Schedule to the Judicature Act of 1873, extended the availablility of the summary judgment procedure to 'a debt or liquidated demand in money'. The incorporation of Order III Rule 6 into Order XIV Rule 1 had the effect of expanding the scope of the summary judgment procedure in respect of claims relating to the recovery of a debt or liquidated demand on a contract, 'as, for instance, on a bill or exchange, promissory note, cheque, or other simple contract debt or on a bond or contract under seal of payment of a liquidated amount of money', on a statute where the amount claimed is a fixed sum, on a guarantee in respect of which the demand against the principal was liquidated, or on a trust.[96]

Perusal of the provisions of Order XIV shows a close doctrinal and procedural association with the Uniform Rules of Court Rule 32 and the Magistrates' Courts Rules rule 14. Clearly evident is the underlying assumption that the plaintiff's claim is unimpeachable. This presumption of right on the part of the plaintiff, confers extensive dispositive powers on a plaintiff to which the defendant must submit. The plaintiff commences proceedings on action. Should the defendant defend the action, the plaintiff 'on affidavit' verifies the cause of action and swears that there is 'no defence to the action'. Implicit is that the plaintiff may deviate from the ordinary proceedings in order to initiate an investigation into the validity of the defence raised by a defendant. The defendant is compelled either to furnish security, or to respond to the plaintiff's demand by seeking leave to defend the action, which would only be granted if the court is satisfied that the

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93 Walker n 30 above at 69. The words 'appears' is equivalent to the notice of intention to defend in our system. See the Uniform Rules of Court Rule 19; Magistrates' Courts Rules rule 13.

94 Walker n 30 at 1309.

95 An endorsement for the purposes of pleading refers to a writ of summons in a superior court that was and still must be endorsed with a statement of claim or remedy or relief sought. Walker n 30 at 613; Wharton n 66 at 405.

96 See Order III Rule 6. In terms of the Uniform Rules of Court Rule 32(1) and the Magistrates' Courts Rules rule 14(1), summary judgment may be brought on a liquid document, a liquidated amount in money, the delivery of specified movable property or for ejectment.

defendant had 'a good defence to the action on the merits', or alternatively, by disclosing 'such facts as the Court or Judge may think sufficient to entitle him to be permitted to defend the action'. The underlying assumption is that the defendant has no valid defence at his disposal. As a result, the defendant might be deprived of his participative rights if he is unable to disclose his defence. A common strand running through all the provisions of Order XIV is the inordinate reliance on judicial discretion to regulate the procedure, in particular to safeguard the rights of the defendant. This is the model of the summary judgment procedure that was received into South African civil procedural law.[97]

South African reception

The reception of the summary judgment procedure into the South African civil jurisdiction has been both tardy and fragmented.[98] Two focal dates are 1917 and 1965. A little over six decades after Keating's Act, the summary judgment procedure was introduced into the magistrates' courts under Order 14 of the Rules to the Magistrates' Courts Act of 1917.[99] Order 14 was later replaced by rule 14 of the Rules to the Magistrates' Courts Act of 1944.[100] In 1965, eleven decades after the enactment of Keating's Act, the summary judgment procedure was uniformly integrated into the practice of all superior courts under Rule 32.[101] Prior to 1957, the Cape Supreme Court was the only superior court that applied the summary judgment procedure under Rule 593, which, in terms of the revision of the Cape Rules in 1938, was replaced by Rule 22.[102] Only in 1957, did the Transvaal Provincial Division and the

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97 The English Rules of 1883 have been noted but are not pertinent to the present discussion. The historical method is applied as a means of examining the context of summary judgment in South African civil procedure. Accordingly, a comparative analysis falls beyond the scope of this article. However, for the contemporary practice of summary judgment in English civil procedure, see Andrew *English civil procedure: fundamentals of the new civil justice system* (2003) 505–520; Gerlis and Loughlin *Civil procedure* (2002) 247–263; in the Federal Court of the United States of America, see Brunet, Redish and Reiter *Summary judgment: federal law and practice* (1994); in South Africa, Van Niekerk, Geyer and Mundell *Summary judgment – a practical guide* loose leaf (1998).

