Vanderbilt Law Review

Volume 5
Issue 3 *Issue 3 - April 1952*

Article 17

4-1952

The Scope of Summary Judgment under the Federal Rules

Henry N. Williams

The Model Code was published in 1942, but as yet it has not been adopted in any jurisdiction. It should serve as the basis for decisions limiting the application of privileges to communications.

LLOYD S. ADAMS, JR.
MARY ELIZABETH POLK

THE SCOPE OF SUMMARY JUDGMENT UNDER THE FEDERAL RULES

The Federal Rules of Civil Procedure provide that, under appropriate circumstances, either the plaintiff or the defendant may seek and obtain a summary judgment.[1] The detailed requirements of Rule 56 have been discussed elsewhere,[2] and they will not be discussed herein other than as they aid in delineating the area covered by summary judgments. In determining the scope of Rule 56, the purpose of the rules as a whole[3] must be considered as well as the effect of the discovery procedures of the rules.[4] In addition the summary judgment rule must be explicitly distinguished from a motion for judgment on the pleadings provided elsewhere in the rules.[5]

At common law the purpose of pleadings was to arrive at an issue of law or fact.[6] If a party challenged the legal sufficiency of an opponent's pleading by demurrer, an issue of law was thus raised and decided by the judge. However, if a pleading were met by a denial, an issue of fact was thus raised to be decided by the jury.[7] The complicated rules that followed from this system, and the importance attached to departures from the rules led to the establishment in many states of a system of procedure and pleading enacted by act of the legislature.[8] The chief purpose of these codes was to compel

1. FED. R. CIV. P. 56.

2. Ilsen, *Recent Developments in Federal Practice and Procedure* in FEDERAL RULES OF CIVIL PROCEDURE WITH APPROVED AMENDMENTS 339-58 (West Pub. Co. Rev. Ed. 1947); 3 MOORE, FEDERAL PRACTICE 3175 *et seq.* (1938) (Supp. 1950); Clark, *Summary Judgments, A Proposed Rule of Court,* 2 F.R.D. 364 (1943); Kennedy, *The Federal Summary Judgment Rule—Some Recent Developments,* 13 BROOKLYN L. REV. 5 (1947); Notes, 48 COL. L. REV. 780 (1948), 99 U. OF PA. L. REV. 212 (1950), 55 YALE L.J. 810 (1946).

3. FED. R. CIV. P. 1.

4. FED. R. CIV. P. 26-37; see Melville, *Summary Judgment and Discovery: The Amended Rules Will Add to Their Usefulness,* 34 A.B.A.J. 187 (1948). For New York practice see, Shientag, *Summary Judgment,* 4 FORD. L. REV. 186 (1935).

5. FED. R. CIV. P. 12(c). See Deming v. Turner, 63 F. Supp. 220 (D.D.C. 1945); 99 U. OF PA. L. REV. 212, 214 (1950).

6. CLARK, CODE PLEADING § 4 (2d ed. 1947); MORGAN AND DWYER, THE STUDY OF LAW 116 (2d ed. 1948); SHIPMAN, COMMON-LAW PLEADING § 15 (3d ed., Ballentine, 1923).

7. CLARK, CODE PLEADING § 78 (2d ed. 1947); MORGAN AND DWYER, THE STUDY OF LAW 116 (2d ed. 1948); SHIPMAN, COMMON-LAW PLEADING § 16 (3d ed., Ballentine, 1923).

8. CLARK, CODE PLEADING §§ 7, 8 (2d ed. 1947).

the parties to disclose the facts upon which their claims rested.[9] In general the codes did not succeed in removing common law technicality from the area of pleading, and the theory of disclosure of all facts was no more successful than the theory of developing precise issues.[10] At this point the Federal Rules of Civil Procedure were promulgated. The declared purpose of these rules is "to secure the just, speedy, and inexpensive determination of every action."[11] In place of the old phraseology of "cause of action" is found "claim,"[12] and the only form of action allowed is a "civil action."[13] There is no provision for setting forth facts in the pleadings beyond the minimum necessary to inform the opponent of the nature of either a claim or a defense.[14] There is almost no possibility of arriving at a precise issue of law or fact unless the parties so desire.[15] The determination of the facts and the development of the issues are provided for by the use of depositions and other discovery methods made available by the rules.[16] As a result all the evidence that can be presented at the trial is available to all parties prior to commencement of the trial, unless evidence is concealed by one of the parties, or unless a witness or document is beyond the power of the court and will remain so until the happening of some future event.

In the event that the information contained in the pleadings is such that it is determinative of the outcome of the controversy it is provided that judgment may be rendered on the pleadings;[17] however, in considering a motion for judgment on the pleadings only matters contained therein may be considered and if other matter is presented the motion is disposed of as in a summary judgment.[18] Should the matters contained in the pleadings make it inappropriate to move for judgment on the pleadings, the court in its discretion, may direct the holding of a pre-trial conference, at which time issues may be formulated and stipulations of the parties may be agreed to in order that the actual trial will be speeded and simplified.[19]

As the pre-trial conference is discretionary with each district court, a party would be compelled to go to trial unless a particular court favored the

9. CLARK, CODE PLEADING § 11 (2d ed. 1947); MORGAN AND DWYER, THE STUDY OF LAW 136 (2d ed. 1948).

10. *Ibid.*

11. FED. R. CIV. P. 1.

12. *Id.* 2.

