Separate Trials on Liability and Damages in Routine Cases: A Legal Analysis

Minn. L. Rev. Editorial Board
Notes
Separate Trials on Liability and Damages in "Routine Cases": A Legal Analysis

In an effort to combat the problem of delay in the courts caused by calendar congestion, the United States District Court for the Northern District of Illinois recently adopted a local rule which encourages the trial judge to order a separate trial on liability and damages in personal injury and other civil actions. Opponents of this local rule have maintained that the employment of such a rule is not advisable because the rule is not authorized by the Federal Rules; its effect on jury decisions is not desirable; and it is unconstitutional as violative of the seventh amendment. The author of this Note examines the local rule and analyzes these objections. He concludes that the local rule's approach is authorized, desirable, and constitutional.

INTRODUCTION

The United States District Court for the Northern District of Illinois recently adopted local rule 21 which encourages the judge, in personal injury and other civil litigation, to order separate trials before the same jury on the issues of liability and damages. This rule purports to be pursuant to Rule 42(b) of the Federal Rules of Civil Procedure which provides that a judge may order a separate trial on separate issues to further convenience or to avoid prejudice.

1. N.D. ILL. CIV. R. 21; 2 FED. RULES SERV. 2d 1048-49 (1960). Rule 21 has been amended since its adoption. The rule originally authorized the employment of a different jury in the second trial on damages. See 4 FED. RULES SERV. 2d 1136 (1961).

2. The rule was adopted Nov. 9, 1959, pursuant to Rule 83 of the Federal Rules of Civil Procedure which allows "each district court by action of a majority of the judges thereof [to] . . . make . . . rules governing its practice not inconsistent with . . . [the Federal] Rules." Rule 83 allows the district courts to set up local rules of procedure to obtain uniformity on procedures otherwise within the individual discretion of each judge.
Rule 21 is designed to help combat the growing problem of delay caused by congested court calendars through shortening the actual time required to try some cases. Whether the employment of rule 21 will reduce delay is not clear; however, this aspect of the rule has been exhaustively analyzed by various commentators and will not be dealt with in this Note. Since delay results in such erosions of evidence as impaired recall and unavailable witnesses, the merit of rule 21 is obvious if its objective is attained. However, this local rule may not be authorized by the Federal Rules. Moreover, the merit of the rule may be overbalanced by its possible effect on the jury function and jury system; in fact, this effect may render the rule unconstitutional under the seventh amendment.

I. RULE 42(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND RULE 21

A. CURRENT PRACTICE OF ORDERING SEPARATE TRIALS ON ISSUES IN THE FEDERAL COURTS

Ordering separate trials on issues is not a new procedure in the federal courts. Before the Federal Rules were adopted, the equity side of the courts possessed discretionary power to order separate trials on various issues, and such separate trials were not uncommon. The passage of the Federal Rules extended this discretionary power to all cases, whether legal or equitable. Fed-
eral Rule 42(b) provides that "the court in furtherance of con-
venience or to avoid prejudice may order a separate trial of . . .
any separate issue . . . ."

Rule 42(b) was derived from two model rules advocated by
the American Judicature Society, the statutes of New York and
California, and Equity Rule 29.7 The model rules and the state
statutes all provide for separate trials in conjunction with the ex-
tensive joinder of claims provisions.8 This suggests that one pur-
pose of Rule 42(b) is to allow separate trials on issues in cases
that become too complicated.9 Separate trials on issues have been
ordered under Rule 42(b) to simplify complex and difficult cases,
and thus avoid the possible prejudice and inconvenience that is
occasionally created by extensive joinder of claims.10 This possible
prejudice and inconvenience is illustrated by the Texas City Dis-
aster Litigation, where 273 suits for damages suffered by 8,485
plaintiffs were consolidated.11 The court ordered a separate trial
on the issue of liability because taking testimony on all of the
damages would have made a very complex case even more diffi-

7. Advisory Committee Notes to the Rules of Civil Procedure for the
United States District Courts, Rule 42, in 3A BARRON & HOLTZOFF, FED-
Court has stated that in ascertaining the meaning of a Federal Rule the
construction given the Rule by the Advisory Committee in their notes "is
of weight." Mississippi Publishing Corp. v. Murphee, 326 U.S. 438, 444
(1946).

