



PROCEDURAL HISTORY: THE DEVELOPMENT OF SUMMARY JUDGMENT AS RULE 56

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INTRODUCTION

Over the last several decades, the Supreme Court rendered several important decisions affecting the scope and use of summary judgment.¹ The 1986 trilogy of summary judgment cases increased the trial court's discretion in deciding whether to grant a motion² and effectively raised a non-moving plaintiff's burden to demonstrate the existence of a material question of fact while decreasing a moving defendant's burden to produce evidence of an issue's absence.³ The

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¹ See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (giving courts wider discretion to determine the existence of triable facts, thereby relieving a significant burden of production from defendants moving for summary judgments and effectively placing the burden on non-moving plaintiffs to produce evidence of a material question); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (expanding the trial court's discretion regarding summary judgment motions); *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (upholding defendant's motion for summary judgment in spite of un rebutted expert testimony in support of plaintiff's position); *Scott v. Harris*, 550 U.S. 372 (2007) (granting summary judgment based on videotaped evidence).

² *Celotex*, 477 U.S. at 317; *Anderson*, 477 U.S. at 242.

³ *Celotex*, 477 U.S. at 317; *Matsushita*, 475 U.S. at 574.

Court's 1986 decisions confirmed summary judgment's primary use as a defendant's remedy. Although summary judgment is now most commonly used to aid defendants, it was initially devised and developed as a plaintiffs' remedy.

In 1934, after Congress passed the Rules Enabling Act ("REA")⁴ into law,⁵ experts in the field understood that summary judgment would be one of the most important procedural reforms included in the new Federal Rules of Civil Procedure ("FRCP").⁶ The original purpose of the remedy was to clear federal court dockets and assist poor plaintiffs in bringing actions against the vast resources of corporate defendants.⁷ While summary judgment would be new to the federal court system, it was far from an innovative concept—England and several states already employed similar procedures.⁸ It was clear by the first draft of the Federal Rules that federal summary judgment would differ from state and foreign summary judgment. However, the extent of these differences would remain unclear until the final draft was completed, nearly four years after Congress passed the REA.⁹ There were significant disagreements between the drafters of the Rules—Edson Sunderland and Charles Clark, and the rest of the Advisory Committee members concerning the causes of action to which summary judgment should be applicable, the types of evidence necessary for the remedy, and even the procedure's constitutionality.¹⁰ This article maps out the history of

⁴ Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2072(a)-(b)).

⁵ See Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1043-95 (1982) (discussing the prolonged legislative process through which the bill went and how the REA was finally passed).

⁶ Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 8, 10 (1959).

⁷ See *infra* notes 93-118 and accompanying text.

⁸ See *infra* Part I.

⁹ See, e.g., U.S. Supreme Court Advisory Committee on Rules for Civil Procedure, Preliminary Draft III of the Rules of Civil Procedure for the District Courts of the United States, Rules 42-43 (Charles E. Clark reporter) (Feb. 1, 1937) (containing changes and annotations by Charles E. Clark), in 7 United States Supreme Court Advisory Committee on Rules for Civil Procedure, Preparatory Papers (unpublished archive, on file with the Charles E. Clark Papers collection at the Yale Manuscripts and Archives Library, Box 100) [hereinafter 7 U.S. Supreme Court Advisory Comm.].

¹⁰ See *infra* Parts IV-V.

summary judgment in both state and foreign courts before the REA was passed and its later development into Rule 56.¹¹

Part I of the article describes the history and development of summary judgment in the American states and in England. Part II describes the factors contributing to, and the extent of, the federal courts' swelling dockets that made summary judgment a necessary innovation. Part III discusses Edson Sunderland's initial draft of the federal summary judgment provisions. Part IV explains the practical and theoretical debates within the Advisory Committee. Part V deals with succeeding drafts of the summary judgment rules and the factors that actually shaped summary judgment from Sunderland's initial conception into Rule 56 as ultimately included in the FRCP.

PART I

The FRCP were not drafted in a vacuum. Edson Sunderland—who drafted the summary judgment provision and several other segments of the Federal Rules—was an eminent procedural scholar.¹² When Sunderland began drafting the federal summary judgment rule, state courts utilized a variety of summary judgment procedures to weed out frivolous defenses and minimize delay. Some mimicked procedures used in England, while others bore more uniquely American traits. In the eighteenth century and first half of the nineteenth century, several states had proto-summary judgment acts.¹³ Throughout the nineteenth century, Alabama, Missouri, Kentucky, Arkansas, Tennessee, and West Virginia experimented with

¹¹ FED. R. CIV. P. 56.

¹² See Peter Charles Hoffer, *Text, Translation, Context Conversation, Preliminary Notes for Decoding the Deliberations of the Advisory Committee That Wrote the Federal Rules of Civil Procedure*, 37 AM. J. LEGAL HIST. 409, 417 (1993). Hoffer contends that Sunderland, but not Clark, was familiar with the developments in summary judgment and was therefore chosen by Clark to write the rules that Clark could not write himself. *Id.* This proposition is, however, erroneous, as Clark drafted the Connecticut summary judgment rule. See Charles E. Clark, *The New Summary Judgment Rule in Connecticut*, 15 A.B.A. J. 82 (1929). Furthermore, Clark wrote several articles about summary judgment. See, e.g., Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1929).

¹³ See Robert Wyness Millar, *Three American Ventures in Summary Civil Procedure*, 38 YALE L.J. 193, 195–204 (1929).

procedures similar to summary judgment.¹⁴ Although some of these states retained the procedures into the twentieth century, most abandoned them in the middle of the nineteenth century, well before the Federal Rules were promulgated in 1938.¹⁵

Virginia was the first North American jurisdiction to implement a procedure similar to summary judgment.¹⁶ In 1732, Virginia passed its first statutes permitting summary proceedings against sheriffs and other officers who failed to deliver public monies entrusted to citizens.¹⁷

Throughout the eighteenth and nineteenth centuries, Virginia expanded its summary proceedings to include actions against officers and against sureties on loans.¹⁸ By 1832, Virginia permitted, at the plaintiff's discretion, summary proceeding by motion in twenty-five categories of action.¹⁹ By 1919, Virginia permitted the summary proceeding to be used in all actions at law.²⁰ Initially, summary procedure was used in Virginia as a means of preventing state enforcement agents from abusing their power, but it later became a means of expediting litigation between private parties.²¹

In the years following Virginia's 1732 summary proceeding statute, a number of other American jurisdictions passed similar statutes.²² However, early summary proceeding statutes did not re-

¹⁴ Clark & Samenow, *supra* note 12, at 423.

¹⁵ See Millar, *supra* note 13, at 203, 208, 210-12; Clark & Samenow, *supra* note 12, at 466 n.304.

¹⁶ Millar, *supra* note 13, at 215.

¹⁷ *Id.* at 215 n.116 (citing Acts of May, 1732, c. 10, § 8, 4 VA. STAT. (Hening) 352). To invoke this early procedure, the statutes required plaintiffs to submit a motion to the court requesting judgment in a summary manner and to give defendants notice of the motion's submission. None of the formal pleadings generally required were necessary to obtain summary judgment. A simple motion requesting judgment with an affidavit and notice to the defendant was sufficient. *Id.* at 215-17; Clark & Samenow, *supra* note 12, at 463-67.

¹⁸ Millar, *supra* note 13, at 214-17.

¹⁹ *Id.* at 216; see, e.g., *Winston v. Commonwealth*, 6 Va. 290 (1800); *Mantz v. Hendley*, 12 Va. 308 (1808); *Long v. Pence*, 25 S.E. 593 (1896).

²⁰ Clark & Samenow, *supra* note 12, at 463.

²¹ Millar, *supra* note 13, at 215-16.

²² See Millar, *supra* note 13. South Carolina passed a statute in 1769; Kentucky in 1805; Alabama in 1820; Mississippi in 1825; Illinois in 1833; Arkansas in 1837; Iowa in 1839; Territorial Kansas in 1855; Washington, D.C. in 1873; Indiana in 1887; Tennessee in 1918; and West Virginia in 1923. These statutes possessed defects similar to those of their predecessor in Virginia. For instance, South Carolina's summary proceeding statute permitted

quire the movant to include any particular type of fact to demonstrate the unmistakable truth of his case. In many circumstances, movants could win by merely stating conclusions of law without supporting facts.²³ Several states instituted procedures similar to Virginia's in the eighteenth and nineteenth centuries.²⁴ However unlike Virginia's summary proceeding, which lasted into the twentieth century, the majority of these statutes did not survive Reconstruction.²⁵

Despite the American origin and common use of statutes like Virginia's, federal summary judgment did not evolve from the American statutes. Rather, in the first third of the twentieth century, a handful of American states, including New Jersey, New York, Connecticut, Michigan, and Illinois, modeled procedures after the English summary judgment statute. Federal summary judgment tracked these statutes and thus had its roots in English law.²⁶

The English summary judgment provision, although initially applicable to a narrower set of cases than the American provisions, avoided the defects and inefficiencies of the American statutes. The 1855 Summary Procedure on Bills of Exchange Act²⁷ provided that summary judgment was "to have a very prompt and summary effect"

judges "to determine, without a jury, in a summary way, on petition, all causes cognizable in the said courts . . . in case both parties shall desire to have the cause tried by a jury, or on application of either party . . . then the said judges shall immediately order . . . the said cause to be tried by the jury impaneled at such courts . . . the said petition shall contain the plaintiff's charge or demand, plainly and distinctly set forth." *Id.* at 196 (quoting Act of 1769, § VI: GRIMKÉ, PUBLIC LAWS OF SOUTH CAROLINA 270 (1790)).

