Chapter 21: Civil Procedure and Practice

Francis J. Larkin
PART III
Adjective Law

CHAPTER 21
Civil Procedure and Practice
FRANCIS J. LARKIN

§21.1. Pretrial oral discovery. De Tocqueville was fond of saying that what we call necessary institutions are often no more than institutions to which we have grown accustomed.1 Too frequently, the familiar is allowed to become the eternal. This exercise in self-delusion was demonstrated again during the 1964 SURVEY year when a proposal to provide for pretrial oral depositions died aborning in the Massachusetts House of Representatives. For this reason alone, in the area of civil procedure and practice, the 1964 SURVEY year must be considered one of lost opportunity.

Despite the fact that pretrial oral discovery has roots in fifteenth century England2 and has been widely utilized in the vast majority of our state courts for many years,3 there has been no significant development in its use as a procedural device in Massachusetts since 1920.

This fact is not unsurprising. The promulgation by the United States Supreme Court of the Federal Rules of Civil Procedure in 1938,4 conspicuously featuring liberalized discovery procedure, was hailed by the American Bar Association as “probably the greatest single accomplishment in modern judicial reform.”5 Consonant with the expectation of their drafters, the rules induced extensive emulation by the

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§21.1. 1 As quoted in Frankfurter, Law and Politics 47 (1962).
2 See generally, Stephen, Principles of Pleading in Civil Actions 135-490 (1895).
3 New Hampshire, for example, has had oral discovery for over one hundred years.
4 308 U.S. 645 (1939).
states, until today more than forty states have introduced broad pretrial discovery.

In Massachusetts the attempt to secure pretrial oral depositions in the Superior Court was not a new one. Indeed, as early as 1921 the Judicature Commission recommended pretrial oral depositions of parties as a means to reduce "court congestion." Similar unsuccessful attempts to secure a procedure for oral depositions have been repeated through the years.

Despite the lugubrious history, the portents for such a measure at last seemed auspicious as the 1964 legislative year commenced. In January, members of the Massachusetts Bar Association's Board of Delegates and Committee on Administration of Justice gathered from all parts of the Commonwealth to hear Superior Court Chief Justice G. Joseph Tauro deliver a penetrating address entitled "Improving the Quality of Justice in Massachusetts."

In this address the Chief Justice took note of the fact that the congestion in the Superior Court, temporarily allayed in the late fifties, now loomed as an even more ominous threat. To combat the problem while it yet remained manageable, the Chief Justice advocated a three-pronged program. The Tauro program called for the addition of ten new judgeships in the Superior Court, an expanded use of the pretrial conference, and the adoption of the federal court rules on oral discovery in Massachusetts practice.

In urging the adoption of oral discovery and in alluding to the federal experience under the rules, the Chief Justice stated pointedly:

[T]he great progress which has been made in the law throughout the past centuries must assuredly be credited to those responsible lawyers and judges who were willing to challenge objectively the routine precedents and practices of their predecessors. These men recognized as valid the axiom that 'the law must remain stable but it cannot stand still.' Today the bench and bar of Massachusetts similarly must be ever alert to ways and means of improving both our procedure and our practice.

This speech attracted widespread public and editorial attention. It was reported in full in the Massachusetts Law Quarterly, together with an excellent analysis of oral discovery by Superior Court Judge Robert Sullivan. Judge Sullivan's article, admirably documented with federal and state experience, pointed out that a system of oral discovery would, in addition to speeding up the disposition of cases, encourage a determination on the merits, help preserve testimony that

8 See Cross and Cronin, Pre-Trial Depositions, 1 Boston B.J. 19 (May 1957). These proposals usually provided that depositions be limited to "parties."
11 See, e.g., For Constant Improvement, editorial, Boston Herald, Jan. 27, 1964.
might otherwise be lost, discourage perjury and fake or exaggerated claims, help poor litigants who could not afford an exhaustive search for evidence, and in general enhance the judicial process.\textsuperscript{18}

Shortly thereafter, the Committee on Administration of Justice of the Massachusetts Bar Association, under the chairmanship of Dean Robert F. Drinan, S.J., of Boston College Law School, held extensive meetings to consider the type of measure which, while effectuating the objectives contemplated by Chief Justice Tauro, would be most likely to gain the approbation of the legislature.

One of the principal questions facing the committee was whether to recommend the submission of a so-called "long bill" or a "short bill." The long bill was essentially a codification of pertinent provisions of the Federal Rules of Civil Procedure, with special emphasis on Rules 26, 28, 29, 30, 32, 34, 35, and 37. Section 9 of this bill would have limited the application of the measure to those Superior Court civil cases which were not subject to transfer to the district courts. The short bill was a measure which sought simply to provide in general terms for a system of pretrial oral discovery, leaving the details to be established by rules of court. In order that the short bill would embrace the same general subject matter as the long bill, it also provided for discovery of documents and other objects and for physical and mental examination.

Ironically, in the light of subsequent events, the reasons adduced by the subcommittee in recommending the adoption of the short bill were scarcely prophetic:

The subcommittee recommends the adoption of the short bill. In the opinion of the subcommittee, even though the long bill is essentially only a codification of the pertinent rules of the Federal Rules of Civil Procedure, it might nevertheless be viewed by some persons as unduly complex, with the result that many misunderstandings might arise during the process of securing its enactment. On the other hand, the short bill is not likely to be subject to this risk, and adequate safeguards can still be established by the adoption of judicial rules under it, as in other jurisdictions.\textsuperscript{14}

Finally, on April 1, 1964, Governor Peabody sent a special message to the legislature urging the adoption of broadened discovery procedures. The proposed bill provided in pertinent part that:

(1) Any party in a civil cause or proceeding in the Superior Court may, subject to rules promulgated by the justices of the Superior Court, take the testimony of any person, including a party, by deposition upon oral examination for the purpose of discovery or for use as evidence or for tort purposes.

(2) For the purpose of discovery or for use as evidence or for

\textsuperscript{18} Ibid.

\textsuperscript{14} Report of Subcommittee on Proposed Bills for Pre-Trial Oral Discovery, Massachusetts Bar Association Committee on Administration of Justice, p. 3 (Mar. 9, 1964).
both purposes the Superior Court may, subject to rules promul-
gated by the justices of the Superior Court, upon motion of any
party showing good cause in any civil cause or proceeding therein
order any other party to (a) produce and permit inspection and
copying of documents and other tangible things not privileged
and (b) permit entry upon designated land or other property for
the purpose of inspecting, measuring or photographing the same
or any object or operation thereon.\textsuperscript{15}

The principal part of the bill was, of course, the provision allowing
depositions to be taken from any person (not merely parties). The
obvious intention was that if the bill were enacted, the Bar would be
afforded the opportunity of submitting suggestions to the Superior
Court for the promulgation of appropriate rules.

