§23.1. Jurisdiction over foreign corporations: Service of process statutes. As in the last two Survey years, the bar continues to struggle with the somewhat difficult Massachusetts rules concerning jurisdiction of local courts over foreign corporations. Massachusetts jurisdictional controversies no longer focus on the old battle grounds of what is constitutionally permissible.  

Recent litigation has involved generally unsuccessful attempts under the two principal Massachusetts service of process statutes to gain jurisdiction here over foreign corporations whose activities were limited to solicitation. The courts in those cases did not doubt that the legis-
lature has the constitutional power to enact a statute conferring juris-
diction on local courts over a foreign corporation which merely solicits
in Massachusetts, at least with regard to matters arising out of the
solicitation. They held that the legislature did not originally intend
to confer such power on the courts and they refused to assume broader
power without express statutory sanction.\(^4\) This conservative trend was
continued during the 1966 Survey year\(^5\) in cases deciding somewhat
different issues, which highlighted the interaction of the Massachusetts
service of process statutes. Such decisions may ultimately cause pro-
ponents of broader local power over foreign corporations to shift the
battlefield from the courts to the legislature.

\textit{Ward v. Associated Motorcycles Limited, Inc.}\(^6\) exemplified the usual
difficulty of establishing jurisdictional "facts" but, more significantly,
illustrated the dangers of choosing to serve a putative agent under
General Laws, Chapter 223, Section 38, but not making service upon
the Secretary of State under Section 3A of Chapter 181. Such a choice
may have unfortunate significance. The defendant was an English cor-
poration, with a principal place of business in London, which had
directly shipped the motorcycle "in suit" to an unnamed distributor.
The action in the United States District Court was for negligence and
breach of warranty. The court found it unnecessary to discuss how the
plaintiff acquired the motorcycle or even the basis of his cause of
action. Service was made on an individual who for an unstated period
of time had been president of a then dormant Delaware corporation,
qualified to do business in Massachusetts, which was a wholly owned
subsidiary of the defendant. Evidence was offered that the subsidiary
was "the manufacturer's representative for the purpose of ordering,
billing and fulfilling the . . . [subsidiary's] . . . warranty, advertising
and sales promotion." An unnamed distributor paid the subsidiary for
the cycle in suit and the subsidiary in turn paid the defendant on an
open account. The court found the evidence of agency of the subsidiary
insufficient to subject the defendant to the jurisdiction of the court.
No Massachusetts cases were cited on this point but several federal
cases were quickly distinguished on the ground that they relied on
considerably more facts and details as to the quality and nature of
the agent's activities in behalf of its principal than the plaintiff pro-
vided in the present case. The court pointedly distinguished a federal
case from the Southern District of New York\(^7\) because in that case the
defendant regularly solicited business through the agent and its busi-
ness in the forum was steady, regular, and growing.\(^8\)

Having already stated grounds sufficient to dispose of the case, Judge
Sweeney held service on the president of the subsidiary to be "in any

\(^5\) Aro Manufacturing Co. v. Automobile Body Research Corp., 352 F.2d 400 (1st
1966).
\(^6\) Ibid.
\(^8\) See also James, Civil Procedure §§12.8 n.21, 21.10 n.18 (1965).
event” invalid because at the time of service he was no longer agent of either the defendant or the subsidiary and the subsidiary was not then engaged in or soliciting business in Massachusetts. The court cited the Turner case in which the Massachusetts Supreme Judicial Court held that a service which purported to be on a corporate representative pursuant to the doing-of-business language of Section 38 of Chapter 223 was invalid since it was not made at the time business was being done. It is immaterial under that statute that the corporation was doing business in Massachusetts at the time of the arising of an alleged cause of action if it is not doing business at the time of purported service. The Turner opinion expressly left undecided whether service on the Secretary of State pursuant to Section 3A of Chapter 181 would have been valid. The distinction arises from the use of the past tense of the verbs “deemed and held” to have appointed the Secretary in Section 3A, which seem to delineate the relevant time for inquiry into the question of whether business is being done under that statute as the time the cause of action arises and not the time service of process is made.