13. *Ibid.*

14. *Id.* 7-11 and Appendix of Forms.

15. *Ibid.*

16. *Id.* 26-37; Holtzoff, *Instruments of Discovery Under the Federal Rules of Civil Procedure,* 41 MICH. L. REV. 205 (1942); Pike and Willis, *The New Federal Deposition —Discovery Procedure and the Rules of Evidence,* 38 COL. L. REV. 1179 & 1436 (1938).

17. FED. R. CIV. P. 12(c); see Note, 99 U. OF PA. L. REV. 212, 214, 226 (1950).

18. *Ibid.*

19. FED. R. CIV. P. 16.

use of the pre-trial procedure. However, a motion for summary judgment under Rule 56 can be made to serve almost the same purpose. Although it is not intended to assert that the purpose of motion for summary judgment is to make mandatory the provisions relating to pre-trial procedure, a careful examination of the two rules will show that essentially the same result will follow in the use of either, except that stipulations cannot be obtained under a motion for summary judgment. The rule in general provides that a motion for summary judgment may be made by either party[20] in any civil action,[21] and that a partial summary judgment may dispose of some issues in the case, allowing the remaining issues to be tried in open court.[22] In ruling upon a motion for summary judgment the court is directed to consider "the pleadings, depositions, and admissions on file, together with affidavits, if any".[23] In brief, on motion for a summary judgment, a court is required to consider all the evidence which has been disclosed and is available to the parties prior to trial, and then to rule as to what issues exist to be tried.

The determination of the existence of an issue has been the shoal upon which judicial opinion has split and sometimes foundered. First, the use of the summary judgment as a procedural device has met with hostility in some of the circuits of the federal judiciary.[24] The terms in which this hostility has been expressed strongly present the attitude of many modern courts toward the use of demurrers, and at least two courts have spoken of a summary judgment as being a legalized form of a "speaking demurrer".[25] Other courts have spoken of whether or not the *pleadings* present any substantial question for determination.[26] Apart from actual hostility expressed in opinions some other courts have taken a somewhat negative approach in determining whether or not a case is appropriate for the rendition of a summary judgment by emphasizing that the summary judgment device is not intended to be a substitute for a trial on the merits and that a judge must not be required to resolve conflicts and ambiguities in the evidence.[27] This is a perfectly sensible

20. *Id.* 56.

21. See Note, 99 U. OF PA. L. REV. 212, 227 (1950).

22. *Ibid.*

23. *Ibid.*

24. See, *e.g.* Parmelee v. Chicago Eye Shield Co., 157 F.2d 582, 587 (8th Cir. 1946); Avrick v. Rockmount Envelope Co., 155 F.2d 568, 571 (10th Cir. 1946); Purity Cheese Co. v. Frank Ryser Co., 153 F.2d 88, 89 (7th Cir. 1946); Michel v. Meier, 8 F.R.D. 464, 471 (W.D. Pa. 1948); Tuolumne Gold Dredging Corp. v. Walter W. Johnson Co., 61 F. Supp. 62, 63 (N.D. Cal. 1945); *cf.* Associated Press Inc. v. United States, 326 U.S. 1, 5, 65 Sup. Ct. 1416, 89 L. Ed. 2013 (1945).

25. Stevens v. Howard D. Johnson Co., 181 F.2d 390, 394 (4th Cir. 1950); Latta v. Western Inv. Co., 173 F.2d 99, 102 (9th Cir. 1949).

26. Schreffler v. Bowles, 153 F.2d 1, 3 (10th Cir. 1946); Bowles v. Ward, 65 F. Supp. 880, 889 (W.D. Pa. 1946).

27. *E.g.*, Coe v. Riley, 160 F.2d 538, 540 (5th Cir. 1947); Falk v. Levine, 66 F. Supp. 700, 703 (D. Mass. 1946); Lincoln Electric Co. v. Knox, 56 F. Supp. 308, 310 (D.D.C. 1944).

interpretation of the language of Rule 56, but it should not cause a judge to hesitate to avoid the delay and expense of a trial when he is convinced that the pleadings and undisputed evidentiary matter presented show that there is no bona fide dispute as to any issue.

Turning to a more positive approach to the interpretation of the scope of Rule 56, we find many expressions in the opinions that the purpose of the rule is to enable the judge to determine whether or not any issue remains to be tried on the merits.[28] The objective of a judge in a hearing upon a motion for a summary judgment is to conduct an inquiry or investigation into the evidence available to determine whether or not there exists a genuine issue of a material fact to be presented to a jury at a regular trial.[29] This procedure does not deprive a party of a jury trial as preserved in the Constitution,[30] for a person has never been entitled to a jury trial unless an issue is tendered,[31] and this procedure merely sets up an orderly method whereby a judge may determine whether or not there is any issue to try. When there is available for consideration of the judge all evidence that could be presented at a trial, then a decision at this point can as adequately dispose of any matter as could be done during a trial on the merits. There are, however, two possible situations in which the moving party may not be able to present all the evidence that might be available at a trial. First, the opposing party may conceal its existence, but he should not be heard to complain if the summary judgment is allowed against his interests as honest and frank disclosure of all evidence is the requisite of proper practice under the Federal Rules. Concealment by an opponent, therefore, should furnish no ground upon which a summary judgment should be refused. The second situation where more evidence would be available at the trial than on a motion for summary judgment is one in which the evidence will not become available until some future date, in which case a judge merely grants a continuance until the evidence can be produced

