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Chapter 9: Civil Practice and Procedure

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CHAPTER 9

Civil Practice and Procedure

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§9.1. Long Arm Jurisdiction. During the *Survey* year the Supreme Judicial Court again considered the reach of the Massachusetts Long Arm Statute.[1] The 1978 decision of *Droukas v. Divers Training Academy, Inc.*,[2] placed certain limitations on the exercise of personal jurisdiction by Massachusetts courts. In contrast, this year's decision, *Good Hope Industries, Inc. v. Ryder Scott Co.*,[3] appears to broaden the reach of the courts of the commonwealth.

The plaintiffs in *Good Hope Industries* consisted of a Massachusetts corporation, which had its principal place of business in Springfield, and four of its wholly-owned subsidiaries.[4] The subsidiaries were Texas corporations, but they had their principal offices in Springfield.[5] The principal bank account of each plaintiff was also in Massachusetts.[6] The defendant was a Texas corporation engaged, *inter alia*, in the service of producing studies and appraisals of natural gas reserves on a world-wide basis.[7]

The plaintiffs' chief executive officer, Mr. Stanley, had been in New Orleans discussing potential financing with a Louisiana bank.[8] In response to Mr. Stanley's inquiries concerning where he could obtain gas reserve appraisals for his company's leasehold interests, a bank officer introduced Mr. Stanley to the defendant's president, Mr. Cruce.[9] During this initial conversation, the defendant was informed that the plaintiffs' main offices were in Massachusetts.[10] Shortly thereafter, Mr. Stanley and Mr. Cruce met at the defendant's offices in Houston and

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§9.1. [1] G.L. c. 223A.
[2] 1978 Mass. Adv. Sh. 1175, 376 N.E.2d 548.
[3] 1979 Mass. Adv. Sh. 1155, 389 N.E.2d 76.
[4] *Id.* at 1157, 389 N.E.2d at 78.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 1158, 389 N.E.2d at 78.
[8] *Id.*
[9] *Id.*
[10] *Id.*

orally agreed that the plaintiffs would provide the defendant with raw data, which the defendant would then analyze for the purpose of preparing periodic reports, to be used to obtain bank loans, on the extent and value of the plaintiffs' natural gas reserves.[11] The defendant sent at least nine such reports to Springfield over the next year.[12] In addition, the defendant initiated at least fifty-two telephone calls to the plaintiffs' personnel in Springfield and sent seventeen invoices to the plaintiffs in Springfield.[13] These invoices were paid by checks drawn on Massachusetts banks.[14]

While the defendant's initial appraisal reports indicated that the plaintiffs' gas reserves were substantial, later reports reflected significantly smaller reserves.[15] In reliance on the earlier reports, the plaintiffs had begun building an ammonia processing plant and had committed themselves on several loans and construction contracts.[16] As a result of the later reports, the plaintiffs were forced to terminate construction and lost their investments.[17] Consequently, the plaintiffs brought an action for damages in Massachusetts superior court, alleging negligence in the preparation of the appraisal reports.[18] The lower court granted a motion to dismiss the complaint for lack of personal jurisdiction.[19] The Supreme Judicial Court accepted the plaintiffs' application for direct appellate review.[20]

At the outset of its analysis, the Court explained that an assertion of jurisdiction over a nonresident defendant requires a "two-fold inquiry."[21] The first step requires the judge to consider whether the assertion of jurisdiction is authorized by the Long Arm Statute. Second, if it is so authorized, the judge must consider whether the exercise of jurisdiction is consistent with the due process limitations of the United States Constitution.[22] The Court noted that since the Massachusetts Long Arm Statute has already been construed to authorize jurisdiction to the extent permitted by the United States Constitution,[23] in practice "the two questions tend to converge."[24]

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11 *Id.* at 1158-59, 389 N.E.2d at 78-79.
12 *Id.* at 1159, 389 N.E.2d at 79.
13 *Id.*
14 *Id.*
15 *Id.* at 1160, 389 N.E.2d at 79.
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.* at 1156, 389 N.E.2d at 77.
20 *Id.*
21 *Id.* at 1161, 389 N.E.2d at 79.
22 *Id.*
23 "Automatic" Sprinkler Corp. of America v. Seneca Foods Corp., 361 Mass. 441, 280 N.E.2d 423 (1972).
24 1979 Mass. Adv. Sh. at 1161, 389 N.E.2d at 79.

