§21.1. Choice of law in diversity actions. In retrospect, the year 1938 was a momentous but perplexing one for civil procedure in the United States. In that year the Supreme Court handed down its tremendously significant decision in *Erie R.R. v. Tompkins*, and just five months later, on September 16, 1938, the Federal Rules of Civil Procedure became effective. Vis-à-vis diversity cases, these dual events immediately evoked the hasty if superficial generalization that prior to 1938, federal courts followed federal concepts of substantive law and state concepts of procedure; after 1938 they followed federal procedural law and state substantive law. Less than clairvoyance was required to see that a conspicuous potential for conflict inhered in any such attempt at a neat and precise compartmentalization in the shadowy penumbra of substance and procedure. Moreover, because of the constitutional
underpinnings of the *Erie* decision, a true watershed in any consideration of federalism in the United States, a question was raised as to whether the rationale of *Erie* did not jeopardize the applicability of many of the Federal Rules of Civil Procedure in diversity cases. Accordingly, the seeds of potential discord between the *Erie* doctrine and the Federal Rules made the year 1938 one of perplexity as well as high promise. However, surprisingly, the question as to the ultimate victor in a direct contest involving the *Erie* doctrine and the Federal Rules had to await the passage of some twenty-seven years. When the answer came, it was supplied by a United States Supreme Court decision, in a case initially commenced in a United States district court in Massachusetts and involving a conflict between a Massachusetts statute and the Federal Rules. The case was *Hanna v. Palmer.* Before turning to the facts in *Hanna,* it may be useful to review some prior judicial history in order to gain perspective.

In *Erie* itself, the question before the Court was whether a federal judge was compelled to apply state law in the classification of the injured plaintiff as a trespasser or licensee in a tort case. This was patently a substantive issue entirely devoid of procedural overtones. The Supreme Court’s decision holding that federal courts had to follow state principles of substantive law in diversity cases revolutionized the federal judiciary. However, because of the clearly substantive issue involved, the decision, *e o nomine,* raised no immediate threat to uniform rules of procedure for the federal courts. Moreover, Mr. Justice Reed’s concurring opinion, essential for the majority in the case, confidently proclaimed that “no one doubts federal power over procedure.”

As suggested above, if a concise and definite cleavage could have been maintained between “substance” and “procedure,” the question of conflict between the *Erie* decision and the Federal Rules would have merely lurked below the surface and, perhaps, need never have been squarely faced. However, in the juridical no-man’s land between substance and procedure, the always vexing and ever-present necessity of according due deference to substantial state interests, on the one hand, and the sometimes competing considerations of maintaining a homogeneous system of procedure for the federal courts, on the other, pushed the issue to the fore.

The march toward a confrontation began in the 1945 Supreme Court decision in *Guarantee Trust Co. v. York.* There the question was whether a state statute of limitations had to be applied in a diversity case, despite the fact that it was considered “procedural” for certain purposes. In deciding this issue in the affirmative, the Court underscored the fact that *Erie* was not based simply on sands of semantics and had to be regarded as more than an exercise in the articulation of scientific legal terminology. Thus, in the Court’s view,

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4 380 U.S. 460, 85 Sup. Ct. 1136, 14 L. Ed. 2d 8 (1965).
5 304 U.S. 64, 92, 58 Sup. Ct. 817, 828, 82 L. Ed. 1188, 1201-1202 (1938).

http://lawdigitalcommons.bc.edu/asml/vol1965/iss1/24
[Erie] expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.7

Thus was born the celebrated "outcome determination" test which, as with many such formalistic "tests," concealed more than it illumined.

While the decision, again eo nomine, did not conflict with any express provisions of the Federal Rules, discord was plainly forecast. It was obvious that virtually every rule of procedure could be regarded as "outcome determinative" in a given factual context. Indeed, even those who drafted the rules trembled upon considering that "hardly a one of the heralded Federal Rules can be considered safe from attack."8 Other prophets of doom believed that it would be essential to repeal the rules in diversity cases.9

The "outcome determination" test appeared to give substance to these fears. Quite apart from the previously noted fact that virtually every procedural rule might conceivably affect the outcome of a litigation, a glib if rigid rule such as "outcome determination" presumably would have a proclivity to generate a mechanical application which might overlook, or at least sublimate, the interests that the Erie doctrine was designed to protect. Thus a slot-machine invocation of the test would render less than exigent such considerations as the residual ramifications of the decision on federal-state relations, whether the putative change in outcome is potentially unjust to one of the litigants, or, anomalously, whether the rule might actually foster forum shopping.

Subsequent to York, in several cases, the Supreme Court affirmed state procedural rules which to some extent impinged on federal rules in rather mechanical opinions. In Ragan v. Merchants Transfer & Warehouse Co.,10 a state rule as to when the statute of limitations is tolled (upon service of summons) was applied rather than Federal Rule 3 ("A civil action is commenced by filing a complaint with the court."). In Woods v. Interstate Realty Co.,11 a state rule as to capacity to sue was applied rather than Rule 17(b) ("The capacity of a corporation to

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7 Id. at 109, 65 Sup. Ct. at 1470, 89 L. Ed. at 2086.
sue or be sued shall be determined by the law under which it was organized."). Both opinions seemingly prescinded from a discussion or consideration of the interests protected by Erie. 12

In 1958, the Supreme Court in a much discussed opinion in Byrd v. Blue Ridge Rural Electric Cooperative, Inc. 18 articulated a new and more sophisticated approach to the problem and one which drew more heavily on the considerations of federalism implicit in Erie. In this case a workman brought an action against a utilities cooperative alleging negligence. The plaintiff's employer had a contract with the cooperative to construct power lines. As a defense, the cooperative argued that the applicable state (South Carolina) workmen's compensation law rendered its remedy exclusive against the cooperative as well as the immediate employer, since the work being done was part of the cooperative's "trade, business or occupation." This raised a rather doubtful issue of fact but the trial judge, consonant with normal state practice, decided the question of the existence of facts supporting a statutory affirmative defense instead of allowing the jury to decide the issue. In reversing, the Supreme Court held that the defense presented a fact question that should be determined by the jury notwithstanding the contrary state rule. In deciding thusly, the Court, in one phase of its opinion, conceded that the choice of judge or jury might "determine outcome" but held that this fact was outweighed by significant countervailing considerations.

