Separate Trial of a Claim or Issue in Modern Pleading: Rule 42(b) of the Federal Rules of Civil Procedure

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SEPARATE TRIAL OF A CLAIM OR ISSUE IN MODERN PLEADING: RULE 42(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

One of the most striking attributes of modern pleading is its new approach to the problems of joinder. Under the codes joinder was regarded as a pleading problem, and limited categories of actions in which joinder was proper were established in advance. The effect of these categories was to limit joinder arbitrarily, and even where seemingly logical joinder requirement was developed it could not properly meet all the situations which might arise in practice. To avoid this rigidity which often resulted in a needless multiplicity of trials, the new rules treat joinder not as a pleading problem, but as one of trial convenience. The modern rules are extraordinarily liberal, allowing joinder of practically any claim or

*The term “Rule 42(b)” as used in the text of this Note includes by reference all the state equivalents to Federal Rule 42(b). See note 9 infra.
1. See 3 Moore, Federal Practice 1803 (2d ed. 1948).
2. Id. at 1806.
4. Ibid.
party with the ultimate goal of a "... just, speedy, and inexpensive determination of every action." While this aim is often achieved by the settlement of as many matters as possible at a single trial, it may be that certain combinations of issues or claims will lead instead to confusion and injustice. The safeguard against such a possibility is Rule 42(b) of the Federal Rules of Civil Procedure:

"Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

It is clear from the text of the rule that the grant of discretionary power to the judge is extremely broad, thereby providing a maximum of flexibility in adopting the rules of modern joinder to each case as it is tried. It follows that the manner in which courts apply Rule 42(b) is important to the successful operation of modern pleading, federal and state. Excessive denial of separate trials will result in some unfairness. On the other hand, excessive granting of separate trials can to a large extent nullify the liberal joinder provisions. This Note attempts to explore and analyze the court decisions made under Rule 42(b) and its state equivalents in the light of the rule's purpose of supplying flexibility to modern pleading.

GRANTING OF SEPERATE TRIALS IN GENERAL

The first question which arises in a study of the application of Rule 42(b) concerns the frequency with which separate trials are granted or denied. A complete and accurate count is impossible for two reasons. First, there is no way of telling in many instances whether a separate trial has been granted because the case is not reported. Second, even in the reported cases it is often difficult to determine exactly what is being done, because the courts talk of

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5. See Wright, supra note 3, at 581.
7. See Wright, supra note 3, at 581.
8. The states regarded in this Note as having adopted modern pleading insofar as joinder provisions are concerned are the following: Arizona, Colorado, Delaware, Iowa, Kentucky, Minnesota, Missouri, Nevada, New Jersey, New Mexico, New York, Texas, Utah, and Wyoming.


"separate trial" and "severance" interchangeably. Nevertheless, some meaningful statistics can be compiled by including those severances which seem tantamount to separate trials under Rule 42(b).

The following is a very limited breakdown of the cases found on the subject in the federal and state courts:

<table>
<thead>
<tr>
<th>Separate Trials Granted or Conducted</th>
<th>Separate Trials Denied</th>
</tr>
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<tbody>
<tr>
<td>Federal ................. 62</td>
<td>28</td>
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<tr>
<td>State:</td>
<td></td>
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<td>Sum Totals ........ 121</td>
<td>46</td>
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It is, of course, dangerous to draw conclusions from these figures without further examining the cases, but it is clear that the courts have not been slow to exercise their discretion in ordering separate trials. Whether the granting of separate trials in nearly three-fourths of the cases represents an excess in one direction or another can only be decided after a case by case analysis.

**Separate Trial of Claims**

The first natural division of cases arising under Rule 42(b) concerns the setting aside of whole claims for separate trial. A claim is usually tried separately for one of three reasons: to avoid confusing the jury or court; to conform to the requirements of procedural necessity or convenience; or to prevent prejudice to a party. While these reasons are not mutually exclusive, they may be considered separately.

**Separate Trial of Claims to Avoid Confusion**

The first reason for ordering a separate trial is that the case is simply too complicated as it stands. An example is found in a case where the claim was for copyright infringement and the counter-

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10. Properly speaking, severance of a claim leaves it as an entirely independent action to be tried, while separate trials will usually result in but one judgment. Wright, Minnesota Rules, Rule 21, Comment 2 (1954).

11. Those severances which are included are the ones apparently granted for the same reasons that a separate trial is ordered under Rule 42(b)—the furtherance of convenience or avoiding of prejudice. Not included are severances granted in the few situations where there has been improper joinder.