The Governor's message also attracted widespread editorial sup-
port,\textsuperscript{16} and the proposed bill came to the legislature with one of the
most imposing galaxies of endorsements ever marshalled behind a
piece of judicial reform legislation.\textsuperscript{17}

Upon reaching the legislature the bill was referred to the Joint
Legislative Committee on the Judiciary, which commenced hearings;
there it encountered vocal tripartite opposition, some predictable, and
some from an unexpected quarter.

Surprisingly, one of the earliest and most vitriolic opponents of the
bill was Stephen E. McCloskey of the Labor Relations Council. Mc-
Closkey sent a letter to the Governor and all members of the legisla-
ture, calling the bill "a vicious device resulting in injustice as per-
formed in Russia."\textsuperscript{18} Although McCloskey, writing as legislative
agent of the Maritime Port Council of Greater Boston, scarcely spoke
for anything like a representative cross section of labor, the speed and
bitterness of his opposition gave an anti-labor aura to the bill from
which it could never be severed.\textsuperscript{19}

The second major source of opposition to the bill came from a
coalition of large casualty insurance companies. In the main, the in-
surance industry took the position that, while not opposed to an oral
discovery procedure—in principle—it could not accept the bill
then pending before the legislature. The industry, through Frank-
lin J. Marryout, filed an extensive statement in opposition to the
pending bill and advocated amendments which would, in effect, have
emasculated the bill as a medium for any meaningful discovery.

\textsuperscript{15}See House No. 3377, Senate No. 800 (1964).

\textsuperscript{16}To Administer Better Justice, editorial, Boston Herald, April 3, 1964; Let's
Update the Courts, editorial, Boston Globe, April 2, 1964.

\textsuperscript{17}The proposed bill was endorsed by, inter alia, the deans of all the law schools
in Massachusetts, the Massachusetts Bar Association, the Boston Bar Association,
the presidents of all the County Bar Associations, the Judicial Council, and the

\textsuperscript{18}See letter of Stephen E. McCloskey, dated April 12, 1964.

\textsuperscript{19}Despite the fact that on June 10, 1964, all six officers of the Massachusetts
State Labor Council, AFL-CIO, sent a signed letter to each member of the legisla-
ture, urging adoption of oral discovery.
These proposed amendments would have, inter alia, most significantly limited discovery to parties. Enactment of these amendments would have been a veritable death by inches to the enlightened spirit of discovery envisaged by the federal rules.

This opposition was predictable. In practical effect, it may well be argued that defendants represented by large insurance companies have little need for expanded discovery. Normally the insurance companies are immediately informed when an accident has taken place. Trained investigators are promptly dispatched to the scene to undertake a complete and thorough investigation. These investigators take pictures, draw plans, and, most significantly, secure as many signed statements as possible from witnesses, all while factual data are relatively available and memories are undimmed. Accordingly, it can be persuasively urged that insurance company lawyers, as compared with their brethren representing the plaintiff, have little need for expanded discovery. Consequently, from a purely partisan aspect, anything which would redress the information gap presently enjoyed by defense attorneys might be expected to be opposed by these representatives of defendants.

On the other hand, continuing to restrict the discussion to the field of personal injury litigation, the majority of people injured in accidents rarely engage a lawyer until vitally critical time has elapsed. By the time that experienced trial counsel has been retained, evidentiary materials are less available and memories have dimmed. Frequently much of the evidence is in the control or possession of the defendants. In sum, adequate pretrial investigation is seriously handicapped, and there is strong evidence that without recourse to expanded discovery procedures many injured persons have small chance to establish or present a prima facie case, regardless of the intrinsic merits of their claims. These facts point up the anomaly of the previously noted position of Mr. McCloskey and the anti-labor overtones surrounding the proposed bill.

A third source of opposition was the Massachusetts Trial Lawyers Association, an unexpected opponent. The Association, which represents many plaintiff lawyers throughout the Commonwealth, apparently opposed the adoption of oral discovery for fear that insurance companies would overwhelm them with oral and other time-consuming discovery proceedings that would conflict with the discharge of other responsibilities. Moreover, there was significant sentiment that, in view of the increasing tendency to appeal auditor's decisions to the Superior Court, pretrial discovery would, in effect, constitute a third trial, which, because of its cost, would render it exceedingly difficult for the person of average means to take a case to court.

21 "A stenographic record of an oral interrogatory costs about $180 for just one session and an interrogatory usually runs about four sessions. Now, how can a person of average means, making $100 to $150 a week, afford to pay out $800"
While hearings on the bill were proceeding, pretrial discovery was the subject of numerous letters to the editor in the metropolitan newspapers. These letters ranged from the emotional to the exceptionally reflective, analytic, and dispassionate.22

On June 12, the Joint Legislative Committee on the Judiciary reported the bill out favorably with substantial amendments.23 The amendments — obviously taking cognizance of the apprehensions of the Trial Lawyers Association — provided that except upon a showing of good cause, the moving party should provide a copy of the deposition to opposing counsel and that all stenographic expense should be borne by the moving party. A further amendment provided against allowing depositions when the cause had already been the subject of an auditor’s hearing, and, conversely, it precluded transfer to an auditor when depositions had been taken. This amendment was designed to eliminate the putative evils of the above noted “Act Three.”24

As amended, the bill was returned to the Senate where, under the skillful leadership of Senate President Maurice Donahue, it won a narrow 21 to 20 victory. But this was to be the last victory enjoyed by its proponents. When it came to a vote in the House of Representa-

http://lawdigitalcommons.bc.edu/asml/vol1964/iss1/24
In the waning hours of an emotionally charged prorogation session, the bill was overwhelmingly defeated, 146 to 57. The defeat of the bill was a serious blow to the modernization of the archaic Massachusetts discovery procedure. Some seven years ago, a man who is frequently referred to as the “Dean of the Trial Bar” in Massachusetts, a man of extensive trial experience in both the state and federal courts, set forth nine reasons why the utilization of pretrial oral deposition would be a giant step forward in improving the procedural posture of a Massachusetts litigant and in ameliorating the administration of justice in Massachusetts. The validity of these reasons has never been effectively challenged, and because of their relevance they bear repeating.

1. It will assist in reducing court congestion in the Superior Court, particularly in jury cases. At present there are delays up to three or more years for jury trials in some counties. For this long period of time from the entry of the writ until trial, there is no real opportunity for settlement based upon a realistic appraisal of the evidence. If both sides could review the evidence early in the proceedings, and analyze the merits of the case by testimony under oath from the parties and not from assertions of counsel, there would be more and earlier settlements. Thus litigation would be more speedily concluded.