28. See, *e.g.*, Creel v. Lone Star Defense Corp., 171 F.2d 964, 968 (5th Cir. 1949), *rev'd*, 339 U.S. 497, 71 Sup. Ct. 855, 95 L. Ed. 1364 (1950); Walling v. Fairmont Creamery Co., 139 F.2d 318, 322 (8th Cir. 1943); Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co., 137 F.2d 871, 877 (6th Cir. 1943); Campana Corp. v. Harrison, 135 F.2d 334, 335 (7th Cir. 1943); DeLoach v. Crowley's Inc., 128 F.2d 378, 380 (5th Cir. 1942); Battista v. Horton, Myers & Raymond, 128 F.2d 29 (D.C. Cir. 1942); Miller v. Miller, 122 F.2d 209, 212 (D.C. Cir. 1941); Fletcher v. Krise, 120 F.2d 809, 811 (D.C. Cir. 1941); Board of Public Instruction for Hernando County, Florida v. Meredith, 119 F.2d 712 (5th Cir. 1941); Whitaker v. Coleman, 115 F.2d 305 (5th Cir. 1940); Crosby v. Oliver Corp., 9 F.R.D. 110 (S.D. Ohio 1949); Sanders v. Nehi Bottling Co., 30 F. Supp. 332 (N.D. Tex. 1939).

29. See Sabin v. Home Owners' Loan Corp., 151 F.2d 541 (10th Cir. 1945); Sprague v. Vogt, 150 F.2d 795 (8th Cir. 1945); Burley v. Elgin, J. & E. Ry., 140 F.2d 488 (7th Cir. 1943), *aff'd*, 325 U.S. 711, 65 Sup. Ct. 1282, 89 L. Ed. 1886 (1945); Reconstruction Finance Corp. v. Aquadro, 7 F.R.D. 406 (W.D. Pa. 1947); Read Magazine v. Hannegan, 63 F. Supp. 318 (D.D.C. 1945); Seward v. Nissen, 2 F.R.D. 545 (D. Del. 1942).

30. See Walsh v. Chicago Bridge & Iron Co., 90 F. Supp. 322 (E.D. Ill. 1949).

31. CLARK, CODE PLEADING § 16 (2d ed. 1947); SHIPMAN, COMMON-LAW PLEADING §§ 15, 16 (3d ed., Ballentine, 1923).

for his consideration. If the objective of the judge is to determine the existence of an issue of a material fact, it follows that almost any issue may be subject to decision under Rule 56,[32] and that a summary judgment is within the principle of res judicata to the same extent as any other judgment.[33]

In no area has the divided attitude of the courts so expressed itself as in the Second Circuit. The decisions rendered therein reveal both attitudes. The controversy carried on with Judge Clark and Judge Frank as the opposing champions demonstrates the two approaches to the use and function of summary judgments. In cases decided in which neither of the two judges participated, the other judges of the circuit have consistently applied the rule so that trial judges have been enabled to examine the facts to determine whether or not an issue of fact existed.[34] The language used in the opinions indicates that all doubts should be resolved against the proponent of a motion for summary judgment, and that only a rare case involving a complicated fact situation is appropriate for summary judgment.[35] On the other hand, only one case in which both Judge Frank and Judge Clark participated resulted in both concurring in the opinion of the court.[36] Ordinarily where the two judges sit on a case involving this issue, one writes the opinion of the court and the other dissents.[37] Judge Frank places great emphasis upon the value of a trial on the merits and the importance of oral testimony where judge and jury can assess the value of each witness's testimony.[38] He further cautions that courts should be reluctant to dispose of a case by means of a "trial by affidavit",[39] and that evidence *may* be presented in a trial which would change the entire complexion of the case from the way in which it appears on motion

32. Examples of the variety of issues that can be decided upon summary judgment can be found in the following cases, which are not all inclusive: Harris Stanley Coal & Land Co. v. Chesapeake & Ohio Ry., 154 F.2d 450 (6th Cir. 1946) (laches and the statute of limitations); Fraser v. Doing, 130 F.2d 617 (D.C. Cir. 1942) (bill of review); Daley v. Sears, Roebuck & Co., 90 F. Supp. 562 (N.D. Ohio 1950) (res judicata); Echevaria v. Texas Co., 31 F. Supp. 596 (D. Del. 1940) (want of proper parties). See Note, 99 U. OF PA. L. REV. 212, 223-26 (1950).

33. See Iselin v. C. W. Hunter Co., 173 F.2d 388 (5th Cir. 1949); Stokke v. Southern Pac. Co., 169 F.2d 42 (10th Cir. 1948); Eller v. Paul Revere Life Ins. Co., 138 F.2d 403, 149 A.L.R. 1191 (8th Cir. 1943); Curacao Trading Co. v. Federal Ins. Co., 3 F.R.D. 203 (S.D.N.Y. 1942).

34. Fogelson v. American Woolen Co., 170 F.2d 660, 662 (2d Cir. 1948); Bozant v. Bank of New York, 156 F.2d 787, 790 (2d Cir. 1946); Cohen v. Eleven West 42nd St., Inc. 115 F.2d 531 (2d Cir. 1940).

35. *Ibid.*

36. Weisser v. Mutsam Shoe Corp., 127 F.2d 344, 346 145 A.L.R. 467 (2d Cir. 1942).

37. Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399 (2d Cir. 1945).

