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Pleadings and Motions before Trial in Federal Criminal Procedure

Lester B. Orfield

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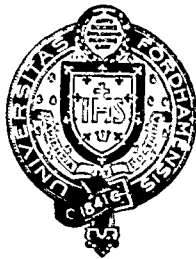
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Pleadings and Motions before Trial in Federal Criminal Procedure

Cover Page Footnote

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TABLE OF LEADING ARTICLES—TITLES

AID TO EDUCATION—FEDERAL FASHION. <i>Leonard F. Manning</i>	495
AID TO EDUCATION—STATE STYLE. <i>Leonard F. Manning</i>	525
A CRITICISM OF CRITICISM: IN RE MEANING. <i>Ray D. Henson</i>	553
THE ESSENTIAL INGREDIENTS FOR ZONING LITIGATION. <i>Allen Fonoroff</i>	693
THE FEDERAL GOVERNMENT AND INTERSTATE COMPACTS. <i>Richard H. Leach</i>	421
FEDERAL PROTECTION OF EMPLOYEE RIGHTS WITHIN TRADE UNIONS. <i>Richard A. Givens</i>	259
MIGRATORY ALIMONY: A CONSTITUTIONAL DILEMMA IN THE EXERCISE OF IN PERSONAM JURISDICTION. <i>Wilfred J. Ritz</i>	83
MODERN ZONING AND PLANNING PROGRESS IN NEW YORK. <i>James Felt</i>	681
MUNICIPAL CONTROL OF URBAN EXPANSION. <i>Henry J. Schmandt</i>	637
NONRESIDENT PERSONAL INCOME TAX: A COMPARATIVE STUDY IN EIGHT STATES. <i>Michael B. Solomon</i>	105
PLEADINGS AND MOTIONS BEFORE TRIAL IN FEDERAL CRIMINAL PROCEDURE. <i>Lester B. Orfield</i>	1
RENT DETERMINATION AND ITS TAX TREATMENT. <i>Lester R. Rusoff</i>	211
THE ROLE OF ADMINISTRATIVE AGENCIES IN URBAN RENEWAL. <i>Eugene J. Morris</i>	707
THE ROLE OF THE FEDERAL GOVERNMENT IN URBAN LAND USE PLANNING. <i>John T. Howard</i>	657
THE ROMAN CONTRIBUTION TO THE COMMON LAW. <i>Edward D. Re</i>	447
TOWARDS A WORLD RULE OF LAW—CUSTOMARY INTERNATIONAL LAW IN AMERICAN COURTS. <i>Alan Schechter</i>	313
VACANT LAND MANAGEMENT: A CHALLENGE TO NEW YORK CITY. <i>Roger Starr</i>	673

TABLE OF LEADING ARTICLES—AUTHORS

FELT, JAMES, <i>Modern Zoning and Planning Progress in New York</i>	681
FONOROFF, ALLEN, <i>The Essential Ingredients for Zoning Litigation</i>	693
GIVENS, RICHARD A., <i>Federal Protection of Employee Rights Within Trade Unions</i> ..	259
HENSON, RAY D., <i>Criticism of Criticism: In re Meaning</i>	553
HOWARD, JOHN T., <i>The Role of the Federal Government in Urban Land Use Planning</i>	657
LEACH, RICHARD H., <i>The Federal Government and Interstate Compacts</i>	421
MANNING, LEONARD F., <i>Aid to Education—Federal Fashion</i>	495
MANNING, LEONARD F., <i>Aid to Education—State Style</i>	525
MORRIS, EUGENE J., <i>The Role of Administrative Agencies in Urban Renewal</i>	707
ORFIELD, LESTER B., <i>Pleadings and Motions Before Trial in Federal Criminal Procedure</i>	1
RE, EDWARD D., <i>The Roman Contribution to the Common Law</i>	447
RITZ, WILFRED J., <i>Migratory Alimony: A Constitutional Dilemma in the Exercise of In Personam Jurisdiction</i>	83
RUSOFF, LESTER R., <i>Rent Determination and Its Tax Treatment</i>	211
SCHECHTER, ALAN, <i>Towards a World Rule of Law—Customary International Law in American Courts</i>	311
SCHMANDT, HENRY J., <i>Municipal Control of Urban Expansion</i>	637
SOLOMON, MICHAEL B., <i>Nonresident Personal Income Tax: A Comparative Study in Eight States</i>	105
STARR, ROGER, <i>Vacant Land Management: A Challenge to New York City</i>	673

TABLE OF BOOKS REVIEWED—AUTHORS

BRINK, GIPPLE, AND HUGHESDON: AN OUTLINE OF THE UNITED STATES PATENT LAW. <i>Virgil E. Woodcock</i>	205
CONNERY AND LEACH: THE FEDERAL GOVERNMENT AND METROPOLITAN AREAS. <i>Arval A. Morris</i>	789
CURRAN: LAW AND MEDICINE: TEXT AND SOURCE MATERIALS ON MEDICO-LEGAL PROBLEMS. <i>Micheal A. Hayes</i>	416
EHRlich: EHRlich's BLACKSTONE. <i>Leonard P. Moore</i>	202
FRANKFURTER: FELIX FRANKFURTER REMINISCES. <i>Tom C. Clark</i>	626
HAYEK: THE CONSTITUTION OF LIBERTY. <i>Adrian P. Burke</i>	410
HENSON: LANDMARKS OF LAW. <i>James M. Landis</i>	201
MARTIN, BIRKHEAD, BURKHEAD AND MUNGER: RIVER BASIN ADMINISTRATION AND THE DELAWARE. <i>Robert Kramer</i>	786
MEDINA: THE ANATOMY OF FREEDOM. <i>Herbert Brownell</i>	203
MEIKLEJOHN: POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE. <i>Charles S. Desmond</i>	629
MONTGOMERY: SACCO-VANZETTI: THE MURDER AND THE MYTH. <i>George W. Bacon</i> ...	412
TINGLE: THE STOCKHOLDER'S REMEDY OF CORPORATE DISSOLUTION. <i>William H. Timbers and Barry H. Garfinkel</i>	627
VAN PANHUY: THE ROLE OF NATIONALITY IN INTERNATIONAL LAW: AN OUTLINE. <i>Martin Domke</i>	415
VERNON: METROPOLIS 1985. <i>W. Bernard Richland</i>	783

COMMENTS

AESTHETIC ZONING: PRESERVATION OF HISTORIC AREAS	729
CONDEMNATION PROCEDURE—AN ARGUMENT FOR REFORM—	757
THE CONFIDENTIAL RELATIONSHIP THEORY OF CONSTRUCTIVE TRUSTS—AN EXCEPTION TO THE STATUTE OF FRAUDS	561
THE GRAND JURY: ITS PRESENT DAY FUNCTION AND CORRELATIVE POWERS	152
INCORPORATION BY REFERENCE AND INDEPENDENT LEGAL SIGNIFICANCE IN THE NEW YORK LAW OF WILLS	143
PARODY AND THE LAW OF COPYRIGHT	570
REDEVELOPMENT—ADMINISTRATIVE PROCEDURE, FINALITY AND JUDICIAL REVIEW ...	777
THE RIGHTS OF A WITNESS BEFORE A CONGRESSIONAL COMMITTEE	357
"SPOT ZONING"—A VICIOUS PRACTICE OR A COMMUNITY BENEFIT	740
TRAFFIC—A MOVING PROBLEM	768
ZONING AND THE LAW OF NUISANCE	749

ADDENDA

ERRATA

Page 592. *Wood v. Hughes*. The proper citation of the case is 9 N.Y.2d 144, — N.E.2d —, 212 N.Y.S.2d 37 (1961).

Subsequent Dispositions of Cases Noted

Page 159. *United States v. Parke, Davis & Co.* An order granted on remand was vacated at 365 U.S. 125 (1961) (per curiam).

Page 163. *In the Matter of Cohen* was affirmed *sub nom. Cohen v. Hurley*, 81 Sup. Ct. 954 (1961).

Page 187. *Remington Arms Co. v. G.E.M., Inc.* is reported officially at 257 Minn. 562 (1960).

Page 404. *Brundage v. United States*. The official citation denying certiorari is at 364 U.S. 831 (1960).

Page 578. *Swart v. South Burlington School Dist.* Certiorari was denied, 29 U.S.L. Week 3345 (U.S. May 15, 1961).

Page 582. *McPhaul v. United States*. Rehearing was denied at 364 U.S. 925 (1960).

Page 586. *Pugach v. Dollinger*. The official citation of the case is 365 U.S. 458 (1961) (per curiam).

Page 619. *Consolidated Edison Co. v. United States* was affirmed by the Supreme Court. See 29 U.S.L. Week 4431 (U.S. May 22, 1961).

INDEX DIGEST

ADMINISTRATIVE AGENCIES

See *Land Planning*

ADMINISTRATIVE PROCEDURE

See *Land Planning*

AGENCY

See *Master and Servant*

ALIMONY

- Migratory Alimony: A Constitutional Dilemma in the Exercise of In Personam Jurisdiction 83
 —The Cases 85
 —The Constitutional Dilemma 89
 —Escape from Constitutional Dilemma 98

ANTITRUST LAW

Price Maintenance Through Refusal to Sell 159

ARBITRATION

Compliance With Conditions Precedent to Arbitrators' Jurisdiction to be Resolved by the Courts 375

ATTORNEYS

Refusal to Answer Questions at a Judicial Inquiry Into Unethical Practices as Ground for Disbarment 163

BANKRUPTCY

Right of Action for Injury to Property as Asset of Bankrupt's Estate 168

CITY PLANNING

See *Land Planning*

COMMON LAW

- The Roman Contribution to the Common Law 447
 —Prologue: The Roman Legal Heritage and the Law of England 447
 —The Study of Roman Law: The Language, Doctrines and Philosophy of Law 449
 —Britain as a Roman Province: Ulpian, Papinian and Paul 455
 —The Advent of Christianity: The Early Kings and a New Outlook 458
 —The Norman Conquest: William and Lanfranc 462
 —Post-Norman Development: The Early Archbishops, Vacarius and the Legists 465

- The Formative Legal Literature: Glanvill, Bracton, and Magna Carta 469
 —The Genesis of English Equity: The Chancellor, the Court of Conscience, and a More Perfect Remedy 477
 —Additional Inroads: The Canon Law, the Ecclesiastical Courts and the Law Merchant 484
 —Epilogue: Civilization and the Universality of the Roman Legal System 489

CONDEMNATION

Condemnation Procedure—An Argument for Reform 757

CONFLICT OF LAWS

Effect of Subsequent Marriage of Litigants on Premarital Tort 174

CONSTITUTIONAL LAW

- See *Evidence*
 See *Interstate Commerce*
 The Constitution of Liberty, A Book Review 410
 Evidence Obtained by State Officers Via Unlawful Seizure Inadmissible in Federal Trial 381
 Merchandise Held in Catalogue Store for Delivery to Customers Not Protected From Local Taxation by Interstate Commerce Clause 386
 Political Freedom: The Constitutional Powers of the People, A Book Review 629
 State Tuition Payments to Denominational Schools Are Unconstitutional 578

COPYRIGHT

Parody and the Law of Copyright 570

CORPORATIONS

The Stockholder's Remedy of Corporate Dissolution, A Book Review 627

COVENANTS

See *Real Property*

CRIMINAL LAW

Sacco-Vanzetti: The Murder and the Myth, A Book Review 412

CRIMINAL PROCEDURE

- Pleadings and Motions Before Trial In Federal Criminal Procedure 1
 —History of Drafting Rule 12 2
 —Federal Procedure Prior to Rule 12 11

- Rule 12 as Interpreted in the
Decisions 61
—Modern Reform Proposals 81
- CUSTOMARY LAW**
See *International Law*
- DISCRIMINATION**
See *Interstate Commerce*
- DISBARMENT OF ATTORNEYS**
See *Attorneys*
- EDUCATION**
See *Federal Aid*
Aid to Education—State Style 525
—The Scholar-Incentive Plan 526
—Critics of the Scholar-Incentive Plan 532
—The Taxpayer's Standing to Sue 538
—The State Constitution Construed 539
—Conclusion 549
- EMINENT DOMAIN**
Use of Balance of Convenience
Doctrine To Deny Part of an
Injunction 390
- EVIDENCE**
See *Constitutional Law*
Admissions Made After Indictment in
Absence of Counsel Not Admissible 393
Control of Subpoenaed Records In-
ferred from Witness' Failure to Deny
Control 532
Federal Injunction to Enjoin State Offi-
cers From Introducing Wiretap
Evidence in State Court Denied 536
- FEDERAL AID**
Aid to Education—Federal Fashion 495
—Presumption of Constitutionality 501
—The Taxpayer's Standing to Sue 502
—The United States Constitution 507
—The Original Meaning of Establish-
ment 510
—Judicial Construction of Establish-
ment 511
- FEDERAL RULES OF CRIMINAL
PROCEDURE**
See *Criminal Procedure*
- GRAND JURY**
The Grand Jury: Its Present Day
Function and Correlative Powers 152
Report Censuring Noncriminal Mis-
conduct of Public Officials Unauthor-
ized 592
- INCOME TAX**
See *Taxation*
Nonresident Personal Income Tax: A
Comparative Study in Eight States 105
—Constitutional Problems 105
—New York 103
—Delaware 125
—Vermont 126
—Massachusetts 127
—Iowa 130
—Wisconsin 132
—Minnesota 134
—California 137
—Conclusion 140
- INTERNATIONAL LAW**
The Role of Nationality in Internation-
al Law: An Outline, A Book Review 415
Towards A World Rule of Law—
Customary International Law in
American Courts 313
—Nonconsideration of Customary Law
Issues 315
—The Common Law Approach 323
—Customary Law Decisions 327
- INTERSTATE COMMERCE**
See *Constitutional Law*
Segregation in Terminal Restaurant
Violative of the Interstate Commerce
Act 598
- INTERSTATE COMPACTS**
The Federal Government and Inter-
state Compacts 421
—Use by the States 421
—Federal Involvement 426
—Recent Congressional Attitudes 433
—Towards a Congressional Policy 441
- JURISPRUDENCE**
The Anatomy of Freedom, A Book
Review 203
A Criticism of Criticism: In Re
Meaning 553
Ehrlich's Blackstone, A Book Review 202
Landmarks of Law, A Book Review 201
- LABOR LAW**
Federal Pre-emption of State Court's
Jurisdiction Over Labor Dispute 604
Federal Protection of Employee Rights
Within Trade Unions 259
—The Steele Case and Its Implications 260
—The 1959 Legislation 276
—The Continuing Challenge 307
Taft-Hartley Act Does Not Pre-empt
State Court of Jurisdiction Over a
Labor Dispute Involving American

Union and Foreign Shipping Corporation	608	LEGISLATIVE INVESTIGATIONS	
Unlawful Intent of Informational Picketing Not to be Inferred Solely From Prior Union Objectives	399	The Rights of a Witness Before a Congressional Committee	357
LAND PLANNING		MAINTENANCE	
Aesthetic Zoning: Preservation of Historic Areas	729	See <i>Alimony</i>	
The Essential Ingredients For Zoning Litigation	693	MASTER AND SERVANT	
—Shaping the Law	693	Serviceman Proceeding to Next Duty Assignment in Private Vehicle Within the Scope of His Employment	614
—Case Law Examples	696	MEDICAL JURISPRUDENCE	
—How the Planner Can Participate	699	Law and Medicine: Text and Source Materials on Medico-Legal Problems, A Book Review	416
—The Private Practitioner	701	MOTIONS	
The Federal Government and Metropolitan Areas, A Book Review	789	See <i>Criminal Procedure</i>	
Metropolis 1985, A Book Review	783	PATENTS	
Modern Zoning and Planning Progress in New York	681	An Outline of United States Patent Law, A Book Review	205
—Community Renewal	682	PLEADING	
—Industrial Development	686	See <i>Criminal Procedure</i>	
—Transportation	690	REAL PROPERTY	
—Conclusion	691	Affirmative Covenant Running With the Land	178
Municipal Control of Urban Expansion	637	ROMAN LAW	
—Zoning Controls	638	See <i>Common Law</i>	
—Subdivision Controls	645	SALES	
—The Timing of Urban Development	651	Absence of Privity in Breach of Warranty Action	183
Redevelopment: Administrative Procedure, Finality and Judicial Review	777	SEARCH AND SEIZURE	
River Basin Administration and The Delaware, A Book Review	786	See <i>Constitutional Law</i>	
The Role of Administrative Agencies in Urban Renewal	707	SUPPORT OF DEPENDENTS	
—General Characteristics of Planning Agencies	708	See <i>Alimony</i>	
—The Internal Structure of the Planning Agency	711	SUPREME COURT	
—The Federal Administrative Agencies	712	Felix Frankfurter Reminisces, A Book Review	626
—The New York State Administrative Agencies	720	TAXATION	
—The New York City Administrative Agencies	723	See <i>Income Tax</i>	
The Role of the Federal Government in Urban Land Use Planning	657	TAXATION	
—The Federal Role in the National Urban Pattern	658	Application of Constructive Receipt Doctrine to Shares of Stock and the Dividends Payable on Them	404
—The Federal Role in Urban Plan Making	660	Paid but Contested Local Real Estate Tax Accrues as a Deduction for Federal Income Tax Purposes in Year of Settlement	619
—The Federal Role in Urban Land Use Development Decisions	664		
—The Federal Role in Indirect Influence on Urban Land Use	669		
—Conclusion	672		
"Spot Zoning"—A Vicious Practice or a Community Benefit	740		
Traffic—A Moving Problem	768		
Vacant Land Management: A Challenge to New York City	673		
Zoning and the Law of Nuisance	749		

Rent Determination and Its Tax Treatment	211	TRADE UNIONS	
—Payments by Lessee to Third Persons as Taxable Income to Lessor	212	See <i>Labor Law</i>	
—Collection of Taxes Assessed Against the Lessor Because of Payments by the Lessee to Others	221	TRUSTS	
—Whether Payments by a Stockholder are Rent or Contributions to Capital	223	Apportionment of Dividend Between Trust Corpus and Income Under the Osborne Rule	192
—Whether Payments by a Corporation are Rent or Dividends	226	The Confidential Relationship Theory of Constructive Trusts—An Exception to the Statute of Frauds	561
—Whether a Transaction Is a Lease With Option to Buy or a Sale	227	WARRANTY	
—Whether Improvements Erected by a Lessee Are Rental Income to the Lessor	238	See <i>Sales</i>	
—Payments by a Lessee for Cancellation of a Lease	242	WILLS	
—Payments Under Leaseback Arrangements	242	Incorporation by Reference and Independent Legal Significance in the New York Law of Wills	143
—Bonuses	249	WIRE TAPPING	
TRADE REGULATION		See <i>Evidence</i>	
Constitutionality of Nonsigner Clause in Resale Price Maintenance	187	ZONING	
		See <i>Land Planning</i>	

TABLE OF CASES

Case names prefixed with an asterisk are the subjects of Case Notes

Aboitz & Co. v. Price	335-36, 341-48, 354	Brownell v. City & County of San Francisco	324
Adams v. Bloom	565-66	*Brundage v. United States	405
Adams v. New York	382	Bull v. Stichman	538
Aeronautical Lodge v. Campbell	274, 285, 295, 302, 309	Burdo v. Metropolitan Life Ins. Co.	617
Afran Trans Co. v. National Maritime Union	610-11	Burnet v. Sanford	621
American Power & Light Co. v. SEC	191	Callow v. Thomas	177
American-Transatlantic Co. v. United States	342, 354	Cantwell v. Connecticut	508-10, 515
Anderson v. Dunn	372	Carpenter v. Chapman	112
Anglo-Chinese Shipping Co. v. United States	317	Carrera v. Carrera	319
Application of Grand Jury	158	Charles A. Frucauff	217
Arcaya v. Paez	341-42	Chicago Stoker Corp.	234
Argento v. Horn	344	City of Akron v. Chapman	697
Armstrong v. Armstrong	84, 88-104	City of Aurora v. Burns	656
Austerberry v. Corporation of Oldham	181	City of New Orleans v. Levy	736
Bar Harbour Shopping Center, Inc. v. Andrews	776	City of Passaic v. Paterson Bell Posting Co.	730
Barenblatt v. United States	359-60	City of West Palm Beach v. State ex rel. Duffey	732
Beilan v. Board of Educ.	165	City of Winchester v. Glover	776
Benanti v. United States	591	Clark v. Allen	324-25
Benton v. Commissioner	233-36	Clark v. Uebersee Finanz Korporation	323
Benz v. Compania Naviera Hildalgo, S. A.	609-13	Cobleigh v. State Land Office Bd.	173
Bergman v. De Sieyes	327, 329, 340-42, 351-53	Cochran v. Louisiana State Bd. of Educ.	504, 514-18, 523, 580
Berman v. Parker	656	Coggs v. Bernard	490
Berstein v. N. V. Nederlandsche	320	*Cohen, In the Matter of	163
Bernstein v. Van Heyghen Freres Societe Anonyme	326, 351	Cole v. Manning	565
*Bingham, In the Matter of	193	Columbia Broadcasting Sys. v. McDonough	606
Bloom & Hamlin v. Nixon	572-73	Columbia Pictures Corp. v. National Broadcasting Co.	574
*Board of Educ. v. Heckler Elec. Co.	376	Conley v. Gibson	300
Bohenek v. Niedzwiecki	177	Consolidated Apparel Co. v. Commissioner	245
Booth v. Baptist Church	144-45	*Consolidated Edison Co. v. United States	620, 622
Bourne v. Bourne	196	Cooke v. Drigant	616-17
Boyd v. United States	382	*Cooner v. United States	614
*Boynton v. Virginia	599	Corthouts v. Town of Newington	643
Bradfield v. Roberts	503, 513-15, 523	Coster v. Coster	175-76
Bradley Co. v. Bradley	565	Counselman v. Hitchcock	365
Breece Veneer and Panel Co. v. Commissioner	234-36	Crooker v. California	395
Bressner Radio Co. v. Commissioner	249-51	Curran v. City of New York	321
Brotherhood of R.R. Trainmen v. Howard	273	Daniels v. Borough of Point Pleasant	646
Brown v. Board of Educ.	534-36	Dauphin County Grand Jury Investigation Proceedings (No. 1)	154
Brown v. Commissioner	247	Davis v. City of Lubbock	781
Brown v. John Hancock Mut. Life Ins. Co.	617	De la Rama v. De la Rama	101-02
Brown v. Mississippi	395	De Sayre v. De La Valdene	320
Brown v. Walker	365	Dixie Pine Prods. Co. v. Commissioner	623
		Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets	190

- Dr. Miles Medical Co. v. John D. Parke & Sons Co.160, 188
 *Dooley v. Anton 604
 Duffcon Concrete Prods., Inc. v. Borough of Cresskill 654
- Eisner v. United States 317
 *Elkins v. United States 381
 Elliot v. Robinson 234
 Ellis, In the Matter of164-67
 Emmet v. Lomakin 320
 Emspak v. United States 362
 Equitable Trust Co. v. Prentice 196, 198
 Erie R.R. v. Tompkins 101
 Estin v. Estin 84
 Everson v. Board of Educ. 495, 509-10, 513, 516-19, 580
- Farrell v. United States 337, 349
 Field Enterprises, Inc. v. Washington 390
 58th St. Plaza Theatre, Inc. ... 215-16
 Finley v. Commissioner 244
 Fiske v. Kansas 516
 Flora Realty & Inv. Co. v. City of Ladue 639-40
 Folsom v. Marsh 571
 Ford Motor Co. v. Huffman . 274, 285, 295, 302, 309
 Foreman v. Foreman 568
 Fowles, In the Matter of 145, 148
 Frabutt v. New York, C. & St. L.R.R. 326
 Friedburg v. Santa Cruz 319
 Frothingham v. Mellon 538
 FTC v. Beech-Nut Packing Co. 160-62
- Getreu v. Bartenders Union 401
 Gibbons, In the Matter of 151
 Gignoux v. Village of Kings Point 640
 Gitlow v. New Jersey 516
 Glenn v. Compania Cubana de Aviacion 328, 340
 Glyn v. Weston Feature Film Co. . 575
 Gold & Stock Tel. Co. v. Commissioner 214
 Goodwin v. State Tax Comm'n 118-19
 Grae, In the Matter of 164-67
 Granville-Smith v. Granville-Smith 99
 Green v. Luby 573-74
 Green v. Minzenheimer 572-73
 Griggs v. Borough of Princeton .. 781
 Guss v. Utah Labor Relations Bd. 605
 Gutov v. Krasne 617
- H. W. Findley 247
 Hadacheck v. Sebastian697
 Haddock v. Haddock 91
 Haley v. State 319
 Hamilton v. Board of Regents . 512-13
 Hanafin v. McCarthy 343, 347
 Hanger v. Hess 566
 Harper, In re 170
- Hatheway v. Smith 146
 Hatzel & Buchler, Inc., In the Matter of 379
 Haw Pia v. China Banking Co. ... 341
 Haywood v. Brunswick Bldg. Soc'y 181
 Helvering v. Brunn 239-49
 Henderson v. United States 599
 *Henningson v. Bloomfield Motors, Inc. 183
 Hess v. Pawleski 84
 Higgins v. Smith 225
 Hill v. Whalen & Martell, Inc. . 573
 Hofman v. United States 364
- *Inces S.S. Co. v. International Maritime Workers Union 603
 Ingle Coal Corp. v. Commissioner 245-46
 International Ass'n of Machinists v. Gonzales 303
 International Shoe Co. v. Washington 84, 92, 95-97
- Ivanecvic v. Artukovic 344, 346-49, 354
 Ivie, In the Matter of 149-50
 Jones v. Board of Adjustment 699
 Jones v. City of Los Angeles 752
 *Jones v. Hicks 169
 Jones v. People 156-53, 594, 596
 Judd v. Board of Educ. 539-44, 546, 548-49
 Judson Mills 234
- Karadzole v. Artukovic 339, 343
 Kelber v. City of Upland 646-48
 Kernochan, In the Matter of 194
 Kidder v. Port Henry Iron Ore Co. 181
 Kilbourn v. Thompson 369
 Kirschenmann v. Westover 244
 Kopluk v. C. P. Trucking Corp. . 177
- Lambros Seaplane Base, Inc. v. The Batory 329, 345
 Langdon v. Astor's Ex'rs 143
 Le Collen, In the Matter of 159
 Leon v. Pacific Tel. & Tel. 576
 Lerner v. Casey 165
 Lickbarrow v. Mason 459
 Lionshead Lake, Inc. v. Township of Wayne 641-42
 Lipman, In the Matter of 377
 Loew's, Inc. v. Columbia Broadcasting Sys. 573-75
 London & So. W. Ry. v. Gomm .. 181
 Louisville, H. & St. L. Ry. v. United States 217-16
 Lubowitz v. Taines 176
 Lucas v. Earl 214
- M. E. Blatt Co. v. United States . 240
 MacPherson v. Buick Motor Co. 103-87
 Marbury v. Madison 507
 Marchant v. Mead-Morrison Mfg. Co. 380

- Marine Cooks, AFL v. Panama S.S. Co. 611
- Marks' Dependents v. Gray 615-17
- Massachusetts v. Mellon 503-06
- May v. Anderson 84
- McCarthy v. Arndstein 362
- McLellan v. Grant 565
- McCullum v. Board of Educ. . . 509-10, 513, 520-24, 582
- McCown v. Fraser 566
- McGee v. International Life Ins. Co. 95-98
- *McLeod v. Chefs Union 399
- *McPhaul v. United States 361, 583
- Meier v. Schmidt 324
- Meyer's Estate, In re 324
- Miller v. Clary 179-82
- Miller v. Gearin 238
- Milliken v. Meyer 85-86, 88, 92-94
- *Morin v. Letourneau 174
- Muller, In the Matter of 335, 342
- Murarka v. Bachrack Bros. 331, 343, 346
- Muskrat v. United States 506
- National City Bank v. Republic of China 315-16
- Nelson v. Los Angeles County ... 165
- Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank 179-82
- *Nicholson v. 300 Broadway Realty Corp. 179
- NLRB v. Bakers Union 402
- NLRB v. Drivers Union 400, 607
- Norton Co. v. Department of Revenue 389-90
- O'Hara, In the Matter of 775
- Ohio ex rel. Eaton v. Price 385
- Old Colony Trust Co. v. Commissioner 218
- Old Dearborn Distrib. Co. v. Seagram-Distillers Corp. 188-92
- Olin Mathieson Chem. Corp. v. Francis 190
- Olmstead v. United States 591
- 109 Main Street Corp. v. Burns .. 775
- Oyama v. California 322
- Paducah & Ill. R.R. 224, 226
- Palko v. Connecticut 509
- Paloma Frocks, Inc., In the Matter of 376
- Pecora v. Zoning Comm'n 772
- Pennoyer v. Neff 83
- People v. Brooklyn Cooperage Co. 539, 545
- *People v. DiBiasi 394
- People v. Spano 396-98
- People ex rel. Lumis v. Graves .. 113
- People ex rel. Monjo v. State Tax Comm'n 114
- People ex rel. Troy v. Graves 111
- Peters v. McKay 326
- Pierce v. Society of Sisters . 512-13, 523
- Piffard, In the Matter of .. 144-45, 148
- Pittsley v. David 176
- Pleasant Valley Packing Co. v. Talarico 605-06
- President and Directors of Manhattan Co. v. Janowitz 149
- *Pugach v. Dollinger 587
- Quantity Oil Co. v. E. I. DuPont De Nemours & Co. 190
- Quick Bear v. Leupp 513-15
- Quinn, In the Matter of 156, 595
- Quinn v. United States 362
- Quong Wo, ex parte 697
- Rausch, In the Matter of . 146, 148, 149
- Reggs Homes, Inc. v. Dickerson .. 649
- Reid v. McCrum 181
- *Remington Arms Co. v. G. E. M., Inc. 187
- Rex v. Cross 768
- Reynard Corp. 215, 217
- Reynolds v. United States 510
- Riley v. Standard Oil Co. 615
- Robinson Brick Co. v. Luthi .. 753-54
- Rockaway Estates, Inc. v. Rockaway Township 656
- Rosen v. Village of Downers Grove 646-49
- Rouss, In the Matter of 164
- Rundquist v. Leibowitz 154
- San Diego Bldg. Trades Council v. Garmon 605, 609
- Sargent v. Board of Educ. 539, 544, 548
- Schieffelin v. Komfort 538
- Schiro, In the Matter of 154
- Schwartz v. Texas 588, 590-91
- Schwegmann Bros. v. Calvert Distillers Corp. 188, 191
- *Sears, Roebuck & Co. v. City of Fort Madison 386
- Security Flour Mills Co. v. Commissioner 621, 623
- Sei Fujii v. State 322
- Selective Draft Law Cases 515
- Shaffer v. Carter 106-08, 120, 140
- Shelley v. Kraemer 603
- Silesian-American Corp. v. Clark .. 323
- Simon v. Town of Needham .. 638-39
- 64th St. Residences, Inc. v. City of New York 539, 547-48
- Skemp v. Commissioner 245-47
- Slaughter-House Cases 508
- Slochower v. Board of Educ. 537
- Small v. Moss 774
- Smith v. United States 338
- Solovei, In the Matter of 164
- Snyder, In re 149
- Somerset v. Stewart 490
- Standard Oil Co. v. United States . 623
- State ex rel. Saveland Park Holding Corp. v. Wieland 733

- State of the Netherlands v. Federal Reserve Bank .. 335, 341-43, 352-53
 Stearns Magnetic Mfg. Co. v. Commissioner 245-46
 Steele v. Louisville & N.R.R. . 260-312
 Stefanelli v. Minard 588-90
 Sunflower Farms, Inc. v. McLean . 566
 Sunshine Anthracite Coal Co. v. Adkins 191
 *Swart v. South Burlington School Dist. 578

 Terminal Realty Corp. 226
 Territo, In re 343
 Textile Workers v. Lincoln Mills .. 300
 Thomas v. Winchester 185
 Travis v. Yale & Towne Mfg. Co. 105-10, 137, 140
 Tsiang v. Tsiang 321
 Tugee Laces, In the Matter of ... 378
 Tumey v. Ohio 296-98, 300
 Tuttmann, In the Matter of 378
 Twining v. New Jersey 509, 516

 Ullmann v. United States 365-66
 United States v. Anderson 620
 United States v. Bausch & Lomb Optical Co. 161-62
 United States v. Bryan .. 361, 371, 585
 United States v. California 348-49
 United States v. Colgate & Co. . 159-63
 United States v. Coplon 319, 339, 341, 346
 United States v. Joliet & C.R.R. .. 222
 United States v. Kleinman 371
 United States v. Moran 371
 United States v. Morris & E.R.R. 222
 United States v. Orman 371
 *United States v. Parke, Davis & Co. 159
 United States v. Rumely 369

 United States v. Texas M. Ry. ... 623
 United States v. Warren R.R. 222
 United States Trust Co. v. Heye . 195
 Uraga Dock Co., In the Matter of 378

 Valley View Village v. Proffett 654
 Vanderbilt v. Vanderbilt 84, 89, 97-104
 Village of Euclid v. Ambler Realty Co. 655, 729-30, 751
 *Village of Richmond Heights v. Board of County Comm'rs 390
 Virginia v. Tennessee . 427-28, 439, 443

 Ward Leonard Elec. Co., In the Matter of 379
 Ward v. Township of Montgomery 655
 Warren v. United States 338
 Watkins v. United States 353-59, 367-69
 Watts v. Indiana 395
 Weeks v. United States 382-84
 Westchester County v. Ranollo .. 319
 Western Contracting Corp. v. Commissioner 235
 West Virginia State Bd. of Educ. v. Barnette 504, 512-13
 White v. Fitzpatrick 244
 Wiik v. Department of Taxation . 133
 Williams v. North Carolina I .. 91-92, 97, 103
 Williams v. North Carolina II .. 84, 86-87, 93, 96-97
 Williamson v. Orenton 102
 Wilson v. Therrell 566
 Wolf v. Colorado 382-85, 537, 590
 *Wood v. Hughes 593

 Yamashita, In re 332-35
 Yakus v. United States 191
 Yarborough v. Yarborough 96

 Zorach v. Clauson 509-11, 513, 520-22, 582

This issue of the *Fordham Law Review*, representing the first symposium issue in the *Review's* history, offers a collection of articles and student comments on a broad variety of land use planning subjects. We have selected a field in which there is perhaps less settled law than in other areas of legal concentration. Our choice, however, has been future-directed, motivated by a desire to familiarize our readers with some of the social, economic and legal problems in a relatively new area of legal endeavor.

In addition to our authors, reviewers and foreword writer, we must express our special gratitude to Miss Miriam Strong, Mr. Robert Alpern, and Mr. Alfred Shapiro of the Department of City Planning of the New York City Planning Commission; Mr. Joseph P. McMurray, Director of the Federal Home Loan Bank Board; Professor Robert C. Wood of the Massachusetts Institute of Technology; and Mr. Sidney Z. Searles and Mr. Norman Williams, Jr., members of the New York Bar. We also express our sincere thanks to those state and local officials of the various jurisdictions of the United States who generously furnished us with written materials, which proved to be of invaluable assistance in the preparation of the student section of this issue.

The Editors

PLEADINGS AND MOTIONS BEFORE TRIAL IN FEDERAL CRIMINAL PROCEDURE

LESTER B. ORFIELD*

Rule 12 of the Federal Rules of Criminal Procedure gave the Supreme Court Advisory Committee more drafting problems than any other rule. Professor Orfield, a member of the Advisory Committee, traces the rule's development through its drafting stages, analyzes the case law which preceded it, and studies the courts' treatment of the rule since its enactment.

Rule 12 of the Federal Rules of Criminal Procedure, entitled "Pleadings and Motions Before Trial; Defenses and Objections," provides:

(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and *nolo contendere*. All other pleas, and demurrers, and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) The Motion Raising Defenses and Objections.

(1) Defenses and Objections Which May Be Raised. Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) Time of Making Motion. The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) Hearing on Motion. A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

(5) Effect of Determination. If a motion is determined adversely to the defendant he shall be permitted to plead if he had not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any act of Congress relating to periods of limitations.

