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RELIEF FROM PREJUDICIAL JOINDER
IN FEDERAL CRIMINAL CASES

Lester B. Orfield*

Rule 14 of the Federal Rules of Criminal Procedure, entitled "Relief From Prejudicial Joinder," provides:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

I. HISTORY OF DRAFTING RULE 14

The first draft of the Federal Rules of Criminal Procedure, dated September 8, 1941, contained several provisions on relief from prejudicial joinder. Rule 20(b) provided: "The court may order such separation of joint defendants or such groups of joint defendants in separate trials as shall be conducive to a fair trial for each defendant and for the government." The rule was modeled to a slight extent on Rule 20(b) of the Rules of Civil Procedure. Rule 21, entitled "Misjoinder and Non-Joinder of Defendants," provided:

Misjoinder of defendants is not a ground for dismissal of a criminal proceeding. Defendants may be dropped, or in proceedings by information or by complaint defendants may be added, by order of the court on motion of any defendant or of its own initiative, at any stage of the proceedings and on such terms as are just. Any proceeding against a defendant may be severed at any time and proceeded with separately.

This was modeled to a considerable degree on Rule 21 of the Rules of Civil Procedure.

Rule 42(b) provided under the heading, "Separate Trials": "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any defendant, or of any separate issue or of any number of defendants or issues." The rule was modeled largely on Rule 42(b) of the Rules of Civil Procedure.

A number of suggestions were offered to the Advisory Committee. The Committee for the Eastern District of Alabama proposed that if there is misjoinder of defendants, misjoinder of offenses, or duplicity, the indictment is not invalid but the court may order severance of the indictment into separate indictments or counts and, if the court believes separate trials would promote substantial justice when there is a misjoinder of defendants, it may order separate trials. The Committee for the District of Colorado suggested that motions for severance should be allowed the government only in cases involving the death penalty. The Committee for the District of New Jersey would leave the matter of separate trials on joint indictments to the discretion of the court.

Rule 31(b) of the second draft, dated January 12, 1942, was the same as Rule 20(b) of the first draft and bore the title, "Joint or Separate Trials of

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Defendants.” The comment of the reporter pointed out that severance is within the discretion of the trial court, and its action on a motion for severance will not be disturbed on appeal in the absence of abuse. The proposed rule would not change existing law. Existing law is sound as in some cases severance is necessary in the interests of justice; and the trial court is best able, in its sound discretion, to determine when a case should be severed. Rule 32 provided: “Misjoinder of defendants is not ground for dismissal of a criminal proceeding. Defendants may be dropped, or in proceedings by informations defendants may be added by order of the Court. Any proceedings against a defendant may be severed by the court.” The reporter in his comment pointed out that the rule makes certain that misjoinder of defendants will not require dismissal of an indictment, but protects the defendant by permitting a severance if he is misjoined with others. It also allows defendants to be added to an information, but not to an indictment.

Rule 31(b) of the third draft, dated March 4, 1942, provided to the same effect as Rule 31(b) of the second draft, except that it omitted the following words which had appeared at the end of the sentence: “for each defendant and for the government.” Rule 32 bore a new title, “Misjoinder and Severance.” It provided: “Misjoinder of defendants is not ground for dismissal of a criminal proceeding. The court may sever any proceeding against a defendant.” The second sentence in Rule 32 of the second draft, on dropping and adding defendants, was omitted.

Rule 9(c) of the fourth draft, dated May 18, 1942, replaced Rule 31(b) of the third draft. It was entitled, “Separate Trials of Defendants and of Charges.” It provided: “The court may order the separation for trial of defendants or of one or more counts of an indictment or information or of a consolidated proceeding, if justice requires.” Rule 10, entitled “Misjoinder of Defendants or of Charges,” replaced Rule 32. It provided: “In case of misjoinder of defendants or of charges, the court shall, as justice requires, separate defendants or charges or dismiss the indictment or any charge therein as to one or more defendants.”

A draft, known as Preliminary Draft, dated May, 1942, was submitted to the Supreme Court for comment. Rule 9(c) provided: “Whenever justice requires the court may order separate trials for one or more defendants charged together or may order separate trials of one or more counts of an indictment or information.” Rule 10 provided: “Whenever justice requires, in cases of misjoinder of defendants or of charges, the court shall separate defendants or charges or dismiss the indictments or information or any charge therein as to one or more defendants.” The Supreme Court made no comment as to Rule 10. With respect to Rule 9 the Court asked whether any study of the abuse of indictments drawn with an excessive number of counts had been made.

The fifth draft, dated June 1942, made no changes. The sixth draft, dated Fall 1942, made some important changes. Rules 9(c) and 10 of the fifth draft were combined into a new Rule 13. The reason for the combination was that the same subject matter was involved. The reason for deferment in position was that the rule on prejudicial joinder was thereby placed
in the procedural position in which such objections commonly are raised by the defendants and are considered by the court, together with other matters of defense and of preparation for trial. Rule 13 was entitled, "Prejudicial Joinder of Offenses or of Defendants." It provided:

If it appears that a defendant or the government may be prejudiced by a joinder of offenses or of defendants in an indictment or information or in a trial, whether by a multiplicity of counts or of defendants or otherwise, the court at any time upon motion of the defendant, of the government, or of its own motion may dismiss an indictment or information or one or more counts thereof, order an election of counts, grant a severance of defendants, and provide whatever other relief is required.

The reporter pointed out in his memorandum to the Advisory Committee that "multiplicity of counts" is expressly mentioned as a source of prejudice for which relief may be provided by the court in one or more specified or unspecified ways. The Supreme Court had asked whether a study had been made "of the abuse of indictments drawn with an excessive number of counts." The research by the Advisory Committee indicated that, under the criminal rule as then planned, the trial judge would have the responsibility for correcting any such abuse, and that no arbitrary limits should be placed on the number of counts which may be included on an indictment. Experience in the United States and England with efforts to fix arbitrary limits by legislation has not been successful.

The first preliminary draft (seventh committee draft), dated May, 1943, changed the number of the Rule to 14 and gave it the present title, "Relief from Prejudicial Joinder." It provided:

If it appears that a defendant or the government may be prejudiced by a joinder of offenses or of defendants in an indictment or information or in a trial whether by multiplicity of counts or of defendants or otherwise, the court at any time upon motion of the defendant, of the government, or of its own motion may order an election of separate trials of counts, grant a severance of defendants, and provide whatever other relief justice may require.

The former language as to dismissal was deleted. Provision for separate trial of counts was made.

The following comments were made to the Advisory Committee: Judge A. Lee Wyman of the United States District Court of South Dakota thought that the motion for election, separate trial or severance should be made before the trial commences. To allow such motions to be made at any time would result in unnecessary confusion, expense and delay. The Michigan federal judges thought that provision that the court may at any time order election or separate trial of counts or grant severance of defendants endangers the rule against double jeopardy. Thomas J. Morrissey, United States Attorney for Colorado, objected to allowing the court to order separate trials of counts or grant a severance of defendants of its own motion. Clyde O. Eastus, United States Attorney for the Northern District of Texas, was opposed to Rule 14; he did not think that severance should be granted by the federal courts. Joseph F. Deeb, United

1 Comments, Recommendations, and Suggestions Received Concerning the Proposed Federal Rules of Criminal Procedure 100 (1943).
2 Id. at 400 (1943). See Note, 72 Harv. L. Rev. 920, 982 n. 460 (1959).
States Attorney for the Western District of Michigan thought that there would be no jeopardy if the order of the trial court were based on the motion of the defendant at any stage in the proceeding. But if the order were made on the motion of the government or on the court’s own motion, after the jury had been impaneled and sworn, there would be jeopardy. Hence the rule should be restricted so far as it applies to motion by the government or the court’s own motion. Assistant Attorney General Wendell Berge thought that the rule suggested the question of whether severance after trial had started would prevent retrial of the defendant severed on the ground of double jeopardy.3

Marks Alexander, Assistant United States Attorney for the Southern District of Illinois, pointed out that, if the trial court severs a count or counts after the trial has started and after a jury has been drawn, the court is in effect directing a verdict of acquittal.4 The court otherwise has the power to direct a verdict, but may not so direct if there is substantial evidence indicating guilt. If a defendant has been placed in jeopardy and the court of its own motion may call for a severance, how does the court use the power under a rule of sound judicial discretion? If two defendants are tried together and the court severs during the trial, the government probably cannot then retry the defendant who was severed from the case. Judge Pierson M. Hall of the Southern District of California offered a motion at the Judicial Conference of the Ninth Circuit to eliminate the words “multiplicity of counts”; otherwise, he said, some might argue that this was the only ground of relief from joinder of offenses.5 The motion was seconded by Judge St. Sure and unanimously carried. George F. Kneip of the Criminal Division of the Department of Justice objected to the language “provide whatever other relief justice may require.” If it is intended to authorize the court to dismiss the indictment, he said, the provision should be eliminated. The other remedies, election, separate trial of counts, or severance should be the only ones permitted. There are no circumstances under which the court should have the power to dismiss an indictment merely because of prejudicial joinder of offenses or defendants, or to dismiss any particular counts if they, in fact, deal with definite offenses or defendants. James E. Ruffin of the Criminal Division of the Department of Justice thought the rule materially defective in not giving the court power to give relief in cases of probable prejudicial duplicity.6 In the opinion of Drury W. Cooper of New York the words “may order an election or separate trial of counts” did not seem wholly clear.

The second preliminary draft (eighth committee draft), dated February, 1944, changed the number of the rule to 13. It provided:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or in a trial, whether by multiplicity of counts or of defendants or otherwise, the court may order an election or separate trial of counts, grant a severance of defendants or provide whatever relief justice requires. A severance of defendants may be granted only before trial.

3 Id. at 401.
4 Id. at 403.
5 Id. at 401.
6 Id. at 402.
But there was no such time limit as to severance of offenses.

There was little comment to the Advisory Committee on this rule. Judge David A. Pine of the District of Columbia suggested that, to avoid apparent contradiction in the provisions of the rule and possible double jeopardy, the words "in a trial" be deleted. He believed the words "a severance of defendants" should be deleted from the last sentence, and the words "such relief" be inserted in lieu thereof. He said there should be added to the last sentence the following clause: "except that during a trial the Court may grant such relief on motion of a defendant when it appears that he is prejudiced by such joinder and such prejudice could not have been reasonably anticipated before trial." Double jeopardy would not be involved where the motion was made by the defendant. The special committee of the Los Angeles Bar Association would delete the language "whether by multiplicity of counts or of defendants or otherwise." Such language if retained might tend to limit the power of the court to order the relief therein provided, which should exist in any case where prejudice to the defendant or the government is shown by the joinder. The committee would eliminate the last sentence of the rule providing that a "severance of defendants may be granted only before trial."

The report of the Advisory Committee (ninth committee draft) dated June, 1944, contained Rule 14 in the present form and sequence. In prior drafts the rule had preceded instead of followed the rule on trial together of indictments or informations. The Supreme Court adopted the rule as contained in the report without any change.

II. THE LAW PRIOR TO RULE 14

A. Duplicity

1. Motion to quash

A writer on federal criminal procedure has concluded: "If duplicity exists in an indictment, the indictment is bad and should be quashed upon motion or declared bad upon demurrer." Duplicity may be attacked by a motion to quash. Such a motion was granted where a single count charged a capital felony and a misdemeanor. Subsequent cases support this view. If the motion is made and denied, it will not avail on writ of error unless the substantial rights of the defendant were prejudiced. A motion to quash is addressed to the discretion of the court "and

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7 Id. Vol. 3 at 47a.
8 Id. Vol. 4 at 31.
12 Connors v. United States, 158 U.S. 408, 411 (1895).
will not be reviewed by an appellate court save in cases where the failure to properly exercise judicial discretion amounts to a denial of justice.\textsuperscript{13} In 1931 a court suggested that a demurrer be used instead of a motion to quash as the motion to quash is discretionary and not subject to appeal.\textsuperscript{14} In 1942 it was suggested that neither a motion to quash or a demurrer should be used, but rather a motion to elect.\textsuperscript{15}

2. Demurrer

In an early case, Chief Judge Cranch stated: “In civil actions advantage can be taken of duplicity only by special demurrer; but in criminal cases it is fatal on general demurrer.”\textsuperscript{16} Many subsequent cases have supported this view.\textsuperscript{17} Even if the defendant demurs and his demurrer is overruled, it will not avail on writ of error unless the substantial rights of the defendant were prejudiced.\textsuperscript{18}