The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence — if not the command — of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. . . . The policy of uniform enforcement of state-created rights and obligations . . . cannot in every case exact compliance with a state rule — not bound up with rights and obligations — which disrupts the federal system of allocating functions between judge and jury. . . . Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interests of furthering the objective that the litigation should not come out one way in the federal courts and another way in the state court. 14

 Accordingly, the Court ultimately held that the conspicuous federal policy against disruption of the judge-jury relationship was dominant in the case.

The decision represented a salutary step away from the rigid applica-

14 Id. at 537-538, 78 Sup. Ct. at 901, 2 L. Ed. 2d at 962-963.
tion of the outcome-determination rule. Under Byrd, the policy of fostering uniformity of outcome between federal and state courts had to be weighed against federal interests in maintaining the integrity of a uniform system of procedure for its courts. However, the balancing of federal-state interests dictated by Blue Ridge was not an easy assignment and the lower federal courts struggled with its application.15

It was against this background that the Hanna case came to the Court. This case was a diversity action brought against the executor of the decedent’s estate. Service of process was made on the defendant by leaving copies of the summons and the complaint with the defendant’s wife at his home, in accord with Rule 4(d)(1) of the Federal Rules of Civil Procedure. The defendant objected to this mode of service on the ground that Massachusetts General Laws, Chapter 197, Section 9, governed service of process in this type of action and that this statute required service “in hand” to the defendant within one year of the accrual of a cause of action. The United States District Court for Massachusetts, agreeing with the defendant, granted summary judgment. The Court of Appeals for the First Circuit, noting that “[r]elatively recent amendments [to Section 9] evince a clear legislative purpose to require personal notification within the year,” held that the discord between the state and federal rules was over “a substantive rather than a procedural matter,” and unanimously affirmed.16 “Because of the threat to the goal of uniformity of federal procedure,” the Supreme Court granted certiorari.17

Speaking for the Court, Chief Justice Warren first discarded the idea that any automatic test, such as “outcome determination,” could be automatically invoked in making a judgment as to which side of the substance-procedure fence a given case falls. Rather, he indicated that all such inquiries should proceed with conscious awareness of the twin aims of the Erie rule: discouragement of forum shopping and avoidance of inequitable administration of the laws.”18 Applying such an orientation to a consideration of the method in which process is served, the Court viewed the Massachusetts mode of service as effecting the substantive rights of a litigant in a most remote and indirect fashion; moreover, it would not, in the Court’s view, likely be an impelling force in the selection of one forum over another and accordingly would likely fall on the procedural side of the dividing line.

However, more fundamental to the Court’s decision was the conclu-

15 As illustrative of the degree of complexity and sophistication required of the lower courts in applying the teaching of Blue Ridge, see Allstate Insurance Co. v. Charneski, 286 F.2d 238 (7th Cir. 1960); Monarch Insurance Co. v. Spach, 281 F.2d 401 (6th Cir. 1960); Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1959), cert. denied, 362 U.S. 949 (1960). These cases are summarized and discussed in Wright, The Law of Federal Courts §§9, at 210-213 (1963). See also, Smith, Blue Ridge and Beyond: A Byrd’s-Eye View of Federalism in Diversity Litigation, 36 Tul. L. Rev. 443 (1962).
16 381 F.2d 157 (1st Cir. 1964).
18 380 U.S. 460, 468, 85 Sup. Ct. 1136, 1142, 14 L. Ed. 2d 8, 13 (1965).
sion that neither Erie nor its progeny were to be the determinative precedents in testing the validity of a federal rule when it ostensibly runs afoul of a contradictory procedural provision of a state. In reaching this conclusion the Court took conspicuous note of the fact that "The Erie rule has never been invoked to void a Federal Rule." While recognizing that cases had been decided which sustained the validity of a state rule against an argument that a federal rule was relevant, the Court stated that "the holding of each such case was not that Erie commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, Erie commanded the enforcement of state law." Here, the direct clash was clearly present and, in this situation, the Court held that the relevant focus was not to Erie and the line of cases following it. Instead, the relevant inquiry was whether the rule at issue "exceeded the congressional mandate embodied in the Rules Enabling Act [or] transgressed constitutional bounds." If both these questions can be answered in the affirmative—a situation which in the Court's view plainly obtained relative to Rule 4(d)(1)—then the rule will stand, notwithstanding countervailing state procedure.

When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Justice Harlan, in a concurring opinion, mounted a characteristically cogent attack upon the rationale of the majority. He argued that it was not enough to characterize Erie as an attempt to discourage forum shopping and prevent the inequitable administration of the laws. Moreover, in his view the Court, in applying its "arguably procedural, ergo constitutional test," failed to accord due deference to the weighty conceptual considerations which bottomed Erie. To Harlan, Erie recognized that primary activity essentially local in character should be regulated by state procedural rules and that it would be subversive in the extreme to allow federal judicial power a vitality which would be beyond the pale of federal legislative power. Taking note of the majority's allusion to matters which could be "rationally capable of classification as either substance or procedure" (and thus within the prima facie validity of the rules), Harlan noted:

So long as a reasonable man could characterize any duly adopted federal rule as "procedural," the Court, unless I misapprehend what is said, would have it apply no matter how seriously it frus-

19 Id. at 470, 85 Sup. Ct. at 1143, 14 L. Ed. 2d at 14.
20 Id. at 471, 85 Sup. Ct. at 1144, 14 L. Ed. 2d at 15.
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...trated a State's substantive regulation of the primary conduct and affairs of its citizens.\(^{21}\)

Harlan's concurrence stemmed from the fact that the application of the Federal Rule, requiring the executor to check at his residence or with his spouse before closing the estate, did not, in his view, give "rise to any real impingement on the vitality of the state policy which the Massachusetts rule is intended to serve."