²³ Edson R. Sunderland, *The Provisions Relating to Trial Practice in the New Illinois Civil Practice Act*, 1 U. CHI. L. REV. 188, 197 (1933).

²⁴ Millar, *supra* note 13, at 195-215; Clark & Samenow, *supra* note 12.

²⁵ See Millar, *supra* note 13, at 203, 208, 210, 211, 212; Clark and Samenow, *supra* note 12, at 466 n.304.

²⁶ Edward Q. Keasbey, *The New Jersey Practice Act of 1912*, 22 YALE L.J. 236, 237 (1913) (explaining that the New Jersey rule was modeled after England's); Thomas McCall, *Summary Judgment Under New York Rules*, 10 A.B.A. J. 22, 22 (1924); WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920-1980*, at 32 (2001) (suggesting that the Federal Rules of Civil Procedure's drafters modeled federal summary judgment on New York's Rule 113). *But see* Leonard S. Saxe, *Summary Judgments in New York: A Statistical Study*, 19 CORNELL L.Q. 237, 239 (1934) (stating that the New York Board "oscillated between suggesting the English rule and an all-embracing rule providing for summary judgment in any type of action").

²⁷ Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict., c. 67 (Eng.), reprinted in *THE COMMON LAW PROCEDURE ACTS* at 382 (John C.F.S. Day ed., 4th ed. 1872).

on amenable cases.²⁸ Enforcement of promissory notes was often delayed by the frivolous defenses raised by defendants.²⁹ The Act provided for a procedure to dispose of defendants' legally unfounded delays.³⁰ Summary judgment facilitated plaintiffs' retrieval of their money without needless litigation.³¹

England expanded its initial summary judgment statute in 1873, permitting the procedure's use in more classes of cases.³² Summary judgment was now available for recovery of debts and other liquidated claims.³³ The 1873 statute expanded summary judgment to types of actions typified by easy cases with undisputed facts: situations with a written instrument documenting debt, or actions for a fixed amount of money.³⁴ The statute only afforded summary judgment to plaintiffs in cases approaching factual certainty.³⁵ Indeed, even in cases for retrieval of land, potentially the most complicated cases, the courts tended to grant summary judgment only in simple cases not involving complicated questions of land titles.³⁶

An additional innovation in the 1873 act was its requirement of an affidavit in support of the facts.³⁷ The plaintiff issued a formal summons with a verification of the cause of action and an affidavit swearing that his claims were truthful and legally uncontestable by

²⁸ Walker v. Hicks, (1877) 3 Q.B.D. 8, 9.

²⁹ The Act itself stated that "bona fide holders of dishonored Bill of Exchange and Promissory Notes are often unjustly delayed and put to unnecessary Expense in recovering the Amount thereof by reason of frivolous or fictitious Defenses to Actions thereon," and therefore, "a summary judgment was permitted in actions of bills of exchange and promissory notes." The directors of the English legal system realized that in a discrete class of cases the plaintiff's claim was generally not contested in good faith, but by "frivolous or fictitious [d]efenses." Clark and Samenow, *supra* note 12, at 424 (quoting the Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict., c. 67 (Eng.)).

³⁰ *Id.*

³¹ *Id.*

³² See Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66 (Eng.).

³³ Clark & Samenow, *supra* note 12, at 425 (quoting Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66 (Eng.)).

³⁴ Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, Order III, Rule 6, Order XIV (Eng.).

³⁵ *Id.*

³⁶ Clark & Samenow, *supra* note 12, at 427.

³⁷ Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, Order III, Rule 6, Order XIV (Eng.).

the defendant.³⁸ Plaintiffs could have their claims heard and judged by a court, without a formal trial where the defendant could stall the judgment, and without the additional expense of hiring a lawyer.³⁹

The 1873 Act also allowed defendants to present affidavits in their defense either on an entire case, or on only a portion of the allegations. This permitted partial summary judgment on some of the issues raised by the plaintiff. Defendants could contest summary judgment with other forms of proof, but affidavits were still the principal form of proof. Although courts' strict construction of these affidavits served as the sole method of preventing plaintiffs from taking advantage of the statute,⁴⁰ this English procedure avoided the defects of the American statutes. To be exercised, it required factual clarity and proof, rather than just stated conclusions of law.

American legal reform in the early twentieth century often found its root in foreign models, procedural reform included.⁴¹ But while states borrowed procedures from England, every state initially passed much narrower summary judgment statutes. New Jersey was the first state to permit summary judgment on the English model.⁴² Like the English rule, New Jersey's summary judgment required an affidavit by the plaintiff that could only be contested by a defendant's demonstration of defenses through affidavit or proof. New Jersey provided for partial summary judgment with respect to specific claims met by a demonstrated defense.⁴³ Like England, New Jersey only allowed summary judgment for a plaintiff in actions for a fixed sum in which the facts could be set forth relatively conclusively. New Jersey's remedy, however, was more circumscribed in its reach

³⁸ Clark & Samenow, *supra* note 12, at 430.

³⁹ Edson Sunderland, *An Appraisal of English Procedure*, 24 MICH. L. REV. 109, 111-12 (1925).

⁴⁰ See Clark & Samenow, *supra* note 12, at 430.

⁴¹ DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* 4 (1998).

⁴² See Practice Act of 1912, ch. 231, 1912 N.J. Laws 377 (codified as amended at 2 N.J. COMP. STAT. (Supp 1915) §§ 191-93).

⁴³ Clark & Samenow, *supra* note 12, at 443 (citing 2 N.J. COMP. STAT. (Supp 1915) §§ 191-93, Rules 58-60).

than England's, permitting summary judgment in just three different categories, compared to England's six.⁴⁴

Michigan next adopted a summary judgment provision in its Judicature Act of 1915.⁴⁵ Michigan's rule, consistent with English summary judgment, required a motion to be supported by an affidavit stating sufficient facts, not merely conclusory assertions of law.⁴⁶ However, Michigan's 1915 rules also included an innovation: if a summary judgment motion was brought in bad faith to artificially lengthen the trial in subversion of the act's purpose, then the plaintiff would be awarded "double the amount of the costs" in addition to the amount to which the plaintiff was already entitled.⁴⁷

Michigan's 1915 rule was significantly less extensive than England's 1873 summary judgment provision, as it was applicable in fewer circumstances. However, it was a clear rule that effectively expedited the collection of funds. Because of the rule's success, Michigan expanded its summary judgment provision in 1931, transforming the rule from a remedy weighted toward plaintiffs into one that treated the plaintiff and defendant equally.⁴⁸ Previous summary judgment statutes made the motion available only to plaintiffs, leaving defendants unable to defeat it without disclosing substantially more facts in an affidavit than did the plaintiff raising the motion.⁴⁹ Michigan's new rules permitted the defendant to defeat a motion for summary judgment through an affidavit "that he ha[d] a valid defense" including "facts sufficient, if true, to constitute a defense."⁵⁰ The new rules put plaintiffs and defendants on equal footing. They required the same evidentiary

⁴⁴ Clark & Samenow, *supra* note 12, at 442-44. Indeed, between 1912 and 1938 when the Federal Rules were adopted, New Jersey used summary judgment in fewer than 150 cases.

⁴⁵ Judicature Act of 1915, 1915 Mich. Pub. Acts 3 (repealed 1961).

⁴⁶ Webster v. Pelavin, 216 N.W. 430, 431 (Mich. 1927).

⁴⁷ Clark & Samenow, *supra* note 12, at 456 (citing Mich. Comp Laws ch. 234 §§ 12581, 12582 (Cahill, 1915)).

⁴⁸ See generally Michigan Summary Disposition Rule, MICH. CT. R. 2.116 (2009).

⁴⁹ See Judicature Act of 1915, ch. 18, § 9, 1915 Mich. Pub. Acts 115 ("[U]pon motion of plaintiff . . . that there is no defense to the action, the court shall enter a judgment in favor of the plaintiff.") (repealed 1961).

⁵⁰ Edson R. Sunderland, *The New Michigan Court Rules*, 29 MICH. L. REV. 586, 591 (1931).

standard for both plaintiff and defendant affidavits, and allowed defendants to bring summary judgment motions against plaintiffs.⁵¹

In 1928, Connecticut adopted a summary judgment provision.⁵² Connecticut's rule was designed to serve two purposes—to expedite procedures for recovery of debt, and to decrease the load of litigation on the courts. Connecticut's initial rule was more expansive than England's.⁵³ Connecticut permitted summary judgment to be used in many categories of actions in which the amount of money in question was uncontested.⁵⁴ Connecticut, however, still did not permit summary judgment in cases with indeterminate damages.⁵⁵

Most states' summary judgment statutes only permitted summary judgment in cases without meaningful disputes over law. Connecticut also permitted summary judgment for disputes over the applicable legal standard.⁵⁶ According to Charles Clark, an expert on Connecticut procedure, these changes allowed the Connecticut rule to "secure[] quick justice for claimants" while "furnish[ing] an easy and direct way of disposing of a large amount of important litigation."⁵⁷

Illinois also had a summary judgment provision before the promulgation of the FRCP.⁵⁸ As a procedure scholar in the neighboring state of Michigan, Edson Sunderland actively participated in drafting Illinois's 1933 Civil Practice Act.⁵⁹ Illinois had long employed a variety of the American summary procedure.⁶⁰ Contrary to the widely held position that Illinois' new procedure act was almost

⁵¹ *Id.*

⁵² Conn. Rules of Civil Practice §§ 14(A)(1)-(6) (1926); *see also* Clark *supra* note 12.