It has been asserted that duplicity may not be attacked by general demurrer.\textsuperscript{19} Motion to elect should be used, instead.\textsuperscript{20} But another court has stated

\begin{itemize}
  \item \textsuperscript{13} Steigman v. United States, 220 Fed. 63, 65 (3d Cir. 1915).
  \item \textsuperscript{14} Sconyers v. United States, 54 F.2d 68, 69 (5th Cir. 1931).
  \item \textsuperscript{17} The demurrer was sustained in the following cases: Bailey v. United States, 53 F.2d 982 (5th Cir. 1931); Curtis v. United States, 38 F.2d 450, 451 (5th Cir. 1930); Greel v. United States, 21 F.2d 690 (8th Cir. 1927), noted 37 Yale L.J. 522 (1928); John Gund Brewing Co. v. United States, 204 Fed. 17, 21 (8th Cir. 1915); United States v. Borden Co., 28 F. Supp. 177, 188 (N.D. Ill. 1939); United States v. Cleveland, 281 Fed. 249, 250 (S.D. Ala. 1922); United States v. Dombowski, 252 Fed. 894, 897 (E.D. Mich. 1918); United States v. Blakeman, 251 Fed. 306, 308 (N.D.N.Y. 1918); United States v. American Naval Stores Co., 186 Fed. 592, 596 (S.D. Ga. 1909); United States v. Smith, 152 Fed. 542, 545 (W.D. Ky. 1907); United States v. Cadwallader, 59 Fed. 677 (W.D. Wis. 1893). The demurrer was overruled in the following cases: United States v. Johnson, 319 U.S. 503, 513 (1943), reversing 123 F.2d 111, 121 (7th Cir. 1941); Frohwerk v. United States, 249 U.S. 204, 209 (1919); Anderson v. United States, 170 U.S. 481, 492 (1898); Connors v. United States, 158 U.S. 408, 411 (1895); Sconyers v. United States, 54 F.2d 68, 69 (5th Cir. 1931); Collins v. United States, 20 F.2d 574, 576 (8th Cir. 1927); Lau v. United States, 13 F.2d 975, 976 (8th Cir. 1926); Evans v. United States, 11 F.2d 37, 38 (4th Cir. 1926); United States v. Olimstead, 5 F.2d 712, 715 (W.D. Wash. 1925); Bailey v. United States, 5 F.2d 437, 438 (5th Cir. 1925); Boone v. United States, 257 Fed. 963, 964 (8th Cir. 1919); Bailey v. United States, 278 Fed. 849, 855 (6th Cir. 1922); Anderson v. United States, 273 Fed. 20, 22, 28 (8th Cir. 1921); Wells v. United States, 257 Fed. 605, 609 (9th Cir. 1919); Knauer v. United States, 237 Fed. 8, 11, 13 (8th Cir. 1916); Lewellen v. United States, 223 Fed. 18, 20 (8th Cir. 1915); Ammerman v. United States, 216 Fed. 326, 329 (8th Cir. 1914); Norton v. United States, 205 Fed. 593 (8th Cir. 1913) cert. denied, 235 U.S. 699 (1914); May v. United States, 199 Fed. 53, 60 (5th Cir. 1912); Lemon v. United States, 164 Fed. 953, 958 (8th Cir. 1908); Gourdain v. United States, 154 Fed. 453, 459 (7th Cir. 1907); United States v. Waltham Watch Co., 47 F. Supp. 524, 528 (S.D.N.Y. 1942); Drawdy v. United States, 288 Fed. 567, 570 (S.D. Fla. 1925); United States v. Patten, 187 Fed. 664, 673 (C.C.S.D.N.Y. 1911); United States v. Eccles, 181 Fed. 906, 908 (D. Ore. 1910); United States v. Great Northern Ry. Co., 157 Fed. 288, 290 (C.C.S.D.N.Y. 1907); United States v. MacAndrews & Forbes Co., 149 Fed. 823, 831 (C.C.S.D.N.Y. 1906); United States v. Scott, 74 Fed. 213, 215 (C.C.D. Ky. 1895); United States v. Thomas, 69 Fed. 588 (S.D. Cal. 1895); United States v. Byrne, 44 Fed. 188 (E.D. Mo. 1890); United States v. Peterson, 27 Fed. Cas. 513, 519 (No. 16037) (C.C.D. Mass. 1846).
  \item \textsuperscript{18} Connors v. United States, 158 U.S. 408, 411 (1895).
  \item \textsuperscript{19} Chambliss v. United States, 218 Fed. 154, 156 (8th Cir. 1914); Pooler v. United States, 127 Fed. 509, 515 (1st Cir. 1904); United States v. Luther, 260 Fed. 579, 584 (E.D. Okla. 1919).
  \item \textsuperscript{20} United States v. Louisville & N. R. R. Co., 165 Fed. 936, 941 (W.D. Ky. 1908).
that a count may be held bad for duplicity "if reasonably challenged on that ground, either by a motion to quash, demurrer, or motion to elect, which are the three approved methods for doing it." In some cases both a demurrer and a motion to quash have been filed. One case asserted that demurrer and not motion to quash should be used to attack duplicity.

3. Motion to elect

Duplicity may be attacked by a motion to compel the government to elect. One case denied the possibility of election and nolle prosequi on the theory that this would permit the government to amend the grand jury indictment, but upheld a demurrer and a motion to quash.

4. Objection to admission of evidence

Duplicity has been attacked by objection to the admission of evidence for the government. The Court of Appeals for the Fifth Circuit has stated broadly that motion to exclude any evidence "is not recognized in the federal courts, at least in this circuit."

5. Motion for directed verdict

Rarely duplicity has been attacked by a motion for directed verdict. The court assumed, without deciding, that this method of attack could be used and found no duplicity.

6. Motion in arrest of judgment

Duplicity is said to be waived by going to trial, for that reason motion in arrest of judgment does not lie, although a few cases imply the contrary.

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21 Lemon v. United States, 164 Fed. 953, 958 (8th Cir. 1908). See also Wells v. United States, 257 Fed. 605, 609 (9th Cir. 1919).
22 Knauer v. United States, 237 Fed. 8, 11, 13 (8th Cir. 1916); United States v. Glasser, 116 F.2d 690, 694 (7th Cir. 1940); United States v. Dembowski, 252 Fed. 894, 895 (E.D. Mich. 1918).
23 Sconyers v. United States, 54 F.2d 68, 69 (5th Cir. 1931). But the court treated a motion to quash as a demurrer.
24 Wirgott v. United States, 163 U.S. 632, 648 (1896); Crain v. United States, 162 U.S. 625, 635 (1896); Connors v. United States, 158 U.S. 408, 411 (1895); In re Lane, 135 U.S. 443, 448 (1890); Sparks v. United States, 90 F.2d 61, 63 (6th Cir. 1937); Sunderland v. United States, 19 F.2d 202, 205 (8th Cir. 1927); Robinson v. United States, 288 Fed. 450, 451 (D.C. Cir. 1923); Bailey v. United States, 278 Fed. 849, 850, 853 (6th Cir. 1922); Wells v. United States, 257 Fed. 605, 609 (9th Cir. 1919); Lemon v. United States, 164 Fed. 953, 958 (8th Cir. 1908); United States v. Louisville & N. R. Co., 165 Fed. 936, 941 (W.D. Ky. 1908); United States v. Peterson, 27 Fed. Cas. 515, 518 (No. 16037) (C.C.D. Mass. 1846).
26 Wright v. United States, 227 Fed. 855, 856 (8th Cir. 1915). The lower court overruled the objection. The court of appeals reversed for insufficiency of evidence.
27 Sunderland v. United States, 19 F.2d 202, 205 (8th Cir. 1927). See also Boone v. United States, 257 Fed. 963, 965 (8th Cir. 1919).
28 Sunderland v. United States, 19 F.2d 202, 205, 206 (8th Cir. 1927).
29 Beauchamp v. United States, 154 F.2d 413, 415 (6th Cir. 1946); Barnard v. United States, 16 F.2d 451, 453 (9th Cir. 1926); Matthews v. United States, 300 Fed. 556 (7th Cir. 1924); Wells v. United States, 257 Fed. 603, 609 (9th Cir. 1919); Lemon v. United States, 164 Fed. 953, 958 (8th Cir. 1908).
30 Crain v. United States, 162 U.S. 625, 635 (1896); Connors v. United States, 158 U.S. 408, 411 (1895); Blitz v. United States, 153 U.S. 308, 315 (1894); Sunderland v. United
There is a doctrine of cure by verdict: 32 A defendant who pleads guilty cannot later raise the issue of duplicity, as he is in the same position as if he had been found guilty by the verdict of a jury. 33 When the sentence is less than that authorized under a good count, the conviction will not be reversed because of a duplicitous count. 34

7. Appeal

Duplicity may not be attacked for the first time on writ of error or appeal. 35 Even if the issue was raised below, as by demurrer or motion to quash, there would be no reversal unless injury to substantial rights of the defendant were shown, in view of the statute on imperfections of form. 36 The same is true as to repugnancy within a count, as charging offenses which are repugnant to each other. 37 Occasionally the appellate courts review the issue of duplicity even though it was not clearly raised below, and find that it did not exist. 38 One case asserted that, where duplicity was raised by motion to quash, a denial of the motion is not subject to review, but nevertheless reversed and found no duplicity. 39 Another court held that it would not review the objection of duplicity where the appellant did not show that his substantial rights were prejudiced, no motion to elect was made, and the charge of the court, if any, was not preserved. 40

8. Habeas corpus

Duplicity may not be attacked following conviction on a writ of habeas corpus, 41 because the accused should have moved to compel the government to elect.
B. Misjoinder of Offenses

1. Motion to quash

Misjoinder of offenses has been attacked by a motion to quash the indictment, but the motion to quash will not lie if the offenses joined are of the same class, if the offenses joined arise out of the same transaction, or if the transactions are connected together. Misjoinder may be cured by a nolle prosequi. A motion to quash is not the proper remedy where an unduly large number of counts is set out; motion to elect is the proper remedy. Nor will it lie when an indictment charges a corporate defendant with a misdemeanor and an individual defendant with a felony; the individual defendant can move for a severance and thus secure his full number of peremptory challenges.

In one case a motion to quash has been held proper, even though the offenses were of the same class. An indictment containing two counts charged the defendant with carnal knowledge of different females, the offense charged in the first count being alleged to have been committed more than six months before that alleged in the second count. In another case the defendant moved

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42 United States v. Porter, 27 Fed. Cas. 595, 596 (No. 16072) (C.C.D.C. 1812), five counts were involved. Two counts were quashed. There was a nolle prosequi as to two counts and the defendant was convicted on one count. Other grounds of error were involved, so that the relief seems not necessarily to have been given for misjoinder. A motion to quash was made in United States v. Scott, 27 Fed. Cas. 997 (No. 16241) (D. Ind. 1865), but denied because a nolle prosequi was filed. Otherwise it would have been granted as the offenses did not come within the cases of joinder permitted by the joinder statute. A motion to quash was granted in United States v. Gaston, 28 Fed. 848 (N.D. Ohio, 1886), the penalty being different for the offenses joined, and the offenses not involving the same transaction or being of the same class.


44 Pointer v. United States, 151 U.S. 396, 403 (1894); Harris v. United States, 8 F.2d 841, 842 (5th Cir. 1925); Goodfriend v. United States, 294 Fed. 148, 150 (9th Cir. 1923); Welsh v. United States, 267 Fed. 819, 821 (2d Cir. 1920); United States v. Bennett, 24 Fed. Cas. 1107, 1109 (No. 14572) (C.C.S.D.N.Y. 1879); United States v. Jacoby, 26 Fed. Cas. 570, 571 (No. 15462) (C.C.S.D.N.Y. 1875); United States v. Belvin, 46 Fed. 381, 385 (E.D. Va. 1891).