8. CAL. CIV. PROC. § 1048; N.Y. CIV. PRAC. ACT § 96; AMERICAN
JUDICATURE SOCIETY, BULL. XIV, RULES OF CIVIL
PROCEDURE 18, 43
(1919). Art. 3, § 2, of the model statutes is very similar to the state
statutes. It provides that "when several claims are united . . . the court
may at any time order any of them to be severed or stayed, or order any of
the issues to be separately tried if they cannot conveniently be disposed of
or tried together." Id. at 18. Art. 10, § 10, is also similar; it provides for sep-
arate trials on issues arising out of counterclaims when this procedure is
convenient. Id. at 43.

9. This conclusion is brought out in the discussions on the Federal Rules
that took place before their adoption. Judge (then Dean) Clark stated in
these discussions that Rule 42(b) could be invoked to avoid prejudice or
inconvenience when a case became "cumbersome" due to the liberal joinder
rules. See ABA, PROCEEDINGS OF CLEVELAND INSTITUTE ON THE FEDERAL
RULES 273, 310 (1938); ABA, PROCEEDINGS OF NEW YORK INSTITUTE
ON THE FEDERAL RULES 277 (1938); ABA, PROCEEDINGS OF WASHINGTON
INSTITUTE ON THE FEDERAL RULES 59, 73, 79–80, 118, 120 (1938).

F.2d 243 (5th Cir. 1956); Hassett v. Modern Maid Packers, Inc., 23 F.R.D.
661 (D. Md. 1959); Rickenbacher Transp., Inc. v. Pennsylvania R.R., 3

11. 197 F.2d 771 (5th Cir. 1952), aff'd sub. nom., Dalehite v. United
States, 346 U.S. 15 (1953), 38 MINN. L. REV. 175 (1954). Rule 42(b)
may also be applied in multiparty litigation involving only a few parties.
In Nettles v. Central Acc. & Life Assur. Corp., 234 F.2d 243 (5th Cir.
1956), the court ordered a separate trial on liability in a negligence action
involving the consolidation of only three claims.
cult for the court to decide. The cases in which separate trials on issues have been ordered to avoid prejudice and inconvenience do not appear to be numerous, however.

Another purpose of Rule 42(b) is to allow separate trials when legal and equitable issues are combined in one action. The Federal Rules provide for the merger of law and equity; nevertheless, the distinction between legal and equitable issues is still relevant because of the seventh amendment. Accordingly, when claims involving both legal and equitable issues have been presented, the courts have ordered separate jury trials on legal issues while the courts independently decided the equitable issues.

Equity Rule 29 is also a basis for Rule 42(b). This rule gave the judge discretion to hear and dispose of defenses "presentable in bar or abatement" before trying the principal case. The equity rule was employed by the courts to further the convenience of the parties; thus, a separate trial on a defense could be ordered only if a decision for the defendant on the issue would end the litigation. The courts also have utilized Rule 42(b) to order separate trials on specific case-determinative defenses. For example, separate trials have been ordered on the defenses of the statute of limitations, the validity of a release, and laches. Such

---

12. Judge Clark stated that the rules contemplate most extensive joinder, and safeguard all rights by provisions for orders of separate trials, etc. Different form of trial of different issues, e.g., one to the jury, another to the court, are a normal feature of the procedure here contemplated. ABA, PROCEEDINGS OF WASHINGTON INSTITUTE ON THE FEDERAL RULES 79-80 (1938).
15. The third sentence of Equity Rule 29 provided that every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. 226 U.S. 656-57 (1912).
17. Smith v. Sperling, 237 F.2d 317 (9th Cir. 1956).

For other defenses upon which separate trials have been ordered, see Carr v. Beverly Hills Corp., 237 F.2d 323 (9th Cir. 1956), rev'd on other grounds, 354 U.S. 917 (1957) (jurisdiction); Canister Co. v. National Can
a procedure benefits the parties because the time and expense of a lengthy trial may be avoided. It is also a convenient practice for the courts since court time will be saved when the defense is sustained.20

While convenience of the court and parties is the usual reason for ordering separate trials on issues, it is not the only reason. A court may order a separate trial on an issue to avoid prejudicing the defendant. This is one of the principal reasons advanced for a separate trial to test the validity of a release allegedly signed by the plaintiff in a personal injury case.21 Releases are often obtained by insurance agents; from this many courts reason that the defendant is prejudiced because the jury is made aware of his insurance.22 Moreover, a jury may disregard the release issue in a trial involving a grossly negligent defendant23 or, conversely, it may hold a defendant who was guilty of fraud in obtaining a release liable whether or not he was negligent.24 The release cases appear to be the only instances where the courts have specifically utilized Rule 42(b) to avoid prejudice, although the prejudice that may result from extensive joinder may have influenced courts to grant separate trials in multiparty litigation.

