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P A R T I I I

Adjective Law

C H A P T E R 20

Civil Procedure and Practice

KENNETH F. JOYCE

§20.1. Collateral estoppel: Effects of prior litigation with reference to non-parties. Traditionally, the doctrine of collateral estoppel by judgment has been said to be available only between litigants who were parties, or in "privity" with parties, to the former adjudication upon which reliance is placed.¹ This general limitation on the application of collateral estoppel has been the subject of a great deal of discussion, pro and con, in the law journals.² While the courts, including the Massachusetts Supreme Judicial Court, have generally adhered to the limitation, a rather broad exception to it has been created "where the liability of a defendant is dependent on the liability of another, or on the existence of a culpable act, that has been determined not to exist in other litigation by the same plaintiff, to which the defendant was neither a party nor a privy."³

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§20.1. ¹ This is sometimes referred to as the requirement of "mutuality," which is said to prohibit a litigant from pleading a former judgment as conclusive on certain issues unless he would be bound if the judgment had gone the other way.

² See, e.g., (opposing) Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 *Stan. L. Rev.* 281 (1957); (favoring) Moore and Currier, *Mutuality and Conclusiveness of Judgments*, 35 *Tul. L. Rev.* 301 (1961); von Moschzisker, *Res Judicata*, 38 *Yale L.J.* 299, 303 (1929). See also Polasky, *Collateral Estoppel-Effects of Prior Litigation*, 39 *Iowa L. Rev.* 217, 241-250 (1954); Seavey, *Res Judicata with Reference to Persons Neither Parties nor Privies*, 57 *Harv. L. Rev.* 98 (1943).

³ Moore and Currier, *supra* at 311. Thus, in *Giedrewicz v. Donovan*, 277 *Mass.* 563, 569, 179 *N.E.* 246, 248 (1931), the Court stated: "As a matter of public policy

A few courts, moreover, have purported to reject entirely the privity or mutuality requirement. In *Bernhard v. Bank of America*⁴ the Supreme Court of California stated, *inter alia*:

The criteria for determining who may assert a plea of *res judicata* differ fundamentally from the criteria for determining against whom a plea of *res judicata* may be asserted. The requirements of due process of law forbid the assertion of a plea of *res judicata* against a party unless he was bound by the earlier litigation. . . . There is no compelling reason, however, for requiring that the party asserting the plea of *res judicata* must have been a party, or in privity with a party, to the earlier litigation.⁵

The better approach, thought the California court, was that:

In determining the validity of a plea of *res judicata* three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party in the prior adjudication?⁶

It has been suggested, however, that if, as seems proper, we are to reject the "blind adoration of the sacred cow of identity of parties," we gain nothing by adopting other equally "wooden tests,"⁷ for "the

and in the interest of accomplishing justice, the better rule would seem to be that, if it is clearly established, in the trial of an action either against the employee or against the principal for damages caused by the employee's negligent conduct, that the employee is not negligent, the judgment in the case first tried is a bar to a subsequent action by the same plaintiff for the same negligent act of the same employee." See *Silva v. Brown*, 319 Mass. 466, 66 N.E.2d 349 (1946). Cf. *Tighe v. Skillings*, 297 Mass. 504, 9 N.E.2d 532 (1937); *McAlevy v. Litch*, 234 Mass. 440, 125 N.E. 606 (1920). See also *Eisel v. Columbia Packing Co.*, 181 F. Supp. 298 (D. Mass. 1960), discussed in 1960 Ann. Surv. Mass. Law §20.4. Compare *Savage v. Macauley*, 302 Mass. 457, 19 N.E.2d 695 (1939). For cases in other jurisdictions applying this exception, see *Moore and Currier*, *supra*, at 311-329.

⁴ 19 Cal. 2d 807, 122 P.2d 892 (1942).

⁵ *Id.* at 811-812, 122 P.2d at 894.