49 United States v. Clark, 125 Fed. 92, 93 (M.D. Pa. 1903).


to quash, and in the alternative for an election between counts.\[^{53}\] In another case the defendant moved to quash, demurred, and moved for an election;\[^{54}\] in a third the defendant moved to quash and for an election.\[^{55}\] One court has quoted Chitty\[^{56}\] as saying that misjoinder of offenses of the same nature may be attacked by motion to quash the indictment before plea or to compel the government to elect, but not by demurrer or motion in arrest of judgment.\[^{57}\]

What is the scope of the motion to quash? Most of the cases do not say. One court has said that the motion challenged the indictment as a whole, rather than one or more counts in it;\[^{58}\] but another court stated: "Misjoinder does not render an indictment incapable of supporting a verdict. If the defendant is embarrassed by such a fault in the indictment against him, he should in advance of trial move to quash it, or for a severance, or to compel the prosecutor to elect on which counts he shall be put to trial."\[^{59}\] In another case, where the defendant moved to quash, the court stated: "Where any single count of an indictment against several persons is sufficient in form and substance to charge defendant moved to quash, the court stated: "Where any single count of an indictment against several persons is sufficient in form and substance to charge

2. Demurrer

Misjoinder of offenses has been attacked by demurrer;\[^{60}\] but demurrer will not lie if the offenses joined are of the same class,\[^{61}\] or involve the same transaction,\[^{62}\] or are connected together.\[^{63}\] One decision has asserted that demurrer is not a proper mode of attack, but rather motion to quash or motion to elect,\[^{64}\] and subsequent decisions hold that a motion to elect is proper.\[^{65}\] Where there

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\[^{54}\] Kelleher v. United States, 35 F.2d 877, 878, 879 (D.C. Cir. 1929).

\[^{55}\] Dean v. United States, 51 F.2d 481, 482 (9th Cir. 1931).

\[^{56}\] 1 Chitty, CRIMINAL LAW, §§ 249, 253 (1819).

\[^{57}\] United States v. Perlstein, 120 F.2d 712, 715 (3d Cir. 1940).

\[^{58}\] Harris v. United States, 8 F.2d 841, 842 (5th Cir. 1925).

\[^{59}\] Dowling v. United States, 49 F.2d 1014, 1015 (5th Cir. 1931).

\[^{60}\] Culjak v. United States, 53 F.2d 554, 555 (9th Cir. 1931).


\[^{64}\] Kreuzer v. United States, 254 Fed. 34, 37 (8th Cir. 1918), cert. denied, 249 U.S. 603 (1919); United States v. Davidson, 244 Fed. 523, 535 (N.D.N.Y. 1917).


\[^{66}\] Todd v. United States, 49 F.2d 550, 552 (5th Cir. 1931); Optner v. United States, 13 F.2d 61, 62 (6th Cir. 1926) (or nolle prosequi); United States v. Cardish, 145 Fed. 242, 244 (E.D. Wis. 1905); United States v. Eastman, 132 Fed. 551, 555 (C.C.D.N.H. 1904).
is a joinder of several counts setting forth the same crime in different ways, to avoid a variance, demurrer does not lie. 67

Where a special statute as to mail frauds limits the number of offenses which may be charged, the remedy of the defendant is not by demurrer, but by motion to compel the government to elect on which counts it will proceed after the evidence is in, if the counts are merely varied descriptions of the same offense; or by compelling the government before trial to nolle prosequi so as to reduce the number of offenses to the limit allowed by the statute. 68 The alleging of more than the statutory number of offenses does not make the whole indictment bad.

What is the scope of the demurrer for misjoinder? Most cases do not say. In one case the court held that it challenged the indictment as a whole, and not one or more counts in it. 69

3. Plea in abatement

Occasionally misjoinder of offenses has been attacked by a plea in abatement. 70 The plea will not be sustained where several counts are used to state the same offense in different ways to avoid variance at the trial. Nor will it be sustained where the counts are for the same transaction, or involve acts and transactions connected together. 71

4. Motion to strike

In one case alleged misjoinder was attacked by a motion to strike. 72

5. Motion to compel election

Where an indictment contains several counts charging offenses against the internal revenue laws, which are misdemeanors, the court will not compel the government to elect between the several counts. "On this point it is only necessary to say, that an examination of the textbooks will show it to be well settled that, in cases of misdemeanor, several offenses may be joined in different counts, and that there is no right, in such cases, to compel the prosecutor to rely on one transaction." 73 In a subsequent case involving felonies the court stated: "Whether the joinder was calculated to embarrass the prisoner, and, therefore, the offenses not 'properly joined,' within the meaning of the statute, was a question to be determined by the judge in his discretion, on a motion to quash or to compel an election." 74 In a case in which it was held that the government need not have elected between six counts describing a murder in

67 Todd v. United States, 48 F.2d 530, 532 (5th Cir. 1931); Sneierson v. United States, 264 Fed. 268, 269 (4th Cir.), cert. denied, 253 U.S. 490 (1920); United States v. Central Vermont Ry., 157 Fed. 291, 293 (C.C.S.D.N.Y. 1907); Etheredge v. United States, 186 Fed. 434, 436 (5th Cir. 1911).
68 Etheredge v. United States, 186 Fed. 434, 437 (5th Cir. 1911).
69 Harris v. United States, 8 F.2d 841, 842 (5th Cir. 1925).
71 United States v. Jones, 69 Fed. 973, 980 (D. Nev. 1895). In this case a motion to quash on the same ground was also filed.
different ways as to the means used, the court stated broadly: “Where an indictment contains several counts, the prosecution will not be compelled to elect on which count they will ask conviction.”75 Where a very long and unnecessary number of counts is set out in the indictment, the most relief a defendant may obtain is compelling the government to elect on which counts it will prosecute; a motion to quash is improper.76 On the other hand, it has been pointed out that “it would manifestly be far more oppressive to the offender to torture him with 32 consecutive trials on 32 separate indictments than to combine them as the statute permits and subject him only to one trial.”777

Where offenses are properly joined in an indictment the defendant cannot compel the government to elect.78 No election is required where the indictment charges in several counts offenses of the same class and connected with the same transaction.79 The Supreme Court has stated broadly: “The question of election


75 United States v. Nevenor, 12 D.C. 152, 165 (D.G. Cir. 1880). The Supreme Court has held in a case where there were two counts charging the same murder in a different manner that whether the government must elect is “a matter purely within the discretion of the court.” Pierce v. United States, 160 U.S. 355, 356 (1895). See also Clifton v. United States, 295 Fed. 925, 926 (D.G. Cir. 1923); Foster v. United States, 256 Fed. 207, (5th Cir. 1919); Terry v. United States, 120 Fed. 483, 484 (4th Cir. 1903); United States v. General Electric Co., 40 F. Supp. 627, 632 (S.D.N.Y. 1941). Compare Thomas v. Hudspeth, 127 F.2d 976, 978 (10th Cir. 1942); Cain v. United States, 19 F.2d 472, 476 (8th Cir. 1927); Koth v. United States, 16 F.2d 89, 61 (9th Cir. 1926).


77 Gardes v. United States, 87 Fed. 172, 174 (5th Cir. 1898). The court cited many federal cases involving numerous counts. The Supreme Court saw no objection to an indictment containing 119 counts, United States v. Britton, 107 U.S. 655, 656 (1882); nor to one containing 59 counts, United States v. Northway, 120 U.S. 327, 328 (1887); nor to one containing 50 counts, Coffin v. United States, 156 U.S. 432, 454 (1895); nor to 17 counts submitted to the jury at a second trial, Coffin v. United States, 162 U.S. 664, 665 (1896). A lower court saw no objection to 57 counts, United States v. Harper, 33 Fed. 471, 472, 494 (C.C.S.D. Ohio 1887). In one case the government was required to elect 25 out of 70 counts, United States v. Hoover Motor Express Co., 42 F. Supp. 64 (M.D. Tenn. 1941). In another case the government was required to elect 25 out of 60 counts, United States v. Hoover Truck Co., 42 F. Supp. 65 (M.D. Tenn. 1941).


79 Dobbins v. United States, 157 F.2d 257, 259 (D.G. Cir.), cert. denied, 329 U.S. 734 (1946); United States v. Hunt, 120 F.2d 592, 593 (7th Cir. 1941); United States v. Sullivan, 98 F.2d 79, 80 (2d Cir. 1939); Tinkoff v. United States, 85 F.2d 868, 876 (7th Cir.), cert. denied, 301 U.S. 689 (1936); McNeil v. United States, 85 F.2d 698, 703 (D.G. Cir. 1936); Felio v. United States, 55 F.2d 161, 164 (8th Cir. 1932); Kelleher v. United States, 35 F.2d 877, 879 (D.C. Cir. 1929); Litkovsky v. United States, 9 F.2d 877, 880 (2d Cir. 1929); Arnold v. United States, 7 F.2d 867, 869 (7th Cir. 1925); Lewis v. United States, 4 F.2d 520, 522 (5th Cir. 1925); Egans v. United States, 5 F.2d 267 (D.G. Cir. 1925); Goodfriend v. United States, 294 Fed. 148, 150 (9th Cir. 1923); Powers v. United States, 295 Fed. 964, 967 (9th Cir. 1923); Robinson v. United States, 288 Fed. 450, 451 (D.C. Cir. 1923); Egans v. United States, 287 Fed. 956, 963 (D.C. Cir. 1923); Caudle v. United States, 278 Fed. 710, 712 (8th Cir. 1921); Billingsley v. United States, 274 Fed. 86, 89 (6th Cir.), cert. denied, 257 U.S. 656 (1921); Fowler v. United States, 273 Fed. 13, 17 (9th Cir. 1921) (three conspiracies to violate three related statutes charged); McNeil v. United States, 246 Fed. 827, 828 (5th Cir. 1917); Rooney v. United States, 203 Fed. 928, 930 (9th Cir. 1913); Chadwick v. United States, 141 Fed. 225, 237 (6th Cir. 1905); McGregor v. United States, 134 Fed. 187, 194 (4th Cir. 1904); United States v. Barber, 280 Fed. 922 (S.D. Fla. 1923); United States v. Petersen, 27 Fed. Cas. 515, 520 (No. 16057) (C.C.D. Mass. 1846); United States v. Dickenson, 25 Fed. Cas. 850, 851 (No. 14958) (C.C.D. Ohio, 1840).
between distinct charges has always seemed to depend on the special circumstances of the case in which it has arisen. The court could quash an indictment or compel an election when the parties are not the same in each count and where the offenses are not parts of the same transaction.

Although election of counts is seldom ordered, the statute on joinder seems to confer considerable discretion on the trial court. The statute permits joinder only of offenses which "may properly be joined." Thus, it does not necessarily follow that joinder is proper merely because the offenses are of the same class, or arise out of the same transaction, or are connected together. The "settled principles of criminal law" must be looked at in determining what offenses "may properly be joined." It is a matter of discretion whether election will be compelled. If in the opinion of the trial court the jury will not be confused by the multiplicity of charges and the defendant will not be embarrassed in his defense, the court may refuse to direct the government to elect.

Occasionally election may be required even where the offenses joined are of the same class. It was so held where an indictment containing two counts charged the defendant with carnal knowledge of two different females, more than six months intervening between the offenses. The court stated:

It is doubtful whether separate and distinct felonies, involving different parties, not arising out of the same transaction or dependent upon the same proof, should ever be consolidated. But it should not be permitted, where the crimes charged are of such a nature that the jury might regard one as corroborative of the other, when in fact, no corroboration exists. The court was "of opinion that for the failure of the court to quash the indictment, or to compel the government to elect upon which count it would proceed, a new trial would be granted." But where a defendant motorist fatally injured two persons within a few minutes on the same automobile ride, the trial court was affirmed in denying the motion of the defendant for a severance of the two counts and for an election upon which count the defendant would be first separately tried. The court stated: "Here the record showed that the killings were closely connected in time, place, and continuity. They occurred within a few minutes of each other and on the same automobile ride and by means of the same instrument." Where two defendants were indicted and convicted of first degree murder, the government was not required to elect between the first three counts charging deliberate and premeditated malice and the second three charging that the defendant purposely killed the deceased while perpetrating an offense punishable by imprisonment in the penitentiary. There was evidence which would justify a conviction as to the first three counts and even more clearly
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as to the second three. A general verdict and judgment of conviction would stand if any count was valid.

Occasionally it has been intimated that a motion to elect is available even though the courts involve offenses arising out of the same transaction.87

Occasional cases hold that where several counts are used to state the same offense in different ways, a motion to elect is proper.88 But error in failing to compel election may be cured where the sentence is on only one count and does not exceed that which is permissible on conviction of a single offense.89

A motion to elect between counts will not lie where the indictments contain no such counts.90

A motion to elect on the ground of repugnancy of counts has been denied where the court concluded that there was no repugnancy.91 When two counts are contradictory, the defendant may move for an election; he cannot remain passive or rely only on motion in arrest of judgment.92 If he fails to move for an election, a verdict of guilty on both counts and judgment thereon will stand.

The problem of election has arisen in a peculiar form as to the crime of conspiracy. In a leading case several defendants were indicted on seven counts, each charging a conspiracy to violate a separate and distinct internal revenue law. At the close of the trial the defendants contended that the proof did not establish more than one agreement and moved that the court require the government to elect one of the seven counts on which to proceed. The trial court refused and the defendants were convicted and sentenced for several conspiracies. The Supreme Court reversed, holding that a single agreement to commit acts in violation of several federal statutes is not punishable as several conspiracies.93 The government may not split up a single agreement into a plurality of offenses by charging in different counts the violation of different statutory provisions as objects of the conspiracy.