In summary, the courts have ordered separate trials on issues

21. Id. at 755–56.
22. In Larsen v. Powell, 16 F.R.D. 322 (D. Colo. 1954), the court reasoned that it is practically impossible to prevent a jury from learning of the defendant's insurance if the release issue is tried with the principal case. It assumed that the jury's knowledge of the defendant's insurance is prejudicial to him. The court rejected the argument that this prejudice could be remedied by a jury instruction to disregard any reference to insurance. Id. at 324. Accord, Bowie v. Sorrell, 113 F. Supp. 373 (W.D. Va.), rev'd on other grounds, 209 F.2d 49 (4th Cir. 1953). But see Crockett v. Boysen, 26 F.R.D. 148 (D. Minn. 1960), where the court held that a separate trial should not be ordered on a release issue. The court reasoned that there is no prejudice in trying this issue with the principal case because of the "simple reason that most jurors know that an insurance company is involved in almost every personal injury action." Id. at 149.
23. See Ross v. Service Lines, Inc., 31 F. Supp. 871 (E.D. Ill. 1940), where the court reasoned that the desire of the jury to render a verdict for either party on the negligence issue may "cloud their judgment" as to the release issue.
24. See Nesbitt v. Hauck, 15 F.R.D. 254, 256 (D.S.D. 1954), where the court reasoned that to submit the fraud issue to the jury may "cause them to minimize or almost wholly ignore the question of negligence and plaintiff's right to recover damages."
under Rule 42(b) in cases where the separation of an issue will simplify an otherwise complex case, will separate legal and equitable issues, will involve a case-determinative defense, or will avoid prejudice which might otherwise injure one party's position. Significantly, Rule 42(b) was not designed to be liberally employed, and the courts have not ordered separate trials under Rule 42(b), except in rather isolated and unusual cases. The courts have generally followed the rule that a lawsuit should not be tried piecemeal—a philosophy adhered to in the Federal Rules.

B. RULE 21'S EFFECT ON CURRENT PRACTICE

Rule 21 states that it is within the purview of Rule 42(b), but it appears to change the current practice of granting separate trials in the federal courts. The rule provides:

Pursuant to and in furtherance of Rule 42(b), Federal Rules of Civil Procedure, to curtail undue delay in the administration of justice in personal injury and other civil litigation wherein the issue of liability may be adjudicated as a prerequisite to the determination of any or all other issues, in jury and non-jury cases, a separate trial may be had upon such issue of liability, upon motion of any of the parties or at the Court's direction, in any claim, cross-claim, counterclaim, or third-party claim.

In the event liability is sustained, the trial on the remaining issues shall proceed before the same jury, unless otherwise stipulated by the parties.

The Court, however, may proceed to trial upon all or any combination of issues if, in its discretion, and in the furtherance of justice, it shall appear that a separate trial will work a hardship upon any of the parties or will result in protracted or costly litigation.

25. This is illustrated by Judge Clark's comment that few people want separate trials, "except in rather peculiar and special cases where it is clear to everybody that they should be had." ABA, PROCEEDINGS OF WASHINGTON INSTITUTE ON THE FEDERAL RULES 59 (1938).


27. Judge Clark stated that the Rules are "based on the theory that it is a sound and a desirable thing that all spots of irritation between the parties should be brought out into the open and should be fought over and disposed of at one time." ABA, PROCEEDINGS OF WASHINGTON INSTITUTE ON THE FEDERAL RULES 58 (1938). (Emphasis added.)

28. N.D. ILL. CIV. R. 21; 2 FED. RULES Serv. 2d 1048 (1960); 4 FED. RULES Serv. 2d 1136 (1961). The second paragraph of the rule originally provided:

In the event liability is sustained, the Court may recess for pretrial or settlement conference or proceed with the trial on any or all of the remaining issues before the Court, before the same jury or before another jury as conditions may require and the Court shall deem met.

2 FED. RULES Serv. 2d 1048 (1960).
A comparison of Rule 42(b) and rule 21 reveals no direct contradictions. Rule 21 does not appear to grant any more discretion to the judge, nor does it require a judge to order a separate trial in any case. Nevertheless, rule 21 does reflect a policy that separate trials will be ordered in "routine" negligence cases, and such a procedure is a substantial departure from the current practice under Rule 42(b) in the federal courts.