12. Further statistics broken down by claims and issues will be found in the appendix to this Note.
claim was for damages under the antitrust laws. The court ordered separate trial of the counterclaim\textsuperscript{13} to make possible a more convenient disposition of the case. Clearly, the two claims involved were of an unusually complex nature. Indeed, an antitrust action is such a complicated affair that it is not surprising to find separate trials ordered, for one reason or another, in six of the seven cases found where antitrust counterclaims were asserted.\textsuperscript{14} Patent litigation is another complex area where separate trials are frequently used. In \textit{Zenith Radio Corp. v. Radio Corp. of America},\textsuperscript{15} the plaintiff brought an action for declaratory judgment of the invalidity, on grounds of misuse, of some 10,000 patents operated in a pool by the defendants over a period of thirty years. The defendant counterclaimed for infringement of 40 specific patents. The court suggested that the defendant move for a separate trial of his counterclaim, saying that "... a trial of both issues would impose a heavier burden than one has the right to ask of any single judge."\textsuperscript{16} In actions like these, it is clear that a single trial of all claims would be a tremendous task for either judge or jury.

Another instance in which separate trials have been ordered occurs when two claims are asserted which are utterly different in both fact and law. There confusion of the jurors may result from their trying to keep in mind the two divergent and unrelated claims. Thus a claim of one party in libel can be separated from the combined claims of the other party for patent infringement, breach of confidential relations, and trade mark infringement.\textsuperscript{17}

Needless to say, the dictates of common sense must control in these cases. Where two claims, such as one for copyright infringement and another for unfair competition, are for practical purposes distinct even though related in subject, they can be tried separately.\textsuperscript{18} As Judge Clark points out, "Here the evidence to support

\textsuperscript{13} See Society of European Stage Authors and Composers, Inc. v. WCAU Broadcasting Co., 35 F. Supp. 460 (E.D. Pa. 1940).


\textsuperscript{15} 106 F. Supp. 561 (D. Del. 1952).

\textsuperscript{16} Id. at 576.

\textsuperscript{17} Martin v. Wyeth, Inc., 96 F. Supp. 689 (D. Md.), aff'd, 193 F. 2d 58 (4th Cir. 1951).

\textsuperscript{18} Collins v. Metro-Goldwyn Pictures Corp., 106 F. 2d 83 (2d Cir. 1939).
the first claim would to a considerable extent be different from, and in addition to, that for the second claim, and there would be little, if any, gain in forcing them always to be tried and adjudicated together.\textsuperscript{19} When this requirement of separate proof is not met, there is no justification for separating claims merely because they are distinguishable. Consequently, a claim for patent infringement and a counterclaim under another patent should not be separated when the subjects of both patents are quite similar.\textsuperscript{20} A separate trial of one claim has even been denied on the ground that a jury would be confused if restricted to one issue when evidence concerning the other claims would have to be admitted.\textsuperscript{21} Certainly the denial of separate trial in these situations is only sensible. Only when virtually no duplication will result should a separate trial be granted merely because the claims are dissimilar, or the purpose of modern pleading to provide inexpensive trials will be defeated. It should also be kept in mind that one trial is generally cheaper than two,\textsuperscript{22} even when the claims require wholly different proof. The presumption should be in favor of a single trial.

Another situation in which separate trials are requested under Rule 42(b) occurs when a threat of confusion arises, not from the total dissimilarity of claims, but from their very similarity. The cases found in this category thus far are confined to actions where a plaintiff sues an employer under the Federal Employers Liability Act or a shipowner under the Jones Act. A third party is sued jointly or impleaded as a defendant on a theory of common law negligence. The result is that the party being sued under the statute does not have the defenses of contributory negligence or assumption of risk.\textsuperscript{23} Contributory negligence can only be offered in mitigation of damages.\textsuperscript{24} In contrast, both these defenses are available to the third party. The third party then moves for a separate trial on the ground that the two theories of liability would confuse the jury to his prejudice. Despite the plausibility of the argument, third parties have been unsuccessful in convincing the courts of the

\textsuperscript{19} Id. at 87 (concurring opinion).
\textsuperscript{22} See 5 Moore, Federal Practice 1211 (2d ed. 1951).
desirability of a separate trial in four of the five cases found on
the subject. In two of the cases requiring a single trial the courts
find that no formidable difficulty results from the two different
theories of liability. In fact, however, it would appear entirely
possible that the jury could become confused to the prejudice of
the third party. Ordinarily this threat of unfairness might well
justify a separate trial even though there would be duplication of
such matters as the issue of foreseeability; fairness is certainly a
consideration paramount to convenience. But the best reason given
for not allowing a separate trial in these cases is that it might
prejudice the plaintiff. Each jury in the separate trials could
come to the conclusion that the plaintiff was injured by the negli-
genence of the defendant who was not then on trial. In that event, the
plaintiff would be without remedy even though both juries found
he had been injured by the negligence of another. While it is true
that each defendant would have been found not negligent, that could
be attributed to the advantage each one had in being able to assert
the negligence of the other party who was not present to deny it.
There is no doubt that a real possibility exits that the jury in a joint
trial would have found one or the other of the defendants liable.
All possible inconsistent results are avoided by denying the
separate trial.

