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Chapter 21: Civil Procedure and Practice

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§21.1. Venue; Motor vehicle torts. Although the statute relating to venue in motor vehicle tort cases, G.L., c. 223, §2, authorized actions to be brought in a District Court in a judicial district where the defendant resides or has a usual place of business or a district adjoining that in which the defendant has a usual place of business, it did not authorize an action to be brought in a District Court in the district in which the plaintiff has a usual place of business. This has been changed by Acts of 1955, c. 158, with the result that in such cases action may be brought in the District Court in the judicial district in which either of the parties has a usual place of business, as well as in that in which he lives.

§21.2. Pleading; Facts. Not the least of legal attainments is the ability to plead facts simply, directly, and without argumentativeness. This is brought home by the case of *Leventhal v. Pierce,* an action on a group of promissory notes. Defendant pleaded a general denial and the following affirmative allegation: "In Harold A. Leventhal vs. Mary Ann Pieczkowski, Suffolk Superior Court, 65957 Equity, this court ruled that the promissory notes, which are the subject of this action, were secured by a mortgage on real estate known as 31 Lexington Avenue in the Hyde Park District of Boston." Thus instead of the direct allegation of the fact, the averment took the form of a state-
ment that the Court had decided in another case that the fact was as alleged.

The Court went to some length to point out that the allegation was incomplete to raise the issue which the defendant wished to raise, namely, that the note was a mortgage note under which the plaintiff was required to give notice to the defendants of an intent to foreclose and to give a warning of liability for deficiency as required by G.L., c. 244, §17B. The Court asserted that the mortgage was not made a part of the record and the Court was left to “conjecture” as to the further facts necessary to make Section 17B applicable, since, among other things, Section 17B does not apply to all types of mortgage notes. The Court concluded: “All that we have before us is the fact that some judge in some other case had ruled that the notes now sued upon were secured by a mortgage of real estate.” 3 (Emphasis supplied.)

This statement is warranted, certainly, since (1) the reference to the earlier case is ineffective as a finding of fact matter; (2) the reference is ineffective because it does not indicate or raise the necessary factors to indicate that the previous action is res judicata as to the present one, or (3) the reference is incomplete as a statement of fact to satisfy the necessary allegations in the answer.

§21.3. Jurors: Peremptory challenges. General Laws, c. 234, §29 was amended by Acts of 1955, c. 485, so as to enable each party in a civil case to use three peremptory challenges, where previously he had only two. The statute also made the same change as to criminal cases other than those involving crimes punishable by death or imprisonment for life.

§21.4. Declaratory relief; Jurisdiction. Although the relief sought in proceedings brought under G.L., c. 231A is usually equitable in character, it has been thought desirable to discuss here the cases arising under this statute.

In Meenes v. Goldberg, 1 the Court made some important observations on the scope and application of the remedies provided by this chapter of the General Laws. It was a bill for a declaratory decree to determine the validity of a sewer assessment. The Superior Court decided that the lien had been discharged. In the full court, the jurisdiction of the Superior Court was brought into question on the basis of a series of cases holding that equity would not pass on the validity of a tax and remitting the taxpayer to whatever statutory remedies might be available. The Supreme Judicial Court distinguished this case as involving the validity of the lien rather than of the tax, but was not content to drop the matter there.

The sweeping terms of G.L., c. 231A, §9 were examined and the conclusion was drawn that the existence of another remedy provided no defense to declaratory proceedings.

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The jurisdiction of the Superior Court was upheld in terms indicating an intent to support jurisdiction by analogy to already existing powers wherever possible. On the merits the determination of the lower court was affirmed, while on the procedural side of the case it was held that rights and duties in connection with the assessment and collection of taxes are a proper subject for the declaratory procedure, but that since such procedure is within the discretion of the court and "under its immediate control," it could at once provide a convenient means of promoting justice without undue interference with the collection of taxes.

The declaratory procedure received further consideration in Morgan v. Banas which was a bill to determine the validity of a zoning ordinance of the city of Springfield. The proceeding was dismissed for failure to join the city, which was deemed to be an indispensable party under G.L., c. 231A, §8. However, the Court made it plain that such a bill is not to be dismissed simply because the court is not prepared to accept an interpretation advanced by petitioner. It is thus suggested that much earlier law circumscribing conventional remedies will not be permitted to impair the utility of this new procedure.

That the availability of the procedure is not without some limits need hardly be said. One important decision along this line is Povey v. School Committee of Medford, a bill brought by fifteen taxpayers, residents of Medford, for an interpretation of the rules and duties of the school committee and a determination of the validity of a vote of the committee and of a contract entered into by it. The Court held that by direct implication the first section of the statute requires that the plaintiffs "must in some manner be parties to the controversy." The opinion makes it plain that the Court understands this to mean that the plaintiffs must have some direct "interest" in the outcome of the controversy in order to have standing to maintain such a proceeding. The Court could not find any such interest on the part of the plaintiffs in this matter which involved the appointment of a school principal.