The results of the use of the present tense in Section 38 and the past tense in Section 3A is unfortunate for the lawyer who fails to instruct the sheriff or a marshall to serve the Secretary of State. The lawyer may argue that jurisdiction should not depend on the ministerial act of in-hand delivery, since service on the Secretary is designed to insure notice to the defendant. Substantial justice is achieved when a defendant has sufficient notice of the cause of action to file a motion to dismiss for lack of jurisdiction in a federal court or an answer in abatement in a state court. The argument proves too much, however, and in any event is more appropriately addressed to the legislature than to the courts since the method of service is controlled by statute. The time has come for the legislature to hear these arguments and make a new judgment on the policy factors involved.

Additional reasons for reviewing the Massachusetts “short arm” statutes are found in recent suggestions that Chapter 181, Section 3A, is narrower in scope than Chapter 223, Section 38. In 1964 Judge Caffrey in the Lowd case, in reaching a decision contrary to Judge Wyzanski in the Radio Shack case, quoted with seeming approval from a brief the argument that the words “doing business” in Chapter

10 Fed. R. Civ. P. 4(d) (3) provides for service on an agent “authorized” to receive process. Similarly G.L., c. 223, §37, speaks of an action against a foreign corporation which is engaged in or soliciting business in Massachusetts.
11 The statute then provided for service on the Commissioner of Corporations. By Acts of 1962, c. 740, §56, the Secretary of State was substituted.
12 See note 2 supra.
181 have a different meaning than the words "engaged in or soliciting business" of Chapter 223. In *Lowd* the court held that the various sections of Chapter 181 are interlocking parts of a cohesive statutory scheme which requires the payment of a fee, the filing of the corporate charter, by-laws, and certain information regarding officers, meetings, and stock as well as the annual filing of a certificate of condition. The court noted that the corporate quantum of activity within a state may be thought insufficient to require the submission of the detailed information required by Chapter 181, while at the same time it may be sufficient to warrant the assertion of jurisdiction over the corporation by the courts of Massachusetts.

The court is, of course, correct in noting that different policy factors are involved in deciding whether a corporation can be sued and how much information it should disclose. A re-examination of both Chapter 223, Section 38, and Chapter 181 as applied to foreign corporations is imperative in light of all policy factors to determine whether it is now appropriate for Massachusetts to follow the lead of the many states which have adopted so-called long-arm statutes. The failure of Massachusetts to assert jurisdiction to the limits of the United States Constitution owes more to inertia than to an affirmative policy to encourage out-of-state businesses to deal with persons in Massachusetts by minimizing the burdens incident to such dealing. Adoption of the Uniform Act was recommended by the Judicial Council in its 1965 report. After favorable House action, the bill died in the Senate but has been refiled for the 1967 session.

Legislation will not, however, solve all jurisdictional problems. The recent case of *Aro Manufacturing Co. v. Automobile Body Research Corp.* illustrates the perennial problem of establishing jurisdictional facts rather than asserting jurisdictional conclusions. In that case the plaintiff, Aro, tried to serve under both statutes. A summons was served on the attorney for a company which Aro contended was the agent or alter ego in Massachusetts of the defendant Automobile Body. In addition, Aro served the Commissioner of Corporations and Taxation. The First Circuit quickly disposed of the contention that service on the attorney conferred jurisdiction by holding that there was no evidence in the record that the company for which he was attorney was the agent of Automobile Body. An affidavit filed specifically stated that the corporations were entirely separate and distinct. The court then proceeded to consider whether Automobile Body was "doing business" within the meaning of Chapter 181, Section 3. The attorney for Aro had filed a counteraffidavit stating on information and belief that Automobile Body licensed (for royalties) manufacturers