C. Is Rule 21 Authorized by the Federal Rules?

Federal Rule 83 provides that a local rule must not be inconsistent with the Federal Rules. To be consistent with the Federal Rules, rule 21 cannot grant more discretion to the judges than they have under Rule 42(b). Rule 21, however, allows the trial judge almost complete discretion in ordering separate trials for routine negligence cases even though the courts have ordered separate trials in only rather extraordinary cases under Rule 42(b). But the failure to order separate trials in routine cases under Rule 42(b) is not necessarily an absence of authority.

Rule 42(b) provides that a separate trial may be ordered on any separate issue to "further convenience." The granting of a separate trial on liability in negligence cases seems to come within the rationale of those cases where convenience was furthered by ordering a separate trial on case-determinative defenses since the liability issue is also determinative of the case. Rule 42(b) states, however, that a separate trial may be ordered only on a separate issue, and the issues of liability and damages in negligence suits

29. The word "routine" is used to describe negligence cases which have not become complex due to the extensive joining of parties or in which special defenses are not raised. The author of rule 21 envisions separate trials as a matter of course in most personal injury suits under the rule. See Miner, supra note 3, at 1268; accord, Brault, supra note 4, at 800.

30. One federal judge (Judge Holtzoff) has employed a practice very similar to an original separate trial on liability, however. In cases where he feels that there is a great likelihood of a directed verdict he allows only evidence of liability to come in. See Ziesel, Kalven & Buchholz, op. cit. supra note 4, at 99-100 n.6.

31. Fed. R. Civ. P. 83 states that "each district court ... may ... make and amend rules governing its practice not inconsistent with these [Federal] Rules." (Emphasis added.)

32. Whether to grant a separate trial on an issue is within the sound discretion of the district court; however, this discretion is not unlimited and cannot be abused. Chicago, R.I. & Pac. R.R. v. Williams, 245 F.2d 397, 404 (8th Cir. 1957); Bowie v. Sorrell, 209 F.2d 49, 51 (4th Cir. 1953); Shippers Pre-cooling Serv. v. Macks, 181 F.2d 510, 514 (5th Cir. 1950). But the trial court's exercise of discretion will not be overturned unless it is clearly abused. See The Seven-Up Co. v. O-So Grape Co., 177 F. Supp. 91, 93 (S.D. Ill. 1959) (dictum).
may be so intertwined that any rational separation is impossible.\textsuperscript{33} The courts have generally granted separate trials on case-determinative defenses only when the issue is clearly separable—when there would be no substantial duplication of witnesses and evidence in a second trial.\textsuperscript{34} In many negligence cases, however, there would be little duplication of evidence; moreover, separate trials have been ordered when legal and equitable issues have been combined in one action although this procedure often results in a substantial repetition of evidence if a second trial is necessary. Separate trials on liability and damages in negligence suits have actually been ordered under Rule 42(b) in multiparty litigation. Thus, the fact that the issues of liability and damages may not be clearly separable in negligence suits does not foreclose the ordering of separate trials in such cases under Rule 42(b).

Rule 42(b) also provides that a separate trial may be ordered to "avoid prejudice," and rule 21 avoids the prejudice suffered by a large number of defendants who are the apparent victims of compromise verdicts.\textsuperscript{35} The prejudice which Rule 42(b) was apparently designed to avoid was that which might result from the extensive joinder of parties.\textsuperscript{36} However, separate trials have been ordered to avoid prejudice in other situations, such as on the issue of a release,\textsuperscript{37} and rule 21 seems to fall within this "release rationale."

Thus, despite the fact that the federal courts had not ordered separate trials in routine negligence cases until the passage of rule 21, this procedure seems to be authorized by the Federal Rules.

\textsuperscript{33} See Weinstein, supra note 4, at 842. Cf. United Air Lines, Inc. v. Wiener, 286 F.2d 302 (9th Cir. 1961), where the court reasoned that when punitive damages are demanded, the question of damages is so intertwined with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty which would amount to a denial of a fair trial.


\textsuperscript{35} See Vogel, supra note 3, at 269.