In the light of what the Court had to say in Meenes v. Goldberg about the unavailability of the defense that there already existed a remedy, the point that the Court makes in the Povey case that the declaratory procedure was not designed to supplant procedures provided for by G.L., c. 40, §53, gives rise to some doubts as to the grounds upon which the two cases may be reconciled. It is evident that the Court was acutely aware of the possible effects on municipal administration of extending the remedy to the sort of case before it.

§21.5. Declaratory relief: The range of application. The range of application of the remedies afforded by this statute is a matter of growing significance and interest. During the 1955 Survey year there were a number of important instances of broadening availability of

the remedy. Thus in *Forziati v. Board of Registration in Medicine*,\(^1\) the jurisdiction of the Board to discipline the plaintiff, a doctor of medicine, was in question and it was decided that there was jurisdiction. In *Brattle Films, Inc. v. Commissioner of Public Safety*,\(^2\) the requirement of a prior written approval for exhibition of certain motion picture films on Sunday was held unconstitutional. In *Holiver v. Department of Public Works*,\(^3\) the Court dealt with the rights and duties of the parties under a contract for the sale of land by the Department; while in *Cochis v. Board of Health of Canton*\(^4\) a bill was entertained to determine the validity of certain regulations promulgated by the board. In the latter case the Court went quite far in its determinations; in fact, it considered and determined the validity of many regulations which did not seem to be in "controversy" between the petitioner and the Board of Health.

These illustrations give some notion of the scope of application of the remedy, although they by no means exhaust the cases decided during the 1955 Survey year.

The application of existing appellate procedures to declaratory proceedings was raised in *Needham Housing Authority v. Vogel*,\(^5\) where a Superior Court judge reported the case to the full court under G.L., c. 214, §13. The report was dismissed on the ground that such appellate procedure is available only to bring the entire case to the full court and not, as here, to bring the matter up on the pleadings. This is, of course, not new law as applied to equity proceedings, but the case is perhaps the first instance of its application specifically to declaratory proceedings.

**§21.6. Limitation of actions; Motor vehicle torts.** The time within which an action of tort for bodily injury or death arising out of the operation of a motor vehicle must be brought has been altered by Acts of 1955, c. 235. The new provision extends to two years the period within which such action may be brought if, within one year after the cause of action accrues, the person against whom the action is to be brought, or his insurer, is notified in writing by registered mail of the existence of the claim.

An important further provision requires that the plaintiff in his declaration explicitly set forth that he has complied with the statute.

**§21.7. Judgment; Motion for judgment on undisputed facts.** The elaborate procedure for getting a speedy trial in actions of contract which was contained in G.L., c. 231, §59, has been abolished by Acts of 1955, c. 674, §1, and in its place the legislature has authorized the

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\(^{1}\) 1955 Mass. Adv. Sh. 895, 128 N.E.2d 789; for a discussion of the case on the merits see §20.6 supra.  
court in actions of contract to enter judgment on motion whenever it has not been made to appear that there is a disputable issue of fact. The statute is couched in very guarded terms and seems sure to be upheld if challenged as to constitutionality. The language of the act follows that contained in a recommendation of the Judicial Council in its Thirtieth Report, with but minor changes in verbiage.

Section 2 of Acts of 1955, c. 674, transferred the provisions for speedy trial in action to recover for personal labor from the old Section 59 to a new Section 59A and adds a new provision of importance which requires the court on motion to advance for speedy trial any action removed from a District Court by the defendant in which the ad damnum is not more than $2000.

§21.8. Agreement for judgment. In an action of tort, Kacouris v. Loukas,1 it appeared that an agreement for judgment had been entered in the office of the clerk of court and on the same day the clerk entered judgment for the plaintiff in accordance with the terms of the agreement. Two days later the defendant moved to strike from the record the agreement. This motion was denied on May 3, 1951, and on May 28, 1951, the clerk again entered judgment for plaintiff.

Real estate of the defendant had been attached by plaintiff, but it was subject to prior mortgages which had been foreclosed before the agreement for judgment was filed. Plaintiff then brought suits to reach and apply the surplus proceeds of the foreclosures. The success of these suits depended upon the existence of valid attachments when the suits were brought and this in turn depended upon the determination of the question when the action of tort, as matter of law, should have gone to judgment.

