Chapter 21: Civil Procedure and Practice

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§21.1. Jurisdiction over non-admitted foreign corporations. In the 1967 Survey year, as in the previous three,1 Massachusetts courts struggled to fathom and define the statutory framework granting personal jurisdiction over foreign corporations seeking to avoid the defense of suits in Massachusetts. Three Massachusetts federal cases were reported in this procedural area,2 but no state ones. Two of the three cases were removed from state courts.3

There is irony in the frequency of federal cases in this field, and the paucity of recent state decisions. The federal courts seek to apply Massachusetts law, as would a state court. This requires the courts to determine whether the corporation is “doing business” in Massachusetts. The cases in the field, however, are invariably removed to federal courts if started in state tribunals. Most of the federal judges have hesitated, in deference to the Erie doctrine,4 to develop a more liberal interpretation of what constitutes “doing business.”5 The Massachusetts Supreme Judicial Court, although noting that a broader definition of “doing business” is constitutionally permissible, has still been constrained to define “doing business” as “solicitation plus” other activity in the cases before it.6 Foreign corporations will continue to remove these cases to federal courts so long as they feel that the federal

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5 The most notable exception to this caution displayed by the federal courts is found in Judge Wyzanski’s opinion in Radio Shack Corp v. Lafayette Radio Electronics Corp., 182 F. Supp. 717 (D. Mass. 1960), discussed in 1960 Ann. Surv. Mass. Law §5.7. Radio Shack is the only known case in Massachusetts which holds that “mere” solicitation by a foreign corporation confers jurisdiction on a local court over matters arising out of the solicitation.

courts in Massachusetts are likely to be more conservative in defining “doing business” than the Supreme Judicial Court might be if presented with the appropriate cases.

Two of the cases this 1967 Survey year arose under General Laws, Chapter 223, Sections 37 and 38, which permit service upon a foreign corporation's “president, treasurer, clerk, cashier, secretary, agent, or other officer in charge of its business” if such corporation “has a usual place of business in the Commonwealth” or “is engaged in or soliciting business in the Commonwealth.” In *Caso v. Lafayette Radio Electronic Corp.*, a Massachusetts resident sued the defendant New York corporation for breach of contract under which the plaintiff was to be the defendant's exclusive agent for selling the defendant's electronic equipment and components in Italy. The plaintiff also alleged deceit in representations that induced him to undertake the Italian agency. The plaintiff served the manager of a Boston retail store, operated by the defendant's wholly owned subsidiary, Lafayette of Massachusetts. The Boston store carries merchandise both of the defendant and others. The defendant mails some of its catalogs into Massachusetts; the Lafayette of Massachusetts store in Boston also has copies available for distribution over the counter. Although the Massachusetts subsidiary does not fill mail orders addressed to the defendant, it does pass them on and occasionally services the defendant's merchandise without charge under the defendant's warranty.

The defendant moved to quash service of process and to dismiss the complaint. The district court found that the officers and directors of the defendant and its subsidiary were the same. The corporations used the same trade name, and the Boston store carried a substantial amount of the defendant's goods. Despite these findings, the district court was unable to find that the defendant utilized the Massachusetts corporation as an agent to conduct its business, nor that it “so dominated and controlled” its subsidiary that “it becomes a mere instrumentality through which the parent carries on its own business.” The district court further found that although the subsidiary was an agent of the defendant in distributing catalogues, no Massachusetts decision had found jurisdiction on the basis of solicitation of business alone, except where the cause of action arose out of the solicitation.

The United States Court of Appeals for the First Circuit, affirming the *Caso* decision, stated that it had derived two propositions from the Massachusetts Supreme Judicial Court's treatment of jurisdiction over foreign corporations:

(a) despite the language of Mass. G.L. Chap. 223, §38, and despite the court's intimations to the contrary, it has never extended jurisdiction over a corporation whose activities in the state amounted to no more than the constitutionally permissible

7 370 F.2d 707 (1st Cir. 1966).
8 See id. at 709.
"minimum contact" — it has regularly found more than "mere solicitation;" (b) even where it has found solicitation plus some other activity, it has not extended jurisdiction, when the cause of action did not arise out of the activities in Massachusetts. On the other hand, where the corporations' activities more closely approximated the regular conduct of a domestic corporation — that is to say, where the defendant was clearly "doing business" in Massachusetts the court has allowed jurisdiction for a transitory cause of action. *Trojan Eng'r. Corp. v. Green Mountain Corp.*, 1936, 293 Mass. 377, 200 N.E. 117.9

Three months after the First Circuit's decision in *Caso*, United States District Court Judge Julian decided *Corbin v. Bastian Blessing Co.*,10 which also arose under the Chapter 223 provisions. Bastian was a foreign manufacturer of gas regulators, one of which was allegedly defective and caused a fire in Cambridge, resulting in the death of the plaintiff's decedent. Service was made on one Murray, described in the officer's return as "Agent in charge of its [defendant's] business at time of service." The defendant moved to dismiss on the grounds that it was not subject to service within the Commonwealth and that service on Murray was not proper service on the defendant corporation.