⁵³ Connecticut may not have been as timid as the other states in its first summary judgment provision because of the device's spectacular success in Connecticut's neighboring state New York. *See infra* notes 64-76 and accompanying text.

⁵⁴ Clark, *supra* note 12, at 440-41.

⁵⁵ *Id.* at 442.

⁵⁶ *See infra* note 64-76 and accompanying text.

⁵⁷ Clark, *supra* note 12, at 82.

⁵⁸ Illinois Civil Practice Act (1933).

⁵⁹ *See* George Ragland, Jr., *Edson R. Sunderland's Contribution to the Reform of Civil Procedure in Illinois*, 58 MICH. L. REV. 27 (1959); Sunderland, *supra* note 23, at 1116; Glenn R. Winters, *Edson Sunderland and Judicial Administration*, 58 MICH. L. REV. 37 (1959).

⁶⁰ Sunderland, *supra* note 23, at 197.

identical to the old one, Sunderland viewed the new procedure as a substantial improvement.⁶¹ Whereas the American procedure permitted summary judgment affidavits to include both facts and conclusions of law,⁶² Illinois' new summary judgment procedure only permitted facts that could be admitted as evidence—a sort of expedited trial.⁶³

Other commentators noted additional important innovations in the 1933 Illinois summary judgment statute. While it did not permit defendants to file summary judgment motions,⁶⁴ it did permit summary judgment on counterclaims.⁶⁵ Illinois also prohibited summary judgment if the defendant's counterclaim had the potential to offset the plaintiff's reward.⁶⁶ Illinois' rule also made the procedure fairer to defendants subject to a summary judgment motion. Plaintiffs' evidentiary burden to bring a summary judgment motion and defendants' burden to oppose the motion were made equal. Furthermore, a defendant had equal opportunity to make the motion on counterclaim irrespective of the plaintiff's motion for summary judgment.

In 1921, New York followed its neighbor New Jersey's 1912 example and adopted a summary judgment provision.⁶⁷ New York's 1921 summary judgment procedure, while not as far-reaching as England's and Connecticut's acts,⁶⁸ was the most effective and widely used.⁶⁹ Originally passed as rules 113 and 114 of New York's 1921 Civil Practice Act, summary judgment's scope was extremely circumscribed. The statute only permitted a motion for summary judgment by affidavit "to recover a debt or liquidated demand . . .

⁶¹ *Id.* at 197-99.

⁶² See Clark, *supra* note 12, at 84 (clarifying that the Connecticut rule allowed judges to decide questions of law on summary judgment, though they could not in other states).

⁶³ Sunderland, *supra* note 23, at 197-99.

⁶⁴ See Charles Clark, *The New Illinois Civil Practice Act*, 1 U. CHI. L. REV. 209, 211 n.8 (1934).

⁶⁵ Albert E. Jenner, Jr. & Walter V. Schaefer, *Legislation and Administration*, 1 U. CHI. L. REV. 752, 762 (1934).

⁶⁶ *Id.* at 763.

⁶⁷ See N.Y. C.P.L.R. 113-14 (1921).

⁶⁸ Clark & Samenow, *supra* note 12, at 423.

⁶⁹ *Id.* Lexis and Westlaw each show no fewer than 1,500 cases in 17 years citing the procedure.

for a stated sum.”⁷⁰ It also treated defendants relatively primitively. A defendant could only overcome a motion for summary judgment if “the defendant by affidavit or other proof, [showed] such facts . . . sufficient to entitle him to defend.”⁷¹ Rule 114 also provided for partial summary judgments—again, a useful way to narrow the issues tried and thus the complexity and duration of the trial.⁷²

New York’s statute also did not provide a concrete evidentiary standard. It offered no criteria by which to decide whether the defendant’s counter-affidavit presented sufficient evidence to defeat a summary judgment motion.⁷³ New York gave the presiding judge wide discretion to grant or deny the motion.⁷⁴ In spite of its defects, summary judgment was useful “in the large metropolitan centers where the court calendars [were] so crowded that frequently it [took] from two to four years before trial of a case.”⁷⁵ Summary judgment was used in the New York courts quite frequently. Between 1921 when it was first introduced, and 1932 when it was next amended by the New York legislature, summary judgment was used no fewer than 750 times.⁷⁶

New York’s 1932 amendments to Rules 113 and 114 increased the number of actions in which summary judgment was permitted. The 1932 amendments permitted summary judgment on a judgment for a specific sum, for an unliquidated debt or demand arising from a contract, for actions to recover for the use of specific chattels, for lien or mortgage foreclosures, for specific performance of certain purchase contracts, and for an accounting on a written contract.⁷⁷ The 1932 amendments extended summary judgment’s applicability

⁷⁰ Clark & Samenow, *supra* note 12, at 445 (quoting N.Y. C.P.L.R. 113 (1921)).

⁷¹ *Id.* at 446.

⁷² *Id.*

⁷³ N.Y. C.P.L.R. 113 (1921) (entering judgment for plaintiff “unless the defendant by affidavit, or other proof, shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend”).

⁷⁴ *Id.*

⁷⁵ Louis C. Ritter & Evert H. Magnuson, *The Motion for Summary Judgment and Its Extension to All Classes of Actions*, 21 MARQ. L. REV. 33, 33 (1937).

⁷⁶ To say that summary judgment was used only 750 times would certainly be to underestimate its prevalence. Even a cursory search on Westlaw reveals that New York used the procedure at least 15 times more frequently than any of the other states that provided the remedy.

⁷⁷ Ritter & Magnuson, *supra* note 75, at 36.

to an additional six causes of actions similar to those permitted in Connecticut's 1929 Civil Practice Act.⁷⁸ Most significantly, the 1932 amendments were the first to permit summary judgment on unliquidated demands.

Following summary judgment's initial introduction in England and its subsequent enactment in various American states, the procedure's use expanded widely.⁷⁹ Several states also expanded the purpose and scope of summary judgment. Connecticut in 1929, and New York in 1932, for example, began using summary judgment as an issue-defining mechanism. By the 1930s, some experts favored expanding summary judgment to all causes of action.⁸⁰ Although summary judgment's initial purpose was to strike out sham defenses and expedite cases in which only questions of law remained,⁸¹ it was poised to become a useful tool in all types of cases.

PART II

When the REA⁸² was passed in 1934,⁸³ the federal court system was overburdened and inefficient.⁸⁴ Although a federal commission attempted a study to determine the causes of the federal courts' ills, it was never successfully completed.⁸⁵ Nevertheless, it was clear to lawyers and laymen alike that the federal judiciary was not performing properly. In prior times, simpler conditions minimized litigation

⁷⁸ *Id.* at 37.

⁷⁹ Arthur R. Miller, *The Pretrial Rush to Judgment*, 78 N.Y.U. L. REV. 982, 1017-18 (2003); see also *supra* notes 27-76 and accompanying text. In addition to the above discussed states, Wisconsin, Delaware, Pennsylvania, Indiana, Virginia, West Virginia, South Carolina, Kentucky, Alabama, Tennessee, Missouri, Louisiana, Massachusetts, Minnesota, Rhode Island, and the District of Columbia also adopted some form of summary judgment before the Federal Rules were promulgated. See Ritter & Magnuson, *supra* note 75, at 38.

⁸⁰ Ritter & Magnuson, *supra* note 75, at 47; see also 247 REPORT OF THE COMM'N ON THE ADMIN. OF JUSTICE IN NEW YORK STATE (1934) (tentatively suggesting that New York make summary judgment available in all classes of action).

⁸¹ Ritter & Magnuson, *supra* note 75, at 47.

⁸² Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2072(a)-(b)).

⁸³ See Burbank, *supra* note 5, at 1043-95 (discussing the passage of the REA).

⁸⁴ See *infra* notes 118-120 and accompanying text.

⁸⁵ Edson R. Sunderland, *Progress Report on the Study of the Federal Courts*, 30 MICH. L. REV. 51 (1931).

and delay.⁸⁶ However, by the end of the nineteenth century, procedure was a “maze”⁸⁷ —it was “cumbersome, wasteful, time-consuming, and very expensive.”⁸⁸ In many districts, especially those with urban centers, several years commonly elapsed between the time of a case’s filing and its conclusion.⁸⁹ Those bringing “petty litigation, . . . collection of debts . . . [and] small controversies,”⁹⁰ felt the delay and difficulty of litigation most acutely. A significant number of these people were poor individuals lacking the funds to carry out intricate and protracted litigation.⁹¹ In this environment, “the result for many persons [was] the denial of justice.”⁹²

Several factors contributed to this “grievous denial of justice”⁹³ for the poor. During the nineteenth and twentieth centuries, America experienced an industrial revolution that caused unprecedented growth in the production economy and transportation systems.⁹⁴ The astounding increase in economic mobilization was accompanied by the proliferation of corporations and their domination of the nation’s economy.⁹⁵ Beginning with the consolidation and coordination of

⁸⁶ REGINALD HEBER SMITH, *JUSTICE AND THE POOR* 6 (1919).

⁸⁷ *Id.* at 7.

⁸⁸ *Id.* at 15.

⁸⁹ EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY* 50 (1992).

⁹⁰ Roscoe Pound, *Administration of Justice in the Modern City*, 26 HARV. L. REV. 308, 315 (1913).

⁹¹ See SMITH, *supra* note 86, at 8.

⁹² *Id.* at 11 (quoting MUNICIPAL COURT OF CHICAGO, EIGHTH AND NINTH ANNUAL REPORT 128 (1915)).

⁹³ Pound, *supra* note 90, at 310.