2. Settlements would be more easily effected in non-jury cases as well. Usually conflicts in evidence can be narrowed to certain issues, and with testimony under oath from the parties they could then assess the extent of their differences and their legal significance. Further, the question of damages could be more accurately explored, and thereby provide the parties with a fairer figure for settlement negotiations.

3. It would eliminate the pre-trial psychology of some litigants that their side is right and the other wrong in black and white terms. Once a party testifies under oath and is subjected to cross-examinations he can see that all is not black and white and then may prefer financial security by a reasonable settlement rather than risk getting less or nothing by trial.

4. It would facilitate the elimination from the court docket of cases having little or no merit. It is unfortunate to have to wait up to three years for a party to show that his adversary's case is without merit. With testimony under oath early in the proceedings, the case without merit or with a fatal legal defect would be quickly revealed, causing the dismissal of such actions or settlement at a nominal amount.

5. It would result in shorter trials in the Superior Court by narrowing the issues actually in controversy. Presentation of evidence involving no real conflict consumes much time in some

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25 The roll call vote in the house came on an amendment to limit the bill to cases involving less than $10,000.
trials and the taking of oral depositions before trial would eliminate much that is uncontroverted.

6. It would eliminate many elements of chance and surprise at the trial. Nothing is accomplished by allowing a case to go to trial with the hope that the other side is not aware of certain damaging evidence or that the adversary has failed to uncover evidence valuable to him. A trial is a serious and expensive undertaking. Its primary purpose is to arrive at the truth. The sooner in the proceeding this is done, the better the ends of justice will be served.

7. It would better provide for perpetuation of testimony. Under our present laws this opportunity to preserve testimony is quite limited. The proposed legislation would provide a record admissible at the trial if the deponent was not alive or otherwise unavailable to testify.

8. It would enable an opposing party to secure admissions of the other party. Such admissions might be sufficiently damaging to put the party out of court, and, at least, could be used to great advantage in cross-examination at the trial.

9. It would tie down a party's story early in the litigation when his memory is still fresh and details are not blurred. Discrepancies between his deposition and testimony at trial could be used to impeach the deponent.26

The intervening years have failed to disclose effective rebuttal to the foregoing enumeration, and the roll call of states adopting broadened discovery continues to increase.27 Abhorrence of the novel is no longer a valid counterpoise, and the interdict to eschew the role of being the first by whom the new is tried can scarcely be adduced as meaningful in Massachusetts.

To be sure, pretrial oral discovery is not a panacea. However, it is a great step forward if one assumes as a philosophic presupposition that the trial of a lawsuit is a quest for truth and not an exercise in naufragio. Moreover, despite its defects, the evidence is indisputable that discovery and its handmaiden, a modern and liberalized system of pleading, have made a conspicuous contribution to the operation and administration of judicial systems in which they are employed.

26 Cross and Cronin, Pre-Trial Oral Deposition, 1 Boston B.J. 19-21 (May, 1957).
27 Rhode Island is the latest state to move towards adoption, bringing the total to forty. Rule 26 of the proposed Rules of Civil Procedure, scheduled to become effective September 1, 1965, is based upon Rule 26 of the Federal Rules of Civil Procedure (with substantial modifications). Rule 26(a) provides for taking the deposition of any person, whether or not a party, for use as evidence or for discovery or both. Leave of court is required only when plaintiff seeks a deposition within twenty days after service on the defendant. The pervasive sweep of discovery contemplated is emphasized by Rule 26(b)(1), which provides that all unprivileged matters relevant to the action are discoverable. Thus, the question of ultimate admissibility is not the criteria. The names and addresses of witnesses are discoverable. See Tentative Draft of Rhode Island Rules of Civil Procedure and Rules of Practice of the Superior Court (1964).
§21.2 CIVIL PROCEDURE AND PRACTICE

It should not be forgotten that pretrial discovery gives each party wide power to probe the other’s case in advance of trial, find out what his evidence is to be, and prepare to meet it. Accordingly, its object and effect is both to eliminate the gambling or sporting element from litigation and to make a trial, as far as possible, an objective search for truth and right. For that very reason, it will always be opposed by that part of the Bar that sets store by courtroom skills and tactics and that would prefer the trial to remain a game of chance or a fencing match between the opposing attorneys.

Oral discovery would greatly assist lawyers in preparing their cases for trial. Witnesses and parties could be examined in advance of trial, thereby enabling attorneys on both sides to evaluate realistically both sides of a controversy. Currently, an attorney must prepare a case to cover all foreseeable contingencies. The plaintiff must present sufficient evidence to overcome all possible defenses. The defense, unaware of the plaintiff’s case, similarly prepares a case to cover all foreseeable contingencies. With discovery, groundless claims and defenses are scrapped and the court is presented a tightly prepared contest.

There can be no question that the right of recourse to litigation—before a jury—should be preserved. However, the focus of the litigation should not be the drawing of issues—the situation that so frequently obtains today—but rather the litigation of issues that have already been formulated through appropriate discovery procedures. It is essential that the Bar face up to this reality before public dissatisfaction with crowded dockets and delayed justice bursts forth with an intensity which may exact more than reasonable satisfaction. On this issue the Bar must rise above myopic preoccupation with personal predilections and see the real issue involved; that issue is no less than a realization that:

If democracy is to survive in postwar days in the contest with foreign ideologies and systems, it must be able to demonstrate its efficiency; and nowhere is this efficiency more important than in the fundamental matter of administering justice. The administration of justice is the lawyer’s business and to see that that business is conducted with efficiency is one of the most important duties that confronts him now as well as one of the most important that the future can bring to him.28

§21.2. Personal jurisdiction over foreign corporations. The impact of the due process clause of the Fourteenth Amendment on the in personam jurisdiction of state courts over foreign corporations has been a source of continuing difficulty to the judiciary and to all others who regard absolute and definitive standards of universal application as consummations devoutly to be implored. The consent basis for

jurisdiction recognized in *Lafayette Insurance Co. v. French* and the presence doctrine articulated in *Rosenberg Bros. & Co. v. Curtis Brown Co.* were succeeded by the minimum contacts with assurance of fair play and substantial justice thesis of *International Shoe Co. v. State of Washington.* The decision in this case purported to sweep away the previous emphasis on mechanical or quantitative tests and to substitute in their place a flexible, qualitative approach to the problem of jurisdiction. Henceforth jurisdiction was to depend upon an analysis of all of the circumstances of the particular case examined in terms of their "quality and nature" and their connection with the obligation sued upon.