In one case the defendant made his motion that the government elect after his plea of not guilty, and before the jury were called.94 According to the Supreme Court the election could be made even later. Justice Harlan stated:

It is appropriate to say that we lay no stress upon the circumstance that the motions in question were not made until after the

88 Thomas v. Hudspeth, 127 F.2d 976, 978 (10th Cir. 1942); Porter v. United States, 31 F.2d 544, 545 (8th Cir. 1929); Cain v. United States, 19 F.2d 472, 476 (8th Cir. 1927); Koth v. United States, 16 F.2d 59, 61 (9th Cir. 1926); Lewis v. United States, 4 F.2d 520, 522 (5th Cir. 1925); Wetzel v. United States, 233 Fed. 984, 985 (9th Cir.), cert. denied, 242 U.S. 648 (1916).
90 Lonergan v. United States, 88 F.2d 591, 594 (9th Cir.), cert. denied, 302 U.S. 663 (1937).
92 Moore v. United States, 288 Fed. 249, 251 (D.G. Cir. 1923).
94 United States v. Dickinson, 25 Fed. Cas. 850 (No. 14959) (C.C.D. Ohio, 1840). In Morris v. United States, 161 Fed. 672, 674 (8th Cir. 1908), the motion was made at the opening of the trial. In Fowler v. United States, 273 Fed. 15, 17 (9th Cir. 1921), motions to elect were made first after part of the government's testimony and then at the end of the government's testimony.
defendant had pleaded not guilty. We have already said that, if in the progress of the trial it appeared that the accused might be embarrassed or confounded in his defense, by reason of being compelled to meet both charges of murder at the same time, and before the same jury, it was in the power of the court, at any time before the trial was concluded, to require the government to elect upon which change it would seek a verdict.\(^9\)

Before the trial, the court may refuse to compel an election because the facts have not been disclosed.\(^9\) In another case the court held that “the trial court has discretion to require the government, either before it has offered proof, or after it has closed its proof, to elect certain counts on which it will ask conviction.”\(^9\) In another case the court stated that whenever it shall be made to appear, whether before the trial, at its inception or during the process of the trial, that the respondent would be unreasonably embarrassed by a trial together of the alleged offenses against the different banking associations, the government will be compelled to elect whether it will go to trial, or proceed with the trial, as the case may be, upon the counts relating to the Berlin Bank, or those relating to the Gorham Bank.\(^9\)

A defendant could not complain on appeal that the government was not required to elect at the close of the government’s evidence,\(^9\) when it was required to elect at the close of all the evidence. The criminal defendant was not prejudiced by the delay, while the government might have been if it had been required to elect earlier. One court stated broadly: “It is generally discretionary with the trial court at which state of the trial an election will be compelled.\(^1\)

Error in refusing a motion to elect may be cured when the defendant is acquitted on a count;\(^1\) or when the sentence is only one count;\(^2\) or where the same sentence is imposed on both counts and they are made to run concurrently.\(^3\)

6. **Severance of counts and separate trials**

The trial court may apparently on its own motion sever the counts at the opening of the trial.\(^4\) As severance of counts is addressed to the sound discretion of the trial court, the appellate court will not review a denial of a sev-

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\(^9\) Pointer v. United States, 151 U.S. 396, 404 (1894).
\(^9\) Gardes v. United States, 87 Fed. 172, 175 (5th Cir. 1898). In Rooney v. United States, 203 Fed. 928, 929 (9th Cir. 1913), the motion was made at the close of the testimony. United States v. Eastman, 132 Fed. 951, 953 (C.C.D.N.H. 1904).


\(^9\) Sidebotham v. United States, 253 Fed. 417, 419 (9th Cir. 1918).


\(^9\) Felio v. United States, 55 F.2d 161, 164 (8th Cir. 1932); Mills v. United States, 294 Fed. 77, 79 (5th Cir. 1923).

\(^9\) Steinberg v. United States, 14 F.2d 564, 565 (2d Cir. 1926).
erance where no claim of injury from the joinder was made and none of the evidence was brought up.\textsuperscript{105}

The trial court may order separate trials as to separate counts. In one case the court stated: "It is unquestionably within the power of the court to compel the government to elect upon which class of counts it will go to trial, and dismiss the others, or to direct separate trials upon the different classes of offenses."\textsuperscript{106}

7. Motion for directed verdict and for judgment n.o.v.

Occasionally a defendant moves for a directed verdict because of misjoinder of offenses.\textsuperscript{107} In one case the defendant moved for a judgment notwithstanding the verdict because of misjoinder of offenses.\textsuperscript{108}

8. Motion for mistrial

In some cases joint trial of several offenses may be ground for mistrial even though the trial court rejected the defendant's motion for a severance. In a trial of two attorneys and others under indictment in two counts for conspiracy to obstruct the administration of justice and to operate an unregistered still, where there was no evidence connecting one attorney with the conspiracy to operate the still, the trial court erred in denying the attorney's motion for mistrial on the ground that trial on both counts prejudiced his rights.\textsuperscript{109} It made no difference that the court directed a verdict for the defendant on the second count.

9. Time of attack on misjoinder

It is sometimes intimated broadly that attacks on joinder should be made before trial, or at least not after conviction. One court stated with respect to both joinder of offenses and joinder of defendants: "If the defendant is embarrassed by such a fault in the indictment against him, he should in advance of trial move to quash it, or for a severance, or to compel the prosecutor to elect on which counts he shall be put to trial. He cannot take the chance of acquittal on a trial and object to misjoinder only after conviction."\textsuperscript{110}

10. Cure by verdict

There may be cure by verdict of a misjoined count. There is such cure if the defendant is acquitted on the misjoined count;\textsuperscript{111} or if the misjoined count

\textsuperscript{105} Morris v. United States, 128 F.2d 912, 917 (5th Cir. 1942).
\textsuperscript{106} United States v. Eastman, 132 Fed. 551, 555 (C.C.D.N.H. 1904). See also Dowling v. United States, 49 F.2d 1014, 1015 (5th Cir. 1931).
\textsuperscript{107} United States v. Tuffanelli, 131 F.2d 890, 893 (7th Cir. 1942); Stokes v. United States, 93 F.2d 744, 745 (5th Cir.), cert. denied, 304 U.S. 558 (1938).
\textsuperscript{108} Powers v. United States, 293 Fed. 964, 965 (9th Cir. 1923).
\textsuperscript{109} United States v. Perlstein, 120 F.2d 276, 283 (3d Cir. 1941). One judge dissented.
\textsuperscript{110} Dowling v. United States, 49 F.2d 1014, 1015 (5th Cir. 1931). In United States v. Lotsch, 102 F.2d 35, 36 (2d Cir.), cert. denied, 307 U.S. 622 (1939), the court merely assumed this view to be correct without committing itself.
\textsuperscript{111} Culjak v. United States, 33 F.2d 554, 555 (9th Cir. 1931); Weinhandler v. United States, 20 F.2d 359, 362 (2d Cir.), cert. denied, 275 U.S. 554 (1927); Optner v. United States, 13 F.2d 11, 12 (6th Cir. 1926); Morris v. United States, 12 F.2d 727, 728 (9th Cir. 1926); Beaux Arts Dresser v. United States, 9 F.2d 531, 533 (2d Cir. 1925). The question was left open in Dowling v. United States, 49 F.2d 1014, 1015 (5th Cir. 1931).
is withdrawn from consideration by the jury.\textsuperscript{112}

11. \textit{Motion for new trial}

A new trial may be granted where the defendant was prejudiced by the joinder of offenses. In one case the court, though denying a new trial on the facts of the particular case, stated broadly: "It is admitted that it is the duty of the court to protect the prisoner from being prejudiced in his defense by the joinder of offenses, and if satisfied that the defendant was so prejudiced, a new trial would be granted."\textsuperscript{113} A motion for new trial will not be granted when an indictment contains several counts alleging the same offense in a different way in order to prevent a variance, as such procedure is proper.\textsuperscript{114} In many cases new trial is denied because the joinder is proper and the defendant fails to prove prejudice.\textsuperscript{115}

12. \textit{Motion in arrest of judgment}

On motion in arrest of judgment the court will not arrest "unless the offenses are of a nature and character radically different, as well as requiring different judgments, different in kind and not merely indictments differing in amount or degree."\textsuperscript{116} Thus, there will be no arrest of judgment if the offenses were committed at the same time and place, but were different in degree, one for revolt and another for attempt to incite the revolt.\textsuperscript{117} The technical rules in civil cases do not apply in criminal cases, as the judgments in civil cases may differ sharply from each other. In cases where an election might be required before verdict, it does not follow that objection can be taken on motion in arrest of judgment that no election was required.

When an indictment describes in different counts different offenses, and of different grades and punishments, implied, however, from the same transaction, and the verdict is guilty of the last count only, motion in arrest will not lie.\textsuperscript{118} Motion in arrest does not lie where several counts are used to state the same offense in different ways.\textsuperscript{119} Motion in arrest has been denied follow-

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\item \textsuperscript{112} Dean v. United States, 51 F.2d 481, 483 (9th Cir. 1931); Latses v. United States, 45 F.2d 949, 950 (10th Cir. 1930).
\item \textsuperscript{113} United States v. Brent, 24 Fed. Cas. 1225, 1226 (No. 14640) (D. Nev. 1873). The court found that the defendant was really benefited by the single trial of several offenses. See also Ex parte Joyce, 13 Fed. Cas. 117 (No. 7556) (W.D. Mo. 1877).
\item \textsuperscript{115} Powers v. United States, 293 Fed. 964, 967 (9th Cir. 1923); United States v. Wentworth, 11 Fed. 52, 54 (C.C.D.N.H. 1882); United States v. Stone, 8 Fed. 232, 251 (C.G.W.D. Tenn. 1881).
\item \textsuperscript{117} United States v. Peterson, 27 Fed. Cas. 515, 519 (No. 16027) (C.C.D. Mass. 1846).
\item \textsuperscript{118} United States v. Stetson, 27 Fed. Cas. 1311 (No. 16590) (C.C.D. Mass. 1847).
\item \textsuperscript{119} Huffman v. United States, 259 Fed. 35, 40 (8th Cir. 1919); Orth v. United States, 25 Fed. 566, 568 (4th Cir. 1918).
\end{itemize}
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ing a denial of a motion to quash when the joinder was proper,\(^2\) as well as after denial of a motion for directed verdict when the joinder was proper.\(^3\) A defendant who has pleaded guilty cannot move in arrest of judgment for misjoinder of offenses.\(^4\)

The statute of 1855\(^5\) made it clear that a motion in arrest would not lie as to joinder of the same class of offenses.\(^6\) In 1883, it was stated broadly that motion in arrest does not lie for misjoinder of offenses.\(^7\) In 1892 the Supreme Court said: “Having gone to trial, without objection, on the indictment as consolidated under the last order of the court, it was not open to any of them to take the objection for the first time after verdict.”\(^8\) Several cases since that date have applied the same rule.\(^9\) In 1923 a court stated that, “generally speaking the motion in arrest will not be sustained, unless the offenses charged, and of which the defendant is found guilty, belong to different classes of crimes requiring different judgment.”\(^10\)

13. **Motion to vacate judgment**

Following trial and conviction on one count a defendant may not attack a joinder of counts by motion to vacate judgment.\(^11\) Such motion may not take the place of motion for new trial or in arrest of judgment.

14. **Appeal**

Several cases have held that there is no right to review a denial of a motion to quash for misjoinder of offenses.\(^12\) But there is contrary authority.\(^13\) Other cases have held that there is no right to review of a decision refusing to compel the government to elect between offenses as the motion is addressed to the discretion of the court;\(^14\) however, the courts have reviewed the issue and found

\(^2\) Powers v. United States, 293 Fed. 964, 967 (9th Cir. 1923).

\(^3\) Stokes v. United States, 93 F.2d 744, 745 (5th Cir.), cert. denied, 304 U.S. 558 (1938).


\(^7\) Logan v. United States, 144 U.S. 263, 297 (1892).

\(^8\) United States v. Loring, 91 Fed. 881, 887 (N.D. Ill. 1884), in which the court considered the motion and then denied it on the facts alleged. See also Sasser v. United States, 29 F.2d 76, 78 (5th Cir.), cert. denied, 279 U.S. 836 (1928).


\(^11\) Todd v. United States, 49 F.2d 530, 532 (5th Cir. 1931); Goodfriend v. United States, 294 Fed. 148 (9th Cir. 1923); Andersen v. United States, 273 Fed. 20, 28, 30 (8th Cir. 1921); Corbin v. United States, 264 Fed. 659, 660 (5th Cir. 1920); McGregor v. United States, 134 Fed. 187, 194 (4th Cir. 1904).

\(^12\) Todd v. United States, 49 F.2d 530, 532 (5th Cir. 1931); Goodfriend v. United States, 294 Fed. 148 (9th Cir. 1923); Andersen v. United States, 273 Fed. 20, 28, 30 (8th Cir. 1921); Corbin v. United States, 264 Fed. 659, 660 (5th Cir. 1920); McGregor v. United States, 134 Fed. 187, 194 (4th Cir. 1904). The statement of the court also covered refusal of a motion to quash. See also McNeil v. United States, 85 F.2d 698, 703 (D.C. Cir. 1936); Corbin v. United States, 264 Fed. 659, 660 (5th Cir. 1920); Sidebotham v. United States, 253 Fed. 417, 419 (9th Cir. 1918).
no error. Another case did not deny review, but pointed out that granting a request for election "depends upon the special circumstances of the case, and rests in the sound discretion of the trial court." In another case the appellate court stated: "It is not for us here to require the government to elect; it may or may not be the duty of the trial court to so require." The appellate court will not necessarily reverse, even though it would have been as well or better to require an election; it has been said the appellate court should not interfere except where the trial court "discretion has been abused or manifest injustice has resulted." The court will not reverse unless the "substantial rights" of the defendant were prejudiced by the denial of the motion to elect, and no review will be permitted where the issue was not raised in the trial court.

