are, and courts as willing to construe it liberally,[34] the case requiring a square overruling may be long in coming.

Constitutional Law—Deprivation of Right to Assistance of Counsel by Appointment of Attorney Representing Co-conspirator—[United States].—Glasser and Kretske, assistant United States attorneys, were convicted of a conspiracy to defraud the government by fixing liquor tax violations.[1] At the trial, one of Kretske's lawyers was unable to appear and Kretske moved for a continuance, being dissatisfied with his remaining counsel. The court suggested that Stewart,[2] one of Glasser's attorneys, act also for Kretske. Stewart raised the question of a possible conflict of interests,[3] and Glasser also objected. The court then directed Kretske's lawyer to stay in the case. After a conference at the defense table, Stewart indicated his willingness to represent Kretske. Glasser, who was present, did not renew his objection. Appealing his conviction, Glasser contended that he had been denied the assistance of counsel guaranteed by the Sixth Amendment.[4] He also contended that he had been denied a trial by an impartial jury, alleging that all the women on the panel were members of the Illinois League of Women Voters, and were biassed in favor of the prosecution, having attended lectures on jury service sponsored by the league.[5] These allegations were supported by Glasser's affidavit. The conviction was affirmed by the circuit court of appeals.[6] On writ of certiorari the Supreme Court *held*, the trial court, by suggesting that counsel for one defendant represent a co-defendant, infringed the former's right to assistance of counsel, and it was not necessary to determine the "precise degree of prejudice" resulting therefrom. Mere acquiescence by defendant was not a waiver of the right. A jury, selected from a private organization, and partisan by training, is not representative of the community, and had a proper offer of proof of these allegations been made, a new trial of all the defendants would have been necessary, but defendant's affidavit was not a sufficient offer of proof. Judgment reversed as to Glasser, two justices dissenting. *Glasser v. United States.*[7]

[34] Compare the attitudes of the commissions and the Court in the two most recent previous cases which afforded opportunities to overrule Smyth v. Ames: Railroad Com'n of California v. Pacific Gas & Electric Co., 302 U.S. 388 (1938), and Driscoll v. Edison Light & Power Co., 307 U.S. 104 (1939). The principal case is a continuation of this mutual accommodation. The Federal Power Commission, however, is now forcing the issue by refusing to allow evidence of reproduction cost to be admitted in rate cases.

[1] Section 37, Criminal Code, Rev. Stat. § 5440 (1875), 18 U.S.C.A. § 88 (1927).

[2] William Scott Stewart, author of Stewart on Trial Strategy (1940).

[3] Stewart also raised the objection that his representation of Kretske might tend to associate Glasser with Kretske in the minds of the jurors, but he later decided that no harm would result in this respect if the jurors were informed of the circumstances of his appointment. R., at 180, 183.

[4] "In all criminal prosecutions, the accused shall enjoy the right to .... trial, by an impartial jury of the State and district wherein the crime shall have been committed, ... and to have the Assistance of Counsel for his defence."

[5] He also alleged that women otherwise qualified, but not members of the league, were systematically excluded. There were six women on the jury in the instant case.

[6] United States v. Glasser, 116 F. (2d) 690 (C.C.A. 7th 1940).

[7] 62 S. Ct. 457 (1942), noted in 28 A.B.A.J. 190 (1942), and 10 Kan. City L. Rev. 117 (1942).

It is difficult to determine from the majority opinion whether the holding in the instant case should be taken to mean that the appointment of a defendant's counsel to represent a co-defendant in a conspiracy case is an infringement of the right to assistance of counsel regardless of whether there is a showing of specific acts of prejudice, or that the defendant in this case was in fact prejudiced by the action of the trial court. If the former interpretation is the one intended, the holding seems to go beyond former decisions of the Court.[8] If the latter interpretation is the correct one, the majority's view of the facts is questionable. Only two specific instances of prejudice to Glasser were alleged. The first was Stewart's failure to cross-examine a witness, Brantman, who testified that he did not know Glasser, when Brantman was recalled to the stand after this testimony had been contradicted by another witness. Stewart stated to the court that he did not cross-examine Brantman because he feared Brantman would lie if he did so.[9] Brantman's testimony was very damaging to Kretske,[10] and Stewart may have felt it would be against Kretske's interest to focus attention on Brantman again.[11] It is possible that a lawyer alert to protect Glasser would have had Brantman reiterate his lack of acquaintance with Glasser; but Brantman had been emphatic on this point on direct examination,[12] and the context of the second witness's testimony indicated its unreliability.[13] If Brantman's veracity was uncertain, Glasser's interests may in fact have been best served by leaving well enough alone.