The decision was widely recognized as an invitation to the states to expand their jurisdiction over nonresidents. A significant number of jurisdictions responded to the invitation by enacting so-called "long arm statutes," under which the scope of in personam jurisdiction was conspicuously broadened.

In the light of these developments there are two distinct questions that normally must be answered each time a state attempts to exercise personal jurisdiction over a foreign corporation: (1) Has the local legislature provided a statutory framework for asserting the subject jurisdiction under the circumstances of the case presented? (2) Is the local statute consonant with the due process requirements of the Federal Constitution? In answering the first inquiry, state law is controlling, while federal precedent controls the second question.

In Massachusetts the question of the extent to which foreign corporations can inject themselves into the state without becoming subject to the in personam jurisdiction of the courts of the Commonwealth has been particularly vexatious.

The question is focused anomalously in the light of the pervasive and far reaching language of the applicable Massachusetts statute. The anomaly derives from the fact that the statute, despite its all embracing language, failed from the outset to gain a liberal construction from the Supreme Judicial Court. In *Thurman v. Chicago, Milwaukee and St. Paul Ry. Co.*, the Court, in construing a virtually

§21.2. 18 How. 404, 15 L. Ed. 451 (U.S. 1855).
3 326 U.S. 310, 316, 66 Sup. Ct. 154, 158, 90 L. Ed. 95, 102 (1945).
7 Pulson v. American Rolling Mill Co., 170 F.2d 195 (1st Cir. 1948).
8 G.L., c. 223, §38, as amended by Acts of 1939, c. 451, 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. ..."
9 254 Mass. 569, 151 N.E. 63 (1926).
identical statute, held that the mere solicitation of business within the state would be an insufficient predicate for establishing in personam jurisdiction over the foreign corporation, notwithstanding the fact that the statute expressly authorized service of process on corporations soliciting business within the state. However, the Court made it plain that the result did not stem from any doubts about the scope of the Massachusetts statute, but rather on supposed constitutional inhibitions.

Since the constitutional fears were allayed in 1945 when the United States Supreme Court decided International Shoe Co. v. State of Washington, it was predictable that Massachusetts courts would have no hesitancy in utilizing the existing statute in expanding the reach of its in personam jurisdiction.

With but one exception, a survey of the Massachusetts cases since International Shoe fails to reflect a perceptible broadening of the judicial base in this area. Indeed, in every case in which General Laws, Chapter 223, Sections 37, 38, were involved as a basis for asserting jurisdiction, the Supreme Judicial Court seemed to place emphasis upon the presence of a continuous and systematic business activity that went beyond mere solicitation, paying at least lip service to the holding in Thurman.

10 G.L., c. 223, §38, stated, like the present statute: “In an action against a foreign corporation . . . which has a usual place of business, is engaged in or soliciting business in the commonwealth, permanently or temporarily, service may be made . . .” as provided for in G.L., c. 223, §37.

11 Indeed, it seemed that the Court, speaking through Chief Justice Rugg, assumed that it had been the legislative intent to make the statute as broad as permissible under constitutional limits: “It is possible that all its words [the language of G.L., c. 238, §38] may be given effect as applied to other states of facts. It is left for full force as to all subjects which it may constitutionally govern . . . The extent of the present decision is to hold that no sufficient service was made to acquire jurisdiction over the defendant [because of the supposed constitutional inhibitions] and that said §38 cannot be given effect to confer such jurisdiction. We hold that that section goes as far toward that end as is permissible, . . . but is prevented from reaching it by the Constitution of the United States . . .” 254 Mass. 569, 575-576, 151 N.E. 63, 66 (1926).

12 326 U.S. 516, 43 Sup. Ct. 170, 90 L. Ed. 95 (1945).


14 Hub Mail Advertising Service, Inc. v. Inter City Sales, Inc., 340 Mass. 8, 162 N.E.2d 760 (1959) (employee maintained in state with broad authority to safeguard company's interests); Jet Manufacturing Co. v. Sanford Ink Co., 330 Mass. 175, 112 N.E.2d 222 (1953) (complaint investigation by an authorized representative who was stationed in the state and empowered to perform all duties incidental to sales and public relations); Wyshak v. Anaconda Copper Mining Co., 328 Mass. 219, 103 N.E.2d 280 (1952) (promotional work and complaint investigation).

A similarly conservative approach has been manifested relative to an alternative statutory method of obtaining jurisdiction over a foreign corporation. 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. Id. §3A provides that in the event of a failure to make the appointment, the corporation will be deemed to have done so. These provisions were before the Supreme Judicial Court in Remington Arms Co. v. Lechmere Tire and Sales Co.,
The single exception to this approach occurred in *Radio Shack Corp. v. Lafayette Radio Electronics Corp.* The United States District Court (Wyzanski, J.) concluded in that case that under Massachusetts law mere solicitation, even in the absence of amplifying circumstances, would furnish an adequate juridical base for in personam jurisdiction over foreign corporations. Suit had been brought against two defendants—one a Massachusetts corporation and the other a New York corporation which owned all of the stock of the Massachusetts corporation. The Massachusetts corporation was engaged in the sale of electronics equipment, a portion of which it obtained from the New York corporation. It also distributed flyers and catalogues, supplied by the New York corporation, which advertised and solicited business and which conspicuously featured the names and addresses of both corporations as the soliciting firms. The record indicated that a significant number of Massachusetts residents did business with the New York corporation as a result of the promotional stimulus of the catalogues and flyers.

Service of process was made on both the general manager of the Massachusetts corporation and on the Massachusetts Commissioner of Corporations, the plaintiff's suit alleging unfair competition and a cause of action under the Trademark Act of 1946. The defendant New York corporation moved for dismissal on the ground that Massachusetts could not permissibly assert jurisdiction over it.

In rejecting this contention, Judge Wyzanski concluded that through the distribution of the advertising materials and catalogues, the New York corporation solicited business in Massachusetts; he then concluded that this fact was sufficient to establish jurisdiction in Massachusetts. Moreover, the court apparently eschewed the indication of the Massachusetts Court that it would not broaden the scope of Chapter 181 in the absence of legislative action and concluded that “[T]oday 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.”