⁹⁴ Between the Civil War and 1920, the United States’ gross national product skyrocketed from \$7 billion to \$35 billion. KERMIT L. HALL, *THE MAGIC MIRROR* 189 (1989). Iron and steel production increased from 900,000 tons of each per year at the end of the Civil War to 24 million tons per year by just fifty years later at the start of World War I. *Id.* Textile mills increased the number of cotton bales they used from 845,000 per year in 1860 to over 4 million in 1900. *Id.* Consequently, the amount of finished product likewise dramatically increased. Railroad track was also laid down astoundingly quickly. *Id.* The fifty years between 1860 and 1910 also saw 210,000 miles of railroad track laid down. *Id.*

⁹⁵ Corporate capitalization also increased, with the capitalization of the largest corporations increasing tenfold from \$10 million in 1880 to \$100 million by the turn of the century. *Id.* at 204; PURCELL, *supra* note 89, at 16.

corporate railroad power between the 1880s and 1900,⁹⁶ most elements of American economic life involved large corporations.⁹⁷

The proliferation of corporations increased the frequency with which the average American came into contact with these economic giants.⁹⁸ Countless Americans worked for corporations and in their factories, bought goods distributed and produced by corporations, used services provided by them, or simply lived near them.⁹⁹

During this period, new immigrants also flooded into American cities, rapidly increasing the rate of American urbanization.¹⁰⁰ Their residence in the over-crowded cities and their desire for labor further increased the chances of interaction between the individual and corporation. Increased contact with the mostly unregulated corporations led to a rise in injuries, and, consequently, a rise in litigation. Increased litigation with corporations coupled with an increase in insurance contracts designed to limit corporations' liabilities ultimately led to still more litigation.¹⁰¹ The economic changes thus meant an explosion of litigation between individuals and national corporations.¹⁰²

Courts were inundated with the resulting business-related cases during this period¹⁰³ and had to devise creative mechanisms to control their dockets. The problem was most acute in the federal courts because corporate litigants, often defendants, preferred federal

⁹⁶ ALFRED D. CHANDLER, *VISIBLE HAND* 132-34 (1977).

⁹⁷ By the 1920s, electrical power and tracking were controlled by corporations. Twenty-four farms produced 60% of American cotton, and sale of goods increasingly became the province of mass retailers rather than small wholesalers and producers. *Id.* at 204, 214, 224.

⁹⁸ See PURCELL, *supra* note 89, at 19. In 1891, for example, a single railroad corporation, the Pennsylvania Railroad, employed over 110,000 workers, which was nearly triple the manpower of the United States' military at the time. CHANDLER, *supra* note 96, at 204.

⁹⁹ PURCELL, *supra* note 89, at 16.

¹⁰⁰ See *id.* (describing the degree of urbanization in the United States). Whereas in 1870 more than half of all Americans lived on farms, by 1916 less than a third of the American population did. *Id.*

¹⁰¹ *Id.* at 20.

¹⁰² *Id.*

¹⁰³ See HALL, *supra* note 94, at 227-29.

courts as a forum. Corporate defendants tended to fare better in federal courts, and “plaintiffs did not do as well in federal court.”¹⁰⁴

In 1842 the U.S. Supreme Court handed down *Swift v. Tyson*, declaring that the Rules of Decision Act did not require federal courts to follow the common law of the state in which they sat.¹⁰⁵ Although federal courts were bound by state statutory law, in the absence of a federal statute, they had the power to develop independent, federal common law.¹⁰⁶ The national uniformity of the federal common law created a favorable environment for supporting business transactions.¹⁰⁷ Moreover, after 1890, the substantive federal common law was also more favorable to corporate interests.¹⁰⁸

The advantage corporations gained as a result of the courts’ favorable disposition towards them was compounded by the vast resources corporations could bring to bear against plaintiffs. Although plaintiffs’ claims were generally legitimate injury and insurance claims, corporations knew that if they simply deferred the litigation, it would become prohibitively expensive for plaintiffs to pursue their claims.¹⁰⁹ Settling would require an output by the corporation, but postponing could end the litigation at no cost to the corporation.¹¹⁰ The first step in this strategy of attrition was often removal from state to federal court. Plaintiffs seldom filed their cases in federal court, but removal based on diversity of citizenship allowed corporations to enjoy the federal courts’ perceived pro-corporation bias.¹¹¹ Upon removal, corporations could even choose the judges to hear their cases.¹¹² Removal placed the burden of distance on the plaintiff, increasing his litigation expenses, and, often, his personal hardship.¹¹³

Defendant corporations also used several dilatory tactics to induce plaintiffs to abandon their cases or settle. Corporations fru-

¹⁰⁴ PURCELL, *supra* note 89, at 22 (citing a study that found that, between 1901 and 1910, plaintiffs won 70% more in state court than in federal court).

¹⁰⁵ 41 U.S. 1 (1842).

¹⁰⁶ *Id.*

¹⁰⁷ PURCELL, *supra* note 89, at 24.

¹⁰⁸ *Id.* at 27.

¹⁰⁹ *Id.*

¹¹⁰ *See id.* at 30.

¹¹¹ *Id.* at 22–23.

¹¹² *Id.* at 25.

¹¹³ *Id.* at 23.

strated plaintiffs' attempts to secure crucial witnesses and physical evidence.¹¹⁴ They also made or threatened to make every available pre- and post-trial motion.¹¹⁵ Often, injured and uneducated potential plaintiffs were induced to sign release forms exculpating the potential defendant corporations. Although courts often voided the release forms,¹¹⁶ securing an invalidation required a costly procedure. Another factor contributing to the high cost and delay prior to the FRCP's adoption was that actions at law and in equity could not be combined. Because cancelling a written instrument was an equity proceeding and tort actions were actions at law, plaintiffs who signed the release forms were required to file two separate actions in federal court in order to pursue their injury claim, further increasing costs.¹¹⁷

While these devices prevented plaintiffs from winning cases, they also contributed to the delay on the already crowded federal dockets. In the years between the Civil War and the First World War, the business of the federal courts continually increased.¹¹⁸ By the early twentieth century, the average time to complete a suit was approximately three and a half years, and by 1912 it rose to slightly over four years.¹¹⁹ These measures do not reflect the full amount of time it took for cases to be litigated from start to finish. Most cases included in the count were "settled, dismissed, or voluntarily discontinued,"¹²⁰

¹¹⁴ See *id.* at 32–33.

¹¹⁵ See *id.* at 33.

¹¹⁶ *Id.* at 35.

¹¹⁷ *Id.* at 36.

¹¹⁸ The total number of cases adjudicated in the federal courts rose from 17,000 in 1876 to 29,000 in 1900, and to 50,000 in 1916. PURCELL, *supra* note 89, at 50. Compare HALL, *supra* note 94, at 229 (citing somewhat higher numbers for total cases adjudicated in federal courts—over 22,000 in the early 1870s, over 39,000 in 1900, and over 66,000 in 1920). The total number of civil cases disposed of in federal court also rose during these decades. Whereas 7,000 civil cases were disposed of in 1876, 10,000 were in 1900, and 19,000 were adjudicated in 1916. PURCELL, *supra* note 89, at 50. Compare HALL, *supra* note 94, at 229 (citing, once again, higher statistics—the federal court disposed of 14,527 civil cases in 1873, 22,520 in 1900, and 32,240 in 1920). The number of cases pending on the federal court dockets also increased from 28,000 in 1876 to 52,477 in 1900 to nearly 90,000 in 1915. Among the total number of pending cases, the number of private suits pending was 14,000 in 1876, 39,000 in 1900, and 55,000 in 1916. PURCELL, *supra* note 89, at 50; HALL, *supra* note 94, at 229.

¹¹⁹ PURCELL, *supra* note 89, at 50.

¹²⁰ *Id.*

not litigated to completion. One can only imagine the duration of a suit from its commencement to the final and definitive awarding of a judgment.

Members of the Advisory Committee recognized that delay was a serious problem in the federal courts, posing hardships, particularly for poor defendants. In their discussions they noted that “in cities like Boston . . . it takes three and a half years for the poor plaintiff’s case to be reached.”¹²¹ Summary judgment was among the reforms necessary for repairing the federal courts’ ills. “The argument for [summary judgment],” according to Charles Clark, Reporter on the Federal Rules, was “that it affords a means by which judgments may be more speedily secured, particularly where court dockets are congested. . . . It also furnishes an easy and direct way of disposing of a large amount of important litigation.”¹²² Another member of the Advisory Committee pointed out that summary judgment was “enormously useful in expediting trials where there is no real distinctive issue.”¹²³ Proceduralists of the time recognized that the best way to improve the federal courts’ efficiency was to include a summary judgment provision in the FRCP.

PART III

The FRCP were intended to cure, or at least mitigate, the ills plaguing the federal court system. Many years prior to the drafting of the Federal Rules, Congress battled over approving federal procedural reform.¹²⁴ Although Congress eventually passed the REA in June of 1934, it had already rejected many drafts¹²⁵ and the future effect of the act was unclear. Charles Clark, then Dean of Yale Law School and an eminent procedural scholar, lobbied Congress to enact his version of the REA. When it was eventually passed, Clark assisted in selecting individuals to serve on the Supreme Court Advi-

¹²¹ 6 Proceedings of U.S. Supreme Court Advisory Committee on Rules for Civil Procedure 1631 (Nov. 18, 1935) (unpublished archive on file with the Charles E. Clark Papers collection at the Yale Manuscripts and Archives Library, Box 94, Folder 5) [hereinafter 6 Proceedings of U.S. Supreme Court Advisory Comm.].

¹²² Clark, *supra* note 12, at 82.

¹²³ 6 Proceedings of U.S. Supreme Court Advisory Comm., *supra* note 121, at 1631.