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I. HISTORY OF DRAFTING RULE 12

The first draft of the Federal Rules of Criminal Procedure, dated September 8, 1941, provided in rule 7(a) that no "other pleadings shall be allowed" beyond indictment, presentment, information, complaint, and pleas of not guilty, *nolo contendere*, and guilty. Rule 7(b) corresponded to Federal Civil Rule 7(b) on "Motions and Other Papers." Rule 7(c) provided: "Demurrers, pleas in abatement, pleas to the jurisdiction, special pleas in bar, and exceptions for insufficiency of a pleading shall not be used." Rule 7(b)(2) provided that if the defendant does not enter a plea of *nolo contendere* or of guilty, he shall enter a plea of not guilty or a motion to dismiss the accusation. If he wishes to deny the charge and assert an affirmative defense, he shall file a motion to dismiss the written accusation, as provided in rule 7(c). Under rule 7(c) the defendant shall file a motion to dismiss

if he wishes to establish affirmatively (1) that the written accusation is inadequate because specified statutory requirements were not obeyed in its preparation or filing; because it does not charge the defendant with the commission of an offense; because it misjoins defendants or defenses; because it misnames the defendant; or because it is otherwise defective or not sufficient to give notice to the defendant and to the court of the offense which the written accusation is designed to accuse the defendant of having committed; or (2) that there is a legal bar to the prosecution because of lack of jurisdiction in the court, the operation of the statute of limitations, justification, entrapment, former jeopardy, former conviction, former acquittal, immunity or pardon; or (3) that there is a bar in fact to a conviction because of impossibility, as in case of alibi, or (4) that the defendant did not have the alleged criminal intent at the time he did the act, because of coercion, self-defense, infancy, intoxication, or insanity. Any other matter constituting an avoidance, or affirmative defense shall likewise be asserted by the defendant by a motion to dismiss the written accusation. The motion to dismiss because of an affirmative defense shall state the facts and shall cite the records, if any, on which the defense is based. The defendant may from time to time, file with the court a motion for an order requiring the government to provide a bill of particulars stating further facts necessary to enable the defendant to prepare his motion to dismiss.

Under rule 7(d) the Government can file a reply motion. The United States attorney can join in the motion to dismiss or reply in opposition thereto, or move for an order requiring the defendant to provide a bill of particulars stating facts necessary for the investigation and disposition of the motion to dismiss. The court must dismiss the accusation if the United States attorney joins in the motion or if his written reply is insufficient. "If a hearing is held, a jury may be had on any issue of fact upon the request of the Government or of the defendant or upon the court's own motion." Upon the conclusion of the hearing, the court shall enter an order either dismissing or overruling the motion to dismiss. If the court overrules the motion, its order shall provide that the facts established be taken as proved upon trial or other judicial consid-

eration of the issue. No order of the court can interfere with the assertion of the defense of lack of jurisdiction.

A letter from the Committee for the District of Colorado suggested that demurrers, motions to quash, pleas in abatement, pleas in bar, and other special pleas be abolished, and a motion to dismiss substituted; that this motion be in writing, stating precisely the grounds for it and the relief or order sought. The motion should be filed at or before the time of arraignment or within the time allowed by the court. All motions to dismiss not based on grounds appearing on the face of the indictment should set forth the facts relied on in concise form and should be verified.

The Committee for the Southern District of Florida suggested that all objections be made by motion to quash, and that this motion be permitted to be made orally and recorded in shorthand by the court reporter; that the motion be heard any time after return of the indictment; and that the rule state the effect of sustaining the motion to quash.

The Committee for the District of Kansas would permit the court to quash an indictment or information on three grounds: (1) the grand jury has no authority over the offense; (2) the facts do not constitute an offense; (3) the indictment or information contains allegations amounting to justification or other bar. An indictment or information should not be dismissed except on motion stating reasons and by court order. Where the defendant has counsel and time the motion should be made before arraignment and ten days before trial, unless the court orders otherwise or unavoidable circumstances prevent. When the defendant is without counsel, the court must afford him an opportunity to file these pleas after counsel has been appointed and consulted.

The Committee for the Western District of Oklahoma recommended that within ten days after a plea of not guilty the defendant may file any special plea in writing without withdrawing the plea of not guilty and serve a copy on the United States attorney; that all objections be consolidated; that if the plea is not timely filed, all objections except failure to charge a crime are waived.

Judge David A. Pine of the District of Columbia would require all dilatory motions to be filed at one time. Alexander Campbell, United States Attorney for Indiana, Northern District, suggested that pleadings be filed within thirty days after return of the indictment or service of a *capias* and would permit the court to extend time to plead on a proper showing. Frederick E. Faville of the Committee for the Northern District of Iowa would hold a pre-trial conference to serve as the Government's bill of particulars and the defendant's disclosure of his actual defense. Tobias E. Diamond, United States Attorney for Iowa, suggested that all objections should be required in one pleading. The Committee for the District of New Jersey would have dilatory pleas and

motions made within thirty days after arraignment, but the defendant need not argue the motion promptly unless the United States attorney brings on the argument.

Rule 30(a) of the second draft, dated January 12, 1942, provided that the only pleas or pleadings shall be an indictment, an information, a complaint, not guilty, *nolo contendere*, and guilty. Presentments were not mentioned. Rule 30(c) provided: "Demurrers, pleas in abatement, pleas to the jurisdiction, motions to quash, and special pleas shall not be used." Instead, a motion would be used, eliminating the problem of selecting a plea. Rule 51(c)(4) provided: "If the defendant pleads not guilty he shall at the same time file any motions asking the court for orders either disposing of the written accusation or bringing the case on to a trial." Rule 51(c)(1) allowed the defendant on arraignment to ask the court for time to secure counsel or otherwise prepare his defense. Rule 51(d) substituted motions for the former modes of objection to the accusation. Rule 51(e) provided that the motion be in writing, signed by the defendant or his attorney, and verified if it alleges matters within the personal knowledge of the defendant or his attorney. The court would hear no grounds of objection other than those stated. These may be one or more of the following, but no legal ground is barred because it is not enumerated:

that the written accusation was not prepared, filed or prosecuted according to law; that it does not charge the defendant with the commission of an offense; that it misnames the defendant; that it misjoins defendants or defenses; that it contains allegations which are surplusage or duplications or repugnant; that it does not cite the statute or rule on which it is based; or that the prosecution is barred by law, because of facts concerning the defendant, as lack of jurisdiction, former jeopardy, former conviction, former acquittal, pardon, or immunity, or because of facts concerning the alleged offense, as lack of jurisdiction, statute of limitation, justification or entrapment.

The Government could make a counter motion. If it "raises an issue of fact," the motion may be heard before a jury upon request of the defendant or Government, or upon the court's own motion.

Rule 51(b) of the third draft, dated March 4, 1942, made no provision for the defendant obtaining time at his arraignment to secure counsel or otherwise prepare his defense. Rule 51(b)(4) provided: "If the defendant pleads not guilty he shall within a reasonable time fixed by the court file any motions for orders with respect to the written accusation." The rule no longer listed in detail the various defenses and objections, but left this to a footnote to rule 51(d)(1). Rule 51(d)(2) provided: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly

on oral testimony or depositions." Rule 51(d)(3) did not provide, as the former drafts, a sweeping right to jury trial.

If the motion raises an issue of fact upon which the defendant in the opinion of the court would heretofore have had the right to jury trial if the issue had been raised by a special plea, a jury may be had without request by the defendant, but the defendant may waive jury trial with the consent of the government and of the court.

Rule 51(d)(4) was new. It provided:

If the motion alleges a defect consisting of the omission from the written accusation of a necessary allegation which either is uncontroverted or would in the opinion of the court be proved by the government if it were contained in the written accusation, the court, if it dismisses the written accusation, may order that the defendant shall not be released if he is in custody, or that his bail shall not be discharged if he has given bail, until the expiration of a period of time specified by the court. If a new written accusation is filed within the specified period, the defendant shall remain in custody or his bail shall be deemed to continue in effect, otherwise he shall be released or his bail discharged at the expiration of the specified period.

The fourth draft, dated May 19, 1942, was more concise and ran closer to the final form. Rule 15(b) provided: "Any matter capable of determination before the trial of the general issue may be raised in advance of trial by motion. Defects in the institution of the prosecution and objections to the indictment or information other than that it fails to charge an offense or to show jurisdiction in the court shall be raised only by motion and before trial." Under rule 15(c)(1) the motion "may be made before or after the plea but within such reasonable time as the court shall fix, and shall be made together unless, for good cause shown, the court shall otherwise permit." The motion was to be made "in writing or orally as the court may permit, and may be supported by affidavit." Rule 15(c)(3) provided:

When a motion in advance of trial raises an issue of fact, the defendant is entitled to trial by jury if the issue could be properly raised at the trial under a plea of not guilty. All other issues of fact raised on motions in advance of trial may be tried as the court shall direct by affidavit or otherwise and with or without a jury. When an issue has been tried and determined in advance of trial, the determination shall control the subsequent course of the proceeding.

Rule 15(a) of the fifth draft, dated June 1942, made no important changes. Rule 15(c)(2) provided that motions "may be made before or after the plea or accompanying the plea but within such reasonable time before trial as the court shall fix, and shall be made and heard together unless, for good cause shown, the court shall otherwise permit." A draft, known as the Preliminary Draft, of May 1942, was submitted to the Supreme Court for comment. The Court pointed out that rule 15(b) abolished demurrers and certain pleas, while a statute allowed a direct appeal to the Supreme Court, speaking in terms of demurrers and pleas

in bar.¹ The statute provided that "the right of appeal shall continue in those cases in which appeals are now authorized by law." Therefore, it seemed necessary, in the court's opinion, to redraft rule 15(b) so as to relate it to the statute. It could be that the abolition of demurrers and pleas in bar was unnecessary. With respect to rule 15(c)(3), relating to the determination of the motion, the Court asked: "Has the question been considered whether this rule raises questions of double jeopardy unless the trial of the preliminary question is before the same jury which sits in the main trial and is in effect a part of the main trial?"

Rule 12 of the sixth draft, dated Winter 1942-1943, made a number of changes. Rule 12 was split into two subsections, with the same titles as the final version. Rule 12(a) was in effect the same as the final version. Rule 12(b)(1) provided: "The motion shall be made at arraignment or at such other time as the court or these rules may determine. The motion shall present together all defenses and objections then available to the defendant. It may be made before, with, or after a plea." Rule 12(b)(2) provided:

The court may order an immediate hearing of the motion, upon request of the defendant, of the Government or upon its own initiative, whenever in the opinion of the court a decision in advance of the trial of the general issue may substantially dispose of the whole proceeding or any part of it. Affidavits may be submitted by each party. The right to trial by jury shall be preserved to each party. The court may determine the motion or it may order that the defense or objections raised by the motion may be submitted for determination at the trial of the general issue.

Rule 15(b)(3) provided for waiver for failure to make a motion "except that the lack of jurisdiction or the failure of the indictment or information to charge an offense shall always be noted by the court whenever or however brought to its attention." Rule 12(b)(5) provided for the statute on direct appeals in criminal cases to continue in effect and the words "demurrer," "motion to quash," "plea in abatement," "plea in bar," or "special plea in bar" to be interpreted to mean "motion raising a defense or objection" as provided in this rule.

The First Preliminary Draft (seventh committee draft), dated May 1943, changed the number of the rule to 13. It contained the same subsection headings and division of subsection headings as the final version. Rule 13(b)(3) provided: "The motion shall be made before or after the plea but within such reasonable time before trial as the court shall fix." The first sentence of rule 13(b)(4) provided: "The court may order a hearing of the motion whenever it is of the opinion that a decision in advance of the trial of the general issue may substantially dispose of the whole proceeding or of any part of it."

1. Act of March 2, 1907, ch. 2564, 34 Stat. 1246.

The following comments were made to the Advisory Committee on the First Preliminary Draft. Former Attorney General Homer Cummings stated, concerning rule 13(a):

This should result in a reduction of opportunities for dilatory tactics, and, at the same time, relieve the defense of embarrassment. Many competent practitioners have been baffled and mystified by the distinctions between pleas in abatement, pleas in bar, demurrers, and motions to quash, and have, at times, found difficulty in determining which of these should be invoked. I recall a case in which I was recently concerned in which learned counsel debated among themselves for nearly a week which course to pursue and which pleading came first. We ended by filing them all plus a few extra motions for full measure. The Court was patient and heard arguments on them all.²

James G. Martin of Norfolk, Virginia, stated: "As 'not guilty' is a plea in bar, I think it would be a little better to say 'and special pleas in bar are abolished,' or 'and pleas in bar (except the plea of not guilty) are abolished.'"³ The federal judges of Michigan pointed out that no provision was made as to a motion for a bill of particulars, the most common dilatory motion.⁴ There should, they said, be a time limit for such motion. It should be made before plea and within five days after arraignment.

The Judicial Conference of the Ninth Circuit adopted a resolution to purge rule 13(b)(1),(4) and (5) and to substitute the provisions of the California Penal Code in paragraphs 1016, 1019, and 1020, which provide what pleas may be interposed.⁵ Thomas V. Arrowsmith, Assistant United States Attorney for the District of New Jersey, thought that the rule still left open the way to delay trial by successive pleas to the jurisdiction and motions for bill of particulars.⁶ Harry L. Underwood, Assistant Director of the Bureau of Inquiry of the Interstate Commerce Commission, favored a statement of the points relied on in the motion, particularly motions to dismiss for failure to charge an offense. Rule 15 of the Federal Rules of Civil Procedure had such a requirement.⁷ Robert S. Rubin, Special Counsel for the Securities and Exchange Commission, stated with respect to the provision that lack of jurisdiction shall be noted whenever it comes to the court's attention: "Does this include the objection of improper venue, which previously had to be raised before trial or else waived? I favor the waiver of such an ob-

2. 1 Advisory Committee on Rules of Criminal Procedure, Comments, Recommendations, and Suggestions Received Concerning the Proposed Federal Rules of Criminal Procedure 93 (1943) [hereinafter cited as Comments].

3. *Id.* at 94.

4. 2 Comments 390.

5. 2 Comments 391.

6. *Id.* at 392.

7. *Id.* at 392.

jection, if not raised prior to trial."⁸ United States District Judge W. Calvin Chesnut of Maryland thought that the rule did not state clearly which motions to dismiss were within the discretion of the court and not appealable, such as motions to quash, and which were appealable on adverse rulings.⁹ John T. Metcalf, United States Attorney for the Eastern District of Kentucky, thought the question of lack of jurisdiction or failure to charge an offense should be raised not later than the time set to move for a new trial.

With respect to rule 13(b)(3), Seth Thomas of the Court of Appeals of the Eighth Circuit suggested that no motions be made before arraignment.¹⁰ If the defendant is going to plead guilty, he will not make a motion. If he pleads not guilty, the trial judge controls the time of making the motion. Judge J. W. Waring of the Eastern District of South Carolina would have the rule provide simply: "The motion shall be made before a plea." Motions should be disposed of before pleas. Once the plea is filed, the case should be ready for trial.¹¹ Joseph T. Votava, United States Attorney for the District of Nebraska, would amend the rule to require leave of court for a motion after plea. To bar motions completely after plea might be harsh on defendants, particularly those arraigned shortly after return of the indictment. Under the existing practice, courts protected the defendant by permitting him to withdraw his plea. The committee rule, on the contrary, permits motions up to trial. This is unfair to the Government since it prevents investigation of the law or writing of briefs.¹² Stuart H. Steinbrink of New York favored a motion made within a fixed time after arraignment, for example, ten days, with a proviso that the court may extend the time for cause.¹³

With respect to rule 13(b)(4), Judge Merrill E. Otis of the Western District of Missouri asked: "Would it not be better if it is a motion which raises an issue of fact as to which the defendant is entitled to a jury trial, to reserve that question to the trial of the case on the merits?"¹⁴ An example of such a motion is one setting up a prior conviction. There should not be two jury trials in such a case. Joseph T. Votava thought that the rule would

lead to a practice of double trials. Under this provision, attorneys for defendants will learn to file motions, raising some issue of fact, and then demanding trial on

8. *Id.* at 393.

9. 1 Comments 95.

10. *Id.* at 96.

11. *Id.* at 96.

12. *Id.* at 97.

13. 2 Comments 394.

14. 1 Comments 98.

15. *Id.* at 98.

the motion, with all of the expense involved, and will do this solely as a fishing expedition to find out just what the Government's evidence is.¹⁶

Judge Xenophon Hicks of the Court of Appeals of the Sixth Circuit thought one trial by jury sufficient, and a preliminary trial unnecessary.¹⁶

Robert S. Rubin found the following sentence ambiguous: "The court may determine the motion or may order that the defenses or objections raised by the motion may be submitted for determination at the trial of the general issue." It was not clear whether court or jury was to decide the issue raised by the motion.¹⁷ This sentence was deleted from the succeeding drafts of the rule. Stuart H. Steinbrink questioned the advisability of permitting the court to reserve the defenses raised by motion until trial.¹⁸ This encouraged the trial judge to avoid responsibility for terminating a prosecution or for deciding difficult legal issues. If a defendant's motion has merit, he is entitled to prompt determination and dismissal, and should not incur the expense and delay of a trial. The Government is likewise saved such expense and, in addition, the defendant may make only one motion. The rule should provide that the motion be determined before trial.¹⁹

Judge A. F. St. Sure of the Northern District of California would delete subsections (1), (4) and (5) of rule 13(b). The rule encourages and permits a determination of issues of fact by a jury all of which, save insanity, are now determined on trial of the general issue. Some issues of fact which might arise in a criminal case are: entrapment, alibi, confession by duress, self defense and the statute of limitations where the issue is whether the defendant is a fugitive. Some of these would present mixed questions of fact and law which the judge would feel constrained to submit to a jury. An unpredictable number of "issues of fact" might arise which would have to be tried by a jury before trial of the general issue.²⁰ James E. Ruffin of the Criminal Division of the Department of Justice thought that the "rule should specify exactly what issues the defendant is entitled to have tried under the general issue, and what issues of fact he is entitled to have tried before the trial of the general issue."²¹

With respect to rule 13(b)(5), Judge T. C. Trimble of the Eastern District of Arkansas thought there should be a provision for suspending the operation of the statute of limitations if the motion were granted, pending the filing of a new accusation.²² Robert S. Rubin thought that

16. 2 Comments 396.

17. *Id.* at 397.

18. *Id.* at 397.

19. *Id.* at 397.

20. *Id.* at 397-98.

21. 2 Comments 398.

22. 1 Comments 99.

the note to this subdivision should make it clear that the rule does not supersede the statutes providing for tolling of the statute of limitations pending the return of a new indictment.²³ James E. Ruffin would state the amount of time which a defendant can be held in custody or on bail pending the filing of a new accusation.²⁴

The Second Preliminary Draft (eighth committee draft), dated February 1944, changed the number of this rule to 12. Rule 12(b)(3) provided: "The motion shall be made before the plea is entered, or thereafter and within such reasonable time before the trial as the court may fix." The other provisions of rule 12 obtained their final form. The provision on the Criminal Appeal Statute was omitted.

The following comments were made to the Advisory Committee on the Second Preliminary Draft. The Special Committee of the Los Angeles Bar Association thought that an indictment should be excluded from the definition of "pleadings," as in rule 12(a)(16). Judge Learned Hand had pointed out that an indictment is not a pleading but the charge of the grand jury.²⁵ Others, including Blackstone, define it as an accusation, but never as a pleading. Concerning rule 12(b)(2), the Committee of the State Bar of California suggested that any motion involving a question of fact, which terminated the case if granted, should be triable by a jury without limitation.²⁶ On the recommendation of Judge Learned Hand, the Judicial Conference for the Second Circuit adopted a motion to strike out the last sentence of rule 12(b) providing that lack of jurisdiction or failure to charge an offense shall be noticed by the court at any time.²⁷

The doctrine of waiver should prevent, except at the beginning, the raising of the jurisdictional question. This was the rule with personal jurisdiction, even in the constitutional or international sense. The defendant could have a fair trial in another district of a state or even in another state. All the federal courts are equally competent. If the defendant chooses to have the case tried by the wrong federal court, consciously or unconsciously, he has no meritorious ground for objection. If he were acquitted after a trial in the wrong court, the Government should not be able to prosecute in the right court. If the defendant consciously avoids raising the question, he is in no position to complain. A question of policy alone is involved. The rules permit the defendant to waive more important questions. The rule is wrong in not permitting a waiver for failure to charge an offense. It is in conflict with federal

23. 2 Comments 399.

24. *Id.* at 399.

25. *Falter v. United States*, 23 F.2d 420, 425 (2d Cir.), cert. denied, 277 U.S. 590 (1928). See 24 Ill. L. Rev. 319, 322 (1929).

26. 4 Comments 30.

27. 3 Comments 44.

rule 55(a) on harmless error.²⁸ Ralph F. Lesemann of the Bar Committee for the Seventh Circuit suggested that the defense of pardon, former acquittal, former conviction, former jeopardy, and the statute of limitations be made by motion before trial, and that such defenses be included in the motion. It is important to the defendant that the rules specify when and how such defenses be raised, and that the Government be apprised before it goes to the expense of preparing for trial.²⁹

The Tennessee federal judges thought that the proposed rule 12(b)(3) was confusing and might require a standing order since a court could not anticipate the making of a motion or fix a reasonable time until notified that a motion was to be made. The rule should read as follows: "The motion shall be made before the plea is entered, or thereafter, within the discretion of the court, and within a reasonable time."³⁰

The Report of the Advisory Committee (ninth committee draft), dated June 1944, merely finalized rule 12(b)(3), providing for the time to make a motion. The Supreme Court adopted the rule without any change.

II. FEDERAL PROCEDURE PRIOR TO RULE 12

A. *What Law Governs*

There have always been cases involving pleadings and motions before trial. The early ones made reference to the common law, to English cases, and to such English writers as Blackstone and Chitty. In 1858 Circuit Justice Clifford, in passing on the wording of an indictment for murder, pointed out that Congress had provided no forms for indictments and that the "common law prevailing in the jurisprudence of the states"³¹ must be what Congress intended regarding the accusation and trial of offenders. The matter "must be referred to the laws of the states and the usages and customs of the courts at the time when the judicial system of the United States was organized."³²

In passing on the sufficiency of an information, a district court in 1870 stated that "state laws do not control in criminal proceedings in the United States courts . . . in the mode or form of charging the offense. . . . On the contrary, the proceedings throughout are according to the course of the common law, except so far as has been otherwise provided by the laws of congress or by constitutional provision."³³ Hence, the names

28. *Id.* at 45.

29. *Id.* at 46.

30. *Id.* at 47.

31. *United States v. Williams*, 28 Fed. Cas. 636, 641 (No. 16707) (C.C.D. Me. 1858).

32. *Ibid.* The court cited *United States v. Reid*, 53 U.S. (12 How.) 361 (1851), which, however, had laid down rules for evidence and trial. In the instant case, the court applied the state law of Maine and Massachusetts, of which Maine had been a part.

33. *United States v. Shepard*, 27 Fed. Cas. 1056, 1058 (No. 16273) (E.D. Mich. 1870).

of witnesses for the prosecution need not be indorsed on the indictment or information even though a statute of the state required it. In 1871 Circuit Judge Dillon stated: "In the federal courts the sufficiency of pleas in abatement, in the absence of legislation by congress touching the question or authorized rules of court, must be tested by the principles of the common law."³⁴ In 1875 Circuit Judge Woods concluded that in the absence of a statute "questions of criminal jurisprudence . . . must be governed by the common law. . . ."³⁵

But in 1880 a judge stated that "in all matters respecting the accusation and trial of offenders, not otherwise provided for, we are referred to the laws and usages of the state when the judicial system was organized."³⁶ In the same year another court followed the common law.³⁷ In 1882, state law governed the effect of standing mute with respect to misdemeanors.³⁸ In 1886 Circuit Justice Gray stated that "the statutes and the practice of the states do not control the rules of pleading in criminal cases in the courts of the United States. . . ."³⁹ At arraignment or trial, the common law applies to objections of present insanity.⁴⁰ As late as 1908, a district court referred to statutes of the state in which the court sat as controlling in attacking the validity of the indictment due to defects in the grand jury proceedings.⁴¹ Yet a plea in abatement was held to lie although the state statutes were silent. Thus prior federal precedents were followed. The same year a court of appeals in determining whether the names of grand jury witnesses must be indorsed on the indictment stated: "Criminal cases in the federal courts are governed and controlled by federal statutes and federal decisions, and state statutes and state decisions are inapplicable."⁴²

In 1916 it was found that state law did not apply in sustaining a demurrer to an indictment.⁴³ In 1920 the Supreme Court held that state law did not apply to a motion to quash an indictment, found after a prior grand jury had failed to find one.⁴⁴ In 1931 the Supreme Court,

34. *United States v. Williams*, 28 Fed. Cas. 666, 669 (No. 16716) (C.C.D. Minn. 1871).

35. *United States v. Hammond*, 26 Fed. Cas. 99, 100 (No. 15294) (C.C.D. La. 1875).

36. *United States v. Coppersmith*, 4 Fed. 198, 204-05 (C.C.W.D. Tenn. 1880). The court cited *United States v. Reid*, 53 U.S. (12 How.) 361 (1851).

37. *United States v. Nye*, 4 Fed. 888, 890 (C.C.S.D. Ohio 1880). The case involved joinder of several distinct misdemeanors in the same indictment.

38. *In re Smith*, 13 Fed. 25, 27 (C.C.D. Mass. 1882). The court cited *United States v. Reid*, 53 U.S. (12 How.) 361 (1851).

39. *United States v. Richardson*, 28 Fed. 61, 66 (C.C.D. Me. 1886).

40. *Youtsey v. United States*, 97 Fed. 937, 940 (6th Cir. 1899).

41. *United States v. Wells*, 163 Fed. 313, 323 (D. Idaho 1908).

42. *Jones v. United States*, 162 Fed. 417, 419 (9th Cir.), cert. denied, 212 U.S. 576 (1908).

43. *United States v. Bopp*, 232 Fed. 177, 178 (N.D. Cal. 1916).

44. *United States v. Thompson*, 251 U.S. 407, 414 (1920).

holding that the privilege against self incrimination is properly raised under a plea of not guilty and not a special plea, stated: "Federal criminal procedure is governed not by state practice but by federal statutes and decisions of the federal courts."⁴⁵ In 1941 a district court held that the defense of insanity must be offered under a plea of not guilty. The procedure was not determined by state practice but "according to the practice of common law. . . ."⁴⁶ In the same year a court of appeals held that state law applied to motions to quash. If the state law allowed such a motion for error extrinsic to the record, the federal court sitting in the state should also allow it.⁴⁷ Yet the court considered "the settled principles of criminal law"⁴⁸ to be determinative of joinder of offenses. Whether a plea in abatement lies because of the dissolution of a corporate defendant was determined by the common law, not the state, prior to 1776.⁴⁹ In 1946, two months before the Federal Rules of Criminal Procedure went into effect, one court of appeals concluded: "It is no longer necessary in the federal courts to follow the old common law rules of criminal pleading. . . ."⁵⁰

B. *Oral Pleading*

In 1836 Chief Judge Cranch stated: "In criminal cases, the pleadings subsequent to the indictment are generally considered as *ore tenus*."⁵¹ However, the court's judgment is the same as if they were in writing and spread upon the record.⁵²

C. *Time of Pleading*

Mr. Justice Field has stated the time when pleading occurs:

When the indictment is found, or the information is filed, a warrant is issued for the arrest of the accused to be brought before the court, unless he is at the time in custody, in which case an order for that purpose is made, to the end, in either case, that he may be arraigned and plead to the indictment or information. When he is brought before the court, objections to the validity or form of the indictment or information, if made, are considered, or issue is joined upon the accusation.⁵³

45. *United States v. Murdock*, 284 U.S. 141, 150 (1931).

46. *United States v. Fore*, 38 F. Supp. 140, 141 (S.D. Cal. 1941).

47. *United States v. Perlstein*, 120 F.2d 276, 279 (3d Cir. 1941), cert. denied, 316 U.S. 678 (1942).

48. *Id.* at 280, quoting *Pointer v. United States*, 151 U.S. 396, 400 (1894).

49. *United States v. Leche*, 44 F. Supp. 765, 766 (E.D. La. 1942).

50. *Norris v. United States*, 152 F.2d 808, 810 (5th Cir.), cert. denied, 328 U.S. 850 (1946).

51. *United States v. White*, 28 Fed. Cas. 550, 557 (No. 16675) (C.C.D.C. 1836). See also *United States v. Mertine*, 64 F. Supp. 792 (D.N.J. 1946); *United States v. Clayton-Kennedy*, 2 F. Supp. 233 (D. Md.), appeal dismissed per curiam, 67 F.2d 923 (4th Cir. 1933).

52. *United States v. White*, 28 Fed. Cas. 562, 566 (No. 16676) (C.C.D.C. 1836).

53. *In re Bonner*, 151 U.S. 242, 257-58 (1894).

According to one writer on federal procedure, the pleadings of the defendant in federal criminal cases came in the following order: (1) plea to the jurisdiction, (2) plea in abatement, (3) motion to quash, (4) demurrer, and (5) pleas in bar.⁵⁴ At the arraignment, which occurred later, the defendant pleaded not guilty, *nolo contendere*, or guilty. He might then ask to withdraw his plea and make the objections enumerated above. This article will consider the pleadings in their chronological order.

1. Plea to the Jurisdiction

A court has stated: "In criminal prosecutions, although a defendant may plead to the jurisdiction of the court, there are but few instances in which he is obliged to have recourse to such a plea. He may take advantage of the matter under the general issue."⁵⁵ In one case the Supreme Court saw no objection to raising the issue by motion for new trial.⁵⁶ In an early case, the court, in submitting the issue of guilt to the jury, stated that a verdict of not guilty would eliminate the issue of jurisdiction, but a verdict of guilty would be subject to the opinion of the court on jurisdiction.⁵⁷ A plea to the jurisdiction must precede a plea of not guilty.⁵⁸ Following the denial of a plea to the jurisdiction the defendant may plead over.⁵⁹

2. Plea in Abatement

In 1871 Circuit Judge Dillon stated that pleas in abatement "are dilatory, and not being favored, the law requires that they shall contain all essential averments, pleaded with strict exactness."⁶⁰ The proper

54. 15 Hughes, *Federal Practice, Jurisdiction and Procedure* 642, 832, 911 (1932). See also Robinson, *Cases on Criminal Law and Procedure* 1221 (1941).

It is said in 1 Chitty, *Criminal Law* 434 (2d ed. 1826), that at common law the order of pleading was as follows: (1) pleas to the jurisdiction, (2) demurrers, (3) dilatory pleas, including pleas in abatement, (3) pleas in bar, such as former convictions, former acquittal, former attainder and pardon, and (5) pleas to the matter of the indictment, i.e., not guilty and special pleas. But this order was not rigidly adhered to. 2 Bishop, *New Criminal Procedure* §§ 746-47 (4th ed. 1895). While Chitty states that double pleading was not allowed, Bishop cites Hawkins to the contrary. 2 Bishop, *op. cit. supra*, §§ 748-52.

55. *United States v. Six Fermenting Tubs*, 27 Fed. Cas. 1089, 1091 (No. 16296) (D. Wis. 1868). The court discussed pleading of the statute of limitations. It was taken advantage of on a plea of not guilty in *United States v. McGill*, 26 Fed. Cas. 1088, 1090 (No. 15676) (C.C.D. Pa. 1806). See also *Wright v. United States*, 158 U.S. 232, 238 (1895).

56. *United States v. Thomas*, 151 U.S. 577, 581 (1894) (jurisdiction over Indians).

57. *United States v. Wiltberger*, 28 Fed. Cas. 727, 731 (No. 16738) (C.C.E.D. Pa. 1819). The issue was as to jurisdiction over a crime committed in a foreign state. The Supreme Court later held there was no jurisdiction. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820). See also *United States v. Bevans*, 16 U.S. (3 Wheat.) 336 (1818).

58. *Ford v. United States*, 273 U.S. 593, 606 (1927).

59. *United States v. Lawrence*, 26 Fed. Cas. 879, 884 (No. 15573) (C.C.S.D.N.Y. 1876); *United States v. Caldwell*, 25 Fed. Cas. 237, 238 (No. 14707) (C.C.S.D.N.Y. 1871).

60. *United States v. Williams*, 28 Fed. Cas. 666, 668 (No. 16716) (C.C.D. Minn. 1871).

conclusion of a plea in abatement is a prayer that the indictment be quashed.⁶¹ When a plea in abatement prays for a judgment which the court cannot give upon such a plea, it is defective. Pleas of misnomer are verified while a plea in abatement usually is not. In cases of misdemeanor and felony, two or more pleas in abatement, not repugnant to one another, may be pleaded.⁶² The Government usually attacks the plea by a demurrer.⁶³ The Supreme Court has stated that in "all cases of contested fact" a plea in abatement is the "proper remedy," rather than a motion to quash.⁶⁴ Under the statute on imperfections of form in the indictment, the defendant must show prejudice from the defect even though he need not aver it.⁶⁵ The trial court has wide discretion in ruling on a plea, particularly on a late one, and the appellate court is not likely to reverse.⁶⁶

A plea of abatement for misnomer should be made before a motion to quash, or there is a waiver.⁶⁷ If the plea of misnomer is followed by a demurrer, a waiver also occurs. One great advantage to pleas in abatement is that they may be used to present issues not on the record.⁶⁸ "All the authorities agree that a plea in abatement is not open to amendment. . . ."⁶⁹ If a plea attacks the evidence before the grand jury, it should be verified.⁷⁰ The plea should aver the facts relied on, and

Accord, *Agnew v. United States*, 165 U.S. 36, 44 (1897); *Olmstead v. United States*, 19 F.2d 842, 845 (9th Cir. 1927), *aff'd*, 277 U.S. 438 (1928); *United States v. Antonelli Fireworks Co.*, 53 F. Supp. 870, 875 (W.D.N.Y. 1943), *aff'd*, 155 F.2d 631 (2d Cir.), *cert. denied*, 329 U.S. 742 (1946); *United States v. Lehigh Valley R.R.*, 43 F.2d 135, 138 (M.D. Pa. 1930); *United States v. American Tobacco Co.*, 177 Fed. 774, 780 (W.D. Ky. 1910); *United States v. Reeves*, 27 Fed. Cas. 750, 751 (No. 16139) (C.C.D. La. 1878); *United States v. Hammond*, 26 Fed. Cas. 99, 101 (No. 15294) (C.C.D. La. 1875).

61. *United States v. Hammond*, 26 Fed. Cas. 99, 101 (No. 15294) (C.C.D. La. 1875).

62. *United States v. Richardson*, 28 Fed. 61, 67 (C.C.D. Me. 1886).

63. *Jones v. United States*, 179 Fed. 584 (9th Cir. 1910); *United States v. Howell*, 65 Fed. 402 (N.D. Cal. 1895); *United States v. Ewan*, 40 Fed. 451 (C.C.N.D. Fla. 1889). In *United States v. Rintelen*, 235 Fed. 787 (S.D.N.Y. 1916), the Government moved to strike out; it also so moved in *United States v. Jones*, 16 F. Supp. 135, 137 (S.D.N.Y. 1936), where the court held that such a motion would lie, demurrer not being the only mode of attack.

64. *Agnew v. United States*, 165 U.S. 36, 44 (1897). See *United States v. Heath*, 260 F.2d 623, 630 (9th Cir. 1953).

65. *United States v. Cobban*, 127 Fed. 713, 715 (C.C.D. Mont. 1904). See An Act to Further the Administration of Justice § 3, 17 Stat. 198 (1872).

66. *Wilder v. United States*, 143 Fed. 433, 439 (4th Cir. 1906), *cert. denied*, 204 U.S. 674 (1907).

67. *Lee v. United States*, 156 Fed. 948, 950 (9th Cir. 1907).

68. *May v. United States*, 236 Fed. 495, 497 (8th Cir. 1916); *United States v. Silverthorne*, 265 Fed. 859, 862 (W.D.N.Y. 1920); *United States v. Wells*, 163 Fed. 313, 323 (D. Idaho 1908).

69. *United States v. American Tobacco Co.*, 177 Fed. 774, 780 (W.D. Ky. 1910). But see *United States v. Burk*, 41 F. Supp. 916, 919 (D. Del. 1941).

70. *Olmstead v. United States*, 19 F.2d 842, 845 (9th Cir. 1927); *United States v.*

not conclusions of law or evidence of such facts.⁷¹ The plea should not be based merely on information and belief.⁷²

The history of the scope of these pleas has been so described: "Pleas in abatement were first used in cases of a misnomer, thereafter to attack the regularity of drawing and convening grand jurors, and still later to determine whether an indictment has been found on incompetent evidence."⁷³ Thus, the plea could be used for objections to the indictment not apparent on the face of the indictment. Its scope was not limited to the conduct of the grand jury, or to the sufficiency and competence of evidence before it. It lies for any defect apparent on the face of the indictment and for matters extrinsic to the record.⁷⁴ In 1926 Mr. Justice Holmes pointed out: "It is true that there is less strictness now in dealing with a plea in abatement than there was a hundred years ago. The question is less what it is called than what it is. But while the quality of an act depends upon its circumstances, the quality of the plea depends upon its contents."⁷⁵ Its effect is not the same as a plea in bar and does not become a plea in bar because of such extrinsic circumstances as the running of the statute of limitations. "The plea looks only to abating the indictment not to barring the action."⁷⁶ In its last decision on pleas in abatement prior to the Federal Rules of Criminal Procedure, the Supreme Court thus described its function in connection with grand jury procedure:

Although frequently described as a dilatory plea which should be strictly construed, . . . such a plea is an appropriate means of raising objections to an indictment which may involve serious and prejudicial infringements of procedural rights, such as an objection to the qualifications of grand jurors . . . to the method of selection of the grand jury . . . or to its composition. . . .⁷⁷

National Wholesale Druggists' Ass'n, 61 F. Supp. 590, 593 (D.N.J. 1945); *United States v. Antonelli Fireworks Co.*, 53 F. Supp. 870, 875 (W.D.N.Y. 1943); *United States v. Bopp*, 232 Fed. 177, 178 (N.D. Cal. 1916); *United States v. Nevin*, 199 Fed. 831, 836 (D. Colo. 1912).