General Laws, c. 235, §1 provides that, in civil actions ripe for judgment, cases are to go to judgment on the first Monday of each month unless the court by special or general order requires otherwise. Superior Court Rule 79 requires otherwise, providing, inter alia, "On written agreement of the parties filed with the clerk judgment may be entered by the clerk on any day, without further order."

On the basis of the provision in Rule 79, the Supreme Judicial Court held that the original entry of judgment in the action of tort by the clerk was correct and the action went to judgment on that date. Accordingly, the motion to strike the agreement for judgment was out of order since the judgment was the thing that would have to be attacked. The Court indicated that the proper remedy for that purpose was a petition to vacate the judgment. Since the agreement for judgment has the extremely important further effect of waiving all exceptions and appeals, the times provided by law for taking such exceptions and appeals are of no consequence in determining when judgment on such agreement becomes final.


§21.9. Judgment; Seasonability of appeal. In both *Ward v. Selectmen of Scituate*¹ and *Klier v. Building Inspector of Lawrence*,² the Court had occasion to consider the seasonability of appeals. Both were petitions for writ of mandamus. In the *Ward* case, after demur- rer to the petition was overruled, it was stipulated that the facts were as set forth in the pleadings. On the basis of the facts as thus agreed, the judge made a “Report of Facts and Order for Judgment” on May 26, 1954. On June 21, the clerk entered judgment for respondents. On July 2, petitioner appealed. On July 30, respondents filed a motion to dismiss the appeal on the ground that it was not seasonably taken. On August 12, this motion was denied “without prejudice.” Respondents were pertinacious and filed a motion to correct the entry of judgment. It was based on the theory that since petitioner did not file a claim of exceptions within three days of the judge’s order, the case became ripe for judgment on June 7. This motion was allowed and the clerk was ordered by the judge to correct the entry of judgment. Petitioner excepted and the full court sustained his exceptions.

In determining the time when the case became ripe for judgment the Court dealt with the various rules and statutes involved. Thus it was held that the expiration of the three days allowed under Superior Court Rule 72 for claim of exceptions was not determinative because, under G.L., c. 231, §96, the petitioner had twenty days from the order for judgment within which to appeal. Thus the case would not be ripe for judgment until after June 16 in this particular instance. However, under Superior Court Rule 79, judgment could not be entered until the next Monday after the case became ripe for judgment. This kept the matter open until June 21.

Finally, the Court reasoned, since the petitioner had twenty days within which to appeal from the judgment itself under G.L., c. 213 §1D, the appeal taken by the petitioner on July 2 was timely.

Although it is by no means a novel point, it never can be overemphasized that under G.L., c. 231, §96 the appeal is from the order for judgment while under G.L., c. 213, §1D the appeal is taken from the judgment itself.

In the *Klier* case, after a hearing on the merits, the trial judge on July 13, 1954, filed with the clerk “Findings of Fact, Rulings of Law,” which concluded with the words “Petition dismissed.” On August 25, the petitioners filed an appeal which in express terms professed to be claimed under G.L., c. 213, §1D. The motion of an intervenor to dismiss the appeal as unseasonable was successful, and from this ruling the petitioners appealed and also filed exceptions. The Court held that the appeal filed on August 25 was seasonable.

The Court held that the words “Petition dismissed” would have been apt to indicate the entry of final judgment, but only if the case

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had been ripe for judgment at the time, and that this was not so because neither the time for claiming exceptions under Superior Court Rule 72, nor the time within which to claim an appeal from an order for judgment under G.L., c. 231, §96 had expired at the time when the trial judge filed the document with the clerk. Hence the trial court’s order amounted only to an order for judgment thus giving the petitioners twenty days thereafter in which to claim an appeal under the statute last above cited, or to file a bill of exceptions under G.L., c. 231, §113. Hence, the case became ripe for judgment on August 8, and under Superior Court Rule 79 would go to judgment on the following Monday, August 9. Since under G.L., c. 213, §1D the petitioners had twenty days following judgment within which to appeal, their appeal taken on August 25 was seasonable.

§21.10. Law of the case. The status of this somewhat murky doctrine received no little clarification in Gleason v. Hardware Mutual Co. In one proceeding or another, the general controversy had twice previously been before the Court. In its 1954 version the Court was presented with an action of contract on a motor vehicle liability policy brought by the insured against the insurer. To attempt to narrate fully the history of the matter would add nothing. In discussing the “doctrine” the Court reduced it to the status of a judicial device through which the Court expresses its determination to “decline the opportunity” to reconsider questions which had been earlier decided in the same general controversy, whether or not in precisely the same case or on an earlier appeal in another case involving the same parties. It is made very plain by the opinion that such determinations do not emanate from any lack of power in the Court and that, in what the court deems a proper case, it may take the view that it has not only the right and power, but also the duty to correct an earlier error.