The second alleged instance of prejudice related to Stewart's failure to object to the admission of testimony as to statements made by Kretske, not in Glasser's presence, implicating Glasser. While the declarations of one conspirator made to a third party are not admissible against an alleged co-conspirator unless the connection of the latter with the conspiracy can be established by other evidence,[14] a slight amount of such

[8] In Avery v. Alabama, 308 U.S. 444 (1940), the Court held that it was not a denial of due process for a state court to refuse the request of recently appointed counsel for additional time in which to prepare the defense, where it did not appear that the result would have been changed thereby. The rule is the same in the federal courts under the Sixth Amendment. Crouch v. United States, 298 Fed. 437 (C.C.A. 6th 1924); Crono v. United States, 59 F. (2d) 339 (C.C.A. 9th 1932); Nuefield v. United States, 118 F. (2d) 375 (App. D.C. 1941). See also note 15 infra.

[9] This explanation was made just before sentence was passed on the defendants. The court responded that it thought Stewart had used good judgment. R., at 1062.

[10] Brantman testified that he took $3,000 from Abosketes, a bootlegger, and gave it to Kretske. R., at 652.

[11] However, Stewart first asked for permission to cross-examine him at a later time, R., at 663, and delayed his announcement that he "wanted nothing further to do with him" until Brantman had resumed the stand, R., at 711.

[12] R., at 656.

[13] The "second witness" referred to above was Abosketes, who stated that Brantman knew Glasser, "and that was all there was to it." R., at 668. But he admitted that he himself did not know Glasser and had not known Brantman before giving him the money. R., at 668. He gave it to him because he seemed to have "first class information" about the pending prosecution. R., at 669. He was "kind of hoping" Brantman would be able to fix Glasser, but did not know and did not ask to whom Brantman gave the money, because "when you get protection .... you don't ask too many questions." R., at 670.

[14] Clune v. United States, 159 U.S. 590, 592 (1895); Minner v. United States, 57 F. (2d) 506, 511 (C.C.A. 10th 1932).

other evidence is sufficient,[15] and the order of proof is within the discretion of the trial court.[16] Since there was other evidence implicating Glasser, the evidence in question was admissible, and, as is pointed out in the dissenting opinion,[17] Stewart's failure to make a frivolous objection to it does not seem prejudicial.[18]

Ordinarily, the actions of the trial court in matters relating to the conduct of the trial will not be interfered with by a reviewing court unless it can be shown that they affected the result of the case.[19] Without a showing of any clear instances of prejudice, the mere possibility that Stewart's representation of Glasser might in some way have been more effective had he not undertaken the additional burden of representing Kretske would not seem to warrant reversal, particularly inasmuch as Stewart consented to the arrangement.[20] However, the case against Glasser was admittedly weak.[21] The evidence against him consisted partly of statements by the other conspirators as to his

[15] See United States v. Baker, 61 F. (2d) 469 (C.C.A. 2d 1932), cert. den. 288 U.S. 602 (1933).

[16] 4 Wigmore, Evidence § 1079 (1940); Thiede v. Utah Territory, 159 U.S. 510, 519 (1895); Hoeppel v. United States, 85 F. (2d) 237, 242 (App. D.C. 1936); Baker v. United States, 21 F. (2d) 903, 905 (C.C.A. 4th 1927).

[17] Glasser v. United States, 62 S. Ct. 457, 475 (1942).