\textsuperscript{37} See notes 22–24 supra. The Advisory Committee on the Federal Rules appears to have envisioned a separate trial for a release when prejudice might result from a disclosure of insurance. See ABA, PROCEEDINGS OF CLEVELAND INSTITUTE ON THE FEDERAL RULES 273, 310 (1938).
II. RULE 21'S EFFECT ON JURY DECISIONS

While rule 21 applies to nonjury as well as to jury trials, it primarily affects personal injury cases, the majority of which are tried before juries. In our legal system the jury is theoretically only the trier of fact. Its function is to arrive at a verdict by applying the law given in the court's instructions to the facts as it finds them. The jury in practice, however, often seems to disregard the court's instructions when contributory negligence is in issue. Instead, it will find for the plaintiff in the form of a reduced verdict even though technically he is not entitled to recover. Such a verdict is called a compromise verdict—a verdict derived by comparing the negligence of the parties and the gravity of the harm, and then arriving at a reduced figure to offset the plaintiff's negligence.

There is little concrete evidence on why juries render compromise verdicts; however, several factors, either individually or in combination, probably account for these decisions. The jury has a natural sympathy for the plaintiff's injuries which may be very important when the injuries are serious or the defendant is a large corporation. Also, the doctrine that contributory negligence is a complete bar to recovery may be contrary to jurors' ideas of fairness. Most jurors apparently look on the compromise verdict as a "fair" verdict as opposed to the legally correct verdict in which the doctrine of contributory negligence is strictly applied. The difficulty of making a decision on the liability issue may also account for some compromise verdicts. In close cases the jury might

38. See Frank, Courts on Trial 110 (1950); Green, Judge and Jury 278-79 (1930); Vanderbilt, Judges and Jurors 54-55 (1956).
40. See Kalven, The Jury, the Law and the Personal Injury Damage Award, 19 Ohio St. L.J. 158, 167 (1958). The compromise verdict has also been defined as one in which some jurors have conceded liability against their judgment in order to arrive at an agreement with the rest of the jury. This concession is given in return for a reduction in damages. See Murray v. Krenz, 94 Conn. 503, 508-09, 109 Atl. 859, 861 (1920); Padayao v. Severance, 116 N.J.L. 385, 387-88, 184 Atl. 514, 515 (Sup. Ct. 1936).
41. See Vogel, supra note 3, at 269.
42. See 2 Harper & James, Torts 1228-29 (1956); Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317, 340 & n.68 (1914); Weinstein, supra note 4, at 832-33.
reduce damages rather than make a complete finding for either party.\textsuperscript{43} It is relatively easy for juries to reduce damages to compensate for the plaintiff's contributory negligence since they are not usually required to explain how they determined the damages awarded. A final factor that may affect the jury's verdict in this regard is insurance. Most jurors are probably aware that defendants generally have insurance,\textsuperscript{44} and from this they may reason that the insurance company can afford the loss better than the plaintiff.\textsuperscript{45}

The employment of rule 21 should reduce the number of compromise verdicts because a separate trial on liability would reduce the effect of most of the factors that influence a jury to render a compromise verdict. Sympathy for the plaintiff would be reduced because only evidence concerning liability could be introduced at the first trial. The jury would obviously be aware that some kind of injury had been sustained, but the extent of the injury would not be explained or demonstrated at length. Since the only question before the jury would be liability, the jurors' ideas on "fairness" may also be affected by the use of separate trials. They might reason that it is not "fair" to give a plaintiff full recovery when he was contributorily negligent. The jury's ability to reduce damages to provide the plaintiff with some compensation, even though he was contributorily negligent, should be eliminated by a separate trial on liability. Conceivably, a jury might realize that it would be reimpaneled if a second trial is held on the issue of damages, and for this reason they might find liability knowing that they could reduce damages at the second trial. But it is doubtful whether jurors are this sophisticated.\textsuperscript{46} A separate trial for liability would also force the jury to make a decision on liability factors in close cases; thus, the compromise verdict may be reduced in these cases. The only factor that would not be affected by rule 21 is insurance, and insurance probably is not enough, by itself, to influence a jury to render a compromise verdict. It would seem that insurance would result in a complete finding for the plaintiff rather than a compromise verdict if jurors were to consider this factor important in awarding damages. In summary, rule 21's use would probably have a substantial effect on the number of compromise verdicts.

\footnotesize
\textsuperscript{43} See Vanderbilt, \textit{op. cit. supra} note 38, at 57.
\textsuperscript{45} See Kalven, \textit{supra} note 40, at 171.
\textsuperscript{46} \textit{But see} Weinstein, \textit{supra} note 4, at 849.
Presumably any rule that would reduce the number of compromise verdicts is desirable because the compromise verdict is not recognized by the law. Indeed, many devices such as summary judgments, directed verdicts, and the exclusionary rules of evidence are employed by the courts partly to diminish the opportunities of compromise verdicts.