Since severance of counts is addressed to the sound discretion of the trial judge, a denial of a severance will not be reviewed where no claim of injury from the joinder was made and none of the evidence was brought up.

What about appellate review when the issue was not raised in the trial court? In several cases the appellate court reviewed, but found no misjoinder. Judgments entered on a plea of nolo contendere will not be reviewed for misjoinder; a defendant who has pleaded guilty may not raise the issue of joinder for the first time on appeal; a misjoinder caused by variance of proof will not result in reversal unless prejudicial to the defendants.

15. Habeas Corpus

It is doubtful that habeas corpus will lie for misjoinder when applied for before trial and conviction. But the writ has been used to attack an erroneous sentence, imposed following joinder of offenses. It will not lie where the offenses may be properly joined, but has been resorted to in order to contend that the offenses joined did not involve several offenses but rather one single

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135 Gardes v. United States, 87 Fed. 172, 176 (5th Cir. 1898).
136 Lemon v. United States, 164 Fed. 953, 958 (8th Cir. 1908).
139 Morris v. United States, 128 F.2d 912, 917 (5th Cir. 1942).
140 United States v. Twentieth Century Bus Operators, 101 F.2d 700, 702 (2d Cir. 1939); Perez v. United States, 10 F.2d 352, 353 (9th Cir. 1926); Grock v. United States, 289 Fed. 544, 547 (D.C. Cir. 1923); Magon v. United States, 260 Fed. 811, 812 (9th Cir. 1919); Kettenbach v. United States, 202 Fed. 377, 382 (9th Cir. 1913).
141 Dillon v. United States, 113 F.2d 334, 338 (8th Cir.), cert. denied, 311 U.S. 689 (1940). Here no misjoinder was found.
142 Spirou v. United States, 24 F.2d 796, 797 (2d Cir. 1928).
143 United States v. Twentieth Century Bus Operators, 101 F.2d 700, 702 (2d Cir. 1939).
144 The question was left undecided in Scott v. United States, 115 F.2d 137, 139 (10th Cir.), cert. denied, 312 U.S. 678 (1940). The petition for habeas corpus was inadequate in form and the court decided on that ground.
145 Ex parte Joyce, 13 Fed. Cas. 1175 (No. 7556) (W.D. Mo. 1877). The joinder was found proper, but not the sentence. See also Thomas v. Hudspeth, 127 F.2d 976 (10th Cir. 1942).
146 Ex parte Peters, 12 Fed. 461, 463 (W.D. Mo. 1880). See also Ex parte Schaffenburg, 21 Fed. Cas. 1144, 1146 (No. 12696) (C.C.D. Col. 1877).
continuous offense. Occasionally the same question arises on an appeal from conviction and sentence.

**C. Misjoinder of Defendants**

1. **Motion to quash**

Misjoinder of defendants has been attacked by motion to quash. The motion was denied where the joinder was proper. A motion to quash does not lie when a corporate defendant is charged with a misdemeanor and an individual defendant with a felony, as the individual defendant may move for a separate trial and thus secure his full number of peremptory challenges. Where any single count of an indictment is sufficient, misjoinder of other defendants or offenses will not invalidate the indictment as a whole. The government could move to dismiss one or more counts; or the trial court could order separate trials. The allegations of a motion to quash for misjoinder are not admitted because no answer was made to the motion, as no answer is required, and the defendant must support his motion. Where there is a joinder of both offenses and of defendants, a defendant attacking misjoinder must attempt to point out which counts he considered improperly joined as to him.

2. **Demurrer**

Misjoinder of defendants has been attacked by demurrer. The defect may be cured by dismissal of defendants by the United States Attorney. Joinder of several defendants and several offenses where all the defendants are not charged with all the offenses has been successfully attacked by demurrer.

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147 Morgan v. Devine, 237 U.S. 632 (1915); Ebeling v. Margan, 237 U.S. 625 (1915); Tesciona v. Hunter, 151 F.2d 589, 591 (10th Cir. 1945); Dimenna v. Johnston, 130 F.2d 465 (9th Cir. 1942) (denial of habeas corpus was reversed); Bertsch v. Snoop, 36 F.2d 155, 156 (5th Cir. 1929); Biddle v. Wilmot, 14 F.2d 505, 506 (8th Cir. 1926); Morgan v. Sylvester, 231 Fed. 886, 888 (6th Cir. 1916).

148 Blockburger v. United States, 284 U.S. 299 (1932); Albrecht v. United States, 273 U.S. 1, 11 (1927); Crespo v. United States, 151 F.2d 44, 45 (1st Cir. 1945); Fleisher v. United States, 31 F.2d 447 (6th Cir. 1929); United States v. Mazzeochi, 75 F.2d 497 (2d Cir. 1935); Beddow v. United States, 70 F.2d 674, 676 (8th Cir. 1934).

149 Ginsberg v. United States, 96 F.2d 433, 435 (5th Cir. 1938); Culjak v. United States, 55 F.2d 554, 555 (9th Cir. 1931); Dowling v. United States, 49 F.2d 1014, 1015 (5th Cir. 1931); Filalatreu v. United States, 14 F.2d 659, 661 (6th Cir. 1926); United States v. Kazinski, 26 Fed. Cas. 682 (No. 15508) (D. Mass. 1855).


153 Culjak v. United States, 96 F.2d 554, 555 (9th Cir. 1931).

154 Ginsberg v. United States, 96 F.2d 433, 436 (5th Cir. 1938).


156 United States v. McDonald, 26 Fed. Cas. 1085 (No. 15670) (E.D. Mo. 1876).

3. **Motion to dismiss indictment**

Misjoinder of defendants has been attacked by a motion to dismiss the indictment as to each defendant.\(^{158}\) If the motion to dismiss was based on the evidence introduced, the government might be put to an election.

4. **Motion to compel election**

Misjoinder of defendants may be attacked by a motion to compel an election.\(^{159}\) If a motion to dismiss is based upon the evidence introduced, the government might be put to an election.\(^{161}\) The motion to elect may be made at the end of the government's evidence.\(^{162}\)

5. **Motion to sever and for separate trial**

One federal appellate court has held that the difficulty of obtaining a fair and impartial trial under an indictment charging several defendants with treason manifested by numerous overt acts, not all of which were participated in by all the defendants, is not properly directed at the legality of the indictment. "This is so for the reason that the court is empowered to prevent an injustice of this character by severance or other means at its disposal in the conduct of the trial."\(^ {163}\)

When three defendants were jointly indicted on ten counts and one defendant pleaded guilty as to three counts, and the trial proceeded as to the other two defendants without him, there was a severance as to him even though there was no express ruling or order made by the court granting a severance.\(^ {164}\)

The defendant or defendants may move for a separate trial. The facts set forth in several reported cases show the granting of a motion for separate trial. In one case where the indictment was of three persons for murder on board an American vessel on the high seas, the motion of one defendant for a separate trial was granted.\(^ {165}\) Apparently, an order for separate trials may be set aside. This happened to the other two defendants in this case.\(^ {166}\) In one case the defendant was indicted with several others in three indictments. One

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\(^{158}\) Jaycox v. United States, 107 Fed. 938, 941 (2d Cir. 1901). The motion was made before any evidence was introduced. In United States v. Standard Oil Co., 23 F. Supp. 937 (W.D. Wis. 1938), the court dismissed the indictment of 11 defendants. See 72 Harv. L. Rev. 920, 982 (1959). In some cases the government filed a *nolle prosequi* as to some of the defendants. Kotzebas v. United States, 328 U.S. 750, 753 (1946).

\(^{159}\) Stokes v. United States, 93 F.2d 744, 745 (5th Cir. 1938); Dowling v. United States, 49 F.2d 1014, 1015 (5th Cir. 1931); Brady v. United States, 39 F.2d 312, 313 (8th Cir. 1930); Lemon v. United States, 20 F.2d 490, 492 (9th Cir. 1927); United States v. Mullen, 7 F.2d 244, 246 (E.D. La. 1925).

\(^{160}\) Todd v. United States, 48 F.2d 530, 532 (5th Cir. 1931).


\(^{162}\) United States v. Mullen, 7 F.2d 244, 246 (E.D. La. 1925).


\(^{164}\) Coile v. United States, 100 F.2d 806, 807 (5th Cir. 1939).


\(^{166}\) Sparf and Hansen v. United States, 156 U.S. 51, 52 (1895).
defendant was granted a separate trial, but the charges set forth in the three
indictments against him were consolidated for a single trial. In some cases the
government has moved for and obtained severance of defendants. No cases
have been found in which it clearly appears that severance was granted on the
court's own motion. The cases have not discussed the problem.

Where an indictment charges a corporate defendant with a misdemeanor
and an individual defendant with a felony, application for severance may be
made by the individual defendant or the government to assure that the indi-
vidual defendant is given the number of peremptory challenges allowed in
felony cases. The government could also consent to trial of all the defendants
as if a felony were charged in each case.

It is the view of some courts that where several offenses and several de-
fendants were involved, an indictment not naming each defendant in each
count was improper. The defendants might move either for a severance and a
separate trial, or to compel an election. Even though some counts are dis-
missed as to some defendants, such defendants are not thereby entitled to sepa-
rate trials. A defendant jointly indicted may secure some protection by
asking for—and receiving—instructions with respect to the evidence. A
court of appeal may reverse for inadequacy of instructions as to the evidence.

As early as 1825, Circuit Justice Washington held that the granting of
separate trials to defendants, jointly indicted, was a matter of discretion.
Separate trials could be denied, he said, where no sufficient reason was set
forth by the applicants, and where, if granted, "great consumption of time"
would be involved. The next year, Circuit Justice Story took a similar view
even where murder, a capital offense, was charged. "I do not cite authorities
on this point," he said, "because the law is familiar and well settled." The

167 Olson v. United States, 133 Fed. 849, 851 (8th Cir. 1904).
168 Benson v. United States, 146 U.S. 325, 328, 333 (1892); DeLuca v. United States,
299 Fed. 741, 742 (2d Cir. 1924). See United States v. Wilson, 28 Fed. Cas. 699, 701
(NO. 16730) (C.C.E.D. Pa. 1830), holding that it is optional for the government to proceed
jointly or separately. The court granted a separate trial, the government not opposing the
motion for separate trial. See also United States v. Marchant, 25 U.S. (12 Wheat.) 305,
306 (1827) to the same effect. Justice Story stated that "it is in the election of the prose-
cutor, whether there should be a joint or separate trial."

169 See Annot., 70 A.L.R. 1179 (1931).
170 United States v. Lehigh Valley R.R. 43 F.2d 135, 144 (M.D. Pa. 1930). In
Story stated as to capital offenses: "Where the trial is joint, the right to peremptory chal-
lenges is in no degree narrowed or affected." When the case went up to the Supreme Court,

171 Stokes v. United States, 93 F.2d 744, 745 (5th Cir.), cert. denied, 304 U.S. 558
(1938).
172 Moore v. United States, 2 F.2d 839, 841 (7th Cir. 1924), cert. denied, 267 U.S.
599 (1925).
173 United States v. Ball, 163 U.S. 662, 672 (1896); Sparf and Hansen v. United States,
156 U.S. 51, 58 (1895); Cochran v. United States, 41 F.2d 193, 198 (8th Cir. 1930); United
343 (No. 13377) (C.C.D.C. 1827).
174 Schmeller v. United States, 143 F.2d 544, 550 (6th Cir. 1944).
for separate trial was granted because of antagonistic defenses, but the court did not discuss
the problem of discretion.
defendants would not lose out with respect to peremptory challenges merely because there was a joint trial. The Supreme Court, on a certificate of division from the circuit court, affirmed this view in an opinion by Justice Story. He stated: "The subject is not provided for by any act of congress; and therefore, if the right can be maintained at all, it must be a right derived from the common law, which the courts of the United States are bound to recognize and enforce." In the first instance, "it is in the election of the prosecutor, whether there would be a joint or separate trial." The discretion of the trial court "cannot be governed by fixed rules." The court is more likely to grant a separate trial in a capital case such as murder on the high seas. The rule of discretion has been repeated in numerous cases. The Statute of Jeofails of 1919 merely added "force to the long existing rule." Several cases hold or imply that where the offenses of several defendants, jointly indicted, are antagonistic to each other, separate trials should be granted. Where seven defendants were jointly indicted, a motion of counsel for separate trials was granted on allegations that their defenses were not only different, but at variance with those of the other four, and that they might differ in making their challenges to the jurors. If there is no showing of antagonism of defenses, a separate trial will not be granted and a court of appeal will not reverse where it was not clearly shown that the defenses were antagonistic. Antagonistic defenses, calculated to prejudice one of several defendants jointly accused, will entitle him, but not the others, to a separate trial.