Admonishing that inquiries into questions of personal jurisdiction are "sensitive to the facts of each case," [25] the Court nevertheless had no hesitancy in concluding that the facts of this case fit within the "literal requirements" of chapter 223A, section 3(a).[26] The Court observed that the defendant's transmittal of periodic reports, the frequent initiation of telephone calls, and the regular acceptance of payment by checks drawn on Massachusetts banks established that the defendant had transacted business in Massachusetts.[27] Additionally, the Court concluded that the cause of action alleged "obviously" arose, at least in part, out of the transaction of business in Massachusetts.[28]

The Court discussed at greater length the second leg of its bifurcated inquiry—that is, whether the exercise of jurisdiction was consistent with constitutional mandates. It determined that the appropriate constitutional analysis could be characterized as follows: "[W]hether there was some minimum contact with the Commonwealth which resulted from an affirmative, intentional act of the defendant, such that it is fair and reasonable to require the defendant to come into the State to defend the action." [29] After distinguishing earlier Massachusetts decisions in which contacts had been found to be insufficient to confer jurisdiction,[30] the Court concluded that the exercise of personal jurisdiction over the defendant in this case would be neither so unfair nor so unreasonable as to result in a denial of due process.[31] The Court emphasized that the defendant's contacts with the forum were deliberate and not fortuitous.[32] The Court noted that sending appraisal reports and initiating numerous telephone calls over an extended period of time to the plaintiffs in Massachusetts constituted purposeful activity within the forum.[33] The defendant, therefore, could have foreseen that significant managerial decisions based upon information provided by the defendant would be made in Massachusetts.[34] The Court reasoned that if the defendant did not

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[25] *Id.* at 1156, 389 N.E.2d at 78 (citing Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1266 (5th Cir. 1978)).

[26] 1979 Mass. Adv. Sh. 1162, 389 N.E.2d at 80. G.L. c. 223A, § 3, reads as follows: "Court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's (a) transacting any business in this commonwealth . . . ."

[27] 1979 Mass. Adv. Sh. at 1162, 389 N.E.2d at 80.

[28] *Id.*

[29] *Id.* at 1163, 389 N.E.2d at 80. The Court borrowed this analysis from Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974), although it noted that other courts have used other formulations. 1979 Mass. Adv. Sh. 1163 n.12, 389 N.E.2d 80 n.12. *See also* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[30] 1979 Mass. Adv. Sh. at 1163, 389 N.E.2d at 80.

[31] *Id.* at 1169, 389 N.E.2d at 83.

[32] *Id.* at 1168, 389 N.E.2d at 82.

[33] *Id.*

[34] *Id.*

want to expose itself to suit in Massachusetts it was within its power to refuse to deal with plaintiffs here.[35] Thus, the Court rejected the defendant's argument that it had not voluntarily associated itself with this forum and that all "these contacts" resulted from the unilateral activity of the plaintiffs.[36]

It is perhaps most instructive to look at the facts that the Court did not find controlling. First, no representatives of the defendant were ever physically present in the commonwealth while conducting business with the plaintiffs. Second, the initial solicitation to enter a business arrangement was made by the plaintiffs rather than by the defendant. Finally, the contract was entered into by Texas corporations, and the contract was consummated in Texas. The combination of these factors certainly presents a strong case against the plaintiffs' claim of personal jurisdiction in Massachusetts.

The Court did note in its conclusion that it was not reaching the merits of defendant's motion to dismiss on the basis of *forum non conveniens*, which it determined was not properly before it.[37] Perhaps this comment may be taken as an indication that while Massachusetts courts have jurisdiction to hear actions such as the present case if they desire, the courts also should remember that they have the discretion to dismiss the action if the most appropriate forum in which to litigate the dispute is outside the commonwealth.

§9.2. Discretionary Award of Costs—Surety Bond. In *Creed v. Apog* [1] the Supreme Judicial Court considered whether the cost of obtaining a letter of credit to secure a surety bond should be recoverable to a prevailing party as a necessary and reasonable cost under chapter 223, section 122, of the General Laws. In *Creed*, the defendants received judgment in their favor in an action concerning a real estate brokerage commission.[2] In the course of that litigation, the defendants had obtained a surety bond to dissolve an attachment that the plaintiffs had obtained on their property.[3] In order to acquire the surety bond, the defendants were required to pay bond premiums of $5,600 and to obtain a letter of credit securing the bond at a cost of $19,500.[4]

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[35] *Id.* at 1169, 389 N.E.2d at 82-83.

[36] *Id.* at 1166, 389 N.E.2d at 82.

[37] G.L. c. 223A, § 5, *added by* Acts of 1968, c. 760, § 7, states: "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just." *Id.*

§9.2. [1] 1979 Mass Adv. Sh. 672, 386 N.E.2d 1273.

[2] 1978 Mass. App. Ct. Sh. 573, 376 N.E.2d 154.