38. Colby v. Klune, 178 F.2d 872 (2d Cir. 1949); Fleetwood Acres, Inc. v. Federal Housing Administration, 171 F.2d 440 (2d Cir. 1948); Dixon v. American Tel. & Tel. Co., 159 F.2d 863, 864 (2d Cir. 1947); Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946) (dissenting opinion by Judge Clark); Zell v. American Seating Co., 138 F.2d 641 (2d Cir. 1943), *rev'd per curiam*, 322 U.S. 709, 64 Sup. Ct. 1053, 88 L. Ed. 1552 (1943); *see* Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399, 405 (2d Cir. 1945) (dissenting opinion).

39. Colby v. Klune, 178 F.2d 872 (2d Cir. 1949).

for summary judgment.[40] He goes so far as to describe the use of summary judgment as a "rack and thumbscrew" to compel discovery prior to trial.[41]

Judge Clark, on the other hand, welcomes the summary judgment device as a legitimate investigation by the trial judge to determine whether or not there exists a genuine issue as to a material fact to be disposed of by a trial in open court. He insists that this determination should be made on the basis of a record actually presented not on the basis of one that might possibly be presented.[42] He contends, moreover, that a party should disclose all available evidence prior to trial, and has no right to postpone until trial his decision whether or not to waive any immunity.[43] He does not contend, however, that trial judge should do more than decide whether or not an issue exists.[44]

The Supreme Court of the United States has ruled upon the summary judgment only a few times. In its first interpretation of the propriety of a summary judgment it held that summary judgment should not be rendered in any case where matters of damage were involved;[45] but in line with the dissent by Mr. Justice Stone,[46] the rules have since been amended so that a summary judgment may be rendered on a question of liability even though there is involved a question of damages.[47] Other rulings of the court have restricted the rendition of a summary judgment to the trial court only.[48] Otherwise, where the question has arisen the court has limited itself to a determination of whether or not in a particular case, there existed a genuine issue as to material fact.[49]

---

40. *Ibid.;* Boro Hall Corp. v. General Motors Corp., 164 F.2d 770, 772 (2d Cir. 1947); Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2d Cir. 1945).

41. See Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399, 405 (2d Cir. 1945) (dissenting opinion).

42. Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399 (2d Cir. 1945); Nahtel Corp. v. West Virginia Pulp & Paper Co., 141 F.2d 1 (2d Cir. 1944); Shotkin v. Mutual Benefit Health & Accident Ass'n, 138 F.2d 531 (2d Cir. 1943); see Arnstein v. Porter, 154 F.2d 464, 475 (2d Cir. 1946) (dissenting opinion). For opinions in which Judge Clark concurred, but did not write the opinion of the court see United States v. Curtiss Aeroplane Co., 147 F.2d 639 (2d Cir. 1945); McElwain v. Wickwire Spencer Steel Co., 126 F.2d 210 (2d Cir. 1942); Altman v. Curtiss-Wright Corp., 124 F.2d 177 (2d Cir. 1942); *cf.* MacDonald v. Du Maurier, 144 F.2d 696, 701 (2d Cir. 1944) (dissenting opinion).

43. Engl v. Aetna Life Ins. Co., 139 F.2d 469 (2d Cir. 1943); *cf.* General Accident, Fire & Life Assur. Corp., Ltd. v. Goodyear Tire & Rubber Co., 132 F.2d 122, 125 (2d Cir. 1942) (opinion by Judge Augustus Hand).

44. See notes 42, 43 *supra.*

45. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 Sup. Ct. 724, 88 L. Ed. 967 (1944).

46. *Id.* at 629.

47. FED. R. CIV. P. 56.

48. Fountain v. Felon, 336 U.S. 681, 69 Sup. Ct. 754, 93 L. Ed. 971 (1949).

49. Kennedy v. Silas Mason Co., 334 U.S. 249, 69 Sup. Ct. 1031, 92 L. Ed. 1125 (1948); International Salt Co. v. United States, 332 U.S. 392, 68 Sup. Ct. 12, 92 L. Ed. 20 (1947); Associated Press Inc. v. United States, 326 U.S. 1, 5, 65 Sup. Ct. 1416, 89 L. Ed. 2013 (1945); Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 65 Sup. Ct. 1282, 89 L. Ed. 1886 (1945); Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 62 Sup. Ct. 402, 86 L. Ed. 363 (1942).

CONCLUSION

The controversy over the proper use of summary judgment resolves itself into a dispute as to when a judge may properly decide that the existence of any material fact is genuinely in issue. This in turn resolves itself into two questions: (1) when is it desirable for a judge to decide a case on "paper", and (2) when is it appropriate for a judge to decide a case without the benefit of a jury?

The antagonism of courts to deciding a case upon "paper" seems to be directly influenced by the treatment of dilatory pleas by common law courts and of demurrers by modern courts with a consequent preference for a trial in open court on the merits. The strictness of these views has carried over into the construction of Rule 56. But there seems to be one element which such antagonists overlook in their arguments. Though the summary judgment procedure is based upon "paper" it is more like the procedure before a chancellor in jurisdictions where law and equity are separate,[50] rather than like the procedures where cases are determined upon demurrers. The judge in a motion for summary judgment does not depend on bare paper allegations; rather he has before him the essence of all the evidence that will be available at the trial, and on this evidence he bases his ruling. Further, if a judge erroneously grants a summary judgment there always remains the relief in appellate court where on all the evidence presented to the trial judge the appellate court may decide whether or not there exists a genuine issue.