Several cases held or intimated that separate trials should be granted when it appears that a defendant would be prejudiced on a joint trial by the reception of evidence which is not admissible against him, but which is competent against

178 Id. at 306. See also United States v. Wilson, 28 Fed. Cas. 699, 701 (No. 16730) (C.C.D. Pa. 1850).
179 United States v. Matthews, 26 Fed. Cas. 1205, 1206 (No. 15741) (C.C.S.D.N.Y. 1843). A separate trial was granted. What constitutes abuse of discretion depends on the whole situation as shown by the record in each case. Brady v. United States, 39 F.2d 312, 313 (8th Cir. 1930).
180 See the numerous cases cited in Annotations, A.L.R. 1172-73 (1931); A.L.R. 1519 (1936); A.L.R., 131 A.L.R. 918 (1941). For decisions of the Supreme Court, see Stilson v. United States, 250 U.S. 583, 585 (1919); United States v. Ball, 163 U.S. 662, 672 (1896).
182 McDonald v. United States, 89 F.2d 128, 136 (8th Cir.), cert. denied, 301 U.S. 697 (1937).
185 See the critical comment by Circuit Justice Story as to this case in United States v. White, 28 Fed. Cas. 580, 584 (No. 16682) (C.C.D. Mass. 1826). But he was inclined to accept the doctrine of separate trial in case of antagonistic defenses.
187 Brady v. United States, 99 Fed. 312, 315 (8th Cir. 1900).
his co-defendant.¹⁸⁸ But a refusal is justified when the jury is properly instructed concerning the application of the evidence and no prejudice has in fact resulted from trying the defendants jointly.¹⁸⁹

An antitrust case is illustrative of this. The prosecution was brought against the directors of a railway; an earlier suit had been dismissed and five directors had been replaced in the interim. The court held that the five new directors were entitled to a separate trial in the new action, due to differences in evidence, defenses, and the possibility of antagonism to the other directors' defenses.¹⁹⁰

The government stated that it did not oppose the severance.

To summarize, it is ground for severance if the law applicable to one defendant may not apply to another. In this case—a indictment for violation of the Clayton Act—some defendants were elected directors before its passage and some after. Where the government does not oppose the motion, separate trial has been granted on application of one defendant, on the ground that the defense of one prisoner will implicate the other, or others.¹⁹¹

A confession of one of two defendants, jointly charged and tried for the same crime, is inadmissible against the other, if the confession was made in the absence of the other and after the crime was committed.¹⁹² In such case, a new trial will be ordered. But it is not error to admit in evidence a confession of one co-conspirator in the joint trial of himself and others, where the jury is instructed that it may be considered only as against him.¹⁹³ In a prosecution for aiding and abetting murder, for instance, the defendant was entitled to a separate trial from that of his principal, when the principal made a confession involving the defendant which was not admissible in its entirety as to the defendant, but admissible as to the principal.¹⁹⁴ A defendant jointly indicted for conspiracy to use the mails to defraud is not entitled to a severance because a co-defendant had pleaded guilty in a state court to a charge of larceny.¹⁹⁵

In cases where one defendant desires to use his co-defendant or another incompetent witness in a joint trial as witness in his behalf, there has been a good deal of uncertainty whether a severance should be granted.¹⁹⁶ There was some authority holding that a severance could be granted,¹⁹⁷ but in 1834 it was definitely held for the first time that separate trials need not be granted so that defendants might use the testimony of each other in their defense.¹⁹⁸

¹⁸⁸ Lennon v. United States, 20 F.2d 490 (8th Cir. 1927); Olmstead v. United States, 19 F.2d 842 (9th Cir. 1927); United States v. Rockefeller, 222 Fed. 534 (S.D.N.Y. 1915).
¹⁹³ Johnson v. United States, 82 F.2d 500, 504 (6th Cir.), cert. denied, 298 U.S. 688 (1936); Hagen v. United States, 268 Fed. 344, 345 (9th Cir. 1920).
¹⁹⁴ Hale v. United States, 25 F.2d 430, 438 (8th Cir. 1928).
¹⁹⁶ ANNOT., 70 A.L.R. 1187 (1931).
¹⁹⁷ O'Brien v. United States, 299 Fed. 568, 570 (8th Cir. 1924).
no difference that such testimony could not be used in a joint trial. Justice Story doubted that a trial court may make a witness competent by an act of its own, such as granting a severance. The rights of the government deserve protection. Separate trial had never previously been granted solely on such a ground. To grant a separate trial could be an abuse of sound discretion. In another case, in which two defendants were indicted for assault and battery, counsel for the defendants asked for separate trials, as he wished to examine each as a witness for the other. The Circuit Court stated that it was perhaps in the discretion of the court to allow it, but the defendants could not claim it as a matter of right. Neither can be examined as a witness for the other unless it should appear that there is no evidence against one, in which case the jury may acquit him, and he may then be examined for the other. But if there be any evidence against him, he cannot be examined. In another early case, the court, on motion of a defendant jointly indicted for larceny on the high seas, permitted the co-defendant to be separately tried so that he could be used as a witness for the defendant in the event of an acquittal. Finally, in 1851, the Supreme Court held that, even where two persons were jointly indicted, but were tried separately, the defendant first tried could not call the other as a witness in his behalf. The court did not hold that the defendant tried after the first defendant could not call the first defendant if he had been acquitted. Thus, grant of a separate trial while of no advantage to the defendant first tried, would be of advantage to the defendant thereafter tried.

Under a statute of 1878, providing that in the trial of persons charged with criminal offenses in the federal courts “the person so charged shall, at his own request but not otherwise, be a competent witness,” one of two defendants jointly indicted may, at his own request, be examined as a witness by the government. It made no difference that the other defendant objected. The court stated that a co-defendant could at his own request also testify for the other defendant. But apparently he could not be compelled to testify.

Suppose a defendant wished to have the testimony of the wife of a co-

199 United States v. Davidson, 25 Fed. Cas. 773 (No. 14922) (C.C.S.D.N.Y. 1841). The co-defendant was acquitted and then testified favorably for the defendant who was also acquitted. In United States v. Harding, 26 Fed. Cas. 131, 135 (No. 15301) (C.C.E.D. Pa. 1846) the court granted a new trial after conviction at a joint trial but not because of the contentions made by the defendants. The trial judge had died pending the motion for new trial, and for that reason the motion was granted. At the new trial it seems that the trial was again joint. 26 Fed. Cas. 138.


201 In United States v. Reid, 53 U.S. (12 How.) 383, 387 (1851), the law of 1789 where the federal court sat was applied. For the case below see United States v. Clements, 25 Fed. Cas. 467, 474 (No. 14817) (C.C.E.D. Va. 1851). The court below held that in case of joint indictment but separate trial a co-defendant is not competent unless he has been acquitted. On motion for new trial the two judges were divided, so the case was certified to the Supreme Court. 25 Fed. Cas. 473. The case was followed in United States v. Collyer, 25 Fed. Cas. 554, 561 (No. 14838) (C.C.S.D.N.Y. 1855).

202 20 Stat. 30 (1878).


204 Id. at 436; accord: Benson v. United States, 146 U.S. 325, 336 (1892) (dictum).

205 Olmstead v. United States, 19 F.2d 842, 848 (9th Cir. 1927). The court of appeals in upholding conviction pointed out that the defendant who moved for severance testified in his own behalf and that it did not “affirmatively appear that his defense was in any way hampered by his inability to adduce testimony from others.”
defendant. In an early case a court stated: "On examining the question, I find the rule to be, that, when trials are separate, the wife may testify in favor of any one other than her husband, except in cases where the acquittal of one defendant works the acquittal of the rest as in cases of conspiracy, and the like." In a subsequent case, it was held that, where separate defenses are interposed by defendants, jointly indicted, and there may be a separate conviction or acquittal of each, the wife of one is a competent witness for the other, and a defendant is entitled to a severance in order to have such testimony if it is otherwise material. A number of cases left open the question whether the wife could testify for a co-defendant at a separate trial. Several cases held that she was not a competent witness for a co-defendant at a joint trial. Ultimately, however, it was held that a wife could be a competent witness in behalf of her husband. It would seem to follow that the spouse of a co-defendant may testify for a defendant whether the trial be separated or joint. It has also been held that granting a separate trial to one of several jointly indicted for conspiracy is within the discretion of the trial judge, reviewable only in case of abuse. Severances in conspiracy cases are granted only for compelling reasons. It is not granted merely because the moving party played a minor role in the conspiracy and thus was directly involved in only a small part of the evidence to be presented; or because a co-defendant has already been convicted under state law for the same offense; or because severance could permit him to utilize testimony of co-defendants in his own behalf; or because it is alleged that the number of defendants will interfere with his

206 United States v. Addate, 299 Fed. 568, 569 (8th Cir. 1924). The facts showed that the trial court offered to allow the witness to testify, but the defendant did not call her. Hence the issue was not squarely before the court.

207 O'Brien v. United States, 299 Fed. 568, 569 (8th Cir. 1924). The facts showed that the trial court offered to allow the witness to testify, but the defendant did not call her. Hence the issue was not squarely before the court.

208 Dowd v. United States, 46 F.2d 417, 421 (4th Cir. 1931); Israel v. United States, 3 F.2d 743, 745 (6th Cir. 1925); United States v. Wade, 28 Fed. Cas. 386 (No. 16629) (C.C.D.C. 1826).

209 Dowd v. United States, 46 F.2d 417, 420 (4th Cir. 1931); Allen v. United States, 4 F.2d 688, 693 (7th Cir. 1925); Israel v. United States, 3 F.2d 743, 745 (6th Cir. 1925) (where wife's testimony would affect the husband's defense); Haddad v. United States, 294 Fed. 536, 537 (6th Cir. 1923); Fitter v. United States, 258 Fed. 567, 576 (2d Cir. 1916); Talbott v. United States, 208 Fed. 144, 145 (5th Cir. 1923); United States v. Liddy, 2 F.2d 60, 61 (E.D. Pa. 1924); United States v. Davidson, 285 Fed. 661, 662 (E.D. Pa. 1922); United States v. Wade, 28 Fed. Cas. 105 (No. 16629) (C.C.D.C. 1826). But see Tinsley v. United States, 43 F.2d 890, 895 (8th Cir. 1930); Green v. United States, 19 F.2d 850, 853 (9th Cir. 1927); O'Brien v. United States, 299 Fed. 568, 570 (8th Cir. 1924).


211 19 IOWA L. REV. 488, 489 (1934).

212 Heike v. United States, 227 U.S. 131, 135, 144 (1913). See also Hammerschmidt v. United States, 287 Fed. 817, 823 (6th Cir. 1923). One of the two conspirators was tried separately in Miller v. United States, 277 Fed. 721, 724 (4th Cir. 1921). See also Vannata v. United States, 289 Fed. 424, 426 (2d Cir. 1923), where one conspirator was indicted alone and tried alone; and Goldberg v. United States, 297 Fed. 98, 101 (5th Cir. 1924).


214 Cochran v. United States, 41 F.2d 193, 198 (8th Cir. 1930); United States v. Lang, 40 F. Supp. 414, 416 (E.D.N.Y. 1941).


216 Olmstead v. United States, 19 F.2d 842, 847 (9th Cir. 1927), aff'd, 277 U.S. 438 (1928).
right to have his guilt individually adjudicated.\textsuperscript{217} A defendant is not entitled to severance in a conspiracy case because he has previously represented his co-defendants as attorney in proceedings against them in the same court, and received from them many confidential communications in relation to matters involved in the present case.\textsuperscript{218}

It would seem that there could be abuse from the admission of a co-defendant's implicating confession in a conspiracy trial.\textsuperscript{219} Judicial and extra-judicial confessions by a co-conspirator after the termination of the conspiracy are not admissible as evidence against the non-declaring defendant.\textsuperscript{220} But when joint defendants are on trial, implicating confessions are admissible if the jury is instructed that such confessions are evidence only against the declaring defendant.\textsuperscript{221} The admonition is said to safeguard the rights of the non-confessing defendant.\textsuperscript{222} What seems to be contrary authority arises in non-conspiracy cases. A conviction has been reversed even where the proper admonition was given on the ground that the defendant's motion for severance should have been granted as to one accused of abetting murder where the principal's confession was admitted.\textsuperscript{223} Some cases assert that the jury does heed the admonition and that the evidentiary effect of the confession is therefore limited to the confessing defendant.\textsuperscript{224} Some courts, while doubting the value of the admonition, defend the rule as furthering the judicial search for truth.\textsuperscript{225}

A large number of defendants does not seem to be sufficient grounds for severance.\textsuperscript{226} Most of the illustrative cases have involved liquor violations. In one of the few cases not in that category a court of appeals affirmed where separate trials were denied to 22 defendants indicted for transporting stolen automobiles in interstate commerce.\textsuperscript{227} In a case in which 75 persons were indicted for conspiracy to violate the National Prohibition Act, 63 went to trial, 55 were convicted, and 42 appealed. It was held not error to proceed to trial with all the defendants.\textsuperscript{228} The court of appeals did refer to the possibility of trial of groups. One trial is desirable in order to avoid repetition, the difficulty of