[3] 1979 Mass. Adv. Sh. at 673, 386 N.E.2d at 1274.

[4] *Id.*

As the prevailing party, the defendants sought to recover their costs of dissolving the attachment. The lower court, however, only allowed the amount of the bond premiums.[5] The superior court judge interpreted chapter 223, section 122, as excluding all costs except those expressly provided for in the statute.[6] Thus, because the cost of obtaining collateral for a surety bond was not mentioned in the statute, the lower court determined that such costs were not recoverable.[7]

On appeal, the Supreme Judicial Court took a different view of the statute. It held that the costs of bond premiums are the "minimum amount of costs which must be awarded in connection with surety bonds."[8] The Court noted that other costs in connection with bonds, not mentioned by the statute, fall within "a policy favoring awards of actual costs to prevailing parties, but leaving considerable discretion with the judge."[9] While reserving discretion in the lower court to award such costs in any particular case, the Supreme Judicial Court found "no valid reason to distinguish between different types of necessary and reasonable costs of bonding."[10] Thus, the case was remanded for consideration of the defendants' motion to award the full cost of the bond.

The necessity for this broad reading of the statute arises from the variety of conditions under which a surety company will post a bond. These conditions include a straight payment of premiums, the posting of full or partial collateral in a variety of forms such as a letter of credit, or some mixture of payment and security. Consequently, a degree of flexibility in this regard may aid both litigants since the net cost of the bond will be borne initially by one party, but may well be taxed against the other at the conclusion of the case. Thus, a lower total cost available through a flexible bonding scheme will benefit at least one, if not both parties.

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[5] *Id.* at 674, 386 N.E.2d at 1274.

[6] *Id.* G.L. c. 223, § 122, reads: "If the attachment is dissolved and the defendant prevails, his costs shall include the fees of the magistrate and the premium or premiums paid for the bond dissolving such attachment, if it be a surety company bond."

[7] 1979 Mass. Adv. Sh. at 674, 386 N.E.2d at 1275.

[8] *Id.*

[9] *Id.* This policy arises from the combined effect of Mass. R. Civ. P. 54(d) (providing that "costs are to be allowed as of course to the prevailing party"), G.L. c. 261, § 1 (to the same effect), and G.L. c. 261, § 13 (placing the award of costs to the prevailing party in the discretion of the judge). The Court's concern for the awarding of actual costs is also apparent in Linthicum v. Archambault, 1979 Mass. Adv. Sh. 2661, 398 N.E.2d 482, where expert witness fees were held to be costs which should normally be recoverable, *id.* at 2669, 398 N.E.2d at 488.

[10] 1979 Mass. Adv. Sh. at 676, 386 N.E.2d at 1275.

§9.3. Res Judicata—Jurisdiction. During the *Survey* period the Supreme Judicial Court decided *Custody of a Minor.*[1] This case arose out of the highly publicized story of Chad Green, a young boy suffering from leukemia. The controversy involved the state's desire to insure that Chad would receive life sustaining medical treatment notwithstanding his parents' objection to that treatment. While the Court's analysis of the substantive issues raised by this case is not relevant to the subject matter of this chapter of the *Survey,* the opinion does discuss certain procedural issues concerning res judicata and jurisdiction that are of general significance beyond the particular facts of this case.

The case originated in the Probate Court for Plymouth County as the result of a petition filed by the child's physician seeking the appointment of a temporary guardian in order to insure that the child would return to the hospital for essential medical treatment.[2] After hearing a brief unsworn statement of facts, the probate judge appointed a guardian ad litem for the boy and granted the relief sought.[3] Shortly thereafter, the parents moved to vacate the order of temporary guardianship.[4] In response to this motion, the probate judge ruled that the probate court was, in fact, not the proper forum to resolve this dispute.[5] In consequence, he vacated the order of temporary guardianship and suggested to the parties that the proper avenue for relief was a petition in the juvenile session of the district court for the care and protection of the child.[6] The child's physician filed such a petition. It was subsequently dismissed by the district court, however.[7] This dismissal was appealed to the superior court,[8] which found that denial of the recommended treatment meant certain death for the minor, and ordered the child committed to the legal custody of the Department of Public Welfare for the purpose of receiving chemotherapy.[9] Appealing the superior court's order, the parents argued that (1) the issue of their fitness as parents had previously been determined in their favor by the probate court and, therefore, was res judicata; and (2) the superior court lacked

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§9.3. [1] 1978 Mass. Adv. Sh. 2002, 379 N.E.2d 1053.

[2] *Id.* at 2002-03, 379 N.E.2d at 1055.