Neither should there be any doubt of whether or not it is appropriate for judge to rule upon such issues. It is a traditional function of the trial judge to rule frequently upon questions of fact as well as questions of law. First the procedures of almost all jurisdictions provide for a method by which a judge may direct a verdict. In directing a verdict the judge is in effect ruling that no jury could find otherwise from the evidence presented to it. The similarity between this function and that of ruling upon a motion for summary judgment is so great that it has been suggested that the tests of the two functions should be the same—the "directed verdict" test.[51] If this test were used the controversies such as appear in the Second Circuit should arise only if there is conflict as to whether or not the "scintilla rule" should be applied. Second, a judge may rule upon facts in the admission of evidence and that evidence may decide the case. The question of relevance of an item of evidence is clearly a matter to be decided by the judge, but suppose that the relevance

50. For example, in Tennessee the law and equity courts are still divided. See GIBSON'S SUITS IN CHANCERY §§ 1262-69(e) (4th ed., Higgins & Crownover, 1937).

51. Christianson v. Gaines, 174 F.2d 534, 536 (D.C. Cir. 1949); Madeirense do Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399, 405 (2d Cir. 1945). See Note, 99 U. OF PA. L. REV. 212 (1950).

of *A* depends upon the existence of *B*, and the relevance of *B* depends upon the existence of *A*. As both facts cannot be offered simultaneously, the judge must decide that no jury could find the existence of one fact or the other, in order to reject the offered evidence. Similarly, if admissibility of relevant fact *A* depends upon the existence of fact *B*, then the judge may find the existence of fact *B* before admitting the evidence, though his decision in the matter will be controlled by reasons for objecting to the offered evidence, and the possible effect it would have upon a jury.[52]

The summary judgment rule is a part of a procedural code and should be subject to the principles of interpretation applicable to such codes.[53] It is a grant of power by the Congress. The rule is not an abstract mandate, but it states in general terms the purpose and manner of operation of the rule, leaving specific application of it to the judiciary. In properly applying the powers created by this rule, courts may overcome judicial disposition against change, while yet steering clear of an overeager desire to do away with the past.

It is suggested that a proper application and use of the rule may be accomplished by approaching a motion for summary judgment as being in the nature of a pre-trial inquest or investigation[54] to determine whether or not there is any substantial controversy that would be proper for a determination in a full trial. This places upon the parties and their attorneys the responsibility to present all evidence to the trial judge. It requires them to be diligent and honest. The function of the judge is then to determine whether or not there exists a justiciable dispute as to any operative facts, and his decision should be subject to no more doubt or criticism than would be appropriate in any case in which a judge rules on admissibility of evidence, a compulsory nonsuit or a directed verdict.

H. BARTON WILLIAMS

CONSTITUTIONAL PROVISIONS REGULATING THE MECHANICS OF ENACTMENT IN TENNESSEE

Increasing attention is being given to the problems involved in the interpretation by the courts of state constitutional provisions concerning the enactment of statutes.[1] An examination of the problems in Tennessee seems

52. MORGAN AND MAGUIRE, CASES ON EVIDENCE 875 (3d ed. 1951).

53. See Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493 (1950).

54. See Hazeltine Research, Inc. v. General Electric Co., 183 F.2d 3 (7th Cir. 1950); Hurd v. Sheffield Steel Corp., 181 F.2d 269 (8th Cir. 1950); Blood v. Fleming, 161 F.2d 292 (10th Cir. 1947); Simmons v. Charbonnier, 56 F. Supp. 512 (S.D. Ga. 1944).

1. See Charlton, *Constitutional Regulation of Legislative Procedure*, 21 IOWA L. REV. 538 (1936); Fry, *Constitutional Regulation of Legislative Procedure in Colorado*,

desirable in view of the declared policy of the Tennessee Supreme Court of interpreting the provisions of the Constitution of Tennessee substantially without regard to interpretations by courts of other states of comparable constitutional provisions.[2]

No distinction between a bill and a resolution or among the various types of resolutions is made in the Constitution of Tennessee and the possible problems have received little attention by the courts. The constitution requires that joint resolutions or orders except on questions of adjournment be handled as bills with respect to approval by the governor.[3] This requirement has been held to apply to a resolution creating a legislative investigating committee to function after the adjournment of the General Assembly.[4] The governor's approval is not required with reference to formal matters of legislative procedure such as a joint resolution fixing the date for the General Assembly to elect members of the state board of elections.[5] The practice is that the joint resolution is used to provide for formal matters of legislative procedure or expressions of condolence and the resolution of one house regulates matters pertaining only to that house. Bills are used for all other legislative proposals. Bills must be passed on three readings,[6] only one of which can occur on one day, while resolutions other than those proposing amendments to the state constitution[7] are passed on one reading. If the courts should hold that a resolution that had been passed and approved by the governor is law to the same extent that a bill would have been,[8] then several constitutional safeguards in the legislative process will have been successfully evaded.