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18 James, Civil Procedure §12.12 n.7 (1965).
19 352 F.2d 400 (1st Cir. 1965).
20 See note 11 supra.
and sellers of unpatented replacement fabrics for automobile convertible folding tops. It was argued that licensing and collecting royalties was the kind of business done by the defendant. The court disposed of the affidavit by holding that the allegations were conclusory and that there was no proof from the record that Automobile Body assigned patents and collected royalties in Massachusetts. It cannot be said that Automobile Body does do business in Massachusetts merely because its subsidiary does, in the absence of any evidence that the subsidiary was its dummy or instrumentality. No mention was made of the kind of business done by the subsidiary or whether it was a licensee of and paid royalties to the defendant. This case points up the problem of the trial lawyer who must introduce facts into the record which support his contentions of jurisdiction. Inability to file factual affidavits through appropriate witnesses or to secure appropriate admissions from opponents may require a court to refuse to assume jurisdiction over the controversy.

§23.2. Impleader: Contractual attempts to avoid. In Jenkins v. General Accident, Fire and Life Assurance Corp. Ltd., the first Massachusetts case decided under the new impleader statute, the Supreme Judicial Court manifested a liberal approach in interpreting the statute. Typical situations normally thought to be covered by impleader are those in which a defendant is entitled to indemnity from a third party against loss or liability on account of the plaintiff's claim, or is entitled to contribution with respect to it. In Jenkins an insured sued by a guest passenger for gross negligence in operation of a motor vehicle attempted to implead his disclaiming insurer as a third-party defendant in the suit. The first count alleged breach of the company's contract to defend and indemnify. The second count in tort alleged breach of the insurer's duty to consider good faith settlement offers. The insurer demurred and filed an answer in abatement in partial reliance on a so-called "no action" clause in the policy which prohibited suits by the insured against the insurer "... unless ... the amount of the insured's obligation to pay shall have been finally determined." The policy also flatly prohibited the insured's impleading the insurer. With little discussion and no difficulty the Supreme Judicial Court reversed the orders of the Justice of the Superior Court who had sustained the demurrer and answer. The Court's reasoning was succinct.

21 The court also held that the jurisdiction was not acquired under the provisions of Section 12 of the Clayton Act, 15 U.S.C. §22 (1964). That statute allows service wherever a corporation may be "found." "Found" was held to mean "doing business" and hence a failure of proof of doing business automatically required a ruling that the corporation was not found in the district of service. Apparently no effort was made to serve the corporation outside of Massachusetts.

4 James, Civil Procedure §10.21 n.4 (1965).
5 James, Civil Procedure §10.21 n.4 (1965).
If the policy provision was given effect it would have nullified the legislative intent in enacting the impleader statute, which was stated by the Court to be the avoidance of multiplicity of actions. This holding seems clearly in accord with the broad language of the statute which allows a defendant to implead a third-party defendant "... who is or may be liable to him for all or part of the plaintiff's claim against him." The key language is, of course, that which authorizes impleader when the third party "may be" liable to the defendant. This language is to be contrasted with the more restrictive words "will be," found in older impleader statutes.

The case is also in accord with the liberal interpretation rejecting requirements of a "matured" liability of the insurer which federal district courts generally have given Rule 14 of the Federal Rules of Civil Procedure. Rule 14 uses the same language of "may be" as the Massachusetts impleader statute. A fortiori, in the absence of contract the impleader statute may accelerate the presentation of rights by eliminating a requirement of applicable state substantive law that the third-party claim be mature, e.g., that the original defendant have suffered an actual loss. It is not material that the main claim is based on a negligence cause of action whereas a count of the third-party claim is based on a contract cause of action, namely the insurance contract. Most federal decisions hold that there is no need for identity of the underlying legal theories. In light of the clear legislative purpose, the principal issue in determining the propriety of impleader is the overlap of factual issues in the several claims. The time of both parties and courts will be saved by a single trial. As the Supreme Judicial Court held in Jenkins, the question of insurance coverage involved many of the fact issues essential to the determination of the liability for negligence. Multiple actions will be avoided since, if coverage is denied, the original plaintiff and third-party plaintiff are barred from further actions by the principle of stare decisis; if coverage is found, the insurer is prevented by collateral estoppel from relitigating the issues which were litigated in the original action.