71. *Olmstead v. United States*, 19 F.2d 842, 845 (9th Cir. 1927); *United States v. Silverthorne*, 265 Fed. 859, 861 (W.D.N.Y. 1920).

72. *United States v. Lehigh Valley R.R.*, 43 F.2d 135, 140 (M.D. Pa. 1930).

73. *United States v. Rintelen*, 235 Fed. 787, 788 (S.D.N.Y. 1916). "At common law the only challenge to an indictment because of the improper constitution of the grand jury was by plea in abatement. . . ." *United States ex rel. McCann v. Thompson*, 144 F.2d 604, 607 (2d Cir. 1944). See *United States v. Heath*, 260 F.2d 623, 630 (9th Cir. 1958).

74. *United States v. Apex Distrib. Co.*, 270 F.2d 747, 753 (9th Cir. 1959); *United States v. Heath*, 260 F.2d 623, 630 (9th Cir. 1958); *United States v. Lehigh Valley R.R.*, 43 F.2d 135, 137 (M.D. Pa. 1930); *United States v. Goldman*, 28 F.2d 424, 426 (D. Conn. 1928); *United States v. Silverthorne*, 265 Fed. 859, 862 (W.D.N.Y. 1920).

75. *United States v. Storrs*, 272 U.S. 652, 654 (1926).

76. *Ibid.*

77. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 29 n.3 (1943), 56 Harv. L. Rev. 828, 41 Mich. L. Rev. 1205.

Where a plea in abatement is sustained because of misconduct of the United States attorney before the grand jury, the defendant may be held in bail pending such further proceedings as the Government may want to take.⁷⁸ On overruling of a plea in abatement, the defendant may plead over.⁷⁹ The Court has found that the defendant is not concluded on the merits despite the English practice.⁸⁰

In many cases the Supreme Court⁸¹ and various circuit courts⁸² reviewed on the merits decisions overruling or refusing to entertain pleas in abatement. A few courts held that a general statute against review of such pleas prevented appellate review of a decision overruling a plea in abatement to an indictment, but at the same time holding that the pleas were properly overruled.⁸³ In 1943 the Supreme Court held that this latter interpretation was erroneous and that appeal, not mandamus, was available.⁸⁴

3. Motion to Quash

A motion to quash an indictment is a proper mode of attacking defects of form or substance.⁸⁵ But it is within the court's discretion to quash an indictment especially for a defect of form.⁸⁶ The motion must be founded on defects which would make erroneous a judgment against the defendant on that indictment.⁸⁷ In many cases the court refused to quash an indictment even for defects which would cause an arrest of judgment. A defect pleadable only in abatement and which is curable by pleading over is not ground for a motion to quash. The Supreme Court has stated: "When made in behalf of defendants, it is usually refused,

78. *United States v. Wells*, 163 Fed. 313, 329 (D. Idaho 1908).

79. *United States v. Williams*, 28 Fed. Cas. 666, 670 (No. 16716) (C.C.D. Minn. 1871); *United States v. Smith*, 27 Fed. Cas. 1186, 1191 (No. 16341a) (C.C.D.N.Y. 1809).

80. *United States v. Gale*, 109 U.S. 65, 67-68 (1883).

81. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 27 (1943); *Hyde v. United States*, 225 U.S. 347, 372-74 (1912); *Holt v. United States*, 218 U.S. 245, 247-48 (1910); *Crawley v. United States*, 194 U.S. 461, 468-74 (1904); *Agnew v. United States*, 165 U.S. 36, 43-45 (1897); *Bram v. United States*, 168 U.S. 532, 566-68 (1897).

82. *Mulloney v. United States*, 79 F.2d 566, 572-80 (1st Cir. 1935); *Dunn v. United States*, 238 Fed. 508 (5th Cir. 1917); *Hillman v. United States*, 192 Fed. 264, 269 (9th Cir. 1911), cert. denied, 225 U.S. 699 (1912); *Lowdon v. United States*, 149 Fed. 673 (5th Cir. 1906), cert. denied, 210 U.S. 434 (1903).

83. *Biemer v. United States*, 54 F.2d 1045 (7th Cir.), cert. denied, 286 U.S. 566 (1932); *Luxenberg v. United States*, 45 F.2d 497, 498 (4th Cir. 1930), cert. denied, 283 U.S. 820 (1931); *Mounday v. United States*, 225 Fed. 965, 967 (8th Cir.), cert. denied, 239 U.S. 645 (1915).

84. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 27 (1943).

85. *United States v. O'Sullivan*, 27 Fed. Cas. 367, 368, 373 (No. 15974) (S.D.N.Y. 1851).

86. *United States v. Gooding*, 25 U.S. (12 Wheat.) 460 (1827); *Takeguma v. United States*, 156 F.2d 437, 441 (9th Cir. 1946).

87. *United States v. Brown*, 24 Fed. Cas. 1273 (No. 14671) (D. Ore. 1871); *United States v. Pond*, 27 Fed. Cas. 590, 591 (No. 16067) (C.C.D. Mass. 1855).

unless in the clearest cases, and the grounds of it are left to be availed of, if available, upon demurrer or motion in arrest of judgment."⁸⁸ Subsequently, a district court concluded that motions to quash are not favored and are not usually allowed "where the motion is founded upon some matter which could be presented by demurrer, motion in arrest of judgment, or which could be made available by way of defense on trial before a jury."⁸⁹ An indictment must be grossly in error to be quashed. If it is subject to both quashing and arrest of judgment, "it may as well be quashed before trial as to have judgment arrested on it after."⁹⁰ In general, the sufficiency of an indictment should be tested by demurrer, since the granting of a motion to quash is discretionary.⁹¹ One district court stated broadly: "An indictment may be quashed for any reason which would render ineffective a trial had upon the accusation as formulated. . . . An indictment is quashed upon the theory that the facts charged therein are insufficient to put the accused upon his defense."⁹² Occasionally, formal written motions to quash have not been filed.⁹³ The court may quash an indictment on its own motion, without the defendant's, when the indictment fails to state an offense.⁹⁴ On a prosecution for treason, where the defendant moves to quash, his counsel may be required to file a formal statement of the grounds on which the motion is based.⁹⁵

Proof of facts outside the record should be offered in the first instance by one or more affidavits accompanying the motion. If the prosecution does not admit the facts, or seriously controverts them, the court should take testimony on the issue.⁹⁶ A motion to quash should be verified

88. *United States v. Rosenburgh*, 74 U.S. (7 Wall.) 580, 583 (1868). See also *Radford v. United States*, 129 Fed. 49, 51 (2d Cir. 1904). There should be no quashing where the points of law raised by the defendant are doubtful. *United States v. Stowell*, 27 Fed. Cas. 1350 (No. 16409) (C.C.D. Mass. 1854).

89. *United States v. Kilpatrick*, 16 Fed. 765, 773 (W.D.N.C. 1883).

90. *United States v. Wardell*, 49 Fed. 914, 915 (C.C.E.D.N.Y. 1892).

91. *Sconyers v. United States*, 54 F.2d 68, 69 (5th Cir. 1931), cert. denied, 285 U.S. 554 (1932); *Gay v. United States*, 12 F.2d 433, 434 (5th Cir.), cert. denied, 273 U.S. 705 (1926).

92. *United States v. Frankfeld*, 38 F. Supp. 1018, 1019 (D.D.C. 1941).

93. *United States v. Mertine*, 64 F. Supp. 792 (D.N.J. 1946). Counsel agreed that the matter should be submitted as if a formal motion to quash had been filed.

94. *District of Columbia v. Horning*, 47 App. D.C. 413, 418 (D.C. Cir. 1918).

95. *In re Davis*, 7 Fed. Cas. 63, 89 (No. 3621a) (C.C.D. Va. 1867-71).

96. *Carter v. Texas*, 177 U.S. 442, 448 (1900); *United States v. Journal Co.*, 197 Fed. 415 (E.D. Va. 1912).

97. *United States v. Perlstein*, 120 F.2d 276, 279 (3d Cir. 1941); *United States v. Reilly*, 30 F.2d 866 (E.D. Pa. 1929); *United States v. Coolidge*, 25 Fed. Cas. 622, 623 (No. 14858) (C.C.D. Mass. 1815). See also *United States v. Johnson*, 319 U.S. 503, 512-13 (1943).

98. *United States v. Brown*, 24 Fed. Cas. 1273, 1274 (No. 14671) (D. Ore. 1871). Accord,

either by facts of record, by admissions of the Government, or by affidavits.⁹⁷

In 1871 a court stated that a motion to quash will not lie "where the objection does not appear or arise upon the face of the indictment, or perhaps the records of the court."⁹⁸ In 1897 the Supreme Court stated that "in all cases of contested fact" a plea in abatement is the "proper remedy."⁹⁹ Yet contrary opinions have been announced from time to time.¹⁰⁰ In 1910 the Court of Appeals of the Third Circuit said that the improper selection of a grand jury by barring Negroes permitted motions to quash "as substitutes for pleas in abatement."¹⁰¹ As to improper presence of a person in the grand jury room, "a motion to quash seems to be made use of in many instances instead of a plea in abatement, although the plea in abatement is the proper remedy in all cases of contested fact."¹⁰² A district court stated that grounds for quashing "may be either matters intrinsic to the pleading as defects apparent on its face or matters extrinsic to the instrument, as irregularities or other facts occurring prior to the return of the bill."¹⁰³ The Court of Appeals of the Third Circuit upheld this wide scope because it was the practice in the state of trial.¹⁰⁴ In 1943 the District Court for Massachusetts held that a motion to quash is the equivalent of a demurrer and cannot be supported by evidence, since it merely tests the indictment on its face.¹⁰⁵

Even though an indictment is quashed, the defendant is not discharged where he is given a recognizance to appear in court readily to answer an indictment and not to depart without leave of court.¹⁰⁶ Where an indictment is quashed for defect in the size of the grand jury, the defendant may be held to await the action of a proper grand jury.¹⁰⁷ On overruling of a motion to quash, the defendant may plead over.¹⁰⁸

Anderson v. United States, 273 Fed. 20, 28 (8th Cir.), cert. denied, 257 U.S. 647 (1921); *Cooper v. United States*, 247 Fed. 45, 47 (4th Cir. 1917); *United States v. Lehigh Valley R.R.*, 43 F.2d 135, 137 (M.D. Pa. 1930); *United States v. Silverthorne*, 265 Fed. 853, 853 (W.D.N.Y. 1920); *United States v. Terry*, 39 Fed. 355 (N.D. Cal. 1889).

99. *Agnew v. United States*, 165 U.S. 36, 44 (1897).

100. See *Carter v. Texas*, 177 U.S. 442, 447 (1900); *Mamaux v. United States*, 264 Fed. 816 (6th Cir. 1920); *McInerney v. United States*, 147 Fed. 183, 184 (1st Cir. 1906); *Breese v. United States*, 143 Fed. 250, 252 (4th Cir. 1905).

101. *Hillegass v. United States*, 183 Fed. 199, 201 (3d Cir. 1910), cert. denied, 219 U.S. 585 (1911).

102. *May v. United States*, 236 Fed. 495, 497 (8th Cir. 1916).

103. *United States v. Frankfeld*, 38 F. Supp. 1018, 1019 (D.D.C. 1941).

104. *United States v. Perlstein*, 120 F.2d 276, 279 (3d Cir. 1941).

105. *United States v. Slobodkin*, 48 F. Supp. 913, 915 (D. Mass. 1943).

106. *United States v. White*, 28 Fed. Cas. 570, 572 (No. 16678) (C.C.D.C. 1837). The indictment was quashed because the statute of limitations had run before the filing of the indictment.

107. *United States v. Haskell*, 169 Fed. 449, 454 (E.D. Olda. 1909).

108. *United States v. Smith*, 27 Fed. Cas. 1186, 1191 (No. 16341a) (C.C.D.N.Y. 1806).

A division of opinion over a motion to quash between judges of a circuit court would not be considered by the Supreme Court,¹⁰⁹ since the matter is discretionary. The rule would be different as to a demurrer. Later, when the courts of appeals had been set up, it was held that that court would not review.¹¹⁰ It was sometimes said that the ruling on a motion to quash was not "ordinarily" reviewable,¹¹¹ or reviewable only for abuse of discretion.¹¹² On the other hand, the appellate courts did not hesitate to review decisions on pleas in abatement.¹¹³

4. Demurrer

In 1827 Mr. Justice Story stated:

Undoubtedly, according to the regular course of practice, objections to the form and sufficiency of an indictment ought to be discussed, upon a motion to quash the indictment, which may be granted or refused in the discretion of the court, or upon demurrer to the indictment, or upon a motion in arrest of judgment, which are matters of right. The defendant has no right to insist that such objections should be discussed or decided, during the trial of the facts by the jury. It would be very inconvenient and embarrassing, to allow a discussion of such topics, during the progress of the cause before the jury, and introduce much confusion into the administration of public justice. But, we think, it is not wholly incompetent for the court to entertain such questions, during the trial, in the exercise of a sound discretion. It should, however, be rarely done, and only under circumstances of an extraordinary nature.¹¹⁴

It was asserted in 1829 that "demurrers, in criminal cases, are very rare, inasmuch as upon a motion to quash, or in arrest of judgment, the defendant may avail himself of all the matters which he could upon demurrer."¹¹⁵ A "demurrer to an indictment admits every matter of fact which is well pleaded. . . ."¹¹⁶ "A demurrer can only be used to object to

109. *United States v. Hamilton*, 109 U.S. 63 (1883); *United States v. Rosenburgh*, 74 U.S. (7 Wall.) 580, 583 (1868).

110. *Conway v. United States*, 142 F.2d 202, 203 (9th Cir. 1944); *Sconyers v. United States*, 54 F.2d 68, 69 (5th Cir. 1931); *Gay v. United States*, 12 F.2d 433 (5th Cir. 1926); *Colbeck v. United States*, 10 F.2d 401, 402 (7th Cir. 1925), cert. denied, 271 U.S. 662 (1926); *Goodfriend v. United States*, 294 Fed. 148, 150 (9th Cir. 1923); *McGregor v. United States*, 134 Fed. 187, 192 (4th Cir. 1904).

111. *Roper v. United States*, 54 F.2d 845, 846 (10th Cir. 1931); *Nanfito v. United States*, 20 F.2d 376, 378 (8th Cir. 1927); *Livezey v. United States*, 279 Fed. 496, 498 (5th Cir.), cert. denied, 260 U.S. 721 (1922); *Anderson v. United States*, 273 Fed. 20, 30 (8th Cir. 1921); *Hillegass v. United States*, 183 Fed. 199, 201 (3d Cir. 1910); *Dillard v. United States*, 141 Fed. 303, 304 (9th Cir. 1905).

112. *Hill v. United States*, 15 F.2d 14 (8th Cir. 1926); *Stewart v. United States*, 300 Fed. 769, 777 (8th Cir. 1924); *Steigman v. United States*, 220 Fed. 63, 65 (3d Cir. 1915); *Carlisle v. United States*, 194 Fed. 827, 829 (4th Cir. 1912).

113. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 27 n.3 (1943).

114. *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 478-79 (1827).

115. *United States v. Watkins*, 28 Fed. Cas. 419, 474 (No. 16649) (C.C.D.C. 1829).

116. *United States v. Cook*, 84 U.S. (17 Wall.) 168, 178 (1872). See also *Knoell v.*

an indictment as insufficient in law, because defective in substance or form."¹¹⁷ While special demurrers are not recognized, pleadings so denominated are treated as a general demurrer.¹¹⁸ A contention made on demurrer fails to raise an issue when not supported by facts in the record,¹¹⁹ and questions of fact cannot be raised on demurrer.¹²⁰ A demurrer attacking an indictment for a fact not alleged in the indictment is bad as a speaking demurrer.¹²¹ Sometimes oral demurrers have been filed.¹²² Questions which can be raised at the trial should not be raised by demurrer.¹²³ No demurrer to the indictment because of a variance between indictment and proof will stand.¹²⁴

As early as 1836 it was held that the scope of a demurrer may be broader than that of a motion in arrest of judgment. Upon demurrer, the court decides upon the whole record as it then appears. Upon motion in arrest of judgment after a verdict, the court decides on the whole record as it then appears. The prima facie cause for demurrer may have been removed by the subsequent pleadings.¹²⁵ Another court at a later date took a more conservative view: "In this country demurrers in criminal proceedings are not usual in practice, as all errors which can be thus presented can be availed of on motion in arrest of judgment."¹²⁶ Under the 1872 statute on imperfections of form in the indictment, the defendant should make his attack early and not wait until time for motion in arrest.¹²⁷ The Supreme Court stated in 1898:

United States, 239 Fed. 16, 19 (3d Cir. 1917); *United States v. Wimberly*, 34 F. Supp. 604, 911 (W.D. La. 1940); *United States v. Boutin*, 251 Fed. 313, 314 (N.D.N.Y. 1918).

117. *United States v. Kilpatrick*, 16 Fed. 765, 773 (W.D.N.C. 1883).

118. *United States v. French*, 57 Fed. 382, 391 (C.C.D. Mass. 1893). Later, the Supreme Court used the term "special demurrer." *Ledbetter v. United States*, 170 U.S. 606, 614 (1898). See *Smith v. United States*, 83 F.2d 631, 637 (8th Cir. 1936); *United States v. Plumer*, 27 Fed. Cas. 561, 572 (No. 16056) (C.C.D. Mass. 1859).

119. *United States v. Cudahy Packing Co.*, 243 Fed. 441, 450 (D. Conn. 1917).

120. *Pierce v. United States*, 252 U.S. 239, 244 (1920). But facts not stated in the indictment are available on demurrer if they are matters judicially noticed. *Jones v. United States*, 137 U.S. 202 (1890); *United States v. Morrison*, 109 Fed. 891 (S.D. Iowa 1901).

121. *United States v. Empire Hat & Cap Mfg. Co.*, 47 F. Supp. 395 (E.D. Pa. 1942); *United States v. Tot*, 36 F. Supp. 273 (D.N.J. 1941), *aff'd*, 131 F.2d 261 (3d Cir. 1942).

122. *United States v. Clayton-Kennedy*, 2 F. Supp. 233 (D. Md. 1933).

123. *United States v. Werner*, 247 Fed. 708 (E.D. Pa. 1918), *aff'd*, 251 U.S. 466 (1920).

124. *Sconyers v. United States*, 54 F.2d 68, 69 (5th Cir. 1931).

125. *United States v. White*, 28 Fed. Cas. 562 (No. 16676) (C.C.D.C. 1836). In *Sutton v. United States*, 157 F.2d 661, 668 (5th Cir. 1946), it is stated that in 1789, a "defect in an indictment that was ground for a general demurrer was sufficient to arrest judgment."

126. *United States v. Kilpatrick*, 16 Fed. 765, 773-74 (W.D.N.C. 1883). See also *Hillegass v. United States*, 183 Fed. 199, 202 (3d Cir. 1910); *United States v. Plumer*, 27 Fed. Cas. 561, 572 (No. 16056) (C.C.D. Mass. 1859).

127. *United States v. San Francisco Bridge Co.*, 88 Fed. 891, 893 (N.D. Cal. 1893); *United States v. Noelke*, 1 Fed. 426, 431 (C.C.S.D.N.Y. 1880).

"We do not wish to be understood . . . as holding that this indictment might not have been open to special demurrer for insufficiency as to the allegations of time and place, but upon motion in arrest of judgment we think it is sufficient."¹²⁸ A court of appeals stated: "We have heretofore expressed our disapproval of the practice of postponing a challenge to the sufficiency of the indictment until after an expensive trial has been had. . . . The better practice is to raise such questions by demurrer in advance of the trial."¹²⁹

A court has the right to give the defendant leave to withdraw his demurrer and plead not guilty after overruling the demurrer and before entering judgment upon it.¹³⁰ In a misdemeanor case, a judgment against the defendant upon demurrer is peremptory, but not if the ruling is against the United States, which may seek a new indictment. Upon permitting a defendant to withdraw his demurrer, the court may require him to waive his right to move in arrest of judgment for any matter apparent under the indictment.¹³¹ In an early case where a demurrer to an indictment for a misdemeanor was overruled, judgment absolute was rendered against the defendant, no suggestion having been made to the court that the defendant had any defense to the indictment.¹³² In 1859 Circuit Justice Clifford concluded that "the settled practice of the court is, that if the demurrer is overruled, the judgment of the court, if the charge is of the grade of felony, shall be respondeat ouster, as at common law."¹³³ Thus the defendant may plead over, as statute ultimately provided.¹³⁴

There seems to have been no similar problem as to other types of pleading. In an early case the court overruled the defendant's plea in abatement and his motion to quash. The defendant then pleaded not guilty.¹³⁵ Likewise, a plea to the jurisdiction having been overruled,

128. *Ledbetter v. United States*, 170 U.S. 606, 614 (1898).

129. *Morris v. United States*, 168 Fed. 682, 683 (8th Cir.), cert. denied, 214 U.S. 527 (1909). See also *Crain v. United States*, 148 F.2d 615 (5th Cir. 1945); *Clement v. United States*, 149 Fed. 305 (8th Cir. 1906). See also *Sutton v. United States*, 157 F.2d 661, 667 (5th Cir. 1946) (Hutcheson, J., dissenting).

130. *United States v. Watkins*, 28 Fed. Cas. 419, 470, 474 (No. 16649) (C.C.D.C. 1829). The court said that there was no federal precedent on the point. Circuit Judge Thruston dissented, 28 Fed. Cas. at 475. See also *Frisbie v. United States*, 157 U.S. 160, 165 (1895); *Hillegass v. United States*, 183 Fed. 199, 201 (3d Cir. 1910); *United States v. French*, 57 Fed. 382, 391 (C.C.D. Mass. 1893).

131. *United States v. Watkins*, 28 Fed. Cas. 419, 475 (No. 16649) (C.C.D.C. 1829).

132. *United States v. Quinn*, 27 Fed. Cas. 673, 680 (No. 16110) (C.C.S.D.N.Y. 1870).

133. *United States v. Plumer*, 27 Fed. Cas. 561, 572 (No. 16056) (C.C.D. Mass. 1859). See also *Hillegass v. United States*, 183 Fed. 199, 201 (3d Cir. 1910).

134. See *Mulloney v. United States*, 79 F.2d 566, 573 (1st Cir. 1935).

135. *United States v. Smith*, 27 Fed. Cas. 1186, 1191 (No. 16341a) (C.C.D.N.Y. 1806). See also *United States v. Williams*, 28 Fed. Cas. 666, 670 (No. 16716) (C.C.D. Minn. 1871).

the defendant was allowed to plead anew.¹³⁶ The Supreme Court indicated that a defendant is not concluded on the merits after a plea in abatement is overruled in the federal courts, despite the English practice.¹³⁷ After a double jeopardy plea is overruled, the case will continue on a plea of not guilty.¹³⁸ Where a plea of immunity was overruled, the defendant on application was granted the privilege of pleading over. The court pointed out that at common law sentence followed immediately in misdemeanor cases, but in felony cases the defendant usually was allowed to plead not guilty after judgment over.¹³⁹ In one case after the overruling of four pleas in bar, the defendant was allowed to plead over. The court said that denial of the right to plead over "might be depriving defendant of the most important right of trial by jury."¹⁴⁰ The court did not say that the defendant had an absolute right to plead over, but rather that the court in its discretion would allow him to plead over.

The sustaining of a demurrer to an indictment is not a bar to the return of a new indictment.¹⁴¹ In general, an order quashing an indictment, dismissing it, or sustaining a demurrer to it, is not jeopardy. The grand jury may indict again after the indictment has been quashed.¹⁴²

For about a century there was no statutory provision for appellate review of criminal convictions.¹⁴³ It followed that a defendant could not have appellate review of the overruling of his demurrer.¹⁴⁴ A division of opinion between the judges of a circuit court might be considered by the Supreme Court.¹⁴⁵

5. Plea in Bar

In 1959 the Supreme Judicial Court of Massachusetts thus described pleas in bar: "The proper purpose of a plea in bar is to set up a ground

136. *United States v. Lawrence*, 26 Fed. Cas. 879, 884 (No. 15573) (C.C.S.D.N.Y. 1876); *United States v. Caldwell*, 25 Fed. Cas. 237, 238 (No. 14707) (C.C.S.D.N.Y. 1871).

137. *United States v. Gale*, 109 U.S. 65, 67-68 (1883). See also *Hillegars v. United States*, 183 Fed. 199, 202 (3d Cir. 1910); *United States v. Richardson*, 28 Fed. 61, 74 (C.C.D. Me. 1886).

138. *Thompson v. United States*, 155 U.S. 271, 273 (1894); *Rankin v. State*, 78 U.S. (11 Wall.) 380, 381 (1870).

139. *Heilke v. United States*, 217 U.S. 423, 430 (1910).

140. *United States v. Rockefeller*, 226 Fed. 328, 329, 332 (S.D.N.Y. 1915).

141. *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916); *Henry v. United States*, 15 F.2d 624, 626 (9th Cir. 1926), cert. denied, 274 U.S. 737 (1927); *Simpson v. United States*, 229 Fed. 940, 943 (9th Cir.), cert. denied, 241 U.S. 668 (1916); *United States v. Owen*, 21 F.2d 868, 870 (N.D. Ill. 1927); *United States v. Bopp*, 232 Fed. 177 (N.D. Cal. 1916); *United States v. Rogoff*, 163 Fed. 311, 312 (C.C.S.D.N.Y. 1903); *United States v. Watkins*, 28 Fed. Cas. 419, 475 (No. 16649) (C.C.D.C. 1829).

142. *Nordlinger v. United States*, 24 App. D.C. 406, 409 (D.C. Cir. 1904).

143. Orfield, *Federal Criminal Appeals*, 45 *Yale L.J.* 1223, 1224-26 (1936).

144. *United States v. Watkins*, 28 Fed. Cas. 419, 475 (No. 16649) (C.C.D.C. 1829).

145. *United States v. Rosenburgh*, 74 U.S. (7 Wall.) 580, 583 (1868).

not open under a plea of not guilty, which is an absolute defence, not only at the time of filing but for all time. Examples of appropriate pleas in bar are former acquittal, former conviction, and pardon.¹⁴⁶ The court added: "To these may be added the statute of limitations."¹⁴⁷

Following overruling of a plea of double jeopardy, the defendant may plead over.¹⁴⁸ The same is true where a plea of immunity is overruled.¹⁴⁹ In one case after the overruling of four pleas in bar the defendant was allowed to plead over.¹⁵⁰ The overruling of a defendant's plea in bar, such as immunity, does not give the defendant an immediate right to appeal.¹⁵¹ There is as yet no final judgment. The same would be true as to the overruling of a plea of former conviction or acquittal.¹⁵²

D. *Objection to the Evidence*

In general, objections to the indictment or information may not be raised at the trial by objecting to evidence. Objection is limited to "circumstances of an extraordinary nature"¹⁵³ and should seldom be made. Almost all federal cases now hold that no objection to introducing evidence can be made, even though the indictment is manifestly defective as failing to state an offense.¹⁵⁴

E. *Functions of the Various Pleadings*

Mr. Justice Gray pointed out that the term "pleadings" means "the allegations made . . . for the purpose of definitely presenting the issue

146. *Commonwealth v. Geagan*, 159 N.E.2d 870, 878 (Mass. 1959), cert. denied, 361 U.S. 895 (1960), citing *United States v. Murdock*, 284 U.S. 141, 151 (1931), and *United States v. Brodson*, 234 F.2d 97, 99 (7th Cir. 1956). See *United States v. Mersky*, 361 U.S. 431, 453 (1960) (Stewart, J., dissenting); *United States v. Heath*, 260 F.2d 623, 629 (9th Cir. 1958).

147. *Commonwealth v. Geagan*, supra note 146, at 878, citing *United States v. Goldman*, 277 U.S. 229 (1928), *United States v. Franklin*, 188 F.2d 182, 186 (7th Cir. 1951), and *Capone v. Aderhold*, 65 F.2d 130, 131 (5th Cir. 1933).

148. *Thompson v. United States*, 155 U.S. 271, 273 (1894); *Rankin v. State*, 78 U.S. (11 Wall.) 380, 381 (1870).

149. *Heike v. United States*, 217 U.S. 423, 427 (1910).

150. *United States v. Rockefeller*, 226 Fed. 328, 329, 332 (S.D.N.Y. 1915).

151. *Heike v. United States*, 217 U.S. 423, 431 (1910).

152. *Id.* at 432. See *Rankin v. State*, 78 U.S. (11 Wall.) 380, 381 (1870).

153. *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 479 (1827). The court upheld such objection in the case before it. The case was followed in *United States v. McBride*, 18 App. D.C. 371, 382 (D.C. Cir. 1889), where the defendant renewed objections made before trial by special pleas and which had been overruled.

154. *Ramirez v. United States*, 23 F.2d 788, 789 (9th Cir. 1928); *Stubbs v. United States*, 1 F.2d 837, 839 (9th Cir. 1924); *Wild v. United States*, 291 Fed. 334, 335 (8th Cir. 1923); *Grant v. United States*, 252 Fed. 692, 693 (8th Cir. 1918); *McKnight v. United States*, 252 Fed. 687, 688 (8th Cir. 1918), cert. denied, 253 U.S. 493 (1920); *Estes v. United States*, 227 Fed. 818, 819 (8th Cir. 1915); *McSpadden v. United States*, 224 Fed. 935, 936 (8th Cir. 1915).

to be tried and determined between them."¹⁵⁵ While rule 12(a) treats an indictment as a pleading, Circuit Judge Learned Hand has stated: "But an indictment is not a pleading of the United States, but the charge of a grand jury. . . ." ¹⁵⁶ Yet another court of appeals has stated: "An indictment is a pleading . . . and the demurrer is likewise a pleading."¹⁵⁷

Prior to the federal rules, the defendant raised defenses and objections by substantially the same procedural methods as those described by Blackstone:¹⁵⁸ "The plea of the prisoner . . . is either, 1. A plea to the jurisdiction; 2. A demurrer; 3. A plea in abatement; 4. A special plea in bar, or 5. The general issue . . . or plea of not guilty." District Judge Hough stated in 1912:

It is therefore necessary to inquire what pleas are possible either to the indictment or information, there being no such thing known as an answer in criminal law in the sense in which that word is used on the civil side. All possible pleas on the criminal side of this court must be either in abatement, in bar, or the general issue.

A motion to quash is not a pleading, and therefore is not included, and jurisdictional pleas, which are sometimes given as a separate class, are really either in abatement or bar according to whether the objection is to a particular court or courts in general.¹⁵⁹

Differences of opinion, uncertainties, and confusion arose with respect to the functions of the various procedural forms by which defenses and objections were raised. In many cases the defendant filed a motion to quash and a plea in abatement, each presenting the same or similar objections.¹⁶⁰ In one case, the court stated: "The language of the pleas in abatement is identical with that of the motions to quash. Both procedures have been adopted by counsel, in order to avoid a possible denial of their claims upon purely technical grounds."¹⁶¹ In another case, one defendant filed a motion to quash the indictment and on the same date, on substantially the same grounds, other defendants filed a plea in abatement in the nature of a motion to quash.¹⁶² Motions to quash were at times filed with demurrers, each raising the same ob-

155. *Tucker v. United States*, 151 U.S. 164, 168 (1894).

156. *Falter v. United States*, 23 F.2d 420, 425 (2d Cir.), cert. denied, 277 U.S. 590 (1928).

157. *Bratton v. United States*, 73 F.2d 795, 799 (10th Cir. 1934).

158. 4 Blackstone, Commentaries §§ 332, 338 (1769).

159. *United States v. J. L. Hopkins & Co.*, 228 Fed. 173, 175 (S.D.N.Y. 1912).

160. *Bram v. United States*, 168 U.S. 532, (1897); *Shreve v. United States*, 77 F.2d 2, 8 (9th Cir. 1935), cert. denied, 296 U.S. 654 (1936); *United States v. Charney*, 50 F. Supp. 581, 582 (D. Mass. 1942); *United States v. Pappagoda*, 288 Fed. 214 (D. Conn. 1923); *United States v. Rintelen*, 235 Fed. 787, 788 (S.D.N.Y. 1916); *United States v. Swift*, 185 Fed. 1002, 1008 (N.D. Ill. 1911); *United States v. Edgerton*, 80 Fed. 374 (D. Mont. 1897).

161. *United States v. Goldman*, 28 F.2d 424, 426 (D. Conn. 1928). See also *United States v. Lehigh Valley R.R.*, 43 F.2d 135, 137 (M.D. Pa. 1930).

162. *United States v. Johnson*, 123 F.2d 111 (7th Cir. 1941), rev'd, 319 U.S. 503 (1943).

jections to the indictment.¹⁶³ A demurrer and a plea in abatement were sometimes filed in the same case, each presenting the same objection or defense.¹⁶⁴ A plea in bar and a plea to the jurisdiction have been filed in the same case, each presenting the same objection or defense.¹⁶⁵ In one case the same defense "was presented in four forms entitled respectively, demurrer, motion to quash, plea in abatement, and plea in bar."¹⁶⁶

As of 1928, the Supreme Court gave little weight to formal procedural distinctions. It stated:

Whether the judgment sustaining the motion of the defendants in error and dismissing the information on the ground that the prosecution was barred by the statute of limitations, was a judgment sustaining a special plea in bar within the meaning of the Act, is to be determined not by form but by substance. . . . The material question in such cases is the effect of the ruling sought to be reviewed. It is immaterial that the plea was erroneously designated as a plea in abatement instead of a plea in bar . . . or that the ruling took the form of granting a motion to quash which was in substance a plea in bar. . . . Here the motion to dismiss raised the bar of the statute of limitations upon the facts appearing on the face of the information, and was equivalent to a special plea in bar setting up such facts. And the effect of sustaining the motion was the same as if such a special plea had been interposed and sustained.¹⁶⁷

The court of appeals also indicated a willingness to consider subject matter over form: "[S]trictly speaking, a motion to quash is within the discretion of the trial court, and is not subject to review. . . . However, treating the motion because of the point it raises as a demurrer, we do not think it was error to overrule it."¹⁶⁸

F. *The Grand Jury*

1. Illegal Selection or Organization of the Grand Jury

Specific defenses and objections raised in the federal courts by the various common law methods of attack will be considered next. The first major topic, defect in the institution of the prosecution, considers,

163. *Morris v. United States*, 12 F.2d 727, 728 (9th Cir. 1926); *Knauer v. United States*, 237 Fed. 8, 10 (8th Cir. 1916); *Dillard v. United States*, 141 Fed. 303, 304 (9th Cir. 1905); *United States v. Charney*, 50 F. Supp. 581, 582 (D. Mass. 1942); *United States v. Jacopetti*, 17 F.2d 771 (N.D. Cal. 1927); *United States v. Dembowski*, 252 Fed. 894, 895 (E.D. Mich. 1918).

164. *United States v. Chambers*, 291 U.S. 217 (1934); *Simpkins v. United States*, 78 F.2d 594, 595 (4th Cir. 1935).

165. *MacKnight v. United States*, 263 Fed. 832, 834 (1st Cir. 1920).

166. *United States v. Oppenheimer*, 242 U.S. 85, 86 (1916).

167. *United States v. Goldman*, 277 U.S. 229, 236 (1928). See also *United States v. Hark*, 320 U.S. 531, 536 (1944).

168. *Sconyers v. United States*, 54 F.2d 68, 69 (5th Cir. 1931). See also *Roper v. United States*, 54 F.2d 845, 847 (10th Cir. 1931).

first, objections to the grand jury per se. Under this subdivision illegal selection or organization of the grand jury is discussed.

The listing which follows is not simply of historical value. Counsel in federal criminal prosecutions under the Federal Criminal Rules can use this as a check list for defenses and objections; the difference is that now in all cases he will make a motion to dismiss.