---

3 ROCKY MT. L. REV. 38 (1930); Grant, *Judicial Control of Legislative Procedure in California,* 1 STAN. L. REV. 428 (1949); Grant, *Judicial Control of the Legislative Process: The Federal Rule,* 3 WEST POL. Q. 364 (1950); Jones, *Constitutional Provisions Regulating the Mechanics of Enactment in Iowa,* 21 IOWA L. REV. 79 (1935); Luce, *Judicial Regulation of Legislative Procedure in Wisconsin,* 1941 WIS. L. REV. 439; Metzenbaum, *Judicial Interpretation of Constitutional Limitations on Legislative Procedure in Ohio,* 11 OHIO ST. L.J. 456 (1950); Nutting, *The Enrolled Bill and the Validity of Legislation,* 15 NEB. L. BULL. 233 (1937); Notes, 32 IOWA L. REV. 147 (1946), 22 IOWA L. REV. 164 (1936), 21 IOWA L. REV. 573 (1936).

2. "Suffice it to say that questions of State constitutional law are, in a very important sense, peculiarly local; and in every jurisdiction the court of last resort must decide for itself the meaning of the constitution under which it exists, and the validity of laws enacted by the legislative branch of the government. The decisions of other courts, construing constitutions containing similar provisions, can be, at most, only suggestive and advisory." Wright v. Cunningham, 115 Tenn. 445, 463, 91 S.W. 293, 297 (1905).

3. TENN. CONST. Art. III, § 18.

4. Gilbreath v. Willett, 148 Tenn. 92, 251 S.W. 910 (1922).

5. Richardson v. Young, 122 Tenn. 471, 125 S.W. 664 (1909).

6. TENN. CONST. Art. II, § 18.

7. *E.g.,* Tenn. Sen. J. 1949, p. 20.

8. Generally a resolution is not considered to be a law. *2* SUTHERLAND, STATUTORY CONSTRUCTION § 3801 (3d ed., Horack, 1943).

The constitution provides that bills may originate in either house, but they may be amended or rejected by the other house.[9] Thus, unlike the requirements of the United States Constitution,[10] any measure may be first considered by either house.

The constitutional requirement of the enacting clause, "Be it enacted by the general assembly of the State of Tennessee,"[11] has been held to be mandatory,[12] but the constitutional requirement is met even though the words "the State of" are omitted.[13]

The requirement that "No bill shall become law which embraces more than one subject, that subject to be expressed in the title"[14] has been the *bete noire* of much legislation. The requirement is mandatory.[15] The term "subject" is synonymous with "purpose"[16] and "object."[17] A chief justice of the Tennessee Supreme Court who was a member of the constitutional convention of 1870 that drafted this provision has explained its purpose: "The Convention evidently designed to cut up [*sic*] by the roots, not only the pernicious system of legislation, which embraced in one act incongruous and independent subjects, but also the evil practice of giving titles to acts which conveyed no real information as to the objects embraced in its provisions."[18]

This requirement is fulfilled when the subject-matter of the act is germane to that expressed in the title, whether the body enlarges or restricts the title.[19] The courts construe this requirement liberally lest "useful" legislation be unnecessarily embarrassed.[20] The generality of the title of an act is no objection to its constitutionality if it covers the subject.[21] Where the title of an act expresses a single general subject or purpose all matters which are naturally and reasonably connected with it and all measures which would or might facilitate the accomplishment of the purpose so stated are properly included in the act and are germane to its title,[22] but the question

9. TENN. CONST. Art. II, § 17.
10. U.S. CONST. Art. I, § 7.
11. TENN. CONST. ART. II, § 20.
12. Kefauver v. Spurling, 154 Tenn. 613, 290 S.W. 14 (1926).
13. State v. Burrow, 119 Tenn. 376, 104 S.W. 526 (1907).
14. TENN. CONST. Art. II, § 17.
15. State v. Yardley, 95 Tenn. 546, 32 S.W. 481 (1895).
16. Warren v. Walker, 167 Tenn. 505, 71 S.W.2d 1057 (1934).
17. State v. Collier, 160 Tenn. 403, 23 S.W.2d 897 (1930).
18. Cannon v. Mathes, 55 Tenn. 504, 518 (1872). See also Swaim v. Smith, 174 Tenn. 688, 130 S.W.2d 116 (1939); Gossett v. State, 2 Tenn. Cas. 546 (1877).
19. Wilson v. State, 143 Tenn. 55, 224 S.W. 168 (1920).
20. State *ex rel.* Morrell v. Fickle, 71 Tenn. 79 (1879); Goetz v. Smith, 152 Tenn. 451, 278 S.W. 417 (1925).
21. State v. Wilson, 80 Tenn. 246 (1883).
22. Cole Mfg. Co. v. Falls, 90 Tenn. 466, 16 S.W. 1045 (1891).

whether the various provisions of an act are congruous and germane is largely one of fact to be determined by the court's knowledge of affairs.[23]

The constitution requires that "All acts which repeal, revive or amend former laws, shall recite in their caption, or otherwise, the title or substance[24] of the law repealed, revived or amended."[25] The purpose of this requirement is to assure definite notice to those to be affected by repeal and others of what is being done.[26] It is not necessary for an act amending an act previously amended to refer to the amendment.[27] Both the body and the caption of an act may be looked to in determining whether the act sufficiently identifies former laws sought to be repealed or amended.[28] A reference to sections of the Code complies with the constitutional requirement,[29] but a general repealing clause[30] is of no effect.[31]

The requirement relative to reference to an act sought to be revived, amended, or repealed applies only when the amendatory act is amendatory upon its face.[32] An act which does not purport to amend a particular statute may operate as an amendment by implication without reciting the title or substance of the former law.[33] Repeal of statutes by implication is not favored in Tennessee. The repugnancy between the two statutes must be plain and unavoidable before one will be held to have repealed the other by implieation.[34]

The constitution provides that "Every bill shall be read once, on three different days, and be passed each time in the house where it originated, before transmission to the other. No bill shall become law until it shall have been read and passed, on three different days in each house. . . ."[35] The general practice of introducing duplicate or companion bills in each house respectively[36] and the substitution and final passage of the bill of one house

23. House v. Creveling, 147 Tenn. 589, 250 S.W. 357 (1923).

24. "Substance" has been held to mean "subject." McMahan v. Felts, 159 Tenn. 435, 19 S.W.2d 249 (1929).

