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Chapter 14: Civil Practice and Procedure

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CHAPTER 14

Civil Practice and Procedure

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§14.1. Personal Jurisdiction: Long Arm Statute: "Transacting Business." Since its enactment in 1968, the Massachusetts Long Arm Statute[1] has been interpreted in several important decisions[2] and has been extensively commented on by local authorities.[3] Much of the attention has focused on the limits of section 3(a) of Chapter 223A of the General Laws, the statute which confers jurisdiction over persons "transacting any business in this commonwealth."[4] While at first glance the section appears quite broad, the courts have carefully circumscribed the language so as to insure that a suit against a nonresident defendant does not offend "traditional notions of fair play and substantial justice."[5] During the *Survey* year the Appeals Court, in *Nichols Associates, Inc. v. Starr,*[6] again emphasized the qualitative significance of a nonresident defendant's contacts with the forum state and for the first time stressed the voluntariness of the defendant's activities in the forum state as a factor in resolving the jurisdictional question.

In *Nichols,* the plaintiff sued to recover the value of certain surveying services. The nonresident defendant had been approached by the plaintiff in Connecticut for the purpose of soliciting the survey work on a parcel of land that the defendant had recently purchased in

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§14.1. [1] G.L. c. 223A, *added by* Acts on 1968, c. 760.

[2] Whittaker Corp. v. United Aircraft Corp., 482 F.2d 1079 (1st Cir. 1973); Murphy v. Erwin-Wasey, Inc., 460 F.2d 661 (1st Cir. 1972); Seymour v. Parke, Davis & Co., 423 F.2d 584 (1st Cir. 1970); "Automatic" Sprinkler Corp. of America v. Seneca Foods Corp., 361 Mass. 441, 280 N.E.2d 423)1972).

[3] Zaben, *The Long Arm Statute: International Shoe Comes to Massachusetts,* 54 MASS. L. Q. 101, 108 (1969); Brown, *A Long Arm Statute for Massachusetts: jurisdiction over non-domiciliaries;* 12 BOSTON B. J. No. 8, 9-18 (1968); 1969 ANN. SURV. MASS. LAW § 20.7; 1970 ANN. SURV. MASS. LAW § 28.1; 1971 ANN. SURV. MASS. LAW § 10.1; 1972 ANN. SURV. MASS. LAW § 20.4; 1973 ANN. SURV. MASS. LAW § 16.2.

[4] G.L. c. 223A, § 3(a).

[5] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), *citing* Milliken v. Meyer, 311 U.S. 457, 463 (1940).

[6] 1976 Mass. App. Ct. Adv. Sh. 177, 341 N.E.2d 909.

Connecticut.[7] No written contract or other agreement was ever executed.

In evaluating defendant's motion to dismiss for lack of personal jurisdiction, the court considered whether the nature and extent of the defendant's contacts with the state had any impact on its commerce.[8] The court identified two occasions of contact with Massachusetts: (1) the performance of work done on behalf of the defendant at the plaintiff's Massachusetts office; and (2) the rare occasions when the defendant sent a messenger to pick up plans at the Massachusetts office.[9] With respect to the work done in Massachusetts, the Appeals Court reasoned:

> [I]t is not a necessary inference . . . that it was even within the contemplation of the parties that the plaintiff would perform any portion of the agreed work in Massachusetts . . . . For all that appears, this particular contact was limited to the defendant's acceptance of services which the plaintiff simply chose to perform in Massachusetts.[10]

Also, regarding the defendant's infrequent incursions into Massachusetts to pick up certain documents, the court observed that the responsibility for pick-ups and deliveries rested with the plaintiff and that the defendant sent its messenger to Massachusetts only when the plaintiff's messenger was unavailable.[11] In considering both contacts, it was clear that the court was greatly influenced by the fact that the defendant had no control over either contact. That fact, coupled with the insignificance of the contacts, led the court to conclude that the defendant was not "transacting any business" in the Commonwealth within the meaning of section 3(a) of chapter 223A.[12]

In its interpretation of section 3(a), the court's emphasis on the nature, including the quality and voluntariness of the nonresident defendant's contacts with the forum state, is consistent with earlier opinions in Massachusetts. For example, in *"Automatic" Sprinkler Corp. of America v. Seneca Foods Corp.*,[13] decided in 1972, the Supreme Judicial Court found jurisdiction lacking where the defendant's only contact with Massachusetts had been the mailing into the state of a purchase order and check in partial payment of the order.[14]

The *Seneca* Court found that the Massachusetts Long Arm Statute was intended to permit the "assertion of jurisdiction over the person