Judge Julian denied the motion to dismiss. He found that Murray had been the defendant's district sales manager, keeping the defendant's records and samples in Stockbridge, Massachusetts. Murray regularly called on about forty customers in Massachusetts, and was "empowered to do whatever is incidental to selling the Company's products." This included investigating complaints and giving technical advice to customers regarding use of the defendant's products. The District Court, citing *Jet Manufacturing Co. v. Sanford Ink Co.*,11 found that this was more than mere solicitation. In terms of the first circuit's summary of Massachusetts law in *Caso*, *Corbin* involved a situation where the defendant was clearly "doing business" in Massachusetts, therefore allowing jurisdiction over a cause of action which may not have arisen out of Massachusetts business.

The third case in the *SURVEY* year, *Garfinkle v. Arizona Land Corp.*,12 arose under General Laws, Chapter 181, Section 3A, which provides that:

Any . . . corporation which does business in this Commonwealth without complying with the provisions of section three [requiring appointment of the Secretary of State as attorney for service of process] . . . shall . . . be deemed and held, in relation to any cause of action or proceeding arising out of such business, to have ap-

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9 Id. at 711, 712.
pointed the secretary or his successor in office to be his true and lawful attorney. . . .

Garfinkle alleged in his declaration that he was engaged by the defendant, an Arizona corporation, to organize a sales force for the sale of its Arizona land to purchasers in Rhode Island and Massachusetts. He alleged that the defendant breached a written contract for such employment. The defendant moved to dismiss on grounds of lack of jurisdiction over the person and insufficiency of service. The district court allowed the motion to dismiss.

In its decision, the district court thoroughly analyzed the definition of "doing business" under Section 3A. Judge Garrity was convinced that a Massachusetts court would consider the same standards used in the cases which arose under Chapter 223 — was the solicitation "a sustaining endeavor with a significant degree of permanency and continuity." The Judge found that the affidavit filed on behalf of the plaintiff was "deficient and ambiguous," and did not make clear precisely what acts were performed where and when. He found that the plaintiff had failed to sustain its burden of proof.

In some ways, the Caso, Corbin, and Garfinkle cases are enormously frustrating. We still do not know whether "mere solicitation" by a foreign corporation is enough in Massachusetts to confer jurisdiction over that corporation, even when the cause of action arises from that solicitation. The district court in Caso approved of the view that it would be enough:

Recent decisions both of this court and the Massachusetts courts hold that solicitation of business within this state, either alone, or in conjunction with other substantial promotional activities, is sufficient to bring a foreign corporation within the jurisdiction of the Massachusetts courts. No decision, however, has gone so far as to find jurisdiction on the basis of solicitation alone, where the cause of action did not arise out of such solicitation.

The Court in Garfinkle suggested that mere solicitation would be enough if it were part of a sustaining endeavor with a significant degree of permanency and continuity. This probably begs the question by broadening the definition of mere solicitation. The Court in Caso, to the contrary, specifically noted that the Massachusetts Supreme Judicial Court had never extended jurisdiction over a foreign corporation under Chapter 223, Section 38, without solicitation plus other activity. To add to the frustration, Caso and Garfinkle must be viewed as dictum on this point, as the courts were unable to find that the causes of action did in fact arise out of business in Massachusetts; the same is true with Bastian, in which there was clearly more than

13 Id. at 191.
15 370 F.2d at 711.
mere solicitation, but where it was uncertain whether that solicitation resulted in the sale of the machine in question.

Furthermore, we still do not know whether the developing definition of "usual place of business in the Commonwealth" under General Laws, Chapter 223, Sections 37 and 38, will be applied to cases arising under General Laws, Chapter 181, Section 3A (constructive service) in which "doing business" must be defined. Despite Judge Garrity's inclination that the test under both statutes would be the same, it should be remembered that Section 3A is specifically restricted to "any cause of action or proceeding arising out of such business," which may suggest a different interpretation. Since Section 3A is limited to causes arising in Massachusetts, a court might feel more free to permit a more liberal view of how little business is required in Massachusetts to support jurisdiction. On the other hand, the Supreme Judicial Court may determine that a liberal test of what constitutes "engaged in or soliciting under business" under Chapter 223, where actual service is required, is appropriate, whereas in defining "doing business" under Chapter 181, where constructive service is allowed, a stricter test is appropriate. Also, the fact that the legislature specifically mentioned solicitation in Chapter 223 and not in Chapter 181 provides an important distinction.¹⁶

Despite the ambiguities which still remain in this field, the practitioner can learn a great deal from the three relevant federal cases decided this Survey year. First, the circuit court in Caso does summarize the Massachusetts law to date. The decision concludes with the following general observations which are helpful in that the underlying policy considerations are emphasized:

We are satisfied that, generally speaking, the Massachusetts courts would assert jurisdiction over a foreign corporation served under section 38: (a) whenever the corporation's activities affect that commerce of Massachusetts substantially so that the state has an interest in regulating the general conduct of those activities ("doing business"), or (b) whenever the corporation's activities in Massachusetts have so affected the particular transaction at issue that it is appropriate to hear the claim in a Massachusetts court. We are not satisfied that jurisdiction would obtain in the absence of both these conditions.¹⁷