98 See also Van Niekerk, Geyer and Mundell in n 97 above at 2.7–2.9 for a brief description of the history of the summary judgment procedure in South Africa.

99 See the Rules contained in schedule 2 to the Magistrates' Courts Act 32 of 1917.

100 32 of 1944. Under the revision of 1968, see the Magistrates' Courts Rules contained in GN R1108 of 21 June 1968 (*Regulation Gazette* 980), as amended.

101 See the Uniform Rules of Court published under GN R48 of 12 January 1965 (*Government Gazette* 999), as amended.

102 See Government Notice 41 in *Government Gazette Extraordinary* dated 13 January 1938. See also Arenhold and Fisher *Rules of the Supreme Court of South Africa, Cape of Good Hope Provincial Division, Eastern Districts Local Division, and their respective circuit courts, and Griqualand West Local Division* (1938).

Witwatersrand Local Division incorporated the summary judgment procedure into their practice under Rule 42*bis*.[103] Summary judgment was not applied in the superior courts of Natal and the Orange Free State until 1965.[104]

Reflecting on the turbulent circumstances under which Keating's Act was introduced,[105] many questions arise regarding the reasons for the erratic reception of the summary judgment procedure into South African practice. Why did it take some eleven decades for the summary judgment procedure to be applied uniformly in the superior courts of South Africa? For what reason was the summary judgment procedure initially relegated to the practice of the lower courts? Was there resistance to this reform? If so, on what grounds of policy?

A possible argument might be that Cape practice was not amenable to procedural reform because it was rooted in the conservative tradition of common-law procedure.[106] But this does not hold true. On the contrary, early Cape practice was receptive to English procedural reform during the nineteenth century. For instance, under the influence of the Common Law Procedure Act of 1854,[107] documentary discovery was received into Cape practice in 1880 under Rule 333.[108] Moreover, under the revision of the Cape rules in 1883, the reformed system of pleading advanced under the Supreme

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103 See GN 687 of 17 May 1957 (*Government Gazette* 5870).

104 The Report of the Van Winsen Commission confirms that only the superior courts of the Cape and Transvaal applied the summary judgment procedure, to the exclusion of the superior courts of Natal and the Orange Free State. See *Committee of inquiry into the formulation of a uniform set of rules for the Supreme Court of South Africa* (1959) at 61.

105 See 4 above.

106 S 46 of the Charter of Justice of 1827 specifically provided that civil proceedings should '… be framed with reference to the corresponding Rules and Forms in use in Our Courts of Record in Westminster …'. The phrase '… Courts of Record in Westminster…' is a reference to the courts of common law; the Common Law Courts sat in Westminster Hall until 1884, when the Royal Courts of Justice in the Strand were opened: Walker n 30 at 1297. See also Erasmus 'Historical foundations of the South African Law of Civil Procedure' 1991 *SALJ* 265 at 269–271.

107 17 & 18 Vict c 125. S 50 of this statute introduced discovery into common-law procedure, which had previously relied on the ancient disclosure mechanism known as *proffert* and *oyer*. However, prior to the enactment of s 50, it was possible to obtain a bill for discovery in Chancery for the purpose of furthering a suit commenced at common law: Holdsworth n 37 171–172; Koffler and Reppy n 27 at 125–126.

108 See GN 240 of 18 March 1880 in the *Cape Gazette* of that date. For Rule 333, see Tennant *Rules, Orders, &c., touching the Forms and Manner of Proceeding in Civil and Criminal Cases, before the Superior and Inferior Courts of the Colony of the Cape of Good Hope* (5 ed 1905) at 78–79. The fifth edition of 1905 was the final edition of this book, which took in the relevant rules in the work by Van der Sandt. For Van der Sandt, see n 112 below.

Court of Judicature Acts 1873 and 1875 is evident, especially in regard to pleading allegations of fact as well as the related principle of specificity in pleading.[109] There must have been some other policy consideration for resisting the reception of the summary judgment procedure.