Illegal selection or organization of the grand jury may be attacked by a plea in abatement.¹⁶⁹ Thus, a plea would lie where the size of the grand jury is too small¹⁷⁰ and perhaps where qualified persons are excluded.¹⁷¹ It does not lie on the ground that forty-eight persons were summoned as grand jurors and only twenty-two persons fit to be sworn attended.¹⁷² The plea should have averred prejudice to the defendant. It does not lie when the grand jury was drawn from one county rather than from the whole district, since there was no allegation of prejudice and the plea was made late.¹⁷³ It would lie if jurors were selected with regard to party affiliations.¹⁷⁴

Illegal selection or organization of the grand jury may be a ground for motion to quash.¹⁷⁵ Illegal conduct of the officers employed in designating, summoning, and returning the grand jury is a ground of prejudice to the defendant¹⁷⁶ and exclusion of qualified persons might be.¹⁷⁷ Intentional exclusion of wage earners is a ground.¹⁷⁸ Exclusion of women

169. *Carter v. Texas*, 177 U.S. 442, 447 (1900); *Agnew v. United States*, 165 U.S. 36, 40 (1897); *United States v. Gale*, 109 U.S. 65, 67 (1883); *Morris v. United States*, 128 F.2d 912, 914 (5th Cir. 1942); *Younge v. United States*, 242 Fed. 788, 792 (4th Cir.), cert. denied, 245 U.S. 656 (1917); *Moffatt v. United States*, 232 Fed. 522, 527 (8th Cir. 1916); *Lowdon v. United States*, 149 Fed. 673, 674 (5th Cir. 1906); *United States v. Nevin*, 199 Fed. 831, 833 (D. Colo. 1912); *United States v. Eagan*, 30 Fed. 603 (C.C.E.D. Mo. 1887); *United States v. Richardson*, 28 Fed. 61 (C.C.D. Me. 1886).

170. *Reynolds v. United States*, 98 U.S. 145, 153 (1878).

171. *United States v. Gale*, 109 U.S. 65, 70 (1883).

172. *United States v. Tuska*, 28 Fed. Cas. 234 (No. 16550) (C.D.N.Y. 1876). The court relied in part on An Act to Further the Administration of Justice § 8, on 17 Stat. 193 (1872), as to technical defects in indictments.

173. *Agnew v. United States*, 165 U.S. 36, 44 (1897).

174. *United States v. Chaires*, 40 Fed. 820, 823 (C.C.N.D. Fla. 1889).

175. *Carter v. Texas*, 177 U.S. 442, 447 (1900); *Agnew v. United States*, 165 U.S. 36, 44 (1897); *United States v. Gale*, 109 U.S. 65, 67 (1883); *Mamaux v. United States*, 264 Fed. 816, 819 (6th Cir. 1920); *Hillegass v. United States*, 183 Fed. 199, 201 (3d Cir. 1910); *United States v. Lewis*, 192 Fed. 633, 638 (E.D. Mo. 1911); *United States v. Haskell*, 169 Fed. 449, 452 (E.D. Okla. 1909).

176. *United States v. Tallman*, 28 Fed. Cas. 9, 10 (No. 16429) (C.C.S.D.N.Y. 1872); *United States v. Reed*, 27 Fed. Cas. 727, 732 (No. 16134) (C.C.N.D. 1852).

177. *United States v. Gale*, 109 U.S. 65, 70 (1883).

178. *Mamaux v. United States*, 264 Fed. 816, 818 (6th Cir. 1920).

in states where women may serve on grand juries may be a ground,¹⁷⁹ as may be the exclusion of Negroes.¹⁸⁰

2. Lack of Legal Qualifications of the Grand Jury

The next objection to the grand jury per se is lack of legal qualifications of its members, which may be attacked by a plea in abatement.¹⁸¹ Such a plea lies where a federal statute excludes insurrectionists from serving on a grand jury.¹⁸² The plea would not lie where a prosecutor was a member of the grand jury,¹⁸³ or where a grand juror had served within two years.¹⁸⁴ It does lie where a member of the grand jury had served on a petty jury which rendered a verdict of guilty against the defendant for the same offense on a former trial, the verdict having been set aside.¹⁸⁵ It does not lie where the names of some of the grand jurors were not on the assessment rolls of their respective counties when there was no averment that the defendant was prejudiced thereby,¹⁸⁶ or where the question is the residence and property of grand jury members.¹⁸⁷

A plea in abatement does not lie where one of the grand jurors who found the indictment had expressed a prior opinion that the defendant was guilty.¹⁸⁸ It does not lie where some of the grand jurors were not legally registered electors,¹⁸⁹ or where the foreman of the grand jury was a vice-president of a national bank.¹⁹⁰ A plea in abatement lies where the statutory life of the grand jury has expired.¹⁹¹

Lack of legal qualifications of the grand jury members may also be

179. *Ballard v. United States*, 329 U.S. 187, 190 (1946); *Wuichet v. United States*, 8 F.2d 561, 562 (6th Cir. 1925), cert. denied, 270 U.S. 651 (1926); *United States v. Roemig*, 52 F. Supp. 857, 859 (N.D. Iowa 1943) (male defendant can object); *United States v. Gilbert*, 31 F. Supp. 195, 202 (S.D. Ohio 1939) (male defendant cannot object).

180. *Nanfito v. United States*, 20 F.2d 376, 378 (8th Cir. 1927).

181. *Crowley v. United States*, 194 U.S. 461, 462 (1904); *United States v. Gale*, 109 U.S. 65, 67 (1883); *United States v. Griffith*, 2 F.2d 925, 926 (D.C. Cir. 1924).

182. *United States v. Hammond*, 26 Fed. Cas. 99, 100 (No. 15294) (C.C.D. La. 1875).

183. *United States v. Williams*, 28 Fed. Cas. 666, 669 (No. 16716) (C.C.D. Minn. 1871).

184. *United States v. Reeves*, 27 Fed. Cas. 750 (No. 16139) (C.C.D. La. 1878). The proper remedy is a challenge. See also *United States v. Clark*, 46 Fed. 633, 640 (D. Alaska 1891).

185. *United States v. Jones*, 31 Fed. 725, 727 (C.C.S.D. Ga. 1887).

186. *United States v. Benson*, 31 Fed. 896, 898 (C.C.D. Cal. 1887). The court relied in part on An Act to Further the Administration of Justice § 8, 17 Stat. 198 (1872), as to technical defects in indictments.

187. *United States v. Tuska*, 28 Fed. Cas. 234, 235 (No. 16550) (C.C.S.D.N.Y. 1876). The court cited An Act to Further the Administration of Justice § 8, 17 Stat. 198 (1872), on technical defects in indictment.

188. *United States v. White*, 28 Fed. Cas. 572 (No. 16679) (C.C.D.C. 1838). The defendant should have objected by challenge for favor.

189. *United States v. Ewan*, 40 Fed. 451 (C.C.N.D. Fla. 1889).

190. *Johnson v. United States*, 11 F.2d 606 (5th Cir.), cert. denied, 271 U.S. 675 (1926).

191. *United States v. McKay*, 45 F. Supp. 1007, 1013 (E.D. Mich. 1942).

attacked by a motion to quash.¹⁹² The motion does not lie where a grand juror expressed sympathy with strikers later indicted, then said that they ought to be shot for destroying private property.¹⁹³ Grand jurors need not be as unprejudiced as petty jurors. A motion to quash does not lie where the foreman of the grand jury was a practicing attorney.¹⁹⁴

In 1934 Congress passed a statute¹⁹⁵ providing that no plea or motion to quash an indictment upon the ground that one or more of the grand jurors was disqualified shall be sustained if it appears that twelve or more jurors, after deducting the member so disqualified, concurred in the finding of the indictment.¹⁹⁶ The statute¹⁹⁷ also required the defendant before arraignment, or during the next ten days, to plead in abatement or move to quash the indictment because of irregularity in drawing or impaneling the grand jury, or disqualification of a grand juror. This statute was strictly applied. If the defendant wished more time, he could ask for a postponement of arraignment.¹⁹⁸ The statute did not apply where the statutory life of the grand jury had expired.¹⁹⁹

3. Objections to the Proceedings of the Grand Jury

The third objection to the grand jury *per se* is error in its proceedings. Objections have been taken by plea in abatement.²⁰⁰ An early case held that it did not lie on the ground that illegal testimony was introduced before the grand jury.²⁰¹ It lies when a defendant is subpoenaed to

192. *Ruthenberg v. United States*, 245 U.S. 480, 482 (1918); *United States v. Gale*, 109 U.S. 65, 67 (1883); *Shaw v. United States*, 180 Fed. 348, 349 (6th Cir. 1910); *United States v. Clune*, 62 Fed. 798 (S.D. Cal. 1894), *aff'd*, 159 U.S. 500 (1895).

193. *United States v. Clune*, *supra* note 192.

194. *Shaw v. United States*, 180 Fed. 348, 349 (6th Cir. 1910).

195. An Act Regulating Procedure in Criminal Cases in the Courts of the United States, 48 Stat. 648 (1934). See 18 U.S.C. § 3288 (1958).

196. The statute was applied in *United States ex rel. McCann v. Thompson*, 144 F.2d 604, 606 (2d Cir. 1944); *Shreve v. United States*, 77 F.2d 2, 3 (9th Cir. 1935); *United States v. Burk*, 41 F. Supp. 916, 917 (D. Del. 1941).

197. See note 195 *supra*.

198. The statute was applied in *Medley v. United States*, 155 F.2d 857, 859 (D.C. Cir.), *cert. denied*, 328 U.S. 873 (1946); *United States ex rel. McCann v. Thompson*, 144 F.2d 604, 607 (2d Cir. 1944).

199. *United States v. McKay*, 45 F. Supp. 1007, 1014 (E.D. Mich. 1942).

200. *United States v. Storrs*, 272 U.S. 652 (1926); *Evaporated Milk Ass'n v. Roche*, 130 F.2d 843, 844 (9th Cir. 1942); *United States v. Parker*, 103 F.2d 857, 860 (3d Cir.), *cert. denied*, 307 U.S. 642 (1939); *May v. United States*, 236 Fed. 495 (8th Cir. 1916); *United States v. National Wholesale Druggists' Ass'n*, 61 F. Supp. 590 (D.N.J. 1945); *United States v. Atlantic Comm'n Co.*, 45 F. Supp. 187, 190, 193 (E.D.N.C. 1942); *United States v. Goldman*, 28 F.2d 424 (D. Conn. 1928); *United States v. Rintelen*, 235 Fed. 787, 788 (S.D.N.Y. 1916); *United States v. American Tobacco Co.*, 177 Fed. 774, 775 (W.D. Ky. 1910); *United States v. Wells*, 163 Fed. 313, 314 (D. Idaho 1903); *United States v. Twining*, 132 Fed. 129, 130 (D.N.J. 1904).

201. *United States v. Smith*, 27 Fed. Cas. 1186 (No. 16341a) (C.C.D.N.Y. 1806). The

attend a grand jury hearing and give material testimony, not knowing that his own conduct is under investigation.²⁰² It lies to attack the conduct of the United States attorney in the grand jury proceeding.²⁰³ It lies to raise an issue of fact of what evidence was presented to the grand jury²⁰⁴ and to raise the issue that the evidence before the grand jury was obtained by an unconstitutional search and seizure.²⁰⁵ The courts, however, have been reluctant to grant the defendant discovery of the grand jury minutes so that he might properly prepare his plea in abatement or in bar.²⁰⁶

Objections to the proceedings of the grand jury have also been taken by a motion to quash.²⁰⁷ The motion lies when the grand jury receives unsworn testimony.²⁰⁸ It does not lie where illegal testimony is introduced before the grand jury.²⁰⁹ An indictment was quashed when an expert witness remained in the grand jury room while another witness was being examined.²¹⁰ A motion to quash must be supported by affidavit when it attacks a proceeding before the grand jury.²¹¹ There must be something in writing, just as there must be a record upon which the court can exercise its discretion.

Government demurred to the plea. The case contains an excellent historical discussion of pleas in abatement in England. See also *United States v. Terry*, 39 Fed. 355 (N.D. Cal. 1889).

202. *United States v. Edgerton*, 80 Fed. 374 (D. Mont. 1897).

203. *United States v. Wells*, 163 Fed. 313, 314 (D. Idaho 1908).

204. *United States v. Swift*, 186 Fed. 1002, 1019 (N.D. Ill. 1911).

205. *Marr v. United States*, 8 F.2d 231, 234 (8th Cir. 1925), cert. denied, 270 U.S. 644 (1926); *United States v. Silverthorne*, 265 Fed. 859, 862 (W.D.N.Y. 1920).

206. *United States v. Molasky*, 118 F.2d 128, 132 (7th Cir. 1941); *United States v. National Wholesale Druggists' Ass'n*, 61 F. Supp. 590, 593 (D.N.J. 1945); *United States v. Antonelli Fireworks Co.*, 53 F. Supp. 870, 876 (W.D.N.Y. 1943); *Orfield, The Federal Grand Jury*, 22 F.R.D. 343, 402-13 (1958).

207. *United States v. Thompson*, 251 U.S. 407, 410 (1920); *United States v. Heinze*, 177 Fed. 770, 771 (C.C.S.D.N.Y. 1910); *McGregor v. United States*, 134 Fed. 187, 192 (4th Cir. 1904); *United States v. Gouled*, 253 Fed. 242, 243 (S.D.N.Y. 1918); *United States v. Edgerton*, 80 Fed. 374 (D. Mont. 1897); *United States v. Terry*, 39 Fed. 355, 356 (N.D. Cal. 1889); *United States v. Kilpatrick*, 16 Fed. 765 (W.D.N.C. 1883).

208. *United States v. Reed*, 27 Fed. Cas. 727, 734 (No. 16134) (C.C.N.D.N.Y. 1852); *United States v. Coolidge*, 25 Fed. Cas. 622, 623 (No. 14858) (C.C.D. Mass. 1815).

209. *United States v. Swift*, 186 Fed. 1002, 1018 (N.D. Ill. 1911); *United States v. Haskell*, 169 Fed. 449, 451 (E.D. Okla. 1909); *McGregor v. United States*, 134 Fed. 187, 192 (4th Cir. 1904); *United States v. Cobban*, 127 Fed. 713, 718 (C.C.D. Mont. 1904); *United States v. Reed*, 27 Fed. Cas. 727, 738 (No. 16134) (C.C.N.D.N.Y. 1852); *United States v. Smith*, 27 Fed. Cas. 1186, 1191 (No. 16341a) (C.C.D.N.Y. 1806); *United States v. Brown*, 24 Fed. Cas. 1273, 1274 (No. 14671) (D. Ore. 1871). But see *United States v. Farrington*, 5 Fed. 343 (N.D.N.Y. 1881); *McKinney v. United States*, 199 Fed. 25, 29 (8th Cir. 1912) (dissenting opinion).

210. *United States v. Edgerton*, 80 Fed. 374, 375 (D. Mont. 1897). See also *United States v. Rosenthal*, 121 Fed. 862, 870, 873 (S.D.N.Y. 1903).

211. *United States v. Coolidge*, 25 Fed. Cas. 622, 623 (No. 14858) (C.C.D. Mass. 1815).

G. *Defects in the Indictment or Information*

The next group of cases deals with defects in the indictment or information, other than failure to allege an offense.

1. Duplicity

The first topic to be considered is duplicity, which may be attacked by a motion to quash;²¹² but the grounds of the motion must be stated.²¹³ Duplicity may be objected to by a general demurrer,²¹⁴ although some cases deny this because of the statute on imperfection of form.²¹⁵ "Duplicity consists in joining in the same count two or more distinct and separate offenses."²¹⁶ Duplicity also may be attacked by a motion to elect.²¹⁷ However, one case regarded this as invalid because it amounted to an amendment of the indictment.²¹⁸

212. *Crain v. United States*, 162 U.S. 625, 635 (1896); *Center v. United States*, 96 F.2d 127, 130 (4th Cir. 1938); *Egan v. United States*, 287 Fed. 958, 961 (D.C. Cir. 1922); *Knauer v. United States*, 237 Fed. 8, 11, 13 (8th Cir. 1916); *Lemon v. United States*, 164 Fed. 953, 958 (8th Cir. 1908); *United States v. Nunnemacher*, 27 Fed. Cas. 202 (No. 15903) (C.C.E.D. Wis. 1876); *United States v. Peterson*, 27 Fed. Cas. 515, 519 (No. 16037) (C.C.D. Mass. 1846); *United States v. Sharp*, 27 Fed. Cas. 1046 (No. 16265) (C.C.D. Pa. 1815); *United States v. Schmidt*, 15 F. Supp. 804, 805 (M.D. Pa. 1936); *United States v. Dembowski*, 252 Fed. 894, 896 (E.D. Mich. 1918).

213. *Connors v. United States*, 158 U.S. 403, 411 (1895).

214. *Connors v. United States*, 158 U.S. 403, 411 (1895); *United States v. Johnson*, 123 F.2d 111, 121 (7th Cir. 1941); *Sconyers v. United States*, 54 F.2d 63, 69 (5th Cir. 1931); *Creel v. United States*, 21 F.2d 690 (8th Cir. 1927); *Lau v. United States*, 13 F.2d 975, 976 (8th Cir. 1926), cert. denied, 273 U.S. 739 (1927); *Evans v. United States*, 11 F.2d 37, 38 (4th Cir. 1926); *Lewellen v. United States*, 223 Fed. 18, 20 (8th Cir. 1915); *Ammcrman v. United States*, 216 Fed. 326 (8th Cir. 1914); *John Gund Brewing Co. v. United States*, 204 Fed. 17, 21 (8th Cir. 1913); *United States v. Peterson*, 27 Fed. Cas. 515, 519 (No. 16037) (C.C.D. Mass. 1846); *United States v. Watkins*, 28 Fed. Cas. 419, 430 (No. 16649) (C.C.D.C. 1829); *United States v. Buerk*, 38 F. Supp. 409, 410 (E.D. Wis. 1941); *United States v. Borden Co.*, 28 F. Supp. 177, 188 (N.D. Ill. 1939); *United States v. Olmstead*, 5 F.2d 712, 713 (W.D. Wash. 1925); *United States v. Drawdy*, 288 Fed. 567, 570 (S.D. Fla. 1923); *United States v. Cleveland*, 281 Fed. 249, 250 (S.D. Ala. 1922); *United States v. Dembowski*, 252 Fed. 894, 897 (E.D. Mich. 1918); *United States v. Cadwallader*, 59 Fed. 677, 678 (W.D. Wis. 1893).

215. *Pooler v. United States*, 127 Fed. 509, 515 (1st Cir. 1904); *United States v. Charney*, 50 F. Supp. 581, 583 (D. Mass. 1942); *United States v. Luther*, 260 Fed. 579, 584 (E.D. Okla. 1919); *United States v. Louisville & N.R.R.*, 165 Fed. 936, 941 (W.D. Ky. 1908).

216. *Optner v. United States*, 13 F.2d 11, 12 (6th Cir. 1926).

217. *Wiborg v. United States*, 163 U.S. 632, 648 (1896); *Crain v. United States*, 162 U.S. 625, 635 (1896); *In re Lane*, 135 U.S. 443, 448 (1890); *Bailey v. United States*, 278 Fed. 849, 851 (6th Cir. 1922); *United States v. Peterson*, 27 Fed. Cas. 515, 519 (No. 16037) (C.C.D. Mass. 1846); *United States v. Charney*, 50 F. Supp. 581, 583 (D. Mass. 1942); *United States v. Louisville & N.R.R.*, 165 Fed. 936, 941 (W.D. Ky. 1908).

218. *United States v. Dembowski*, 252 Fed. 894, 898 (E.D. Mich. 1918).

2. Several Counts Charging the Same Offense

A motion to quash does not lie because several counts of the indictment charge the same offense. The most the defendant can claim is that the Government be required to elect on which counts it will prosecute.²¹⁰

3. Misjoinder of Offenses

A plea in abatement,²²⁰ a motion to quash,²²¹ a demurrer,²²² a motion to elect,²²³ and a motion for severance of counts²²⁴ will all lie where there is a misjoinder of offenses.

4. Misjoinder of Defendants

A motion to quash²²⁵ and a demurrer²²⁶ lie for misjoinder of defendants. Further, a motion for separate trial or a motion for severance lies where there is a misjoinder of defendants.²²⁷

5. Repugnancy

A motion to quash lies for repugnancy.²²⁸ A demurrer has been used

219. *Wetzel v. United States*, 233 Fed. 984, 985 (9th Cir. 1916), cert. denied, 242 U.S. 648 (1917); *United States v. Harman*, 38 Fed. 827, 829 (D. Kan. 1889).

220. *United States v. Howell*, 65 Fed. 402, 403 (N.D. Cal. 1895).

221. *Pointer v. United States*, 151 U.S. 396, 400 (1894); *Ginsberg v. United States*, 96 F.2d 433, 435 (5th Cir. 1938); *Powers v. United States*, 293 Fed. 964, 965 (9th Cir. 1923); *Corbin v. United States*, 264 Fed. 659, 660 (5th Cir. 1920); *United States v. Nye*, 4 Fed. 888, 892 (C.C.S.D. Ohio 1880); *United States v. O'Callahan*, 27 Fed. Cas. 216 (No. 15910) (C.C.N.D. Ohio 1855); *United States v. General Elec. Co.*, 40 F. Supp. 627, 629, 632 (S.D.N.Y. 1941); *Kidwell v. United States*, 38 App. D.C. 566, 568 (D.C. Cir. 1912).

222. *Kreuzer v. United States*, 254 Fed. 34, 36 (8th Cir. 1918), cert. denied, 249 U.S. 603 (1919); *Dillard v. United States*, 141 Fed. 303, 304 (9th Cir. 1905); *United States v. Spintz*, 18 Fed. 377 (C.C.S.D. Ga. 1883); *United States v. Nye*, 4 Fed. 888, 892 (C.C.S.D. Ohio 1880); *United States v. Jacopetti*, 17 F.2d 771 (N.D. Cal. 1927).

223. *Pointer v. United States*, 151 U.S. 396, 402 (1894); *Nestlerode v. United States*, 122 F.2d 56, 58 (D.C. Cir. 1941); *Perlstein v. United States*, 120 F.2d 276, 280 (3d Cir. 1941); *Optner v. United States*, 13 F.2d 11 (6th Cir. 1926); *Powers v. United States*, 293 Fed. 964, 965 (9th Cir. 1923); *McGregor v. United States*, 134 Fed. 187, 194 (4th Cir. 1904); *United States v. General Elec. Co.*, 40 F. Supp. 627, 632 (S.D.N.Y. 1941).

224. *Nestlerode v. United States*, 122 F.2d 56, 58 (D.C. Cir. 1941).

225. *Ginsberg v. United States*, 96 F.2d 433, 435 (5th Cir. 1938); *Culjak v. United States*, 53 F.2d 554, 555 (9th Cir. 1931); *Filiatreau v. United States*, 14 F.2d 659, 661 (6th Cir. 1926).

226. *Ainsworth v. United States*, 1 App. D.C. 518, 524 (D.C. Cir. 1893). The court pointed out that no cases directly in point were cited by either side.

227. *Morris v. United States*, 128 F.2d 912, 917 (5th Cir. 1942); *Ginsberg v. United States*, 96 F.2d 433, 436 (5th Cir. 1938); *Dowling v. United States*, 49 F.2d 1014, 1015 (5th Cir. 1931); *Lennon v. United States*, 20 F.2d 490, 492 (8th Cir. 1927); *United States v. Atlantic Comm'n Co.*, 45 F. Supp. 187, 190 (E.D.N.C. 1942).

228. *Silkworth v. United States*, 10 F.2d 711, 714 (2d Cir.), cert. denied, 271 U.S. 664 (1926); *Lehman v. United States*, 127 Fed. 41, 47 (2d Cir. 1903); *Sims v. United States*,

to attack repugnancy.²²⁹ Under the statute on imperfection of form the error is cured by verdict where no objection is taken.²³⁰

6. Surplusage

Surplusage has been attacked by motion to quash.²³¹ But it is not fatal error in view of the statute on imperfection of form. Similarly, a directed verdict sought at the end of the Government's case has been denied.²³² Surplusage has been attacked by demurrer.²³³ It is not fatal error, however, in view of the statute on imperfection of form of indictments.

7. Presentment Not Followed by Indictment

A motion to quash a presentment after the entry of a *nolle prosequi* will be overruled since the courts take no notice of presentments on which the United States attorney does not institute proceedings.²³⁴

8. Conclusion of Indictment

The omission to charge that the offense was "contrary to the form of the statutes in such case made and provided, against the peace and dignity of the United States" is immaterial and is not open to attack by demurrer or other pleading.²³⁵

9. Signature of Grand Jury Foreman

A plea in abatement has been used to make the contention that there was an omission of a formal indorsement of an indictment as "a true bill," signed by the foreman of the grand jury.²³⁶ A demurrer has been used to make the contention that the foreman indorsing the indictment as a true bill should describe himself as "foreman of the grand jury" rather than simply as "foreman."²³⁷

121 Fed. 515, 518 (9th Cir. 1903); *United States v. Nunnemacher*, 27 Fed. Cas. 202 (No. 15903) (C.C.E.D. Wis. 1876).

229. *Lehman v. United States*, 127 Fed. 41, 47 (2d Cir. 1903); *Sims v. United States*, 121 Fed. 515, 518 (9th Cir. 1903); *United States v. French*, 57 Fed. 382, 384 (C.C.D. Mass. 1893).

230. *Lehman v. United States*, 127 Fed. 41, 47 (2d Cir. 1903).

231. *United States v. Moody*, 164 Fed. 269, 270, 275 (W.D. Mich. 1903); *United States v. Bornemann*, 35 Fed. 824 (C.C.N.D. Cal. 1888).

232. *Cummings v. United States*, 131 F.2d 107 (5th Cir. 1942).

233. *United States v. Drawdy*, 288 Fed. 567, 570 (S.D. Fla. 1923); *United States v. Clark*, 46 Fed. 633, 638 (D. Alaska 1891).

234. *United States v. Hill*, 26 Fed. Cas. 315, 316 (No. 15364) (C.C.D. Va. 1899).

235. *Frisbie v. United States*, 157 U.S. 160, 168 (1895).

236. *Id.* at 163. It was held not to lie in view of the statute on imperfections of form, An Act to Further the Administration of Justice § 8, 17 Stat. 193 (1872).

237. *Edwards v. United States*, 312 U.S. 473, 482 (1941), reversing 113 F.2d 236 (10th Cir. 1940).

10. Indictment Based on Affirmation

In one case the defendant moved to quash and pleaded in abatement where the indictment, reciting that it was presented on oath and affirmation, did not recite that the juror affirmed because of conscientious scruples.²³⁸ The defendant did not succeed because of the statute on imperfection of form.

11. Pendency of Another Indictment

The pendency of another indictment for the same offense cannot be pleaded in bar or abatement, though it may be a good ground for a motion to quash.²³⁹ However, a defendant who has been twice indicted for the same offense, but who was never arraigned under the first indictment and has never pleaded to it, has no right to have it quashed before going to trial under the second indictment.²⁴⁰ After a trial on the second indictment, the defendant could then plead the former acquittal or conviction in bar if later arraigned under the first. The Government has a right to elect under which indictment it will proceed. Where a defendant has pleaded to the first indictment, and a second indictment is thereafter found, the court will ordinarily quash the first indictment to protect against double jeopardy.²⁴¹ An order to quash is necessary.

12. Information Not Showing Defendant Held to Answer

A demurrer does not lie where an information did not show that the defendant was held to answer on a complaint before a commissioner, or that the charge was found true by a grand jury.²⁴² These are not necessary elements of an information.

13. Information Not Signed by United States Attorney

A motion to quash will lie where the information was signed by one other than the United States attorney.²⁴³ A sworn assistant of the United States attorney may sign the name of the United States attorney under general authority conferred by the latter. A plea in abatement will also lie.²⁴⁴

238. *Bram v. United States*, 168 U.S. 532, 566 (1897).

239. *United States v. Herbert*, 26 Fed. Cas. 284, 286 (No. 15354) (C.C.D.D.C. 1836). Motion to quash was denied in *Thompson v. United States*, 202 Fed. 401, 404 (9th Cir. 1913), the court finding no precedents for it.

240. *United States v. Maloney*, 26 Fed. Cas. 1149 (No. 15713a) (C.C.D.N.Y. 1853).

241. *United States v. Strewl*, 99 F.2d 474, 477 (2d Cir. 1938), cert. denied, 306 U.S. 638 (1939).

242. *United States v. Moller*, 26 Fed. Cas. 1289 (No. 15794) (C.C.S.D.N.Y. 1879).

243. *United States v. Nagle*, 27 Fed. Cas. 68 (No. 15852) (C.C.S.D.N.Y. 1879). See also *Caha v. United States*, 152 U.S. 211, 221 (1894); *United States v. Atlantic Comm'n Co.*, 45 F. Supp. 187, 190 (E.D.N.C. 1942).

244. *United States v. Atlantic Comm'n Co.*, 45 F. Supp. 187, 190 (E.D.N.C. 1942).

14. Information Not Supported by Oath

A motion to quash was used to assert that an information was not supported by oath or affirmation showing probable cause, and that a warrant of arrest under this information was invalid.²⁴⁵

15. Prosecution by Information Improper

A motion to quash was used to assert the claim that a crime must be prosecuted by indictment rather than by information.²⁴⁶ A demurrer has also been used to assert this claim.²⁴⁷

16. Dissolution of Corporate Defendant

A plea in abatement was used to raise the objection that the corporate defendant has been dissolved.²⁴⁸ It could also be used upon the death of a natural defendant.

17. Misnomer

A plea in abatement would lie for misnomer,²⁴⁹ and also for the want of an addition or for a wrong addition,²⁵⁰ but the defendant must state his true name in the plea.²⁵¹ A married woman could raise the plea of coverture under a plea in abatement, a motion to quash, or a plea of not guilty.²⁵² The concept of addition of estate, mystery, or place would cover that of coverture. Hence, the indictment should allege whether or not a woman defendant is single, married, or widowed. A plea lies where

245. *United States v. Shepard*, 27 Fed. Cas. 1056 (No. 16273) (E.D. Mich. 1870).

246. *United States v. Butler*, 25 Fed. Cas. 226 (No. 14701) (C.C.D.S.C. 1876); *United States v. Shepard*, 27 Fed. Cas. 1056, 1058 (No. 16273) (E.D. Mich. 1870).

247. *United States v. Field*, 16 Fed. 778 (C.C.D. Vt. 1833).

248. *United States v. Leche*, 44 F. Supp. 765, 766 (E.D. La. 1942).

249. *Faust v. United States*, 163 U.S. 452 (1896); *United States v. Fawcett*, 115 F.2d 764, 767 (3d Cir. 1940); *Capriola v. United States*, 61 F.2d 5, 11 (7th Cir.), cert. denied, 287 U.S. 671 (1932); *United States ex rel Mouquin v. Hecht*, 22 F.2d 264 (2d Cir. 1927), cert. denied, 276 U.S. 621 (1928); *Filiatreau v. United States*, 14 F.2d 659, 660 (6th Cir. 1926); *MacKnight v. United States*, 263 Fed. 332, 334 (1st Cir. 1920); *Lee v. United States*, 156 Fed. 948, 950 (9th Cir. 1907); *United States v. Spintz*, 18 Fed. 377 (C.C.S.D. Ga. 1883); *United States v. De Quilfeldt*, 5 Fed. 276, 280 (C.C.W.D. Tenn. 1831); *United States v. Pond*, 27 Fed. Cas. 590, 591 (No. 16067) (C.C.D. Mass. 1855); *United States v. Empire Hat and Cap Mfg. Co.*, 47 F. Supp. 395, 401 (E.D. Pa. 1942); *United States v. Howard*, 26 Fed. Cas. 386 (No. 15402) (D. Ore. 1871).

250. *United States v. De Quilfeldt*, 5 Fed. 276, 280 (C.C.W.D. Tenn. 1831) (coverture); *United States v. Pond*, 27 Fed. Cas. 590, 591 (No. 16067) (C.C.D. Mass. 1855).

251. *United States v. Hammond*, 26 Fed. Cas. 99, 101 (No. 15294) (C.C.D. La. 1875); *United States v. Howard*, 26 Fed. Cas. 386 (No. 15402) (D. Ore. 1871).

252. *United States v. De Quilfeldt*, 5 Fed. 276, 281 (C.C.W.D. Tenn. 1831).

the initials of the Christian name are used.²⁵³ However, a motion to quash will not lie for misnomer,²⁵⁴ nor will a demurrer.²⁵⁵

18. Lack of Name of Defendant

Demurrer lies where the name of the defendant does not appear in the indictment.²⁵⁶ An indictment charging an offense by "John Doe, a Chinese person, whose true name is to the grand jurors aforesaid unknown" is bad. A motion to quash would also lie. If the defendant had been indicted simply as John Doe, a plea in abatement would lie.²⁵⁷

19. Failure to Allege an Offense

In 1876 the Supreme Court pointed out that whether an indictment charges an offense "is a question which has to be met at almost every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc."²⁵⁸ But habeas corpus would not lie. The Court stated that a motion to quash will lie if every ingredient of the offense is not "accurately and clearly alleged in the indictment."²⁵⁹

A decision of a court of appeals held that where an indictment failed to state facts sufficient to constitute an offense, although there was no demurrer, motion to quash, demand for a bill of particulars, motion for new trial, or in arrest of judgment, the court could reverse the conviction.²⁶⁰ The cases were in conflict on the question of whether habeas corpus would lie.²⁶¹

253. *United States v. Upham*, 43 Fed. 68 (C.C.S.D. Ala. 1890).

254. *Filiatreau v. United States*, 14 F.2d 659, 661 (6th Cir. 1926); *United States v. Pond*, 27 Fed. Cas. 590, 591 (No. 16067) (C.C.D. Mass. 1855). But see *United States v. De Quilfeldt*, 5 Fed. 276, 280 (C.C.W.D. Tenn. 1881).

255. *United States v. Howard*, 26 Fed. Cas. 386 (No. 15402) (D. Ore. 1871).

256. *United States v. Doe*, 127 Fed. 982, 984 (N.D. Cal. 1904).

257. *Id.* at 983.

258. *Ex parte Parks*, 93 U.S. 18, 20 (1876). At this date writ of error was not available. The Supreme Court took a similar view as early as 1830. *Ex parte Tobias Watkins*, 28 U.S. (3 Pet.) 193, 203 (1830).

259. *United States v. Cook*, 84 U.S. (17 Wall.) 168, 174 (1872). See also *Rosen v. United States*, 161 U.S. 29, 40 (1896); *Sugar v. United States*, 252 Fed. 74, 76 (6th Cir.), cert. denied, 248 U.S. 578 (1918); *United States v. Wardell*, 49 Fed. 914 (C.C.E.D.N.Y. 1892); *United States v. Schmidt*, 15 F. Supp. 804, 805 (M.D. Pa. 1936). Contra, *United States v. Myatt*, 264 Fed. 442, 452 (E.D.N.C. 1920).

260. *Sonnenberg v. United States*, 264 Fed. 327, 328 (9th Cir. 1920). Accord, *Goldstein v. United States*, 73 F.2d 804, 808 (9th Cir. 1934); *Grimsley v. United States*, 50 F.2d 509, 511 (5th Cir. 1931); *Connley v. United States*, 46 F.2d 53, 54 (9th Cir. 1931); *Remus v. United States*, 291 Fed. 513, 516 (6th Cir. 1923); *Edwards v. United States*, 266 Fed. 848, 850 (4th Cir. 1920). See Orfield, *Criminal Appeals in America* 96 (1939). See also 54 Harv. L. Rev. 1204, 1208 (1941).

261. See Orfield, *Arrest of Judgment in Federal Criminal Procedure*, 42 Iowa L. Rev. 8, 27 (1956); 47 Colum. L. Rev. 693, 694 (1947); 35 Colum. L. Rev. 404, 408-09 (1935).

a. Required Mental Element

A motion to quash will lie where there is no allegation as to the required mental element,²⁶² as will a demurrer.²⁶³

b. Required Act or Conduct

A motion to quash,²⁶⁴ as well as a demurrer,²⁶⁵ will lie where there is no allegation as to the required act or conduct of the defendant.

c. Some Other Essential Averment

A motion to quash will lie where there is no allegation as to some other essential averment,²⁶⁶ as will a demurrer.²⁶⁷

d. Repeal or Expiration of Statute

The lack of a statute creating the crime alleged is a ground of attack. First to be considered in this connection is repeal or expiration of the statute.

A plea in abatement will lie on the ground of repeal of the statute.²⁶⁸ This applies where prosecutions begin or continue after repeal, although probably not where final judgment is rendered before repeal.²⁶⁹

A motion to quash will lie because the statute making the act a crime has been repealed.²⁷⁰ This includes an indictment previously found, but not yet tried, since no one can be punished for an act not a crime at the time of punishment.

Demurrer also lies when the statute has been repealed.²⁷¹ It will lie when the act defining the offense has been repealed, although the act

262. *Cohn v. United States*, 258 Fed. 355, 357 (2d Cir. 1919); *United States v. Conant*, 25 Fed. Cas. 591, 593 (No. 14344) (C.C.D. Mass. 1879).

263. *Moffatt v. United States*, 232 Fed. 522, 530 (8th Cir. 1916).