Moreover, the three cases illustrate the utmost importance to the plaintiff of proving those facts which will support a finding of substantial business activity in Massachusetts or that the foreign corporation's activities in Massachusetts have significantly affected the particular transaction or occurrence in question. In Caso, the trial judge

¹⁷ 370 F.2d at 712.
noted that "on the evidence presented" he could not find that the defendant utilized the Massachusetts corporation as an agent nor "so dominated and controlled" the subsidiary that it became "a mere instrumentality."\textsuperscript{18}

In \textit{Garfinkle}, the actual holding was quite narrow: "the court finds that the plaintiffs have failed to sustain their burden . . . of proving that the defendant corporation was doing business in Massachusetts."\textsuperscript{19} The affidavit filed by the defendant in this case was extremely precise and listed in detail the vital contacts the defendant had with Arizona, and not Massachusetts. Neither plaintiff signed a counter-affidavit. The counter-affidavit signed by one Adelson, whose relationship to the plaintiff was not disclosed, was vague, "deficient and ambiguous." There was no evidence presented to the court as to the precise language of the contract sued upon nor where it was negotiated and signed. There was no evidence presented by the plaintiff as to what, if anything, he in fact did in Massachusetts on behalf of the defendant.

In \textit{Corbin}, on the other hand, the plaintiff's counsel conducted a lengthy deposition of the alleged resident agent, Murray. This deposition enabled the court to find many facts which almost compelled a conclusion that the foreign defendant corporation was "doing business" in Massachusetts in an extensive way: forty customers in Massachusetts were called upon every ninety days; investigation of complaints in Massachusetts, and technical advice given in Massachusetts; figures on total value sales in Massachusetts for three years, ranging from $198,000 to $236,000. The judge, because the evidence had been submitted to him, was able to find "that the defendant's activities in this state exceeded mere solicitation and brought it well within the reach of section 38."\textsuperscript{20}

It is submitted that if these questions of jurisdiction over, and service upon, foreign corporations are viewed as "burden of proof" and trial preparation problems, as well as substantive law issues, plaintiffs will have considerably greater expectations of achieving success. With the utilization of full scale pre-trial hearings, depositions, and affidavits, a surprising amount of evidence can be brought before the court on a motion to dismiss. That much of the vital information is in the hands of the defendant corporation seeking to avoid service is not insurmountable, as evidenced by \textit{Corbin}. Supreme Judicial Court Rule 15,\textsuperscript{21} permitting oral depositions in state actions, will aid the plaintiff striving to prove jurisdictional facts.

\section*{21.2. Adding defendants after the statute of limitations has run.}

Two opposing strains frequently clash in procedural problems. There is the desire to lay conflict to rest, to achieve finality; thus, there are statutes of limitations and the concept of "res judicata." There is,

\textsuperscript{19} 260 F. Supp. at 192.
\textsuperscript{20} 265 F. Supp. at 340.
however, the law's practical awareness of the imperfection of the system. Substance is to prevail over form; courts are reluctant to deny a hearing on the merits; and thus, amendments to pleadings are infrequently denied. This "tug of war" is particularly manifest when a plaintiff seeks to add or substitute a defendant after the applicable statute of limitations has run. Two Massachusetts opinions were reported during the 1967 Survey year on this point: one state and one federal. Their viewpoints were poles apart.

In Wadsworth v. Boston Gas Co., the plaintiffs initially sued the landlord in tort for personal injuries and conscious suffering. It was alleged that a gas appliance had functioned improperly. At a time when an original action against Boston Gas would have been barred by the statute of limitations, the plaintiffs motions to amend by adding Boston Gas as a defendant were allowed. Boston Gas was then duly served. A motion to dismiss by Boston Gas was denied. The gas company argued on appeal that it was error to allow the plaintiff to add a defendant subsequent to the expiration of the statutory limitations period. The Supreme Judicial Court, in denying the exception of Boston Gas, made four main points, all of which illustrate a lenient attitude toward adding defendants. The Court, noting that the law in Massachusetts is more liberal than other states with respect to amendment of complaints, held that the running of a statute of limitation is not a reason for denying an amendment, and may, in fact, furnish a reason for allowing it. The Court found that there was no difference, in principle, between permitting a plaintiff to substitute a defendant and permitting a plaintiff to add a defendant. Thus, the Court stated: "Our inquiry, on review, then, is limited to whether, as a matter of law, the allowance of the amendments resulted in the introduction of a new cause of action against the added defendant." Since the plaintiff, after the adding of the new defendant, sought to hold the new defendant responsible for the injury first alleged, the Court held that no new cause of action was introduced.