A likely supposition is that the summary judgment procedure was not relevant for Cape practice at the time. Within the general system of Anglo-American civil procedure, Cape practice was in the unique position that it already had a summary procedural remedy for dealing with dishonoured bills of exchange and promissory notes.[110] Known in Roman-Dutch procedure as *handvulling* or *namptissiment*,[111] provisional sentence was incorporated as Rule 12 under the Rules of Supreme Court of the Colony of the Cape of Good Hope established under the Royal Charter of Justice of 1827.[112] Early writers confirm that provisional sentence was established practice in the superior courts of South Africa.[113] Thus, the problem that vexed the parent English system of civil procedure was of little consequence in the South African context at the time as provisional sentence was an adequate remedy for dealing with the problem of dishonoured bills of exchange and promissory notes without having to tamper with the ordinary proceedings.[114]

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109 See also GN 240 of 26 March 1880 in the *Cape Gazette* of that date, in terms of which Rule 330 replaced Rules 18 and 19 that were originally promulgated on 2 March 1829. See, further, Erasmus n 106 at 271–272.

110 There are isolated instances of the use of summary proceedings of Civilian origin in other Anglo-American jurisdictions. See in this regard, Millar n 61 above at 193; McMahon 'The historical development of executory procedure in Louisiana' 1958 *Tulane Law Review* 555.

111 See Nagel n 21 at 312.

112 See Rule 12 in Van der Sandt *Rules, Orders, &c., touching the Forms and Manner of Proceeding in Civil and Criminal Cases, before the Supreme, Circuit, and Magistrates' Courts of the Colony of the Cape of Good Hope* (1843) at 33–34. The final edition of Van der Sandt's work is dated 1864; thereafter, this work was taken in by Tennant. For Tennant, see n 108 above.

113 See Nathan *The common law of South Africa* vol 4 (1907) 2230–2252; Van Zyl *Judicial practice of South Africa* vol 1 (4ed) 135–173 especially at 135–137. For the record, reference may be made to the following articles published in five parts: Herbstein and Snitcher 'Provisional sentence' 1933 *SALJ* 175; 1933 *SALJ* 315; 1933 *SALJ* 481; 1934 *SALJ* 56; 1934 *SALJ* 200.

114 Another possibility is that with the passage of time, South African lawyers only vaguely remembered or were ignorant of Order XIV. In 1905, an interesting comment was made by Morice *English and Roman-Dutch law* (2 ed 1905) 372–375 as follows: 'The English law procedure most resembling provisional sentence is signing judgment under Order XIV of the Rules of the Supreme Court.' The author then continues with a brief description of Order XIV. It is submitted that the author's comparison between provisional sentence and Order XIV shows a lack of insight into the English model of the summary judgment procedure. Moreover, it is curious that the author should describe the provisions of Order XIV for the South African reader.

An open question is: how did the superior courts deal with a fictitious defence prior to1965? Scrutiny of case law contained in the *Index to the Southern African law reports 1828–1946*,[115] offers little guidance. Cases classified under 'summary judgment' use the term in a different context.[116] However, later case law indicates that the Orange Free State Provincial Division approached the matter of frivolous or fictitious defences by resorting to its inherent jurisdiction to prevent an abuse of process. In *Mostert v Von Herschberg*[117] the court set aside a *mala fide* notice of intention to defend, whereupon the plaintiff was permitted to apply for default judgment.[118] However, in *Sussman v Testa*[119] the court applied its inherent jurisdiction to dismiss an application for striking out the respondent's notice of intention to defend in the main action on the ground that the applicant had failed to show that the respondent was not *bona fide* and had entered appearance to defend merely as a delaying tactic.[120] These decisions of the Free State Court are not exhaustive and are offered merely to illustrate the exercise of inherent jurisdiction in relation to an application to strike out an appearance to defend. This practice went far wider. For example, a compromise pleaded as a defence was held not to be frivolous or vexatious;[121] an exception was struck out as it had been taken *mala fide* and served no purpose other than to gain time by forcing a postponement;[122] an application for striking out a defendant's plea on the ground that it was not *bona fide*, was dismissed.[123] Against this background, combined with provisional sentence proceedings, the summary judgment procedure was seemingly superfluous as, through the exercise of their inherent power, the courts refused to countenance an abuse of process or deny a litigant the right to access. This possibly explains the remnant of resistance from the Natal

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115 Malan and Van der Walt (eds) vols 1–5.