⁶ *Id.* at 812-813, 122 P.2d at 895. In the *Bernhard* case, A, one of the beneficiaries under B's will, objected to the allowance of the account of C, B's executor, on the ground that C had withdrawn certain money from Y bank, money which A claimed should have been included in B's estate. The Probate Court held that the money had been a gift from B to C. A thereupon sued the Y bank, claiming that it had improperly allowed the withdrawal of the money. Y bank was allowed to plead the judgment of the Probate Court against A. See also *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 118, 134 N.E.2d 97, 98 (1956): "Our holding here is not to be treated as adding another general class of cases to the list of 'exceptions' to the rule requiring mutuality of estoppel. It is merely the announcement of the underlying principle which is found in the cases classed as 'exceptions' to the mutuality rule . . . that in determining the applicability of the doctrine of *res judicata* as a defense, the test to be applied is 'identity of issues'."

⁷ *Eisel v. Columbia Packing Co.*, 181 F. Supp. 298, 301 (D. Mass. 1960). Indeed, the three-question test of *Bernhard* has not been followed by the lower appellate courts in California. In *Nevarov v. Caldwell*, 161 Cal. App. 2d 762, 327 P.2d 111 (1958), the court, in refusing to allow a plaintiff, one of several persons injured in

question brooks no such facile solution.”⁸ And as Professor Currie admonished in his article prompted by the *Bernhard* case, “Over and over again it has been demonstrated that, in the use of this doctrine of collateral estoppel, courts must be alert to the danger that its extension by merely logical processes of manipulation may produce results which are abhorrent to the sense of justice and to orderly law administration.”⁹

Albernaz v. City of Fall River,¹⁰ decided during the 1963 SURVEY year, involved a petition under G.L., c. 31, §47E, to enforce certain provisions of the civil service laws. This section provides that welfare employees of cities and towns shall receive certain annual step rate increases in salary. Fall River had accepted the section in 1951, and in 1952 the Director of Civil Service established a compensation plan for welfare employees, setting forth maximum and minimum salaries and providing a table of annual step rate increases. In 1957, 1959, 1960, and 1961, amendments to the plan were adopted, increasing the maximum and minimum salaries and providing for the respective step rate increases. After each amendment the city readjusted its salary scale but did not credit the employees with the step rate increases earned under the prior plans. Instead, if the employee’s salary, as it existed at the time of the amendment, was less than the new minimum, it was increased to the new minimum, but if it exceeded the new minimum, it remained the same, to be increased only according to the step rate increases then in effect.

In 1957 certain employees brought a petition against the city in the Superior Court and were awarded a decree declaring that after each amendment the employees were entitled to receive the new minimum plus the step rate increases earned under the plan prior to the amendment. A similar petition was brought in 1959 by other employees and resulted in a similar decree. In neither case did the city appeal.

In 1962, *Albernaz* and certain other employees, none of whom had been parties to the prior cases, brought another petition and contended that the city was estopped by the 1959 decree from relitigating the issue of whether they were entitled to credit for previously earned step rate increases. The Supreme Judicial Court, reversing a decree of the Superior Court, rejected this contention. The Court noted: “Recent decisions in other courts show a growing tendency to extend the doctrine of collateral estoppel in cases where it is sought to use a prior judgment defensively against a plaintiff.”¹¹ “But,” said the Court,

an automobile accident, the benefit of a prior judgment for another plaintiff against the same defendant, stated: “It is a fair conclusion that the later rulings of [the California Supreme] court evince no inclination to enlarge the application of *Bernhard* to dissimilar situations or to give it universal import.” *Id.* at 772, 327 P.2d at 118.

⁸ Polasky, *Collateral Estoppel-Effects of Prior Litigation*, 39 Iowa L. Rev. 217, 250 (1954).

⁹ Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 281, 289 (1957).

¹⁰ 1963 Mass. Adv. Sh. 963, 191 N.E.2d 771.

¹¹ *Id.* at 965, 191 N.E.2d at 773.