As the concurring opinion indicated, the difficulty in the majority's view stems not so much from the result which is reached but from the broad and sweeping language used by the Chief Justice. Read literally, this language would call for automatic application of a federal procedural rule, provided that the rule was "relevant" to the issue at bar. The test articulated by the Court "attributes such overriding force to the Federal Rules that it is hard to think of a case where a conflicting state rule would be allowed to operate even though the state rule reflected policy considerations which, under Erie, would lie within the realm of state legislative authority."\(^{22}\) In the quest for the unquestionably salutary uniform system of federal procedure, there remains a serious question as to whether state substantive interests will be adequately protected. While it is true that most substantive interests would, as a matter of definition, reside outside the realm of procedure and, accordingly, not run afoul of the provisions of the Federal Rules, experience has demonstrated that this is not universally true. One may concede that the potential for discord is not so acute when the conflict derives not from positive state policies antithetical to the Federal Rules, but rather from the negative omissions of state procedural systems which fail to provide for modern pleading. The central difficulty—a difficulty which in terms of federalism is not insignificant—will be generated from those situations in which positive state policies such as those embodied in statutes of limitations, the protection of privileged communications, and the requirements for bringing certain actions, such as derivative suits, come in conflict with provisions of the Federal Rules. In the past, state interests have been adequately recognized when they have been in conflict with competing federal provisions.\(^{23}\) Whether this situation will continue to obtain is now conjectural. Perhaps the saving grace is that as more states are added to the ever-expanding list of those revising their procedural systems after the pattern of the Federal Rules, the occasions for direct conflict must inevitably diminish.\(^{24}\)

\(^{21}\) Id. at 476, 85 Sup. Ct. at 1146, 14 L. Ed. 2d at 18.

\(^{22}\) Id. at 478, 85 Sup. Ct. at 1147, 14 L. Ed. 2d at 19.

\(^{23}\) See, e.g., Underwood v. Maloney, 256 F.2d 334 (3d Cir. 1958), cert. denied, 358 U.S. 864 (1958), where state law was said to prohibit class suits against labor unions and require their being sued as an unincorporated association. The federal court ruled that a class action under Federal Rule 23(a) could not be maintained in a diversity case.

\(^{24}\) Professor Wright notes that the Rules have been adopted in toto in some 20 jurisdictions, and have had some influence on procedural revision in almost every other state. Wright, The Law of Federal Courts §63 at 225 (1963).
§21.2. Personal jurisdiction over foreign corporations. Frequently inextricably involved with the considerations posed in the preceding discussion of the appropriate mode of acquisition of jurisdiction is a related but totally different question — the constitutional question of whether a corporation has sufficient contacts with a state so that rendering it subject to suit there comports with the requirements of due process.¹ It is usually assumed that the same due process limitations are applicable in federal courts in diversity cases as would obtain in state courts in similar litigation.² However, it frequently happens that a nonresident corporation has sufficient contacts with a state to render the assertion of jurisdiction constitutionally permissible but the state statutory framework has not authorized the local courts to exercise the full reach of jurisdiction available to them.³

Typically, as in Massachusetts, the state statute authorizing service upon foreign corporations “doing business” may have been interpreted more restrictively than required by the due process clause of the Federal Constitution. Accordingly, the foreign corporation may not be amenable to suit in state courts under circumstances where Federal Rule 4(d)(3) would authorize a federal court in the same state to serve process, if an appropriate officer or agent of the corporation could be found within the state. Most federal courts, including the First Circuit, have ruled that the apparent authorization of the federal rule must yield to the more restrictive limits of state policy under force of the Erie doctrine.⁴ Judge Clark’s persuasive argument for a contrary rule in Jaftex Corp. v. Randolph Mills, Inc.,⁵ was overruled recently by the Second Circuit sitting en banc.⁶

The central issue in Massachusetts has revolved around the question

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⁴ See, e.g., Waltham Precision Instrument Co. v. McDonnell Aircraft Corp., 310 F.2d 20 (1st Cir. 1960); Pulson v. American Rolling Mill Co., 170 F.2d 195 (1st Cir. 1948).
⁵ 282 F.2d 508 (2d Cir. 1960).
of the extent of activity in which a foreign corporation must engage in order to subject itself to nondomiciliary jurisdiction for the litigation of claims generated by that activity under the relevant Massachusetts statutes. More specifically, the judicial battle has usually raged over the issue of whether "mere solicitation" of business within the state would render an interstate corporation amenable to suit under Massachusetts law. It is anomalous that the problem has arisen at all in the light of the broad and pervasive language of the applicable statute. Nonetheless, from the beginning the Massachusetts Supreme Judicial Court has taken the position that "mere solicitation"—absent additional factors—is insufficient to subject the foreign corporation to Massachusetts jurisdiction. In every case in which a foreign corporation, served with process pursuant to General Laws, Chapter 223, Sections 37 and 38, defended on grounds of jurisdiction, the Supreme Judicial Court has strained to find indicia of business activity which exceeded bare solicitation in order to validate the exercise of jurisdiction.

The sole exception occurred in Radio Shack Corp. v. Lafayette Radio Electronics Corp.,9 where in 1960 Judge Wyzanski, in divining what he deemed to be the future course of Massachusetts decisional law, concluded that the Massachusetts Court was changing its traditional position and that henceforth mere solicitation would furnish a valid juridical base for jurisdiction, at least so far as a statutory analogue of General Laws, Chapter 223, Section 38, was concerned.