116 By way of example, the following cases are classified under the term 'summary judgment'. In *Ginman v Kistasammy Naiken* 1881 2 NLR 27, the order was granted in an application brought to sign judgment against the plaintiff for non-procedure in respect of the failure to take further steps upon formal appearance being entered in provisional sentence proceedings. The court in *Grundling v Grundling* granted judgment as prayed without hearing evidence where the declaration claimed ejectment for arrear rental and the defendant was in default of appearance.

117 1959 3 SA 956 (O).

118 *Id* at 958. See also S*labbert, Verster & Malherbe (Bft) Bpk v Kruger* 1959 PH F45 (O) at 120.

119 1951 2 SA 226 (O).

120 *Id* at 230–231. See also *Geldenhys v Kotzé* 1964 2 SA 167 (O) at 169E–H 171F–H; *Van Aswegen v Fourie* 1964 3 SA 94 (O) at 101.

121 See *Western Assurance Co Ltd v Caldwell's Trustee* 1918 AD 262 at 271–272.

122 See *Hudson v Hudson* 1927 AD 259 at 269.

123 *Odendaal v De Jager* 1961 4 SA 307(O) at 310–312.

bench and bar that initially opposed the introduction of the summary judgment procedure under Rule 32 of Uniform Rules of Court.[124]

Post 1965

During the period after 1965, it took some time before the summary judgment procedure became accepted and settled practice. Although summary judgment was fully integrated into South African practice, it met with pockets of resistance. Particularly during the 1980s, summary judgment was called into question. There are two notable instances in this regard.

In 1980, the Report of the Galgut Commission was published.[125] The Report represented the views of the bench, each Society of Advocates, the Associated Law Societies of South Africa (now the Law Society of South Africa), the Clearing Bankers Association of South Africa, the Association of Building Societies, and 'welfare organisations and other bodies'.[126] In regard to Rule 32, the following opening comment was made: 'It is generally agreed that the present [summary judgment] procedure has little value.' Two recommendations followed. The first proposed that the plaintiff be given the right to submit a replying affidavit to the defendant's answering affidavit in terms of Rule 32(3)(b). The second read as follows

> …that a plaintiff files his declaration and be given the right to apply for summary judgment by filing a verifying affidavit in terms of sub-rule 2; that the defendant files his plea and supports the allegations on oath; that the plaintiff then replicates and confirms the allegations on oath.[127]

This recommendation harks back to Cape Rule 22 in terms of which an application for summary judgment was commenced after the defendant had entered an appearance to defend and the plaintiff had filed a declaration.[128] The Transvaal Rule 42*bis* followed the provisions of the Magistrates' Courts Act of 1917 which required a plaintiff to initiate summary judgment proceedings on receipt of the defendant's notice of intention to defend.[129] Rule 42*bis* was severely criticised at the time because its was contended that

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124 See the *Report of the Van Winsen Commission* n 104 at 61.

125 *Report of the commission of inquiry into civil proceedings in the Supreme Court of South Africa* (1980).

126 *Id* at 3.

127 *Id* at 78.

128 See Arenhold and Fisher *Rules of the Supreme Court of South Africa, Cape of Good Hope Provincial Division, Eastern Districts Division and their respective circuit courts, and Griqualand West Local Division* (2 ed 1949) at 42.

129 See Order XIV rule 1(1).

it placed the defendant at a disadvantage on account of the lack of particularity in regard to the plaintiff's claim, which was achieved under Cape Rule 22.[130] Judge Galgut supported the second recommendation, as follows[131]

> The procedure in (b) creates no hardship and if the matter proceeds to trial then the pleadings filed will stand as the pleadings in the suit, thus saving expense. The plaintiff could file his declaration as soon as he wishes … The defendant presently has to set out his defence as required by sub-rule (3)(b). Hence he should be able to file a plea. … If the defendant has no defence, he has brought the extra expense onto his own shoulders. … A court should have a discretion to order immediate oral evidence if, in its view, the issue is a very narrow one.