"rarely, if ever has a court allowed a stranger to the first action to use a judgment offensively, as distinguished from defensively, against a party who did not initiate the prior litigation."¹²

The Court's reference to the distinctions between "offensive" and "defensive" use of the prior judgment and to its use by one who was a plaintiff in the prior case and one who was not, seems attributable to Professor Currie's article, cited in the opinion. But the decision does not purport to be based on such distinctions. Indeed, the significance of the opinion seems to lie in the Court's refusal to adopt any such rigid tests.¹³ The Court is of the opinion that "[j]udicial reluctance in allowing strangers to use an earlier judgment is based on principles of fairness." Acceptance of the petitioners' argument might result in "injustice to the city." The city, "unaware that strangers to the [prior] proceedings would seek to use that judgment offensively in subsequent proceedings, may have foregone its right to appeal after determining that the costs and inconvenience of appeal exceeded the costs of satisfying the decree" or for "other reasons, equally good."¹⁴

To be sure, the Court's articulation of its estimate of the fairness of the situation is not beyond question. It is difficult to understand why the decision of a party not to appeal a prior adverse judgment because of cost, inconvenience, or other "good reason" should determine whether it is fair to bind the party by the prior judgment. Giedrewicz¹⁵ may have had "good reason" not to appeal but lack of appeal did not carry the day for him.¹⁶ It could be argued with some force, however, (although it must be conceded that the argument is also applicable to cases like *Giedrewicz*) that whereas the doctrine of collateral estoppel has as one of its stated purposes the minimization of litigation, a rule that an adverse judgment in a prior action will bind a party to that action in favor of a non-party in subsequent actions may, ironically, increase litigation by encouraging, if not compelling, appeals which otherwise would not be taken. In any event it would seem clear that the result in *Albernaz* is proper when we consider that the city was in the position of being faced with a multitude of claimants, not unlike a defendant in a tort action in which many persons have been injured by the same allegedly negligent conduct. In such a situation it would be anomalous, and unfair to the defendant, to hold that irrespective of how many times he obtained a favorable judgment, he can not have the benefit of such judgment against later plaintiffs, but that if he loses to just one anywhere along the line, he is precluded from liti-

¹² *Id.* at 966, 191 N.E.2d at 773.

¹³ Professor Currie himself employs the "offensive-defensive," "plaintiff-defendant" distinctions, as "a tentative working tool" which is "ambiguous" and which "[w]e shall find in the end does not furnish a satisfactory solution for the general problem." Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 *Stan. L. Rev.* 281, 290, 308 (1957).

¹⁴ 1963 *Mass. Adv. Sh.* 963, 966, 191 N.E.2d 771, 773.

¹⁵ *Giedrewicz v. Donovan*, 277 *Mass.* 568, 179 N.E. 246 (1931).

¹⁶ "The fact that a party who might have appealed fails to do so is immaterial." Scott, *Collateral Estoppel by Judgment*, 56 *Harv. L. Rev.* 1, 15-16 (1912).

gating the issue against all those who sue later. To the extent that this argument lacks weight when the decisive issue is, as it was in *Albernaz*, one solely of law, and thus susceptible to final resolution by appeal, it should be noted that the Court approached and decided *Albernaz* without reference to that as a distinguishing factor, and its decision accordingly seems applicable (in fact more properly so) to cases in which the decisive issue is one of fact or of law application, e.g., a finding of negligence.

§20.2. Collateral estoppel: Questions of law affecting third parties. *Bishop v. City of Fall River*,¹ although in other respects raising the same issues decided in the *Albernaz* case,² involved an additional aspect of the doctrine of collateral estoppel by judgment. Three of the petitioning employees in *Bishop* had been petitioners in the 1957 action, which, as heretofore noted, resulted in a decree adverse to the city, from which the city did not appeal. Should these three petitioners fare better than their fellow petitioners who had not been parties to the 1957 action or than the petitioners in *Albernaz*? The Supreme Judicial Court answered in the negative. Noting that “[t]he question presented in this proceeding³ is purely a question of law” and that “[h]itherto, this court has not had occasion to consider the application of res judicata to matters of law when such application would treat members of the same class differently,” the Court accepted, as controlling, the principle stated in Comment *f* to Section 70 of the Restatement of Judgments:⁴

The determination of a question of law by a judgment in an action is not conclusive between the parties in a subsequent action on a different cause of action, even though both causes of action arose out of the same subject matter or transaction, if it would be unjust to one of the parties or to third persons to apply one rule of law in subsequent actions between the same parties and to apply a different rule of law between other persons.⁵

Since the Court had decided in *Albernaz* that the employees were not entitled to credit for prior step rate increases (contrary to the former holdings of the Superior Court), to accept the contention of the three petitioners in *Bishop*, that the 1957 decree estopped the city with respect to them, would have resulted in the three petitioners receiving higher salaries than their fellow employees, who were similarly situated but fortuitously, were not parties to the former action.⁶

¹ §20.2. 1 1963 Mass. Adv. Sh. 969, 191 N.E.2d 769.