The Court also quickly disposed of the insurer's contention that the statute did not apply to insurers because impleading prejudices in-

6 See 3 Moore, Federal Practice §§14.02 [4-1], 14.12 n.3 (2d ed. 1966).
The problem of prejudice was left to the trial judge in reliance on his broad powers to sever cases to do justice. The Court cited cases indicating that a court has broad powers to do justice and adopt rules to that end and also cited the general rulemaking statute. Several United States district court decisions interpreting Federal Rule 14, which were not cited by the Court, have rejected the prejudice argument on the ground that the presence of insurance is common knowledge. Other courts have denied impleader in the exercise of their discretion.

The Jenkins case has a silent issue of the meaning of the term "claim" in the impleader statute, which was apparently not raised by the parties and was not discussed by the Court. It has been held that a defendant cannot assert an entirely separate claim against a third party in federal impleader, even though it arises out of the same general facts as the original claim, since the defendant is not trying to pass on to the third party any of the defendant's liability to the plaintiff. The second count of the declaration in impleader sounded in tort for breach of the insurer's obligation to consider offers of settlement in good faith and was based on a refusal to settle the case for $4500 in the face of an auditor's finding of $29,700, where coverage was limited to $5000. Both counts sought damages for the expense incurred and to be incurred in defense, including counsel fees and disbursements. Therefore, even the indemnity count sought to pass on to the insurer more damages than the plaintiff could recover against the insured. Attorneys' fees have been held to be part of a claim for indemnity so that they may be claimed in a third-party action under Federal Rule 14. The United States district court in Massachusetts recently refused to grant a declaratory judgment as to the rights of a corporate shipowner which was being sued in a Massachusetts superior court by a longshoreman; the shipowner sought a declaration that the longshoreman's employer was liable to the shipowner for the costs of defending the state suit (which was still pending) as well as any amount paid on the substantive claim. The district court refused jurisdiction in part because, since the original institution of this declaratory judg-


13 The cases are collected at 3 Moore, Federal Practice §14.12 n.6 (2d ed. 1966).

14 Id. §14.07 n.9.

15 Paliaga v. Luckenbach Steamship Co., 301 F.2d 403 (2d Cir. 1962).

ment action, Massachusetts had adopted its impleader statute. The court apparently considered that impleader would allow recovery of the shipowner’s costs of defense, if it were successful in its main impleading purpose of shifting liability to the plaintiff longshoreman’s employer.

The problem raised by the second count in impleader in *Jenkins v. General Accident, Fire and Life Assurance Corp., Ltd.* is more difficult. The insured’s “claim” for damages under count two is based on the obligation of the insurer to defend; the insured is not, therefore, merely passing onto the insurer the plaintiff’s “claim” against the insured for negligence for operating a motor vehicle. A claim based on an insurer’s failure to defend is under substantive law independent of any breach of its obligation to indemnify for loss. The Court held that the insured need not allege ability to pay a judgment since he may be damaged by the effect on his credit of an outstanding claim even if he cannot pay it. By clear implication, the insured can recover for such damage. A claim for damage to a defendant’s credit can hardly be said to be a passing on to a third party of part of the defendant’s liability to the original plaintiff.

Analytically the problem may be classified as involving permissive joinder of claims rather than impleader as such, assuming the first count is considered to have assimilated the expenses of defense as part of the indemnity claim. Prior to 1966, some federal courts had prohibited the assertion against a third-party defendant of additional claims which were peculiar to the original defendant, even though such claims were joined to efforts to pass on to the third-party defendant part of the liability asserted by the plaintiff against the defendant. Prior to a 1966 amendment, Federal Rule of Civil Procedure 18(a), headed Joinder of Claims and Remedies, only allowed joinder of third-party claims “... if the requirements ... [of Rule 14] are satisfied.” The amendment to Rule 18 eliminated this language and the rule now states: “A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.”