Some commentators feel that compromise verdicts serve a useful function in our legal system, however, and therefore any rule which reduces them is considered undesirable. A principal reason advanced for preserving the jury system in civil actions is that the jury reflects the community's view on the law. The compromise verdict may thus be defensible because it represents the layman's verdict as opposed to a logical, legally-proper decision. But, if this is true our theory of contributory negligence needs to be revised. Such a basic revision of the law should be made by the legislature; it should not be made by the courts. Hence, it seems improper to give the compromise verdict implied recognition by refusing to adopt rule 21 because it would reduce compromise verdicts. It seems somewhat anomalous to have the doctrine of contributory negligence expounded by the courts and disregarded by the juries. Rule 21 may be desirable, therefore, simply because it does put the issue of contributory negligence versus comparative negligence squarely before the public.

III. CONSTITUTIONAL OBJECTION TO RULE 21

The constitutional attack on rule 21 is that, insofar as it affects the jury system, the rule violates the seventh amendment.

The seventh amendment provides:


49. At least two commentators on rule 21 have taken this position. See Weinstein, Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power, 14 VAND. L. REV. 831 (1961); Brault, Should the Issues of Liability and of Damages in Tort Cases Be Separated for the Purposes of Trial?, 1960 INS. L.J. 798.

50. See HOLMES, THE COMMON LAW 123 (1881); James, supra note 48, at 247.

51. For an example of a proposed "model" comparative negligence statute, see Prosser, Comparative Negligence, 51 MICH. L. REV. 465, 508 (1953).

52. See generally 74 HARV. L. REV. 781 (1961); 49 ILL. B.J. 424 (1961); 36 NOTRE DAME LAW. 388 (1961); 48 VA. L. REV. 99 (1962). The fact that rule 21 may be pursuant to and not inconsistent with Rule 42(b) does not foreclose consideration of its constitutionality, for the Supreme Court
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The essence of the constitutional argument is that the amendment preserves the right to have one jury consider both liability and damages at the same time because this was the practice in England when the amendment was adopted in 1791. The validity of this constitutional objection thus turns upon what features of the right to trial by jury the seventh amendment actually preserves.

Prior to the adoption of the seventh amendment, the opponents of the Constitution strongly objected to the lack of a guarantee of a jury trial in civil cases; they argued that giving the Supreme Court appellate jurisdiction "both as to Law and Fact" would destroy the institution of trial by jury in civil cases. The seventh amendment was passed, at least in part, to meet this objection; thus, the amendment clearly preserves the right to have facts tried by a jury re-examined by a court only according to the rules of the common law. The amendment may have preserved more than this, however. Mr. Justice Story maintained that the amendment "secured the right of a trial by jury in civil cases in the fullest latitude of the common law."

At common law the parties had a right to a unanimous verdict of twelve jurors in the presence and under the superintendence of a judge having powers to instruct them as to the law and advise (not direct) them as to the facts. The common law considers that "the fact that this Court promulgated the rules . . . does not foreclose consideration of their validity." Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444 (1946).

53. The common law referred to in the amendment is the common law of England as of 1791. Therefore, to determine which rules are to be applied to which suits, the courts must consult the English common law of 1791. See Baltimore & C. Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).

54. The amendment preserves the right to trial by jury, not the jury trial itself. See Capital Traction Co. v. Hof, 174 U.S. 1, 13-14 (1899).


56. See 2 Story, Constitution 523-26 (4th ed. 1873). These fears were probably groundless in view of the intent of the framers; nevertheless, the lack of a guarantee of a jury in civil trials almost prevented ratification of the Constitution. Id. at 523.

57. Id. at 526.


ed both the issue of liability and the amount of damages to be jury questions. These issues were usually considered at the same time by the same jury, but it is not clear that the common law required this procedure.

Although there do not appear to be any cases dealing with the granting of separate trials for liability and damages prior to 1873, separate trials on separate issues were not completely unknown to the common law. The action at law of account-render called for separate trials on whether a defendant-trustee was liable for an accounting, and if he was, how much was owing. There is no evidence that account-render was prohibited by the common-law courts at any time. The Judicature Rules of 1873 also reflect the existence of separate trials on issues at common law. One of these rules authorized separation of issues at the trial level, and there is some indication that the Judicature Rules merely codified existing practice. Thus, separate trials on issues were apparently neither unknown nor prohibited at common law, and, therefore, there seems to have been no absolute right in 1791 to have one jury consider all the issues of a case at one time.