[3] This petition was filed pursuant to G.L. c. 201, § 14.

[4] 1978 Mass. Adv. Sh. at 2003, 379 N.E.2d at 1055.

[5] The Supreme Judicial Court noted in its decision that the probate judge was in error in this conclusion, citing Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977). The Court noted, however, that this error did not affect the jurisdiction of the superior court to hear the case. 1978 Mass. Adv. Sh. at 2014 n.3, 379 N.E.2d at 1059 n.3.

[6] *Id.* at 2003, 379 N.E.2d at 1055.

[7] *Id.*

[8] G.L. c. 119, § 27, gives the petitioner a right to claim a trial *de novo* in superior court.

[9] 1978 Mass. Adv. Sh. at 2004, 379 N.E.2d at 1055-56.

subject matter jurisdiction.[10] The Supreme Judicial Court, however, rejected both of these arguments.[11]

In reviewing the parents' claim of a res judicata defense, the Court noted that the defense ordinarily must rest upon the fact that a judgment on the merits had been entered in the prior litigation.[12] Thus, the Court noted that where, as in the present case, the prior action was dismissed without an evidentiary hearing, the court in the second action should give res judicata effect to the prior action only when the defendant can prove that the prior order of the court was rendered upon some particular ground going to the merits of the case.[13] In this action the Court observed that it was clear from the probate judge's comments that he was vacating his temporary guardianship order to enable the parties to petition another court to resolve their dispute.[14] Thus, the judge did not dismiss the guardianship petition on any ground going to its merits but merely on a jurisdictional issue.[15]

After denying the res judicata defense, the Court focused on the parents' claim that the superior court lacked subject matter jurisdiction.[16] The Court, however, rejected this contention and noted that, in fact, there were two sources of subject matter jurisdiction.[17] The first was statutory, pursuant to chapter 119, section 24, of the General Laws, which grants the district courts jurisdiction to consider petitions alleging, *inter alia,* that a minor child "is without necessary and proper physical . . . care . . . ." The Court found that such language was clearly broad enough to encompass the essential medical care at issue in this case.[18]

The second basis of jurisdiction identified by the Supreme Judicial Court was considerably broader. It arose out of the superior court's "general equity jurisdiction."[19] The Court observed that under the principles of general equity jurisprudence, a court of equity has both the power and responsibility to care for and protect those persons who, by virtue of some legal disability, are unable to protect themselves.[20] In the present case, the Court stated that the superior court clearly had

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[10] *Id.* at 2004, 379 N.E.2d at 1056.
[11] *Id.*
[12] *Id.* at 2013, 379 N.E.2d at 1059. *See also* Hacker v. Beck, 325 Mass. 594, 91 N.E.2d 832 (1950).
[13] 1978 Mass. Adv. Sh. at 2013, 379 N.E.2d at 1059.
[14] *Id.* at 2014, 379 N.E.2d at 1059.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 2015, 379 N.E.2d at 1059.
[19] *Id.* at 2017, 379 N.E.2d at 1060.
[20] *Id.* at 2018, 379 N.E.2d at 1060.

the power to render orders concerning the proper medical care of a minor, when his chances of survival were at stake.[21]

The Court further noted that its decision in the present case is not contrary to its holding in *Superintendent of Belchertown State School v. Saikewicz.*[22] In *Saikewicz,* the Court held that the probate court had been given a specific grant of equitable powers to act in all matters relating to guardianship.[23] The Court in this case noted that such jurisdiction in guardianship matters is not exclusively vested in the probate court. The Court pointed out that section 6 of chapter 215 of the General Laws specifically provides that the jurisdiction of the probate court is concurrent with that of the superior court in such matters.[24] Thus, the Court concluded that its holding in *Saikewicz* did not compel a contrary result.[25]

§9.4. Executions—Interest—Rule 69. In *Stokosa v. Waltuch*[1] the Supreme Judicial Court addressed one of the practical issues that often confronts plaintiffs' counsel after they have reduced their claim to a judgment—whether a clerk, when issuing an execution on a judgment, must compute the amount of interest owed by the defendant up to the date that the execution actually issues. In *Stokosa* the plaintiff obtained a jury verdict in his favor in a motor-vehicle negligence action, and a judgment was entered on this verdict on October 7, 1976.[2] On the following day, the plaintiff filed an affidavit which set forth his costs.[3] He did not, however, file his motion for costs until December 10, 1976.[4] The motion was allowed on January 6, 1977.[5] Thereafter, the plaintiff filed an additional motion in the superior court that he termed a "motion for interest to date of execution."[6] In this motion, the plaintiff asserted that the clerk's office had informed counsel that it would not compute interest to the date execution issued.[7] The plaintiff, therefore, requested the court to order the clerk to do so.[8] After hearing, the court denied this motion, noting that the clerk is "not required to compute interest

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21 *Id.*
22 373 Mass. 728, 370 N.E.2d 417 (1977).
23 *Id.* at 755, 370 N.E.2d at 433.
24 1978 Mass. Adv. Sh. at 2018, 379 N.E.2d at 1060. *See* G.L. c. 215, § 6.
25 1978 Mass. Adv. Sh. at 2018, 379 N.E.2d at 1060.