The Advisory Committee Note on the Amendments to Rule 18 cites two impleader cases and states that a party asserting any claim “... may join as many claims as he has against an opposing party.” The amendment eliminates any requirement that every claim independently meet the requirements of Rule 14 and permits joinder of

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20 The cases are cited in note 19 supra. Noland is cited by the Advisory Committee as “See” and Humphrey as “But cf.”
additional related claims to any claim which does meet those requirements.

Massachusetts' rules of joinder are not quite so broad as are the federal rules, but the statutes relative to joinder of tort and contract causes of action would seem to allow joinder in Jenkins since they arise out of the same matter. It will be interesting to see how broadly the Supreme Judicial Court, if it is squarely presented with the issue, will interpret its inherent power to do justice in the light of the clear legislative history that "all related claims" should be determined in one action. The Noland case authorized recovery by a third-party plaintiff upon a claim closely related to, yet different from, and for an amount in excess of the original plaintiff's claim. The court placed its decision solely on the ground that the purpose of Federal Rule 14 is to avoid circuity and multiplicity, and did not consider any possible effects of Rule 18. An amendment to the statute permitting joinder of claims may ultimately be necessary and in any event would save the expense and anguish of a court test.

§23.3. Impleader and venue: District courts. In a recent article on the impleader statute, the authors commented that a defendant should remove a case to the Superior Court if he intended to implead a party since the impleader statute was not included in the statutory provisions of Chapter 231, which apply to the district courts. In 1966, the legislature amended General Laws, Chapter 231, Section 141, to add the impleader statute and thus make it applicable to the district courts. This action may give rise to problems of venue as suggested in the article. By amendment approved during the 1966 Survey year, in a transitory cause of action, venue is proper in a district court (1) in the county where one of the parties lives or has his usual place of business or, (2) if commenced by trustee process, in the county where any trustee lives or has his usual place of business, and in either event (a) in the judicial district where one of the parties or one of the trustees lives or has a usual place of business or (b) in a judicial district, in the same county adjacent to the judicial district where the defendant lives or has his usual place of business. It is obvious that a potential impleader action may not comply with the venue provisions as to the third-party defendant in the district in which plaintiff brings suit. It seems unlikely that the legislature intended to amend

22 G.L., c. 231, §§1A, 7 (Sixth).
23 See notes 5 and 11 supra.

2 G.L., c. 231, §141.
3 McCarthy and Burns supra note 1.
4 G.L., c. 228, §2, as amended by Acts of 1965, c. 752. Suffolk County cases may be brought in the Boston Municipal Court pursuant to G.L., c. 218, §54. This act amended an act passed only a few months before, Acts of 1965, c. 454, which had not allowed suit in the district where the plaintiff lived or had a usual place of business.
the venue statutes sub silentio. Other states have amended their venue statutes to meet this problem.\(^5\)

\(^{23.4}\). Trustee process: Jurisdiction of district courts. In \textit{General Motors Corp. v. McKernan}\(^1\) the Supreme Judicial Court reminded the bar of the care required in the use of the trustee writ. The trustee in this case was the employer of the defendant. The return date of the writ was more than 30 days from the date of the writ. The trustee was defaulted for failure to answer and, on motion and affidavit of the plaintiff, judgment was entered against the employee and execution subsequently issued. The trustee brought a petition for writ of error in the single justice session, that is, the Supreme Judicial Court for the County of Suffolk. The justice reserved and reported the petition to the full bench. The Court held that the writ of error was proper, set aside the judgment in the original action, and dismissed the action. The applicable statute provides: "A trustee writ issued by a district court shall be returnable not more than thirty days after the date thereof..."\(^2\) The return date for other original writs can be up to 60 days after service.\(^3\) The Court held that the legislature had shortened the period for return to benefit the trustee by restricting the period in which he may be inconvenienced by litigation to which he is not an interested party. To ensure that the benefit intended would be given to the trustee, the statute was construed as a limitation on the jurisdiction of the district courts. The Supreme Judicial Court cited authorities which had interpreted the somewhat different language of General Laws, Chapter 246, Section 1. That statute enumerates the kind of cases which can be begun by trustee process and requires a bond in all cases over $1,000 except for specified kinds of actions. These cases had been recently summarized as holding that if an action is commenced by trustee process in violation of that statute, e.g., failure to file a bond, the court lacks jurisdiction over the action and the defect could not be cured by amendment.\(^4\)