Burns v. Turner Construction Co. was decided by the federal district court after Boston Gas. The plaintiff, Burns, was injured when a platform railing gave way at Children's Hospital Medical Center, re-

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4 G.L., c. 231, §138, provides in part: "The cause of action shall be considered to be the same for which the action was brought, if the court finds it to be the cause of action relied on by the plaintiff when the action was commenced, however the same may be misdescribed; and the allowance by the court of an amendment shall be conclusive evidence of the identity of the cause of action. . . ."
6 Id.
7 Id.
8 Id. at 330-331, 223 N.E.2d at 810, citing G.L., c. 231, §138.
9 Id. at 331, 223 N.E.2d at 810.
sulting in the plaintiff’s fall and injury. The plaintiff first brought suit for negligent design and installation of the platform against Turner, which was doing construction work at the hospital. After discovery proceedings, the plaintiff amended his complaint by adding seven party defendants; an architecture firm, another construction firm, three companies which might have negligently secured the railings after unloading materials, a doctor who had removed the railings to allow a delivery, and the hospital. The amendment was made after the appropriate limitation period expired.

The newly added defendants moved to dismiss, arguing that as against them, the plaintiff was barred by the statute of limitations, and therefore, the plaintiff should not be permitted to add them as defendants. In granting the motion to dismiss, the district court looked to Massachusetts law. There is, however, a remarkable contrast between Boston Gas and Burns. The court, in Burns, held that under Massachusetts law, “in order to amend his action . . . the plaintiff must establish the propriety of his amendment as a matter of law, as well as demonstrate that the proposed amendment will not operate to prejudice the defendants.” This statement should be compared with Boston Gas, where there is no mention made of possible prejudice to defendants. The inquiry in Boston Gas was directed solely to whether the effect of the amendment was to create a new cause of action.

The district court further noted that, while some Massachusetts cases had allowed for substitution of parties after the expiration of the period of the statute of limitations, “research has not disclosed a single Massachusetts case in which the statute has been held to permit the addition of new parties.” Boston Gas, on the other hand, noted that there was no difference in principle between substitution of parties and addition of parties. Moreover, nowhere in Burns does the district court note, as was noted in Boston Gas, that the running of the statute of limitations could, in some instances, form a reason for allowing the addition of parties.

The court further noted in Burns that the allowance of amendments lies within the court’s discretion under Massachusetts law and that there was no doubt that a Massachusetts judge would weigh considerations such as those enumerated in the second sentence of Rule 15(c), Fed. R. Civ. P., which provides in part, “an amendment changing the party against whom a claim is asserted relates back if . . . within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action as he will not

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11 Id. at 769.
12 Id. at 769-770.
14 265 F. Supp. at 770.
16 Id.
be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."17

The court found, however, that the standards of this rule were not met in this case.18

The court in Burns, in its analysis of Massachusetts law and its discretionary utilization of Federal Rule 15(c), has perhaps made two mistakes which cancel each other out and lead to a correct result. The court’s view of the Massachusetts law concerning adding defendants after the statutory period, particularly where it relies in part on Federal Rule 15(c), is considerably more narrow than is evidenced in Boston Gas. Boston Gas looks to whether a new cause of action has been introduced, and then defines “cause of action” as “the injury.” In Burns, there is the more restrictive approach of treating new theories of liability as new causes of action, and of superimposing upon this test an analysis of prior notice to the new defendant, potential prejudice to him, and whether he had or should have had knowledge of the mistake in identity.

It is submitted that the district court in Burns not only misconstrued Massachusetts law, but probably should not have looked to it in the first place. Hanna v. Plumer,19 decided by the United States Supreme Court in 1964, held that in a civil action where the jurisdiction of the United States district court is based upon diversity of citizenship between parties, service of process shall be made in the manner prescribed by the applicable Federal Rule of Civil Procedure, even though this may be different from the manner prescribed by Massachusetts law. In overturning decisions of the United States District Court for the District of Massachusetts and the United States Court of Appeals for the First Circuit, the Supreme Court noted that “the Erie rule has never been invoked to void a Federal rule.”20 In language which apparently makes each Federal Rule of Civil Procedure mandatory in diversity cases, unless the rule is found to be unconstitutional or beyond the Congressional grant of authority to enact rules, the Supreme Court stated:

When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.21

In Hanna, Chief Justice Warren noted that the Erie decision was

17 265 F. Supp. at 770.
18 Id.
20 Id. at 470.
21 Id. at 471.
an attempt to prevent "forum shopping" and to avoid the inequitable administration of laws. Whether one can add a party after the statute of limitations has run, like the question of how to serve process, is not one which would normally influence a party's selection of forum. An attorney would not usually choose between a state or federal court on the ground that he may later wish to add a party. Rules governing amendment seem to be similar to the type of administrative rule which an attorney would expect to be uniform in federal courts throughout the country. Regardless of the "policy" arguments, Federal Rule 15(c), as seen from the comparison between the Boston Gas and Burns decisions, is different from the Massachusetts rule on adding parties subsequent to the running of the applicable statute of limitations; and it now appears that, under Hanna, the federal rule must be followed. As was stated in Newman v. Freeman, a district court case decided after Hanna:

The Federal Rule must prevail in any event for an additional reason. Under the Supreme Court's alternative holding in Hanna, any state law or rule which conflicts with a valid Federal Rule must fail. Since we find no difficulty in saying that Rule 15(c) is constitutional and comes within the Rules Enabling Act which provides that the rules shall "not abridge, enlarge or modify any substantive right," state law must bow to Rule 15(c).