Another statutory procedure for initiating suit against a foreign corporation doing business within Massachusetts is by service of process on the Commissioner of Corporations and Taxation pursuant to Sections 3 and 3A of General Laws, Chapter 181.10 The Supreme Judicial Court in 1959, in Remington Arms Co. v. Lechmere Tire and Sales Co.,11 had to construe these statutes along with Sections 5 and 12 of General Laws, Chapter 181.12 In Remington the Court refused to en-

7 G.L., c. 223, §38, as amended by Acts of 1939, c. 451, §61, by reference to G.L., c. 223, §37, authorizes service of process on a foreign corporation if the corporation "... has a usual place of business in the commonwealth, or, with or without such usual place of business, is engaged in or soliciting business in the commonwealth, permanently or temporarily. ..."


10 G.L., c. 181, §3, requires every foreign corporation doing business within the Commonwealth to appoint as its attorney for the service of process the Commissioner of Corporations. G.L., c. 181, §3A, provides that in the event of a failure to make the appointment as required in Section 3, the corporation will be deemed to have done so.


12 G.L., c. 181, §5, provides: "Every foreign corporation of the classes described in section three, before transacting business in this commonwealth, shall, upon payment of the fee provided by section twenty-three, file ... a copy of its charter, ... certified ... by-laws, and a certificate" of certain information as to the corpo-
large the scope of Chapter 181 in the absence of overt legislative action, notwithstanding certain then-recent Supreme Court decisions which allayed constitutional fears of the states relative to their legislative power over foreign corporations engaged in interstate commerce. Accordingly, the Remington decision held, inter alia, that Sections 3, 5, and 12 of General Laws, Chapter 181, did not apply to foreign corporations engaged solely in interstate commerce. Nonetheless, in Radio Shack Judge Wyzanski read this part of the decision as reflecting the state Court's willingness to distinguish Section 3A of this Chapter from Sections 3, 5, and 12 in the light of an earlier decision of the Supreme Judicial Court in Wyshak v. Anaconda Copper Mining Co. He thereupon proceeded to hold that mere solicitation of business by a foreign corporation was an adequate basis for service of process under General Laws, Chapter 181, Section 3A.

The question of whether the various sections of the statute thus called for different standards and whether "mere solicitation" would satisfy Section 3A again came before the United States District Court during the 1965 Survey year in Lowd v. California Fund Management Co. The case involved a motion to dismiss by a California corporation upon which an asserted service of process by a Massachusetts plaintiff was made by delivery of a copy of a writ and summons to the Secretary of State pursuant to General Laws, Chapter 181, Section 3A.

The defendant took the position that service on a foreign corporation under the provisions of Section 3A could legitimately be made only upon corporations required to qualify under Section 3. In support of this position the defendant placed primary reliance upon the opinion of Chief Justice Wilkins in Remington, in which, as previously noted, the Court ruled that Sections 3, 5, and 12 of Chapter 181 were not applicable to foreign corporations engaged exclusively in interstate commerce in the Commonwealth. The defendant argued that since it was not subject to Section 3 it could not properly be served under Section 3A.

In countering this argument the plaintiff cited Radio Shack, in which service on an agent of a foreign corporation under General Laws,
Chapter 223, Sections 37 and 38, was held to be valid. Central to the plaintiff’s argument was the following language of Judge Wyzanski:

In Remington Arms Inc. v. Lechmere Tire and Sales Co., Mass., 158 N.E.2d 134, Chief Justice Wilkins, while stating that the Massachusetts Court would not re-examine constructions that court had heretofore placed on §§3, 5 and 12 of c. 181, showed a willingness to accept a party’s concession that §3A, the section governing service of process upon the commissioner, should now be interpreted in the light of Wyshak v. Anaconda Copper Mining Co., 328 Mass. 219, 103 N.E.2d 230. If I understand aright the opinion of Chief Justice Wilkins this means that today the Massachusetts court regards mere solicitation of business by a foreign corporation as an adequate basis for service of process under c. 181, §3A in cases arising out of such solicitation. And if this construction be correct, then the service on the commissioner in the case at bar was appropriate and does confer jurisdiction over the New York Corporation.17

In Lowd, Judge Caffrey reached a conclusion contrary to Radio Shack, explicitly noting that counsel for the defendant had elicited additional information — not brought to the attention of Judge Wyzanski in Radio Shack — on the true purport of Chief Justice Wilkins’ reference to the “concession” made by the company in the Remington Arms Company case. This “additional light” was the following quote from the brief for Remington filed in the Supreme Judicial Court:

One thing should be made perfectly clear. Remington is by no means taking the position that it cannot be served with process here in the usual way. See G.L. c. 223, sec. 38. That issue is not in the case; but, if it were, it would not be disputed. What Remington does urge, however, is that the provisions of Chapter 181 are a different matter entirely. There, the words “doing business” have a different meaning, different standards. Remington is not doing business in Massachusetts within the meaning of that Chapter.18

In view of this language, Judge Caffrey concluded that Chief Justice Wilkins did not indicate a willingness to accept the concession of a party that Section 3A should be construed in the light of Wyshak. The district court reiterated the critical fact that Wyshak concerned service of process under the provisions of General Laws, Chapter 246, Section 1, while the related case of Jet Manufacturing Co. v. Sanford Ink Co.19 dealt with service of process under General Laws, Chapter 223, Section 38, and “Remington in its brief clearly conceded that it could have been, but was not, served with process under the provisions of Ch. 223,

Accordingly, in the court's view, Sections 3, 3A, 5, and 12 of Chapter 181 are interlocking parts of a cohesive statutory scheme. Thus if a corporation does not engage in a sufficient "quantum" of business activity to bring itself within the purview of Section 5, "that same quantum of activity is insufficient to require the corporaton to register under Section 3 or to permit effective service on it pursuant to the provisions of Section 3A."21

