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### Separate Trials for Defendants Jointly Indicted

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## SEPARATE TRIALS FOR DEFENDANTS JOINTLY INDICTED.

It is provided by statute<sup>1</sup> in New York today that defendants, jointly indicted, may be tried separately or jointly in the discretion of the trial court. This is substantially an enactment of the rule which prevailed at common law,<sup>2</sup> which, however, was altered by legislation passed in 1829, wherein it was provided that where two or more persons were jointly indicted for any felony, any defendant requesting it would be entitled to a separate trial.<sup>3</sup> This remained the law in this state<sup>4</sup> until the amendment to the Code of Criminal Procedure enacted by the laws of 1926.<sup>5</sup>

When shall the trial judge exercise his discretion and grant separate trials?<sup>7</sup> How shall the peremptory challenges of the joint defendants be apportioned, if at all?<sup>6</sup> One may well visualize the importance of the determination of these questions to an individual whose life is at stake, about to be tried jointly with a defendant who has already confessed and who is indifferent to his fate, has a damaging record, or who is treacherously scheming to avoid conviction by shifting the guilt, with the help of perjured testimony, upon his co-defendant. Denial of the application by the trial judge of separate trials will not be reviewed unless there has been an abuse in the exercise of his discretion.<sup>7</sup>

Although the restoration of the common law rule by the legislature has been heralded as a salutary step forward in the speeding up of criminal procedure in our courts,<sup>8</sup> we must still bear in mind that the accused has a fundamental right to a fair and impartial trial.<sup>9</sup> Let us inspect briefly a few of the recent cases involving

<sup>1</sup> Code Crim. Proc., Sec. 391, as amended by L. 1926, Ch. 461, in effect July 1, 1926.

<sup>2</sup> *People v. Vermilyea*, 7 Cow. 108 (1827); *Rex v. Noble*, 15 Howell's State trials 731; *U. S. v. Marchant and Colson*, 25 U. S. 480 (1857).

<sup>3</sup> 2 R. S. (1st Ed. 1829), Pt. IV, Ch. 2.

<sup>4</sup> Re-enacted in the Code Crim. Proc., L. 1881, Ch. 504, Sec. 391.

<sup>5</sup> *Supra* Note 1.

<sup>6</sup> Sec. 360 of the Code of Criminal Procedure reads as follows: "When several defendants are tried together they cannot sever their challenges, but must join therein." See also Sections 372 and 373 of the Code of Criminal Procedure.

<sup>7</sup> *People v. Stochon*, 1 Parker's Crim. Rep. 424 (1853); *Webster v. People*, 92 N. Y. 422 (1883); *Matter of Whitman*, 225 N. Y. 21, 121 N. E. 485 (1918).

<sup>8</sup> See Hiscock, *Criminal Law and Procedure in New York* (1926), 26 Col. L. Rev. 253, 257. See also 26 Col. L. Rev. 752.

<sup>9</sup> The words of Lehman, *J.*, in his dissenting opinion in *People v. Fisher*, 249 N. Y. 419, 428, 164 N. E. 336, 339 (1928) are significant:

"No consideration of expense to the state, inconvenience to witnesses and public authorities, or even of delay in punishment of the guilty can justify a procedure which results in serious impairment of the rights of an accused to a fair consideration by an impartial jury of the competent testimony produced against him."

Section 391 of the Code of Criminal Procedure and view the trend of judicial opinion.

In *People v. Doran*,<sup>10</sup> two persons were jointly indicted and tried for murder in the first degree. Each of the defendants contended that he should be tried separately, the main contention of each being that the other had made a confession.<sup>11</sup> Denial of separate trials was affirmed by the Court of Appeals. It seems hard to believe that the jury, even though cautioned, could deliberate with complete fairness on the individual guilt of each of the accused without some mental confusion arising from their consideration of both confessions. One confession<sup>12</sup> may have been illegally secured by force and violence,<sup>13</sup> yet because the confession of the co-defendant appeared to be dependable and accurate, it is easily conceivable that the former was disregarded and both defendants convicted on the latter confession.

The Court of Appeals was also called upon to decide in the *Doran* case the apportionment of the peremptory challenges available.<sup>14</sup> The trial court had held that all the defendants must join in the peremptory challenges, and their view was sustained in the highest court.<sup>15</sup> The legislature having established the method of apportionment of peremptory challenges, the court was powerless to vary the rule.<sup>16</sup> The apparent injustice in requiring that each defendant join in all peremptory challenges is a matter for legislative reform.<sup>17</sup>

In the notorious case of *People v. Snyder and Gray*,<sup>18</sup> the question of separate trials was again before the Court of Appeals. Both defendants had made confessions. Mrs. Snyder made an application for a separate trial. The defendant Gray joined with the

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<sup>10</sup> 246 N. Y. 409, 159 N. E. 379 (1927).