The final major source of confusion arises from the third-party
practice allowed by the new rules. The introduction of third parties
and claims concerning them may well lead to situations confusing
to a jury. Thus the personal injury claim of a wife against a defendant
who brings in the husband as a third-party defendant may be
separated from the claims of the husband arising from the same
accident. Third-party complaints against the defendant's surety
have been ordered tried separately to avoid undue delay of the
plaintiff's claim, or to prevent complication of the main

25. "Severance" was granted in Ginsburg v. Standard Oil Co. of New
Jersey, 5 F. R. D. 48 (S.D. N.Y. 1945). "Severance" or separate trial was
denied in: Lawrence v. Great Northern Ry., 98 F. Supp. 746 (D. Minn. 1951),
aff'd, Waylander-Peterson Co. v. Great Northern Ry., 201 F. 2d 408 (8th
Cir. 1953); Pabellon v. Grace Lines, Inc., 12 F. R. D. 123 (S.D. N.Y. 1951);
Psaroumbas v. United Greek Shipowners Corp., 5 F. R. D. 398 (S.D. N.Y.
1946). It was held error to grant a separate trial in Way v. Waterloo, Cedar
Falls & Northern R. R., 239 Iowa 244, 29 N. W. 2d 867 (1947).
26. Lawrence v. Great Northern Ry., 98 F. Supp. 746 (D. Minn. 1951);
27. Psaroumbas v. United Greek Shipowners Corp., 5 F. R. D. 398
(S.D. N.Y. 1946); Way v. Waterloo, Cedar Falls & Northern R. R., 239
Iowa 244, 29 N. W. 2d 867 (1947).
478 (Sup. Ct. 1948), aff'd mem., 275 App. Div. 659, 86 N. Y. S. 2d 688 (1st
Dep't 1949).
action. But trial of the surety claim with the main action will not always result in delay, and a single trial may save both time and expense. A more convincing reason for separating the claim against a surety is that it may be unnecessary to try that claim if the main action is decided for the defendant. In any case, the courts have made it clear that multiple parties are to be expected under the new rules and separate trials should not be granted merely because the liberal joinder provisions are used. Thus a third-party claim need not be tried separately simply because the issues may become complicated, so long as they can be disposed of at one trial, nor where ultimate liability cannot be fixed without determination of several common fact issues. Several claims brought by one plaintiff against different defendants can be tried together when there are issues common to all. A good illustration of the court’s denying a separate trial where most of the possible objections to multiple parties were raised is Brewster v. Gair Realty Corp. The plaintiff there raised, among others, the arguments that his claim would be delayed, that his selection of jurors would be hampered by the peremptory challenge right of the impleaded party, and that his witnesses would be cross-examined by someone whom he is not suing. The court denied the “severance,” pointing out that these complaints are no different from those possible in every case where impleader is allowed. To this it might be added that, if a trial is to be regarded partly as a device for getting at the truth, there is really nothing lost by having one more party scrutinizing the jury and cross-examining the witnesses. In any event, it appears that the courts are not reacting unfavorably to the multiple party actions arising under the new rules.

Generally, then, it may be said that to avoid confusion a separate trial of a claim may be ordered where a single trial of all the claims

33. See United States v. Montlack, 11 F. R. D. 159, 160 (E.D. N.Y. 1951). In that case only the surety claim was a jury matter, so there was a possibility of wholly avoiding a jury trial.
37. 101 N. Y. S. 2d 1006 (Sup. Ct. 1950).
38. Id. at 1007-1008.
and parties will be intolerably complicated or will involve the juxtaposition of theoretically divergent claims. Naturally, there is no way of telling how many overly complicated trials have been conducted where no motion was made for separate trial, but it appears that separate trials have been awarded in extremely complicated litigation when requested. Yet separate trials have not generally been granted where duplication would result.

Separate Trial of Claims for Procedural Convenience

A claim may be set aside for separate trial when it will, in one way or another, aid in the disposition of a case in a rather mechanical sense. If one claim can be disposed of very easily and the other cannot, separate trial is possible if the facts are not too closely connected. Thus a summary judgment can be given on one or more claims, and the remaining ones may be tried separately under Rule 42(b). While the separation of a claim which can be decided without trial is clearly a convenience to all parties, there is a danger when multiple defendants are concerned that the early dismissal of one defendant may prejudice the remaining ones. An example of such prejudice occurred in a case where an injured passenger of one car in a collision sued the drivers of both cars involved. At the close of the plaintiff’s case, the court erroneously directed a verdict for one defendant against whom a submissable case had been made. On appeal it was held that the other defendant could properly complain of this error because it deprived him of his only defense—the sole negligence of the first driver. Thus the separate trial is a convenient instrument with which to dispose of claims summarily, but it may be a dangerous one if its effect on all parties is not thoroughly considered before it is used.