On analysis, this recommendation implies that summary judgment would no longer be an extraordinary procedure as it would be assimilated into the ordinary proceedings in the same manner as an exception or special plea, but in this instance the procedural objective would be to test the sufficiency of the defendant's defence.

The summary judgment procedure has, and still does, prick the conscience of our courts. A notable example is *Standard Krediet Korporasie v Botes*.[132] In its proper context, *Botes* is an insignificant case, being decided in 1986 by the South West Africa Supreme Court which at the time functioned on the periphery of the South African judicial system prior to the independence of Namibia on 21 March 1990. The facts of the case are of little importance as the plaintiff's application for summary judgment was dismissed with costs; the document attached to the deponent's verifying affidavit was in fact not a liquid document, and the defendant failed to appear at the hearing.[133] However, *Botes* has achieved notoriety for Judge Bethune's diatribe against the summary judgment procedure.[134] The inevitable academic wrangling

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130 See *Annual survey of South African law 1957* (1958) 224 at 225; Hoppenstein 'Summary judgment in the Transvaal Provincial Division and Witwatersrand Local Division' 1958 *SALJ* 211 at 212.

131 *Report of the Galgut commission* n 125 above at 79.

132 1986 4 SA 946 (SWA).

133 947B–G.

134 His Lordship inveighed that the summary judgment procedure was not of Roman-Dutch origin and that provisional sentence provided an adequate remedy for claims based on a liquid document (947H–I and 949B); because a declaration is no longer filed as was formerly the case in regard to Cape superior court practice, the defendant only has a 'general indication' of the claim filed against him (948A–C); the rules of court do not allow the defendant sufficient time to file an opposing affidavit (948E–F); summary judgment is often used by plaintiffs '… for the ulterior purpose of snatching a judgment

followed. Beck[135] supported the continued practice of summary judgment by critically demolishing the points raised by Judge Bethune as unfounded. On the other hand, Swanepoel[136] argued that summary judgment is a farce in that it deviates from the ordinary rules and is misused by plaintiffs to secure a tactical advantage over defendants. Dicker[137] took issue with Swanepoel by arguing that summary judgment, within its limited scope of application, is both a useful and necessary procedural mechanism.

The significance of *Botes* and the related journal articles is the extent to which the summary judgment procedure continued to evoke heated responses in the context of procedural policy.[138] Even more remarkable, is that these outbursts occurred after the decision of the then Appellate Division in *Maharaj v Barclays National Bank Ltd*[139] in which Corbett JA, in a reasoned and elegant judgment, analysed the summary judgment procedure and provided rules of policy for the exercise of judicial discretion.[140]

The question that comes to the fore is why the summary judgment procedure, by comparison to other procedural mechanisms, is open to controversy. Perhaps part of the answer is to be found in the Galgut Commission's review of Rule 32. The various options posed[141] illustrates that the summary judgment procedure is capable of different permutations, indicating that its internal procedural structure is unstable. In my view, this inherent defect in the summary judgment procedure may be traced to its historical prototype,[142] which was the product of political compromise rather than informed procedural reform. Analysis of Keating's Act points to a conflation of the principle of the unimpeachable right of a plaintiff embodied in the summary diligence,[143] and selective provisions aimed at curbing the incidence of sham

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or to get the defendant to disclose evidence to which the plaintiff would not be entitled.' (948G); the social attitudes have changed since the summary judgment procedure was devised in England '… at a time when a privileged section of the community was in effective control of the administration of justice and when it was quite usual to incacerate in a debtor's prison persons who were unable to meet their contractual obligations.' (948I–J).

135 See 'Summary judgment in Namibia: the death knell?' 1987 *SALJ* 386.

136 See 'Summiere vonnis – 'n klug? 1987 *De Rebus*163.

137 See 'The future of summary judgment' 1994 *De Rebus* 457.

138 However, see Van Niekerk, Geyer and Mundell in n 97 above at 15.3–15.7 for an balanced evaluation of these differing viewpoints. See also Van Heerden 'Summiere vonnis: nog 'n stuiwer in die armbeurs' 1999 *Journal of South African Law* 304.