Several other cases decided in the United States District Court for the District of Massachusetts during the 1965 survey year also emphasized Massachusetts' conservative approach to the problem of personal jurisdiction over foreign corporations. In Perna v. Dell Publishing Co.,22 Garney v. Dell Publishing Co.,23 and Garney v. MacFadden Publications, Inc.,24 the court in all three cases decided that jurisdiction could not be asserted over a defendant foreign corporation under the present statute since there was no "doing of business" within the Commonwealth. The touchstone of the rationale of all three cases is seen in Perna where Chief Judge Sweeney, utilizing the "quantum" of activity orientation, noted that the foreign corporation had no assets, personnel office, plant, warehouse, or telephone listing in the Commonwealth and that it had never appointed anyone, including the Secretary of State of the Commonwealth, an agent to receive service of process. The court found that the corporation's sole contact with Massachusetts was the fact that its magazines were sold within the state through mail subscriptions and retail outlets and that this was insufficient to hold the defendant publisher amenable to Massachusetts jurisdiction.25

There is no question that the federal court decisions construing the relevant Massachusetts statutes in the area are properly reflecting the restrictive view of the Massachusetts Supreme Judicial Court as to what constitutes "doing business" in the Commonwealth. Moreover, as Judge Caffrey indicated in Lowd, the Massachusetts Court has not been inhibited from applying a more expansive gloss to the pervasive words of the statutory framework because of any lingering constitutional fears. Rather the Court has shrunk from the more liberal view on the grounds of the lack of an overt and specific legislative mandate. "Thus, defendant's motion must be allowed, not because Massachusetts constitutionally could not exert jurisdiction over a defendant situated as the defendant herein, but because the Supreme Judicial Court tells us that thus far the Massachusetts legislature has not elected to do so."26

It is clear that the situation in Massachusetts is at variance with the trend of statutory and decisional law in this area.27 Moreover, as has been previously suggested:

21 Ibid.
It can be asked, . . . whether the Court, in continuing to approach the question of jurisdiction on a quantitative basis — looking for the presence of an office, etc. — is not taking an overly restrictive view. It must be remembered that, at bottom, *International Shoe* established a principle: the principle of fair play and substantial justice. In this era of expanded transportation and communication, a foreign corporation, despite the absence from the Commonwealth of the external manifestations of its business, may well so inject and impress itself upon the local economy that it would be fair and just to have it answer within the forum.28

Whatever the merit of this analysis, it is now clear that any change in the current situation will have to stem from the legislature and not the Court.

A related but different question was presented by two cases also decided in the Federal District Court for Massachusetts, *Brenner v. Rubin*29 and *Hall v. Rubin*.30 These were Fair Labor Standards Act cases31 which concerned the requirements of General Laws, Chapter 227, Section 5A.32 Pursuant to this statute, the defendant had filed a

Minn. 1960); Nelson v. Miller, 11 Ill. 2d §78, 143 N.E.2d 673 (1957); Painter v. Home Finance Co., 245 N.C. 576, 96 S.E.2d 731 (1957). N.Y. Cir. Prac. Law & Rules §302(a) (McKenney's, 1965), give New York courts personal jurisdiction over nondomiciliaries as a result of their doing any business within the state, committing a tortious act (except defamation of character), or owning, using, or possessing real property within the state. A conspicuous example of the trend of decisional law in this area is supplied by American Cyanamid Co. v. Rosenblatt, 16 N.Y.2d 621, 261 N.Y.S.2d 69, 209 N.E.2d 112 (1965), *application for stay denied*, heard before Mr. Justice Goldberg in chambers, 34 U.S.L. Week 3169 (1965), wherein the Court of Appeals of the State of New York upheld service on appellant, a United States citizen in Rome, Italy, under the above cited New York "long arm" statute. See also Currie, The Growth of the Long Arm, 1963 Ill. Law Forum 533.

31 Actions to recover unpaid minimum and overtime wages pursuant to 29 U.S.C. §§201-209 (1964).
32 G.L., c. 227, §5A: "Appointment of agents and filing of certificates by certain non-residents; notice of action; continuance.

"Except as provided in section five, every non-resident doing business in the commonwealth shall file a certificate with the clerk of each city or town where he does business, setting forth his full name, address and place of business and the trade name under which he does business, and also a statement whereby he appoints the clerk of each such city or town, or his successor in office, his true and lawful agent upon whom all lawful processes may be served in any action arising out of such business in this commonwealth. If such person fails to appoint an agent and does business in this commonwealth, service of process may be made upon the clerk of any city or town where such business is conducted. When legal process against any such person is served upon such clerk, a copy of such process shall forthwith be sent by registered mail with a return receipt requested by the plaintiff to the defendant at his last known address. The plaintiff's affidavit of compliance herewith, and the defendant's return receipt, if received by the plaintiff, or other proof of actual notice shall be filed in the case on or before the return day of the process or within such further time as the court may allow. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action.”
statement with the City Clerk for the city of Lawrence, in which the defendant did business, appointing the official an agent for service of process. Prior to service in the present cases, the defendant ceased to do business in the Commonwealth but filed no notice to this effect with the Clerk. In the absence of such a notice the question was whether service on the Clerk was sufficient to confer personal jurisdiction over the defendant in the Massachusetts court. In both cases the court answered this question in the negative, holding that the question of whether a certificate of discontinuance had been filed was irrelevant since the decisive and determinative issue was whether the defendant was, in fact, doing business within the Commonwealth at the time of service of process. Since the defendant was not doing business here at the critical moment, the court obtained no jurisdiction over him.3

§21.3. Res judicata. The doctrine of res judicata expresses the salutary principle of judicial administration and public policy that litigation, once decided on the merits, should come to an end. As the Massachusetts Supreme Judicial Court has stated:

This doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, "of public policy and of private peace," which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect.4

Questions of res judicata usually require application of one of two rules governing the effect to be accorded a previous adjudication. One rule is that a final judgment is a bar to any further litigation based on the selfsame cause of action between the same parties. The second rule, familiarly known as collateral estoppel, holds that where a fact question essential to the outcome of a litigation is actually decided, it may not be litigated in a subsequent action. Thus collateral estoppel seeks to preclude the relitigation of identical issues.5 Though the two rules are frequently approached as conceptually distinct, the Massachusetts treat-
ment of the doctrine of res judicata appears to be an amalgam of both rules. Thus the Supreme Judicial Court stated in Cleaveland v. Malden Savings Bank: “A judgment on the merits in an earlier proceeding between the same parties is a bar, as to every issue that in fact was or in law might have been litigated, to a later proceeding on the same cause of action.”