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\item \textsuperscript{218} Olmstead v. United States, 19 F.2d 842, 847 (9th Cir. 1927).
\item \textsuperscript{219} Note, 56 \textit{Colum. L. Rev.} 1112, 1113 (1956).
\item \textsuperscript{220} Fiswick v. United States, 329 U.S. 211, 217 (1946); Brown v. United States, 150 U.S. 93, 98 (1893); Logan v. United States, 144 U.S. 263, 309 (1892). See also Gambino v. United States, 108 F.2d 140 (3d Cir. 1939); United States v. Corso, 100 F.2d 604, 605 (7th Cir. 1938); Holt v. United States, 94 F.2d 90 (10th Cir. 1937); Seeman v. United States, 90 F.2d 88, 90 (5th Cir. 1937); Mayola v. United States, 71 F.2d 65, 67 (9th Cir. 1934); Dowdy v. United States, 46 F.2d 417, 427 (4th Cir. 1931); Feder v. United States, 257 Fed. 694, 695 (2d Cir. 1919); Fain v. United States, 200 Fed. 525, 533 (8th Cir. 1913).
\item \textsuperscript{221} United States v. Ball, 163 U.S. 662, 692 (1896); Rich v. United States, 62 F.2d 638, 640 (1st Cir. 1933); Gwinn v. United States, 294 Fed. 878, 880 (5th Cir. 1923).
\item \textsuperscript{222} Johnson v. United States, 82 F.2d 500, 504. (6th Cir. 1936).
\item \textsuperscript{223} Hale v. United States, 25 F.2d 430, 438 (8th Cir. 1928).
\item \textsuperscript{224} Johnson v. United States, 82 F.2d 500, 504 (6th Cir. 1936).
\item \textsuperscript{225} United States v. Pugliese, 153 F.2d 497, 500 (2d Cir. 1945); Nash v. United States, 54 F.2d 1006 (2d Cir. 1932).
\item \textsuperscript{226} Note, 13 \textit{Neb. L. Bull.} 151 (1934).
\item \textsuperscript{227} Waldeck v. United States, 2 F.2d 243 (7th Cir. 1924), \textit{cert. denied}, 267 U.S. 595 (1925).
\item \textsuperscript{228} Allen v. United States, 4 F.2d 688, 690, 698 (7th Cir. 1925). See 62 \textit{Harv. L. Rev.} 276, 282 (1948).
\end{itemize}
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classifying into groups, and representation by many lawyers. On the other hand, the jury might be confused; the government cannot focus its attack; and the trial judge encounters administrative difficulties. In another case, 91 defendants were indicted for conspiracy to violate the National Prohibition Act and 21 were convicted, some not apprehended, some acquitted, and some pleaded guilty. The court of appeals held that the trial court could in its discretion deny separate trials in conspiracy cases. In another case 29 defendants were indicted; 23 were tried, of whom 11 were dismissed, a verdict of acquittal directed as to seven, and there was a verdict of guilty as to five. The question as to separate trial did not arise as an issue but the court of appeals stated that the practice of submitting to a jury, in one trial, the question of the guilt of thirty or fifty citizens, where the testimony as to each is different, is not to be encouraged. It is extremely difficult for an experienced trial judge to trace the skeins of scattered testimony to so many individuals; with inexperienced jurors, such complicated testimony is apt to become but a confused jumble, and a verdict is too apt to represent an impression that the defendants are guilty of something, with little reference to the crime with which they are charged.

In one case 86 defendants were indicted, 59 went to trial and 36 were found guilty. The court of appeals affirmed, although it pointed out that grouping the defendants for several trials might at times be advisable. In an unreported case, 90 defendants were indicted. There was a dismissal as to all but 57. These were tried over an eight-week period. The court directed verdicts for seven, and on its own motion granted mistrials as to all those remaining except 16. The case went to the jury as to the 16, and the jury failed to agree. In one case, after a jury verdict of guilty as to 30 individuals and 16 corporations, the trial court dismissed the indictment or granted a new trial as to 25 individuals and four corporations. The trial had lasted almost four months. In one case 41 persons were indicted and tried together under an indictment for conspiracy to obstruct the passage of the mail, and one for conspiracy to restrain trade or commerce. The defendants were union members, and 34 appealed; the judgment was affirmed in part and reversed in part. Where two indictments for using the mails to defraud and for conspiracy were returned against 53 defendants and consolidated, separate trials were refused.

229 Olmstead v. United States, 19 F.2d 842, 843, 847 (9th Cir. 1927). Nine defendants appealed.
230 Marcante v. United States, 49 F.2d 156, 158 (10th Cir. 1931). There was a reversal because of insufficient evidence. To similar effect see Booth v. United States, 57 F.2d 192, 197 (10th Cir. 1932). The court did not reverse because it concluded that upon the whole record the defendant had had a fair trial. One judge dissented. Ninety six persons indicted. The trial lasted three weeks.
231 Capriola v. United States, 61 F.2d 3, 11 (7th Cir. 1932). In United States v. Heitler, 274 Fed. 401, 405 (N.D. Ill. 1921) the trial court referred to the difficulty of trying a case involving more than 30 defendants; but denied a new trial.
234 United States v. Anderson, 101 F.2d 325 (7th Cir. 1939).
to severance. But it pointed out that instructions to the jury would protect the defendants and that offenses such as conspiracy contemplated a number of defendants. Cases involving numerous defendants often take a long time to try, thus taxing the memory of the tribunal. In a sedition trial of 30 defendants the trial lasted seven months; the death of the trial judge made it necessary to declare a mistrial. Eventually there was a dismissal because of delay in prosecution. In 1943, Judge Jerome Frank dissented to the trial of numerous defendants. He stated:

More ought to be done, I think, to prevent prosecutors from employing the excuse of need for "expedition" to use, unnecessarily, conspiracy trials, in which large numbers of defendants are herded into one suit, instead of bringing several actions. The trial dockets are not so congested as to compel such omnibus trials. Any district judge can do much to meet this situation by exercising his discretion, on his own motion to compel severance.

When numerous defendants and multiple conspiracies are involved, the difficulties are enhanced. In a leading decision, the court held that the government could not string together for common trial eight or more separate and distinct conspiracies, related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all. This was not a case of harmless error. The indictment itself changed only one conspiracy. There is an all-important difference between a case in which two conspiracies involving four persons are proved, and a case where eight conspiracies involving originally 32 persons are involved though the case went to trial only as to 19 and the names of 13 were submitted to the jury and seven were convicted. Defendants charged with criminal contempt were not entitled to separate trials where the evidence was almost identical and the trial judge could have easily separated the facts. It made no difference that the contempt of the other defendants occurred the day before the contempt of the defendant who moved for a separate trial.

Severance will not be granted where the moving party files affidavits alleging innocence and the government's inability to prove guilt. A defendant may not have a separate trial for a narcotics offense merely because he is under indictment for murder in the state court. It is not ground for a separate trial

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237 United States v. McWilliams, 163 F.2d 695 (D.C. Cir. 1947).
238 United States v. Liss, 157 F.2d 995, 1001, 1004 (2d Cir. 1945).
239 Kotakeas v. United States, 328 U.S. 750, 766, 773 (1946), reversing, 151 F.2d 170 (2d Cir. 1945). Two justices dissented. The case is noted in 72 Harv. L. Rev. 920, 992 (1959); 26 Boston U.L. Rev. 386, 401 (1957). It was followed in Canella v. United States, 157 F.2d 470, 477 (5th Cir. 1945). A proceeding on five conspiracies involving 12 persons was improper.
241 Russell v. United States, 86 F.2d 389, 393 (8th Cir. 1936).
243 United States v. Cohen, 124 F.2d 164, 166 (2d Cir. 1941), cert. denied, 315 U.S. 811 (1942). The same case held that two other defendants were not entitled to separate trials merely because they had acted as spies for the police or because they might have given some of the evidence leading to the trial, or because their co-defendants were hostile to them.
that a co-defendant was kept handcuffed in the presence of the jury.244

6. Motion for directed verdict

In one case, improper joinder of defendants was attacked by a motion for a directed verdict made after the government had put in its evidence. On denial of the motion the defendants appealed and obtained a reversal.245 In one case, on election between two defendants, the court directed a verdict in favor of the defendant not elected.246 In cases involving numerous defendants, directed verdicts are often granted as to some of the defendants.247

7. Motion for mistrial

In an unreported case 90 defendants were indicted; 57 were tried over a period of eight weeks. The court directed verdicts for seven; and on its own motion granted mistrials as to all the remaining 16.248 In a sedition trial of 30 defendants, the trial lasted seven months; the death of the trial judge made it necessary to declare a mistrial.249

8. Time of attack on joinder

The facts of several cases indicate that attacks on joinder were made before arraignment and plea.250

At what time should the defendants move for a separate trial? One court has stated:

At the time such preliminary question arises the judge, not being in possession of other facts than those disclosed on the face of the indictment, must act thereon until a clear showing made on the part of the objecting defendant that his interests will be seriously prejudiced by a joint trial. And where it becomes apparent to the presiding judge in the progress of the trial that injustice may be done to any defendant by such joint trial, it is to be presumed that he will afford relief by awarding a new trial.251

In one case the defendant moved at the conclusion of the evidence.252 One court has stated with respect to both joinder of defendants and of offenses: "If the defendant is embarrassed by such a fault in the indictment against him, he should in advance of trial move to quash it, or for a severance, or to compel the prosecutor to elect on which counts he shall be put to trial. He cannot take

244 McDonald v. United States, 89 F.2d 128, 136 (8th Cir.), cert. denied, 301 U.S. 697 (1937).
245 Brimie v. United States, 200 Fed. 726, 727, 730 (7th Cir. 1912). In another case the court of appeals in reversing stated that the trial court should have directed a verdict for the defendant at the end of the evidence. Nazzaro v. United States, 56 F.2d 1026, 1028 (10th Cir. 1932).
246 United States v. Mullen, 7 F.2d 244, 246 (E.D. La. 1925).
251 Krause v. United States, 147 Fed. 442, 444 (8th Cir. 1906).
252 Milner v. United States, 293 Fed. 590 (5th Cir. 1923).
the chance of acquittal on a trial and object to misjoinder only after conviction."

9. **Motion for new trial**

A defendant denied a separate trial has, after conviction, sometimes moved for a new trial. Where the defendants, before impaneling of the jury had requested a severance, but severance was erroneously denied, a new trial was granted. But new trial will not be granted merely because one or more defendants are acquitted, others are convicted, and there is disagreement as to others. In one case the court ordered a new trial for 18 defendants after a four-month trial and a jury verdict of guilty.

10. **Motion in arrest of judgment**

Misjoinder of defendants may not be attacked for the first time on motion in arrest of judgment. This is also true as to defendants who have pleaded guilty.

11. **Appeal**

Where the defendants at the opening of the trial move for separate trials on the ground of misjoinder and the trial court denies the motion, the appellate court may reverse. This is true when under a joint indictment, different defendants are convicted of distinct and separate offenses. A failure of the defendants to move for separate trial because of misjoinder may bar reversal on appeal where several verdicts are rendered, but not when a single joint verdict is rendered. Misjoinder of defendants, both where the defendants have been convicted after trial, and where they have pleaded guilty, cannot be raised for the first time on appeal.

The appellate courts are reluctant to review a denial of a motion for separate trials. One court stated:

"Neither was there reversible error in the action of the court in refusing the request of defendants for separate trials. In practice this is matter resting largely in the sound discretion of the trial court, which will not be reviewed in the absence of clear indications."
that serious prejudice resulted therefrom, to one or more of the defendants.\textsuperscript{264} One court of appeal, in granting a new trial, stated: "This discretion, however, like any other vested in the trial court is, if abused, subject to review and correction." \textsuperscript{265} Judge Jerome Frank, in a dissenting opinion, has insisted on the rule that, if error is shown, there must be reversal unless it affirmatively appears from the whole record that it was not prejudicial.\textsuperscript{266}

12. \textit{Habeas corpus}

Misjoinder of defendants has been successfully attacked by habeas corpus on a proceeding to remove the defendant from one federal district to another.\textsuperscript{267}

D. Consolidation of Indictments

1. Resistance to motion to consolidate

Where the government files a motion to consolidate several indictments, the defendant may resist the motion.\textsuperscript{268} Affidavits may be filed both in support of the motion, and in opposition thereto.\textsuperscript{269}

2. Motion to compel election

Where there is improper consolidation of indictments, the court may compel the government to elect.\textsuperscript{270} One court has stated:

\begin{quote}
Of course the authority to direct that separate indictments be tried together should be exercised with caution lest the defendant be confounded in his defense or otherwise prejudiced thereby, and if at any time in the course of such a trial it is discovered that it tends to prejudice any substantial right of the defendant the court should compel the prosecutor to elect upon which indictment he will proceed.\textsuperscript{271}
\end{quote}

Election has been ordered during the trial.\textsuperscript{272} No election would be required where the indictments grew out of one transaction.\textsuperscript{273} No election need be


\textsuperscript{265} United States v. Haupt, 136 F.2d 661, 672 (7th Cir. 1943).

\textsuperscript{266} United States v. Liss, 137 F.2d 995, 1001, 1005 (2d Cir. 1943).