The joinder of legal and equitable claims in one action can lead to separate trials, as the jury trial can be separately conducted under Rule 42(b). Thus antitrust counterclaims have been set aside for separate jury trial, leaving for trial to the court the “equitable” claim of unfair competition. In such cases, where the equitable

42. Biggs v. Crosswhite, 240 Mo. App. 1171, 225 S. W. 2d 514 (1949).
43. See Keene v. Hale-Halsey Co., 118 F. 2d 332, 335 (5th Cir. 1940).
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issue is quite complicated, it is certainly best to order a separate trial instead of having the jury sit by while those claims are tried to the court. But in other cases a simultaneous trial is convenient and will avoid much duplication. The mere fact that one claim is legal and the other equitable is not of itself reason enough to order separate trials under Rule 42(b). In all, the courts do not appear to have acted without good reasons on those occasions when separate trials of legal and equitable claims were ordered. Rule 42(b) is apparently being used effectively enough in the furtherance of procedural convenience.

Separate Trial of Claims to Avoid Prejudice

One other class of cases in which separate trial of a claim is ordered is that where the single trial, while not overly complicated nor physically inconvenient, would for one reason or another prejudice one of the parties. Such a situation is frequently found when the defendant impleads his insurer. In nearly all of the cases found on the subject, the courts have held that the action against the insurer should not be tried with the main action, on the ground that it would prejudice the insurer to have the fact of insurance made known at the main trial. Severance has been granted even though the court admitted that a modern juror probably knows that practically everyone carries automobile liability insurance. Needless to say, when prejudice to a party is involved, a separate trial can be granted even though litigation of an issue might be duplicated. Generally, it may be doubted that anything is gained by keeping the fact of insurance from the jurors. If the jurors have not assumed that the defendant is insured, it will almost certainly be made clear to them on voir dire. Yet the cases show that the courts for the most part are simply unwilling to take the step and allow joint trial of an insurer.

Another type of prejudice which may occasion a separate trial is the delay of plaintiff’s claim. Hence, where the plaintiff’s

47. Remch v. Grabov, 193 Misc. 731, 70 N. Y. S. 2d 462 (Sup. Ct. 1947) (separate trial only if case is tried before a jury).
48. Id. at 733, 70 N. Y. S. 2d at 464.
claim was for re-employment under the Selective Service Act which provides that such a claim shall be speedily heard, the court ordered a separate trial of a counterclaim which might delay the action.\(^5\)

Likewise, if an impleaded third party invoked the Soldiers' and Sailors' Relief Act to delay trial until he was out of the service, a plaintiff could obtain a separate trial of his main claim without having to wait.\(^6\)

The policy of these cases is simple: speed as well as economy is a goal of the new rules. Here any gain from holding only one trial would be more than offset by the failure to provide the plaintiff with some approximation of speedy justice.

The last group of cases where separate trial of a claim may be ordered to avoid prejudice to a party is particularly interesting. Here the two claims are such that they have a combined effect quite different from the sum of their separate effects. When two claims being asserted are based on the negligence of one defendant in very similar accidents happening within a short interval of time, the cumulative effect may prejudice the jury against the defendant, and a "severance" can be granted.\(^8\)

It has also been held that a claim on a contract could be separated from one for fraudulent shifting of assets, on the ground that evidence as to the false transfer would prejudice the defendants on the contract claim.\(^4\)

This principle as it is applied to claims could perhaps be extended to other cases where one claim involves some act of doubtful morality on the part of the defendant, wholly independent of the other claim. Finally, two personal injury cases should not be tried together when one of the plaintiffs has injuries of a gruesome nature, as the character of those injuries might influence the jurors unconsciously to inflate the other verdict.\(^5\)

These cases show a recognition by the courts that a joint trial of two claims is not neatly compartmentalized in the minds of the jurors. All the evidence is together before them, and it cannot be presumed that psychological factors attending one claim will be without effect on the other. Yet these cases where prejudice might carry over are unusual by their very circumstances. That the court can order separate trials and thus meet the situation is a tribute to the flexibility of Rule 42(b).