By its terms the language of this definition presents several interesting questions. However, none is more perplexing than the issue of which facts were litigated or “in law might have been litigated” in the prior action. Applying this orientation, the classic dichotomy as to which issues are foreclosed through having come within a sufficiently viable prior judicial scrutiny, turns on the distinction between “ultimate” and “evidentiary” facts. However, again, the question as to what is “ultimate” and what is “evidentiary” is another conspicuous example of “tests” which are easy in the articulation but difficult in the application. To say that jurisdictions have differed as to what constitutes an “ultimate” fact as distinguished from an “evidentiary” fact is but to engage in understatement. One definition which has achieved a fair degree of currency and acceptance is that of Judge Learned Hand who stated that ultimate facts are “those facts, upon whose combined occurrence the law raises the duty, or the right, in question.” However, as noted, this test is far from universally accepted and many courts have sought to evolve their own standards, some concluding that an “ultimate” fact is any fact put in issue by the pleadings, others that it is only one of those facts fundamentally affecting the rights and obligations of the parties in the earlier action (a formularization which seemingly would satisfy Judge Hand) and, finally, still others which hold that only the “final” fact at issue between the parties could realistically be considered an “ultimate” fact: a “test” which immediately prompts one to ask whether the fact is “ultimate” because it is “final” or “final” because it is “ultimate.” Moreover, other commentators have proposed standards which involve variations on all the judicial themes canvassed above. In an exhaustive note, the editors of the Harvard Law Review suggested that the most effective division between ultimate and evidentiary facts would be “to make the doctrine applicable when it is clear from the record, pleadings or opinion that the determination of the fact in question was a necessary step in arriving at the final judgment, provided that at the time it was foreseeable that the fact might be of importance in future litigation.” Whatever other virtues it has, this standard would seem to demand a level of prescience conspicuous for even a Harvard trained jurist.

Massachusetts has eschewed adding to the proliferation of talismanic

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9 Id. at 298, 197 N.E. at 16.
10 The Evergreens v. Nunan, 141 F.2d 927, 928 (2d Cir. 1944), cert. denied, 323 U.S. 720 (1944).
11 See Annotation, 142 A.L.R. 1233 (1943), and cases collected therein.
tests. Rather, the court determines on a case by case basis whether the fact in question was essential to the determination of a prior adjudication. This is unquestionably a sound approach, for in answering the question of whether a previously adjudicated fact should be barred in a subsequent proceeding the court need not be mindful of the niceties of a precise verbal formulation, but rather of the mischief sought to be remedied by the doctrine and the underlying judicial presuppositions which lend it relevance and vitality. The most obvious purpose of the rule is to prevent the vexatious relitigation of matters which should have been concluded by a final judgment in an earlier action. Frequently the determination of this issue presents the difficult question of effectuating the conceded sound policy considerations which underlie the doctrine while avoiding a situation in which the second plaintiff loses his day in court because of a fleeting or tangential similitude to the factual and legal complexion of succeeding actions.

These considerations were before the Supreme Judicial Court in Town of Boylston v. McGrath, in which the concept of res judicata unsuccessfully was sought to be invoked by a defendant. The plaintiff brought a bill in equity to enjoin the defendant from maintaining an excavation in adjoining land which deprived the plaintiff's land of lateral support. The defendant raised a plea in abatement and a plea in bar on the theory that a prior action between the parties, resulting in a judgment for the defendant, was res judicata to the present action. The earlier action was in two counts, one alleging trespass and the other conversion in the removal of soil from the town's land by the defendants. The plea in bar alleged that:

[e]vidence introduced at the [former] trial on the question of damages was [as] to the amount of fill required to restore the . . . plaintiff's land to its original state, the angle of repose necessary to support such land . . . and the value of the amount of land necessary . . . for restoration. Plans and charts were introduced . . . showing the property lines . . . and the angle of repose necessary . . . The same factual claim as introduced in evidence in the prior case . . . is alleged in the . . . present bill. The . . . plaintiff at no time . . . sought to amend its declaration nor to amend for hearing . . . in Equity.

Both the plea in abatement and plea in bar were sustained in the Superior Court.

On appeal, the Supreme Judicial Court examined the papers in the prior law action. It found that in that action the trial judge ruled that the plaintiff town had not sustained its burden of proof to show the

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10 Two defendants were joined originally in the action. However one defendant filed no pleading and accordingly, as in the Court's opinion, the reference will be to a singular defendant. Id. at 405, 204 N.E.2d at 907.
11 Id. at 405, 406, 204 N.E.2d at 907.
The judge, ruling that the defendant should not be prepared to respond to a theory introduced so late in the case and "of which he had no notice," denied the plaintiff's requests and found for the defendant.