Even if the common law would not have approved of separate trials on issues, the Supreme Court has not always adhered to Mr. Justice Story's interpretation that the amendment "secured the right of a trial by jury in civil cases in the fullest latitude of the common law." The Court has developed the doctrine that the constitutional conception of a jury trial is not inflexible in all details as long as the essential elements of the institution are preserved. The Court reasoned that since the Constitution is concerned with substance, not form, the aim of the seventh amendment "is not to preserve mere matters of form and procedure but substance of right." Under this doctrine,

all of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the

---

62. 3 BLACKSTONE, COMMENTARIES 164 (Tucker ed. 1803); Mayers, The Severance for Trial of Liability from Damage, 86 U. Pa. L. Rev. 389, 391-93 (1938). This action was available about 1700 in every case where money was received by a trustee or person in a similar position.
63. The action apparently fell into disuse because of the development of the equitable action for account which had procedural advantages. Ibid.
64. SUPREME COURT OF JUDICATURE RULES, Order XXXVI, rule 8 (1883).
court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law.\textsuperscript{68}

The seventh amendment does not unalterably preserve the English law of 1791 or inhibit the introduction of procedural reform.\textsuperscript{69} The Supreme Court has applied this doctrine in holding that a federal court may constitutionally appoint auditors to hear testimony and examine books, and then report upon such issues of fact as an aid to the jury in arriving at its verdict;\textsuperscript{70} the court may require both a general and a special verdict, and then direct a verdict for the defendant on the basis of the facts specially found;\textsuperscript{71} and appellate courts may accept only that part of a verdict which declares that the plaintiff is entitled to recover, and remand for retrial only those issues that were incorrectly decided.\textsuperscript{72} None of these procedures was known at common law, but they were held constitutional because their employment changed only form and did not interfere with the substantive right to have a jury make all fact determinations.

This form-substance distinction was relied upon to uphold the constitutionality of rule 21 in the two cases in which the rule was challenged. In the first case, \textit{O'Donnell v. Watson Bros. Trans. Co.},\textsuperscript{73} the trial court reasoned that the rule was clearly constitu-

\textsuperscript{68} Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931); \textit{accord}, Baltimore & C. Line, Inc. v. Redman, 295 U.S. 654, 657 (1935): \textit{[The aim of the Amendment . . . is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.}}

\textsuperscript{69} \textit{But see} Dimick v. Schiedt, 293 U.S. 474, 476 (1935), where the Court stated that \textit{“in order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.”} \textit{Accord}, Continental Ill. Nat'l Bank v. Chicago, R.I. & Pac. Ry., 294 U.S. 648, 669 (1935), where the Court, in dictum, stated that the guarantee of the seventh amendment \textit{“has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the essential elements recognized in this country and England when the Constitution was adopted.”}}

\textsuperscript{70} \textit{Ex parte Peterson,} 253 U.S. 300, 309 (1920).

\textsuperscript{71} Walker v. New Mexico & So. Pac. R.R., 165 U.S. 593 (1897).


\textsuperscript{73} 183 F. Supp. 577, 585–86 (N.D. Ill. 1960).
tional since only form was changed; a jury would ultimately pass upon all the fact issues. The same reasoning was employed in *Hosie v. Chicago & N.W. Ry.*, where the Seventh Circuit stated that under rule 21 "the essential character of a trial by jury was preserved." In both decisions the courts relied principally upon the case of *Gasoline Products Co. v. Champlin Ref. Co.* to sustain constitutionality.

In *Gasoline Products*, the Court, relying on the form-substance distinction, overturned the common-law rule that an error as to one issue in a trial resulted in a second trial of all issues; instead, it sanctioned a retrial of only that issue which had been incorrectly decided in the trial court. The Court has thus, in effect, approved of separate trials on separate issues, for the difference between remanding an issue for retrial and an original trial on a single issue is merely form. Because the Court has sanctioned separate trials on separate issues, however, does not mean that rule 21 is constitutional. In *Gasoline Products*, the Court stated that one issue could be sent back to be tried before a different jury only when "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice"; thus, a separate trial on issues has been sanctioned only when the issues are distinct and