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[7] *Id.* at 183, 341 N.E.2d at 911.
[8] *Id.* at 186, 341 N.E.2d at 912.
[9] *Id.* at 186-87, 341 N.E.2d at 912.
[10] *Id.* at 186, 341 N.E.2d at 912.
[11] *Id.* at 187, 341 N.E.2d at 912.
[12] *Id.* at 188, 341 N.E.2d at 913.
[13] 361 Mass. 441, 280 N.E.2d 423 (1972).
[14] *Id.* at 442-43, 280 N.E.2d at 425.

to the limits allowed by the Constitution of the United States."[15] Nonetheless, the Court held that the contacts in the case were insufficient to confer personal jurisdiction in that the affirmation of a contract and payment through the mail did not constitute purposely availing oneself of the privilege of conducting business within the state.[16]

Similarly, in *Whittaker Corp. v. United Aircraft Corp.*,[17] the First Circuit Court of Appeals followed the same approach in a carefully reasoned and instructive opinion. There, United solicited purchases from Whittaker in Florida and Connecticut, but its personnel contacted Whittaker's employees in Massachusetts "by telephone, teletype, or mail on thirteen occasions and visited Whittaker's Massachusetts facility on four instances . . . ."[18] Calling section 3(a) "the most open-ended provision in the statute,"[19] the court expressed the qualitative test as follows: "[A] number of factors, including the nature and purpose of the contacts, the connection between the contacts and the cause of action, the number of contacts, the interest of the forum, and the convenience and fairness to the parties must be considered."[20]

The *Nichols* decision, which followed these principles as developed in earlier cases involving the scope of section 3(a) of chapter 223A, is instructive primarily because of the significance it attaches to the issue of whether the nonresident defendant's contacts with the forum state are voluntary. In the context of section 3(a), it affords the nonresident defendant the option of maintaining that the contacts with the forum state, while possibly numerous, were beyond his control.

§14.2. Attachment: Levy: Execution. The potential dangers to creditors who entrust matters to constables or deputy sheriffs without specifically calling to their attention the requirements of the statute or rule under which they are expected to act were evident in *McGrath v. Worcester County National Bank*,[1] a case decided by the Appeals Court during the *Survey* year. In *McGrath*, an attaching judgment creditor prevailed over a prior attaching judgment creditor because of what appears to have been either improper or inadequate directions given to the deputy sheriff.

The facts in *McGrath* were undisputed.[2] On May 20, 1969, the plaintiff attached certain real estate of the debtor. On June 12, 1973, the execution was delivered to the deputy sheriff with instructions to "levy" upon the attached land. After several unsuccessful attempts to secure payment, the deputy sheriff recorded the execution in the reg-

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[15] *Id.* at 443, 280 N.E.2d at 424.
[16] *Id.* at 446, 280 N.E.2d at 426. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958).
[17] 482 F.2d 1079 (1st Cir. 1973).
[18] *Id.* at 1081.
[19] *Id.* at 1082.
[20] *Id.* at 1083.

§14.2. [1] 1975 Mass. App. Ct. Adv. Sh. 1369, 338 N.E.2d 361.
[2] *Id.* at 1369-70, 338 N.E.2d at 362-3.

istry of deeds on July 16, 1973. A memorandum dated July 16, 1973 was attached to the execution and recited that the sheriff "this day levied on [the real estate]."[3] During October a sheriff's sale was held at which the defendant was the highest bidder. The defendant, who had also sued the debtor and had attached the same real estate on June 2, 1969, refused, however, to accept a deed or pay the bid price, contending that the plaintiff's attachment had been lost and that the sale was therefore invalid.[4] The defendant's judgment against the debtor was entered on October 23, 1973, and its execution was recorded on November 16, 1973. A decree affirming the validity of the sheriff's sale was reversed by the Appeals Court, and a judgment dissolving the plaintiff's attachment and declaring the sheriff's sale invalid was entered.[5] In resolving this particular dispute, the court clarified the interrelationship between two statutes which bear upon the attachment process. One statute, section 59 of Chapter 223 of the General Laws, provides in part that "[p]roperty which has been attached shall be held for thirty days after final judgment for the plaintiff . . . so that it may be taken on execution." A related statute, section 4 of chapter 236, provides:

> If land was attached on mesne process, a copy of the execution with a memorandum . . . shall be deposited by the officer in the registry . . . within forty days after the judgment in the action, and the attachment shall become void forty days after said judgment unless the copy is so deposited.