Although it is probable that federal courts, in light of Hanna, will apply Federal Rule 15(c) when a question arises of adding a defendant subsequent to the statutory period, the proposition is not without some difficulty. If the issue is framed not in terms of amending pleadings to add a defendant, but instead in terms of interpreting the state statute of limitations, one could make an argument that would lead to the opposite result.

Under Guaranty Trust Co. v. York, which has not been overruled, a federal district court in a diversity case is to apply the state statute of limitations. The Rules Enabling Act, under which the Federal Rules of Civil Procedure were promulgated, provides that "such rules shall not abridge, enlarge or modify any substantive right." Therefore, under this reasoning, a Federal Rule of Civil Procedure
cannot validly, directly or indirectly, prescribe a statute of limitations to be applied in diversity cases.

Perhaps the answer to the above analysis is found in the Hanna case. There, the defendant argued that the state statute of limitations barred the defendant because service had not been properly made under Massachusetts law within the statutory period. Nevertheless, the United States Supreme Court looked at the Federal Rule of Civil Procedure relating to the service of process as distinct from the statute of limitations. It is submitted that the Court would look at the propriety of amending pleadings and adding defendants as similarly independent. Many Federal Rules of Civil Procedure will, in a given case, bear on substantive law issues in an attenuated way, but it is unlikely that the United States Supreme Court will permit this to erode Hanna's protective attitude toward the Federal Rules.

It would appear, then, that the district court in Burns should have applied Federal Rule of Civil Procedure 15(c), citing Hanna. This would have led to the same result reached by failing to apply the Massachusetts law as summarized in Boston Gas and by choosing, as a matter of discretion, to apply the standards recited in 15(c).

The results of Burns and Boston Gas indicate that there are, in Massachusetts, two sets of rules with respect to adding or substituting defendants after the applicable statute of limitations has run: the Boston Gas rule in state courts and Federal Rule 15(c) in federal courts. In view of Hanna, there will be undoubtedly many instances in which such dichotomies unfold. The two sets of rules in Massachusetts concerning the addition or substitution of new defendants after an applicable statute of limitations has run will coalesce to the extent that Massachusetts trial court judges agree with the district court in Burns that the factors recited in Federal Rule 15(c) should be considered in the exercise of discretion. A state judge, however, might well decide that these federal tests are a bit too rigid. He may feel, for instance, that it is not as important that the defendant had notice of the pending action against another or knew or should have known that a mistake had been made, as it is important that the new defendant, within the statutory period, had investigated the events, or had sufficient information about the occurrences so that he will not be prejudiced. Regardless, an attempt to adjust the demands of orderly procedure and finality with fairness to a mistaken, but aggrieved, plaintiff would suggest the Rule 15(c) criteria, or a similar balancing of interests, should be applied.²⁸

B. STUDENT COMMENT

§21.3. Contempt: Distinction between civil and criminal; effect of reversal of underlying injunction; Town of Stow v. Marinelli.¹

The defendants, Louis and Sonja Marinelli, husband and wife, owned land


in the town of Stow upon which they conducted earth moving operations. On March 1, 1965, the town of Stow adopted a bylaw pursuant to General Laws, Chapter 40, Section 21, Paragraph 17, an enabling act regulating the removal of earth materials. The bylaw provided in part that "[n]o permit for the removal of earth materials shall be granted . . . unless the Board [of Selectmen] shall find that operations under such a permit . . . will not be contrary to the best interests of the Town."2 Shortly after this bylaw became effective the Marinellis, individually, and Garden City Gravel Corporation, a family-owned corporation, applied for a permit to remove sand and gravel from their premises. The Board found that continued operations would be contrary to the best interests of the town and directed the Marinellis and Garden to wind up operations and to grade and restore the premises, while working under a temporary permit. The Marinellis and Garden continued to remove sand and gravel after the temporary permit expired, and did not restore the premises as directed. The town brought a bill in equity, asking, in part, that the defendants be enjoined from continuing earth-moving operations. The relief was granted and the defendants appealed.

After the defendants claimed their appeal, but before the appeal was entered in the court, the defendants continued with their earth-moving operations. The town filed a petition for contempt. The defendants failed to justify their actions, and a contempt decree, with a six-month jail sentence, was entered against the defendants. On appeal, the Supreme Judicial Court, reversing and remanding, HELD: A civil contempt citation based on failure to obey an injunction will fall where, on appeal, it is found that there was no basis for the injunction.

On appeal, the Court was confronted with two issues: (1) whether the contempt decree ordered against the defendants was civil or criminal; and (2) the effect of a reversal of an injunction order upon a prior contempt citation. On the first issue, the Court found that the contempt citation was partly civil and partly criminal. The Court reasoned that there was no positive assurance that the adjudication for contempt by the lower court was either wholly remedial (civil) or wholly punitive (criminal). On the second issue, the Court held that decrees for contempt which are criminal in nature will survive the reversal of the injunction which was disobeyed; but civil contempts will fall with reversal of the original decree. The Court reasoned that criminal contempt decrees should always be maintained since they are aimed at vindicating the authority and dignity of the court and punishing the contemnor for affronting the court. As to civil contempt decrees, however, the plaintiff should not profit from remedial relief obtained against a contemnor after it has been decided, on appeal, that the plaintiff was not originally entitled to any equitable relief. The Court remanded the case for further consideration by the trial court judge as to the criminal sanction, on the theory that the

2 Id. at 1080-1081, 227 N.E.2d at 711.
judge might not have made precisely the same disposition had he
known that the original decree was invalid and that no civil contempt
could be considered in fashioning the original contempt sanction.