<sup>11</sup> See Bishop's New Criminal Procedure, Secs. 1018, 1019 and cases there cited.

<sup>12</sup> The voluntariness of *Doran's* confession was extremely doubtful in the case under discussion. See dissenting opinion, per Lehman, J., 246 N. Y. at 429, 159 N. E. at 387.

<sup>13</sup> For confessions generally, see the Code Crim. Proc., Sec. 395; *People v. Weiner*, 248 N. Y. 118, 161 N. E. 441 (1928).

<sup>14</sup> *Supra* Note 6.

<sup>15</sup> By the common law, established in *Salisbury's* case, 1 Plowd 100, and never departed from, if two or more persons were put on trial jointly for crime, they were each entitled to the full number of peremptory challenges allowed by law, though the Crown could compel them to elect whether they would join in their challenges or be tried separately. See Ann. Cases, 1914, A at p. 860 and cases there cited.

<sup>16</sup> *People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408 (1912); *People v. Dunn*, 157 N. Y. 528, 52 N. E. 572 (1898); *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. Rep. 350 (1887); *U. S. v. Marchant*, *supra* Note 2.

<sup>17</sup> See *U. S. v. Marchant* and *Rex v. Noble*, *supra* Note 2. In England, due to the fact that each defendant jointly indicted was entitled to the full quota of peremptory challenges, many separate trials were granted due to the scarcity of talesmen available.

<sup>18</sup> 246 N. Y. 491, 159 N. E. 408 (1927).

state in opposing this application. In their confessions, and upon the trial, where each defendant testified, each attempted personal exculpation by throwing as much of the blame as possible upon the other. The Court of Appeals upheld the conviction and affirmed the denial of separate trials. In its opinion the Court took particular pains to point out the scrupulous care of the trial judge in protecting the individual rights of both defendants:<sup>19</sup>

"No general rule limiting or governing the exercise of the court's discretion can be deduced from these decisions. \* \* \* The courts should apply but one test. Will separate trial impede or assist the proper administration of justice in a particular case and secure to the accused the right of a fair trial?"<sup>20</sup>

Granted that elasticity of discretion is desirable frequently, is the glittering generality of this test a fair safeguard for an accused? Are fundamental rights to be sacrificed to secure greater speed, economy and convenience in the administration of the law?

In *People v. Fisher*<sup>21</sup> three defendants were jointly indicted and tried for a felony murder. Two of the defendants had made confessions. The defendant Fisher steadfastly denied guilt and the other two defendants who had implicated him in their previous confessions, repudiated these confessions completely on the trial. Fisher's motion for a separate trial was denied. The subsequent conviction of all the defendants was affirmed by the Court of Appeals. In a dissenting opinion in which Kellogg, J. concurred, Judge Lehman contends vigorously that the denial of a separate trial to the defendant Fisher was error.<sup>22</sup>

<sup>19</sup> In the *Doran* case, *supra* Note 10 at 426, 159 N. E. at 385, the trial Judge allowed *each* defendant 30 peremptory challenges.

See also *People v. Marcus*, 220 App. Div. 697, 699, 222 N. Y. Supp. 456 (1st Dept. 1927), *aff'd* 246 N. Y. 637 (1927), wherein the careful instructions of the trial Judge were stressed. In this case the defendant moved for a separate trial after he had been jointly indicted with three others for criminally receiving stolen goods. The defendant contended there was imminent danger of confusion in the minds of the jury as to his individual guilt as a result of the admissions and conduct of his co-defendants. The motion for a separate trial was denied.

See also *People v. Stein*, 221 App. Div. 4, 222 N. Y. Supp. 460 (2nd Dept. 1927); *People v. Talzer*, 221 App. Div. 3, 222 N. Y. Supp. 462 (2nd Dept. 1927).

<sup>20</sup> *Supra* Note 18 at 497, 159 N. E. at 410.

<sup>21</sup> *Supra* Note 9.

<sup>22</sup> *Supra* Note 9 at 428, 144 N. E. at 339. The dissenting opinion effectively summarized the question as follows:

"Upon a joint trial, the jury is called upon to decide the guilt of each accused. The jury hears the evidence produced against all. Evidence which is relevant as to the guilt of one accused may be irrelevant upon the guilt of a co-defendant. One defendant may have made admissions or confessions which are competent evidence against him. They are inadmissible against the other defendants. The jury must sift the evi-

Where the co-defendants have acted in the *furtherance* of a conspiracy the acts and declarations of one conspirator done and uttered in the execution of a common design are admissible against any other party to the conspiracy and it is not necessary that the conspiracy should be charged in the indictment.<sup>23</sup> But if the acts and declarations of one conspirator take place after the common design is accomplished or abandoned, they are inadmissible against the other conspirators. They must be made in furtherance of the prosecution of the common object, or constitute a part of the *res gestae* of some act done for that purpose.<sup>24</sup>