[18] Immediately after he accepted the appointment to represent Kretske, Stewart suggested to the court that it would be desirable if after an objection had once been made, defendants' rights could be preserved without repetitious objections on the same ground. The court directed that the record show all adverse rulings carried exception. R., at 185. This was repeated. R., at 195, 680. At p. 53 of Glasser's reply brief in the Supreme Court it is said: ". . . . [the] context [R., at 449 et seq.] conclusively shows that he [Stewart] at all times vigorously asserted for his client the right to be tried on no hearsay evidence. . . . ." In the instances in which Stewart did not object, note 22 infra, the context made it clear to the jury what the testimony would be. In three of the instances the questions were asked by the court. R., at 243, 297, 306. In others, Stewart had objected that the questions were leading. R., at 229, 245. In these circumstances, Stewart and the other defense counsel may well have felt that objections that the evidence was inadmissible as to Glasser would merely emphasize it. To the crucial testimony of Alexander Campbell, Assistant United States District Attorney for the Northern District of Indiana, that Roth had tried to bribe him in Kretske's presence, and had told him "we handle cases in Chicago that way sometimes," Stewart filed a formal motion to exclude, R., at 98, 678; and the jury was excused while the motion was argued, R., at 679.

[19] In Shores v. United States, 80 F. (2d) 942 (C.C.A. 9th 1935), cert. den. 297 U.S. 705 (1936), noted in 22 Va. L. Rev. 957 (1936), the conviction in a conspiracy case of a defendant who was forced by the court to accept representation by the attorney for a co-defendant when his own lawyer was unable to appear was affirmed on the ground that the result would not "rightly" have been different, had defendant's own counsel conducted his case. One judge dissented strongly, on the ground that numerous specific instances of prejudice were shown. See also the cases cited in notes 8 and 16 supra.

[20] The dissenting justices thought it clear that the arrangement was voluntarily assumed by the parties. Glasser v. United States, 62 S. Ct. 457, 474 (1942). It is worthy of notice that attorney George Callaghan, who represented Glasser in the preliminary stages of the proceeding, continued as associate counsel after Stewart entered the case and participated in Glasser's defense at the trial. Brief for United States in the Supreme Court, at 63.

[21] Glasser v. United States, 62 S. Ct. 457, 463 (1942), referring to Brief for United States in the Supreme Court, at 6.

complicity,[22] and partly of circumstantial evidence of doubtful probative value—e.g., that he had dismissed cases or failed to present them to the grand jury without apparent satisfactory reasons.[23] There was no single piece of evidence conclusively connecting him with the conspiracy. It is therefore possible that Stewart's dual role was an important factor in persuading the jury of Glasser's association with the other conspirators. The possibility of prejudice from this combination of circumstances may have considerably influenced that majority of the court.

If Glasser was in fact prejudiced by Stewart's acceptance of the appointment to represent Kretske, it is open to question whether his apparent acquiescence should not prevent him from objecting now. It has been settled that the right to representation by counsel may be waived,[24] although, since the right is a fundamental one, the courts will indulge every reasonable presumption against waiver.[25] A waiver is not binding unless it was intelligently and competently made,[26] but the determination of whether there has been an intelligent waiver must depend upon the particular facts and circumstances surrounding each case, including the background, experience, and conduct of the accused.[27] In the instant case Glasser, an experienced criminal trial lawyer, made no objection to Stewart's dual role at any time during the course of the trial, in his plea to the court before sentence was passed upon him, or in his assignment of grounds for appeal. The point was first raised fifteen weeks after the close of the trial, when a "joint and several assignment of error" was filed.[28] Under these circumstances, to require a new trial is indeed to "strain the concept of fairness till it is narrowed to a filament."[29]

[22] Thus Swanson, a bootlegger, testified (after his memory had been refreshed by the prosecuting attorney) that Kretske had told him part of a bribe would go to Glasser. R., at 230. Similar testimony was given by Del Rocco, R., at 243, 245, and Hodorowicz, R., at 297, members of the same gang; and by Raubunas, R., at 510, and Dewes, R., at 543, who also were bootleggers.

[23] E.g., Raubunas, note 22 supra, and two other members of his group were no-billed on Glasser's advice, but were indicted by Glasser's successor, Brief for United States in the Supreme Court, at 25, and convicted. Investigator Bailey testified that Glasser had continued cases pending against the Hodorowicz group over his objection. R., at 649, 710. Glasser refused to let Investigator Dowd testify in a libel action against an automobile belonging to the Raubunas group, R., at 219, and the libel was dismissed. Glasser also advised Hodorowicz as to the choice of a defense attorney, R., at 302, and Hodorowicz sent him a case of liquor for Christmas, R., at 302.