The *Marinelli* case is a "first impression decision."³ The Supreme
Judicial Court, in deciding on the effect of the reversal of an injunc-
tion on a prior contempt decree, reaffirmed one of the uniformly ac-
cepted and applied dichotomies in the law of contempt: the distinc-
tion between civil and criminal contempt. This section will discuss
the definitional and classificatory problems of this dichotomy. In ad-
dition, consideration will be given to the alternative choices which
were open to the Supreme Judicial Court on the issue of the civil-
criminal contempt distinction. Finally, the ramifications of the rule
set forth in *Marinelli* will be considered.

The courts have used many bases of classifications, singly and in
combination, to determine whether a contempt proceeding is civil or
criminal in nature.⁴ In most jurisdictions, the distinction between
civil and criminal contempt is based on the broad concept of the
"remedial" or "punitive" nature of the contempt citation.⁵ In the
leading case of *Gompers v. Bucks Stove & Range Co.*, the United
States Supreme Court stated:

> It is not the tact of punishment but rather its character and pur-
pose that often serve to distinguish between the two classes of
cases. If it is for civil contempt the punishment is remedial, and
for the benefit of complainant. But if it is for criminal contempt
the sentence is punitive, to vindicate the authority of the court.⁶

The courts have been careful to note, however, that a judgment in a
remedial proceeding for the benefit of a private plaintiff will inci-
dentally vindicate the authority of the court,⁷ and, likewise, a criminal
contempt judgment may favor private party interests.⁸ The dominant
purpose of a proceeding, rather than its incidental effect, however,
determines whether it is "remedial" or "punitive."⁹

Among the more specific factors often used by the courts as a basis
of classifying a contempt proceeding is the character of the plaintiff.
The courts have considered the proceeding to be civil if the plaintiff
is a private party.¹⁰ If the contempt suit, however, is brought by the

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³ Id. at 1084, 227 N.E.2d at 713.
⁴ See Moskovitz, Contempt of Injunctions, Civil and Criminal, 43 Colum. L. Rev. 780 (1943).
⁵ This distinction has been widely accepted. E.g., McCrone v. United States, 307 U.S. 61, 64-65 (1939); In re Merchants' Stock and Grain Co., 223 U.S. 639, 641 (1912); Root v. MacDonald, 260 Mass. 344, 359, 157 N.E. 684, 689 (1927).
⁶ 221 U.S. 418, 441 (1911).
⁷ E.g., id. at 443 (1911); O'Brien v. People ex rel. Kellogg Switchboard and Supply Co., 216 Ill. 354, 368-369, 75 N.E. 108, 113-114 (1905).
¹⁰ E.g., Raymor Ballroom Co. v. Buck, 110 F.2d 207 (1st Cir. 1940); Anargyros v. Anargyros & Co., 191 F. 208 (C.C. N.D. Cal. 1911).
state, an attorney-general or a court-appointed representative of the public, then the courts have held that the proceeding is criminal in nature.\textsuperscript{11}

Whether the contempt proceeding is civil or criminal has been determined by considering the approach of one or both of the parties at the contempt proceeding. One such method of determination is the arguments of counsel at trial. In \textit{The Navemar},\textsuperscript{12} the fact that the complainant's counsel argued that "the court should assert its authority and unless good cause is shown here, should punish these men with adequate punishment such that this kind of thing won't happen again in New York Harbor,"\textsuperscript{13} was held to indicate a criminal contempt. The Court reasoned that this argument indicated a proceeding seeking punitive, not remedial, redress. In addition, the "mutual understanding of the parties throughout the trial" is a factor which has been relied on in resolving the question as to civil or criminal contempt.\textsuperscript{14}

In \textit{State ex rel. Jones v. Miller}, the Kansas Supreme Court noted that "a civil contempt proceeding may be inferred from the fact that a jury was waived."\textsuperscript{15}

The courts have also considered certain elements of the contempt proceeding in arriving at a decision as to its character, such as (1) the title of the proceedings, (2) the prayer for relief, and (3) the nature of the contempt judgment. A contempt judgment may be entitled in the form of the original injunction action, and filed as a continuation thereof, or it may be filed as a separate and independent action. Some courts have held that the former method indicates a civil contempt proceeding,\textsuperscript{16} while the latter has been held to indicate criminal contempt.\textsuperscript{17}

In considering the prayer for relief, the courts have interpreted a prayer that defendant be "punished" as indicating a criminal proceeding;\textsuperscript{18} while a prayer asking that the defendant be coerced into complying with the injunction has been held to indicate a civil contempt proceeding.\textsuperscript{19}

The contempt order itself is frequently used in determining whether a contempt proceeding is civil or criminal. When a fine has been ordered paid to the state, the judgment has been considered as punitive and the proceeding criminal in nature.\textsuperscript{20} Likewise, if the defendant