The foregoing cases stress the legalistic formula required at the trial—that the jury may not consider the confessions, admissions and conduct of one defendant not in furtherance of a conspiracy, or made after the accomplishment or failure of the common purpose, in determining the guilt of a co-defendant.<sup>25</sup> Common experience and common sense point in a different direction. Jurors are not accustomed to weigh evidence in that manner. In weighing the credibility of the testimony of one defendant, they can not and do not ignore knowledge derived from other evidence which lends credibility to that testimony; even though the jury might perhaps separate the issues raised by each defense and consider only the competent and relevant evidence bearing on those defenses. The duty of the courts is to preserve intact both in letter and spirit, our constitutional guarantees of a fair and impartial trial. If in accomplishing this duty, the courts must grant separate trials to defendants jointly indicted, they should do so unequivocally.<sup>26</sup> The better and safer course would

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dence produced before it, and, in arriving at its determination of the guilt of each defendant, it may consider only the evidence which is competent and relevant against that particular defendant. We may assume that jurors will try to obey the instructions of the court and to give to each defendant a fair trial. The question will always remain whether they can do so in a particular case. That question is now before us in this case."

<sup>23</sup> Logan v. United States, 144 U. S. 263, 12 Sup. Ct. Rep. 617 (1891); People v. Becker, 215 N. Y. 126, 109 N. E. 127 (1915); People v. Storrs, 207 N. Y. 147, 100 N. E. 730 (1912); People v. McKane, 143 N. Y. 555, 38 N. E. 950 (1894); People v. McQuade, 110 N. Y. 284, 18 N. E. 156 (1888); People v. Davis, 56 N. Y. 95 (1874).

<sup>24</sup> Cases cited *supra* Note 23.

<sup>25</sup> The following extract from People v. Goskell, 132 Misc. 318, 319 (1928) is typical of how far this consideration influences the courts in denying separate trials:

"It is the duty of the Court to properly instruct the jury with reference to the testimony affecting each defendant, and to see that the rights of each defendant are properly safeguarded. This the Court will do to the utmost of his ability. *With this in mind, I do not see how any harm can come to either defendant by trying the defendants together.*" (Italics ours.)

<sup>26</sup> "Personally I am firmly of the conviction that public policy even more insistently demands that the courts should maintain the law in its full vigor and should accord to every accused the rights guaranteed to him by law, than that the guilty shall be swiftly brought to account. Each time a court affirms

be to grant separate trials in every case where a co-defendant *might* be prejudiced by the confessions, admissions or declarations of a co-defendant and not leave it to conjecture or chance that he *may not* be prejudiced.

BERTRAM R. BERNSTEIN.

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SURVIVAL OF ACCRUED RIGHTS UPON THE CANCELLATION OF  
EMPLOYMENT CONTRACTS.

It has been the rule in this state since an early date that where a contract is terminated by the mutual consent of the parties, no claim with respect to the rights already accrued thereunder can be enforced unless expressly or impliedly reserved in the agreement which terminates the contract.<sup>1</sup> Yet not until recently did the Court of Appeals apply this rule to a case of a simple contract of hiring and service, upon the termination of which no further relationship was contemplated by the parties.

In the case of *Coletti v. Knox Hat Co., Inc.*,<sup>2</sup> decided in January of this year, the Court of Appeals reversed an order granting a motion for summary judgment which had been affirmed by the Appellate Division. The complaint alleged that on or about January 1, 1925, the plaintiff and defendant had entered into an oral contract, the terms of which were contained in a letter memorandum, which was renewed in 1926 with slight modifications as to drawing account and territory. The plaintiff was to be employed by the defendant in the capacity of sales agent for a certain territory, with a drawing account of \$10,000 per year, payable bi-monthly, and traveling expenses for the year, both to be deducted from total commissions. His commissions were to be paid at the rate of 10% of the aggregate on the first \$150,000 sales for the calendar year, and 2% on all sales beyond that amount. A check for the balance of the total commissions for the year was to be given him as soon after January 1, as practical.

The complaint further alleges "That the plaintiff continued in the employ of the defendant up to on or about September 1, 1926, pursuant to and in accordance with said agreement \* \* \* at which

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a judgment where a right conferred by law has been disregarded it weakens the force of the law. Indeed, the reasonable fear of the court where guilt is clearly established it is impeding the course of justice may result in decisions which make trial judges careless, and encourage public officers and prosecuting attorneys in the view which often obtains the approval of the unthinking, that a guilty man, even before his guilt is established according to law, has no constitutional rights." From an address delivered by Judge Lehman before the Association of the Bar, February 27, 1930.

<sup>1</sup> *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198 (1890).

<sup>2</sup> 252 N. Y. 468, 169 N. E. 648 (1930).