§9.4. 1 1979 Mass. Adv. Sh. 1978, 393 N.E.2d 350.
2 *Id.* at 1979, 393 N.E.2d at 351.
3 *Id.*
4 *Id.* at 1982, 393 N.E.2d at 352.
5 *Id.*
6 *Id.* at 1979, 393 N.E.2d at 354.
7 *Id.*
8 *Id.*
8 *Id.*

beyond the date of judgment."[9] It further noted that the clerk's decision to compute interest on the execution from the date the action was commenced until the date on which the period for appeal of the judgment had run was in accordance with his statutory responsibility.[10]

The issue on appeal was not whether the plaintiff was due interest on his judgment to the date of execution. It is clear that a plaintiff is due interest until the date payment is received.[11] Rather, the question was whether the clerk *must* compute interest to the date execution issues. The plaintiff contended that certain defendants, especially insurance companies, will pay only the interest computed and stated in the execution, despite their legal obligation to pay interest from the date of judgment to the date of payment on the judgment.[12]

Although the Court did not address the question of whether the plaintiff's allegations concerning the conduct of defendants were generally true, the Court did acknowledge the importance of having trial judges and clerks assist in the full collection of interest due and the utility to plaintiffs of requiring clerks to compute the interest to date of execution.[13] The Court determined, however, that there is simply nothing in the rules and statutes which presently directs the clerk to make such computations or requires a judge to order the clerk to do so.[14] Furthermore, the Court concluded that the question of whether the practice would better serve the interests of justice was an appropriate question for consideration by those involved in the continuing study and development of rules governing civil procedure.[15] Thus, while the Court affirmed the lower court's decision, it noted that it would refer this matter to the Standing Advisory Committee on the Massachusetts Rules of Civil Procedure for study.[16]

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[9] *Id.*

[10] *Id.* at 1980, 393 N.E.2d at 351. After the plaintiff's motion for computation of interest was denied, he filed still another motion, this time pursuant to Mass. R. Civ. P. 69. This motion sought an order requiring the defendant's liability insurer to pay the full amount of the judgment plus costs and "interest computed to the date that this order is issued . . . ." The superior court denied this motion and the Supreme Judicial Court affirmed, noting that there was nothing in the record which indicated that the insurer had been requested to pay the judgment. There was also no indication that the insurer had done anything from which it could be inferred that it would not pay the judgment with interest when requested. The Court stated that it was not inclined to exercise its powers under rule 69 until the need therefor was actually demonstrated. *Id.* at 1982, 393 N.E.2d at 352.

[11] *Id.* at 1980, 393 N.E.2d at 351. *See also* G.L. c. 235, § 8, which provides that "[e]very judgment for the payment of money shall bear interest from the day of its entry." *Id.*

[12] 1979 Mass. Adv. Sh. at 1981, 393 N.E.2d at 351.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 1984, 393 N.E.2d at 352.

§9.5. Judgment Notwithstanding the Verdict—Remittitur—Rule 50(b) —Rule 59(a). In *D'Annolfo v. Stoneham Housing Authority*[1] the Supreme Judicial Court addressed a series of questions arising out of a trial court's determination that a jury's answers to special interrogatories were not supported by the evidence adduced at trial. *D'Annolfo* was an action brought for damages resulting from the Stoneham Housing Authority's taking of the plaintiffs' land for a housing project.[2] At the outset of the trial, the plaintiffs announced that they intended to introduce evidence as to the potential value of the land if certain zoning restrictions attendant to it at the time of the taking could have been altered.[3] To this end, the plaintiffs also sought to introduce evidence which would show that there was a reasonable prospect for obtaining the requisite zoning change.[4] After hearing the plaintiffs' offer of proof, the trial judge determined that he would admit all evidence bearing upon this issue[5] and that he would submit three special questions to the jury: (1) what was the fair market value of the land under the present zoning, (2) whether there was a reasonable prospect of changing that zoning, and (3) if there were such a prospect, what the fair market value of the land then would be.[6] The trial judge made it clear that he was proceeding in this fashion solely to avoid the necessity of a second trial.[7] Furthermore, he stated that he would probably decline to enter a judgment based upon an affirmative answer to the second question.[8] In this regard, the judge observed that if he were the trier of fact he would not find that there was a reasonable prospect of having the zoning restrictions lifted.[9] Nevertheless, the jury returned with an affirmative answer to the second question.[10] Consequently, it gave a market value of $99,000 based upon such a zoning change in response to question number three.[11] Pursuant to question one, the jury found that the value of the land under the existing zoning restrictions was $65,000.[12] Notwithstanding the jury's response to questions two and three, and without commenting upon those responses, the judge entered judgment for the plaintiffs in the amount of $65,000.[13]