¹²⁴ See Burbank, *supra* note 5, at 1043–95.

¹²⁵ *Id.*

sory Committee for the FRCP.¹²⁶ Clark also maneuvered to have himself, not more senior procedural scholar Edson Sunderland, appointed Reporter for the Advisory Committee.¹²⁷

Although Clark knew what he wanted to put into each of the new Federal Rules, he could not entirely exclude Sunderland from the drafting process.¹²⁸ Clark assigned Sunderland to draft several sets of provisions, including those on summary judgment.¹²⁹

Sunderland surveyed prior state summary judgment rules to include in his first draft.¹³⁰ He took the basic idea for the statute from England, took the penalty for deceitfully using the motion from Michigan's statutory scheme, and took from Connecticut the provisions permitting summary judgment to be a tool to decide questions of law when no questions of fact existed. He borrowed the expansive reach of the summary judgment from New York's

¹²⁶ Hoffer, *supra* note 12, at 423. The Advisory Committee included: Charles Clark, the Reporter; Edson Sunderland, a drafter; George Wickersham; Professor Cherry; Armistead Dobie; Edmund M. Morgan; Scott Loftin; Edgar Tolman; and William D. Mitchell, the committee chair. These men came from diverse areas of the legal profession. Wickersham was President of the American Law Institute when he was appointed to the Advisory Committee, was former Attorney General under President Taft, and led one of New York's premier corporate law firms—Cadwalader, Wickersham & Taft. He had also recently stepped down as chairman of the National Commission on Law Observance and Enforcement. The other members of the committee came from diverse areas of the legal profession. Loftin was President of the American Bar Association. Tolman was secretary of the ABA, editor of its journal, and represented the Department of Justice as Special Assistant to the Attorney General. Chairman Mitchell was himself another former Attorney General who had recently retired from public office to privately practice law in New York City. Monte Lemann of New Orleans, Robert Dodge of Boston, and Warren Olney of San Francisco were practitioners. There were also several professors. Dobie was a professor at the University of Virginia and author of the leading casebook on federal jurisdiction and procedure. Morgan taught at Harvard law school. Sunderland was an eminent procedure professor at the University of Michigan law school, and Wilbur Cherry was dean of University of Minnesota Law School. See Clark, *supra* note 6, at 7-8; Hoffer, *supra* note 12, at 417-19, 423-24.

¹²⁷ Clark, *supra* note 6, at 7-8; Hoffer, *supra* note 12, at 434.

¹²⁸ Clark, *supra* note 6, at 7-8 (intimating that he was forced by external circumstances to give Sunderland the drafting of certain provisions); Hoffer, *supra* note 12, at 434-35 (explaining that Clark gave the drafting of these few rules to Sunderland to keep Sunderland happy because Clark stole the privilege of being the official reporter of the entire project).

¹²⁹ Clark, *supra* note 6, at 7-8; Hoffer, *supra* note 12, at 434-35.

¹³⁰ Clark, *supra* note 6, at 10-12.

well-utilized summary judgment initiatives,¹³¹ relying most heavily on the Commission on the Administration of Justice in New York's 1934 Report.¹³² The scope and format of the proposed summary judgment rules mirrored the Commission's suggestions.¹³³

The result of a vast survey of American and English summary judgment rules, Sunderland's 1935 draft of the Federal Rules was a novel permutation of summary judgment procedures, but it was by no means an entirely novel system. Sunderland's rules were an amalgamation of several jurisdictions' procedures, influenced most heavily by the New York model.¹³⁴ Although Sunderland did not lift his provisions from New York wholesale, New York was a logical place to look for a summary judgment model.¹³⁵

¹³¹ See, e.g., *Waxman v. Williamson*, 175 N.E. 534, 536 (N.Y. 1931) (expanding the definition of debt in Rule 113 to include the value of goods delivered and services rendered); *Poland Export Co. v. Marcus*, 198 N.Y.S. 5, 6 (App. Div. 1923) (expanding the applicability of Rule 113 from the actions included in the statute's text to "express contracts for the payment of money, or where the agreement to pay arises out of a contract relation, as on a *quantum meruit* or *quantum valebat*, and not those where a promise to pay is implied from the violation of a duty, by reason of which in equity and good conscience the money should not be withheld."); *Hanna v. Mitchell*, 196 N.Y.S. 43, 54-56 (App. Div. 1922) (defending, generally, New York's summary judgment provision); *Montgomery v. Lans*, 194 N.Y.S. 96, 97 (App. Term 1922) (stating, even so early in the New York summary judgment's tenure, that the "rule should be liberally construed").

¹³² See REPORT OF THE COMM'N ON THE ADMIN. OF JUSTICE IN NEW YORK, *supra* note 80, at 285-88.

¹³³ Compare *id.* with 1 U. S. Supreme Court Advisory Committee on Rules for Civil Procedure, pt. 2, Rules 66-78 (Oct. 16, 1935) (unpublished archive, on file with the Charles E. Clark Papers collection at the Yale Manuscripts and Archives Library, Box 97) [hereinafter 1 U.S. Supreme Court Advisory Comm.].

¹³⁴ New York's influence on Sunderland was explicitly affirmed when a member of the Advisory Committee asked Sunderland, "You followed the recommendation of the Commission [on the Administration of Justice in New York]?" Sunderland responded affirmatively. Later in the discussion, Sunderland revealed that at first he wrote his summary judgment provision like New York's Rule 113, including only a limited provision. After deliberation he "shifted" to the expansive form present in the first draft. 6 Proceedings of U.S. Supreme Court Advisory Comm., *supra* note 121, at 1572-73, 1579.

¹³⁵ It is no wonder that Sunderland was most interested in New York's innovations: the procedure had proved more useful in New York since its introduction there in 1921 than it was in any other jurisdiction to date. See *supra* notes 69-71 and accompanying text. New York therefore frequently expanded the procedure—both through its own improvements and by adapting those of other jurisdictions.

More interestingly, Sunderland's draft split summary judgment proposals into two types of procedures, as did the Commission on the Administration of Justice in New York. Sunderland's two types of summary judgment had different purposes and evidentiary standards. Like the New York model, Sunderland's first draft required a motion based on affidavit that factually demonstrated the moving party's entitlement to judgment.¹³⁶ Also like the New York version, his draft provided that summary judgment be granted in certain cases in which the claims failed to present a factual issue for trial.¹³⁷

Sunderland's initial draft of the summary judgment provisions included thirteen separate rules, Rules 66 through 78.¹³⁸ The first four related to summary judgment on depositions or admissions. The remaining nine rules dealt with summary judgment on affidavits. He conceived of summary judgment as comprising two discrete procedural measures, but it is difficult to precisely distinguish his two types of summary judgment. Summary judgment on depositions and admissions was designed for situations in which the parties' depositions and admissions on file clarified the factual situation, removing any doubt as to the case's applicable facts and leaving only legal questions.¹³⁹ In this situation, summary judgment could be invoked to expeditiously answer the case's remaining question of law. However, Sunderland intended summary judgment on affidavits as a means of distinguishing between founded and fabricated claims and defenses. Summary judgment on affidavits was to be invoked when a claim was facially groundless.¹⁴⁰

Rule 66 discussed the extent of summary judgment's availability on depositions and admissions.¹⁴¹ This form of relief would be granted if the relevant depositions and admissions dispelled all factual questions, leaving only legal determinations for the court.¹⁴² Rule 66 was designed to diminish trial time in factually certain cases by giving parties the ability to avoid litigating a full trial only to

¹³⁶ REPORT OF THE COMM'N ON THE ADMIN. OF JUSTICE IN NEW YORK, *supra* note 80, at 285-86.

¹³⁷ *Id.* at 285.

¹³⁸ 1 U.S. Supreme Court Advisory Comm., *supra* note 133.

¹³⁹ *Id.* at Rule 66.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

have a judge declare the parties' rights according to the clearly applicable law. Under the federal rules, both plaintiffs and defendants could file for summary judgment. Unlike the conception of summary judgment in many states, where the procedure was designed as a device to assist plaintiffs,¹⁴³ Sunderland's draft gave plaintiffs and defendants equal opportunities.¹⁴⁴ Additionally, Rule 66 included Connecticut's standard that the party prevailing on summary judgment must be entitled to judgment "as a matter of law."¹⁴⁵ Unlike other formulations that endowed the presiding judge with a considerable amount of discretion, tentative Rule 66 provided concrete criteria for determining whether or not summary judgment was available on depositions or admissions.

The next three rules were part of one design, also dealing with summary judgment on depositions and admissions. Rule 67 mandated that, except when used to dispose of affirmative defenses, summary judgment was the legal equivalent of a full adjudication of the case, triggering *res judicata* and preclusion as would any other final judicial determination.¹⁴⁶ Rule 68 permitted partial summary judgment on depositions and admissions,¹⁴⁷ and Rule 69 outlined the way in which courts should decide the extent of damages or other remedies to be awarded.¹⁴⁸ Rule 68 and the second half of 67 were counterparts. Both served as methods of narrowing and defining the questions and issues determining the scope of the case. Rule 69 permitted summary judgment on portions of issues. While summary judgment was designed to rapidly dispose of cases, it was not meant to be used inequitably. Even successful summary judgment motions did not necessarily determine the movant's final success in the action, which could involve complex issues that were not necessarily determined by the motion granted.

¹⁴³ See *supra* Part I.

¹⁴⁴ Sunderland had long thought equal opportunities for plaintiffs and defendants to move for summary judgment was very important. See 1 U.S. Supreme Court Advisory Comm., *supra* note 133, at Rule 66 (allowing "any party" to move for summary judgment); Sunderland, *supra* note 23, at 198-99.