264. *United States v. Myatt*, 264 Fed. 442 (E.D.N.C. 1920); *United States v. Bettilini*, 24 Fed. Cas. 1135 (No. 14587) (C.C.N.D. Fla. 1871); *United States v. Pond*, 27 Fed. Cas. 590 (No. 16057) (C.C.D. Mass. 1855).

265. *Bratton v. United States*, 73 F.2d 795, 798 (10th Cir. 1934).

266. *United States v. Fay*, 83 Fed. 839 (E.D. Mo. 1897); *United States v. Wardell*, 49 Fed. 914 (C.C.E.D.N.Y. 1892).

267. *United States v. Johnson*, 123 F.2d 111, 120 (7th Cir. 1941); *United States v. Louisville & N.R.R.*, 165 Fed. 936, 941 (W.D. Ky. 1908).

268. *United States v. Chambers*, 291 U.S. 217, 222 (1934); *Simplins v. United States*, 78 F.2d 594, 595 (4th Cir. 1935).

269. *United States v. Chambers*, 291 U.S. 217, 226 (1934).

270. *United States v. Finlay*, 25 Fed. Cas. 1035 (No. 15099) (W.D. Pa. 1869). See also *United States v. Hark*, 49 F. Supp. 95, 98 (D. Mass. 1943). The Supreme Court, however, treated the motion to quash as a plea in bar with respect to Government appeals. *United States v. Hark*, 320 U.S. 531, 536 (1944).

271. *United States v. Chambers*, 291 U.S. 217, 222 (1934); *Simplins v. United States*, 78 F.2d 594, 595 (4th Cir. 1935); *Bailey v. United States*, 5 F.2d 437 (5th Cir. 1925); *United States v. Luther*, 260 Fed. 579 (E.D. Okla. 1919).

imposing a penalty is still in force.²⁷² It lies where the statute has expired.²⁷³

Early cases held that repeal of a statute could be raised on a plea of not guilty.²⁷⁴ In one case, counsel for the defendant intended not to move to quash and proposed discussing the issue of repeal as soon as the jury was sworn and before evidence was introduced.²⁷⁵ The United States attorney objected to the novelty of the proceeding and the court ordered the trial to proceed in the usual course. Both the evidence and the law have to be put to the jury, who then give a verdict. If the verdict went against the defendant, he could move in arrest of judgment.

e. Constitutionality of the Statute

A motion to quash lies to attack the constitutionality of a statute.²⁷⁶ In one case a motion to quash and a plea in abatement were used to attack constitutionality.²⁷⁷ A demurrer can also be used.²⁷⁸

f. No Statutory Provision Making the Facts Alleged an Offense

A motion to quash²⁷⁹ and a demurrer²⁸⁰ lie if there is no statute making the facts alleged a crime.

g. Certainty in Alleging the Offense

A demurrer will lie for lack of clearness, definiteness, and certainty in alleging the offense.²⁸¹ The Supreme Court has stated that "the

272. *United States v. Van Vliet*, 23 Fed. 35 (E.D. Mich. 1885).

273. *Sims v. United States*, 121 Fed. 515, 516 (9th Cir. 1903).

274. *Anonymous*, 1 Fed. Cas. 1032 (No. 475) (C.C.D. Pa. 1804); *United States v. Passmore*, 27 Fed. Cas. 458 (No. 16005) (C.C.D. Pa. 1804).

275. *United States v. Passmore*, 27 Fed. Cas. 458, 459 n.3 (No. 16005) (C.C.D. Pa. 1804).

276. *Sugar v. United States*, 252 Fed. 74, 76 (6th Cir. 1918).

277. *United States v. Atlantic Comm'n Co.*, 45 F. Supp. 187, 190 (E.D.N.C. 1942).

278. *Frisbie v. United States*, 157 U.S. 160, 165 (1895); *United States v. Kagama*, 118 U.S. 375 (1886); *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); *United States v. Quinn*, 27 Fed. Cas. 673, 676 (No. 16110) (C.C.S.D.N.Y. 1870); *United States v. Cudahy Packing Co.*, 243 Fed. 441, 446 (D. Conn. 1917); *United States v. Moody*, 164 Fed. 269, 270 (W.D. Mich. 1908).

279. *Caha v. United States*, 152 U.S. 211, 213 (1894); *Ex parte Parks*, 93 U.S. 18, 20 (1876); *United States v. O'Sullivan*, 27 Fed. Cas. 367, 373 (No. 15974) (S.D.N.Y. 1851).

280. *Ex parte Parks*, 93 U.S. 18, 20 (1876); *United States v. Sandefuhr*, 145 Fed. 49, 52 (E.D. Ark. 1906); *United States v. Brown*, 24 Fed. Cas. 1273, 1275 (No. 14671) (D. Ore. 1871); *United States v. Barney*, 24 Fed. Cas. 1011 (No. 14524) (C.C.S.D.N.Y. 1866).

281. *Rosen v. United States*, 161 U.S. 29, 40 (1896); *Stokes v. United States*, 157 U.S. 187, 188 (1895); *Chew v. United States*, 9 F.2d 348, 350 (8th Cir. 1925); *Bailey v. United States*, 5 F.2d 437 (5th Cir. 1925); *United States v. Borden Co.*, 28 F. Supp. 177, 188 (N.D. Ill. 1939); *United States v. Drawdy*, 288 Fed. 567, 572 (S.D. Fla. 1923); *United States v. Peuschel*, 116 Fed. 642, 648 (S.D. Cal. 1902); *United States v. Long*, 68 Fed. 348, 349 (S.D. Cal. 1895); *United States v. Brown*, 24 Fed. Cas. 1273, 1275 (No. 14671) (D. Ore. 1871).

constitutional right of the defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash . . . that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offence. . . .²⁸²

H. Lack of Jurisdiction

1. Lack of Jurisdiction of Court as a Court

District Judge Hough concluded that "jurisdictional pleas, which are sometimes given as a separate class, are really either in abatement or bar according to whether the objection is to a particular court or to courts in general."²⁸³ In one case lack of jurisdiction of the court as a court was attacked by a plea to the jurisdiction and a plea in bar.²⁸⁴ It was alleged that the court had lost jurisdiction because the defendant was not granted a speedy trial.

2. Lack of Jurisdiction of Territory

A plea to the jurisdiction has been used to attack a court's jurisdiction of territory.²⁸⁵ It was held to lie where the offense of murder was committed in another country.²⁸⁶

A plea in abatement²⁸⁷ and a motion to quash²⁸⁸ have also been used to attack the court's jurisdiction of territory. A demurrer was used where the offense was wilful destruction of a vessel in United States waters, but not on the high seas.²⁸⁹ A demurrer was filed and rejected concerning federal jurisdiction over murder committed by Indians on an Indian reservation in the state of California.²⁹⁰ The same result was at-

282. *Rosen v. United States*, 161 U.S. 29, 40 (1896).

283. *United States v. J. L. Hopkins & Co.*, 228 Fed. 173, 175 (S.D.N.Y. 1912).

284. *MacKnight v. United States*, 263 Fed. 832, 834 (1st Cir. 1920).

285. *Wright v. United States*, 158 U.S. 232, 233, 238 (1895); *United States v. Rodgers*, 150 U.S. 249, 250 (1893); *United States v. Rogers*, 45 U.S. (4 How.) 567, 571 (1846); *Price v. United States*, 68 F.2d 133, 134 (5th Cir.), cert. denied, 292 U.S. 632 (1934); *United States v. Ferris*, 19 F.2d 925, 926 (N.D. Cal. 1927); *United States v. Schouweiler*, 19 F.2d 387, 388 (S.D. Cal. 1927); *United States v. Wiltberger*, 28 Fed. Cas. 727 (No. 16738) (C.C.E.D. Pa. 1819).

286. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820); *United States v. Wiltberger*, 28 Fed. Cas. 727, 731 (No. 16738) (C.C.E.D. Pa. 1819).

287. *United States v. Newth*, 149 Fed. 302 (W.D. Wash. 1906).

288. *Wright v. United States*, 158 U.S. 232, 234 (1895); *Reass v. United States*, 99 F.2d 752, 753 (4th Cir. 1938); *United States v. New Bedford Bridge*, 27 Fed. Cas. 91, 92 (No. 15867) (C.C.D. Mass. 1847); *United States v. Johnson*, 53 F. Supp. 596 (D. Del. 1944), aff'd, 323 U.S. 273 (1944).

289. *United States v. Wilson*, 28 Fed. Cas. 718 (No. 16731) (S.D.N.Y. 1856).

290. *United States v. Kagama*, 118 U.S. 375 (1886).

tained in a case involving a murder committed on a guano island appertaining to the United States.²⁹¹ A demurrer was filed and rejected where the crime of perjury was perpetrated in Oklahoma territory, the federal court of Kansas having jurisdiction.²⁹² A demurrer was filed and rejected where a fraud on the United States Government was committed on the high seas and in a foreign country by American citizens.²⁹³ Unlawful seizure of the defendant on the high seas can be raised by demurrer.²⁹⁴ A demurrer was filed and denied regarding a murder on a United States ship in foreign territorial waters.²⁹⁵ A demurrer was overruled to a forgery committed in a post office located in a state.²⁹⁶

One court has stated: "The usual way of contesting the territorial jurisdiction of the court to try a crime under the Sixth Amendment . . . is on a plea of not guilty, which puts in issue the whole case and enables the defendant to make any special defense which goes to an original absence of guilt as charged."²⁹⁷ Yet, a separate trial of the issue of territorial jurisdiction may be convenient, just like a separate trial of the issue of present insanity. A long and expensive trial of the main fact may be avoided. The defendant will not improperly gain the defense of double jeopardy. It might be added that the court's lack of territorial jurisdiction over the offense can be attacked by habeas corpus.²⁹⁸

3. Lack of Venue of the Offense

An indictment should allege venue in the district and it is subject to demurrer if it fails to do so.²⁹⁹ Venue "is a fact to be established, at least by prima facie or presumptive proof by the prosecutor, and . . .

291. *Jones v. United States*, 137 U.S. 202, 204 (1890).

292. *Caha v. United States*, 152 U.S. 211, 213 (1894).

293. *United States v. Bowman*, 260 U.S. 94, 97 (1922), reversing 287 Fed. 588 (S.D.N.Y. 1921), 71 U. Pa. L. Rev. 173 (1923).

294. *Ford v. United States*, 273 U.S. 593, 601 (1927).

295. *United States v. Flores*, 289 U.S. 137, 145 (1933), 46 Harv. L. Rev. 1338, 2 Geo. Wash. L. Rev. 106, 19 Va. L. Rev. 873. But see *Mathues v. United States ex rel. Maro*, 27 F.2d 518 (3d Cir. 1928), 27 Mich. L. Rev. 706 (1929).

296. *United States v. Andem*, 158 Fed. 996, 998-1000 (D.N.J. 1908).

297. *Price v. United States*, 68 F.2d 133, 134 (5th Cir. 1934); *Conley v. United States*, 23 F.2d 226, 227 (4th Cir. 1928); *United States v. Britton*, 24 Fed. Cas. 1239, 1241 (No. 14650) (C.C.D. Mass. 1822). See also *United States v. Cornell*, 25 Fed. Cas. 646, 647 (No. 14867) (C.C.D.R.I. 1819).

298. *Bowen v. Johnston*, 306 U.S. 19 (1939); *Case v. United States*, 14 F.2d 510 (8th Cir. 1926).

299. *Bratton v. United States*, 73 F.2d 795, 798 (10th Cir. 1934); *Skelley v. United States*, 37 F.2d 503 (10th Cir. 1930); *Patterson v. United States*, 222 Fed. 599, 626 (6th Cir.), cert. denied, 238 U.S. 635 (1915); *United States v. Bink*, 74 F. Supp. 603, 608 n.9 (D. Ore. 1947); *United States v. Christopherson*, 261 Fed. 225, 226 (E.D. Mo. 1919); *United States v. Jenks*, 258 Fed. 763 (E.D. Pa. 1919); *United States v. Marx*, 122 Fed. 964 (E.D. Va. 1903).

the onus probandi rests on the Government.³⁰⁰ Venue can be proved by circumstantial evidence.³⁰¹ On failure of proof the defendant is entitled to a directed verdict.³⁰² Improper venue may be attacked by a plea to the jurisdiction.³⁰³ It may also be attacked by a plea in abatement.³⁰⁴ Improper venue of an offense has been raised by a motion to quash where the grand jury was drawn exclusively from one division of a district to investigate crimes committed therein, but indicted for an offense committed in another division.³⁰⁵ Attack on venue is also made by demurrer.³⁰⁶

4. Lack of Jurisdiction of the Subject Matter

A demurrer has been used to attack the court's jurisdiction of the subject matter.³⁰⁷ One defendant construed such lack of jurisdiction to mean prosecution in a district other than the one of the offense.³⁰⁸ Neither the Supreme Court nor the lower court spoke in such terms. Occasional decisions have sharply differentiated the jurisdiction of a federal court in one state from that in another, in effect speaking in terms of jurisdiction of the subject matter.³⁰⁹

Mr. Justice Field has stated in a habeas corpus case that a "court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction. . . . In order that a court may take jurisdiction of a criminal case, the law must, in the first instance, authorize it to act upon a particular class of offenses within which the one presented is embraced."³¹⁰

300. *United States v. Britton*, 24 Fed. Cas. 1239, 1241 (No. 14650) (C.C.D. Mass. 1822); *Price v. United States*, 68 F.2d 133, 134 (5th Cir. 1934); *Moran v. United States*, 264 Fed. 768, 770 (6th Cir. 1920). Accord, *Vernon v. United States*, 146 Fed. 121, 126 (5th Cir. 1906).

301. *Vernon v. United States*, 146 Fed. 121, 126 (5th Cir. 1906).

302. *Id.* at 127.

303. *Price v. United States*, 68 F.2d 133, 134 (5th Cir. 1934).

304. *United States v. Newth*, 149 Fed. 302 (W.D. Wash. 1906).

305. *United States v. Tait*, 6 F.2d 942 (S.D. Ala. 1925). See Orfield, *Venue of Federal Criminal Cases*, 17 U. Pitt. L. Rev. 375, 382 n.30, 411 n.230 (1956); *United States v. Beaugh*, 2 F.2d 378 (W.D. La. 1924).

306. *Reass v. United States*, 99 F.2d 752, 753 (4th Cir. 1938); *United States v. Buerk*, 38 F. Supp. 409, 410 (E.D. Wis. 1941).

307. *Ford v. United States*, 273 U.S. 593, 606 (1927); *United States v. Lombardo*, 241 U.S. 73, 75 (1916); *United States v. Anderson*, 60 F. Supp. 649, 650 (W.D. Wash. 1945); *United States v. Jacopetti*, 17 F.2d 771 (N.D. Cal. 1927).

308. *United States v. Lombardo*, 241 U.S. 73, 75 (1916), affirming 228 Fed. 929, 932 (W.D. Wash. 1915).

309. *Weinberg v. United States*, 126 F.2d 1004, 1006 (2d Cir. 1942); *United States v. Bink*, 74 F. Supp. 603, 607 (D. Ore. 1947); *In re Rosditscher*, 33 Fed. 657 (E.D. Va. 1893).

310. *In re Bonner*, 151 U.S. 242, 257 (1894).

5. Lack of Jurisdiction of Person of Defendant

A plea to the jurisdiction over the person of the defendant has been filed where the defendant has been extradited and is being prosecuted for a crime not listed in the extradition treaty. Early cases rejected the plea on that ground,³¹¹ but the Supreme Court took a different view in 1886.³¹² Jurisdiction "of the person" was lacking. The plea has been used in other cases to attack jurisdiction over the person of the defendant, such as Indians.³¹³ Ordinarily, one who desires to object to the jurisdiction of the court over his person must appear before the court only for that purpose.³¹⁴ He must raise only that question; if he does more, he waives his objection. One who pleads to the indictment, or makes motions to suppress evidence or to quash the indictment, has submitted to the jurisdiction of the court in the ordinary case. In rare cases, the defendant may withdraw his general appearance. A demurrer has also been used to attack jurisdiction over the person of the defendant.³¹⁵

I. *The Raising of Defenses*

1. Former Jeopardy

A former conviction should be pleaded in bar.³¹⁶ If it is not pleaded, the defendant cannot rely on this defense. A former conviction may not be pleaded in bar unless it has been followed by judgment.³¹⁷ A former conviction on a void indictment, when the penalty has not been inflicted, may not be pleaded.³¹⁸ A defendant so pleading must produce the entire record and not merely a portion of it.³¹⁹ A former acquittal may be

311. *United States v. Lawrence*, 26 Fed. Cas. 879, 881 (No. 15573) (C.C.S.D.N.Y. 1876); *United States v. Caldwell*, 25 Fed. Cas. 237 (No. 14707) (C.C.S.D.N.Y. 1871).

312. *United States v. Rauscher*, 119 U.S. 407, 433 (1886). See Orfield, *Arrest of Judgment in Federal Criminal Procedure*, 42 Iowa L. Rev. 8, 18 (1956).

313. *Wright v. United States*, 158 U.S. 232, 233, 238 (1895). See also *Ford v. United States*, 273 U.S. 593, 606 (1927), affirming 10 F.2d 339 (9th Cir. 1926); *United States v. Lloyd*, 23 F.2d 858 (N.D. Cal. 1928); *United States v. Schouweiler*, 19 F.2d 387, 388 (S.D. Cal. 1927); *United States v. Ferris*, 19 F.2d 925, 926 (N.D. Cal. 1927).

314. *United States v. Lloyd*, 23 F.2d 858, 859 (N.D. Cal. 1928).

315. *Ford v. United States*, 273 U.S. 593, 606 (1927), affirming 10 F.2d 339, 344 (9th Cir. 1926).

316. *United States v. Murdock*, 284 U.S. 141, 151 (1931); *United States v. Lanza*, 260 U.S. 377, 379 (1922); *United States v. Mason*, 213 U.S. 115, 120 (1909); *United States v. Ball*, 163 U.S. 662, 665 (1896); *Thompson v. United States*, 155 U.S. 271, 274 (1894); *Hans Nielsen, Petitioner*, 131 U.S. 176, 177, 186 (1889); *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 159 (1833); *Goodrich v. United States*, 146 F.2d 265 (5th Cir. 1944); *Miller v. United States*, 41 App. D.C. 52, 60 (D.C. Cir.), cert. denied, 231 U.S. 755 (1913).

317. *Kepner v. United States*, 195 U.S. 100, 130 (1904); *United States v. Herbert*, 26 Fed. Cas. 284, 286 (No. 15354) (C.C.D.C. 1836). An acquittal need not be followed by judgment.

318. *United States v. Jones*, 31 Fed. 725, 728 (C.C.S.D. Ga. 1887).

319. *Id.* at 727.

pleaded in bar.³²⁰ It may be so pleaded even where the former court had jurisdiction and proceeded on a defective indictment which was not objected to before verdict.³²¹ If the court had no jurisdiction, it cannot be pleaded in bar.³²² Res judicata may be pleaded in bar, as a judgment for the defendant on a special plea of the statute of limitations.³²³ While there may be a waiver of a not guilty plea by proceeding to trial, the defendant must be given an opportunity to plead former jeopardy.³²⁴ A conviction after denial of such opportunity would be invalid. Judge Learned Hand has stated: "Upon the plea of double jeopardy the defendant has the burden of proof, and must make out his case."³²⁵ A defendant pleading former jeopardy may support his plea with oral testimony to prove his former conviction, and may resort to the record.³²⁶

An early case suggests that former jeopardy might be raised under a plea of not guilty. "I prefer to say that, in criminal cases, the plea of not guilty puts in issue the whole case on both sides. . . . It is usual to plead matters of record, such as a former conviction or acquittal; but I doubt if even that is necessary."³²⁷

2. Pardon

If a pardon is by public statute or presidential proclamation, the court must take judicial notice of it.³²⁸ An individual pardon by the President, however, must be pleaded in bar by motion, plea, or otherwise.³²⁹ It

320. *United States v. Ball*, 163 U.S. 662, 665 (1896); *United States v. Weitz*, 293 Fed. 992, 993 (N.D. Ill. 1923).

321. *United States v. Ball*, 163 U.S. 662, 666 (1896). See 20 Colum. L. Rev. 915 (1920).

322. *United States v. Ball*, 163 U.S. 662, 669 (1896).

323. *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916). Estoppel may also be pleaded. *United States v. Morse*, 24 F.2d 1001 (S.D.N.Y. 1926). See also *United States v. Meyerson*, 24 F.2d 855, 856 (S.D.N.Y. 1928).

324. *Rulovitch v. United States*, 286 Fed. 315, 319 (3d Cir.), cert. denied, 261 U.S. 622 (1923).

325. *Kastel v. United States*, 23 F.2d 156, 157 (2d Cir. 1927).

326. *Bartell v. United States*, 227 U.S. 427, 433 (1913); *Dunbar v. United States*, 156 U.S. 185, 191 (1895); *Koa Gora v. Territory of Hawaii*, 152 F.2d 933, 935 (9th Cir.), cert. denied, 328 U.S. 862 (1946); *United States v. Remington*, 64 F.2d 326, 333 (2d Cir. 1933); *Capone v. United States*, 56 F.2d 927, 933 (7th Cir.), cert. denied, 286 U.S. 553 (1932); *Tubbs v. United States*, 105 Fed. 59, 61 (8th Cir. 1900); *United States v. Claffin*, 25 Fed. Cas. 433, 434 (No. 14798) (C.C.S.D.N.Y. 1875).

327. *United States v. Brown*, 24 Fed. Cas. 1263, 1264 (No. 14665) (D. Mass. 1873).

328. *Armstrong v. United States*, 80 U.S. (13 Wall.) 154, 156 (1871); *In re Greathouse*, 10 Fed. Cas. 1057, 1059 (No. 5741) (C.C.N.D. Cal. 1864).

329. *United States v. Murdock*, 284 U.S. 141, 151 (1931); *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 161 (1833); *Miller v. United States*, 41 App. D.C. 52, 61 (D.C. Cir. 1913); *In re Greathouse*, 10 Fed. Cas. 1057, 1061 (No. 5741) (C.C.N.D. Cal. 1864); *United States v. Schreck*, 6 Alaska 412, 418 (1921).

must be pleaded before a plea of guilty unless the date is subsequent to the pleadings, since the defendant is estopped by his plea of not guilty.³³⁰ The defense may possibly be raised by motion.³³¹

3. Statute of Limitations

The statute of limitations may be raised by a plea in abatement.³³² A motion to quash does not lie with the running of the statute of limitations since this would deprive the Government of an opportunity to reply that the defendant was a person fleeing from justice, or to show it at the trial.³³³ The defense should be raised by a special plea or by a plea of not guilty.³³⁴ On the other hand, it has been said that the general practice is to make a motion to quash.³³⁵ A few decisions have allowed the motion to quash.³³⁶ In 1829 it was held that the defendant may avail himself of the statute of limitations by demurrer,³³⁷ but in 1872 the Supreme Court held that demurrer would not lie.³³⁸

The statute of limitations may be raised by a plea in bar.³³⁹ But it

330. *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 162 (1833). For a case in which the pardon came later and the defendant pleaded in arrest of judgment, see *De Kay v. United States*, 280 Fed. 465, 471 (1st Cir.), cert. denied, 260 U.S. 738 (1922).

331. *United States v. Wilson*, 32 U.S. (7 Pet.) 159, 162 (1833).

332. *United States v. Hewecker*, 79 Fed. 59, 60 (C.C.S.D.N.Y. 1896); *United States v. Brace*, 143 Fed. 703, 704 (N.D. Cal. 1906). See, however, *United States v. Barber*, 219 U.S. 72, 77 (1911), suggesting a plea in bar.

333. *United States v. Cook*, 84 U.S. (17 Wall.) 168, 179 (1872); *United States v. White*, 28 Fed. Cas. 550, 551 (No. 16675) (C.C.D.D.C. 1836).

334. *United States v. White*, 28 Fed. Cas. 550, 551 (No. 16675) (C.C.D.D.C. 1836). Habeas corpus was denied where the defendant had not pleaded the defense. *Johnson v. United States*, 13 Fed. Cas. 867 (No. 7418) (C.C.D. Mich. 1842).

335. *United States v. Six Fermenting Tubs*, 27 Fed. Cas. 1089, 1091 (No. 16296) (D. Wis. 1868).

336. *United States v. Oppenheimer*, 242 U.S. 85, 86 (1916).

337. *United States v. Watkins*, 28 Fed. Cas. 419, 470 (No. 16649) (C.C.D.D.C. 1929). Accord, *Pinkerton v. United States*, 151 F.2d 499, 500 (5th Cir. 1945), aff'd, 328 U.S. 640 (1946); *United States v. White*, 28 Fed. Cas. 570 (No. 16678) (C.C.D.D.C. 1837); *United States v. Jacopetti*, 17 F.2d 771 (N.D. Cal. 1927); *United States v. Raley*, 173 Fed. 159, 167 (D. Ore. 1909); *United States v. Wells*, 163 Fed. 313, 314 (D. Idaho 1908).

338. *United States v. Cook*, 84 U.S. (17 Wall.) 168, 178 (1872). Accord, *Hughes v. United States*, 114 F.2d 285, 288 (6th Cir. 1940); *Capone v. Aderhold*, 65 F.2d 130, 131 (5th Cir. 1933); *Evans v. United States*, 11 F.2d 37, 39 (4th Cir. 1926); *Greene v. United States*, 154 Fed. 401, 411 (5th Cir.), cert. denied, 207 U.S. 596 (1907); *United States v. Smith*, 13 F.2d 923, 924 (W.D. La. 1926); *United States v. Andem*, 158 Fed. 996, 999 (D.N.J. 1908); *United States v. Brace*, 143 Fed. 703, 704 (N.D. Cal. 1906).

339. *United States v. Oppenheimer*, 242 U.S. 85, 86 (1916); *United States v. Barber*, 219 U.S. 72, 78 (1911); *United States v. Cook*, 84 U.S. (17 Wall.) 168, 179 (1872); *Forthoffer v. Swope*, 103 F.2d 707, 709 (9th Cir. 1939); *Brouse v. United States*, 68 F.2d 294 (1st Cir. 1933); *Capone v. Aderhold*, 65 F.2d 130 (5th Cir. 1933); *United States v. Mayo*, 26 Fed. Cas. 1230 (No. 15755) (C.C.D. Mass. 1813); *United States v. Slacum*, 27 Fed. Cas.

was held with respect to continuing offenses that a special plea in bar does not lie, and that the issue must be raised under a plea of not guilty.³⁴⁰ The statute of limitations may be raised by a motion to stay all further proceedings on the information.³⁴¹ The statute of limitations may also be raised by a motion to dismiss, treated as a special plea in bar.³⁴²

4. Present Insanity

A motion for a continuance may be used to raise the issue of the defendant's present insanity.³⁴³ One presently insane can neither plead to an arraignment nor be tried.³⁴⁴ Counsel should object before arraignment, but failure to object is not a waiver and objection to a trial is permitted after arraignment. A petition for inquiry into the mental condition of the defendant also lies.³⁴⁵

5. Immunity

The defense of immunity may be raised by a plea in abatement,³⁴⁶ or by a motion to quash.³⁴⁷ In one case, an alleged violation of the privilege against self incrimination before the grand jury was attacked by a motion to quash and a plea in abatement.³⁴⁸ The defense of immunity can also be made by a plea in bar.³⁴⁹ There may be an amended plea in

1124 (No. 16311) (C.C.D.C. 1808); *United States v. J. L. Hopkins & Co.*, 228 Fed. 173, 175 (S.D.N.Y. 1912); *United States v. Brace*, 149 Fed. 374, 376 (N.D. Cal. 1907).

340. *United States v. Kissel*, 218 U.S. 601, 610 (1910), reversing 173 Fed. 823, 829 (C.C.S.D.N.Y. 1909), 10 Colum. L. Rev. 159 (1910). Accord, *United States v. Barber*, 219 U.S. 72, 78 (1911).

341. *United States v. Mann*, 26 Fed. Cas. 1153, 1154, 1157 (No. 15718) (C.C.D.N.H. 1812).

342. *United States v. Goldman*, 277 U.S. 229, 236 (1928).

343. *Youtsey v. United States*, 97 Fed. 937, 940 (6th Cir. 1899); *United States v. German*, 115 Fed. 987, 988 (W.D. Ky. 1902). See also *United States v. Boylen*, 41 F. Supp. 724 (D. Ore. 1941).

344. *Youtsey v. United States*, 97 Fed. 937, 940 (6th Cir. 1899).

345. *United States v. Harriman*, 4 F. Supp. 186 (S.D.N.Y. 1933).

346. *United States v. Thomas*, 49 F. Supp. 547 (W.D. Ky. 1943); *United States v. Slobodkin*, 48 F. Supp. 913, 1914 (D. Mass. 1943); *United States v. Goodner*, 35 F. Supp. 286, 287 (D. Colo. 1940); *United States v. Shaw*, 33 F. Supp. 531 (S.D. Cal. 1940), rev'd on other grounds, 131 F.2d 476 (9th Cir. 1942); *United States v. Swift*, 185 Fed. 1002, 1003 (N.D. Ill. 1911).

347. *United States v. Goodner*, 35 F. Supp. 286, 287 (D. Colo. 1940); *United States v. Ward*, 295 Fed. 576 (W.D. Wash. 1924); *United States v. Swift*, 186 Fed. 1002, 1003 (N.D. Ill. 1911).

348. *United States v. Wilson*, 42 F. Supp. 721 (D. Del. 1942).

349. *United States v. Monia*, 317 U.S. 424 (1943), affirming *United States v. American Meat Institute*, 47 F. Supp. 482 (N.D. Ill. 1942); *Edwards v. United States*, 312 U.S. 473, 479 (1941), reversing 113 F.2d 286 (10th Cir. 1940); *Sherwin v. United States*, 263 U.S. 369, 370 (1925); *Heike v. United States*, 217 U.S. 423, 426 (1910); *United States v. Molasky*, 118 F.2d 128, 133 (7th Cir. 1941); *United States v. Chaplin*, 54 F. Supp. 926

bar.³⁵⁰ It is error to overrule a plea of immunity under the Securities Act³⁵¹ without ordering production of a transcript of the testimony delivered by the defendant before the Securities and Exchange Commission.³⁵²

6. Entrapment

Matters of defense or objection not capable of determination without the trial of the general issue are raised under a plea of not guilty. Thus, the defense of entrapment is raised by a plea of not guilty,³⁵³ not by a motion to quash,³⁵⁴ a plea in abatement,³⁵⁵ or a plea in bar.³⁵⁶ Under the majority view of the Supreme Court, evidence of entrapment must be introduced by the plea of not guilty, and the fact of entrapment is a matter for the jury to determine in finding the defendant guilty or not guilty.³⁵⁷ Under the minority view of Justices Roberts, Brandeis, and Stone, the issue of entrapment whenever raised is left to the court. On a finding of entrapment the indictment must be quashed and the case dismissed.

7. Statute of Limitations

On a plea of not guilty the defendant may raise the defense of the statute of limitations.³⁵⁸ This is true where the issue is whether the

(S.D. Cal. 1944); *United States v. Goldman*, 28 F.2d 424 (D. Conn. 1928); *United States v. Moore*, 15 F.2d 593 (D. Ore. 1926); *United States v. Pardue*, 294 Fed. 543 (S.D. Tex. 1923); *United States v. Elton*, 222 Fed. 428 (S.D.N.Y. 1915); *United States v. Skinner*, 218 Fed. 870 (S.D.N.Y. 1914).

350. *United States v. Molasky*, 118 F.2d 128, 133 (7th Cir. 1941).

351. 48 Stat. 74 (1933), 15 U.S.C. § 77a (1958).

352. *Edwards v. United States*, 312 U.S. 473, 479-82 (1941).

353. *Sorrells v. United States*, 287 U.S. 435, 452 (1932); *United States v. Pappagoda*, 288 Fed. 214, 215 (D. Conn. 1923).

354. *United States v. Pappagoda*, 288 Fed. 214, 215 (D. Conn. 1923).

355. *Claiborne v. United States*, 77 F.2d 682, 691 (8th Cir. 1935).

356. *Sorrells v. United States*, 287 U.S. 435, 452 (1932).

357. See Note, 42 *Yale L. J.* 803 (1933). See also *United States v. Cerone*, 150 F.2d 382, 384 (7th Cir.), cert. denied, 326 U.S. 756 (1945).

358. *Biddinger v. Commissioner of Police*, 245 U.S. 128, 135 (1917); *Forthoffer v. Swope*, 103 F.2d 707, 709 (9th Cir. 1939); *Greene v. United States*, 154 Fed. 401, 411 (5th Cir. 1907); *United States v. Ballard*, 24 Fed. Cas. 972 (No. 14507) (C.C.D. Mich. 1844); *Parsons v. Hunter*, 18 Fed. Cas. 1259, 1262 (No. 10778) (C.C.D.N.H. 1836); *United States v. Porter*, 27 Fed. Cas. 595, 597 (No. 16072) (C.C.D.D.C. 1812); *United States v. J. L. Hopkins & Co.*, 228 Fed. 173, 175 (S.D.N.Y. 1912); *United States v. Andem*, 158 Fed. 996, 999 (D.N.J. 1908); *United States v. Brace*, 143 Fed. 703, 704 (N.D. Cal. 1906); *United States v. Brown*, 24 Fed. Cas. 1263 (No. 14665) (D. Mass. 1873); *United States v. Six Fermenting Tubs*, 27 Fed. Cas. 1089, 1091 (No. 16296) (D. Wis. 1868). It is said in *People v. Kaplan*, 143 Misc. 91, 256 N.Y. Supp. 874 (Gen. Sess. 1932), that the weight of authority favors use of the not guilty plea to raise the issue of the statute of limitations. See 10 *Colum. L. Rev.* 159 (1910); 8 *Colum. L. Rev.* 52 (1908); 33 *Mich. L. Rev.* 805 (1935); 7 *Va. L. Rev.* 656 (1921).

defendant is a fugitive.³⁵⁹ The Government need not file any written special replication.³⁶⁰ The defendant is in no better position if he pleads not guilty than if he pleads specially.³⁶¹ The plea of not guilty also lies for the denial of a continuing defense,³⁶² and other extensions of the time limitation.³⁶³

8. Insanity at Time of Offense

The defense of insanity at the time of an offense may be raised on a plea of not guilty.³⁶⁴

9. Alibi

The defense of alibi may be raised on a plea of not guilty.³⁶⁵

10. Privilege Against Self Incrimination

The defendant should raise the privilege against self incrimination under a plea of not guilty, not by a special plea in advance of trial.³⁶⁶ Matters of defense determinable under the general issue should not be raised by a special plea both as to questions of law and of fact.

J. Waiver

1. Waiver of Defenses

Former acquittal, former conviction, and former jeopardy must ordinarily be pleaded specially. There may be an express or implied waiver. It may be implied from the failure to raise the objection or defense at the first opportunity. It comes too late, however, when first raised by motion in arrest of judgment,³⁶⁷ by motion for new trial,³⁶⁸ or on appeal.³⁶⁹ There is a waiver when the defendant pleads not guilty and is

359. *United States v. Cook*, 84 U.S. (17 Wall.) 168, 179 (1872); *Greene v. United States*, 154 Fed. 401, 411 (5th Cir. 1907); *United States v. Smith*, 13 F.2d 923, 924 (W.D. La. 1926); *United States v. Brace*, 143 Fed. 703, 704 (N.D. Cal. 1906).

360. *United States v. White*, 28 Fed. Cas. 562, 566 (No. 16676) (C.C.D.D.C. 1836); *United States v. White*, 28 Fed. Cas. 550, 551 (No. 16675) (C.C.D.D.C. 1836).

361. *United States v. White*, 28 Fed. Cas. 562, 568 (No. 16676) (C.C.D.D.C. 1836).

362. *United States v. Brace*, 149 Fed. 874, 876 (N.D. Cal. 1907).

363. *United States v. Clayton-Kennedy*, 2 F. Supp. 233, 235 (D. Md. 1933).

364. *Owens v. United States*, 85 F.2d 270, 271 (D.C. Cir. 1936); *Whitney v. Zerst*, 62 F.2d 970, 972 (10th Cir. 1933); *United States v. Fore*, 38 F. Supp. 140, 141 (S.D. Cal. 1941).

365. *Colbeck v. United States*, 10 F.2d 401, 403 (7th Cir. 1925), cert. denied, 270 U.S. 663 (1926).

366. *United States v. Murdock*, 284 U.S. 141, 150 (1931).

367. *Levin v. United States*, 5 F.2d 598, 600 (9th Cir.), cert. denied, 269 U.S. 562 (1925). *Contra*, *Reynolds v. United States*, 280 Fed. 1, 4 (6th Cir. 1922).

368. *Brady v. United States*, 24 F.2d 399, 405 (8th Cir. 1923).