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§9.5. [1] 1978 Mass. Adv. Sh. 1895, 378 N.E.2d 971.
[2] *Id.*
[3] *Id.* at 1896, 378 N.E.2d at 974.
[4] *Id.*
[5] *Id.* at 1897, 378 N.E.2d at 974.
[6] *Id.* at 1898, 378 N.E.2d at 974.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 1897, 378 N.E.2d at 974.
[10] *Id.* at 1899, 378 N.E.2d at 975.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 1900, 378 N.E.2d at 975.

The defendant then filed a motion for judgment notwithstanding the verdict on questions two and three and for a new trial with respect to the judgment of $65,000 on the grounds that the verdict was excessive and against the weight of the evidence.[14] After a hearing, the judge issued an order granting defendant's motion for judgment notwithstanding the verdict on questions two and three, and, without stating any grounds, also granted the motion for a new trial.[15] The defendant then wrote to the judge asking whether he intended to order remittitur. In response, the judge revoked his order for a new trial and entered an order stating that the $65,000 verdict was excessive by $27,000, and granting a new trial unless the plaintiffs remitted $27,000.[16] The plaintiffs chose not to remit any portion of the verdict and appealed.[17] The Supreme Judicial Court granted direct appellate review.

The Supreme Judicial Court upheld the actions of the lower court. The Court began its analysis by reviewing the trial judge's order granting the defendant's motion for judgment notwithstanding the verdict on special verdicts two and three. The Court summarily rejected the plaintiffs' argument that the defendant's motion for judgment notwithstanding the verdict was improper because its earlier motion for a directed verdict was procedurally inadequate.[18] The plaintiffs argued that the defendant's motion for a directed verdict failed to state any specific grounds as required by rule 50(a) of the Massachusetts Rules of Civil Procedure.[19] Therefore, the plaintiffs contended, the defendant's motion for judgment notwithstanding the verdict should be treated as a nullity because it was not predicated upon a proper and timely motion for a directed verdict.[20] The Court, however, held that while a motion for a directed verdict might be denied because it failed to state specific

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[14] *Id.*

[15] During this hearing the judge commented that neither of the market value figures returned by the jury made sense to him and that the $65,000 figure was preposterous. *Id.*

[16] *Id.* at 1901, 378 N.E.2d at 975.

[17] *Id.*

[18] *Id.* at 1902, 378 N.E.2d at 976.

[19] *Id.* *See* Mass. R. Civ. P. 50(a).

[20] 1978 Mass. Adv. Sh. at 1902, 378 N.E.2d at 1976. *See* Mass. R. Civ. P. 50(b), which provides in relevant part:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict.

Id.

grounds, a judge was not required to do so.[21] In this case, the Court observed that the reason for the defendant's motion was obvious to all.[22] Furthermore, the plaintiffs did not object to the motion on the grounds of lack of specificity when it was presented at trial. Thus, the Court concluded that the objection was waived.[23]

The Court then addressed the more substantive aspects of the plaintiffs' objections to the entry of judgment notwithstanding the verdict. It noted that in a land damage case where the plaintiff seeks to have the market value based upon a land use requiring a zoning change, the judge must make a threshold determination that sufficient evidence of a reasonable probability of obtaining a change in existing restrictions has been introduced to warrant submitting the question to a jury.[24] Furthermore, the Court stated that there is no reason why the judge could not reserve his decision on this question by the use of special verdicts.[25] Thus, the Court observed that the question to be decided on appeal was whether the judge abused his discretion by, in effect, excluding the evidence on the possibility of a zoning change and the opinions of value based on that change.[26]

After reviewing the evidence offered by plaintiffs on this point, the Supreme Judicial Court found that the trial judge had not abused his discretion.[27] The Court found it necessary, however, to comment on the statement set forth in the trial judge's order that the jury's response to question two "was against the weight of the evidence." The Court noted that the standard to be applied in deciding a motion for judgment notwithstanding the verdict is the same as that applied to a motion for a directed verdict—that is, whether the evidence, construed against the moving party, justifies a verdict against him.[28] Consequently, the "weight of the evidence" standard does not apply to a motion for judgment notwithstanding the verdict.[29] Nevertheless, the Court determined that the trial court's reference to the "weight of the evidence" could fairly be read as a reference to the likelihood of a zoning change, a question on which the judge had discretion to admit or exclude evidence, rather

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21 1978 Mass. Adv. Sh. at 1902, 378 N.E.2d at 1976.