The Court distinguished a case not involving a trustee writ in which the return date of the subpoena also exceeded the time provided by the statute then regulating election petitions. \textit{Ashley v. Three Justices of the Superior Court}\(^5\) held that the defect in the return date was not jurisdictional and could have been raised by motion to dismiss but not by a writ of prohibition. The case was said to represent the kind of defect involving the obtaining of jurisdiction over the person which, by appearance, can be waived.\(^6\) The Court stated that cases involving trustee writs involve jurisdiction of the court over the subject matter,
which cannot be waived as a matter of policy. It is now clear that not only can defects in a trustee writ be raised for the first time by counsel on appeal in the Supreme Judicial Court without waiver but also an independent action can be brought after the time for appeal has expired. A writ of error may be sued out within six years after entry of judgment in a civil case.

§23.5. Peremptory challenges. In Henrickson v. Drewrys Limited, U.S.A., the Supreme Judicial Court decided how many peremptory challenges were to be allowed a single plaintiff who joined in one action a number of defendants whom he alleged to be severally but not jointly liable to him. Section 4(a) of General Laws, Chapter 231, authorizes joinder of two or more persons as defendants "... if there is asserted against them jointly, severally, or in the alternative, any right to recover in respect of or arising out of the same matter, transaction, occurrence, or series of matters, transactions or occurrences." This case was a motor vehicle tort case in which the plaintiff sued the corporate defendant and joined an alleged agent or servant of the corporate defendant. The case was tried, with a companion case brought by the plaintiff against an unrelated defendant, and the plaintiff was given 12 peremptory challenges. The defendant argued that the plaintiff was only entitled to eight.

The Court affirmed the trial court's denial of the defendant's argument and ruled that the plaintiff should be permitted four peremptory challenges for each defendant whom he joined as a party and against whom he asserted several liability. The decision was placed on the grounds of encouraging the use of the simpler procedure of joinder authorized by General Laws, Chapter 231, Section 4A. The Court said that if a plaintiff were to bring separate actions against each defendant, he would clearly have four peremptory challenges for each defendant even if, as here, the cases were consolidated for trial. The plaintiff is not to be prejudiced by joining all defendants in one action. The applicable statute was construed in a manner that would avoid multiplicity of actions. The Court cited but did not quote the applicable statute which provides: "In a civil case each party shall be entitled to four such challenges." This language might be strictly interpreted to limit a plaintiff in a civil case to four peremptory challenges despite the number of defendants. Such a narrow interpretation is supported by reference to the immediately preceding portion of the section which deals with peremptory challenges in criminal cases. In a criminal case the clause specifically grants to the plaintiff (the Commonwealth) "as many challenges as equal the whole number to which all of the defendants in the case are entitled."
Since the legislature used appropriate language in one clause of the section and omitted such language in the very next clause, a persuasive argument might be made that the omission was deliberate. It is encouraging that the Court used the policy argument that by the joinder statute the legislature intended to avoid multiplicity of actions. Difficulties could have been raised by dependence only on the language of the actual statute governing the decision, without considering the policy of the joinder statute. The attitude represented by this opinion may foreshadow liberal interpretation of statutes, such as the impleader statute, which have similar purposes.

§23.6. Judicial control over witnesses. In Zambarano v. Massachusetts Turnpike Authority the Supreme Judicial Court dealt with two problems involving the trial court's discretion to control the manner of examination of witnesses. This was an eminent domain case in which counsel for the Authority stated that he intended to present two expert witnesses on value. At the request of counsel for the landowner, the trial judge excluded the second expert from the courtroom during the testimony of the first expert for the stated purpose of testing the memory, accuracy, and judgment of the second witness without his being refreshed by the first witness. Without discussion the Court held such sequestration of witnesses to be within the discretion of the trial judge. The ruling is in accord with well settled principles in the Commonwealth.