Since in *McGrath* the attachment was levied upon after the thirty day period provided for in section 59 of chapter 223, but the copy of the execution was registered prior to the expiration of the forty-day period allowed in section 4 of chapter 236, the question arose as to what compliance was necessary to preserve the attachment. The trial judge ruled that the attachment had been preserved notwithstanding the thirty-day provision of section 59 of chapter 223.[6] On appeal, the Appeals Court held that since there was no inconsistency between the statutes, both statutes had to be complied with.[7] In finding no inconsistency, the court reasoned that the "two statutes are directed at two different acts to be performed by the officer in order to preserve the lien."[8] The differing time periods allowed for the different acts, the court concluded, reflect only a conscious legislative judgment that a ten-day interval between the levying and recording deadlines is appropriate.[9] Since on the facts in *McGrath,* section 59 of chapter 223

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[3] *Id.* at 1370, 338 N.E.2d 363.
[4] *Id.*
[5] *Id.* at 1375-76, 338 N.E.2d at 364.
[6] *See id.* at 1372, 338 N.E.2d at 363.
[7] *Id.* at 1373, 338 N.E.2d at 363.
[8] *Id.* at 1372, 338 N.E.2d at 363.
[9] *Id.* at 1374, 338 N.E.2d at 364.

had not been complied with, and the decisional law under that section and its predecessors makes it clear that an attachment not levied upon within thirty days of judgment is lost,[10] the court ruled that the attachment was automatically dissolved and the sale was therefore invalid.[11]

The harsh result reached in the *McGrath* case contains an important lesson for all lawyers dealing with sheriffs and constables, namely, that they should call to the officer's attention the requirements of the statute or rule pursuant to which the officer is to act. This is particularly important because the Court in *McGrath*, in addition to requiring compliance with both statutes, construed the actions in compliance narrowly. Thus, despite the fact that the record in the case referred to several attempts at collection by the sheriff prior to the expiration of the statutory thirty-day period and that there is authority to the effect that an overt act by the sheriff, short of an actual entry upon the land, is sufficient to mark the commencement of a levy under the statute,[12] the court declined to look beyond the language of the sheriff's memorandum which recorded the date of the accomplishment of the levy.[13]

§14.3. Masters: Transcript of Proceedings: Objections. The importance of the wording of an order of reference to a master was made clear during the *Survey* year in *Michelson v. Aronson*[1] where the losing party, despite numerous attempts, never relieved himself of the language of the initial order of reference. Also, the opinion contains an instructive treatment of the procedures to be followed when objecting to a master's report.

In *Michelson,* an action for an accounting between two lawyers, a superior court judge entered an order of reference directing the master to "find the subsidiary facts on each issue tried and report them and his general findings based on such subsidiary findings to the court,"[2] but stating that the master "not report any evidence . . . ."[3] Almost a year after the reference, the master filed a report in which he found the defendant liable on a number of the plaintiff's claims.[4]

Subsequent to the issuance of the master's report, the defendant filed numerous objections claiming among other things, that the mas-

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[10] Horn v. Hitchcock, 332 Mass. 643, 644-45, 127 N.E.2d 482, 484 (1955); Whittemore v. Swain, 198 Mass. 37, 40, 84 N.E. 307, 308-09 (1908); Hardy v. Safford, 132 Mass. 332, 335 (1882).

[11] 1975 Mass. App. Ct. Adv. Sh. 1369, 1375-6, 338 N.E.2d 361, 364.

[12] Hunneman v. Phelps, 207 Mass. 439, 440, 93 N.E. 697, 697 (1911); Hall v. Crocker, 44 Mass. (3 Met.) 245, 249-51 (1841).

[13] *See* 1975 Mass. App. Ct. Adv. Sh. at 1375, 338 N.E.2d at 364.

§14.3. [1] 1976 Mass. App. Ct. Adv. Sh. 357, 344 N.E.2d 423.

[2] *Id.* at 358, 344 N.E.2d at 425.

[3] *Id.*

[4] *Id.* at 357, 344 N.E.2d at 424.

ter's findings were not supported by the evidence or were contrary to the evidence.[5] At a hearing before a superior court judge, the defendant's objections were overruled and the master's report, with minor exceptions, was adopted.[6] A judgment was subsequently entered against the defendant. During the pendency of the appeal from the entry of the judgment, the defendant attempted on numerous occasions to have the transcript of the proceedings before the master made a part of the record on appeal.[7] The defendant's contention throughout was that under the Rules of Civil and Appellate Procedure, which took effect on July 1, 1974, he was entitled, as a matter of right, to have the transcript included in the record on appeal. The court disagreed and used the case as an opportunity to expound on the effect of the new rules on proceedings before masters in nonjury cases.