22 *Id.*

23 *Id.*

24 *Id.* at 1904, 378 N.E.2d at 976. *See also* Skyline Homes, Inc. v. Commonwealth, 362 Mass. 684, 687, 290 N.E.2d 160, 162 (1972).

25 1978 Mass. Adv. Sh. at 1904, 378 N.E.2d at 977.

26 *Id.*

27 *Id.*

28 *Id.* at 1905, 378 N.E.2d at 977. *See* 8 MASSACHUSETTS PRACTICE, SMITH & ZOBEL, RULES PRACTICE § 50.13 (1977).

29 1978 Mass. Adv. Sh. at 1906, 378 N.E.2d at 977. *See* 9 C.A. WRIGHT & A.R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2539 (1971).

than a statement of the standard being used by the judge in granting the motion for judgment notwithstanding the verdict.[30]

The Court next addressed the trial judge's order granting the motion for a new trial, if the plaintiff did not remit $27,000 of the jury's verdict. The initial question with regard to this order was whether such an order allowing a motion for a new trial was interlocutory and, therefore, not ripe for review until completion of the second trial.[31] The Court found, however, that the instant case presented a "special circumstance." [32] The Court concluded that since the present appeal was properly before the Court pursuant to plaintiff's appeal of the trial judge's entry of judgment notwithstanding the verdict with respect to special interrogatory number two, it was proper for the Supreme Judicial Court also to consider whether the court below erred in conditionally granting a new trial.[33]

Finally, the Supreme Judicial Court reviewed the plaintiffs' argument that a remittitur may not reduce a jury's verdict below the highest amount which the jury could warrantably have found. The plaintiffs contested that there was evidence to warrant a verdict of $65,000, since their expert testified to a value of $61,500, very nearly the amount of the verdict.[34] The Court noted that, while rule 59 of the Federal Rules of Civil Procedure does not specifically refer to remittiturs, the preferable standard under federal procedure for measuring a remittitur appears to be whether the verdict was reduced to the highest amount which the jury could properly have awarded.[35] On the other hand, the Court recognized that rule 59(a) of the Massachusetts Rules of Civil Procedure does specifically state: "A new trial shall not be granted solely on the ground that the damages are excessive until the prevailing party has first been given the opportunity to remit so much thereof as the court adjudges is excessive." [36] Thus, the Court observed that a trial judge in Massachusetts may have a broader range of discretion than a federal judge in determining the amount of remittitur.[37] The remittitur may be such as to bring the verdict anywhere within the range of verdicts sup-

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[30] 1978 Mass. Adv. Sh. at 1906, 378 N.E.2d at 977.
[31] *Id.* at 1909, 378 N.E.2d at 978.
[32] *Id.*
[33] *Id.* at 1909-10, 378 N.E.2d at 978.
[34] *Id.* at 1910, 378 N.E.2d at 979.
[35] *Id.* at 1911, 378 N.E.2d at 979. *See* 11 C.A. WRIGHT & A.R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2815 (1973).
[36] This provision of Mass. R. Civ. P. 59(a) comports with the remittitur language contained in G.L. c. 231, § 127, which was repealed by Acts of 1975, c. 377, § 109. The Court held that the cases decided under G.L. c. 231, § 127, were applicable to rule 59(a). 1978 Mass. Adv. Sh. at 1912, 378 N.E.2d at 979.
[37] *Id.*

ported by the evidence.[38] In conclusion, the Court recognized that the plaintiffs have a constitutional right to have a jury determination of the amount of damages which they are due.[39] The Court cautioned, therefore, that if after a second trial a judge again seeks to reduce the jury's verdict, constitutional considerations require that the judge "be careful not to usurp the jury's role.'" [40]

§9.6. Contempt—Writ of Error. In *Katz v. Commonwealth*[1] the Supreme Judicial Court reviewed various procedural and substantive issues arising out of a finding of criminal contempt by a judge of the Boston Housing Court in the course of a civil action. While some of these issues deal only with criminal procedure, others are instructive to the civil practitioner.