In reversing, the Supreme Judicial Court initially noted that, focusing merely on the pleadings, application of the principle of res judicata would not be warranted. Plainly the new allegations (loss of lateral support) call for the application of a different rule of substantive law from that invoked in the first action (trespass and conversion). Moreover, apart from substantive legal theories, the Court noted that the respective pleadings actually set forth different operative facts, not merely a new legal label for a virtually identical factual encore. "The present allegations are therefore not essentially the same, restyled and characterized to be appropriate to a different legal theory."\(^\text{13}\)

A different legal theory predicated on different factual allegations in the pleadings would not, in the Court's view, render a successive action per se immune from attack on the basis of res judicata. Notwithstanding a showing of pleading dissimilitude, it would still be open to a twice-sued defendant to show, apart from pleadings, that the evidence adduced at the former trial was identical with the facts sought to be tried anew in the second trial. Where the requisite identity was established the second suit (or issue) must fail. The Court also noted that in assaying the relevance of a res judicata invocation, courts may pretermit statements alleging a putatively different form of liability where a comparison of the records show that the two actions grow "out of the same transaction, act, or agreement, and seek ... redress for the same wrong."\(^\text{14}\) In the present case the record in the first trial did not reflect whether evidence touching the subject matter of the second suit had been taken. However, the Supreme Judicial Court inferred from certain comments of the initial trial judge that the plaintiff's evidence as well as pleadings and specifications was directed at the thrust of the initial allegations and not to the action for loss of lateral support. In reaching the ultimate conclusion that application of the res judicata doctrine

\(^{12}\) Id. at 406, 204 N.E.2d at 907.

\(^{13}\) Id. at 407, 204 N.E.2d at 908.

\(^{14}\) Id. at 408, 204 N.E.2d at 908, quoting from Mackintosh v. Chambers, 285 Mass. 594, 596, 190 N.E. 38, 40 (1934).
would be unwarranted and unfair the Court laid down principles which succinctly summarize a healthy approach to this area:

True, the same conduct of the defendant causing the plaintiff's injury underlies both actions. But the first case was not for that conduct, but for other supposed acts which, according to the judge's findings, had not been proved. The action did not lose that essential aspect at any time up to judgment. We think the town has not had its day in court for the loss of lateral support.\(^\text{15}\)

In view of the policies and aims underlying the doctrine of res judicata, it appears that the Court's decision is plainly correct. While the obvious purpose of the doctrine is to prevent further litigation of matters decided by a final judgment in a former suit, it does not follow that any matters commented upon (or upon which evidence was adduced) in the earlier suit are thereafter forever tainted vis-à-vis future judicial activity. Similar facts may, as in the present case, have radiating potencies of far different legal consequences. In seeking to bar the present suit on grounds of res judicata, the defendant was arguing, in effect, that because both causes of action were based on the same physical condition — the excavation on the defendant's property — the second suit should be barred. This urges far too broad an application of the principle of res judicata.

§21.4. Procedural rules: Construction. A number of instances during the 1965 Survey year indicate an increasingly liberal approach to construction of procedural rules by the Supreme Judicial Court. Several of these involve application of General Laws, Chapter 231, Section 102C. In Newgent v. Colonial Contractors & Builders, Inc.,\(^1\) the question of the prima facie weight to be accorded to a district court decision when it is retransferred to Superior Court pursuant to Section 102C was once again presented to the Court. In the district court a decision was entered for the defendant, but a Superior Court jury, upon retransfer, returned a verdict for the plaintiff. Counsel for the defendant did not introduce evidence of the prior decision at the trial, nor did he request an instruction concerning it. On appeal he contended that an instruction mentioning the force of the decision should have been given by the court on its own motion and that the failure to do constituted a jurisdictional defect. The Supreme Judicial Court disagreed with the defendant, holding that, despite the decision's prima facie weight, it could be brought into play at the trial only upon the prevailing party's request.

Earlier cases interpreting the statute have emphasized the prima facie weight of the district court decisions in Superior Court trials upon retransfer, but they have all dealt with instances where the prior decision was actually pleaded by the party who prevailed in the district court.\(^2\)

\(^{15}\) Id. at 409, 204 N.E.2d at 908.


\(^1\) Id. at 409, 204 N.E.2d 922 (1965).


http://lawdigitalcommons.bc.edu/asml/vol1965/iss1/24
However, certain language in these cases does lend some support to the result in the present case. For instance, in *Universal C.I.T. Credit Corp. v. Ingel* the Supreme Judicial Court stated: "The finding of the District Court which the plaintiff offered in evidence is, under G.L. c. 231, §102C, prima facie evidence upon such matters as are put in issue by the pleading at the trial in the Superior Court." But this case, as well as all others interpreting the section, left unanswered the question of whether the decision itself had to be offered in evidence to achieve this effect.

Faced with the problem for the first time in *Newgent*, the Supreme Judicial Court reached the logical and practical result. No reason appears to suggest that this evidence should be treated differently than any other and, consequently, it must be introduced by the party seeking to use it for it to come to the attention of judge and jury. As the Court stated:

If the defendant wanted an instruction given to the jury as to its meaning, it should have asked for it in the form of a request, or, at the end of the charge, invited the judge's attention to the omission. . . . It did neither. It cannot now as of right demand a new trial because of the omission. The issue is not one of jurisdiction but is one of trial practice.

A second clause of Section 102C to be construed by the Supreme Judicial Court during the 1965 survey year was that which requires a request for retransfer to be filed within ten days of "notice of the decision or finding" of the district court. In *McGloin v. Nilson*, a district court decision was rendered on March 2. Following that, a draft report was filed, which was ultimately dismissed on March 30 because of a procedural error. On a motion to dismiss the motion for retransfer, the question presented was whether the ten-day period began to run on the actual date of decision, or on the date upon which the draft report was dismissed and the decision became finally effective. The court below dismissed the motion, reading the statute literally and holding March 2 to be the determinative date. The Supreme Judicial Court reversed this decision, giving the statute a common sense interpretation. It is obvious that before the entry of a final result in district court, including the appellate processes envisaged by the filing of a draft report, a motion for retransfer would be meaningless. The result in *McGloin* was not final until the draft report was dismissed. Hence, the ten-day period should commence to run only at that time. The legislative history of the statute indicated that the framers had not contemplated the kind of situation posed by the *McGloin* case and that the Court was in...
effect free to write on a blank slate in reaching a conclusion. That it did not adhere to the strict letter of the law, but read a liberal meaning into the statute, is indeed an encouraging sign in the sometimes overly literal world of Massachusetts civil procedure.