\textsuperscript{267} United States v. Morse, 287 Fed. 906, 911 (D. Conn. 1923).


\textsuperscript{269} United States v. Bopp, 237 Fed. 283, 284 (N.D. Cal. 1916).

\textsuperscript{270} United States v. Silverman, 106 F.2d 750, 753 (3d Cir. 1939); United States v. Anderson, 101 F.2d 325, 327, 333 (7th Cir. 1939); Castelini v. United States, 64 F.2d 636 (6th Cir. 1933) (appellate court reversed a consolidation); Davis v. United States, 12 F.2d 253, 254 (5th Cir.), \textit{cert. denied}, 271 U.S. 688 (1926) (election ordered at trial); Lemon v. United States, 164 Fed. 955, 958 (8th Cir. 1908); Brown v. United States, 143 Fed. 60, 67 (8th Cir. 1906); Dolan v. United States, 133 Fed. 440, 446 (8th Cir. 1904); United States v. Gilbert, 31 F. Supp. 195, 198 (S.D. Ohio, 1939).

\textsuperscript{271} Johnson v. United States, 82 F.2d 500, 504 (6th Cir.), \textit{cert. denied}, 271 U.S. 688 (1926). The election resulted in the dropping of one indictment out of four.

\textsuperscript{272} Davis v. United States, 12 F.2d 253, 254 (5th Cir.), \textit{cert. denied}, 298 U.S. 688 (1936); Silverman v. United States, 59 F.2d 636, 637 (1st Cir. 1932).
ordered where the crimes charged are of the same class and are closely connected. 274

Where there are two indictments found against a defendant but trial of only one, there is no obligation to consolidate, nor any duty on the government to elect between the indictments. 275 At least this is true when the defendant fails to object until after trial.

3. Motion to sever

In one case, in which two indictments against one defendant were consolidated, the defendant attacked the consolidation by a motion for severance. 276 Where several indictments involve several defendants, individual defendants may sometimes secure a severance from other defendants, followed by a requested consolidation of indictments and trial separately of the several defendants. 277 The government may secure such severance of defendants followed by consolidation of indictments and trial separately of the several defendants. 278 Where there is improper consolidation as to several defendants, the court of appeals will reverse. 279

4. Cure by verdict or otherwise

Where there has been an improper consolidation of two indictments, an acquittal under one indictment does not necessarily cure the error where there is a conviction under the other. 280 Consolidation may often be prevented from becoming prejudicial by proper instructions to the jury. 281 Where two indictments are consolidated, but one is dismissed before submission to the jury, there can be no prejudicial error. 282 If the view be taken that there can be no consolidation unless all defendants be included in all indictments, this may be cured by a severance as to defendants not included in all. 283 A defendant is not necessarily prejudiced by consolidation as to being joined with another if the charges against the other are withdrawn from the jury before the case is submitted to them. 284

5. Motion for new trial

A consolidation of three indictments against one defendant is not ground

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278 DeLuca v. United States, 299 Fed. 741, 742 (2d Cir. 1924). But on the particular facts, consolidation was denied, as the offenses were not related.
279 Zedd v. United States, 11 F.2d 96 (4th Cir. 1926).
280 Castellini v. United States, 64 F.2d 636, 638 (6th Cir. 1933).
281 United States v. Antonelli Fireworks Co., 155 F.2d 631, 635 (2d Cir. 1946); Kelly v. United States, 258 Fed. 392, 403 (6th Cir. 1919).
282 Cohen v. United States, 35 F.2d 958 (5th Cir. 1929).
283 United States v. Kelley, 105 F.2d 912, 916 (2d Cir. 1939).
for new trial where the consolidation is proper. But a new trial was granted where the defendant had requested a severance, and the evidence showed that fair trial required a separate trial.

A new trial was granted when the indictments involved different persons in the various indictments. A trial judge may properly deny a new trial sought by several defendants where no prejudice was suffered by the consolidation.

6. Motion in arrest of judgment
   Consolidation has been attacked by motion in arrest of judgment. But the motion will not be granted if all the counts in all the indictments could have been included in one indictment in the first instance. The motion should be granted when consolidation is improper, e.g., where different defendants are involved in the various indictments.

7. Motion to vacate order of consolidation
   An order of consolidation has been attacked by a motion to vacate the order.

8. Appeal
   Where the defendant objects to improper consolidation before or at the trial, the appellate court will review the error. In some cases the appellate court has reviewed and found no improper consolidation even though it does not clearly appear that objection was made seasonably in the trial court. There may be a reversal when two indictments for a single offense are consolidated and two penalties are imposed. Where the record contains no tran-

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288 McElroy v. United States, 164 U.S. 76, 77, 81 (1896); Callaghan v. United States, 299 Fed. 172, 174 (8th Cir. 1924).
289 Kelly v. United States, 258 Fed. 392, 403 (6th Cir. 1919).
290 Turner v. United States, 56 Fed. 280, 281 (5th Cir. 1895).
291 Id. at 285. See also: Williams v. United States, 168 U.S. 382, 391 (1897); United States v. Ancarola, 1 Fed. 676, 677 (C.C.S.D.N.Y. 1880).
294 McElroy v. United States, 164 U.S. 76, 80 (1896); Castellini v. United States, 64 F.2d 636 (6th Cir. 1933) (consolidation reversed); Carter v. United States, 38 F.2d 227 (5th Cir. 1930); Zedd v. United States, 11 F.2d 96 (4th Cir. 1926) (consolidation reversed); DeLuca v. United States, 299 Fed. 741, 742 (2d Cir. 1924) (consolidation reversed); Jacobsen v. United States, 272 Fed. 399, 400 (7th Cir. 1920).
295 United States v. Smith, 112 F.2d 83, 84 (2d Cir. 1940); Rose v. United States, 45 F.2d 459, 460 (8th Cir. 1930); Hostetter v. United States, 16 F.2d 921, 922 (8th Cir. 1926); Morris v. United States, 12 F.2d 727, 729 (9th Cir. 1926); Edwards v. United States, 7 F.2d 598, 599, 601 (8th Cir. 1926); Fiedler v. United States, 5 F.2d 556, 557 (4th Cir. 1925); Goldberg v. United States, 297 Fed. 98, 99, 101 (5th Cir. 1924); Krause v. United States, 147 Fed. 442, 444 (8th Cir. 1906).
296 United States v. Mazzoli, 75 F.2d 497 (2d Cir. 1935).
script of the proceedings, the appellate court will not reverse because it cannot know whether the indictments involved offenses connected together, or whether any possible prejudice was minimized by the instructions.\textsuperscript{297}

Where the defendant or defendants go to trial without objection to consolidation, they may not object for the first time after verdict or on appeal.\textsuperscript{298} They may consider consolidation more advantageous or more convenient. If the defendant himself requested consolidation, he cannot later object.\textsuperscript{299} A failure to object to consolidation before trial may result in loss of peremptory challenges for several indictments.\textsuperscript{300}

A court of appeal has stated that consolidation is "confided to the sound discretion of the trial court, with the exercise of which we ought not to interfere except in cases where that discretion has been abused or manifest injustice has resulted."\textsuperscript{301}

9. \textit{Habeas corpus}

Habeas corpus was denied when eight defendants were indicted in four indictments for conspiracy to intimidate a negro from voting in an election for a member of Congress, a different victim being named in each indictment.\textsuperscript{302} There was no problem of jurisdiction. Review should have been by writ of error. Habeas corpus is improper as the "inquiry is addressed to a question of error in the proceeding and judgment, and not to the question of whether the judgment and sentence are void, as without jurisdiction and authority."\textsuperscript{303} In some cases the appellate court on review of a trial court decision denying habeas corpus has reviewed the consolidation and found it proper.\textsuperscript{304}

It has been stated that, where "sentences are imposed on verdicts of guilty

\begin{itemize}
\item \textsuperscript{297} United States v. Silverman, 106 F.2d 750, 753 (3d Cir. 1939).
\item \textsuperscript{298} Bucklin v. United States, 159 U.S. 662 (1895); Logan v. United States, 144 U.S. 263, 297 (1892); Rettich v. United States, 84 F.2d 118, 120 (1st Cir. 1936); Hostetter v. United States, 16 F.2d 921, 923 (8th Cir. 1926); Viassis v. United States, 3 F.2d 905, 906 (9th Cir. 1925); Goldberg v. United States, 280 Fed. 89, 92 (5th Cir. 1922); Kharas v. United States, 192 Fed. 503, 505 (8th Cir. 1911); Haynes v. United States, 101 Fed. 817, 818 (8th Cir. 1900). In Adams v. United States, 128 F.2d 820, 821 (5th Cir. 1942), the appellate court considered the issue even though no objection was made until after verdict. See also Betts v. United States, 132 Fed. 229, 230, 236 (1st Cir. 1904), where the court relied on the statute on consolidation in civil cases.
\item \textsuperscript{299} Davis v. United States, 148 F.2d 203 (5th Cir.), \textit{cert. denied}, 325 U.S. 888 (1945); Kharas v. United States, 192 Fed. 503, 505 (8th Cir. 1911). See United States v. Hunter, 26 Fed. Cas. 436 (No. 15425) (C.C.D.C. 1807), in which a motion to discharge the jury from the consideration of one defendant's case was denied; a motion for a limiting instruction was also denied. See also Kettenbach v. United States, 202 Fed. 377, 381 (9th Cir.), \textit{cert. denied}, 229 U.S. 613 (1913).
\item \textsuperscript{300} The prevalent view seems to have been that consolidation did not increase the number of challenges. Beckett v. United States, 84 F.2d 721, 732 (6th Cir. 1936); Rettich v. United States, 84 F.2d 118, 120 (1st Cir. 1936); Zedd v. United States, 11 F.2d 96, 97 (4th Cir. 1926); Solomon v. United States, 297 Fed. 82, 85 (1st Cir. 1924); Kettenbach v. United States, 202 Fed. 377, 392 (9th Cir.), \textit{cert. denied}, 229 U.S. 613 (1913); Kharas v. United States, 192 Fed. 503, 506 (8th Cir. 1911); Krause v. United States, 147 Fed. 442, 446 (8th Cir. 1906). A number of courts took the position that if there was merely trial together instead of consolidation the number of challenges increased accordingly. Rettich v. United States, 84 F.2d 118, 120 (1st Cir. 1936); Callaghan v. United States, 299 Fed. 172, 175 (8th Cir. 1924).
\item \textsuperscript{301} Lemon v. United States, 164 Fed. 953, 958 (8th Cir. 1908).
\item \textsuperscript{302} \textit{Ex parte} Yarbrough, 110 U.S. 651, 653 (1884).
\item \textsuperscript{303} Howard v. United States, 75 Fed. 986, 997 (6th Cir. 1896).
\item \textsuperscript{304} Humphries v. Biddle, 19 F.2d 193, 195 (8th Cir. 1927).
\end{itemize}
... on several indictments consolidated for trial, it is the rule that the sentences so imposed run concurrently, in the absence of specific and definite provisions therein that they be made to run consecutively by specifying the order of sequence. 306 Habeas corpus would lie if the defendant were imprisoned longer than the sentence provided for. 306

E. Right to Counsel

A defendant in a conspiracy case is deprived of the assistance of counsel, contrary to the sixth amendment, where, over his objection, the court appoints his counsel to also represent a co-defendant, if this is done with notice to the judge that their interests may be inconsistent, and where the counsel's defense of the first defendant is less effective than it might have been if he had represented that defendant alone. 307 In an earlier decision of a lower court, a trial lawyer was assigned to act for three co-defendants who made no objection at the time of the appointment. The court rejected the allegation of a conflict of interest to the prejudice of the defendants as an "absurd afterthought." 308

Since 1938, a defendant has had a right to assigned counsel at the trial. 309 But since his rights even at arraignment 310 and plea 311 were dubious, and since attack on joinder was often made prior to arraignment and plea, the right to assigned counsel before trial probably did not exist, even after 1938. To some extent the defendant's situation was not altogether harsh. Statistics indicate that a federal criminal defendant does not often file pleadings other than pleas of guilty or not guilty. 312 But when he does, he certainly needs counsel, and in many of the cases prior to 1946 the facts as set out in the decisions reveal that he had counsel, although retained counsel.

[To be concluded in the August issue.]

305 Daugherty v. United States, 2 F.2d 691, 692 (8th Cir. 1924). While the Supreme Court reversed on other grounds, it seemed to accept this reasoning. United States v. Daugherty, 269 U.S. 360, 363 (1926). See also Orfield, Criminal Procedure from Arrest to Appeal 575-77 (1947); 11 Neb. L. Bull 204 (1932); 11 Minn. L. Rev. 72 (1926).
306 United States v. Patterson, 29 Fed. 775 (C.C.D.N.J. 1887). See the discussion of this case by Chief Judge Johnsen in Young v. United States, 274 F.2d 698, 701 (8th Cir. 1960).
308 United States v. Rollnick, 91 F.2d 911, 916 (2d Cir. 1937).
312 Orfield, Criminal Procedure from Arrest to Appeal 283 (1947).