Rule 53 of the Massachusetts Rules of Civil Procedure governs the appointment, powers and duties of masters, as well as the conduct of proceedings before them.[8] Paragraph (e) of Rule 53 provides in part that a master "shall file the report . . . and in an action to be tried without a jury, when directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence." Rule 8(a) of the Rules of Appellate Procedure, on the other hand, states that "[t]he original papers and exhibits on file, the transcript of the proceedings, if any . . . shall constitute the record on appeal . . . ."[9] The defendant's contention in *Michelson* was that Rule 8(a) required that the transcript of the proceedings before a master, if available, be part of an appeal from a judgment based on a master's report in a nonjury case[10] since without a transcript, master's errors could not be corrected.[11]

While the Appeals Court acknowledged that the rules governing appellate procedure and the rules of civil procedure must be read together as a comprehensive whole[12] and that differences between the local Massachusetts rule and the rule in effect in the federal court

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[5] *Id.* at 358, 344 N.E.2d at 424.

[6] *Id.* at 358, 344 N.E.2d at 424.

[7] Shortly after the defendant filed his claim of appeal, he filed a motion in the superior court to amend the order of reference so as to require the master to file with his report the transcript of the proceedings. The motion was denied. Subsequently, the defendant filed a motion in the Appeals Court to amend the record on appeal by the inclusion of the transcript of the proceedings before the master. The motion was denied by a single justice "without prejudice to the filing of a like motion in the Superior Court." *Id.* at 359, 344 N.E.2d at 425. A motion to include the transcipt was then filed in the superior court and denied, whereupon a second motion seeking the same relief was filed in the Appeals Court and denied. *Id.*

[8] MASS. R. CIV. P. 53.

[9] MASS. R. APP. P. 8(a).

[10] 1976 Mass. App. Ct. Adv. Sh. at 359, 344 N.E.2d at 425.

[11] *Id.*

[12] *See* Giacobbe v. First Coolidge Corp., 1975 Mass. Adv. Sh. 894, 903-06, 325 N.E.2d 922 (1975).

must be minimized,[13] it correctly observed that in the area of proceedings before a master, significant differences do exist between the local rule and its federal counterpart. Specifically, the court noted that federal Rule 53(e) provides that a master sitting in a nonjury case must file a transcript of the proceedings with his report "unless otherwise directed by the order of reference."[14] The Massachusetts counterpart of federal Rule 53(e) was written to achieve the exact opposite result in order to be consistent with traditional practice in the state courts that a master was rarely ordered to report the evidence.[15]

Focusing on the literal wording of the local Rule 53(e), the court correctly observed that the trial judge has the discretion to decline to order a report of the evidence[16] and that in *Michelson,* the trial judge directed the master not to report the evidence. Since the transcript of the master's proceedings was not authorized by the order of reference, the court held that it was not "a transcript of the proceedings" within the meaning of Rule 8(a) and was not properly a part of the record on appeal.[17]

The court explained that its holding denying the inclusion of the transcript as a matter of right did not deprive the defendant of any way to challenge serious errors in the master's report.[18] Rather, the court maintained that the proper procedure for preserving meaningful challenges to a master's findings is set out in section 7 of Rule 49 of the Rules of the Superior Court.[19] The court's explanation of the mechanics of the Rule helped clarify its sometimes confusing language. Section 7 of Rule 49 of the Rules of the Superior Court provides that the master shall set a time and place when counsel can suggest changes by way of preliminary objections to his report before it is finalized and filed with the court. The procedures are somewhat confusing because they depend in large part on a proper characterization of the alleged errors. If the preliminary objections raise a question of *law* the resolution of which depends on unreported evidence, the master is required, when requested to do so, to append to his report "a brief, accurate and fair summary of so much of the evidence . . ."[20] so as to permit the court to decide such question. The preliminary objection procedure is important because it is a prerequisite to having the reviewing court decide questions based on unreported evidence. If, however, the preliminary objection raises a question as to

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[13] *See* Rollins Environmental Serv., Inc. v. Superior Ct., 1975 Mass. Adv. Sh. 2052, 2060, 330 N.E.2d 814, 817-18.

[14] FED. R. CIV. P. 53(e).

[15] Peters v. Wallach, 1975 Mass. Adv. Sh. 61, 66-67, 321 N.E.2d 806, 809; Shelburne Shirt Co., Inc. v. Singer, 322 Mass. 262, 265, 76 N.E.2d 762, 764 (1948).