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Separate Trial of Claims Without Apparent Reason

There is another class of cases which are difficult to explain, not in the court's denial of the separate trial, but in the reasons for a party making a motion for the separate trial in the first place. Perhaps the motions are best explained either as delaying tactics or as vestigial attempts to achieve the fragmentation existing before the adoption of modern rules. A prime example is found where, after a plaintiff was allowed to file a supplemental complaint to bring his claim up to date, the defendant moved for a separate trial of the matter contained in the supplemental complaint even though this matter was virtually identical to that in the first complaint. The court naturally refused, declaring that the whole purpose of the supplemental complaint would be subverted by such a procedure. Likewise denied have been motions for separate trials concerning one lease out of three on which an action was based, one patent out of four applying to the same piece of machinery, and of the claims of several plaintiffs damaged by a product of the defendant. There would seem to be no benefit to be derived from separate trials in any of these cases, so they were properly denied.

The Texas courts, on the other hand, take a unique approach to the granting of separate trials under Rule 42(b). They have granted severances or separate trials in over four-fifths of the cases found. In an action by the seller for the purchase price of goods sold, the Texas court severed the counterclaim for misrepresentation of similar goods previously sold. A claim for fraudulent transfer of community property has been separated from one for divorce when there was no indication that prejudice or severe complication would result, and the only convenience to the court would seem to be the ease of hearing claims one at a time. All of the Texas cases found on appeal, and it is natural that the lower court's granting of a

57. Id. at 1020.
61. See Waller Peanut Co. v. Lee County Peanut Co., 217 S. W. 2d 183 (Tex. Civ. App. 1949). This was a true severance which the appellate court regarded as discretionary. It should be noted, however, that the Texas counterclaim rule is not as liberal as the federal one. A tort cannot be the subject of a counterclaim against a contractual demand, and vice versa, "... unless it arises out of or is incident to or is connected with same." Tex. R. Civ. P. 97(g).
separate trial, being discretionary, will not be reversed unless some very convincing reason be shown why it should. Yet the attitude of the Texas courts can be gleaned from the reasons offered for finding a “severance” or separate trial proper. Offered are the justifications that the issues were separate and distinct, that severance made no difference to the adjudication of the main claim, and that the party against whom the severed claim was asserted was not insolvent. There seems to be no presumption here in favor of a single trial. As a result, the parties often must go through the extra expenses attending two trials for little reason.

An unusual use of Rule 42(b) appears in the Texas case of *Leon v. Noble.* There the defendant argued that the plaintiff was estopped because his claim had been a compulsory counterclaim in a prior suit by the defendant arising out of the same automobile accident. The plaintiff had taken a voluntary nonsuit on that counterclaim because he had not been ready for trial. The court hearing the later case held that the plaintiff was not estopped, because in allowing the nonsuit the first court was merely exercising its discretion in directing a separate trial. Such an application of Rule 42(b) appears indefensible. It results in almost total duplication of evidence in two trials. The first trial could have been postponed if the un-readiness to try the counterclaim was excusable. The compulsory counterclaim rule is totally emasculated if the counterclaim can be tried separately or severed whenever a party requests it. Fortunately, a later decision by another branch of the Texas Court of Civil Appeals has gone quite the other way. There it was held that Rule 42(b) is not broad enough to allow “severance” of a compulsory counterclaim, and both claim and counterclaim must be tried at the same time. While it is probably a bit too rigid to say that there can never be a separate trial of a compulsory counterclaim, this case certainly takes the proper direction to avoid the harmful results of *Leon v. Noble.* In any event, the marked tendency toward allowing severance merely upon request seems to be confined to the Texas courts.

It therefore appears that some separate trials of claims have been ordered when the reasons for so doing have not been convincing or have been totally absent. But it is clear that there have been many

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more cases where good reasons have been given, where the separate trial successfully prevented confusion or prejudice, or was procedurally convenient. On the whole it can be said that satisfactory results are being achieved under Rule 42(b) for the separate trial of claims.

Separate Trial of Issues

The courts grant separate trials of particular issues in even a larger proportion of cases than they do of claims. Separate trials have been granted or conducted in 60 cases found on the subject; they have been denied in only 15. The granting of separate trial of an issue is based, in nearly all of the cases, on the fact that a trial of the one issue beforehand may be dispositive of the entire case. In some instances there is added the possibility of prejudice to a party if all the issues are tried together. An understanding of the manner in which the separate trial of issues is being handled is best gained by an examination of the cases where the question arises, either as to the separation of small issues or large segments of the case.

Issue of Validity of a Release Executed by Plaintiff

One of the most common instances where the separate trial of an issue is ordered occurs when the defendant offers in defense a release signed by the plaintiff and the plaintiff attacks its validity. A separate trial is then granted to test the validity of the release. One important reason given for the separate trial, and one which seldom appears outside of release cases, is that it would prejudice the defendant to have the issue tried with the rest of the claim. In some instances where the release was obtained by the agent of an insurance company, the courts have ordered a separate trial on the ground that it would be prejudicial to have the existence of insurance brought to the attention of the jury. The force of reason probably lies more with one court which denied a separate trial of the release issue with the statement that juries are not "... as ingenuous as the law seems to suppose."