369. *Miller v. United States*, 41 App. D.C. 52, 62 (D.C. Cir. 1913).

tried and convicted without claim of the defense.³⁷⁰ There is also a waiver when he pleads guilty.³⁷¹

The defense of the statute of limitations is not available on appeal if not properly presented below.³⁷² In some cases the courts have nevertheless reviewed the issue.³⁷³ It cannot be raised by motion in arrest of judgment, since the prosecution is entitled to an opportunity to introduce evidence which would bring the defendant within any exception contained in the statute.³⁷⁴

Misjoinder of offenses could be raised before trial or during the trial. Misjoinder of counts may be raised by motion to elect³⁷⁵ or dismiss³⁷⁶ during the trial.

Under the law prior to the rules, the defendant could present various defenses and objections in successive pleadings. In one case he filed in order a plea in abatement, a demurrer, a plea to the jurisdiction, and a plea of not guilty.³⁷⁷ All the pleadings except the plea of not guilty occurred before arraignment. In another case the defendant first moved to quash, then demurred, pleaded not guilty, and filed a special plea to each count. He then moved to quash on another ground, followed by a motion that the Government elect on which counts it would proceed.³⁷⁸ Another defendant first demurred for failure to state an offense, then was given leave to file a plea in abatement and a motion to quash for duplicity.³⁷⁹ Still another moved to quash, demurred, and then filed three pleas in abatement.³⁸⁰ In another case the defendant pleaded not guilty, withdrew his plea, and demurred. He then moved to quash, pleaded in

370. *McGinley v. Hudspeth*, 120 F.2d 523, 525 (10th Cir. 1941); *Curtis v. United States*, 67 F.2d 943, 948 (10th Cir. 1933); *Callahan v. United States*, 35 F.2d 633, 634 (10th Cir. 1929); *Brady v. United States*, 24 F.2d 399, 405 (8th Cir. 1928); *Blair v. White*, 24 F.2d 323, 324 (8th Cir. 1928).

371. *Graham v. Squier*, 132 F.2d 681, 683 (9th Cir. 1942), cert. denied, 318 U.S. 777 (1943); *Caballero v. Hudspeth*, 114 F.2d 545, 547 (10th Cir. 1940); *Bracey v. Zerbst*, 93 F.2d 8, 10 (10th Cir. 1937); *United States v. Lawson*, 57 F. Supp. 664, 667 (N.D. Tex. 1944); *United States v. Harrison*, 23 F. Supp. 249, 252 (S.D.N.Y.), aff'd, 99 F.2d 1017 (2d Cir. 1938).

372. *Forthoffer v. Swope*, 103 F.2d 707, 709 (9th Cir. 1939); *Evans v. United States*, 11 F.2d 37, 39 (4th Cir. 1926); *Pruett v. United States*, 3 F.2d 353, 354 (9th Cir. 1925).

373. *Evans v. United States*, 11 F.2d 37, 39 (4th Cir. 1926); *Pruett v. United States*, 3 F.2d 353, 354 (9th Cir. 1925).

374. *Capone v. Aderhold*, 65 F.2d 130, 131 (5th Cir. 1933).

375. *Gardes v. United States*, 87 Fed. 172, 175 (5th Cir. 1898).

376. *United States v. Perlstein*, 120 F.2d 276, 280-81 (3d Cir. 1941); *Beaux Arts Dresses v. United States*, 9 F.2d 531, 532 (2d Cir. 1925), cert. denied, 270 U.S. 644 (1926).

377. *Crowley v. United States*, 194 U.S. 461, 465 (1904).

378. *McGregor v. United States*, 134 Fed. 187, 190 (4th Cir. 1904).

379. *United States v. Barber*, 219 U.S. 72, 76 (1911).

380. *Matters v. United States*, 244 Fed. 736, 737 (8th Cir. 1917), cert. denied, 255 U.S. 575 (1921).

abatement, and filed a second motion to quash.³⁵¹ In another case the defendant moved to compel the Government to elect which offenses it would prosecute, and then he demurred for failure to charge an offense. Finally, he was tried.³⁵²

Objections to the grand jury which should have been raised before trial by pleas in abatement or by motion to quash are waived if not so raised.³⁵³ As to the omission of the formal indorsement of an indictment as a "true bill," signed by the foreman, the Supreme Court stated: "The defect, however, is waived if objection is not made in the first instance and before trial, for it does not go to the substance of the charge, but only to the form in which it is presented."³⁵⁴ One court stated: "By failing to demur to the indictment the plaintiff in error waived all objections thereto, except the objection that some substantial element of the crime was omitted therefrom."³⁵⁵ Prosecution under a copy of the indictment, if there is a defect, may be waived by going to trial without objection.³⁵⁶

The objection that the indictment is invalid for duplicity cannot be raised after verdict and judgment.³⁵⁷ It is waived unless presented before trial,³⁵⁸ but even then it cannot be raised by a motion to dismiss.³⁵⁹ Duplicity may not be presented for the first time by motion in arrest of judgment,³⁶⁰ or on appeal.³⁶¹ It is reviewable on appeal only if it has

381. *United States v. Perlman*, 247 Fed. 158, 159 (S.D.N.Y. 1917).

382. *Bailey v. United States*, 278 Fed. 849, 850 (6th Cir. 1922).

383. *United States v. Gale*, 109 U.S. 65, 67 (1883); *Shaw v. United States*, 1 F.2d 199, 201 (8th Cir. 1924); *Burchett v. United States*, 194 Fed. 821, 825 (4th Cir. 1912); *United States v. Hartwell*, 26 Fed. Cas. 204, 205 (No. 15319) (C.C.D. Mass. 1870).

384. *Frisbie v. United States*, 157 U.S. 160, 164 (1895).

385. *Berry v. United States*, 259 Fed. 203, 205 (9th Cir. 1919).

386. *United States v. McKee*, 26 Fed. Cas. 1112, 1115 (No. 15687) (C.C.E.D. Mo. 1876).

387. *Babcock v. United States*, 34 Fed. 873, 876 (C.C.D. Colo. 1888). See *Durland v. United States*, 161 U.S. 305, 315 (1896).

388. *Beauchamp v. United States*, 154 F.2d 413, 415 (6th Cir.), cert. denied, 329 U.S. 723 (1946); *United States v. Fawcett*, 115 F.2d 764, 767 (3d Cir. 1940); *Wells v. United States*, 257 Fed. 605, 609 (9th Cir. 1919); *Lemon v. United States*, 164 Fed. 953, 958 (8th Cir. 1908).

389. *Barnard v. United States*, 16 F.2d 451, 453 (9th Cir. 1926), cert. denied, 274 U.S. 736 (1927).

390. *United States v. Fawcett*, 115 F.2d 764, 767 (3d Cir. 1940); *Spirou v. United States*, 24 F.2d 796, 797 (2d Cir.), cert. denied, 277 U.S. 596 (1928); *Barnard v. United States*, 16 F.2d 451, 453 (9th Cir. 1926); *Chew v. United States*, 9 F.2d 348, 353 (8th Cir. 1925); *Morgan v. United States*, 148 Fed. 189, 190 (8th Cir.), cert. denied, 203 U.S. 595 (1903); *Pooler v. United States*, 127 Fed. 509, 514 (1st Cir. 1904); *United States v. Bayaud*, 16 Fed. 376, 386 (C.C.S.D.N.Y. 1883); *United States v. Fero*, 18 Fed. 501 (E.D. Wis. 1893).

391. *Connors v. United States*, 158 U.S. 408, 411 (1895); *Spirou v. United States*, 24 F.2d 796, 797 (2d Cir. 1928); *Wells v. United States*, 257 Fed. 605, 609 (9th Cir. 1919).

been presented before trial.³⁹² An objection to misnomer cannot be raised after trial by a motion for a new trial.³⁹³

What about waiver of venue within the district as between divisions of the district? Where the grand jury is drawn exclusively from one division of a district to investigate offenses committed within such division, but hands down an indictment for an offense committed in another division of the district, the defendant waives his right to object if he proceeds to trial on a plea of not guilty.³⁹⁴ There is a waiver where the defendant files a plea of guilty, having failed previously to file, among others, a plea in abatement.³⁹⁵ The question of venue cannot be raised after conviction.³⁹⁶ With respect to the statutory requirement that capital offenses be tried in the county of the offense, the court held that venue was waivable through delay.³⁹⁷ Venue within the district is merely a personal privilege.³⁹⁸

What about waiver of venue as between districts? Prior to 1931, no federal decision involved waiver of venue as between districts.³⁹⁹ Waiver of trial by jury was upheld in 1930.⁴⁰⁰ Referring to such waiver, one court concluded:

If, as is thus decided, a person charged with crime may forego a jury trial by agreeing to waive a jury, it would, we think, be difficult to sustain the view that he may not also in the same manner waive the provision in the same article with relation to the place of trial. Logically it seems to us to follow that both are in the same category. Whatever sanctity growing out of established custom obtains with relation to the trial of a defendant in the vicinage of the crime obtains with equal force with relation to the right to trial by jury. . . .⁴⁰¹

The court pointed out that the defendants might have pleaded to the jurisdiction.⁴⁰² When the case went to the Supreme Court, the Court did not disagree with these conclusions, finding that the indictment suffi-

392. *Creel v. United States*, 21 F.2d 690, 691 (8th Cir. 1927).

393. *Filiatreau v. United States*, 14 F.2d 659, 660 (6th Cir. 1926); *United States v. De Quilfeldt*, 5 Fed. 276, 280 (C.C.W.D. Tenn. 1881).

394. *Rosencrans v. United States*, 165 U.S. 257, 263 (1897); *McNealy v. Johnston*, 100 F.2d 280, 282 (9th Cir. 1938); *Silverberg v. United States*, 4 F.2d 908, 909 (5th Cir.), cert. denied, 268 U.S. 706 (1925). See *Salinger v. Loisel*, 265 U.S. 224, 237 (1924); *Biggerstaff v. United States*, 260 Fed. 926 (8th Cir. 1919).

395. *Marvel v. Zerbst*, 83 F.2d 974, 977 (10th Cir. 1936).

396. *Gowling v. United States*, 64 F.2d 796, 798 (6th Cir. 1933).

397. *United States v. Parker*, 19 F. Supp. 450, 457-59 (D.N.J. 1937), aff'd, 103 F.2d 857, 861 (3d Cir. 1939).

398. *Carrillo v. Squier*, 137 F.2d 648 (9th Cir. 1943); *McNealy v. Johnston*, 100 F.2d 280, 282 (9th Cir. 1938); *Silverberg v. United States*, 4 F.2d 908, 909 (5th Cir. 1925).

399. 48 Colum. L. Rev. 939, 942 n.22 (1948).

400. *Patton v. United States*, 281 U.S. 276 (1930).

401. *Hagner v. United States*, 54 F.2d 446, 448 (D.C. Cir. 1931), aff'd, 285 U.S. 427 (1932).

402. 54 F.2d at 449.

ciently charged a crime committed in the trial district. No objection was taken except by motion in arrest of judgment. "In view of this conclusion, it becomes unnecessary to consider the further question whether the trial court had jurisdiction to try the indictment, if construed as charging the commission of an offense only"⁴⁰³ in another district. Since a continuous offense was involved, both districts could indict and try. Hence, the case is rather weak on its facts. There was venue at the place of the indictment and trial. A decision of the Court of Appeals of the Second Circuit did not reject the doctrine of waiver mainly because the facts indicated no waiver. The case involved two districts. Judge Learned Hand stated: "We do not say that the District Court for the Northern District of New York had as little jurisdiction over a crime committed in the Southern District, as though that were the territory of another sovereign."⁴⁰⁴ A federal statute gave it general jurisdiction over all "crimes and misdemeanors cognizable under the authority of the United States."⁴⁰⁵ He did not necessarily accept the theory that the constitutional provision on the place of trial defines jurisdiction, for he said "we do not suggest [that the provision] . . . be treated as defining jurisdiction [and] . . . we therefore leave open any question of jurisdiction. . . ."⁴⁰⁶ Thus the court did not reject a waiver involving actual consent, but refused to infer consent from mere delay.

The Court of Appeals of the Tenth Circuit stated that the Constitution deals "not with jurisdiction but with venue."⁴⁰⁷ It found waiver of trial by jury to be valid. This case, however, involved a continuous offense committed in both districts. By pleading guilty and failing to challenge the venue, the defendant waived the issue of venue and could not attack it on habeas corpus. In a case arising in the Second Circuit, Judge Learned Hand found no facts showing waiver but pointed out that the courts of appeals of the District of Columbia and the Tenth Circuit had upheld waiver of venue.⁴⁰⁸

Lack of jurisdiction over the person is waived if not presented before a plea to the indictment or information.⁴⁰⁹ While "the competency of any

403. *Hagner v. United States*, 285 U.S. 427, 433-34 (1932). Both indictment and trial occurred in the same district.

404. *United States v. Strowl*, 99 F.2d 474, 477 (2d Cir. 1938), cert. denied, 305 U.S. 638 (1939).

405. See 18 U.S.C. § 2321 (1953).

406. *United States v. Strowl*, 99 F.2d at 478.

407. *Mahaffey v. Hudspeth*, 128 F.2d 940, 942 (10th Cir. 1942).

408. *United States v. Zeuli*, 137 F.2d 845, 847 (2d Cir. 1943).

409. *Albrecht v. United States*, 273 U.S. 1, 8 (1927); *Ford v. United States*, 273 U.S. 593, 606 (1927), affirming 10 F.2d 339 (9th Cir. 1926); *Dowdell v. United States*, 221 U.S. 325, 332 (1911); *Chapman v. Scott*, 10 F.2d 156, 159 (D. Conn. 1925), aff'd, 10 F.2d 690 (2d Cir. 1926).

court to adjudicate the subject-matter may always be questioned, jurisdiction of the person, if not challenged upon appearance, is equivalent to consent."⁴¹⁰ The Supreme Court has stated: "A plea to the jurisdiction must precede the plea of not guilty. Such a plea was not filed. The effect of the failure to file it was to waive the question of the jurisdiction of the persons of defendants."⁴¹¹

2. No Waiver of Jurisdiction Over Subject Matter

Lack of jurisdiction over the subject matter cannot be waived.⁴¹² The issue may be raised at any time, for example, by habeas corpus.⁴¹³

3. No Waiver of Failure to Charge Offense

If the indictment failed to charge an offense, the defendant could raise the objection after trial by motion in arrest of judgment.⁴¹⁴ A motion to exclude testimony is not the proper way to raise the issue.⁴¹⁵

In 1895 the Supreme Court stated that "while it may be true that a defendant by waiting until [after verdict] . . . does not waive the objection that some substantial element of the crime is omitted, yet he does waive all objections which run to the mere form in which the various elements of the crime are stated, or to the fact that the indictment is inartificially drawn."⁴¹⁶ The defendant does not receive more time to demur or move to quash by obtaining permission, when pleading not guilty, to take advantage of all matters that can be availed of on a demurrer or a motion to quash.⁴¹⁷

K. *Withdrawal of Plea*

1. Plea of Not Guilty

A court may permit a defendant to withdraw his plea of not guilty and then move to quash.⁴¹⁸ One court permitted a withdrawal when the defendants pleaded not guilty without the presence or advice of coun-

410. *Chapman v. Scott*, 10 F.2d 156, 159 (D. Conn. 1925).

411. *Ford v. United States*, 273 U.S. 593, 606 (1927).

412. *Chapman v. Scott*, 10 F.2d 156, 159 (D. Conn. 1925).

413. *In re Bonner*, 151 U.S. 242, 257 (1894).

414. *Berry v. United States*, 259 Fed. 203 (9th Cir. 1919); *Cohn v. United States*, 258 Fed. 355, 357 (2d Cir. 1919). Compare *Dunbar v. United States*, 156 U.S. 185, 191 (1895).

415. *Gray v. United States*, 9 F.2d 337, 339 (9th Cir. 1925).

416. *Dunbar v. United States*, 156 U.S. 185, 192 (1895).

417. *Breese v. United States*, 226 U.S. 1, 11 (1912).

418. *United States v. O'Sullivan*, 27 Fed. Cas. 367, 368 (No. 15974) (S.D.N.Y. 1851). See also *Pointer v. United States*, 151 U.S. 396, 404 (1894); *O'Hara v. United States*, 129 Fed. 551, 556 (6th Cir. 1904); *United States v. Lewis*, 192 Fed. 633, 637 (E.D. Mo. 1911); *United States v. London*, 176 Fed. 976, 978 (E.D. Okla. 1909).

sel, but under the assurance of the court that their rights would not be prejudiced. "The authority of the court, to control the order of pleading at its discretion, cannot be doubted."⁴¹⁹ Likewise, the court may permit a defendant to withdraw a plea of not guilty, and plead in abatement.⁴²⁰ The Supreme Court, moreover, finds no objection to a motion to quash made after a plea of not guilty.⁴²¹ It has been held that a plea of misnomer must precede a motion to quash.⁴²² However, a subsequent demurrer will waive this plea. In one case the defendant was permitted to withdraw his plea of not guilty and then re-enter it after his motion to quash and demurrer were overruled.⁴²³ It is not error for a court to refuse to allow the withdrawal of a plea of not guilty so that a motion to quash the indictment can be filed.⁴²⁴ Refusal to withdraw is especially justified when there is a second trial and the statute of limitations would prevent a new indictment.⁴²⁵

The overruling of a motion seeking permission to withdraw a plea of not guilty in order to interpose a demurrer to the indictment is within the discretion of the court and is not reviewable.⁴²⁶ In one case the defendant was permitted to withdraw a plea of not guilty and to interpose four pleas in bar.⁴²⁷

2. Plea to Jurisdiction

The court will permit withdrawal of a plea to the jurisdiction when it is entered on an unconditional promise of the court that it can be withdrawn at the discretion of the defendant's counsel.⁴²⁸

L. *Simultaneous Pleas*

In 1818 a United States attorney objected to the defendant simultaneously entering on arraignment a plea of not guilty and a plea to the jurisdiction.⁴²⁹ However, no decision was rendered since the defendant

419. *United States v. O'Sullivan*, 27 Fed. Cas. 367, 368 (No. 15974) (S.D.N.Y. 1851).

420. *United States v. De Quilfeldt*, 5 Fed. 276, 278 (C.C.W.D. Tenn. 1831). This was done to permit the defendant to show coverture as a defense.

421. *Pointer v. United States*, 151 U.S. 396, 404 (1894).

422. *Lee v. United States*, 156 Fed. 948, 950 (9th Cir. 1907).

423. *Mamaux v. United States*, 264 Fed. 816, 819 (6th Cir. 1920).

424. *Colbeck v. United States*, 10 F.2d 401, 402 (7th Cir. 1925), cert. denied, 271 U.S. 662 (1926).

425. *Waller v. United States*, 179 Fed. 810 (8th Cir. 1910).

426. *Andrews v. United States*, 224 Fed. 418, 419 (9th Cir. 1915). The court may refuse withdrawal of a plea of not guilty when the case is called for trial and the defendant's counsel admits that the demurrer is without merit. *Callahan v. United States*, 35 F.2d 633, 634 (10th Cir. 1929).

427. *United States v. Rockefeller*, 226 Fed. 328, 329 (S.D.N.Y. 1915).

428. *United States v. Hare*, 26 Fed. Cas. 148, 149, 155 (No. 15304) (C.C.D. Md. 1818).

429. *Id.* at 155.

was permitted to withdraw his pleas. In another case the defendant filed a demurrer and a plea in abatement at arraignment.⁴³⁰ The court first considered the demurrer and, on its overruling, the plea in abatement. The Supreme Court has said that pleas of not guilty and former jeopardy may be entered at the same time, since they are not inconsistent. The plea of former jeopardy, however, will be first considered.⁴³¹

In one case the court stated:

[T]he plea of *autrefois acquit* or *convict* should not be tendered simultaneously with the general issue. It is the rule in criminal law, as it was at common law on the civil side, that defenses both dilatory and peremptory, if they did not go to the merits of the controversy, should be pleaded first, in order that judgment (if against defendant) might be *respondeat ouster*. This practice arose after the severity which directed final judgment against defendant on overruling a plea in bar . . . had been modified.⁴³²

But since this was only a matter of detail, the court examined the record as to the plea of jeopardy.

M. *Time for Pleading*

A plea in abatement may be too late even though made before trial. It was held too late as to an objection to the summoning of a grand jury where *venires* were issued November 18 and December 2. The court opened December 3, the indictment was returned December 12, and the plea was filed December 17.⁴³³ A plea in abatement made before arraignment and three days after indictment, is timely.⁴³⁴ A plea tendered after the overruling of a demurrer and at a term after the one at which the defendant had pleaded not guilty comes too late.⁴³⁵ A plea filed nineteen days after the finding of the indictment and on the day of the trial is too late.⁴³⁶ The defendant objected because the grand jury was completed when two bystanders were summoned. "An objection of this kind should be made at the earliest day that the defendant has an opportunity to make it."⁴³⁷ A plea in abatement made four years after indictment, which alleges that the secretary of the jury unlawfully abstracted some names from the box containing the names of prospective grand jurors so that they could not be drawn for service, comes too late.⁴³⁸ A plea filed more than two months after indictment and

430. *United States v. Jones*, 31 Fed. 725, 726 (C.C.S.D. Ga. 1887).

431. *Thompson v. United States*, 155 U.S. 271, 274 (1894).

432. *United States v. J. L. Hopkins & Co.*, 228 Fed. 173, 175-76 (S.D.N.Y. 1912).

433. *Agnew v. United States*, 165 U.S. 36, 44-45 (1897).

434. *Crowley v. United States*, 194 U.S. 461, 474 (1904).

435. *Wilder v. United States*, 143 Fed. 433, 438 (4th Cir. 1906).

436. *Lowdon v. United States*, 149 Fed. 673, 674 (5th Cir. 1906).

437. *Id.* at 675.

438. *Hyde v. United States*, 35 App. D.C. 451, 473 (D.C. Cir. 1910), *aff'd*, 225 U.S. 347, 373 (1912).

nineteen days after service of process on the indictment is too late. The court stated that one of the rules applicable to pleas in abatement "requires the plea to be presented with the greatest promptness—general rules which are applied . . . to all those matters of abatement which, in the technical sense, are dilatory, and which even if sustained do not finally dispose of the subject matter of the indictment. . . ." ⁴³⁹ A plea in abatement made thirty-five days after arrest under the indictment comes too late. ⁴⁴⁰ A plea alleging illegal selection of the grand jurors, filed nine months after the indictment, is too late. ⁴⁴¹ The court said: "An objection of this kind should be made at the earliest day that the defendant has an opportunity to make it." ⁴⁴² Usually, the plea should be made at arraignment. ⁴⁴³ A plea filed after answer and motion to quash, based on grounds which the defendant might have discovered, comes too late. When the defendant was indicted in October 1913, pleaded not guilty, but was found guilty and appealed to the court of appeals which reversed, a plea filed in 1916 comes too late. ⁴⁴⁴ A plea filed seven months after indictment and after two prior pleas had been ruled on, ⁴⁴⁵ or 108 days after the indictment and arraignment, is too late. ⁴⁴⁶ A plea in abatement for incompetency or disqualification of a grand juror should be filed before a plea of not guilty or there is a waiver of the defect. ⁴⁴⁷ A plea filed three months after indictment is too late. ⁴⁴⁸

A motion to quash must be timely made. ⁴⁴⁹ Hence, a motion two months after indictment, when defendant has been placed under bond before indictment, is too late. ⁴⁵⁰ A motion to quash because of the illegal constitution of the grand jury is timely when filed before arraignment. The indictment was on February 3, the motion, March 15. ⁴⁵¹ Delay due to judicial disqualification will excuse a late motion. ⁴⁵² A motion to quash made after a delay of eleven-and-a-half years, based on the ground that the grand jury did not accompany the foreman on the return

439. *United States v. American Tobacco Co.*, 177 Fed. 774, 777 (W.D. Ky. 1910).

440. *United States v. Louisville & N.R.R.*, 177 Fed. 780, 785 (W.D. Ky. 1910).

441. *Mofiat v. United States*, 232 Fed. 522, 528-29 (8th Cir. 1916).

442. *Id.* at 529.

443. *United States v. Rintelen*, 235 Fed. 787, 789 (S.D.N.Y. 1916).

444. *Younge v. United States*, 242 Fed. 788, 791 (4th Cir. 1917).

445. *Matters v. United States*, 244 Fed. 736, 737 (8th Cir. 1917).

446. *United States v. Perlman*, 247 Fed. 158, 162 (S.D.N.Y. 1917).

447. *Shaw v. United States*, 1 F.2d 199, 201 (8th Cir. 1924).

448. *Powe v. United States*, 2 F.2d 975 (5th Cir. 1924).

449. It should be made before pleading in bar. *United States v. Gale*, 109 U.S. 65, 70 (1883); *Howard v. United States*, 26 F.2d 551, 552 (D.C. Cir. 1928).

450. *Wolfson v. United States*, 101 Fed. 430, 432 (5th Cir. 1900).

451. *United States v. Haskell*, 169 Fed. 449, 454 (E.D. Okla. 1909).

452. *United States v. Lewis*, 192 Fed. 633, 637 (E.D. Mo. 1911).

of the indictment, comes too late.⁴⁵³ Where defendant was arrested in March, indicted on June 2, and moved to quash on June 3, the court deemed the motion to quash timely, though with some reluctance.⁴⁵⁴ A motion to quash made on the day of the trial, stating that the indictment fails to set forth an offense, comes too late.⁴⁵⁵ One case concluded that a motion to quash "should be made at or before the beginning of the trial."⁴⁵⁶ After a defendant has pleaded not guilty and has moved for a bill of particulars, the case being set for trial, he may not move to quash on grounds known to him at the start.⁴⁵⁷ Where the grand jury was impaneled on March 12, and the defendant made bond on April 3 and was indicted on April 20, it was too late on May 14 to object to an increase in the size of the grand jury.⁴⁵⁸ A motion to quash on the morning of the trial, based on the ground of illegal evidence before the grand jury, is too late.⁴⁵⁹ The court will overrule an unsupported motion to quash because of incompetent evidence before the grand jury made at the close of the Government's testimony.⁴⁶⁰ A motion to quash an indictment on the ground that some of the evidence submitted to the grand jury had been obtained by an unlawful search comes too late when made after the jury had been impaneled and several witnesses for the Government had been examined.⁴⁶¹

N. *Trial by Court or by Jury*

When there is a hearing on the issue raised by the objections and defenses, who tries it, the court or jury? This is a matter of considerable uncertainty for at least two reasons. In the first place, the decisions on the problem are usually very brief and not well reasoned. In the second place, it is usually not clear whether the court was laying down a rule of constitutional law as to the right to trial by jury or merely a rule of practice. The cases discussed may be of value under the Federal Rules of Criminal Procedure when the issue of trial by jury is raised.

Determination of a plea to the jurisdiction was left to the jury when its corrections depended on the alleged existence of certain facts not admitted.⁴⁶² In a subsequent case separate trial of the issue of territorial

453. *Breese v. United States*, 226 U.S. 1, 7, 11 (1912).

454. *Christopoulo v. United States*, 230 Fed. 788, 790 (4th Cir. 1916).

455. *Benson v. United States*, 240 Fed. 413 (5th Cir. 1917).

456. *Cooper v. United States*, 247 Fed. 45, 47 (4th Cir. 1917).

457. *United States v. Gouled*, 253 Fed. 242, 243 (S.D.N.Y. 1918).

458. *Cook v. United States*, 4 F.2d 517, 518 (5th Cir. 1925).

459. *Colbeck v. United States*, 10 F.2d 401, 402 (7th Cir. 1925).

460. *Murdick v. United States*, 15 F.2d 965, 967 (8th Cir. 1926).

461. *Cody v. United States*, 73 F.2d 180, 184 (9th Cir. 1934).

462. *Wright v. United States*, 158 U.S. 232, 238 (1895). A special verdict was taken as to a crime committed outside the jurisdiction of any state in *United States v. Jackalow*, 66 U.S. (1 Black) 484 (1861).

jurisdiction was denied, the court ordering it "to be tried by the jury along with the merits."⁴⁶³ The defendant had requested a separate trial.

Decision was rendered by the court on a plea in abatement interposed on the ground of illegal drawing of the grand jury,⁴⁶⁴ and on the ground that there was no competent evidence before the grand jury returning the indictment.⁴⁶⁵ In one case the method of determination of a plea in abatement raising illegal proceedings of the grand jury was not finally determined.⁴⁶⁶ Yet, the court of appeals stated: "It seems to be conceded that this trial should be before a jury."⁴⁶⁷

In one case the trial court overruled a plea in abatement as a matter of law. Later, there was a submission at the request of the United States attorney, "presumably out of abundant caution," to the trial jury of the question of fact involved in the identity of a grand juror with the person naturalized. On appeal, this was upheld.⁴⁶⁸ There was no need for the issue to be submitted to a jury other than the trial jury. If a demand had been submitted to the trial court for another jury, "doubtless" the trial court would have granted such demand. Since it had not been, the court of appeals would not review the matter. The evidence for the Government was full and complete. The defendant offered no evidence to the contrary. In another case the court denied a preliminary trial on a plea in abatement averring misnomer, "and ordered that the plea be tried with the merits."⁴⁶⁹ The court stated: "The issues of fact as to the meaning of the words 'Luigi' and 'Louis,' as well as the existence of misnomers in the indictment, were left to the jury for decision. We think the action was more favorable to the appellant than the record warranted."⁴⁷⁰ In a subsequent case a court of appeals held that on a plea in abatement for misnomer the "question thus raised was tried by a jury and if the finding was in favor of the defendant, the indictment was abated."⁴⁷¹

Decision was rendered by the court on a plea in abatement raising

463. *Price v. United States*, 68 F.2d 133 (5th Cir. 1934). See also *United States v. Holmes*, 18 U.S. (5 Wheat.) 412 (1820).

464. *Agnew v. United States*, 165 U.S. 36, 41 (1897); *Morris v. United States*, 128 F.2d 912, 914 (5th Cir. 1942). In *United States v. Upham*, 43 Fed. 63 (C.C.S.D. Ala. 1859), the jury apparently passed on the plea.

465. *United States v. Goldman*, 28 F.2d 424 (D. Conn. 1928); *United States v. Jones*, 16 F. Supp. 135 (S.D.N.Y. 1936).

466. *Evaporated Milk Ass'n v. Roche*, 130 F.2d 843, 846 (9th Cir. 1942), rev'd, 319 U.S. 21 (1943).

467. *Evaporated Milk Ass'n v. Roche*, 130 F.2d 843, 846 (9th Cir. 1942).

468. *Jones v. United States*, 179 Fed. 584, 592-93 (9th Cir. 1910).

469. *Capriola v. United States*, 61 F.2d 5, 6 (7th Cir. 1932), cert. denied, 287 U.S. 671 (1933).

470. 61 F.2d at 12.

471. *United States v. Fawcett*, 115 F.2d 764, 767 (3d Cir. 1940).

the defense of immunity,⁴⁷² and "on admitted facts contained" in the "sworn plea" of the defendant.⁴⁷³ A jury decided a self incrimination point raised in a plea of abatement,⁴⁷⁴ while the Supreme Court decided a plea in abatement presenting the defense of the statute of limitations, treating the plea as being in fact a plea in bar.⁴⁷⁵

Decision was rendered by the court on a motion to quash.⁴⁷⁶ The court stated broadly that where, from the inspection of an indictment, it becomes clear to the court that, if a jury should find the defendant guilty under the evidence on which it is conceded the Government would be compelled to rely, a new trial would necessarily be granted, then the indictment should be quashed. This power is linked to the power to direct a verdict for the defendant. Likewise, decision was rendered by the court on a motion to quash the indictment because no women were on the grand jury panel.⁴⁷⁷

Decision was rendered by the court upon a plea in bar presenting expiration of the statute of limitations after a jury trial of the issue had been waived.⁴⁷⁸ By agreement of the parties, the judge tried the issues of fact and law involved in the plea.

The determination of a former jeopardy plea was made by directed verdict at the time of the trial of the general issue and before a verdict on the plea of not guilty.⁴⁷⁹ The court directed the jury to find in favor of the Government. Of course, there could be no directed verdict of guilt.⁴⁸⁰ Since there have been many directed verdicts in these preliminary trials, it is doubtful whether there is any constitutional right to such a trial by jury. The court's determination of the question of law raised by a plea of former acquittal was held to be final.⁴⁸¹ There

472. *United States v. Thomas*, 49 F. Supp. 547 (W.D. Ky. 1943).

473. *United States v. Shaw*, 33 F. Supp. 531, 532 (S.D. Cal. 1940).

474. *Mulloney v. United States*, 79 F.2d 566, 574 (1st Cir. 1935), affirming *United States v. Mulloney*, 8 F. Supp. 674 (D. Mass. 1934), cert. denied, 296 U.S. 658 (1936).

475. *United States v. Barber*, 219 U.S. 72, 73, 78 (1910). It was also said in *United States v. Goldman*, 277 U.S. 229, 236 (1928), that the plea in *United States v. Barber*, supra, was in reality a plea in bar.

476. *United States v. Kuhl*, 85 Fed. 624, 625 (S.D. Iowa 1898).

477. *United States v. Roemig*, 52 F. Supp. 857, 858 (N.D. Iowa 1943).

478. *Brouse v. United States*, 68 F.2d 294 (1st Cir. 1933). The court ruled against the defendant.

479. *United States v. Ball*, 163 U.S. 662, 665 (1896); *Thompson v. United States*, 155 U.S. 271, 273 (1894).

480. *Sparf v. United States*, 156 U.S. 51, 105 (1895). See Orfield, *Motion For Acquittal in Federal Criminal Procedure: Successor to Directed Verdict*, 28 Temp. L. Q. 400, 406 (1955).

481. *United States v. Peters*, 87 Fed. 984, 986 (C.C.D. Wash. 1898), aff'd, 94 Fed. 127, 135 (9th Cir. 1899), cert. denied, 176 U.S. 684 (1900).

were no questions of fact "to be disposed of by a jury."⁴⁸² The defendant waived his right, "if any he ever had," to other disposition of his plea, since he consented to go to trial. In a subsequent case, decision on a plea of former acquittal was made by the court, with no mention of waiver of jury.⁴⁸³ The decision was against the defendant. Similarly, determination was made by the court, after a waiver of jury trial, upon a plea in bar averring former jeopardy.⁴⁸⁴

In one case the Supreme Court raised but did not decide the question of whether the defendant was deprived of his constitutional right to trial by jury where the trial court directed verdict against him upon his plea of immunity.⁴⁸⁵ Subsequently in this case, both the lower court⁴⁸⁶ and the Supreme Court⁴⁸⁷ held that the determination by the jury on a directed verdict was valid. Neither side asked that the case be submitted to a jury. In a subsequent case the jury found against the claim of immunity under instructions of the court.⁴⁸⁸ A later case said the determination of a plea of immunity was for the court.⁴⁸⁹ As late as 1937, one court stated broadly: "Numerous cases are called to the attention of the court in which issues raised by special plea in bar were tried before a jury. . . . There can be no question of a defendant's right in that respect upon a proper showing of sufficient issues. That the defendants herein do not make."⁴⁹⁰ The court concluded that if tenable issues were raised by a plea in bar, they could be tried at the trial of the general issue.

As to the determination of an averment of present insanity, one court stated: "If present insanity does not appear until the trial has begun, the court may submit the objection to the jury along with the principal issue, requiring a special verdict as to the competency of the defendant to understand the proceeding and intelligently defend himself. But, if the jury find insanity to exist, a verdict upon the issue of not guilty should be quashed."⁴⁹¹ Another court stated: "The court may submit

482. *Peters v. United States*, 94 Fed. 127, 135 (9th Cir. 1899).

483. *United States v. J. L. Hopkins & Co.*, 228 Fed. 173, 176 (S.D.N.Y. 1912).

484. *United States v. Weiss*, 293 Fed. 992, 994 (N.D. Ill. 1923).

485. *Heike v. United States*, 217 U.S. 423, 428 (1910).

486. *United States v. Heike*, 175 Fed. 852, 856, 860 (C.C.S.D.N.Y. 1910).

487. *Heike v. United States*, 227 U.S. 131, 140 (1913).

488. *Sherwin v. United States*, 268 U.S. 369, 370 (1925). See also *United States v. Greater N.Y. Live Poultry Chamber of Commerce*, 34 F.2d 967 (S.D.N.Y. 1929).

489. *United States v. Goldman*, 28 F.2d 424 (D. Conn. 1928). See also *United States v. Eisele*, 52 F. Supp. 105 (D.D.C. 1943); *United States v. Greater N.Y. Live Poultry Chamber of Commerce*, 33 F.2d 1005 (S.D.N.Y. 1929).

490. *United States v. Noble*, 19 F. Supp. 527, 530 (W.D.N.Y. 1937).

