

Alabama Rules of Civil Procedure

VI. TRIALS

Rule 42.

Consolidation: Separate trials.

(a) *Consolidation.* When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) *Separate trials.* The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by Article 1, Section 11 of the Alabama Constitution of 1901.

(dc) *District court rule.* Rule 42 applies in the district courts and the provisions for consolidation and separate trials provided therein should be applied liberally in recognition of the unavailability of jury trials in the district courts.

[Amended 5-16-83, eff. 7-1-83.]

Committee Comments on 1973 Adoption

Rule 42(a) A.R.C.P. is identical to Rule 42(a) F.R.C.P. Rule 42(b) A.R.C.P. differs only in the elimination of reference to jury trial rights under the Seventh Amendment to the U.S. Constitution.

The general statute on consolidation Tit. 7, § 259, Code of Ala. preserved the restrictive common law limitations that actions to be consolidated must be pending, perfect and complete at the same time, they must be between the plaintiff and the same defendant, and must be such as might have been joined in the same complaint. The statute, and the common law before it, left little scope for consolidation and did not facilitate the administration of justice. It is superseded by Rule 42(a). The rule is similar to the special consolidation statute

for Jefferson County, Tit. 7, § 221, Code of Ala. which has been given a sympathetic construction by the Supreme Court. *Ex parte Ashton*, 231 Ala. 497, 165 So. 773 (1936); *Ex parte Miller*, 273 Ala. 453, 142 So.2d 910 (1962). Rule 42(a) speaks both of joint hearings or trials and of consolidation. This wording is intended to confer a broad discretion to merge the two actions so far as is necessary for their most convenient determination, and to permit merger of some or all of the issues in the two cases. But where there is complete consolidation, the actions retain their separate identity and the parties and pleadings in one action do not automatically become parties and pleadings in the other action. *Oikarinen v. Alexian Bros.*, 342 F.2d 155 (3d Cir.1965). *National Nut Co. of California v. Susu Nut Co.*, 61 F.Supp. 86 (N.D.Ill.1944); *Simon v. Carroll*, 241 Minn. 211, 62 N.W.2d 822 (1954).

The test for consolidation under the special statute for Jefferson County is whether the causes are “of like nature or relative to the same question.” This language was copied from the predecessor to Rule 42(a) F.R.C.P. Its vagueness was responsible for a narrow construction on occasion. This ambiguity is now rejected in both Rule 42(a) F.R.C.P. and A.R.C.P. by permitting consolidation when there is a “common question of law or fact”. This is similar to the test used elsewhere in the rules, e.g., Rules 20(a), 23(b)(3), and 24(b)(2). However, caution should be exercised in order to prevent the court from making non-jury findings which are binding in subsequent jury phases of a case when the matters made the basis of the court’s non-jury findings are matters upon which the litigant is entitled to a jury determination. See e.g., *Beacon Theatres, Inc., v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959) and *Dairy Queen, Inc., v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962) construing federally controlled jury trial rights in civil proceedings. See 5 Moore’s *Federal Practice*, ¶ 42.02 (2d Ed.1971).

Some practical examples of compelling cases for consolidation include actions by husband and wife, members of the same family or persons very similarly situated whose claims for relief arise from the same accident or occurrence.

Rule 42(b) gives the trial court a virtually unlimited freedom to order separate trials of claims, issues, or parties, as may seem dictated by convenience and the desire to avoid prejudice. There is no similar provision in present Alabama law, probably because there is no need for such a provision so long as joinder is restricted and law and equity remain unmerged. But the broad joinder provisions of Rules 13, 14 and 18 to 24 place almost no restrictions on joinder at the pleading stage. They leave it to be handled as a matter of trial convenience, and Rule 42(b) is the rule authorizing the Court to make the necessary orders for trial convenience. Further, the merger of law and equity, and the consequent possibility of intermingling of issues to be tried by the jury

with issues to be tried by the court, necessitates a rule such as this one which will permit the court to shape the order of trial. An exhaustive study of the practical operation of the rule concludes: "... on the whole the separate trial has proved a very flexible and useful instrument for preventing confusion, avoiding prejudice and providing a convenient method of disposing of litigation as fairly and quickly as possible. The rule serves its purpose in modern pleading." Note, *Separate Trial of a Claim or Issue in Modern Pleading: Rule 42(b) of the Federal Rules of Civil Procedure*, 39 Minn.L.Rev. 743, 762-763 (1955). See also Moore's Federal Practice, ¶ 42.03 (2d Ed.)

Rule 42(b), F.R.C.P. contains some rather broad latitude for severance and, therefore, contains a caveat with respect to preservation of Seventh Amendment, U.S. Constitution, rights to a trial by jury. Although the United States Supreme Court has not yet made the Seventh Amendment applicable to civil proceedings in state courts based upon the Fourteenth Amendment [*New York Cent. RR. v. White*, 243 U.S. 188, 208, 37 S.Ct. 247, 61 L.Ed. 667 (1917)], the Alabama Constitution of 1901, Art. 1, Sec. 11, preserves the right of trial by jury. The caveat arises from questions posed and unanswered in *United Air Lines, Inc., v. Wiener*, 286 F.2d 302 (9th Cir.1961), cert. denied 366 U.S. 924, 81 S.Ct. 1352, 6 L.Ed.2d 384 (1961) wherein the separate trials of liability and damages before separate juries was viewed as a possible denial of jury trial as contemplated by the Seventh Amendment. Note however, that separate trials of liability and damages before the same jury passed constitutional muster in *Hosie v. Chicago & N.W. Ry.*, 282 F.2d 639 (7th Cir.1960); cert. denied, 365 U.S. 814, 81 S.Ct. 695, 5 L.Ed.2d 693 (1961) which, like *United Air Lines, Inc., v. Wiener*, supra, was governed by a federal jury trial standard. This same sentiment is preserved by reference to the relevant Alabama Constitutional provisions.

Rule 42(b) provides that separate trials are to be ordered only where needed "in furtherance of convenience or to avoid prejudice." Separate trials are not to be granted merely because the matters involved would have been tried separately before the rules were adopted, or because some of the parties might prefer separate trials. It is the interest of efficient judicial administration which is to be considered, rather than the wishes of the parties. See *Way v. Waterloo, C.F. & N.R.R.*, 239 Iowa 244, 29 N.W.2d 867 (1947).

These rules make severance mandatory where a damage claim and a liability insurance coverage question are presented in the same jury action. See Rule 18(c). By the same token, Rule 18(c) precludes consolidation when the issues are presented in separate jury actions.

For the entry of separate judgments where separate trials have been ordered, see Rule 54(b). For motions for new trial on the questions of damages or liability or both see Rule 59.

**Committee Comments Adopted
February 13, 2004, to Rule 42**

See the Committee Comments Adopted February 13, 2004, to Rule 21 regarding the need to observe the distinction between separate trials, as contemplated by Rule 42(b), and severances, as contemplated by Rule 21.

**District Court Committee Comments
(Amended effective July 1, 1983)**

The considerations that ordinarily might apply to consolidation or separate trials under Rule 42 in the circuit courts may not necessarily apply in the district courts, because of the basic differences in the practice in the district courts.

Note from the reporter of decisions: The order adopting the Committee Comments to Rules 5, 15, 21, 23, 24, and 42, Alabama Rules of Civil Procedure, effective February 13, 2004, is published in that volume of *Alabama Reporter* that contains Alabama cases from 865 So.2d.