Another attempt to reduce the docket backlog in Superior Court generated by transfer statutes is found in the 1965 amendment to General Laws, Chapter 231, Section 104. The section as amended requires that a suit, to be eligible for removal pursuant to Section 104, must have an ad damnum in excess of two thousand dollars. If the ad damnum is less than that amount, the only access to Superior Court is via the route prescribed by Section 102C. While this is a praiseworthy attempt to reach a desirable goal, it is problematical that it will be successful in an era where a pleader’s proclivity toward viewing ultimate recovery, and the antecedent ad damnum, is characterized conspicuously by optimism.

A reluctance to elevate form over substance is also apparent in two recent cases which stress the personal knowledge of the trial judge in opposition to formalistic procedural requirements. In *Sixty-Eight Devonshire, Inc. v. Shapiro*, a bill of exceptions was presented for allowance within the time allowed by Superior Court Rule 74, but it lacked a jurat and a statement that it was made under penalties of perjury. On the defendant’s motion to dismiss because of the defect, the plaintiff moved to amend its inadvertent omission. The Superior Court allowed the amendment and denied the defendant’s motion to dismiss. The Supreme Judicial Court overruled the defendant’s exceptions, emphasizing the trial judge’s personal knowledge that the bill had been seasonably filed, and that the defect was merely formal, not substantial. Under the circumstances the Court held that there was “substantial” compliance with Rule 74.

In the second case, *Spiller v. Metropolitan Transit Authority*, a Superior Court jury returned a verdict for the defendant, subsequent to which the plaintiff moved for a new trial on the ground of newly discovered evidence. The plaintiff attached to the motion three affidavits, two by persons who had been summoned as witnesses by the defendant but had not been called, and the third by a person who had not previously been involved in the case. It appeared that these witnesses might contradict in part evidence submitted by the defendant. The Supreme Judicial Court affirmed the lower court’s denial of the motion for a new trial. The Court noted that the trial judge’s knowledge of what took place at the trial included the fact that the plaintiff was able to use the defendant’s failure to call a witness it had summoned to draw in inference adverse to the defendant. If this was in fact

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8 1964 Mass. Adv. Sh. 1337, 202 N.E.2d 811, also noted in §5.5 supra.
9 Id. at 1339, 202 N.E.2d at 814.
done the Court would not allow a new trial to restate the same matter. If her counsel failed to take the opportunity to argue the point, "the consequences of his failure are not to be imputed to his adversary who, by not calling the witnesses, took the risk of telling argument against his client. . . . The plaintiff has had her day in court and is not entitled to another."  

Both cases were properly decided. Their effect is to eliminate purely formalistic requirements from the path of a litigant when it appears that all parties are in possession of information sought to be guaranteed by procedural rules. Although the present cases are apparently unique on their facts, a series of cases decided under Superior Court Rule 74, the rule involved in McGloin v. Nilson, discussed above, indicate that the Court had long read the rule in a way that created distinct traps for the unwary litigant. Thus, where a clerk failed to notify the parties of allowance of a bill of exceptions, it was held that the parties were not thereby excused from complying with statutory requirements for a bill of exceptions. In a similar vein, it has frequently been suggested that a party, to protect his rights, must personally examine the docket entries at frequent intervals. Accordingly, to emphasize the superiority of the trial judge's knowledge of matters before him over a strict construction of a procedural rule is a refreshing step in the proper direction.

§21.5. Parties: Standing to sue of tenant in a public housing authority. In Sullivan v. Fall River Housing Authority the plaintiff, a tenant of the defendant, sued to enjoin a proposed rent increase. The Supreme Judicial Court affirmed a lower court judgment dismissing the suit, holding that the plaintiff had no standing to sue. Central to this disposition was a comprehensive legislative history which indicated that actions challenging the rentals which could be charged by housing authorities were open exclusively to the Department of Commerce and Development and the fact that "there is no indication of a legislative intent at any time to confer a right upon tenants of a housing authority to bring a suit like the present." 

§21.6. Legislation: Pretrial discovery of medical reports. For many years, one of the conspicuous deficiencies in Massachusetts procedure has been a weakness in pretrial discovery procedures. A statute passed during the most recent legislative session partly ameliorates this situation in cases in the field of personal injury litigation, in which an insurer is involved. By its terms any company, issuing or executing a liability policy, which requests and makes a medical examination of a

11 Id. at 342, 204 N.E.2d at 917.
12 See text supported by note 5 supra.
13 Moskow v. Murphy, 310 Mass. 249, 252, 37 N.E.2d 486, 488 (1941).
14 Ibid.

2 Id. at 524, 205 N.E.2d at 704.

2 Acts of 1965, c. 369, adding new §111F to G.L., c. 175.
person injured in an accident, must, upon request of the injured party or his attorney, furnish the party or the attorney with copies of reports of all medical examinations by the insurer provided that the injured party will, upon request of the insurer, furnish it with copies of reports of all medical examinations and treatment made by his attending physician or physicians. Access to full medical records by both the insurer and the injured party should help to enable the plaintiff to establish a prima facie case, and the defendant to structure valid defenses to it. The statute serves to eliminate the factor of surprise in personal injury litigation, a factor which has no legitimate place in court, even under the adversary system. The statute is to be applauded.

Editor's Note. In last year's Survey, the failure of the legislature to adopt the bill creating deposition and discovery rights in civil actions was noted. After hearing arguments on its power to issue a rule governing these matters, the Supreme Judicial Court adopted, after the end of the 1965 Survey year, a new General Rule 15. In substance this new Rule adopts a liberal discovery practice, modeled in general but not always in detail after the Federal Rules of Civil Procedure provisions governing discovery. While the details of the Rule will be discussed in next year's Annual Survey, attorneys interested should obtain a copy of the Rule prior to its effective date, April 1, 1966.