491. *Youtsey v. United States*, 97 Fed. 937, 941 (6th Cir. 1899). See also *United States v. Fore*, 38 F. Supp. 140, 141 (S.D. Cal. 1941).

the issue of present insanity . . . to a jury impaneled for that purpose, or may determine the issue itself."⁴⁹² In another case the court stated: "The defendant is not entitled to a jury trial of his mental condition."⁴⁹³ A subsequent case employed a jury.⁴⁹⁴

O. *Pleading Over*

Prior to the federal rules, if the defendant's pleading were overruled, he was permitted to plead over. It was so held with respect to a plea to the jurisdiction,⁴⁹⁵ plea in abatement,⁴⁹⁶ motion to quash,⁴⁹⁷ and demurrer.⁴⁹⁸ There were similar holdings when a special plea of immunity was overruled,⁴⁹⁹ and when four pleas in bar were overruled.⁵⁰⁰

P. *Right to Counsel*

There has been virtually no discussion in the cases of a defendant's right to counsel with respect to his pleadings other than not guilty or guilty. In one case the Supreme Court quoted Chitty⁵⁰¹ as saying:

It is perfectly clear that all persons serving upon the grand jury must be good and lawful men. . . . And if a man who lies under any of these disqualifications be returned, he may be challenged by the prisoner before the bill is presented; or, if it be discovered after the finding, the defendant may plead it in avoidance, and answer over to the felony; for which purpose he may be allowed the assistance of counsel on producing in court the record of the outlawry, attainder, or conviction, on which the incompetence of the juryman rests.⁵⁰²

In many cases defenses and objections were raised before arraignment. For example, in one case the defendant filed a plea in abatement, a

492. *Whitney v. Zerbst*, 62 F.2d 970, 972 (10th Cir. 1933). See *United States v. Boylen*, 41 F. Supp. 724 (D. Ore. 1941).

493. *United States v. Harriman*, 4 F. Supp. 186, 187 (S.D.N.Y. 1933).

494. *Owens v. United States*, 85 F.2d 270, 271 (D.C. Cir. 1936).

495. *United States v. Lawrence*, 26 Fed. Cas. 879, 884 (No. 15573) (C.C.S.D.N.Y. 1876); *United States v. Caldwell*, 25 Fed. Cas. 237, 238 (No. 14707) (C.C.S.D.N.Y. 1871).

496. *United States v. Gale*, 109 U.S. 65, 67 (1883); *United States v. Williams*, 28 Fed. Cas. 666, 670 (No. 16716) (C.C.D. Minn. 1871); *United States v. Smith*, 27 Fed. Cas. 1186, 1191 (No. 16341a) (C.C.D.N.Y. 1806).

497. *United States v. Smith*, 27 Fed. Cas. 1186, 1191 (No. 16341a) (C.C.D.N.Y. 1806).

498. *Mulloney v. United States*, 79 F.2d 566, 573 (1st Cir. 1935); *Hillegass v. United States*, 183 Fed. 199, 201 (3d Cir. 1910); *United States v. Plumer*, 27 Fed. Cas. 561, 572 (No. 16056) (C.C.D. Mass. 1859); *United States v. Watkins*, 28 Fed. Cas. 419, 470, 474 (No. 16649) (C.C.D.D.C. 1829).

499. *Heike v. United States*, 217 U.S. 423, 427 (1910).

500. *United States v. Rockefeller*, 226 Fed. 328 (S.D.N.Y. 1915).

501. *I Chitty, Criminal Law* 307 (2d ed. 1826).

502. *United States v. Gale*, 109 U.S. 65, 67 (1883). See also Orfield, *Criminal Procedure From Arrest to Appeal* 267-68 n.6 (1947). At common law there was no right to retain counsel for felonies, but only for treason and misdemeanors. Beaney, *The Right to Counsel in American Courts* 8-12 (1953).

demurrer, a plea to the jurisdiction, and then was arraigned. Finally, he pleaded not guilty.⁵⁰³ In such a case, if the right to counsel accrued only at arraignment, the defendant would have had to proceed without counsel, unless he could retain counsel at his own expense. On the other hand, when he pleaded not guilty, withdrew his plea, and filed various objections and defenses,⁵⁰⁴ arguably he would have the right to counsel since he had been arraigned. If the objection is taken at the arraignment,⁵⁰⁵ there should likewise be a right to counsel.

It has been shown that the right to counsel at Government expense, at arraignment⁵⁰⁶ and with respect to pleas⁵⁰⁷ of not guilty, *nolo contendere*, and guilty, was extremely limited. As a matter of logic, it must have followed that the right to counsel as to defenses and objections raised by the defendant must have been similarly limited. The utter absence of judicial decisions indicating any right to counsel is highly significant. But it is easy to exaggerate this deficiency in criminal procedure. A study made fifteen years ago of 34,240 federal criminal cases, revealed that pleadings were filed by defendants in only 1,857 cases. Of the 2,695 pleadings filed, only 403 were motions to quash. On 1,530 of these pleadings, the ruling was in favor of the Government, and on 827, the ruling was in favor of the defendant.⁵⁰⁸ On the other hand, it should be pointed out that the average defendant doubtless has a far better understanding of what he is doing when he pleads not guilty, *nolo contendere*, or guilty, than when he moves to dismiss.

III. RULE 12 AS INTERPRETED IN THE DECISIONS

A. *Abolition of Common Law Objections and Defenses*

Following the adoption of rule 12(a), a motion to quash⁵⁰⁹ and a plea in abatement⁵¹⁰ will be treated as a motion to dismiss. Although motions to quash were abolished, one court of appeals made reference

503. *Crowley v. United States*, 194 U.S. 461, 465 (1904).

504. See, e.g., *United States v. Perlman*, 247 Fed. 153, 159 (S.D.N.Y. 1916).

505. In *United States v. Rintelen*, 235 Fed. 787, 789 (S.D.N.Y. 1916), it was said that a plea in abatement should usually be made at arraignment.

506. Orfield, *Arraignment in Federal Criminal Procedure*, 20 La. L. Rev. 1, 20, 23 (1959).

507. Orfield, *Pleas in Federal Criminal Procedure*, 35 Notre Dame Law. 1, 21, 39 (1959).

508. Orfield, *op. cit. supra* note 502, at 283.

509. *Universal Milk Bottle Serv. v. United States*, 183 F.2d 959, 962 (6th Cir. 1951); *United States v. Holmes*, 168 F.2d 838, 890 n.6 (3d Cir. 1948); *United States v. Davis*, 148 Supp. 478 (D.N.D. 1957); *United States v. Smyth*, 104 F. Supp. 279, 281 (N.D. Cal. 1952); *United States v. Hearne*, 6 F.R.D. 294 (E.D. Wis. 1946); *United States v. McNeil*, 91 A.2d 849, 850 (D.C. Mun. Ct. of App. 1952).

510. *United States v. Holmes*, 168 F.2d 838, 890 n.6 (3d Cir. 1948); *United States v. Janitz*, 161 F.2d 19, 21 n.6 (3d Cir. 1947); *United States v. Smyth*, 104 F. Supp. 279, 281 (N.D. Cal. 1952).

to the former doctrine that there would be no review on appeal of a denial of a motion to quash.⁵¹¹ A special plea in bar, such as the statute of limitations, is now covered by the motion to dismiss.⁵¹² A demurrer will be treated as a motion to dismiss.⁵¹³ A number of cases have continued to use the old phraseology.⁵¹⁴ One court has stated that "the substance of common law pleading in criminal prosecutions has not been abolished. Pleas, demurrers and motions to quash the indictment, are abolished . . . but the same defenses may be raised before trial by motions as provided in the rules of criminal procedure."⁵¹⁵

It should be noted that rule 12(a) does not speak only of defenses which could have been raised by demurrer.⁵¹⁶ The Court of Appeals of the Second Circuit had improperly spoken of the rule as referring only to demurrers.⁵¹⁷ Rule 12(a) seems to command only that all defenses which are raised before trial shall be raised by motion to dismiss.⁵¹⁸ The function of limiting the scope of defenses which may be raised before trial is performed by rule 12(b)(1) and not by rule 12(a).

The jurisdiction of the court of appeals under section 3731 of Title 18,⁵¹⁹ concerning appeals by the Government, is in line with rule 12, and no increase in jurisdiction was intended.⁵²⁰ This was also true of the 1942 statute; rule 12 did not increase the scope of appeal.⁵²¹

511. *United States v. Holmes*, 168 F.2d 888, 890 (3d Cir. 1948). Nevertheless, the court did review the denial and upheld it.

512. *United States v. Zisblatt*, 172 F.2d 740, 742 (2d Cir. 1949); *United States v. Haramic*, 125 F. Supp. 128, 129 (W.D. Pa. 1959).

513. *United States v. Jones*, 207 F.2d 785, 787 (5th Cir. 1953); *Universal Milk Bottle Serv. v. United States*, 188 F.2d 959, 962 (6th Cir. 1951); *United States v. Haramic*, 125 F. Supp. 128, 129 (W.D. Pa. 1954); *United States v. Selph*, 82 F. Supp. 56, 57 (S.D. Cal. 1949).

514. *United States v. Nunan*, 236 F.2d 576, 592 (2d Cir. 1956); *United States v. Tornabene*, 222 F.2d 875 (3d Cir. 1955); *Harris v. United States*, 190 F.2d 503, 505 (10th Cir. 1951).

515. *United States v. Williams*, 203 F.2d 572, 573 (5th Cir. 1953). See also *United States v. Mersky*, 361 U.S. 431, 453 (1960) (Stewart, J., dissenting); *United States v. Brodson*, 234 F.2d 97, 100 (7th Cir. 1956).

516. *United States v. J. R. Watkins Co.*, 16 F.R.D. 229, 232 (D. Minn. 1954).

517. *United States v. Parrino*, 203 F.2d 284, 287 (2d Cir. 1953), cert. denied, 348 U.S. 841 (1954).

518. *United States v. J. R. Watkins Co.*, 16 F.R.D. 229, 232 (D. Minn. 1954).

519. 18 U.S.C. § 3731 (1958).

520. *United States v. Apex Distrib. Co.*, 270 F.2d 747, 751, 754 (9th Cir. 1959). Compare *United States v. Mersky*, 361 U.S. 431, 453 (1960); *United States v. Heath*, 260 F.2d 623, 627 (9th Cir. 1958); *United States v. Nardolillo*, 252 F.2d 755, 757 (1st Cir. 1958); *United States v. Pack*, 247 F.2d 168, 170 (3d Cir. 1957).

521. *United States v. Janitz*, 161 F.2d 19, 21 (3d Cir. 1947). Compare *United States v. Apex Distrib. Co.*, 270 F.2d 747, 752, 755 (9th Cir. 1959).

B. *Overlapping of Rules 12 and 6*

It should be noted that there may be a certain overlapping of rule 12 with rule 6(b).⁵²² Under rule 6(b) a motion to dismiss lies for irregularity in the summoning or array of grand jurors, or for objections to individual jurors.⁵²³ A motion under rule 12(b) has been made to raise the issue of self incrimination of a witness before the grand jury.⁵²⁴ A motion to dismiss because of illegal evidence before the grand jury was treated by one court as involving rule 12(b).⁵²⁵ Objection to the array or panel of the grand jury has been treated as coming under both rules 12 and 6(b).⁵²⁶

C. *Overlapping of Rules 12 and 14*

One court of appeals appears to have linked a motion under rule 12(b) with a motion under rule 14 on relief from prejudicial joinder of defendants.⁵²⁷

D. *Overlapping of Rules 12 and 48*

There is also a certain overlapping of rule 12 with rule 48(b) on dismissal for delay. A prosecution has been dismissed for delay under both rules.⁵²⁸

E. *Defenses and Objections Which May be Raised*

On a motion to dismiss counts of an information, rule 12(b) restricts the motion to an objection which is capable of determination without

522. See *Soper v. United States*, 220 F.2d 158, 159 (9th Cir. 1955); *United States v. Gilboy*, 160 F. Supp. 442 (M.D. Pa. 1958); *United States v. Long*, 118 F. Supp. 357 (D.P.R. 1954); *United States v. Smyth*, 104 F. Supp. 279, 281 (N.D. Cal. 1952).

523. *United States v. Agnew*, 6 F.R.D. 566, 567 (E.D. Pa. 1947). See Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 419-23 (1959).

524. *United States v. Miller*, 80 F. Supp. 979, 981 (E.D. Pa. 1948). See also *United States v. Gilboy*, 160 F. Supp. 442, 460 (M.D. Pa. 1958).

525. *United States v. Fujimoto*, 102 F. Supp. 890, 896 (D. Hawaii 1952). See also *United States v. Wheeler*, 256 F.2d 745, 749 (3d Cir. 1958); *United States v. Gilboy*, 160 F. Supp. 442, 459 (M.D. Pa. 1958).

526. *Miranda v. United States*, 255 F.2d 9, 16 (1st Cir. 1958). See also *Scales v. United States*, 260 F.2d 21, 44 (4th Cir.), cert. granted, 358 U.S. 917 (1958); *Paliafico v. United States*, 237 F.2d 97, 110 (6th Cir. 1956), cert. denied, 352 U.S. 1025 (1957); *United States v. Klock*, 210 F.2d 217, 220 (2d Cir. 1954); *York v. United States*, 167 F.2d 847, 848 (5th Cir. 1948); *Wright v. United States*, 165 F.2d 405, 407 (9th Cir. 1948).

527. *United States v. Soto*, 256 F.2d 729, 735 (7th Cir. 1958). The court erroneously referred to rule 12(g)(2) instead of rule 12(b)(2). The former is nonexistent. See, as to misjoinder of offenses, *United States v. Guterma*, 179 F. Supp. 420 (E.D.N.Y. 1959).

528. *Petition of Provo*, 17 F.R.D. 183, 203 (D. Md. 1955). See also *United States v. Apex Distrib. Co.*, 270 F.2d 747, 755 (9th Cir. 1959); *United States v. Heath*, 260 F.2d 623, 632 (9th Cir. 1958); *United States v. Wheeler*, 256 F.2d 745, 749 (3d Cir. 1958); *United States v. Barnes*, 175 F. Supp. 60, 64 (S.D. Cal. 1959); *United States v. Patricia*, 21 F.R.D. 363, 364 (S.D.N.Y. 1958).

the trial of the general issues.⁵²⁹ The court will not consider matters which might be received as evidence upon trial. The court will not consider the motives for including the counts, such as an alleged threat by an assistant United States attorney that if the defendant did not plead guilty to certain counts, then the present counts would be added.

Since the general issue may not be determined on the motion, the allegations of an indictment or information must be taken as true on a motion to dismiss for failure to state an offense.⁵³⁰ In construing an indictment on demurrer, the courts cannot consider extraneous matter. It is a "speaking demurrer" to contend that "from the face of the indictment, plus facts of which the courts may take judicial notice," no offense is stated.⁵³¹ While rule 47 permits a motion to be supported by affidavit, there was no intention to allow speaking motions nor summary judgments as in the Federal Rules of Civil Procedure.⁵³² In one case it was held that when the court, in deciding to dismiss, did not consider matter in the appendices attached to the motion and denied certain allegations, the question whether to grant the Government's motion to strike the appendices had become moot.⁵³³

Where on an indictment for perjury the "false statements charged are not even probably material, the indictment may be dismissed without putting defendant to the mere ceremony of trial."⁵³⁴ Where in a prosecution under the Sherman Act,⁵³⁵ a motion to take testimony or to ask questions was such that disposal of it before trial would require double trial of a large part of the case, the motion should be denied.⁵³⁶ Whether a letter to a woman, referring to reports of her immoral conduct and stating that the writer would "deal with you and your cohorts,"

529. *United States v. Hearne*, 6 F.R.D. 294, 295 (E.D. Wis. 1946).

530. *United States v. Lattimore*, 215 F.2d 847, 851, 857 (D.C. Cir. 1954); *United States v. Jones*, 207 F.2d 785, 787 (5th Cir. 1953); *United States v. Chrysler Corp.*, 180 F.2d 557, 558 (9th Cir. 1950); *Local 36, Int'l Fishermen v. United States*, 177 F.2d 320, 326 (9th Cir. 1949), cert. denied, 339 U.S. 947 (1950); *United States v. Gilboy*, 160 F. Supp. 442, 455 (M.D. Pa. 1958); *United States v. Pennell*, 144 F. Supp. 320, 322 (N.D. Cal. 1956); *United States v. Silverman*, 129 F. Supp. 496, 501 (D. Conn. 1955); *United States v. J. R. Watkins Co.*, 16 F.R.D. 229, 234 (D. Minn. 1954); *United States v. Universal Milk Bottle Serv.*, 85 F. Supp. 622, 625 (S.D. Ohio 1949).

531. *Local 36, Int'l Fishermen v. United States*, 177 F.2d 320, 326 (9th Cir. 1949). See also *United States v. Barnes*, 175 F. Supp. 60, 61 (S.D. Cal. 1959), where a speaking motion was allowed.

532. *United States v. J. R. Watkins Co.*, 16 F.R.D. 229, 234 (D. Minn. 1954).

533. *United States v. Lattimore*, 127 F. Supp. 405, 407 n.4 (D.D.C. 1955).

534. *United States v. Laut*, 17 F.R.D. 31, 36 (S.D.N.Y. 1955).

535. 28 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

536. *United States v. Maryland State Licensed Beverage Ass'n*, 138 F. Supp. 685, 700 (D. Md. 1956), rev'd on other grounds, 240 F.2d 420 (4th Cir. 1957).

constituted a threat was a question of fact, not to be determined on a motion to dismiss.⁵³⁷

The annotation of the Advisory Committee to rule 12(b)(1) and (2) points out that there are some "objections and defenses, which the defendant at his option may raise by motion before trial." This includes "such matters as former jeopardy, former conviction, former acquittal, statute of limitations, immunity, lack of jurisdiction, failure of indictment or information to state an offense, etc." Cases on this point have usually involved the statute of limitations.

The bar of the statute of limitations is a matter of defense.⁵³⁸ It cannot be raised by demurrer, or by a motion for judgment of acquittal at the end of the Government's case.⁵³⁹ In one case the defendant moved to dismiss before trial, at the conclusion of the Government's case, and at the close of all the evidence.⁵⁴⁰ The trial court dismissed after a verdict of guilty and the Government appealed. Where in an indictment for conspiracy the defense was withdrawal by some defendants long enough for the statute of limitations to operate, the defendants must show this at the trial.⁵⁴¹

The defense of the statute of limitations "should be presented to and passed upon by the trial court."⁵⁴² It may be raised by motion to dismiss before trial.⁵⁴³ It may not be raised for the first time on a motion to vacate sentence under section 2255 of Title 28.⁵⁴⁴

In a case involving a motion to vacate judgment of conviction, the Court of Appeals for the Second Circuit held that a defendant may avail himself of the statute of limitations on a plea of not guilty, and that the trial court should not dismiss an indictment because it appears on its face that the statute of limitations has run.⁵⁴⁵ In the next year, an able opinion by Judge Nordbye held that under rule 12(b)(1) the de-

537. *United States v. Pennell*, 144 F. Supp. 317, 319 (N.D. Cal. 1956).

538. *United States v. Franklin*, 188 F.2d 182, 186 (7th Cir. 1951); *United States v. Johnson*, 76 F. Supp. 542 (M.D. Pa. 1947).

539. *United States v. Johnson*, 76 F. Supp. 542, 544 (M.D. Pa. 1947).

540. *United States v. Zisblatt Furniture Co.*, 78 F. Supp. 9, 10 (S.D.N.Y. 1948). See the case on appeal, 172 F.2d 740, 741 (2d Cir. 1949).

541. *United States v. Metropolitan Leather & Findings Ass'n*, 82 F. Supp. 449, 453 (S.D.N.Y. 1949).

542. *United States v. Franklin*, 188 F.2d 182, 186 (7th Cir. 1951).

543. *United States v. Gelb*, 175 F. Supp. 267, 270 (S.D.N.Y.), *aff'd mem.*, 269 F.2d 675 (2d Cir.), *cert. denied*, 361 U.S. 822 (1959); *United States v. Brandt*, 139 F. Supp. 367, 372 (N.D. Ohio 1955); *United States v. Fujimoto*, 102 F. Supp. 390, 397 (D. Hawaii 1952).

544. 28 U.S.C. § 2255 (1958). See *United States v. Taylor*, 207 F.2d 437, 438 (2d Cir. 1953). Conviction was on a plea of guilty. See also *Askins v. United States*, 251 F.2d 909, 913 (D.C. Cir. 1958); *United States v. Gelb*, 175 F. Supp. 267, 270 (S.D.N.Y. 1959).

545. *United States v. Parrino*, 203 F.2d 284, 285 (2d Cir. 1953) (L. Hand, J.).

fendant may plead the running of the statute either before or at the trial of the general issue.⁵⁴⁶ The Government objected to a motion before trial because this would contradict the allegations of the indictment. The decision of the Second Circuit involved different facts. There the defendant had pleaded guilty and had moved to vacate the judgment. In the instant case, the defendant made his motion before trial. Rule 12(a) does not speak only of offenses which formerly could have been raised by demurrer. A district court in Pennsylvania took the same view.⁵⁴⁷ It is in the discretion of the trial court whether the issue be determined before or at trial. The court in the instant case ordered a hearing before trial, and pointed to the hardships of compelling a trial if the statute of limitations has run. In a case involving a continuing conspiracy under the Smith Act⁵⁴⁸ the court stated that "that is something to be dealt with at the trial and not on a preliminary motion such as this."⁵⁴⁹ In a perjury prosecution the court granted a motion to dismiss.⁵⁵⁰ In 1958 the Court of Appeals of the District of Columbia stated that the defense of the statute of limitations "must be raised at the trial or before trial on motion."⁵⁵¹ Where the information charged on its face the commission of one offense which could well have been consummated within the limitation period, a motion to dismiss would be denied.⁵⁵²

Motions to dismiss have been made on the ground of double jeopardy and *res judicata*.⁵⁵³ A ruling against a motion on the ground of *res judicata* does not mean that questions relating to the doctrine of *res judicata* may not arise during the course of the trial.⁵⁵⁴

Failure of the indictment or information to charge an offense may be raised by motion to dismiss.⁵⁵⁵ But the motion may not be used to challenge the truth of the allegations in the indictment.⁵⁵⁶ The latter raises issues of fact which should be tried by the jury. That is to say,

546. *United States v. J. R. Watkins Co.*, 16 F.R.D. 229 (D. Minn. 1954).

547. *United States v. Haramic*, 125 F. Supp. 128, 129 (W.D. Pa. 1954).

548. 18 U.S.C. § 2385 (1958).

549. *United States v. Silverman*, 129 F. Supp. 496, 501 (D. Conn. 1955).

550. *United States v. Laut*, 17 F.R.D. 31, 36 (S.D.N.Y. 1955).

551. *Askins v. United States*, 251 F.2d 909, 913 (D.C. Cir. 1958).

552. *United States v. Dierker*, 164 F. Supp. 304, 305 (W.D. Pa. 1958).

553. *Sealfon v. United States*, 332 U.S. 575, 578 (1948), reversing 161 F.2d 481 (3d Cir. 1947); *United States v. Perrone*, 161 F. Supp. 252, 254, 257 (S.D.N.Y. 1958).

554. *United States v. Perrone*, 161 F. Supp. 252, 261 (S.D.N.Y. 1958).

555. *United States v. Debrow*, 346 U.S. 374 (1953); *Universal Milk Bottle Serv. v. United States*, 188 F.2d 959 (6th Cir. 1951); *United States v. MacKenzie*, 170 F. Supp. 797 (D. Me. 1959); *United States v. Siegel*, 152 F. Supp. 370, 372 (S.D.N.Y. 1957), *aff'd*, 263 F.2d 530 (2d Cir.), *cert. denied*, 359 U.S. 1012 (1959); *United States v. Miller*, 17 F.R.D. 486 (D. Vt. 1955); *United States v. Schneiderman*, 102 F. Supp. 87, 97 (S.D. Cal. 1951).

556. *Universal Milk Bottle Serv. v. United States*, 188 F.2d 959, 962 (6th Cir. 1951).

it raises the general issue. The pleas of not guilty and *nolo contendere*, in response to allegations of the indictment essential to prove the offense charged, require a trial of the general issues. The motion cannot take the place of such pleas. A motion to dismiss lies where the indictment fails to charge an essential element of the crime such as the fact that the defendant acted knowingly.⁵⁵⁷

F. *Defenses and Objections Which Must be Raised*

A motion to dismiss on the ground of admission of incompetent or hearsay testimony before the grand jury is inadequate unless it affirmatively appears in the motion that no competent evidence of the commission of the offense charged was presented to the grand jury, or unless all the evidence was unlawfully procured in violation of substantial rights of the defendant, so as to subject the evidence to exclusion if offered against him.⁵⁵⁸

Repugnancy is not necessarily a ground for a motion to dismiss, for example, where the indictment is in the alternative with the intention of proving one of the counts therein.⁵⁵⁹ However, a motion to dismiss may be made on the ground that the indictment is too vague.⁵⁶⁰

A motion to dismiss because of use of aliases in the indictment in referring to the defendant will be denied where there was no indication that the aliases could not be proved at the trial.⁵⁶¹ Prosecution or trial in a district in which the offense was not committed may be attacked by a motion to dismiss.⁵⁶²

The crime of treason may be committed by an American citizen in a foreign country; hence, a motion to dismiss does not lie.⁵⁶³ A crime

557. *United States v. Deer*, 131 F. Supp. 319 (E.D. Wash. 1955); *United States v. Miller*, 17 F.R.D. 486 (D. Vt. 1955).

558. *United States v. Frontier Asthma Co.*, 69 F. Supp. 994, 998 (W.D.N.Y. 1947).

559. *United States v. Valenti*, 74 F. Supp. 718, 720 (W.D. Pa. 1947).

560. *United States v. Lattimore*, 215 F.2d 847, 849 (D.C. Cir. 1954); *United States v. Lattimore*, 127 F. Supp. 405 (D.D.C. 1955), *aff'd* by equally divided court, 232 F.2d 334 (D.C. Cir. 1955), 43 Geo. L. J. 111 (1954). See also *United States v. Greater Blouse, Skirt & Neckwear Contractors' Ass'n*, 177 F. Supp. 213, 218 (S.D.N.Y. 1959).

It has been said that the correct remedy where the indictment is too broad or general is not dismissal but a bill of particulars. *Cefalu v. United States*, 234 F.2d 522, 524 (10th Cir. 1956); *United States v. Bonanno*, 177 F. Supp. 105, 113-14 (S.D.N.Y. 1959).

561. *United States v. Valenti*, 74 F. Supp. 718, 720 (W.D. Pa. 1947).

562. *Reynolds v. United States*, 225 F.2d 123, 127 (5th Cir. 1955); *United States v. Patteson*, 132 F. Supp. 67 (D. Kan. 1955), *aff'd*, 229 F.2d 257 (10th Cir. 1956); *United States v. Long*, 118 F. Supp. 857, 859 (D.P.R. 1954); *United States v. Moody*, 102 F. Supp. 315, 318 (W.D. Mo. 1952); *United States v. Borow*, 101 F. Supp. 211 (D.N.J. 1951).

563. *United States v. Chandler*, 72 F. Supp. 230, 233 (D. Mass. 1947), *aff'd*, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

committed in Lake St. Clair is within maritime jurisdiction; hence, a motion to dismiss does not lie.⁵⁶⁴

A corporate defendant may move to dismiss on the ground that it has been dissolved,⁵⁶⁵ and such a motion lies where the Government fails to allow discovery under the rules of discovery.⁵⁶⁶

A novel ground for the motion to dismiss was employed in a net-worth tax prosecution. A trial court granted dismissal because the defendant was without funds to procure an expert accountant, his funds having been tied up through jeopardy assessments.⁵⁶⁷ The court of appeals, however, reversed.⁵⁶⁸

Motions attacking an indictment should be filed jointly and not piecemeal, so that they may be set for hearing, argued, and disposed of with the least delay.⁵⁶⁹

An attack on an indictment for insufficiency of evidence before the grand jury must be made by motion to dismiss before trial.⁵⁷⁰ Failure to make such motion constitutes a waiver of the defense. Objections that the United States attorney who appeared before the grand jury was prejudiced against the defendant and that a weapon other than that mentioned in the indictment was presented to the grand jury are waived if not presented by motion to dismiss.⁵⁷¹

The objection that the indictment was not returned in open court may be made by motion to dismiss. If there is no such motion and the defendant pleads guilty, there is a waiver of the objection.⁵⁷²

Duplicity,⁵⁷³ inconsistency, and repugnancy⁵⁷⁴ must be seasonably

564. *Hoopengartner v. United States*, 270 F.2d 465, 469 (6th Cir. 1959).

565. *Melrose Distillers, Inc. v. United States*, 359 U.S. 271 (1959); *United States v. San Diego Grocers Ass'n*, 177 F. Supp. 352 (S.D. Cal. 1959); *United States v. Maryland State Licensed Beverage Ass'n*, 138 F. Supp. 685, 706 (D. Md. 1956).

566. *United States v. Heath*, 260 F.2d 623, 625 (9th Cir. 1958), dismissing appeal from 147 F. Supp. 877 (D. Hawaii 1957); *United States v. Nardolillo*, 252 F.2d 755, 757 (1st Cir. 1958). But see *United States v. Apex Distrib. Co.*, 270 F.2d 747, 750 (9th Cir. 1959).

567. *United States v. Brodson*, 136 F. Supp. 158 (E.D. Wis. 1955), rev'd on other grounds, 241 F.2d 107 (7th Cir. 1957), 25 *Fordham L. Rev.* 339 (1956), 69 *Harv. L. Rev.* 1499 (1956), 44 *Ky. L. J.* 476 (1956). See Orfield, *Expert Witnesses in Federal Criminal Procedure*, 20 *F.R.D.* 317, 346-47 (1958).

568. *United States v. Brodson*, 234 F.2d 97 (7th Cir. 1956).

569. *United States v. Long*, 15 *F.R.D.* 25, 28 (D.P.R. 1953).

570. *United States v. Labate*, 270 F.2d 122, 123 (3d Cir.), cert. denied, 361 U.S. 900 (1959). The court stated that the "extent, if any, that Rule 12(b)(2) is modified by [*Costello v. United States*, 350 U.S. 359, 360 (1956)] is not before us." 270 F.2d at 124 n.2.

571. *Soper v. United States*, 220 F.2d 158, 159 (9th Cir.), cert. denied, 350 U.S. 828 (1955). The objection may not be first raised on appeal.

572. *Hornbrook v. United States*, 216 F.2d 112 (5th Cir. 1954).

573. *Korholz v. United States*, 269 F.2d 897, 901 (10th Cir. 1959), cert. denied, 361 U.S. 829 (1960); *Hanf v. United States*, 235 F.2d 710, 714 (8th Cir.), cert. denied, 352 U.S. 880 (1956); *United States v. Richie*, 222 F.2d 436, 437 (3d Cir. 1955); *Torres*

challenged by a motion to dismiss. Otherwise, they are waived. These objections may not be raised for the first time on appeal. Where an indictment contained four counts regarding the unlawful purchase or disposition of narcotics and the narcotics in each count were received at the same time and place, and handled in the same way by the defendant, the sentences on each count running concurrently, the defendant should have objected before or at the trial.⁵⁷⁶ If not, there was a waiver.⁵⁷⁶

Where there have been irregularities in a federal removal proceeding, the defendant may move to dismiss.⁵⁷⁷ Failure to do so is a waiver. Failure of the United States Commissioner to follow the Federal Rules of Criminal Procedure may be objected to by motion to dismiss, and a failure to move is a waiver.⁵⁷⁸ Technical error, if any, in arraignment in the wrong district of the state is waived by the defendant's going to trial with counsel and making no motion to dismiss.⁵⁷⁹ A failure to object before trial to joinder of offenses constitutes a waiver.⁵⁸⁰ Misjoinder of defendants cannot be objected to for the first time on appeal.⁵⁸¹

In general, if the indictment is sufficient to advise the defendant of the offense, enabling him to defend and protect himself against subsequent jeopardy, he waives if he does not move to dismiss. He may not raise the issue on appeal.⁵⁸² In general, it is sufficient if the indictment contains "the essential elements of the offense charged."⁵⁸³ The Supreme

Martinez v. United States, 220 F.2d 740, 743 (1st Cir. 1955); Witt v. United States, 196 F.2d 285, 286 (9th Cir. 1952); Beauchamp v. United States, 154 F.2d 413, 415 (6th Cir.), cert. denied, 329 U.S. 723 (1946); United States v. Raff, 161 F. Supp. 276, 281 (M.D. Pa. 1958); United States v. Gilboy, 160 F. Supp. 442, 457 (M.D. Pa. 1958); United States v. Kidwell, 14 F.R.D. 399, 400 (W.D. Mo. 1953); United States v. Smyth, 104 F. Supp. 279, 281 (N.D. Cal. 1952).

574. Harris v. United States, 190 F.2d 503, 505 (10th Cir. 1951).

575. Anderson v. United States, 189 F.2d 202, 204 (6th Cir. 1951).

576. United States v. Private Brands, Inc., 250 F.2d 554, 557 (2d Cir. 1957), cert. denied, 355 U.S. 957 (1958).

577. Hardy v. United States, 250 F.2d 580, 581 (8th Cir.), cert. denied, 357 U.S. 921 (1958).

578. United States v. Bistram, 153 F. Supp. 816, 818 (D.N.D. 1957), aff'd, 253 F.2d 610 (8th Cir. 1958).

579. United States v. Bradford, 122 F. Supp. 915, 918 (S.D.N.Y. 1954).

580. Smith v. United States, 180 F.2d 775 (D.C. Cir. 1950). But the court of appeals found the joinder permissible under rule 8(a).

581. Lelles v. United States, 241 F.2d 21, 23 (9th Cir.), cert. denied, 353 U.S. 974 (1957).

582. Finn v. United States, 256 F.2d 304, 306 (4th Cir. 1958); United States v. Miller, 246 F.2d 486, 488 (2d Cir. 1957); Hudson v. United States, 229 F.2d 36 (D.C. Cir. 1956); United States v. Butch, 164 F. Supp. 678, 681 (E.D. Pa. 1958); United States v. Starks, 6 F.R.D. 43 (S.D.N.Y. 1946).

583. United States v. Miller, 17 F.R.D. 486, 488 (D. Vt. 1955). See United States v. Debrow, 346 U.S. 374 (1953); Bennett v. United States, 252 F.2d 97, 98 (10th Cir. 1958).

Court has stated: "The sufficiency of the indictment is not a question of whether it could have been more definite and certain."⁵⁸⁴ Failure to charge the necessary mental element in a crime, such as *scienter*, is waived by failure to move to dismiss.⁵⁸⁵

The defendant may waive trial within the proper division of the district.⁵⁸⁶ When the defendant fails to make a timely motion for transfer to the proper division, there is a waiver.⁵⁸⁷ Request for a transfer from one division to another may operate as a waiver of venue.⁵⁸⁸ Venue in the division is a right conferred by statute and rule of court, and not a constitutional right. Since venue in the district is waivable, it follows that venue in the division is waivable.

According to some cases, venue for trial within the district may be waived. A defendant claimed that his violation of the Selective Service Act was committed solely in Oregon. He was tried and sentenced in the Western District of New York. Judge Jerome Frank stated:

We assume, *arguendo*, the correctness of this characterization of the indictment. On that basis, a timely objection pursuant to Article III, § 2 of the Constitution and to the Sixth Amendment, should have halted the trial. But a defendant, thus warned, by the face of the indictment, of the improper venue, waives the error when he goes to trial without interposing an objection, as defendant did here.⁵⁸⁹

The holding is a broad one as it seems to permit, where there is a waiver, both indictment and trial in a district other than that of the offense. The Court of Appeals of the Ninth Circuit held that although the indictment found in the Southern District of California failed to state that the crime was committed in the state or district, the defendant, by going to trial on the merits without raising any question as to venue, waived such defect.⁵⁹⁰ As a consequence, the defendant was tried in the Southern District of California for a crime possibly committed in Brooklyn, New

584. *United States v. Debrow*, 346 U.S. 374, 378 (1953). This case was followed in *United States v. Raff*, 161 F. Supp. 276, 281 (M.D. Pa. 1958).

585. *United States v. Williams*, 202 F.2d 712, 713 (5th Cir. 1953). The petition for rehearing was denied. 203 F.2d 572 (5th Cir. 1953).

586. *United States v. Bistram*, 153 F. Supp. 816, 818 (D.N.D. 1957), *aff'd*, 253 F.2d 610, 613 (8th Cir. 1958); *United States v. Bryson*, 16 F.R.D. 431, 435 (N.D. Cal. 1954); *United States v. Bink*, 74 F. Supp. 603, 607, 614 (D. Ore. 1947).