Shortly after this decision came down it was suggested that the district court may have taken an overly expansive view of the Massachusetts cases in concluding that mere solicitation of business was sufficient to subject the corporation to service of process. The prescience of the comment is evident in the light of the cases decided since *Radio Shack.*
In Waltham Precision Instrument Co. v. McDonnell Aircraft Corp.,\(^19\) the defendant corporation was incorporated under the laws of Maryland, with its principal place of business in St. Louis, Missouri. In 1958, in conjunction with the Mercury Space Program, the defendant solicited from the plaintiff, a Massachusetts corporation, and from other corporations,\(^20\) a bid for the manufacture of certain clock mechanisms for use by the defendant in the space program. After negotiations the defendant issued a purchase order to the plaintiff, and work on the project was begun. The defendant cancelled the contract in 1960 and the plaintiff instituted a suit for breach of contract. Service was made on the Massachusetts Commissioner of Corporations and Taxation, pursuant to the provisions of Section 3A of Chapter 181 of the General Laws. The federal district court dismissed the action for lack of proper service, holding that the Massachusetts statute did not extend jurisdiction over a foreign corporation on the facts presented. On appeal the plaintiff relied heavily upon the apparent thesis of Radio Shack that "mere" solicitation of business was sufficient for the proper invocation of the Massachusetts statute.\(^21\)

In rejecting that contention and affirming the decision of the district court, the United States Court of Appeals for the First Circuit held that its examination of the Massachusetts cases militated against the conclusion that solicitation alone would be sufficient for a juridical base. The court noted, significantly, that its study of the Massachusetts cases indicated that the decisive factor was not the bare question of whether there had been solicitation, but whether that solicitation could be said to be part and parcel of "a sustaining endeavor with a significant degree of permanency and continuity."\(^22\) In the court's view this latter factor was absent in McDonnell: "This is not a situation where a foreign corporation establishes a permanent purchasing office in a state or even, absent such an office, the record indicates a regular and systematic course of purchasing within the state."\(^23\) In sum, the court was unwilling to predicate jurisdiction on the ad hoc or episodic course of conduct established by the record.\(^24\)

Three cases decided in the United States District Court for the District of Massachusetts during the 1964 SURVEY year continued to emphasize Massachusetts' conservative approach to the problem. Applying existing state law, the court, in all three cases, decided that jurisdiction could not be asserted over a defendant foreign corporation

\(^{19}\) 10 F.2d 20 (1st Cir. 1962).

\(^{20}\) The record is silent on whether any of the other companies solicited in connection with the project were Massachusetts corporations.

\(^{21}\) See Brief for Appellant, pp. 5-7.

\(^{22}\) 10 F.2d 20, 24 (1st Cir. 1962).

\(^{23}\) Id. at 24.

\(^{24}\) The court explicitly noted that it was not to be understood as holding that it would be constitutionally impermissible for Massachusetts to assert jurisdiction on facts similar to those before the court. It merely held that the Supreme Judicial Court had declined, to date, to extend the ambit of its jurisdiction as far as the plaintiff requested.
under the present statute since there was no "doing of business" within the Commonwealth. In *DeNucci v. Fleischer*,

25 a libel action against The Ring, Inc., a New York magazine corporation, the court granted the defendant's motion to set aside the service of process under General Laws, Chapter 223, Section 38, and dismissed the complaint for lack of personal jurisdiction. Using a familiar approach, the court held that when the foreign corporation had no offices, bank accounts, agents, or employees in Massachusetts, the facts that one-hundred copies of *The Ring* magazine were mailed to subscribers in Massachusetts and that other copies entered the state through a system of independent distributors were not sufficient to constitute "doing business" for assertion of personal jurisdiction. The court indicated that the asserted solicitation of business in Massachusetts by placing information and order forms for subscriptions inside the magazine was "incidental" to the circulation of the magazine itself and, in the absence of any more direct or active solicitation, was too unsubstantial to afford a basis for jurisdiction. Though conceding that General Laws, Chapter 223, Section 38, is couched in terms of "soliciting business," the court, adhering to prior interpretations of Massachusetts law, held that the ultimate test of asserting personal jurisdiction is "doing business," as indicated in General Laws, Chapter 181, Section 3A, and under that provision, solicitation without some additional promotional activity would not constitute "doing business" within the meaning of that statute.

When a foreign corporate defendant did nothing more than appoint a Connecticut distributor, and the distributor, who was not under the direction or control of the defendant, sold to the plaintiff pipes that were the subject matter of a breach of warranty action and which the distributor transported from Connecticut to Massachusetts, the defendant was not "doing business" in Massachusetts within General Laws, Chapter 181, Section 3A, and substituted service upon the defendant in Massachusetts under General Laws, Chapter 223, Section 38, was invalid.

26 Finally, in *Wilensky v. Standard Beryllium Corp.*

27 the court held that a corporation that was engaged almost exclusively in a mining operation in Brazil and whose sole Massachusetts activity was the sale by an independent stock brokerage firm of stock in the corporation was not "doing business" in Massachusetts within the meaning of General Laws, Chapter 181, Section 3A, and the purported substituted service of process upon the defendant under General Laws, Chapter 223, Section 38, was invalid. The court, in order to avoid the language of *DeNucci* that "solicitation plus promotional activity" would be sufficient for jurisdiction—a situation which apparently obtained on the present record—pointed out that General Laws, Chapter 181,


Section 3A, did not authorize assertion of jurisdiction over a corporation based on the sale of its stock in the state when that was not the customary product of the corporation and when there was no additional business activity within the state. Thus, in the Wilensky case, General Laws, Chapter 181, Section 3A, was not extended to predicate jurisdiction on the sale of stock since, in the court's view, this was not the customary product of the defendant foreign corporation even though solicitation and subsequent sale took place in Massachusetts.

There is no doubt that the federal court decisions construing the relevant Massachusetts statutes in this area properly reflect the approach of the Massachusetts Supreme Judicial Court. It can be asked, however, 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 manifestation 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.

While this principle may cause a defendant to defend suits away from home, it can be argued that this is not an unreasonable risk for him to bear when he elects to do business abroad. Indeed, "the manufacturer which depends upon a national market for its business can be so prepared. Subjection to jurisdiction seems to be a reasonable cost of the manufacturer's obtaining a profit from commercial transactions connected with the forum state." 28

§21.3. Judicial review of administrative agencies: Jurisdiction of reviewing court. When a remedy is created by a statute that prescribes time within which and the method by which it must be pursued as conditions requisite to its availability, the court has no jurisdiction to entertain proceedings for relief begun at a later time or prosecuted by a different method. 1 The question of whether a particular notice provision was jurisdictional was presented and resolved during the 1964 survey year. In the case of Cohen v. Board of Registration in Pharmacy, 2 the Court construed a section of the Massachusetts Administrative Procedure Act. 3

The petitioners, acting under General Laws, Chapter 30A, Section 14(1), 4 filed a petition to review the decision of the Board of Registrat-


3 The statute directly involved here is G.L., c. 30A, §14(1) and (2).
4 Section 14(1) provides in part: "Proceedings for judicial review of an agency
tion in Pharmacy which had denied the petitioners' application for registration of a drug store. The petitioners did not give notice to the intervenors, who had been parties before the board, until eleven days after the filing. General Laws, Chapter 30A, Section 14(2), requires that such notice be given within ten days. The intervenors filed a notice of intervention under General Laws, Chapter 30A, Section 14(5). The petitioners filed a motion for leave to file a substituted petition for review. A motion by the intervenors to dismiss the latter motion was granted on the ground that the Superior Court was without jurisdiction because of the untimely notice to the intervenors.