The *Katz* case originated as a landlord-tenant dispute. The landlord initiated a summary-process action, seeking possession and damages for unpaid rent.[2] The defendant tenants raised a number of counterclaims, and served the landlord with interrogatories and requests for the production of documents.[3] After the plaintiff landlord repeatedly neglected to respond to the defendant's discovery requests, the court ordered that judgment enter for the tenants on the landlord's claims for possession and rent.[4] The tenants, however, still required discovery to pursue their counterclaims.[5] Therefore, the judge ordered the landlord to produce documents and answer interrogatories by August 18, 1978.[6] Pursuant to that order, the landlord finally provided the documents and answered the interrogatories.

Upon receipt of the answers, however, one of the tenants moved that the landlord be held in criminal contempt by reason of perjury in these answers.[7] In response to the tenant's motion, the judge issued an order to show cause. A show cause hearing was convened, and, thereafter, the judge found (1) that the landlord's answer was false, (2) that he knew the answer was false, and (3) that the answer was material to the tenant's claims.[8] The judge then found that the landlord was guilty of criminal contempt of court beyond any reasonable doubt. Because of

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38 *Id.*
39 *Id.* at 1912-13, 378 N.E.2d at 979.
40 *Id.*

§9.6. 1 1979 Mass. Adv. Sh. 2581, 399 N.E.2d 1055.
2 *Id.* at 2581-82, 399 N.E.2d at 1057.
3 *Id.* at 2582, 399 N.E.2d at 1057.
4 *Id.*
5 *Id.*
6 *Id.* at 2583, 399 N.E.2d at 1058.
7 *Id.*
8 *Id.*

the landlord's repeated and wilful defiance of the court, the judge ruled that punishment beyond monetary sanctions was in order.[9] Therefore, the judge found for the tenants on their counterclaims, awarded attorney's fees to the tenants, fined the landlord, and sentenced him to a period of incarceration at the Charles Street Jail.[10]

The landlord sought direct review of the contempt finding by the Supreme Judicial Court by means of a writ of error petition. The Court noted that this procedure was in accordance with prior Supreme Judicial Court decisions which had considered matters of criminal contempt [11] by writs of error. On the other hand, the Court noted that issues of law arising in civil contempt cases had generally been reviewed by means of appeal rather than by writ of error.[12]

Further, the Court observed that, effective July 1, 1979, the procedure for review of criminal judgments by a writ of error was repealed, and the contemnor's only right to appeal is to the Appeals Court.[13] In any event, because the rules of criminal procedure have not been made applicable to criminal proceedings in housing court, and because the appeal was in process on July 1, 1979, the Court concluded that it would treat the writ of error as having the same scope as an appeal to the Appeals Court in the civil case out of which the contempt charges arose.[14] The sentence under review had both civil and criminal features, and the Court determined that it would review both. The Court noted, however, that if a similar situation should arise in the future, an appeal to the Appeals Court would be appropriate.[15]

After reviewing the appropriate form and scope of review, the Court addressed the substantive issues raised by the landlord. First, the Court summarily rejected the landlord's contention that private parties to a civil action, such as the tenants in the instant case, cannot press both the civil and criminal aspects of a case in the housing court.[16] The Court held that a private citizen can prosecute a criminal complaint in the housing court just as he may in a district court.[17]

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[9] *Id.* at 2584, 399 N.E.2d at 1058.
[10] *Id.*
[11] *Id.* at 2584, 399 N.E.2d at 1059. *See* G.L. c. 250, § 9, *repealed by* Acts of 1979, c. 344, § 13, effective July 1, 1979; Hurley v. Commonwealth, 188 Mass. 443, 74 N.E. 677 (1905).
[12] 1979 Mass. Adv. Sh. at 2585, 399 N.E.2d at 1059. Nickerson v. Dowd, 342 Mass. 462, 174 N.E.2d 346 (1961).
[13] 1979 Mass. Adv. Sh. at 2586, 399 N.E.2d at 1059.
[14] *Id.*
[15] *Id.* at 2586, 399 N.E.2d at 1060.
[16] *Id.* at 2587, 399 N.E.2d at 1060.
[17] *Id.*

Second, the Court rejected the landlord's contention that he had received inadequate notice.[18] The Court observed that, although technical accuracy of pleadings has not traditionally been required in contempt cases, the alleged contemnor should be advised of the charges against him and have a reasonable opportunity to respond to them.[19] In the case at bar, however, the Court concluded that the tenant's motion, followed by the judge's order to show cause, gave the landlord adequate notice of the charges against him and sufficient warning that charges of criminal contempt were in issue.[20]

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[18] *Id.*
[19] *Id.*
[20] *Id.* at 2587-88, 399 N.E.2d at 1060.