A different and more difficult question was presented by a motion for mistrial made by counsel for the Authority on the ground that he had been prohibited from conferring with an expert witness sponsored by him during a recess which was called while the witness was being cross-examined as to his qualifications. Without much discussion, the Court held that this, too, was within the discretion of the trial court and noted that cases dealing with parties as witnesses in criminal trials and civil trials were not in point.

Restriction on consultation with parties does involve different policy considerations than restrictions on conferences with witnesses but there are policy factors involved in the latter situation which were not discussed by the Massachusetts Supreme Judicial Court. The First Circuit has strongly commented that it is improper for a trial judge to prevent counsel from talking with a witness which he has sponsored while the witness is on the stand. The court stated: "We are not aware of any rule of law, 'elementary' or otherwise, or any canon of professional conduct forbidding the practice" of talking with a witness during a recess called while the witness is on the stand.


4 G.L., c. 231, §4A.
5 G.L., c. 234, §29.

2 Leach and McNaughton, Handbook of Massachusetts Evidence 44 (3d ed. 1956).
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court noted that the hallway conference with a witness may be tactically unwise because it may become the subject of comment by opposing counsel. "But tactics are one thing and rules of law and canons of ethics are quite another."4 The court then referred to a commendation in another case given counsel for the Government for privately reminding a witness of a false statement, which reminder resulted in a change in testimony.5

It may be that a trial judge can best determine whether the ends of justice are served by allowing or forbidding conferences with witnesses and that the matter should therefore rest in his discretion. Such an attitude, however, should be consciously analyzed rather than adopted without discussion since it bespeaks a lack of confidence in the trial bar.

§23.7. Instructions. In Hazelton & Son, Inc. v. Teel6 the plaintiff's action for payment for work done was countered by cross-actions in tort and contract from the defendants. Instead of charging the jury on the subject matter of the entire case, the trial judge submitted a special question to the jury which if answered in the negative would have ended the case. The jury answered the question in the affirmative and the trial judge then charged on the remaining questions in the case. The Supreme Judicial Court held that this procedure was proper and discretionary with the trial judge. Such a judgment seems appropriately left to the discretion of the one who has heard the evidence and is consistent with the policy of expediting trials.

In Liakos v. Moreno7 the Supreme Judicial Court took the unusual step of reversing the lower court judge for failure to charge on a matter as to which no written request for instructions was made before argument. Rule 71 of the 1954 Rules of the Superior Court requires that "[r]equests for instructions . . . shall be made in writing before the closing arguments unless special leave is given." In Liakos the plaintiff requested an instruction at the conclusion of the charge which he had not previously requested in writing before argument. No special leave had been granted and the trial court denied the request, noting for the record that the request had been made at the conclusion of the charge. The Supreme Judicial Court held that, notwithstanding Rule 71, a party is entitled to an adequate charge on the controlling issue of a case. When attention was called to the omission in the charge, and the omitted matter was not supplied, the Court would sustain the exception when necessary to render substantial justice.

The Liakos case involved medical evidence of prenatal damage to a child born with cerebral palsy following the striking of its mother by the defendant's automobile. The Court concluded that the trial court had taken from the jury an issue of medical causal connection which properly should have been considered by them. Without bother-

4 Ibid.
5 Frazer v. United States, 233 F.2d 1, 2 (9th Cir. 1956).

ing to determine the nicety of whether the belated request was directed to an omission or to an error in the judge's charge, the Court held that the request sufficiently called to the trial judge's attention the inadequacy of the original charge and that he had a duty to charge adequately. Since the issue of medical causal connection was controlling in the case, the Court held that the trial judge had to charge correctly even though the belated requested instruction was imperfect in form. This is another illustration of the willingness of the Court to cut through procedural technicalities to do justice and the decision should be applauded by the bar.