But, as was pointed out earlier, courts by and large still refuse to let matters concerning insurance come before the jury. The suggestion has also been made that the defendant might be prejudiced, independently of the insurance problem, by a single trial because the jury might minimize or

70. Ibid.
totally ignore the questions of negligence and damages. Conversely, the argument has been accepted that a jury hearing both issues might decide the release issue for the plaintiff because of the jury's desire to hold the defendant liable for his negligence. It would seem that either occurrence is possible. A jury might want to hold a grossly negligent defendant regardless of a release, and might equally well want to hold a defendant who was guilty of fraud whether or not he was negligent. It is preferable to separate issues as well as claims when one of them involves moral turpitude which does not causally affect the others.

Probably the soundest reason for trying the issue of release separately, and the one most often advanced, is that it will dispose of the entire case if the issue is decided for the defendant. Thus the trial of the main issues, where most of the expense arises, could be avoided. Likewise where the plaintiff has violated an agreement not to bring an action in a state other than that in which he was injured, the validity of this agreement should be determined first. If the decision regarding the agreement's validity were postponed until after a trial of the main issues, the purpose of the agreement would have been frustrated even if it were found valid, and the whole trial might become a nullity as well.

Because it is clearly sensible in many cases to try the validity of the release first, it might be thought that a separate trial of that issue had become automatic. It is gratifying to find that this is not so. Where the release was obtained so close to the time of the injury that the details of the injury would have to be introduced, as well as the treatment which had bearing on the adequacy of the consideration, a separate trial was denied. Furthermore, when the ground of avoiding the release was mutual mistake as to the extent of the injuries, a separate trial was denied because the issue was too involved with the merits of the action. In *Fleischman v. Harwood*, a husband and wife sued for injuries to the wife alone. She had signed a release and sought to avoid it. The defendant's motion for separate trial of the release issue was denied because the husband's

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73. This reason was the ground for ordering separate trials in *Sognose Realities, Inc. v. Twentieth Century-Fox Film Corp.*, 15 F. R. D. 496 (S.D. N.Y. 1954), and in *Harkins v. Gilkey*, 123 N. Y. S. 2d 120 (Sup. Ct. 1953).
77. 10 F. R. D. 139 (S.D. N.Y. 1950).
claim remained and there would have to be a trial on the merits whether or not the release was valid. Thus the courts are not granting separate trials of release issues when it would result in a duplication of the evidence in two trials. In this area the courts are exhibiting the flexibility required to achieve the goals of convenience and economy.

Other Simple Issues Which May Dispose of the Case

There are a number of other issues for which separate trial is often granted on the sole ground that a decision for the defendant on one such issue will put an end to the litigation. For this reason separate trials have been granted as to the particular defenses of the statute of limitations, res judicata, estoppel by judgment, and the Statute of Frauds. There would seemingly be no reason why other similar defenses might not also be tried separately, although a separate trial of laches has been denied when the motion was made after the preparation for a single trial was virtually completed.

The only case found where a separate trial of the limitations issue has been denied is Frasier v. Twentieth Century-Fox Film Corp. In that action for damages under the antitrust laws, some of the defendants sought a separate trial of the issue of limitations, not as a bar to the action itself, but to restrict the trial and discovery procedure to matters not cut off by the running of the statute. The court refused to allow a trial of the limitations issue before completion of the discovery proceedings. The propriety of such a decision depends entirely on the facts of the particular case. A decision that certain matters are barred by limitations would not preclude discovery proceedings concerning those matters if they were in some way relevant to the subject of the pending action. But such a decision might well render much of the matter involved irrelevant, and where this possibility exists the discovery procedure should be postponed until it is determined how much of it will be necessary.

An early separate trial would seem quite desirable when there is a possibility of avoiding some of the discovery proceedings, especially in complicated cases where they are likely to be very expensive and inconvenient.