¹⁴⁵ See *supra* notes 51-56 and accompanying text; 1 U.S. Supreme Court Advisory Comm., *supra* note 133, at Rule 66.

¹⁴⁶ 1 U.S. Supreme Court Advisory Comm., *supra* note 133, at Rule 67.

¹⁴⁷ *Id.* at Rule 68.

¹⁴⁸ *Id.* at Rule 69.

Sunderland's draft of Rules 70 through 78 dealt with summary judgment on affidavits which, in Sunderland's scheme, was an entirely separate procedure from summary judgments on depositions and admissions. Rule 70 indicated that summary judgment on an affidavit was available to both plaintiffs and defendants on all claims, counterclaims, and cross-claims, in all circumstances, thus providing both parties with the same opportunity to bring a motion for summary judgment.¹⁴⁹ Sunderland maintained in his provisions that "[b]oth [plaintiff and defendant] ought to be treated alike," and that summary judgment extend to all classes of action.¹⁵⁰

Sunderland's conception of summary judgment was useful in several ways. He tried to make the procedure as equitable as possible, making summary judgment available to all parties at all times on all claims.¹⁵¹ The most crucial element of Sunderland's summary judgment was that it included two separate elements, each with a different role. Sunderland saw summary judgment on affidavits as the best procedure to speed the collection of debts from derelict debtors. The second type of summary judgment, on depositions and admissions, was intended to give judges the latitude to solve purely legal matters with no intermingled disputed questions of fact without a trial or jury. Both of these types of procedures were meant to speed up the disposition of cases in federal court by helping clear away unnecessary delays in the adversarial system.

PART IV

Edson Sunderland's perspective on summary judgment was definitive for certain aspects of the provision's formulation in the FRCP. However, the rest of the Advisory Committee perceived elements of the procedure differently. In 1935, when the Advisory Committee—which represented a relatively diverse group in terms of their home states' procedures—met to deliberate the first draft of the Rules, they raised several concerns.¹⁵² Some were troubled by

¹⁴⁹ *Id.* at Rule 70.

¹⁵⁰ 6 Proceedings of U.S. Supreme Court Advisory Comm., *supra* note 121, at 1572, 1588.

¹⁵¹ See Sunderland, *supra* note 23, at 198–99.

¹⁵² See *supra* notes 121–23 and accompanying text (discussing that summary judgment was accepted by attorneys who were familiar with the procedure).

elements of the procedure that Sunderland had not addressed, due to his familiarity and comfort with summary judgment. During the discussions Sunderland defended the provisions in his draft and worked to convince the skeptics of his scheme's advisability and practicality.

It is interesting to note that the Committee's reservations seem to have been partially mitigated by their perception that New York's summary judgment rule was the foundation of Sunderland's provisions. In the very first discussion, George Wickersham assumed that Sunderland was taking his provision from the New York Rule.¹⁵³ He was eventually convinced of the advisability of extending the procedure "because of the New York Rule, and the procedure taking place under it."¹⁵⁴ Nevertheless, the Committee was not entirely convinced by New York's success and raised some issues with the procedure as put forth by Sunderland.

Certain members of the Advisory Committee, particularly Wickersham, were initially concerned about broadening summary judgment's applicability.¹⁵⁵ Interestingly, his objection was based on practice, not principle. Wickersham pointed out that the "limitations in the New York rule were put in out of precaution, as it was a new remedy, and they did not want to make it too offensive to the bar right away; and they have been extending it gradually."¹⁵⁶ He felt that it would be best if the new Federal Rules were similarly cautious. To defeat the objection, Sunderland explained that attorneys in places without summary judgment were still "very favorable" to its unrestricted availability.¹⁵⁷ When it came to summary judgment's scope, "[i]f you are going into unliquidated claims at all, you might just as well go the whole way."¹⁵⁸

Some of the Advisory Committee members still wanted to discuss the procedure practically, specifically the types of issues and cases in which summary judgment might be available. Committee member Scott Loftin asked whether there was "any jurisdiction

¹⁵³ See 6 Proceedings of U.S. Supreme Court Advisory Comm., *supra* note 121, at 1572-73.

¹⁵⁴ *Id.* at 1574.

¹⁵⁵ See *id.* at 1572-73.

¹⁵⁶ *Id.* at 1573.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1574.

where this kind of procedure applies to all kind of actions.”¹⁵⁹ Sunderland replied, “There is not. . . . They have [had] quite a tendency in England to enlarge. . . . [T]hey have got almost everything in, but not yet. . . . I do not know why.”¹⁶⁰ But Loftin was still reluctant to allow summary judgment to be so expansive without a justification for its unprecedented increase. He wondered “whether we are going too far, whether there is some reason why it should be limited to certain classes of actions.”¹⁶¹ As if speaking for Sunderland, Wickersham replied, “I think it was because the bar was not familiar with it.”¹⁶²

Sunderland argued that summary judgment’s utility in the types of cases to which it was already applicable encouraged its expansion to all classes of action. He explained: “I have a statement here in the Report of the Commission [on Administration of Justice in New York]. . . . [T]he total number of summary-judgment motions for the 9-year period. . . . was probably . . . 15.4 per cent of the probable total number of contract cases on the trial calendar . . .”¹⁶³ He was intent on translating New York’s mechanisms into a means of improving the federal courts’ efficiency.

However, as the New York report discussed its success only in contract actions, this defense based on the New York report left Sunderland open to another line of inquiry—whether the provisions were important for tort actions as well.¹⁶⁴ Sunderland felt that questioning summary judgment’s utility in tort posed a broader challenge to extending summary judgment to any unliquidated claims, as all unliquidated claims posed essentially the same evidentiary challenge vis a vis summary judgment. Committee chair William Mitchell answered that “[i]n New York the law does include unliquidated contracts.”¹⁶⁵ Sunderland continued, “[A]nd England began with liquidated values, and they finally enlarged it to bringing in all the others. New York began with liquidated value, and they

¹⁵⁹ *Id.* at 1605.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1608.

¹⁶² *Id.*

¹⁶³ *Id.* at 1608–09.

¹⁶⁴ See REPORT OF THE COMM’N ON THE ADMIN. OF JUSTICE IN NEW YORK, *supra* note 80.

¹⁶⁵ 6 Proceedings of U.S. Supreme Court Advisory Comm., *supra* note 121, at 1609.

enlarged it to bring in all the others.”¹⁶⁶ Sunderland felt that the reason that members of the bar in other jurisdictions refused to remove all of the limits on summary judgment was “nothing; no reason whatever,” they were motivated only by timidity.¹⁶⁷

The members of the Advisory Committee were nevertheless not uniformly convinced, and one member suggested that they “include tort cases but in all causes restrict the court to formulating the issue.”¹⁶⁸ After quite a bit of discussion, Sunderland finally began to convert some of his opponents. One admitted that “there may be [tort] cases where [summary judgment] would help. If you permit it and it cannot work in the majority of cases, it has not done any harm,” and the summary judgment would still expedite a certain additional number of cases.¹⁶⁹ In the end, the Advisory Committee agreed to permit summary judgment’s extension to all classes of action.

The right to a jury trial was another issue debated by the Advisory Committee. Mitchell raised the question of whether or not summary judgment infringed on “the constitutional right to a jury trial.”¹⁷⁰ The committee dwelled on this issue for the rest of their Rule 66 discussion.¹⁷¹ A seasoned practitioner familiar with summary judgment may not have raised the jury trial objection.¹⁷² Mitchell, however, was “not familiar with summary judgments.”¹⁷³ Al-

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1625.

¹⁶⁸ *Id.* at 1624.

¹⁶⁹ *Id.* at 1634.

¹⁷⁰ *Id.* at 1574.

¹⁷¹ *Id.* at 1574–85.

¹⁷² In 1902 the Supreme Court ruled on the constitutionality of a procedure very similar to summary judgment. *See Fidelity & Deposit Co. of Maryland v. U.S.*, 187 U.S. 315 (1902) (indicating that summary judgment “prescribes the means of making an issue. . . . The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands.”). The Supreme Court decided that “[i]f it were true that the rule deprived the plaintiff in error of the right of trial by jury, we should pronounce it void without reference to cases. But it does not do so.” *Id.* at 320. The Supreme Court thus declared more than three decades before the Advisory Committee met that summary judgment-type procedures did not interfere with the right to a jury trial as no issues of fact existed for the jury to determine. *See also Hanna v. Mitchell*, 196 N.Y.S. 43, 54–56 (App. Div. 1922); *Commonwealth Fuel Co. v. Powpit Co.*, 209 N.Y.S. 603, 607–08 (App. Div. 1925); *Karpas v. Bandler*, 218 N.Y.S. 500, 502–503 (App. Div. 1926); *see generally Ex parte Peterson*, 253 U.S. 300 (1920).

¹⁷³ 6 Proceedings of U.S. Supreme Court Advisory Comm., *supra* note 121, at 1574.

though he was comfortable with the judge determining whether the litigants' dispute had sufficient merit to warrant a trial, he was not comfortable with the judge alone determining the extent of damages to be awarded in unliquidated claims.¹⁷⁴ Sunderland countered that "there [was] no constitutional right to a trial by jury for damages."¹⁷⁵ Summary judgment, and the subsequent judicial damages determination, was analogous to a judgment "on default."¹⁷⁶ It was only for convenience that the previously impaneled jury decided the question of damages in a jury trial. Sunderland maintained that "[i]f the case goes to the jury at all, it all goes; if it does not go to the jury on any question affecting liability, then you are outside the realm of jury trial,"¹⁷⁷ and on summary judgment the judge could determine damages.