\textsuperscript{11} E.g., United States ex rel. West Virginia–Pittsburgh Coal Co. v. Bittner, 11 F.2d 93 (4th Cir. 1926); Ex parte Whitmore, 9 Utah 441, 35 P. 524 (1894).
\textsuperscript{12} 17 F. Supp. 495 (E.D.N.Y. 1936).
\textsuperscript{13} Id. at 498.
\textsuperscript{14} See Moskovitz, note 4 supra, at 788.
\textsuperscript{15} 147 Kan. 242, 244, 75 P.2d 239, 240 (1938).
\textsuperscript{16} E.g., Norstrom v. Wahl, 41 F.2d 910 (7th Cir. 1930); Morgan v. National Bank of Commerce of Shawnee, 90 Okla. 260, 217 P. 388 (1923).
\textsuperscript{17} United States ex rel. West Virginia–Pittsburgh Coal Co. v. Bittner, 11 F.2d 93 (4th Cir. 1926).
\textsuperscript{18} E.g., Kelly v. Montebello Park Co., 141 Md. 194, 118 A. 600 (1922); Hanna v. State ex rel. Rice, 169 Miss. 514, 153 So. 371 (1934).
\textsuperscript{19} E.g., Ramsay v. Ramsay, 125 Miss. 715, 88 So. 280 (1921).
\textsuperscript{20} E.g., In re Merchants' Stock and Grain Co., 223 U.S. 639 (1912); Oakland Coal Co. v. Wilson, 196 Ind. 501, 149 N.E. 54 (1925).
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is imprisoned for a definite term, the order has been held as being one for criminal contempt. 21 Further, it has been held that a fine which bears no relation to the sum claimed by the plaintiff indicates a criminal contempt. 22 A fine ordered paid to a private party, on the other hand, has been held to indicate civil contempt. 23

The courts further examine the object of the plaintiff's suit to determine whether it is to stop the defendant from continuing with an act, or to force the defendant to do an act. One test used by the courts is the "mandatory-restraining" test. Under a mandatory injunction (an injunction forcing the defendant to do an act), a performance owed to the plaintiff can be coerced by a contempt order imprisoning the defendant until he complies. 24 If a restraining order is violated, however, imprisonment for contempt will not serve to redress the plaintiff's injury. Therefore, courts have concluded that the violation of a restraining order indicates a criminal contempt, since the plaintiff will not profit by the sanction on the defendant. 25

Courts also consider the intent or motive of the defendant. A contempt cannot be criminal unless it is willful. 26 In civil contempts, the general rule is that the defendant need not have acted willfully, 27 although the fact that the defendant acted willfully does not require a finding of criminal contempt proceeding. 28 A criminal proceeding requires an intent to defy the court or an intent to disobey the injunction. 29 A civil contempt would involve an intent to do acts which constitute a violation of the injunction, but without any intent to violate the injunction itself. 30

Special elements of contumacy have been considered by the courts in concluding that a contempt is criminal. Criminal contempt has been predicated on the use of force. 31 Violations of labor injunctions have often involved violence or threats of violence, and have usually been held to constitute criminal contempt. 32 The use of fraud has also been deemed as relevant in finding a criminal contempt. 33

Further, the repetition of violations has been used by courts in de-

21 E.g., Stewart v. United States, 236 F. 838 (8th Cir. 1916); Ex parte Parent, 112 Wash. 620, 192 P. 947 (1920).
23 Campbell v. Motion Picture Machine Operators of Minneapolis, 151 Minn. 238, 186 N.W. 787 (1922).
24 Moskovitz, note 4 supra, at 791.
25 E.g., Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry., 266 U.S. 42 (1924); Reeder v. Morton-Gregson Co., 296 F. 785 (8th Cir. 1924).
31 Moskovitz, note 4 supra, at 747 n.80.
33 In re La Varre, 48 F.2d 216 (S.D. Ga. 1930).
terminating criminal contempt. In Whitaker v. McBride, the Nebraska Supreme Court noted that

it may not be out of place to say that the sentence [of criminal contempt] appears to have been fully warranted. The record shows a settled purpose and persistent effort on the part of . . . [defendant] and his counsel to trifle with the court. . . . A certain amount of persistence on the part of litigants and counsel is to be expected and is commendable. But when it takes the direction of open defiance . . . it . . . should be . . . punished as contempt of court.34

The discussion above presents certain bases of classification used by the courts to decide whether a contempt is civil or criminal. The above classifications, however, should not suggest that it is a simple matter to arrive at a conclusion as to whether a contempt proceeding is either civil or criminal. The state of the law in this area is very confused.35 Different courts rely on different methods of classification in arriving at a decision. Therefore, the line between civil and criminal contempt is often quite tenuous.36

The examination of the whole record to determine how the proceeding should be defined37 causes some confusion. Where a combination of factors, and not a single decisive factor, is relied upon,38 any given factor may be disregarded because it is outweighed by other factors.39 Further, some cases will be cited as relying on a particular factor without always mentioning the presence of other factors.40 This confused state has led one author to conclude:

[A]ll that can be gleaned . . . is that the legal rules supporting both civil and criminal contempts have been liquefied to the point where one often washes into the other. . . .