Another group of issues which may merit a separate trial under Rule 42(b) concerns the jurisdiction of the court to hear a case. For instance, separate trials have been held on the issues of diversity of citizenship\(^86\) and the existence of a justiciable case or controversy\(^87\) in order to establish federal jurisdiction. These decisions are certainly proper when the jurisdiction issue is a separate matter which may result in the case being thrown out of court, but any generalization covering the issue of jurisdiction would be unwise. In the case of \textit{Cain v. Blumberg},\(^88\) the court denied a separate trial of the issue whether the claim equalled the amount requisite for federal diversity jurisdiction, because it would have involved a detailed inquiry into the extent of the plaintiff's injuries, causing much duplication. It would seem that in this case the only thing to be gained by a separate trial would be a possible elimination of the need to try the liability question, which appeared to be a slight one. Equally great would have been the possibility that much of the evidence on damages would have had to be heard twice. In such a situation there is no reason for risking the event of two trials. This case indicates that the issue of jurisdiction is no more fit for mechanical handling under Rule 42(b) than is any other issue, and the courts are not so handling it.

Another issue which appears to exist quite apart from the merits of the case is that of the standing of a party to maintain an action. This issue has frequently appeared where a party is attacking the validity of a will and the question arises whether he is a person interested in the estate. If all the contestants are being challenged, the issue of their standing may be heard separately as this would avoid a will contest if decided against the contestants.\(^89\) Even if there are other, unchallenged contestants, the standing of one may be determined separately when it will simplify for the jury the issues in the will contest.\(^90\) But separation under those circumstances is not ordered where the standing depends on whether a prior will was effectively revoked by the execution of a later one.

\(^{88}\) \textit{51 F. Supp. 234} (W.D. La. 1943).
\(^{89}\) \textit{In re Gerdes' Estate}, 62 N. W. 2d 777 (Iowa 1954).
when this would lead to the duplication of hearing evidence on such
issues as fraud, undue influence, and testamentary capacity. This
possibility of duplication simply illustrates the proposition that some
thought is required before any issue is set aside for separate trial. The
seemingly independent issue of the standing of a party is often
a special part of the merits of a case.

There are many instances where, because of the special circum-
stances of a particular case, one point arises which might be dis-
positive of the whole controversy. Thus, in King v. Edward Hines
Lumber Co., the parties agreed that there would be no case for the
plaintiff if the road on which an accident occurred was not a
public highway to which an Oregon traffic statute applied. The
court tried the issue separately under Rule 42(b) and found the
road not to be public, thereby ending the case with a minimum of ex-
penditure and inconvenience. In an action under the Federal Employers
Liability Act the question whether the plaintiff employee was en-
gaged in interstate commerce has been tried first as it was a condition
precedent to the action. Likewise it can be determined in a
separate trial whether a plaintiff was an employee of the defendant
and thereby barred by the compensation laws from suing on the basis
of negligence. In all of these cases, a special issue comes to the fore
which may be dispositive of the case and which is easily isolated for
trial. Under such circumstances there can be little doubt about the
desirability of a separate trial. This does not mean that a separate
trial is in order whenever it is possible to see some element on
which the case might depend. For example, plaintiff cannot get
a separate trial of the defense asserted that his complaint fails to state
a claim, when such a hearing would merely carve the heart out of
a case and dispose of it beforehand for the convenience of the
plaintiff. It is clear then, that the courts have been allowing sepa-
rate trials of particular issues which, as a general defense or a
special point of the case at hand, may be dispositive of the case and
are conveniently heard separately.

Division of Trial into Segments

There is another group of cases where the issue sought to be
separated is not a simple, easily heard one but is instead a very

91. In Re Aims' Estate, 199 Misc. 185, 97 N. Y. S. 2d 140 (Surr. Ct.
1950).
1952).
812 (E.D. N.Y. 1940).
important segment of the case. One reason for granting a separate trial in such a situation may be that there is a possibility of avoiding a part of the trial which would be especially inconvenient because of unusual circumstances. Thus the issue of liability was tried before that of damages in *Rickenbacher Transp., Inc. v. Pennsylvania R. R.*, where the plaintiff's truck containing shipments from 35 consignors was hit by the defendant's train. The damages question would have required detailed evidence from 35 sources. Clearly it is much more practical first to determine whether the defendant is liable before presenting evidence on such a complicated question. Perhaps the best example of the saving of time and expense to be gained from a separate trial of the liability question is provided by *In re Texas City Disaster Litigation.* In that case a separate finding that the United States was not liable on some 273 consolidated suits obviated the necessity of hearing evidence of damages to 8485 plaintiffs suing on various death, personal injury, and property damage claims.