587. *Cagnina v. United States*, 223 F.2d 149, 154 (5th Cir. 1955), citing *Orfield*, *The Constitutionality of Federal Criminal Rule 20*, 34 Cornell L. Q. 129, 135 (1948).

588. *United States v. Bryson*, 16 F.R.D. 431, 434 (N.D. Cal. 1954).

589. *United States v. Jones*, 162 F.2d 72, 73 (2d Cir. 1947). *Accord*, *United States v. Greenberg*, 268 F.2d 120, 123 (2d Cir. 1959); *Poliafico v. United States*, 237 F.2d 97, 113 (6th Cir. 1956); *United States v. Brothman*, 191 F.2d 70, 72 (2d Cir. 1951); see *United States v. Bink*, 74 F. Supp. 603, 607 n.2 (D. Ore. 1947).

590. *Rodd v. United States*, 165 F.2d 54, 56 (9th Cir. 1947), *cert. denied*, 334 U.S. 815 (1948). Compare *Nemec v. United States*, 191 F.2d 810, 811 (9th Cir. 1951), involving a motion to vacate judgment.

York. The defendant pleaded not guilty and was tried by the court after a waiver of trial by jury. The Court of Appeals of the Sixth Circuit held that where a defendant, represented by counsel, did not raise the issue of venue before the jury was impaneled and proceeded to trial on a plea of not guilty, he waived the issue of venue.⁵⁹¹ A district court in California upheld waiver, citing cases from the Second, Third, Sixth, Eighth, Ninth and District of Columbia Circuits.⁵⁹² Shortly thereafter, waiver was upheld in the Fifth Circuit.⁵⁹³ The issue was raised in the Seventh Circuit, but was left open; the court did not deny that there could be waiver on proper facts.⁵⁹⁴

The District Court of Oregon rejected the doctrine of waiver between districts for pleas of guilty under rule 20.⁵⁹⁵ The District Court of Maine rejected the doctrine of waiver between districts as to a transfer of an alleged noncontinuous offense under rule 21(b).⁵⁹⁶ The former court suggested that it is universal practice in federal indictments to allege the occurrence in the state and district. If there is no such recital, the trial court should dismiss, and the appellate court should notice the point.⁵⁹⁷

Several courts have held that there may be a proper waiver of venue between districts for a plea of guilty under rule 20.⁵⁹⁸ There may be waiver as to transfer for prejudice under rule 21(a).⁵⁹⁹ There may be waiver as to transfer of continuing crimes under rule 21(b).⁶⁰⁰

591. *Shetterly v. United States*, 205 F.2d 334 (6th Cir. 1953). But see *United States v. Lefkoff*, 113 F. Supp. 551, 556 (E.D. Tenn. 1953), 63 Yale L. J. 426, 430 (1954).

592. *United States v. Bryson*, 16 F.R.D. 431, 434-35 (N.D. Cal. 1954).

593. *Cagnina v. United States*, 223 F.2d 149, 154 (5th Cir. 1955).

594. *United States v. Browne*, 225 F.2d 751, 754 (7th Cir. 1955).

595. *United States v. Bink*, 74 F. Supp. 603, 609-10 (D. Ore. 1947). The holding is defended in 28 B. U. L. Rev. 230, 231 (1948); 36 Geo. L. J. 263, 265 (1948); 16 U. Chi. L. Rev. 187, 190 (1948). It is criticized in Orfield, *The Constitutionality of Federal Criminal Rule 20*, 34 Cornell L. Q. 129 (1948); 48 Colum. L. Rev. 939 (1943); 46 Mich. L. Rev. 964, 967 (1948). See also Comment, 96 U. Pa. L. Rev. 443 (1948); Comment, 53 Mich. L. Rev. 997, 998 (1955).

596. *United States v. Holdsworth*, 9 F.R.D. 198, 203 (D. Me. 1949). On dismissal of the appeal, the court of appeals did not follow this reasoning. *Holdsworth v. United States*, 179 F.2d 933, 936-37 (1st Cir. 1950).

597. *United States v. Bink*, 74 F. Supp. 603, 608 (D. Ore. 1947).

598. *Hornbrook v. United States*, 216 F.2d 112, 113 (5th Cir. 1954). There may be an implied waiver as to the division. *Earnest v. United States*, 193 F.2d 561, 562 (6th Cir. 1952); *United States v. Gallagher*, 183 F.2d 342, 345 (3d Cir. 1950), cert. denied, 340 U.S. 913 (1951); *Levine v. United States*, 182 F.2d 556, 558 (8th Cir. 1950), cert. denied, 340 U.S. 921 (1951); *United States v. Bistram*, 153 F. Supp. 316, 318 (D.N.D. 1957); *United States v. Binion*, 107 F. Supp. 680, 681 (D. Nev. 1952).

599. *United States v. Parr*, 17 F.R.D. 512, 518 (S.D. Tex. 1955).

600. *Cagnina v. United States*, 223 F.2d 149, 154 (5th Cir. 1955); *Holdsworth v. United States*, 179 F.2d 933, 937 (1st Cir. 1950); *United States v. Bryson*, 16 F.R.D. 431,

Several cases have held that the issue of venue can be raised during the trial by a motion for acquittal under rule 29.⁶⁰¹ One case found that there had been a final and conclusive waiver.⁶⁰² In favor of allowing a motion for acquittal, it has been said that the defendant cannot know before trial whether the Government will fail to prove venue. He can know this only when the Government has concluded its case.⁶⁰³ No doctrine of waiver was applied to a defendant who committed a crime "out of the jurisdiction of any particular state or district."⁶⁰⁴ However, the crime was treason, and the defendant obtained confidential records not previously available by showing that the correct venue was elsewhere.⁶⁰⁵

Where a defendant knew before trial that she had testified before a grand jury, the objection that the indictment was procured by testimony given involuntarily and through violation of constitutional rights must be raised before trial by motion to dismiss.⁶⁰⁶ If not, there is a waiver, and a motion in arrest of judgment will not lie, nor will a motion to dismiss made at the end of the trial. The indictment has been dismissed where the defendant, against whom criminal informations were pending, was compelled to testify before a grand jury and was not warned of his constitutional privilege against self incrimination.⁶⁰⁷

The words "lack of jurisdiction" in rule 12(b)(2) refer to jurisdiction of the subject matter.⁶⁰⁸ A defendant cannot waive such jurisdiction. But

434 (N.D. Cal. 1954). But see *United States v. Lefkoff*, 113 F. Supp. 551, 556 (E.D. Tenn. 1953).

601. *United States v. Browne*, 225 F.2d 751, 755 (7th Cir. 1955); *United States v. Brothman*, 191 F.2d 70, 72 (2d Cir. 1951); *United States v. Jones*, 174 F.2d 746, 748 (7th Cir. 1949).

602. *United States v. Bryson*, 16 F.R.D. 431, 435 (N.D. Cal. 1954). See also *United States v. Greenberg*, 268 F.2d 120, 123 (2d Cir. 1959); *Poliafico v. United States*, 237 F.2d 97, 113 (6th Cir. 1956).

603. *United States v. Browne*, 225 F.2d 751, 755 (7th Cir. 1955) (2-to-1 decision).

604. *United States v. Provoo*, 215 F.2d 531 (2d Cir. 1954). See Orfield, *The Venue of Federal Criminal Cases*, 17 U. of Pitt. L. Rev. 375, 396 (1956).

605. *United States v. Provoo*, 215 F.2d 531, 537 (2d Cir. 1954).

606. *United States v. Garnes*, 156 F. Supp. 467, 470 (S.D.N.Y. 1957), *aff'd*, 258 F.2d 530 (2d Cir. 1958), *cert. denied*, 359 U.S. 937 (1959). The defendant appeared as a witness before the grand jury, and was not at the time a criminal defendant. See also *United States v. Scully*, 225 F.2d 113, 116 (2d Cir. 1955), *cert. denied*, 350 U.S. 897 (1956), 10 Sw. L. J. 321, 34 Texas L. Rev. 641, 1956 Wash. U. L. Q. 373; *United States v. Klein*, 247 F.2d 908, 920 (2d Cir. 1957). See Note, 15 Fed. B. J. 194 (1955).

607. *United States v. Lawn*, 115 F. Supp. 674, 677 (S.D.N.Y. 1953). The court stated that there was inherent power to dismiss. *Id.* at 678. See Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 431-32 (1959).

608. *Pon v. United States*, 168 F.2d 373, 374 (1st Cir. 1948). See also *Bistram v. United States*, 253 F.2d 610, 612 (8th Cir. 1958); *United States v. Holdsworth*, 9 F.R.D. 198, 201 (D. Me 1949).

he may waive jurisdiction of the person, such as an illegal arrest.⁶⁰⁹ A court has jurisdiction even if the defendant was kidnapped from a foreign country by federal officers, among others, in violation of federal and international law.⁶¹⁰ The defendant should have challenged the lack of personal jurisdiction by a motion to dismiss. Personal jurisdiction can be waived in criminal as well as civil cases. It would appear that the committee annotation to the Second Preliminary Draft was not correct in stating that the provision that lack of jurisdiction shall always be noted by the court

is not in entire accord with the present practice in providing that an objection to lack of jurisdiction of the court may be presented at any time, since lack of jurisdiction of the court over the person is waived under the present practice if the objection is not presented before any plea to the indictment or information.⁶¹¹

Both before and after the Federal Rules of Criminal Procedure jurisdiction of the person and venue could be waived.

A defendant could not, even by invitation, confer jurisdiction on the court to impose a sentence greater than what the statute permitted. Hence, a court of appeals can reverse.⁶¹² Want of jurisdiction or failure to charge an offense could be raised for the first time on appeal.⁶¹³

The defense of lack of jurisdiction of the subject matter may be filed shortly before trial in the case of a proceeding wrongly transferred to the transferee district.⁶¹⁴ The case was in the transferee court and the decision was of the same court.

The defense of lack of jurisdiction over the offense may be raised by a motion under section 2255 of Title 28.⁶¹⁵ If the accused is not in custody, he may not make such motion.⁶¹⁶

Failure to charge an offense can be raised under rule 12(b)(2) even after the time for motion in arrest of judgment under rule 34 has ex-

609. *Pon v. United States*, 168 F.2d 373, 374 (1st Cir. 1948). In this case the arrest was found to be legal. See also *Bistram v. United States*, 253 F.2d 610, 612 (8th Cir. 1958).

610. *United States v. Rosenberg*, 195 F.2d 583, 602-03 (2d Cir.), cert. denied, 344 U.S. 889 (1952).

611. Advisory Committee on Rules of Criminal Procedure, Federal Rules of Criminal Procedure, Second Preliminary Draft 63-64 (1944).

612. *Shelton v. United States*, 165 F.2d 241, 245 (D.C. Cir. 1947).

613. *Anderson v. United States*, 189 F.2d 202, 204 (6th Cir. 1951).

614. *United States v. Holdsworth*, 9 F.R.D. 198, 201 (D. Me. 1949). The concept of jurisdiction over the subject matter may possibly be clarified by Kenny's statement that "if the offense is one over which no English court at all has jurisdiction (e.g., an offense committed on board a foreign ship on the high seas), this defence can clearly be raised not only as a legal objection but even under 'not guilty'." Kenny, *Outlines of Criminal Law* 562 (Turner ed. 1958).

615. *Keto v. United States*, 189 F.2d 247, 251 (8th Cir. 1951). See 28 U.S.C. § 2255 (1958).

616. *United States v. Bradford*, 194 F.2d 197, 200 (2d Cir. 1952)

pired.⁶¹⁷ The court may notice this defect at "any time during the pending of the proceeding." The proceeding is still pending when sentence has not been pronounced. The defect may be noticed on appeal, though not raised below.⁶¹⁸ A motion to dismiss for failure to charge an offense may be made on the opening day of the trial.⁶¹⁹ The court may and should dismiss on its own motion.⁶²⁰ The court is not required to determine the defendant's competency. There is no doctrine of waiver as to failure to charge an offense.⁶²¹

With respect to collateral attack by motion under section 2255 of Title 28 for failure to charge an offense, it has been frequently stated that only under exceptional circumstances is the sufficiency of an indictment or information open to such attack.⁶²² If a federal offense is charged, the motion does not lie.⁶²³ If no offense is charged, the motion does lie.⁶²⁴

Rule 12(b)(2) and rule 34 authorize a motion in arrest of judgment. Both, however, are subject to rule 52(a) on harmless error.⁶²⁵ In effect, the five day limit provided in rule 34 for motion in arrest of judgment has been extended by rule 12(b).⁶²⁶ A motion in arrest filed late has been treated as a motion to vacate under section 2255 of Title 28.⁶²⁷

617. *Finn v. United States*, 256 F.2d 304, 306 (4th Cir. 1958); *United States v. Yuncker*, 147 F. Supp. 97, 99 (S.D. Ind. 1956); *United States v. Holmes*, 110 F. Supp. 233, 234 (S.D. Tex. 1953).

618. *United States v. Calhoun*, 257 F.2d 673, 680 (7th Cir. 1958); *United States v. Manuszak*, 234 F.2d 421, 422 (3d Cir. 1956); *United States v. Smith*, 232 F.2d 570, 572 (3d Cir. 1956); *Hotch v. United States*, 208 F.2d 244, 250 (9th Cir. 1953); *Johnson v. United States*, 206 F.2d 806, 808 (9th Cir. 1953).

619. *United States v. Mercer*, 133 F. Supp. 288, 291 (N.D. Cal. 1955). The motion was made just after the jury had been impaneled.

620. *United States v. Marino*, 148 F. Supp. 75, 76 (N.D. Ill. 1957).

621. *Finn v. United States*, 256 F.2d 304, 306 (4th Cir. 1958).

622. *Klein v. United States*, 204 F.2d 513 (7th Cir. 1953); *Barnes v. United States*, 197 F.2d 271, 273 (8th Cir. 1952); *Keto v. United States*, 189 F.2d 247, 249 (8th Cir. 1951); *Aaron v. United States*, 188 F.2d 446 (4th Cir.), cert. denied, 341 U.S. 954 (1951); *Buono v. United States*, 126 F. Supp. 644, 645 (S.D.N.Y. 1954); *United States v. Jenkins*, 106 F. Supp. 5, 6 (D. Neb. 1952).

623. *Rowley v. United States*, 191 F.2d 949, 951 (8th Cir. 1951); *Banks v. United States*, 140 F. Supp. 837, 838 (S.D. Ind. 1956).

624. *Martenev v. United States*, 216 F.2d 760, 763 (10th Cir. 1954), cert. denied, 348 U.S. 953 (1955). See Orfield, *Arrest of Judgment in Federal Criminal Procedure*, 42 Iowa L. Rev. 8, 27 (1956).

625. *Williams v. United States*, 170 F.2d 319, 322 (5th Cir. 1949).

626. *Finn v. United States*, 256 F.2d 304, 306 (4th Cir. 1958); *Martenev v. United States*, 216 F.2d 760 (10th Cir. 1954); *Hotch v. United States*, 208 F.2d 244, 250 (9th Cir. 1953); *United States v. McDonough Co.*, 180 F. Supp. 511, 515 (S.D. Ohio 1959); *United States v. Holmes*, 110 F. Supp. 233 (S.D. Tex. 1953). Compare *Marion v. United States*, 171 F.2d 185, 186 (9th Cir. 1948), cert. denied, 337 U.S. 944 (1949). See Orfield, *Arrest of Judgment in Federal Criminal Procedure*, 42 Iowa L. Rev. 8, 24-28 (1956).

627. *Martenev v. United States*, 216 F.2d 760, 762 (10th Cir. 1954). But the defendant

G. *Time of Making Motion*

An attack on an indictment on grounds other than jurisdiction of the court or that the indictment fails to state an offense must, unless opportunity to make it was lacking, be made before commencement of trial.⁶²³ In one case, a defendant was allowed to make a motion to dismiss two indictments after a plea of not guilty as to each.⁶²³ One case erroneously referred to a statute now superseded requiring objection to be made before or within ten days after arraignment.⁶³⁰ In one case a defendant was allowed to make a motion to dismiss two indictments after a plea of not guilty as to each.⁶³¹ Failure to charge the mental element of a crime, such as *scienter*, cannot be raised by motion in arrest of judgment.⁶³²

The district court did not abuse its discretion with respect to the time for filing a motion to dismiss where, on a plea of not guilty, it gave the defendants ten days in which to move and then denied a second extension of time. The defendants alleged no specific grounds for extension of time.⁶³³ A defendant did not act timely when he pleaded guilty on December 16, secured a delay to make certain pretrial motions until January 14, appeared on January 14 asking for sixty more days, obtained an extension to only February 18, filed certain motions on February 18, and on March 15, for the first time, filed a motion attacking the grand jury.⁶³⁴ In one case the defendants at the time of their plea of not guilty were given a month to move to dismiss.⁶³⁵

must be in custody. *United States v. McDonough*, 180 F. Supp. 511, 515 (S.D. Ohio 1959).

628. *Cratty v. United States*, 163 F.2d 844, 849 (D.C. Cir. 1947). Here attack for the first time on appeal was rejected. A motion to dismiss made at the second day of the trial is not timely where the indictment was filed many months before the trial. *United States v. Dale*, 223 F.2d 181, 184 (7th Cir. 1955). A motion at the opening of the trial is too late. *Hanf v. United States*, 235 F.2d 710, 714 (8th Cir. 1956). See also *Scales v. United States*, 260 F.2d 21, 45 (4th Cir. 1958).

629. *United States v. Dixon*, 73 F. Supp. 683, 684 (E.D.N.Y. 1947). The method of impaneling a grand jury shall be attacked before entry of plea unless the court permits it to be made within a reasonable time thereafter. *Pollafico v. United States*, 237 F.2d 97, 110 (6th Cir. 1956); *United States v. Spinley*, 138 F. Supp. 241 (W.D. Pa. 1956).

630. *Wright v. United States*, 165 F.2d 405, 407 (8th Cir. 1948). The note to rule 12(b)(3) indicates that the rule supersedes this statute.

631. *United States v. Zisblatt Furniture Co.*, 78 F. Supp. 9, 13 (S.D.N.Y. 1948). Compare 172 F.2d 740, 741 (2d Cir. 1949).

632. *United States v. Williams*, 202 F.2d 712, 713 (5th Cir. 1953).

633. *Cleaver v. United States*, 238 F.2d 766, 769 (10th Cir. 1956).

634. *Scales v. United States*, 260 F.2d 21, 46 (4th Cir. 1958).

635. *Ellsins v. United States*, 266 F.2d 588, 590 (9th Cir. 1959), rev'd on other grounds, 361 U.S. 810 (1960). The trial court denied motions made after the time permitted. See also *United States v. Greater Blouse, Skirt & Neckwear Contractors' Ass'n*, 177 F. Supp. 213, 228 (S.D.N.Y. 1959).

A motion to dismiss should precede a subpoena duces tecum under rule 17(c).⁶³⁶ At the end of the Government's evidence the court will not permit the defendant to renew all his motions made before trial.⁶³⁷

The Supreme Court has stated: "Even in federal felony cases where, unlike state prosecutions, indictment by a grand jury is a matter of right, this Court has strictly circumscribed the time within which motions addressed to the composition of the grand jury may be made."⁶³⁸

H. *Hearing on Motion*

Under rule 12(b)(4) determination of a motion to dismiss may be deferred until a trial of the general issue. In a treason prosecution the legal sufficiency of an overt act shall not be determined until all the evidence is presented, except when the evidence could not possibly add anything to what appeared to be an unreasonable act.⁶³⁹ Whether a subpoena issued by a congressional committee directing the production of certain documents is so broad as to violate the fourth amendment is a mixed question of law and fact which should not be decided on a motion to dismiss an indictment.⁶⁴⁰ It can only be determined at the trial and on the facts. In general, a motion to dismiss because of the unconstitutionality of the act creating the substantive offense will be denied unless the unconstitutionality of the act is apparent on its face.⁶⁴¹ A motion to dismiss was used to attack the constitutionality of the Selective Service Act of 1948.⁶⁴² One case held that a motion to dismiss, on the ground that the statute making the act an offense was unconstitutional, was not premature. It did not have to be reserved until the trial of the case, after evidence had been introduced.⁶⁴³ Another case permitted attack on constitutionality before trial, but objected to the use of affidavits.⁶⁴⁴

Rule 12(b)(4) provides that a motion to dismiss "shall be determined before trial," but that the hearing may "be deferred for determination at the trial of the general issue." Where the defendant did not

636. *United States v. Long*, 15 F.R.D. 25, 27 (D. P.R. 1953). Where the defendant is granted a bill of particulars or discovery, the trial court sometimes extends the time to move to dismiss. *United States v. Greater Blouse, Skirt & Neckwear Contractors' Ass'n*, 177 F. Supp. 213, 228 (S.D.N.Y. 1959).

637. *United States v. Klein*, 139 F. Supp. 135, 143 (S.D.N.Y. 1955).

638. *Michel v. Louisiana*, 350 U.S. 91, 99 (1955).

639. *United States v. Chandler*, 72 F. Supp. 230, 235 (D. Mass. 1947).

640. *United States v. Bryan*, 72 F. Supp. 58, 64 (D.D.C. 1947), *rev'd*, 174 F.2d 525 (D.C. Cir. 1949), *rev'd*, 339 U.S. 323 (1950).

641. *United States v. Bridges*, 86 F. Supp. 922, 928 (N.D. Cal. 1949); *United States v. Foster*, 80 F. Supp. 479, 483 (S.D.N.Y. 1948).

642. *George v. United States*, 196 F.2d 445, 447 (9th Cir. 1952).

643. *United States v. Forrester*, 105 F. Supp. 136, 137 (N.D. Ga. 1952).

644. *United States v. Mungiole*, 125 F. Supp. 32, 33 (E.D. Pa. 1954).

request such deferment, and motions to dismiss were made and denied at the close of the Government's case and the whole case, the court of appeals may consider the defendant's contention that overruling his motion was error.⁶⁴⁵

Insanity at the time of the offense "is tried to the jury as a part of the trial under the indictment."⁶⁴⁶ Subsequent insanity involves an issue collateral to the trial. When the defendant's present mental condition is questioned before trial, the court should conduct the inquiry.⁶⁴⁷

A district court has held that there was no requirement of trial by jury as to issues of fact raised with respect to the authority of an assistant United States attorney in connection with a grand jury, the powers of a grand jury, the presence of an unauthorized person in the grand jury room, and the absence of evidence to support the indictment.⁶⁴⁸ The Constitution did not require a jury trial and the uniform practice had been not to grant it. Where the issues raised by the motion to dismiss are issues of law, the court will hear argument on such matters as questions of law. Examples of issues of law are mentioned in the first sentence of this paragraph. If general legal argument would not dispose of the matters, there could be a trial of the controverted facts, if justice imperatively required it.

A court of appeals has concluded that where there is no issue as to the facts the judge, not the jury, should pass on the issue of *res judicata*.⁶⁴⁹

It has been pointed out that under rule 47 the motion to dismiss may be supported by affidavits.⁶⁵⁰ The court will not, on motion of the Government, strike an affidavit which does not contain matter relevant to the general issue raised by the pleadings.⁶⁵¹ Affidavits should not be used to test mixed questions of fact and of constitutional law.⁶⁵² Affidavits based on information and belief accompanying a motion to dismiss

645. *United States v. Costello*, 221 F.2d 668, 677 (2d Cir. 1955).

646. *McIntosh v. Pescor*, 175 F.2d 95, 98 (6th Cir. 1949).

647. *United States v. MacLeod*, 83 F. Supp. 372 (E.D. Pa. 1949).

648. *United States v. Smyth*, 104 F. Supp. 279, 282 (N.D. Cal. 1952). The defendants waived a jury trial in open court.

G. Aaron Younquist pointed out, in *Federal Rules of Criminal Procedure* 164 (Holtzoff Ed. 146), that "there was danger in trying to point which of these objections were triable by jury and which were not. It is a very indefinite field, and it would hardly do to mislead the courts and to mislead counsel by saying that such and such an objection may be tried by the court without the jury, and then to have the Supreme Court later say that under the Constitution there was a right of trial by jury. . . ."

649. *United States v. Sealfon*, 161 F.2d 481, 484 (3d Cir. 1947), *rev'd on other grounds*, 332 U.S. 575 (1948).

650. *United States v. J. R. Watkins Co.*, 16 F.R.D. 229, 231, 233 (D. Minn. 1954). Affidavits were used in *United States v. Patrisso*, 21 F.R.D. 363, 365 (S.D.N.Y. 1953).

651. *United States v. Quinn*, 111 F. Supp. 870, 873 (E.D.N.Y. 1953).

652. *United States v. Mungiole*, 125 F. Supp. 32, 33 (E.D. Pa. 1954).

because of insufficiency of evidence before the grand jury are not sufficient.⁶⁵³ On a motion to dismiss because of double jeopardy, the defendant may supplement his motion by oral testimony.⁶⁵⁴

Suppose a judge hears a motion to dismiss and denies it. May he or another trial judge hear further argument? A district court judge has said that conceding that a judge who determined a matter may entertain a rehearing of it,

I know of no precedent which would allow one judge in a criminal case to rehear a matter determined by another, except when the same legal question should arise, at a subsequent stage of the proceedings, either on the admissibility of testimony, or on a motion to acquit made at the conclusion of the Government's case, and grounded on the insufficiency of the evidence.⁶⁵⁵

Yet, in this case the second judge heard further argument on the sufficiency of the indictment, and considered this as being in the nature of a "voluntary pre-trial" and not a motion for a rehearing. Like the first judge, he found the indictment sufficient. Defenses asserted in a defendant's motion to dismiss, denied by a district judge, are not open to further consideration in the trial of the case before another judge of the same court.⁶⁵⁶

I. *Effect of Determination*

In a case where illegally seized evidence was used before a United States commissioner who bound over the defendants, the order binding over was dismissed without prejudice to lawful prosecution of the defendants, and the defendants were continued in the same bail for thirty days pending the filing of an indictment or information.⁶⁵⁷ In a case under the Smith Act, the court ordered bail of the defendants at liberty continued. The defendants in custody were to be held ten days pending the filing of a new indictment.⁶⁵⁸ In another case under the Smith Act the court ordered the bail of each defendant continued for a period of twenty-one days pending the filing of a new indictment, subject to such orders relative to enlargement as were then outstanding.⁶⁵⁹ In one case the court ordered bail continued for thirty days pending the filing of a new indictment or information.⁶⁶⁰

653. *United States v. Frontier Asthma Co.*, 69 F. Supp. 994, 997 (W.D.N.Y. 1947).

654. *Kramer v. United States*, 166 F.2d 515, 519 (9th Cir. 1948).

655. *United States v. Selph*, 82 F. Supp. 56, 57 (S.D. Cal. 1949). See also *United States v. Patrisso*, 21 F.R.D. 363, 365 (S.D.N.Y. 1958), involving a motion to dismiss for delay in prosecution.

656. *United States v. Jaffe*, 98 F. Supp. 191, 192 (D.D.C. 1951).

657. *United States v. Cole*, 6 F.R.D. 581, 584 (D. Conn. 1947).

658. *United States v. Schneiderman*, 102 F. Supp. 87, 97 (S.D. Cal. 1951).

659. *United States v. Silverman*, 129 F. Supp. 496, 514 (D. Conn. 1955).

660. *United States v. MacKenzie*, 170 F. Supp. 797, 800 (D. Me. 1959).

With respect to the last sentence of rule 12(b)(5) a circuit judge has pointed out: "That savings clause preserves the provisions of statutes permitting reindictment if the original indictment is found defective or dismissed for certain irregularities, and the statute of limitations has run."⁶⁶¹

Where an indictment is dismissed on a technical ground, such as duplicity, a new indictment may be found.⁶⁶²

Where defendant's motion for dismissal of an indictment is denied, he cannot take an immediate appeal.⁶⁶³ Such an appeal therefore will be dismissed by the court of appeals. The order denying dismissal is not a "final decision" under section 1291 of Title 28.⁶⁶⁴ The court of appeals will not grant a stay in order for the defendant to apply to the Supreme Court for a writ of certiorari.

J. *Right to Counsel*

As was true before the adoption of the rules, there has been little discussion of the right to counsel. In a leading case, the Supreme Court stated: "Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered."⁶⁶⁵ However, this statement was made in connection with a plea of guilty; the right to counsel in making a plea of guilty was more directly involved. The Supreme Court also stated: "Arraignment is too important a step in a criminal proceeding to give such wholly inadequate representation to one charged with a crime."⁶⁶⁶ There should be no "hollow compliance with the mandate of the Constitution at a stage so important as arraignment." With respect to waiver of counsel on a plea of guilty, the Supreme Court stated: "To be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter."⁶⁶⁷

661. *United States v. Brodson*, 234 F.2d 97, 102 (7th Cir. 1956).

662. *United States v. Potishman*, 230 F.2d 271, 274 (5th Cir.), cert. denied, 351 U.S. 918 (1956).

663. *Kyle v. United States*, 211 F.2d 912, 914 (9th Cir. 1954).

664. *Atlantic Fishermen's Union v. United States*, 197 F.2d 519 (1st Cir. 1952). See 28 U.S.C. § 1291 (1958).

665. *Von Moltke v. Gillies*, 332 U.S. 703, 721 (1948). See *Gann v. Gough*, 79 F. Supp. 912, 916 (N.D. Ga. 1948), which is discussed by Balter, *Assignment of Counsel in Federal Courts to Defend Indigent Persons Accused of Crime*, 24 Calif. B. J. 114, 117 (1948); Beaney, *The Right to Counsel in American Courts* 61-63 (1955).

666. *Id.* at 723.

667. *Id.* at 724.

The right of the defendant to counsel to raise defenses and objections under rule 12 is somewhat connected with his right to counsel when he makes a plea of guilty under rule 11. One court has held that a defendant without counsel at arraignment and plea is constitutionally entitled to considerable explanation and discussion of the charge against him and the facts relating to a decision to plead guilty.⁶⁶⁸ Another court held that the trial court need not explain and set out for the accused the possible defenses he might have to the charges against him, even if counsel is waived. The waiver, however, must be competent, intelligent, and intentional.⁶⁶⁹ The Court of Appeals of the Tenth Circuit has concluded that the trial court should advise the defendant concerning the notice of the charge, the range of possible punishment, defenses, and circumstances in mitigation, as well as of the right to counsel.⁶⁷⁰ A similar view has been taken in the Second Circuit,⁶⁷¹ and is probably the view of the Fourth⁶⁷² and the District of Columbia Circuits.⁶⁷³ If the defendant pleads guilty without counsel, the failure to appoint counsel is not prejudicial, if counsel is appointed immediately thereafter and full opportunity is given to withdraw the plea of guilty.⁶⁷⁴ The federal cases on this point followed a similar ruling of the Supreme Court as to state court cases.⁶⁷⁵ A recent case held that the failure of the trial judge to inform the defendant of his right to counsel when he pleaded guilty was cured when the defendant was represented by counsel at the time of sentence and had the opportunity to move to withdraw his plea but failed to do so.⁶⁷⁶

Absence of counsel at arraignment when the defendant pleads not guilty is not a basis for release.⁶⁷⁷ The Constitution does not guarantee counsel in such a case.⁶⁷⁸ The Court of Appeals of the District of Columbia has stated: "It has not been the custom in this jurisdiction to assign counsel upon arraignment if the plea is not guilty, and we are not advised

668. *Howard v. United States*, 186 F.2d 778, 779 (6th Cir. 1951).

669. *Michener v. United States*, 181 F.2d 911, 919 (8th Cir. 1950).

670. *Snell v. United States*, 174 F.2d 580, 582 (10th Cir. 1949).

671. *United States v. Lester*, 247 F.2d 496, 499 (2d Cir. 1957).

672. *Gundlach v. United States*, 262 F.2d 72, 76 (4th Cir. 1958), cert. denied, 360 U.S. 904 (1959).

673. *Smith v. United States*, 265 F.2d 99, 100 (D.C. Cir.), cert. denied, 361 U.S. 843 (1959). But see *Edwards v. United States*, 256 F.2d 707, 710 (D.C. Cir.), cert. denied, 358 U.S. 847 (1958).

674. *Council v. Clemmer*, 177 F.2d 22, 23 (D.C. Cir.), cert. denied, 338 U.S. 880 (1949); *Hiatt v. Gann*, 170 F.2d 473 (5th Cir. 1948), cert. denied, 337 U.S. 920 (1949).

675. *Canizio v. New York*, 327 U.S. 82, 85 (1946).

676. *Young v. United States*, 228 F.2d 693, 694 (8th Cir.), cert. denied, 351 U.S. 913 (1956).

677. *Ruben v. Welch*, 159 F.2d 493 (4th Cir.), cert. denied, 331 U.S. 184 (1947).

678. *Council v. Clemmer*, 177 F.2d 22, 23 (D.C. Cir. 1949).

that it has been the custom in other jurisdictions.⁶⁷⁹ The law may be summarized in the words of Professor Fellman: "It has been held that an accused is entitled to assistance of a lawyer upon arraignment whether he pleads guilty or not, but the weight of authority seems to be otherwise."⁶⁸⁰ He has also stated that the lower federal courts

disagree as to whether the right accrues at arraignment, though the better view is that one needs the advice of counsel on the crucial question of how to plead. Some judges have taken the position that how one pleads doesn't matter so much because counsel are always free to change the plea later. However, once a plea of guilty has been entered, a very damaging admission has been made, and counsel may be understandably reluctant to try to undo the harm later by changing the plea. State courts are practically unanimous in agreeing that the right to counsel accrues at arraignment.⁶⁸¹

Will inadequacy of counsel be presumed from a failure to move to dismiss? In a state court case the Supreme Court held that it would not where the matter was within counsel's discretion and there were valid reasons for not moving.⁶⁸²

IV. MODERN REFORM PROPOSALS

The late G. Aaron Youngquist has pointed out that rule 12 of the Federal Rules of Criminal Procedure "gave the committee more trouble than any other rule in the book" and resulted in a "very drastic rule" which "should very materially aid in clearing away the underbrush in criminal prosecutions."⁶⁸³ The rule seems to have worked very well in practice. Rule 25 of the Uniform Rules of Criminal Procedure of the National Conference of Commissioners on Uniform Laws, approved in 1953, is modeled very closely on Federal Criminal Rule 12. Comment on rule 12 has been uniformly favorable.⁶⁸⁴ Similar procedure for the states has been urged.⁶⁸⁵ New Jersey and Maryland have adopted rules of court following the federal rule. Sections of the American Law Institute Code are substantially similar.⁶⁸⁶ The drafters of the Uniform Rules pointed out that sections of the Institute Code made specific pro-

679. *Ibid.*

680. Fellman, *The Constitutional Right to Counsel in Federal Courts*, 30 *Neb. L. Rev.* 559, 588 (1951).

681. Fellman, *The Defendant's Rights* 123 (1958).

682. *Michel v. Louisiana*, 350 U.S. 91, 100 (1955).

683. *Federal Rules of Procedure* 162-63 (Holtzoff Ed. 1946).

684. Berge, *Some Comments on the Proposed Federal Rules of Criminal Procedure*, 34 *J. Crim. L.* 222, 224 (1944); Cummings, *The Third Great Adventure*, 29 *A.B.A.J.* 654, 655 (1944); Harno, *The Proposed Rules of Federal Criminal Procedure*, 42 *Mich. L. Rev.* 623, 625 (1944).

685. Rossman, *Study of Rules 10-17 of the Federal Rules*, 25 *Ore. L. Rev.* 21, 29-31 (1946).

686. *A.L.I. Code* §§ 207-22.

vision for specifying in the motion the facts upon which defenses are based.⁶⁸⁷ They decided, however, not to follow the Institute Code, agreeing that there would be danger in an attempt to specify issues triable by a jury.⁶⁸⁸ They also considered but rejected a provision equivalent to federal rule 47, stating the grounds upon which it is made and the relief or order sought. They rejected a provision that failure to plead insanity should not preclude raising the issue later. The first sentence of Uniform Rule 25 differs from the first sentence of federal rule 12, listing *nolo contendere* in brackets. It also lists in brackets "not guilty by reason of insanity as provided by statute." It also states in brackets: "here insert any other procedures used in a particular State, as, e.g., where trial is on complaint and warrant on appeal from a magistrate." The last sentence of rule 25, unlike the federal rule, fixes a maximum time for holding in custody or continuing bail if the defendant's motion to dismiss is granted. English pleading today remains very much as it has been in the past.⁶⁸⁹

687. A.L.I. Code §§ 212-14.

688. They cited to this effect Dession, *New Federal Rules of Criminal Procedure* II, 56 *Yale L. J.* 197, 213 (1947); Orfield, *Criminal Procedure From Arrest to Appeal* 289, 290 (1947).

689. Archbold, *Criminal Pleading, Evidence and Practice* 139-60 (32d ed. 1949); Kenny, *Outlines of Criminal Law* 556-58, 560-65 (Turner ed. 1958); Orfield, *Criminal Procedure From Arrest to Appeal* 266-72 (1947).