[16] 1976 Mass. App. Ct. Adv. Sh. 357, 363, 344 N.E.2d 423, 426.

[17] *Id.* at 365, 344 N.E.2d at 427.

[18] *Id.*

[19] *Id.*

[20] Rule 49, § 7 of the Superior Court.

whether the evidence was sufficient in *law* to support a finding of fact made by the master, no summary of the evidence shall be made without special order of the court unless the evidence was taken by a reporter approved by the master prior to the commencement of the hearing and the objecting party bears the expense of reproducing the transcript.

Preliminary objections for either of the above stated reasons are prerequisites to raising final objections to the report of the master.[21] Thus, final objections as defined in section 7 of Rule 49, which depend on unreported evidence, have no standing unless the groundwork is laid through a preliminary objection and a summary of the evidence.[22] Defendant, having failed in the instant case to raise preliminary objections to the master's report, lost the opportunity to raise objection on appeal to matters not apparent on the face of the report.[23]

§14.4. Summary Judgment: Sufficiency of Affidavits. In what it called "an especially appropriate case to do so,"[1] the Supreme Judicial Court reviewed at great length the requirements of Rule 56 of the Massachusetts Rules of Civil Procedure.[2] The case, *Community National Bank v. Dawes,*[3] is significant because it presented the Court with its first opportunity to expound on the rule since the rule was adopted on July 1, 1974.

The decision arose out of a simple action by a bank on a promissory note against the maker and two alleged endorsers. A superior court judge allowed the plaintiff's motion for summary judgment against all defendants.[4] One defendant, an endorser, appealed. The facts indicated that the maker executed the note to liquidate a balance then due to the plaintiff.[5] At the time that the note was signed, two persons signed their names on the back of the note under the legend "Assenting to Terms and Waivers on the Face of this Note."[6] The maker defaulted and the plaintiff brought suit against the maker and the endorsers. One of the endorsers filed an answer in the action claiming, among other things, that his signature was not an endorsement for which he could be held liable, but was merely an assent to the terms of the note.[7] Shortly after the suit was filed, the plaintiff filed a mo-

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[21] 1976 Mass. App. Ct. Adv. Sh. at 367-68, 344 N.E.2d at 428.
[22] *Id.* at 368, 344 N.E.2d at 428.
[23] *Id.*

§14.4. [1] Community Nat'l Bank v. Dawes, 1976 Mass. Adv. Sh. 194, 197, 340 N.E.2d 877, 879.
[2] MASS. R. CIV. P. 56.
[3] 1976 Mass. Adv. Sh. 194, 340 NE.2d 877.
[4] *Id.* at 194-95, 340 N.E.2d at 878.
[5] *Id.* at 195, 340 N.E.2d at 878.
[6] *Id.*
[7] *Id.* at 195-96, 340 N.E.2d at 878.

tion for summary judgment and relied on an affidavit of one of its officers. Although an affidavit in opposition to the motion was filed, a superior court judge allowed the motion.[8] After a lengthy discussion of the principles involved, the Supreme Judicial Court affirmed the granting of the motion.[9]

Rule 56 of the Massachusetts Rules of Civil Procedure permits a party, within certain time limitations, to move for summary judgment "with or without supporting affidavits,"[10] but a carefully prepared motion for summary judgment is seldom filed without supporting affidavits. A judgment shall be rendered "forthwith" if it appears from the record that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[11] Affidavits filed in support of a Rule 56 motion must squarely meet the requirements of the Rule. Specifically, they "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."[12]

The local summary judgment rule closely tracks Rule 56 of the Federal Rules of Civil Procedure which has had a long and successful history as an important tool of federal practice.[13] Yet, as the Court in the *Community National* case correctly observed, there has developed in the federal courts some authority which has served to place unwarranted limitations on the use of motions for summary judgment.[14] To counter the possible effect of such authority on local practice, the Supreme Judicial Court in *Community National* went to great lengths to

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[8] *Id.* at 196, 340 N.E.2d at 878-9.

[9] *Id.* at 208, 340 N.E.2d at 883.

[10] MASS. R. CIV. P. 56(a).

[11] MASS. R. CIV. P. 56(c).

[12] MASS. R. CIV. P. 56(e). *See* Shapiro Equipment Corp. v. Morris & Son Constr. Corp., 1976 Mass. Adv. Sh. 382, 341 N.E.2d 668 (affidavits made on information and belief are to be disregarded).

[13] FED. R. CIV. P. 56; *see* J. MOORE, FEDERAL PRACTICE, ¶ 56.04[1], at 46-63 (2d ed. 1976), and cases cited therein.