The Supreme Judicial Court held that the failure to give timely notice to the intervenors was merely a threshold matter within subsection (2), and not a jurisdictional requirement. In reaching this conclusion the Court, in effect, held the mandatory provisions of subsection (2) to be nonjurisdictional. All that was required to gain jurisdiction was a filing by the petitioners within thirty days and a notice thereof to the agency. No notice to the other parties to the original adjudication hearing was required, despite the fact that subsection (2) specifically called for such notice.

The Court distinguished Kravitz v. Director of the Division of Employment Security on the ground that the statute there involved required the parties who were before the agency to be initial parties to the proceeding for review. This distinction is quite valid in view of the procedure required by the statute. As the Court said in Kravitz,

decision shall be instituted by the filing of a petition for review in the superior court . . . within thirty days after receipt of notice of the final decision of the agency. . . . A copy of the petition shall, within the same period, be served . . . upon the agency."

Section 14(2) provides in part: "The petition shall be addressed to the court and shall include a concise statement of the facts upon which jurisdiction and venue are based. . . . Copies of the petition shall be served. . . . For the purpose of such service the agency upon request shall certify to the petitioners the names and addresses of all such parties as disclosed by its records. . . ." (Emphasis added).

Section 14(5) provides in part: "Any person served with a copy of the petition for review as provided in paragraph (2) of this section . . . may do so."


Petitioner's Brief, p. 20, conceded that the terms of subsection (2) were mandatory.

"Party" to an adjudicatory proceeding means, according to G.L., c. 30A, §1(3)(b), "any other person who . . . by any provision of the General Laws is entitled to participate fully in the proceedings, and . . . (c) any other person allowed by the agency to intervene as a party." See, Curran & Sacks, The Massachusetts Administrative Procedure Act, 77 B.U.L. Rev. 70, 87 (1957).


Ibid. Delivery to the director is required upon petition to review of "as many copies of the order of notice and petition as there are parties respondent." Section 42 further provides the "in such proceedings every other party to the proceeding before the board shall be made a party respondent."
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"[A]part from this statute there is no right to such a review. . . . Compliance with its terms was a condition precedent to the right of review."\(^{13}\)

Subsection (2) contains a number of requirements for the correct filing of the petition. Among the threshold matters required by subsection (2) are a concise statement of the facts, a proper showing of jurisdiction, and a statement of the particular relief denied. The Court viewed the absence of a provision for extending the time limit in subsection (2) as further support for the proposition that the requirements as stated therein were not jurisdictional. If the agency did not furnish the petitioner with a proper list within the proper time, he would, if the Board's argument were accepted, lose his right to review because of circumstances beyond his control.\(^{14}\) The fact that a petitioner might be able to protect himself under subsection (1) by withholding entry of the petition did not influence the Court in this decision.\(^{15}\) The Court may have interpreted unambiguous and mandatory statutory language broadly, but its decision was more than justified, particularly in view of the lack of substantial prejudice to the intervenors.

§21.4. Right to a jury trial: Equitable proceeding for inspection of corporate books. Article XV of the Declaration of Rights of the Constitution of the Commonwealth, adopted in 1780, provides as follows:

In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred. . . .

In Donaldson v. Boston Herald-Traveler Corp.,\(^{1}\) the plaintiff sued in equity to obtain a copy of a list of stockholders, as provided in General Laws, Chapter 155, Section 22, which states:

If any officer or agent of a corporation having charge of such copies, books or records refuses to . . . exhibit them, he or the corporation shall be liable to a stockholder for all the actual damages . . . and the supreme judicial or superior court shall have jurisdiction in equity . . . to order . . . said copies . . . to be exhibited to him . . . but in an action for damages or a proceeding in equity under the section . . . it shall be a defence that the actual purpose and reason for the inspection sought are . . . for the purpose of selling said list or copies thereof or of

\(^{13}\) 326 Mass. 419, 421, 95 N.E.2d 165, 166 (1950).

\(^{14}\) See Weiner v. Director of Division of Employment Security, 327 Mass. 360, 363, 99 N.E.2d 57, 59 (1951). In fact the petitioner has at least forty days to learn these names and addresses from the agency.


using the same for a purpose other than in the interest of the applicant, as a stockholder, relative to the affairs of the corporation. . . .

The defendant refused to deliver the books or copies thereof because of alleged bad faith and requested a jury trial on the issues of beneficial ownership and whether or not the plaintiff was acting for other interests than his own relative to the affairs of the corporation. The Supreme Judicial Court refused to grant the defendant's motion for a jury trial on these issues.

The Court held that the present action was not one "concerning property," but rather was, in effect, an attempt by the corporation to prevent the "exercise of a stockholder's right of examining corporate books." The Court indicated that the real issue in the case was whether a suit for inspection of corporate books was one that was a part of equity jurisprudence as it was generally understood in England and Massachusetts at the time of the adoption of the Constitution. Since the statutory remedy has only been available since 1903, the defendants urged that they were outside the exception provided in Article XV of the Constitution. The Court rejected this contention on various grounds.

The Court took the position that in 1780 the analogous remedy for an inspection of corporate books was a proceeding for a writ of mandamus. Moreover, the Court recognized that it is well settled that equity is not without jurisdiction over proceedings in mandamus. But then what of the "sacred" guarantee of a trial by jury? The Court, in dealing with the contention that there was a right to a jury in mandamus cases, cited Casey v. Justice of the Superior Court, in which it was specifically held that a "petition for mandamus was not triable to a jury when our Constitution was adopted." However, in support of this result the court in Casey cited Attorney General v. Sullivan, which dealt with an "information in the nature of quo warranto," and not a writ of mandamus. Any distinction between the two writs was dismissed as not being formidably objectionable because of the similarity of origin and, in certain cases, the concurrency