Another area where liability is often tried before the issue of damages is that of patent infringement. There the issues of patent validity and infringement may be tried together before the issue of damages as both the former issues must be decided for the plaintiff before damages become a question. These cases can be explained by the fact that the liability issues are separable from that of damages and the latter is extremely complex. Complexity of the damages issue without separability is not enough, however. For example, damages for violation of the antitrust acts are complex, but a separate trial of that issue has been denied because there could be no liability without damages. Nor can separate trial under Rule 42(b) be granted in a situation where fraud in wrongfully claiming second class postal rates would necessarily require damages to make it a fraud. The courts therefore have been consistent in giving separate trials for the issue of liability where it can be separated without making trial of the remaining damages issue senseless or repetitious, and where trial of that remaining issue will be complicated in itself. No cases have been found separating liability from damages when all these factors are not present, but

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96. 3 F. R. D. 202 (S.D. N.Y. 1942).
it has been suggested that the practice of trying liability separately should be extended.\textsuperscript{101} It is true that a decision for the defendant on the issue of liability would end the case, and the issue could be heard separately without duplicating the evidence as to damages. But in many cases, especially personal injury negligence cases, the separation might affect the outcome of the case. It can reasonably be suspected that the degree of negligence, the contributory negligence of the plaintiff, and other conduct of the parties are presently reflected, with many juries, in the finding of damages as well as the finding of liability. To a purist it probably would seem desirable to put an end to this, but it may be argued that this lends a beneficial flexibility to the strict rules of liability and contributory negligence. At least it should be recognized that separate trials of liability and damages would differ from a single trial in more than form. It is one thing for a jury to find a defendant liable when it can itself fix the damages. It is another to do so when it is not known at the time what the damages will be. It may well be better to allow the present system to continue where, according to the community standard represented by the jury, liability is a quantitative as well as qualitative matter. In any event, the cases to date indicate that the separation of liability from damages is not being asked of the courts in the ordinary run of cases.

Another major segment of a case capable of separate determination appears in contract actions. The court may order a separate trial of the existence of a contract on which the action is based.\textsuperscript{102} Similarly, in a complicated case calling in question the validity of some 550 patents, the issue of existence of a licensing agreement was ordered tried separately when such a contract would win the case for the defendant by estoppel.\textsuperscript{103} The validity of a contract may be a subject for separate trial, just as its existence can. A separate consolidated trial has been ordered on the issue of insanity of a person who was the defendant in two different contract actions.\textsuperscript{104} In these situations where a decision on the contract issue might avoid a complicated action, or two separate actions, a separate trial is clearly preferable. In neither case will there be duplication of evidence. Yet separate trials are not always advisable merely because the issues are separable and could dispose of the case. In

\textsuperscript{101} See 5 Moore, Federal Practice 1217 (2d ed. 1951).
\textsuperscript{104} Hotel George V v. McLean, 1 F. R. D. 241 (D. D.C. 1940).
Hammonds v. Hammonds\(^{105}\) the lower court, on motion of both parties, tried separately in two different trials the issues of undue influence and testamentary capacity in a will contest. Though either issue would have settled the case if decided for the contestants, the separate trials drew the following comment from the appellate court: "We are at a loss to understand on what theory or ground a trial court should permit, even by consent of all parties, separate trials in a will contest on the issues of undue influence and mental capacity. The purpose of [Rule 42(b)] is to reduce rather than increase the number of trials."\(^{106}\) This case serves to illustrate two important points. First, the separate trial of issues dispositive of the case can be carried so far that it defeats its own purpose. Second, the separate trial under Rule 42(b) is a matter in which the convenience of the court, not that of the parties, is the dominant consideration.\(^{107}\) In view of the fact that most court calendars are filled for some time in advance, the efficient disposition of cases is important to others than just the parties involved in each suit.

As for the separation of issues in general, it can be seen that separate trial under Rule 42(b) has been granted in a considerable number of cases. When the issue may be dispositive of the case, is easily separable, and leaves substantial or complex issues remaining to be tried, separate trials have often been granted and have worked to the advantage of all concerned.

**CONCLUSION**

The foregoing text as well as the appendix indicates that the courts are exercising their discretion in ordering separate trials under Rule 42(b) both as to claims and issues. While there are cases in which the separate trial resulted in duplication, delay, or unnecessary expense, these have been relatively few, concentrated mostly in the state cases concerning claims. The cases where separate trials are granted may be divided into the groups discussed in this Note. In each group there are enough exceptions to indicate that the advisability of a separate trial is a matter to be determined according to the circumstances of each case. Consequently no formula can be evolved which will serve as a grand summary of all the material found concerning Rule 42(b). What can be said is that on the whole the separate trial has proved a very flexible and

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\(^{105}\) 263 S. W. 2d 348 (Mo. 1954).
\(^{106}\) Id. at 350.
\(^{107}\) See Wright, Minnesota Rules, Rule 42, Comment 2 (1954).
useful instrument for preventing confusion, avoiding prejudice, and providing a convenient method of disposing of litigation as fairly and quickly as possible. The rule serves its purpose in modern pleading.

**APPENDIX108**

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108. The breakdown into specific claims or issues here is obviously not complete. Only the recurring claims or issues lend themselves to classification for statistical purposes.