[14] *See, e.g.,* Associated Press v. United States, 326 U.S. 1, 6 (1945) ("Rule 56 should be cautiously invoked"); Season-All Indust., Inc. v. Turkiye Sise Ve Cam Fabrikalari, S.A., 425 F.2d 34, 39 (3d Cir. 1970) ("summary judgment is not a punishment for the incoherence of a pleading"); Schoenbaum v. Firstbrook, 405 F.2d 215, 218 (2d Cir. 1968) (summary judgment should rarely be granted where most of the facts are exclusively within the defendant's knowledge); General Elec. Co. v. United States Dynamics, Inc., 403 F.2d 933, 934 (1st Cir. 1968); Moutoux v. Gulling Auto Elec. Inc., 295 F.2d 573, 576 (7th Cir. 1961) (where the question is close, doubts should be resolved against the movant); Colby v. Klune, 178 F.2d 872, 873 (2d Cir. 1949) (desire to avoid "trial by affidavit"); Peckham v. Ronrico Corp., 171 F.2d 653, 657 (1st Cir. 1948) ("A litigant has a right to a trial where there is the slightest doubt as to the facts"); Witaker v. Coleman, 115 F.2d 305, 306 (5th Cir. 1940) ("To proceed to summary judgment .... [i]t must appear that there is no substantial evidence on [an issue]",; Van Brode Milling Co. v. Kravex Mfg. Corp., 21 F.R.D. 246, 249 (E.D.N.Y. 1957) ("[a]ny reasonable doubt should be resolved against the movant").

endorse the use of local Rule 56, referring to it as a "welcome, progressive addition to judicial procedure in this Commonwealth."[15]

Turning to the facts of the case, the endorser argued that his signature appearing on the back of the note was not an endorsement for which he could be found liable.[16] In support of his contention, he filed an affidavit which stated, among other things, that he received no consideration for the note, that he signed the note solely for the accommodation of the bank, and that the language on the reverse side of the note was not intended to create any liability on his part as a guarantor or co-maker.[17] The Supreme Judicial Court ruled that the trial judge's granting of the motion was correct because the bank had met its burden by showing that "no genuine issue of . . . liability on the note is raised,"[18] and the defendant did not present enough "countervailing details" to demonstrate the existence of any issue of act triable by a jury.[19] Thus, the Court established that it is not sufficient to withstand a summary judgment motion to make the bare assertion of inferences that could be triable.[20] Rather, specific facts relating to the transaction and not hypothetical arguments must be advanced in opposition to the summary judgment motion.[21]

The *Community National* case, being the first case involving local Rule 56 to reach the Supreme Judicial Court, is important for two reasons. First, the decision anticipated the reluctance on the part of some lower court judges to allow motions for summary judgment and emphasized the important role that summary procedures have in the expeditious and fair settlement of disputes. Second, the decision is important because of the practical teaching it contains concerning the proper drafting of affidavits in support of and against motions for summary judgment.

§14.5. Probate Courts: Jurisdiction: Controversies Between Divorced Persons. In *Wood v. Wood,*[1] decided during the *Survey* year, the Supreme Judicial Court analyzed the scope of the jurisdiction granted by that section of the General Laws which permits the Probate Courts "after the divorce decree has become absolute . . . to grant equitable relief in controversies over property between persons who have been divorced."[2] The Court upheld plenary equitable jurisdiction in such cases.[3]

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[15] 1976 Mass. Adv. Sh. at 197, 340 N.E.2d at 879.
[16] *Id.* at 195-6, 340 N.E.2d at 878.
[17] *Id.* at 196, 340 N.E.2d at 879.
[18] *Id.* at 202, 340 N.E.2d at 881.
[19] *Id.*
[20] *Id.* at 205, 340 N.E.2d at 882.
[21] *Id.* at 205-06, 340 N.E.2d at 882.

§14.1. [1] 1976 Mass. Adv. Sh. 371, 342 N.E.2d 712.
[2] G.L. c. 215, § 6, *added by* Acts of 1973, c. 1114, § 63.
[3] The Court also held that the probate court had personal jurisdiction over the nonresident former spouse under G.L. c. 223A § 3(c) (the Long Arm Statute), which pro-

The complaint was filed in the probate court by the husband against his former spouse. The husband alleged that in violation of the divorce decree, the wife had removed certain personal property from their former residence, had intentionally damaged other property situated there, and had sold certain property belonging to the plaintiff.[4] Among other things, the complaint sought a determination of the plaintiff's ownership in the property, a return of the property or, if a return was not available, an award of damages.[5] A probate court judge ruled that the matter was not within the court's jurisdiction.[6]

