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In 1855 the English Parliament passed Keating's Act,[1] which provided a summary proceeding for collection of bills of exchange.[2] This predecessor of modern federal summary judgment procedure was designed primarily to identify before trial debtors who sought delay through spurious defense.[3] In contemporary American federal practice, however, summary judgment is employed more frequently to identify claimants who lack evidence sufficient to reach the jury and who will therefore probably suffer a directed verdict or its equivalent at trial.[4] The importance of summary judgment to the defendant has been enhanced by a specialization of function within the pretrial system as a consequence of the Federal Rules of Civil Procedure. Common law and to a lesser extent code pleading standards required that the complaint contain a factual allegation of each essential element

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1. Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict., c. 67.

2. *See* Bauman, *The Evolution of the Summary Judgment Procedure*, 31 IND. L.J. 329 (1956).

3. *See id.*

4. The federal district court decisions listed in 28 U.S.C.A. under FED. R. CIV. P. 56, at 35-66 (West Supp. 1973), involved a total of 243 motions for summary judgment. In 75 of the motions (about 31 percent of the total), plaintiffs were the moving parties; in 168 of the motions (about 69 percent), defendants were the moving parties.

Defendants were successful in obtaining summary judgment in 75 of 168 instances (about 45 percent). Plaintiffs obtained summary judgment in 32 of 75 instances (about 43 percent).

In 52 instances defendants sought summary judgment on the basis of an affirmative defense. This represents approximately 31 percent of the total number of motions by

defendants. When asserting affirmative defenses, defendants prevailed in 22 of 52 instances, a success rate of about 42 percent.

In 116 defense motions (about 69 percent of the total), defendants sought to establish the nonexistence of an essential element of the plaintiff's claim. They succeeded in 53 instances, a success rate of about 46 percent. *See* statistical research on file with the *Yale Law Journal*.

It should be noted that many summary judgment decisions are not reported and thus are not reflected in the above statistics.

The current practice undoubtedly reflects the fact that claimants must prove all essential unadmitted elements of a claim to succeed whereas the defendant need only disprove one essential element of the claim in order to prevail. Persons asserting affirmative defenses also confront the burden of proving all essential elements and consequently fall into the same analytical category as claimants when such defenses are challenged on motion for summary judgment. The more inclusive phrase, the party with the burden of proof, is thus more precise than "claimant." Since persons asserting affirmative defenses ordinarily also deny one or more of the claimant's material allegations and will not suffer adverse judgments as a consequence of a plaintiff's motion for summary judgment which is successful only with respect to affirmative defenses, they face such motions much less frequently.