25. TENN. CONST. Art. II, § 17.

26. Warren v. Walker, 167 Tenn. 505, 71 S.W.2d 1057 (1934).

27. Goodbar v. Memphis, 113 Tenn. 20, 81 S.W. 1061 (1904).

28. House v. Creveling, 147 Tenn. 589, 250 S.W. 357 (1923).

29. State v. Runnells, 92 Tenn. 320, 21 S.W. 665 (1893).

30. The usual language is that "all laws and parts of laws in conflict with this act be and the same are hereby repealed."

31. Memphis v. American Express Co., 102 Tenn. 336, 52 S.W. 172 (1899).

32. Edwards v. Davis, 146 Tenn. 615, 244 S.W. 359 (1922).

33. Illinois Cent. Ry. v. Crider, 91 Tenn. 489, 19 S.W. 618 (1892); Daniels v. State, 155 Tenn. 549, 296 S.W. 20 (1927).

34. Frazier v. East Tennessee, V. & G. Ry., 88 Tenn. 138, 12 S.W. 537 (1889).

35. TENN. CONST. Art. II, § 18. See State v. Persica, 130 Tenn. 48, 168 S.W. 1056 (1914).

36. See the Tennessee Senate Journal and Tennessee House Journal for the same day in any recent session.

in the other house[37] reduces from five to three days the minimum time required for the General Assembly to pass a bill.[38] This constitutional provision limits the scope of an amendment to a pending bill. Any amendment that is germane to the subject of a bill may be introduced at any time before the third reading of that bill.[39] An amendment to the caption of a bill changing "to amend . . ." to "to repeal . . ." has been held to create a new bill and require three readings in the new form to be valid.[40]

A bill must receive ". . . the assent of a majority of the members to which that house shall be entitled under this constitution. . . ." on its final passage in each house.[41] Presumably only a majority vote of the members present can pass a bill on first and second readings. In practice, the speaker mutters that the bill "passed first reading" or "passed second reading" as appropriate. The constitutional requirement makes a failure to vote for a bill because of the absence of a member or his being "present and not voting" equally effective as voting "No" on the bill.[42]

A bill passed by the General Assembly becomes effective in one of three ways: the governor may sign it; a bill held by the governor longer than five days, not counting Sundays, becomes a law without his signature unless the General Assembly adjourns *sine die* during the five-day period;[43] or a bill may be passed over the governor's veto. Thus the governor may "pocket veto" any bill presented to him within five days of the adjournment of the General Assembly *sine die*. The practice is for the governor to sign all bills that he intends to sign before the General Assembly adjourns,[44] but it appears that the governor may sign a bill anytime within five days after it is presented to him.[45]

The General Assembly can pass a bill over the veto of the governor by a vote of a majority of those elected to each house.[46] A bill vetoed by the

37. This practice has received approval in Archibald v. Clark, 112 Tenn. 532, 82 S.W. 310 (1902) and Tennessee Coal, Iron & Ry. Co. v. Hooper, 131 Tenn. 611, 175 S.W. 1146 (1915).

38. The legislature rarely acts so rapidly as to make these figures of more than theoretical interest.

39. Forrester v. Memphis, 159 Tenn. 16, 15 S.W.2d 739 (1929).

40. Erwin v. State, 116 Tenn. 71 93 S.W. 73 (1906).

41. TENN. CONST. Art. II, § 18.

42. "Pairing" as the term is used in the United States Congress is thus impossible in the Tennessee General Assembly although it has been attempted. See Nashville Tennessean, April 3, 1949.

43. TENN. CONST. Art. II, § 18, Art. III, § 18.

44. PRESCOTT, CONSTITUTIONAL PROVISIONS ON THE GOVERNOR'S VETO POWER 69 (Univ. of Tenn. 1947).

45. The relevant language of the Tennessee constitution is almost identical with that of U.S. CONST. Art. I, § 7, which the Supreme Court has held permitted the President to sign a bill after Congress adjourned. Edwards v. United States, 286 U.S. 482, 52 Sup. Ct. 627, 76 L. Ed. 1239 (1932).

46. TENN. CONST. Art. III, § 18. It will be noted that a vote of the majority of the members to which each house is entitled is required to pass a bill on third reading.

governor is first reconsidered in the house of origin.[47] Voting on a bill being reconsidered following a governor's veto is by the yeas and nays and the names of those voting for and against the bill are entered on the journals.[48]

The constitution provides that no law of a "general nature"[49] shall take effect until forty days after its passage[50] unless it states that the public welfare requires that it take effect sooner.[51] The legislature can fix the effective date of a statute later than forty days after its passage.[52] The usual legislative practice is for the last section of an act to declare that the act takes effect from and after its passage, "the public welfare requiring it."[53] This practice by the legislature avoids any problem in distinguishing laws of a "general nature" from other laws, but the problem of the citizen knowing the law is aggravated.