75. 283 U.S. 494 (1931). While the Seventh Circuit in *Hosie* upheld the procedure of separate trials on issues of liability and damages, it stated that if two juries were involved a difficult constitutional issue under the seventh amendment would be presented. It is difficult to follow the court's reasoning on this point for the principal case relied upon to sustain separate trials, *Gasoline Products*, involved two juries. If *Gasoline Products* sanctions separate trials on the issues, it also sanctions the employment of different juries on each issue. For the text of the original rule 21 which sanctioned the use of two juries, see 2 FED. RULES SERV. 2d 1048-49 (1960).
77. It could be argued, however, that *Gasoline Products* does not support rule 21 because the remanding of a separate issue for retrial is not clearly analogous to an original separate trial on that issue. In *Gasoline Products* the plaintiff had received an opportunity for a compromise verdict in the first trial. The courts should not be required to take notice of this distinction, however, for the compromise verdict is not generally recognized. Moreover, the Court in *Gasoline Products* said any issue could be separately retried. Thus, although the issue usually retried alone is damages—and therefore the plaintiff has received the benefit of a possible compromise verdict—this would not seem to prevent the court from only remanding the liability issue.
78. See Weinstein, *supra* note 49, at 842.
79. 283 U.S. at 500.
separable. Gasoline Products involved a contract action, and the issues sent back were damages and the validity of a counterclaim; but the issues of liability and damages may not be as distinct and separable in negligence cases because damages are often adjusted in compromise verdicts.80 Some of the courts of appeals, however, have approved of separate trials for liability and damages in negligence suits involving multiparty litigation.81 If the issues are constitutionally separable in such cases, no good reason is apparent why they should not be constitutionally separable in all negligence cases. Moreover, the compromise verdict is not generally recognized by the courts or law.

It seems clear that the intent of the framers of the seventh amendment was to preserve the institution of trial by jury because the jury trial was considered an effective instrument in the administration of justice.82 If the institution is to continue to be effective, it must be capable of adapting to the needs of the present and of the future.83 The rights under the seventh amendment have been preserved by the Federal Rules,84 which indicates that the Supreme Court in promulgating the Federal Rules did not view Rule 42(b) as a radical departure from prior practice. Even if the submitting of issues in separate trials is considered a departure from the common-law use of jury trials, it must be viewed in conjunction with present needs. If trial by jury is to have any meaning, it should be trial by jury within a reasonable time after the filing of a lawsuit, and the objective of rule 21 is to reduce delay in the courts.85 Assuming this objective is fulfilled, the rule should be held to be merely form and not violative of the seventh amendment.

CONCLUSION

The reception of rule 21 by the courts has been mixed. The

---

81. See notes 10 & 11 supra. These cases may not be controlling on this point, however, since there is no indication that the constitutional issue was raised.
85. One commentator who has done extensive research in the area of delay in the courts has predicted that rule 21 will “save at least 20 per cent of the court's trial time.” Ziesel, The Jury and the Court Delay, in 328 Annals 46, 52 (1960). For an excellent analysis of the various factors that must be considered in determining whether rule 21 will actually reduce delay, see Weinstein, supra note 49, at 844–52; Note, 46 Iowa L. Rev. 815, 819–25 (1961).
Judicial Conference of the District of Columbia has voted to reject a similar rule; after recently adopting a similar plan, the Supreme Court of New York County silently abandoned it. The Texas Supreme Court has refused to allow separate trials in routine negligence litigation despite the fact that Texas has a rule identical to Rule 42(b). On the other hand, the Appellate Divisions of both New York and Illinois have not only approved of separate trials in unusual cases, but they have also impliedly approved of this procedure in routine cases. While it is not clear whether rule 21 will reduce delay in the courts, it is clear that the courts have an obligation to make an effort in this direction. In many jurisdictions court calendars are as much as three years behind. To meet this problem, the courts should experiment with new procedures. If rule 21 is not acceptable, it would seem that the courts have an obligation to come up with an alternative solution. Perhaps, Judge Holtzoff's procedure—requiring the plaintiff in doubtful cases to prove liability and, if he survives a motion for a directed verdict, then proceed to the issue of damages—is a more desirable solution. However, it seems likely that the trial judge would have difficulty in determining the probable validity of the plaintiff's claim before he has actually heard the testimony. Any procedural remedy must, in any case, preserve the fundamental rights of the parties. Rule 21 preserves these rights and may well be a partial solution to the delay in the courts problem.