Although Rule 1 of the Massachusetts Rules of Civil Procedure[7] abolishes the distinction between law and equity, it does not alter the jurisdiction of the various courts in the Commonwealth, including the probate courts.[8] Accordingly, in *Wood,* jurisdiction of the probate court over the controversy was governed by section 6 of Chapter 215 of the General Laws.[9] The first paragraph of section 6 confers on the probate courts jurisdiction over "all cases and matters of equity cognizable under the general principles of equity jurisdiction" concurrent with the general equity jurisdiction of the superior and supreme judicial courts. The second paragraph of section 6 grants the probate courts "concurrent jurisdiction to grant equitable relief in controversies over property" after the divorce has become final.

In reversing judgment for the defendant, the Supreme Judicial Court relied on the second paragraph of section 6 of Chapter 215 and expressly chose not to consider the plaintiff's argument that the relief sought fits squarely within the language of the first paragraph of section 6.[10] The Court observed that suits between husbands and wives concerning title to property have traditionally been a part of the superior court's exercise of equity jurisdiction[11] and, in 1936, became an important part of the probate court's exercise of general equity

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vides for jurisdiction over a person "causing tortious injury by an act or omission in this commonwealth." The Court correctly observed the defendant's alleged wrongful taking, detention, disposition, and damaging of property belonging to the plaintiff was tortious. 1976 Mass. Adv. Sh. at 379, 342 N.E.2d at 716-16.

[4] 1976 Mass. Adv. Sh. at 372-73, 342 N.E.2d at 714.

[5] *Id.* at 373, 342 N.E.2d at 714.

[6] *Id.* at 372, 342 N.E.2d at 714.

[7] MASS. R. CIV. P. 1.

[8] MASS. R. CIV. P. 82.

[9] Acts of 1973, c. 1114, § 63.

[10] 1976 Mass. Adv. Sh. at 377, 342 N.E.2d at 716. Plaintiff had argued that the suits in equity maintainable, in superior court under G.L. c. 214 §§ 1, 1A, and 3, encompassed the causes of action in the instant case thereby bringing such claims within the equity jurisdiction of the probate court. 1976 Mass. Adv. Sh. at 375-77, 342 N.E.2d at 715-16. The Court, apparently finding that the second paragraph of G.L. c. 215, § 6 conferred such broad jurisdiction over property claims of divorced parties, deemed it unnecessary to consider the narrower bases for jurisdiction alleged by plaintiff.

[11] 1976 Mass. Adv. Sh. at 377, 342 N.E.2d at 716. *See* White v. White, 322 Mass. 461, 465, 78 N.E.2d 100, 102 (1948).

jurisdiction.[12] In 1958, the statute was amended to include the language regarding controversies over property after a divorce decree becomes final.[13] Thus, the Court ruled that the 1958 amendment, when read in light of the grant of general equity jurisdiction to the probate court, gave the probate court broad jurisdiction over property disputes between divorced persons.[14] For example, the probate courts now have jurisdiction to hear "controversies over ownership, over division of property owned jointly or in common, over wrongful taking, detention, disposition or other damage to property"[15] and, under their traditional equity powers, can grant injunctive relief or damages.[16]

By so ruling the court reaffirmed the policy relative to probate court jurisdiction that had been recognized prior to the extension of jurisdiction to suits arising after the divorce decree has become final. The broad construction of the new grant of jurisdiction reflects the policy consideration that "[t]he existence of a readily available method of settling disputes over property completely and finally in the same court which deals with the marital relations of the parties may be a substantial aid in the efficient administration of justice."[17]

§14.6. Judgement: Res Judicata: Motion to Dismiss. In *Osserman v. Jacobs*,[1] the Supreme Judicial Court considered the circumstances in which a judgment for the defendant upon the sustaining of a demurrer precludes a second action on the same cause of action.[2] The second action was commenced by the filing of a complaint containing two counts, one in tort and the other in contract.[3] Briefly, the complaint alleged misconduct on the part of the defendants while the latter acted as the plaintiff's accountants. The defendants moved to dismiss the complaint under Rule 12(b)(6) of the Massachusetts Rules of Civil Procedure,[4] which complaint raised the entry of a judgment in their favor in a prior action.[5] A superior court judge allowed the motion to dismiss.[6]

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[12] G.L. c. 208, § 33 *added by* Acts of 1936, c. 221, § 1.

[13] Acts of 1958, c. 223.