. . . A thorough consideration of the cases leaves a distinct impression that courts apply an ad hoc kind of accounting to contempt situations and arrive at conclusions which, no matter how just in the immediate case, compose only the most casual and intellectually unsatisfying link with any body of law or legal principle.41

Despite the problems involved in the criminal and civil contempt dichotomy, the Supreme Judicial Court, in Marinelli, adopted the

34 98 N.W. 877, 879 (Neb. 1904).
37 E.g., Schwartz v. United States, 217 F. 866, 868 (4th Cir. 1914).
38 E.g., Pino v. United States, 278 F. 479 (7th Cir. 1921); Hammond Lumber Co. v. Sailors' Union of the Pacific, 167 F. 809 (C.C.N.D. Cal. 1909).
39 E.g., Krentler-Arnold Hinge Last Co. v. Leman, 50 F.2d 699 (1st Cir. 1931); Bradstreet Co. v. Bradstreet's Collection Bureau, 249 F. 958 (2d Cir. 1918).
40 Moskovitz, note 4 supra, at 782.
rule that a civil contempt decree must fall with a reversal of the injunction on which it was based, while a criminal contempt decree will be maintained after the injunction is reversed. Although this is the majority rule, the Supreme Judicial Court had two other alternatives suggested by other jurisdictions: (1) to make no distinction between civil and criminal contempts, holding that the contempt decree falls with the injunction reversal; or (2) to make no distinction between civil and criminal contempts, holding that the contempt decree remains after the injunction reversal.

The Court's choice, however, would seem proper, considering the ultimate ends which a contempt order seeks to achieve. There appear to be two competing principles involved in determining whether a contempt decree should fall with the reversal of the underlying injunction, and in determining these cases, the courts must seek an appropriate balance. On the one hand, the courts must seek to protect their authority and the orderly administration of justice. On the other hand, the courts must seek to protect the individual, whose actions are inhibited by an unfounded injunction.

It would appear that the alternative chosen by the Supreme Judicial Court meets the goals of both of the above principles. By distinguishing between the two contempt processes, and according each one a different treatment as to an injunction reversal, each of the above goals is properly served. The issue in a civil contempt is one of remedial rights of parties, and if an injunction is reversed, then it would appear that to allow the contempt based on it to fall would not infringe on the court's authority and would protect the individual. If a private party can no longer legally maintain an injunction, then neither should that party be able to have any remedial relief based on a contempt decree. In civil contempt, the purpose of the injunction and purpose of the contempt are directly related.

In a criminal proceeding, however, the situation is somewhat different. In this case a court is only concerned with maintaining its authority as a means to enforce the sanctions of society. The purpose of the contempt then is different from that of the injunction. The injunction is used to aid the complaining party, while the contempt decree is used to maintain the dignity of the court. Since there is no connection between the purpose of the contempt decree and the purpose of the injunction, there is nothing inconsistent with maintaining that a defendant might still be punished for violating the injunction order, even after it is found, on appeal, that the order was erroneous.

While the Supreme Judicial Court may have chosen the most acceptable alternative, this alternative still poses certain problems. First, the Massachusetts approach embodies the civil-criminal contempt distinction, and along with it, all the problems of classification of contempts discussed above. Second, this approach involves issues of individual free-
doms and warnings to possible contemnors. Upon examination of the way in which courts have handled the contempt distinctions, utilizing all of the factors in a multiplicity of combinations, one is left at best with few and vague guides. As one author has concluded: "A wrong­ doer may never know, at the time of his wrongful act, whether he has committed a civil or criminal contempt or what the form of his sanction will be."41 This would seem to conflict with prevailing notions of due process in both criminal and constitutional law. The issue seems parallel to the issue of vagueness of statutes and the consequent infringement of individual rights of knowing what constitutes a given crime by statute.

The Supreme Judicial Court, besides accepting the civil and criminal contempt distinction, went further in Marinelli and split the contempt, holding that it might be "partly remedial and partly punitive, partaking of both civil and criminal features."46 There is precedent for this procedure. In United States v. United Mineworkers of America,47 as well as in the Massachusetts case of Root v. MacDonald,48 a partly remedial and partly punitive contempt decree was found. From a survey of the contempt area, however, such a determination seems to fall into a distinct minority of cases.

Initially, the conceptual "splitting" of the contempt and thus likewise the "splitting" of the sanctions seems somewhat confusing. In principle, however, no more or less has been done than if the proceeding was determined as either wholly civil or criminal, and the appropriate sanctions were applied. The same substantive rules would be utilized. The difference with "splitting" is that both civil and criminal sanctions are being applied to one act. The ultimate decision of the judge as to the sanction or sanctions to be applied in a "partly civil, partly criminal" case would rest on a "weighing" of the amount of each contempt present in the proceeding, and arriving at a fair conclusion as to how much the defendant should be punished for each.49 It would be conceivable to have two separate sanctions (e.g., possibly a fine and imprisonment), or one sanction which, in degree, would adequately reflect the presence of each type of contempt.

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45 Goldfarb, note 35 supra, at 66.