Some members of the Advisory Committee were still not convinced.¹⁷⁸ Charles Clark stepped in with legal theory justifying summary judgments. "Summary judgments . . . have been upheld, the general theory being that the process determines that there is no defense; the defense is only a sham."¹⁷⁹ Another member further clarified that summary judgment would only be available where the party deserved the judgment as a matter of law: it could only be used when the "judge would have to instruct the jury" anyway.¹⁸⁰

The Advisory Committee's treatment of the jury trial in summary judgment revealed the more conservative and hesitant tendencies of individuals from non-summary judgment states. However, what is surprising about the Advisory Committee's reaction is their strong focus on the jury trial in summary judgment, which—although a significant element of the American legal system—was not an element innovated by Sunderland. They were interested in preserving entrenched rights from the encroachments of new summary judgment innovations.

Jury trial was such a concern to Dunworth that he wanted to make a general rule that "trial by jury is preserved where any issue

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1575.

¹⁷⁷ *Id.* at 1575–76.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1577.

¹⁸⁰ *Id.*

of fact arises on the pleadings. . . . [I]t is our duty to . . . preserve trial by jury in every case where it is not waived, and where there is an issue of fact in the pleadings not done away with by an admission of the parties."¹⁸¹ However, Clark maintained that the summary judgment "does not go on the theory of admissions at all, but only on the theory that there is a sham defense"¹⁸² and therefore no form of trial, especially a jury trial, is warranted.

There were multiple legal and policy arguments on both sides of the issue. In the end, a member moved "on the matter of policy, that in every case where there is nothing left but the question of damages, it be left to the jury to determine."¹⁸³ The Advisory Committee determined that, assuming that the jury was not waived, the right to a jury trial to determine unliquidated damages should be preserved.¹⁸⁴

In a related matter, members of the committee wanted to ensure that summary judgment's applicability be explicitly and unmistakably confined to situations in which no questions of fact were involved. All factual issues would be decided by a jury. In his provisions on summary judgments on depositions and admissions, Sunderland made it clear that summary judgment would only be available if the party was entitled to judgment "as a matter of law."¹⁸⁵ However, in his draft of the rules on summary judgment on affidavits he did not use this language,¹⁸⁶ which concerned some of the Advisory Committee. Chairman Mitchell said, "[T]he language [should] make it perfectly clear that you are not deciding the case on the summary judgment application on statement of facts on affidavit."¹⁸⁷ Through the affidavit "the court is getting at . . . not a decision sticking to the facts, but to ascertain whether as a matter of law there is any issue of fact at all."¹⁸⁸ Edgar Tolman reinforced the point: "The sole ground for sustaining these judgments, summary judgments, is that there is no substantial issue

¹⁸¹ *Id.* at 1595.

¹⁸² *Id.*

¹⁸³ *Id.* at 1584.

¹⁸⁴ *Id.* at 1584–85.

¹⁸⁵ 1 U.S. Supreme Court Advisory Comm., *supra* note 133, at Rule 66.

¹⁸⁶ *See generally id.* at n. following Rules 70–78.

¹⁸⁷ 6 Proceedings of U.S. Supreme Court Advisory Comm., *supra* note 121, at 1593.

¹⁸⁸ *Id.*

of fact. Then why not say there is no substantial issue of fact?"¹⁸⁹ Committee members collectively agreed to the suggested language.¹⁹⁰

Rule 67, describing the nature of the judgment rendered, said that summary judgment on depositions or admissions would be decisions on the merits except those solely disposing of defenses.¹⁹¹ There was confusion about the meaning of this rule. "What does Rule 67 mean?" asked Olney. "I do not want that passed without an explanation of it."¹⁹² Clark explained, "That is so that there will not be a dismissal merely; that the judgment will be on the merits. It is a final judgment."¹⁹³ Commenting on Clark's explanation, Sunderland said, "I want to be sure that [summary judgment] is not a mere dismissal without prejudice."¹⁹⁴ Sunderland explained that "at common law they did not treat the two parties alike. If the plaintiff failed, it was just a dismissal, but if the defendant failed it was a final judgment on the merits; and that is unfair."¹⁹⁵ Sunderland maintained that "[b]oth ought to be treated alike, and that is all I am trying to provide for here."¹⁹⁶ Equality between the parties on all procedural elements was one of the important goals of the Advisory Committee. However, the more hesitant members of the Committee were not immediately inclined to extend this principle to all elements of summary judgment.

The debate continued in other areas as well. Sunderland intended a grant of summary judgment to be a final remedy, disposing of a case in the same manner as would a final judgment after a full trial.¹⁹⁷ However, Wickersham challenged whether, if a "complaint is dismissed because, on inquiry, it appears that the plaintiff has failed to establish a cause of action," then is the judgment "rendered a bar to a subsequent suit on the same cause of action, with an additional statement of facts, perhaps?" Clark, for the progressive

¹⁸⁹ *Id.* at 1594.

¹⁹⁰ *Id.* at 1594-95.

¹⁹¹ 1 U.S. Supreme Court Advisory Comm., *supra* note 133, at Rule 67.

¹⁹² 6 Proceedings of U.S. Supreme Court Advisory Comm., *supra* note 121, at 1586.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1587.

¹⁹⁵ *Id.* at 1588.

¹⁹⁶ *Id.*

¹⁹⁷ *See id.*

group, maintained that “[i]t ought to be.”¹⁹⁸ But Wickersham was not satisfied: “Suppose subsequently he gets facts which would entitle him to recover, and he brings a new suit . . . Is the first judgment, a bar to his bringing that suit?” Mitchell and Sunderland replied, almost as one, “[I]t ought to be.”¹⁹⁹ Wickersham continued, “[B]ut I question whether it is.”²⁰⁰ “I do not think there is any question but that it is barred. Of course that motion by the defendant has not been very much used,” explained Clark.²⁰¹ But Clark was adamant that the effect of summary judgment was final judgment on the merits.²⁰²

However, several members were still wary, so Sunderland gave a concrete example of summary judgment’s finality. “[S]uppose the defendant raises the point by denial of something that the plaintiff has alleged. Under this rule [Rule 67] the defendant can ask for a summary judgment either on affirmative defense or on a denial. . . . [W]hy should there not be final judgment on the merits against the plaintiff instead of just a dismissal?”²⁰³ With that explanation, the matter came to a close. Dodge, a practitioner in Boston, agreed that “there should be” a final judgment against the plaintiff in Sunderland’s example.²⁰⁴ And, Sunderland clarified, “the rule ought to be drawn so that if the issue is one which would dispose of the case, then it is a final judgment.”²⁰⁵ Satisfied, the members of the Advisory Committee paved the way for plaintiffs’ and defendants’ equal treatment in federal courts, requiring summary judgment to have equal finality regardless of which party brought the motion.

The discussions of the Advisory Committee demonstrated their conservatism on several issues including trial by jury, and the nature and extent of summary judgment. Sunderland and the more progressive faction convinced those less familiar with summary judgment to make it as extensive and useful as possible. Although the majority of the Advisory Committee did not budge on the jury trial issue – which they viewed as threatening a vital, constitutionally

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1590.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 1591.

²⁰³ *Id.*

²⁰⁴ *Id.* See also Hoffer, *supra* note 12, at 427.

²⁰⁵ 6 Proceedings of U.S. Supreme Court Advisory Comm., *supra* note 121, at 1592.

protected right—they accepted that the federal courts’ expanding docket and inefficiency made maximally expansive summary judgment important.

PART V

Charles Clark, the Reporter of the Advisory Committee on the Drafting of the FRCP, who was accustomed to summary judgment,²⁰⁶ did not have the same concerns with Sunderland’s summary judgment provisions as some of the other members of the Advisory Committee. However, Clark had his own concerns with Sunderland’s rules. Clark was interested in making the Federal Rules as textually concise and legally broad as possible, in order to increase the federal courts’ efficiency. Clark wanted to consolidate the rules and make them clearer for the bench and bar. He often allowed Sunderland’s ideas and innovations to stand, but Clark poked fun at Sunderland’s wording and objected to some of Sunderland’s emphases.²⁰⁷

Clark was opposed to several elements of Sunderland’s formulation, including Sunderland’s decision to break summary judgment into multiple rules. Clark felt that several of the rules could be combined, or even covered together “by some general phrase.”²⁰⁸ Clark’s conception of summary judgment was of a broadly-worded provision applicable to many different situations, rather than Sunderland’s multiplicity of narrower provisions. In the end, Clark’s persistence over Sunderland’s objections got Olney, another member of the

²⁰⁶ See Clark & Samenow, *supra* note 12.

²⁰⁷ Poking fun at Sunderland’s draft, Clark said that, “referring to Rule 67 here, I do not know that it is quite foolish on its face, but it almost says that all summary judgments shall be on the merits unless they are not on the merits.” 6 Proceedings of U.S. Supreme Court Advisory Comm., *supra* note 121, at 1585. Rule 67 reads: “All summary judgments rendered upon depositions or admissions shall be upon the merits, except judgments rendered for either party upon defenses to any claim or counterclaim not going to the merits.” 1 U.S. Supreme Court Advisory Comm., *supra* note 133, at Rule 67. Sunderland attempted to explain his provisions: “where the plaintiff has tried to state a case . . . the judgment should be positive and final against him on the merits.” 6 Proceedings of U.S. Supreme Court Advisory Comm., *supra* note 121, at 1587.

²⁰⁸ 6 Proceedings of U.S. Supreme Court Advisory Comm., *supra* note 121, at 1585.