2 In Albee v. Lamson & Hubbard Corp., 320 Mass. 421, 69 N.E.2d 811 (1946), the Court, in a common law mandamus action to inspect corporate books, held that the plaintiff had the burden of proof to allege and prove his good faith and proper purpose.
5 1964 Mass. Adv. Sh. 555, 556, 197 N.E.2d 671, 674. In Albee v. Lamson & Hubbard Corp., supra note 1, proceedings upon a petition for a writ of mandamus in a corporate book inspection case were held to be proceedings in law and not in equity.
6 229 Mass. 200, 118 N.E. 297 (1918).
7 Id. at 201, 118 N.E. at 297.
8 163 Mass. 446, 40 N.E. 843 (1895).
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of their use. The summary dismissal of this important point is not, however, wholly supported by the general citations of the Court.\footnote{Cf. 1964 Mass. Adv. Sh. 553, 556, 197 N.E.2d 671, 674.}

§21.5. \textbf{Bill for an accounting: Master’s report.} In a bill for an accounting “both parties are actors and the defendant may have a decree in his favor without the aid of a cross bill [counterclaim].”\footnote{See 44 Am. Jur., \textit{Quo Warranto} §12 (1942), where it is stated: “Some of their functions seem to approach, yet the two remedies serve different purposes. Where mandamus is the appropriate remedy, quo warranto will not ordinarily lie. . . . Quo warranto . . . is not aimed at compulsion of official duty but . . . is designed to try the right or title to the office. . . .”}

The issue of the sufficiency of pleading a counterclaim was one of a number of issues raised and answered somewhat obliquely by the Supreme Judicial Court in the case of \textit{Tocci Brothers Construction Co., Inc. v. Tocci.}\footnote{\text{Wilde v. Sawtelle, 232 Mass. 117, 123, 122 N.E. 167, 168 (1919).}}

The plaintiff corporation sued in equity for a bill of accounting against the defendant (Frank), who was an officer and a stockholder in the closed corporation. The gist of the plaintiff’s complaint was that Frank charged a number of items bought for his personal use to the corporation. Frank answered that he was merely charging the goods to the corporation as a credit against what was owed him. He counterclaimed generally that the plaintiff corporation was indebted to him, but without specifically stating the reasons for this debt. Concurrent with this equity suit was an action at law initiated by Frank for the money allegedly owed him and for which he was counterclaiming in the equity action. The order of reference to the master (who was also the auditor in the law suit) required the legal and equitable actions to be heard together.

The master made numerous findings as to the relationship between the plaintiff and the defendant.\footnote{\text{See generally Superior Court Rule 90 (1954).}} He made no specific subsidiary finding in respect of Frank’s claim against the corporation.\footnote{A general finding or conclusion will stand if the subsidiary findings upon which it rests are not reported. Gorton v. Schonfeld, 311 Mass. 352, 356, 41 N.E.2d 12, 14 (1942).} He did, however, allude to the basis of that claim in describing the arrangement among the family stockholders: “. . . each stockholder drawing the same salary, and Frank, in addition, being credited with a percentage of the sums received by the corporation for jobs he had estimated, prepared the bids, and secured the contracts.” The master’s sole conclusionary finding was that the “. . . amounts paid for by the corporation should be deducted from the $10,538.80 due to Frank for commissions,” leaving a balance due Frank of $4062.15. The auditor’s report made additional subsidiary findings as to Frank’s claim against the corporation under their corporate arrangement.

One issue before the Court was precipitated by the failure of the corporation to press its exceptions to the master’s report. Frank’s
motion to confirm the master's report was unopposed, as was his motion for entry of a final decree. The judge was under no duty, the Court said, to search for matters which might guide his discretionary action on exceptions which were not supported by appearance of counsel. It has been said in reference to an auditor's report that objections thereto "had no standing except as the foundation of a motion to recommit the report for correction of errors." No such motion for recommittal was made here.

The plaintiff, citing Sandford v. Wright, insisted that the general "counterclaim" in the defendant's answer did not contain "a clear and exact statement of all the material facts upon which the plaintiff's right to relief" was based. Although the Court did not answer this contention directly, a reasonable inference is that by not demurring or objecting prior to the trial to the propriety of the counterclaim, the plaintiff waived his right to object later. The Court referred to Zuckernik v. Jordan Marsh Co., which held in part that a bill for an accounting opens for determination the balance, after considering both sides of the account. The Court assumed that the absence in the master's report of a statement of subsidiary facts supporting Frank's counterclaim would have been a ground for recommittal, apart from the circumstance of the companion case.

It is generally held that a reversible error has to be found upon the face of the master's report. Hence, all the objections to the report were basically factual and, accordingly, were waived when not pressed at the hearing for affirmance of the report. The Court in closing stated that "there was in the report the essential conclusionary finding that the corporation was indebted to Frank and it was not error in law to confirm the report inclusive of that finding."

§21.6. Instructions to jury after formal charge: Absence of counsel.
It frequently happens that the jury, after retiring to the jury room, may submit a question to the judge seeking guidance or clarification. A vexing question is whether the judge may publicly answer the

7 164 Mass. 85, 41 N.E. 120 (1896).
14 Record, p. 16.
16 Ibid.

§21.6. In Lewis v. Lewis, 220 Mass. 364, 107 N.E. 970 (1915), it was held that because the nature of the communication between the judge and jury was secret,
question despite the fact that counsel for neither side is present. In the 1964 Survey year the Supreme Judicial Court was presented with the problem of a post-retirement instruction in the absence of counsel on the merits of the controversy.

In Runshaw v. Bernstein, the plaintiff sued in tort for personal injuries sustained while a pedestrian. The jurors retired for their deliberations at about 2:55 P.M. At approximately 10:35 P.M., after receiving additional instructions on the general subject of jury-room debate, the jury sent a written question to the judge in his lobby. The judge opened it and read it aloud to the clerk of court and the court stenographer. The question read: "Is a reasonably prudent pedestrian, after making the decision that he can cross the highway in safety, obligated to continue his observation of the on-coming traffic as he crosses?" The judge wrote the following answer on the reverse side of the paper: "The jury must decide if he continues to observe or if he relies on the first observation. What does the reasonably prudent man do?" Not more than twenty minutes later, the jury returned verdicts for the defendant. The plaintiff's motion for a new trial was denied.

The Supreme Judicial Court had to decide if the error complained of "injuriously affected the substantial rights of the parties." The Court conceded that it was an "irregularity" for a trial judge to instruct the jury out of presence of counsel. "But it is not every irregularity which will render the verdict void and warrant setting it aside. This depends upon another consideration; namely, whether the irregularity is of such a nature as to affect the impartiality, purity, and regularity of the verdict itself." Here, although the Court chided the judge on his indulgence in the procedure at issue, it held that there were sufficient safeguards to insure protection to all parties concerned. Both the publicity given the question and answer and the correctness of the judge's instruction mitigated against a ruling for the plaintiff.