No money may be drawn from the state treasury except as a result of appropriation made by law.[54] The General Assembly called into extraordinary session by the governor may enter on no "legislative business except that for which it was specially called."[55] The constitution [56] also provides that "After a bill has been rejected,[57] no bill containing the same substance shall be passed into a law during the same session." This provision has been held not to prohibit the enactment at an extraordinary session of a bill that had been rejected at the regular session of the legislature.[58]

The procedural requirements for the passing of bills imposed by the constitution have been restricted in importance by decisions of the courts. A legislative act preserved in the secretary of state's office, authenticated by the signatures of the speakers and the signature of the governor with the

---

Situations might arise, *e.g.*, an election contest would be pending and a given seat not be filled, in which a smaller number of votes would be required to pass a bill over the governor's veto than to pass it initially.

47. The order in which vetoed bills are to be reconsidered is mandatory. Webb v. Carter, 129 Tenn. 183, 165 S.W. 426 (1914).

48. TENN. CONST. Art III, § 18.

49. This term has required little construction in view of legislative practice, but it has been held not to include an act repealing a charter of a town. Johnson v. State, 71 Tenn. 469 (1879).

50. The date of passage is the date a bill is approved by the governor or finally passed over his veto. Logan v. State, 50 Tenn. 442 (1872). A statute operates the whole day of its approval in the absence of evidence of the precise time when approved. 1 SUTHERLAND, STATUORY CONSTRUCTION § 1604 (3d ed., Horack, 1943).

51. TENN. CONST. Art. II, § 20.

52. State *ex rel.* Cummings v. Trewhitt, 113 Tenn. 562, 82 S.W. 480 (1904).

53. See Tennessee Public Acts or Tennessee Private Acts for any session since 1900.

54. TENN. CONST. Art. II, § 24.

55. *Id.* Art. III, § 9.

56. *Id.* Art. II, § 19.

57. This term has not been construed by the courts in Tennessee or elsewhere. 1 SUTHERLAND, STATUTORY CONSTRUCTION § 807 (3d ed., Horack, 1943).

58. Williams v. Nashville, 89 Tenn. 487, 15 S.W. 364 (1891).

date of his approval will be given every presumption of validity,[59] but the legislative journals may be looked to in order to determine whether the bill was constitutionally passed.[60] The journals of the legislature are conclusive: "They are entitled to absolute verity, and cannot be impeached on the ground of mistake or fraud. If there are errors, the House [or presumably Senate] itself is the only tribunal authorized to correct them."[61]

The courts have indulged in some interesting—perhaps fanciful—presumptions concerning the journals that are entitled to "absolute verity." No presumption of regular and valid enactment of a statute will be indulged which contradicts the affirmative showing of the journals.[62] The courts do not presume from the mere silence of the journals that the General Assembly has disregarded the constitutional requirements except in instances where the constitution expressly requires that a given fact appear on the journals.[63] A journal entry that an act failed to receive a constitutional majority[64] on final passage does not affirmatively show that the act was not thercafter regularly passed by such majority.[65] A journal entry that a bill was tabled does not contradict the presumption that the bill was subsequently put upon its final reading and received a constitutional majority.[66] On the other hand, when a journal entry states that a bill was defeated by a majority vote on final reading and a motion was made to reconsider the vote, and this motion was tabled, the presumption does not arise that the vote defeating the bill was reconsidered and the bill was passed by a constitutional majority.[67]

---

59. Forrester v. Memphis, 159 Tenn. 16, 15 S.W.2d 739 (1929).

60. Williams v. State, 74 Tenn. 549 (1880).

61. Heiskell v. Knox County, 132 Tenn. 180, 177 S.W. 483 (1915).

62. State v. Nashville Baseball Club, 127 Tenn. 292, 154 S.W. 1151 (1913).

63. Williams v. State, 74 Tenn. 549 (1880); House v. Creveling, 147 Tenn. 589, 250 S.W. 357 (1923). "Where the failure of constitutional compliance in the enactment of statutes is not discoverable from the face of the act itself . . . [courts have held] (1) that the enrolled bill is conclusive and like the sheriff's return cannot be attacked; (2) that the enrolled bill is *prima facie* correct and only in case the legislative journal shows affirmative contradiction of the constitutional requirement will the bill be held invalid; (3) that although the enrolled bill is *prima facie* correct, evidence from the journals or other extrinsic sources is admissible to strike the bill down; (4) that the legislative journal is conclusive and the enrolled bill is valid only if it accords with the recital in the journal and the constitutional procedure. . . . At the present time the tendency seems to be toward the abandonment of the conclusive presumption rule and the adoption of the third rule leaving only a *prima facie* presumption of validity which may be attacked by any autoritative source of information." 1 SUTHERLAND, STATUTORY CONSTRUCTION § 1402 (3d ed., Horack, 1943). See the references cited, note 1 *supra*.

64. A constitutional majority is a majority of the members to which the Senate or House is entitled.

65. State *ex rel.* Thompson v. Davis, 146 Tenn. 287, 240 S.W. 762 (1922).

66. State v. Hannum, 158 Tenn. 119, 11 S.W.2d 858 (1928).

67. Wright v. Wright, 173 Tenn. 334, 117 S.W.2d 736 (1938). In each of the instances here discussed the bill had been signed by the speaker and approved by the governor.