Advisory Committee, to suggest that the “matter be covered by Dean Clark making his suggestions to the draftsman.”²⁰⁹

Sunderland’s wordiness was not Clark’s only concern. Sunderland’s rules provided a motion to sweep away clearly spurious issues, and the procedures were to be equally applicable to plaintiffs and defendants.²¹⁰ Clark envisioned summary judgment as a more expansive remedy aimed at simplification of an entire trial, rather than at a specific issue under motion.²¹¹ These two perspectives clashed during a discussion of whether the motion, even if denied because some factual issue was presented, could be used “to limit the issues to be drawn.”²¹² Clark favored this usage.²¹³ Sunderland, although concerned with efficiency, did not want to achieve it at the expense of equal treatment for plaintiffs and defendants. He reasoned that if a party moved for summary judgment after only their side of the case had been presented, then the chance that issues would be improperly excluded is increased, even if insufficient certainty is reached to grant summary judgment.²¹⁴ However, Clark’s perspective once again prevailed in the instructions for redrafting the new provision. Chairman Mitchell suggested “refer[ring] back to the Recorder [Clark] the question whether or not he cannot take advantage of the summary judgment procedure where the summary judgment is denied, for framing the issues, limiting the issues, and excluding those which he ruled out as chaff.”²¹⁵ Although Sunderland redrafted this provision, Mitchell’s unequivocal agreement with Clark meant that Sunderland’s view was bound to lose.

The next draft of the summary judgment rules were included in Tentative Draft II, which were discussed from mid-December 1935

²⁰⁹ *Id.* at 1586.

²¹⁰ See *supra* notes 197–199 and accompanying text (discussing Sunderland’s first draft).

²¹¹ See Clark, *supra* note 12, at 82.

²¹² See 6 Proceedings of U.S. Supreme Court Advisory Comm., *supra* note 121, at 1617.

²¹³ See Clark, *supra* note 12, at 82 (describing the summary judgment rule as a means not only to resolve simple claims but also to efficiently dispose of large amounts of important litigation).

²¹⁴ See 6 Proceedings of U.S. Supreme Court Advisory Comm., *supra* note 121, at 1617.

²¹⁵ *Id.* at 1618.

to mid-January 1936.²¹⁶ The second draft of the rules reflected several important changes. The differentiation between summary judgment on affidavits and summary judgment on depositions and admissions remained. However, the new draft included only two rules instead of thirteen. The new Rule 40 became Motion for Summary Judgment on Depositions and Admissions, useful when only questions of law remained and matters of fact were not in dispute.²¹⁷ Rule 41 became Motion for Summary Judgment Upon Affidavits, permitting summary judgment when factual disputes existed but one position was so totally disingenuous as to be disposable by evidence on affidavit.²¹⁸

The reworked summary judgment rules were masterfully reworded—clearly and concisely, perhaps suggesting Clark’s hand in the version. However, his presence is less apparent in the redraft’s substance. These versions largely included the same concepts as Sunderland’s first draft. Sunderland’s extension of summary judgment to all classes of action, parties’ equal treatment, and its limitation to the motions made, to the exclusion of its use as an issue-narrowing device, all remained in the second draft.²¹⁹ Furthermore, Rules 40 and 41 retained the different characters of the motions. Thus, the second draft included the dual but separate functions of summary judgment: permitting judicial resolutions of pure questions of law and dissipating dilatory proceedings.

Although this draft did not incorporate Clark’s suggestions, it did indirectly integrate the Advisory Committee’s concerns. The note after Rule 40 addressed the question of deciding a residual question of damages when all other factual questions were resolved.²²⁰ It extended the general provisions respecting jury trials to damages in cases disposed of by summary judgment.²²¹ The right to jury trial, as insisted upon by a strong segment of the Advisory Committee,

²¹⁶ 2 U.S. Supreme Court Advisory Committee on Rules for Civil Procedure, Preparatory Papers Tentative Draft II (Charles E. Clark reporter) (Dec. 23, 1935–Jan. 15, 1936) (unpublished archive, on file with the Charles E. Clark Papers collection at the Yale Manuscripts and Archives Library, Box 98).

²¹⁷ *Id.* at Rule 40.

²¹⁸ *Id.* at Rule 41.

²¹⁹ *Id.*

²²⁰ *Id.* at n. to Rule 40.

²²¹ *Id.*

was preserved.²²² Summary judgment's scope was also addressed in the second draft – the note to Rule 41 was designed to alleviate fears that an extensive rule would overwhelm parties' rights at trial.²²³ Sunderland explained in this note the way in which states had used summary judgment, its effectiveness in New York, and that "there is no reason for restricting [summary judgment rules] to any type of case" as "[t]hey will tend to be used . . . only in appropriate cases."²²⁴

The succeeding two drafts that were in circulation over the following year, Tentative Drafts III²²⁵ and IV, did not include material alterations to the summary judgment provisions. In Tentative Draft III, however, Clark drastically changed both the function of summary judgment and the wording. The provisions for summary judgment for both the claimant and the defendant explained that "[a]ny party seeking to recover upon a claim, counterclaim or cross-claim may . . . move for a summary judgment in his favor upon all or any part thereof."²²⁶ Such judgment shall forthwith be rendered if the depositions, admissions, and affidavits "set forth facts which, on their face, would require a decision in his favor as a matter of law."²²⁷ Clark's formulation retained Sunderland's most significant contributions to summary judgment: its unlimited applicability and its use to resolve disputes of law when the material facts are agreed upon. Clark, however, transformed these basic innovations to reflect his own vision.

Deleting Rule 42, Summary Judgment on Depositions and Admissions, Clark combined both types of summary judgment into one more general procedure. He wrote in general language and made depositions, admissions, and affidavits concurrently available options as means of proving contentions on the motion.²²⁸ Furthermore, Clark took Sunderland's original formulation for granting

²²² *Id.*

²²³ *Id.* at n. to Rule 41.

²²⁴ *Id.*

²²⁵ 3 U.S. Supreme Court Advisory Committee on Rules for Civil Procedure, Preparatory Papers Tentative Draft III (Charles E. Clark reporter) (Mar. 1936) (unpublished archive, on file with the Charles E. Clark Papers collection at the Yale Manuscripts and Archives Library, Box 98).

²²⁶ 7 U.S. Supreme Court Advisory Comm., *supra* note 9, at Rule 43 (containing annotations by C.E. Clark).

²²⁷ *Id.*

²²⁸ *Id.*

summary judgment on depositions or admissions when the case was clear “as a matter of law”²²⁹ and made it the standard necessary for granting any summary judgment. Both summary judgment granted when no factual controversy existed and summary judgment granted to rid the trial of dilatory elements required that the motion be granted only when a case’s resolution was clear as a matter of law.

In the next draft of the Rules, a preliminary draft dated February 1937, Rule 43 was largely the same provision as that of the previous draft.²³⁰ However, Rule 44, defining the issues when a case was not fully adjudicated on a motion for judgment, represented a further integration of Clark’s ideas in the summary judgment provisions. If a motion for summary judgment was rejected, the court should declare which facts are uncontroversial and established for the trial.²³¹ Thus even a failed summary judgment motion could result in a simplified trial, finally including Clark’s vision that the rule be used as an issue-narrowing device.

Before the provisions were codified as Rule 56 in the final draft of the FRCP in 1938, summary judgment went through one more incarnation.²³² This version was substantially the same as the previous. It included general provisions making the procedure maximally applicable. All of summary judgment’s uses were included as multiple facets of a single rule.

When the final draft of the FRCP was adopted in 1938, summary judgment was a hybrid of Sunderland’s and Clark’s ideas and innovations. Sunderland’s contributions were made primarily at the earlier phase of the federal procedure’s development. He ensured that summary judgment would be more than just a means of clearing away sham elements of a trial—it would also be used to resolve purely legal disputes. Furthermore, Sunderland’s intimate familiarity with

²²⁹ *Id.*

²³⁰ 8 U.S. Supreme Court Advisory Committee on Rules for Civil Procedure, Preparatory Papers Preliminary Draft (Charles E. Clark reporter) (Feb. 1937) (unpublished archive, on file with the Charles E. Clark Papers collection at the Yale Manuscripts and Archives Library, Box 100).

²³¹ *Id.* at Rule 44 (containing annotation by Charles Clark).

²³² 10 U.S. Supreme Court Committee on Rules for Civil Procedure, Preparatory Papers Final Report Rule 38 (Charles E. Clark reporter) (Nov. 1937) (unpublished archive, on file with the Charles E. Clark Papers collection at the Yale Manuscripts and Archives Library, Box 101).

states' summary judgment procedures gave him insight into summary judgment's docket-clearing potential, moving him to ensure that summary judgment would be equally applicable to all actions for all parties. Clark's contributions occurred in the latter half of the Rules' development. He used Sunderland's procedures as a base and expanded them into an issue-narrowing device, enhancing summary judgment's docket-clearing potential. Clark's additions allowed summary judgment to expedite cases even when the motion itself was denied. While expanding its use, Clark contracted the provision's wording, making the rule clear and concise to avoid confusion when the new rules were introduced as the procedural guidelines of the entire federal court system.

Summary judgment was initially intended to decrease delays in litigation manufactured by corporate defendants, which placed a cost burden on poorer plaintiffs. However, the Advisory Committee did not immediately accept summary judgment's validity as a procedural remedy. Members questioned the constitutionality of bypassing the jury, and the wisdom of permitting its use in all classes of cases. Despite these obstacles, the efforts of Edson Sunderland and Charles Clark transformed summary judgment from a mildly useful procedure for plaintiffs in certain cases, into an invaluable tool for expeditious modern litigation and docket management.