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4 The judge summoned the jury and read to them excerpts from Commonwealth v. Tuvey, 8 Cush. 1 (Mass. 1851). No exception was taken to this instruction which was given openly, but out of presence of counsel.

5 G.L., c. 231, §132, states: "No new trial shall be granted in any court action . . . if the judge who presided at the trial . . . or the supreme judicial court . . . deems that the error complained of has not injuriously affected the substantial rights of the parties. . . ."


8 See Lewis v. Lewis, supra note 1. See also Filippon v. Albion Vein Slate Co., 250 U.S. 76, 99 Sup. Ct. 455, 63 L. Ed. 853 (1919), a decision almost directly on the point, except that the judge's answer was erroneous.
The Court refused to hold it to be an absolute rule of law "that whenever the instruction touches the merits of the jury's deliberation it necessarily constitutes an irregularity of such a nature as to affect the impartiality, purity, and regularity of the verdict itself."9 But the nature of instructions that touch the merits does seem to be an important factor in the decisions upon which the Court relied. In *Moseley v. Washburn*10 and *Whitney v. Commonwealth*,11 language was used that did indicate that the Court would refuse a new trial as long as there was no tendency to influence the jury upon the merits of the controversy. This view is further substantiated by the decisions in *Kullberg v. O'Donnell*12 and *Commonwealth v. Heden*.13 By refusing to establish an absolute rule, the Court has retained for itself the problem of weighing the irregularities involved. This is done at the expense of an uncertainty with respect to the limits of the judge's instructing powers out of presence of counsel.14

§21.7. Conditional nonsuit prevented from going to judgment: Waiver and notice. The general rule as to when a case is ripe for judgment1 has been stated as:

... when under the last entry, the case seems to have been brought to a final determination, and everything seems to have been done that ought to be done before the entry of a final adjudication upon the rights of the parties.2

It is also well-settled that "... irregularities and defects not touching the jurisdiction of the court over the subject matter may be waived by the parties, and certain conduct in reference to the filing of papers or failing to urge seasonably an objection, or treating a pleading as sufficient, has been held to constitute a waiver."3

These two principles were before the Supreme Judicial Court in an interesting decision arising from a complex procedural context. In *Holmes v. Fitchburg & Leominster St. Ry.*,4 a conditional nonsuit was entered against the plaintiff on March 30, 1960. The condition of the nonsuit was a requirement that the plaintiff answer certain

11 190 Mass. 531, 540, 77 N.E. 516, 520 (1906).
12 158 Mass. 405, 33 N.E. 528 (1893).
14 The United States Supreme Court in *Fillippon v. Albion Vein Slate Co.*, supra note 8, regarded the denial of the opportunity to take exception to the instruction of the judge, when given, as essential to the process of taking an exception. But see Superior Court Rule 72 (1954).

§21.7. 1 G.L., c. 235, §1: "Judgments in civil actions and proceedings ripe for judgment in the superior court ... shall ... be entered by the clerk at ten o'clock in the forenoon on the first Monday of each month. ..."

interrogations within thirty days. On April 27, 1960, the plaintiff filed a motion for an extension of the time to answer the interrogations. The case went to trial on November 9, 1961, without any action on the plaintiff's motion. At that time the plaintiff, without objection from the defendant, filed his answer to the interrogations. On November 10, 1961, the jury returned a verdict for the plaintiff.

On February 8, 1963, the defendant made a motion to strike from the record the plaintiff's motion for an extension, and excepted to the denial of its motion. On appeal, the defendant contended that the plaintiff's mere motion for an extension of time to answer interrogations did not stop the nonsuit, which was ripe for judgment, from automatically going to judgment. The defendant cited numerous examples of impediments that were held insufficient to stop a case from going automatically to judgment. In opposition, the plaintiff based his contention upon the decision of Cohen v. Industrial Bank & Trust Co. In Cohen it was held that the filing of a motion to remove a default judgment was adequate to halt the judgment from being ripe. The Court stated that the main issue and "... sole question for decision is whether the mere filing of these motions was sufficient to prevent the case from going to judgment, or whether the case automatically terminated." The reason that the movant need not have obtained affirmative action by the court was the Court's belief that one might proceed with "all reasonable celerity" and still default his case. A contention was made in Holmes that the decision encouraged dilatory tactics. This was answered specifically in Cohen, when the Court stated: "The conclusion reached does not offer to an obstinate or contumacious litigant a new weapon for delay."

The second problem dealt with by the Court in Holmes was one of waiver. The Court agreed with the plaintiff's contention that since the defendant had not objected to the filing of answers immediately prior to trial, he had waived the right to contest their procedural validity. In Krinsky v. Stevens Coal & Sales Co. the Court held that "... the lack of a formal order authorizing the filing of a pleading by a party is waived by the opposing party replying to such pleading." The plaintiffs were supported further by Hill v. Trustees of Glenwood Cemetery, in which the Court, in discussing the waiver of a demurrer, said: "If ... the defendants voluntarily went forward

5 See note 1 supra.
6 See Defendant's Brief, pp. 7, 8.
7 274 Mass. 498, 175 N.E. 78 (1931).
8 Id. at 499, 175 N.E. at 79.
9 Id. at 501, 175 N.E. at 79.
10 See Defendant's Brief, p. 12.
12 309 Mass. 528, 36 N.E.2d 411 (1941).
13 Id. at 533, 36 N.E.2d at 414.
on the merits without seeking a decision on the demurrer, they could not, as of right, press it thereafter."\textsuperscript{11i}

A third issue involved in the \textit{Holmes} decision dealt with an interpretation of Rules \textsuperscript{318} and \textsuperscript{7217} of the Superior Court. The problem was one of notice to the defendant's attorney and his failure to file seasonable exceptions. It was held that notice of a denial of motions need only be given to one of the defendant's attorneys and that the time for filing of exceptions starts to run from the receipt by this attorney. The Court held that Rule \textsuperscript{3} spoke the disjunctive ("or any"), and therefore notice to all attorneys of record was not required. The facts aptly support the holding in that the attorney, who in fact did receive the first notice, was the one who had conducted the trial and who had filed all the motions. The other attorney, although he was the one whom the defendant had retained, had in fact hired the attorney who received notice to try the case.

\textsuperscript{16} Id. at 398, 82 N.E.2d at 241.

\textsuperscript{17} Superior Court Rule \textsuperscript{3} states: "A notice to a party . . . shall be given to such party or his attorneys by delivering the same personally to him. . . ." (Emphasis supplied.)

\textsuperscript{17} Superior Court Rule \textsuperscript{17} states: "Exceptions . . . shall be taken by a writing filed with the clerk within three days after the receipt from the clerk of notice thereof." (Emphasis supplied.)