[14] 1976 Mass. Adv. Sh. at 378, 342 N.E.2d at 716.

[15] *Id.*

[16] Grunberg v. Louison, 343 Mass. 729, 180 N.E.2d 802 (1962); Codman v. Wills, 331 Mass. 154, 159, 118 N.E.2d 94, 97 (1954).

[17] 1976 Mass. Adv. Sh. at 377, 342 N.E.2d at 716, *quoting* MacLennan v. MacLennan, 311 Mass. 709, 712, 42 N.E.2d 838, 839 (1942).

§14.6. [1] 1975 Mass. Adv. Sh. 3442, 339 N.E.2d 193.

[2] The first action was dismissed prior to the adoption of the new Massachusetts Rules of Civil Procedure on July 1, 1974. Under the new rules, the "demurrer" has been replaced with a motion to dismiss for failure to state a claim for which relief can be granted. MASS. R. CIV. P. 12(b)(6).

[3] 1975 Mass. Adv. Sh. at 3443, 339 N.E.2d at 194.

[4] MASS. R. CIV. P. 12(b)(6).

[5] 1975 Mass. Adv. Sh. at 3443, 339 N.E.2d at 194.

[6] *Id.* at 3443-44, 339 N.E.2d at 194-95.

The prior action involved the same parties, arose out of the same transactions, and appears to have set forth the same causes of action as the second action.[7] In the prior action, a demurrer was sustained both to the original declaration and to an amended declaration.[8] Under the superior court rules then in effect, the plaintiff had ten days from the sustaining of the demurrer within which to file a second amended declaration; otherwise judgment would automatically enter for the defendant.[9] Since no second amended declaration was filed, judgment was entered for the defendant, and no appeal was filed.[10] Some time later, the plaintiff filed a motion to vacate the judgment which was denied.[11] The plaintiff then filed the separate action alleging the same causes of action.

The motion to dismiss in the second action raised the question of whether the unappealed judgment in the first action, not being "on the merits," was forever binding on the plaintiff who sought to start another identical action. In ruling that it was, the Court referred to the several opportunities afforded the plaintiff to state a claim for which relief could be granted.[12] Under the superior court rules then in effect and the cases interpreting them,[13] the plaintiff was given the opportunity to, and did in fact, file an amended declaration. That being the case, the Court relied on the general rule that "a judgment in . . . [an] earlier action following the sustaining of a demurrer is a bar to a second action for the same cause of action where the plaintiff had been granted leave to amend his earlier declaration and had neglected or refused to do."[14] The same rule applies, the Court held, where a pleading is dismissed and an amendment fails to cure the defect.[15] Although *Osserman* was decided with regard to procedures now superseded by the new Massachusetts Rules of Civil Procedures, the case remains instructive to practioners. This is so since the Court, in

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[7] *Id.* at 3444, 339 N.E.2d at 195.

[8] *Id.*

[9] Prior practice was controlled by Rule 23 of the Superior Court (1954) which stated:

> A motion for leave to amend shall contain or be accompanied by the proposed amendment.
>
> If a demurrer is sustained, and leave to amend is not denied, a case shall be deemed ripe for final judgment or decree only after ten days from the sustaining of the demurrer, or such other time as the court may allow for amendment, and then only after the disposition of any motion to amend the pleading demurred to, filed within such time. After the expiration of such time no motion to amend such pleading shall be filed without leave of court.

The Rule was repealed by order of the Superior Court effective June 30, 1974.

[10] 1975 Mass. Adv. Sh. at 3444-45, 339 N.E.2d at 194.

[11] *Id.*

[12] *Id.* at 3447, 339 N.E.2d at 195.

[13] Hacker v. Beck, 325 Mass. 594, 91 N.E.832 (1950); Elfam v. Glaser, 313 Mass. 370, 47 N.E.2d 925 (1943).

[14] Martin v. Hunt, 352 Mass. 774, 774, 226 N.E.2d 359, 359 (1967), *quoting* Hacker v. Beck, 325 Mass. 594, 597, 91 N.E.2d 832, 834 (1950).

[15] Martin v. Hunt, 352 Mass. 774, 774, 226 N.E.2d 359, 359 (1967).

dicta, noted that the rule followed in *Osserman* of precluding a second action for the same cause of action following the dismissal of the first claim under Rule 12(b)(6) of the Massachusetts Rules of Civil Procedure may be more stringently applied under the new rules in light of the new pleading rules which contain liberal amendment provisions.[16]

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[16] 1975 Mass. Adv. Sh. at 3449, 339 N.E.2d at 196. *See* MASS. R. CIV. P. 15.