139 1976 1 SA 418 (A).

140 425G–426E.

141 See text to ns 127–131 above.

142 See 5 above.

143 See text to n 24 and ns 55–58 above.

pleading, without embedding the procedural rights of litigants within the procedure itself. Unlike its Civilian prototypes,[144] the protection of the dispositive and participative rights of litigants, especially those of the defendant, are external to the summary judgment procedure in that this was made dependent on the exercise of judicial discretion.[145] Evident in Judge Galgut's recommendations is an attempt to build procedural guarantees into the provisions of Rule 32.

Despite sporadic disputation, summary judgment has developed in a manner unique to South Africa and has become settled practice for the recovery of debts.[146] Whether this will hold true for the future is difficult to predict. The decision of the Supreme Court of Appeal in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*[147] could become a cardinal factor in setting a stable trend. Judge Navsa held that the summary judgment procedure is impeccable[148] and therefore should not be labelled as 'extraordinary' and 'drastic', but rather the emphasis should fall 'on the proper application of the rule'.[149] Undoubtedly, the hope is that the summary judgment procedure will develop constructively on the basis of the judicial norms that have been moulded since 1917. However, to deny its 'extraordinary' and 'drastic' nature shows a loss of memory of the historical 'labels' that since Keating's Act have dictated its intrinsic procedural structure. Devised as a result of political compromise,[150] the summary judgment procedure is not a summary procedure in its plenary sense for it neither abridges the ordinary proceedings in order speedily to move the

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144 See 2 above.

145 See s 2 of the Summary Procedure on Bills of Exchange Act of 1855, which specifically provided that leave to defend might be granted upon the defendant '… paying into court the sum endorsed on the writ, or upon affidavits *satisfactory to the judge*, which disclose a legal or equitable defence, or such facts as would make incumbent upon the holder to prove consideration, or such other facts as the *judge may deem sufficient to support the application,* and on such terms as to security or otherwise *as to the judge may seem fit*.' (own italics) See, further, text to ns 84–84 above. Similarly, Order XIV Rule 1 under the Rules of the Supreme Court of Judicature Acts, 1873 and 1875 provided: ' ... and the *Court or the Judge may*, unless the defendant, by affidavit or otherwise, *satisfy the Court or Judge* that he has a good defence to the action on the merits, or disclose such facts that *the Court or the Judge may think sufficient* to entitle him to be permit to defend the action, make an order empowering the plaintiff to sign judgment accordingly.' (own italics) See, further, text to n 92 above.

146 Van Niekerk, Geyer and Mundell in n 97 above at 2.9 and 15.9–15.10.

147 2009 5 SA 1 (SCA); 2009 3 All SA 407 (SCA).

148 *Id* at 11J; 415[32].

149 *Id* at 12A–D;415[32]–416[33].

150 See, further, 4 above.

proceedings to trial, nor does it expedite execution of judgment.[151] Through the South African reception of Order XIV of the original English Rules,[152] our system has inherited the procedural imperatives that underlie Keating's Act.[153] In its historical context, the summary judgment procedure is 'extraordinary' in the sense that it deviates structurally from the ordinary proceedings in order to test the *bona fides* of the defendant's defence, and 'drastic' in that it intercepts the participative rights of a defendant that consequently need to be tempered through the vigilant exercise of judicial discretion.

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151 See, further, 2 above and text to ns 86–89 above. See also Millar 'The 'new procedure' of the English rules' 1932–1933 (27) *Illinois Law Review* 363 where, although in a different context, it is stated: '… [W]e must bear in mind the distinction, too often overlooked, between a 'summary procedure' in the proper sense of the term and a 'procedure of summary judgment.' The former exhibits a variation from the ordinary procedure in different particulars with the object of expediting decision, but contemplates a trial of the cause as a normal course of proceeding; the latter follows the rules of ordinary procedure, except that by satisfying certain preconditions, the plaintiff may cause the summary rejection of an unmeritorious defence and obtain judgment without trial.'

152 See, further, 6 above.

153 See, further, 5 above for Keating's Act as the historical prototype.