[24] Schick v. United States, 195 U.S. 65, 72 (1904). The Fourteenth Amendment has not yet been held to require the states to provide counsel except in capital cases. Powell v. Alabama, 287 U.S. 45, 71 (1932); Gall v. Brady, 39 F. Supp. 504 (Md. 1941); cf. Smith v. O'Grady, 312 U.S. 329 (1941).

[25] Ohio Bell Tel. Co. v. Public Utilities Com'n of Ohio, 301 U.S. 292, 307 (1937); Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937).

[26] Walker v. Johnston, 312 U.S. 275 (1941); Holiday v. Johnston, 313 U.S. 342 (1941). Thus an insane person may not waive representation, even though he appears normal at the time. Williams v. State, 163 Ark. 623, 260 S.W. 721 (1924).

[27] Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[28] Glasser v. United States, 62 S. Ct. 457, 473 (1942).

[29] Mr. Justice Cardozo, in Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).

Glasser's second ground of appeal—that he had not been tried by an impartial jury—would require a reversal, if the allegations could be sustained by proof that the jurors were biassed.[30] Membership in the league would not of itself be a ground for disqualification unless the league were actively interested in the litigation.[31] It was not improper for the league to submit a list of prospective jurors,[32] although it is improper to delegate the final choice to it, no matter how high-minded its motives.[33] However, the disqualification of jurors on ground of bias is peculiarly a matter for the trial court,[34] and reviewing courts are sparing in the use of their powers to set aside its decision.[35] Glasser based his affidavit on an article written by one of the women of the panel from which the jury was selected.[36] The trial court considered his petition and was convinced that the defendants were not prejudiced by the composition of the jury; and the circuit court of appeals held that the trial court had not abused its discretion.[37] Clearly, the jury should be a body truly representative of the community;[38] but this doctrine grew out of, and primarily relates to, the exclusion of persons from the jury lists on account of racial discrimination.[39] It may be questioned whether its application in the instant case is entirely consistent with its history and traditional usage.

Copyrights—Assignability of Right of Renewal—[Federal].—In 1912, Graff, a lyricist, assigned to the plaintiff music publishers the copyright to his lyric, "When Irish Eyes Are Smiling," pursuant to a general royalty agreement under which Graff was

[30] 1 Cooley, Constitutional Limitations 678 (8th ed. 1927); Wood v. United States, 83 F. (2d) 587, 589 (App. D.C. 1936).

[31] Remus v. United States, 291 Fed. 501 (1923), cert. den. 263 U.S. 717 (1924) (membership in Anti-Saloon League in case involving violation of National Prohibition Act); Noonan v. Saline County Coal Co., 173 Ill. App. 541 (1912) (membership in United Mine Workers in case between member of union and his employer); Musick v. People, 40 Ill. 268 (1866) (membership in society for detection and prosecution of horse thieves in prosecution for stealing a horse). See 31 A.L.R. 411 (1924).

[32] Walker v. United States, 93 F. (2d) 383 (C.C.A. 8th 1937).

[33] United States v. Murphy, 224 Fed. 554 (D.C.N.Y. 1915). Thus, the clerk may not exclude names otherwise qualified, merely because they do not appear in the list submitted by the league. Cf. United States v. Ballard, 35 F. Supp. 105 (Cal. 1940).

[34] Crawford v. United States, 212 U.S. 183, 196 (1909); Union Electric Light & Power Co. v. Snyder Estate, 65 F. (2d) 297 (C.C.A. 8th 1933).

[35] Reynolds v. United States, 98 U.S. 145, 157 (1878); Frank v. United States, 59 F. (2d) 670, 675 (C.C.A. 9th 1932).

[36] Women and the Law, 26 A.B.A.J. 354 (1940). The writer states: "With one exception, the women were all members of the League of Women Voters, who had been recommended by that organization at the invitation of the court." In the same article it is said: "All the information we had, had been given us by members of the Bar Association and distinguished judges."

[37] United States v. Glasser, 116 F. (2d) 690, 705 (C.C.A. 7th 1940).

[38] Smith v. Texas, 311 U.S. 128, 130 (1940).

[39] Strauder v. West Virginia, 100 U.S. 303, 309 (1879); Martin v. Texas, 200 U.S. 316, 319 (1906); Chambers v. Florida, 309 U.S. 227, 228 (1940).