² *Bishop* and *Albernaz* were decided on the same day. See §20.1 *supra*.

³ I.e., the construction of G.L., c. 31, §47E and the provisions of the compensation plan.

⁴ (1948 Supplement).

⁵ For an interesting view of the background and history of Section 70, Comment *f*, see Note, Developments — Res Judicata, 65 Harv. L. Rev. 818, 843-844 (1952); see also Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 7-10 (1942).

⁶ The dispute in *Bishop* concerned the rights of the petitioning employees under a compensation plan amendment, which was subsequent to the amendment involved

§20.3. **Notice of filing: Draft reports and bills of exceptions.** District Court Rule 28, which governs, inter alia, the time within which a draft report must be filed with the court, provides: "A copy of such draft report shall be delivered or mailed postpaid by the party requesting the report to the trial Justice and to the adverse party before the close of the next business day after such filing." Failure to mail or deliver the required copies within the stated time limit is grounds for the dismissal of the draft report.¹

In *Famigletti v. Neviackas*² a copy of the draft report was mailed to, and received by, the adverse party before the original was filed in court. The Supreme Judicial Court held that this did not constitute compliance with Rule 28 and that a motion to dismiss the report should have been granted. The Court reached this conclusion by placing on Rule 28 a construction similar to that placed by earlier cases on G.L., c. 231, §113, which deals with notice of the filing of bills of exceptions.³

General Laws, c. 231, §113, provides pertinently, that "The exceptions shall be reduced to writing . . . and filed with the clerk, and notice thereof shall be given to the adverse party" within twenty days after a verdict or decision, unless an extension is granted. This section has been construed to require, on penalty of dismissal of the bill of exceptions, (1) that the bill actually be filed with the clerk before notice of the filing is given to the adverse party,⁴ and (2) that the notice "must state that the filing has taken place as a definitely past fact"⁵ and is not satisfied by "an anticipatory advice or warning of an event expected to come to pass."⁶ In *Checkoway v. Cashman Brothers Co.*,⁷ however, it was held that Section 113 was satisfied when the letter of notice, stating that the bill of exceptions had been filed, reached the adverse

in the 1957 case. It was not strictly necessary, therefore, for the court to resort to the principle stated in Comment f to Section 70, for "where the subsequent action involves parallel facts, but a different historical transaction, the application of the law to the facts is not subject to collateral estoppel." Note, *Developments—Res Judicata, supra*, at 843. See *Restatement of Judgments* §70 (1948). Comment e; *Scott, supra*, at 10; *Commissioner v. Sunner*, 333 U.S. 591, 68 Sup. Ct. 715, 92 L. Ed. 898 (1948). For situations in which no third party rights are involved, see *United States v. Moser*, 266 U.S. 236, 45 Sup. Ct. 66, 69 L. Ed. 262 (1924); but see Note, *Developments—Res Judicata, supra*, at 845.

§20.3. ¹ *Wind Innersole & Counter Co. v. Geilich*, 317 Mass. 327, 58 N.E.2d 134 (1944).

² 324 Mass. 70, 84 N.E.2d 458 (1948).

³ In *Wind Innersole & Counter Co. v. Geilich*, 317 Mass. 327, 329, 58 N.E.2d 134, 134-135 (1944), the Court had stated: "The provision for delivering or mailing a copy of the draft report to the adverse party is closely analogous to the statutory provision for giving notice of the filing of a bill of exceptions to the adverse party. G.L. (Ter. Ed.) c. 231, §113."

⁴ *La Fond v. Registrar of Voters*, 296 Mass. 453, 6 N.E.2d 390 (1937); *Walsh v. Feinstein*, 274 Mass. 597, 175 N.E. 102 (1931).

⁵ See *Checkoway v. Cashman Brothers Co.*, 305 Mass. 470, 471, 26 N.E.2d 374, 375 (1940).

⁶ *Walsh v. Feinstein*, 274 Mass. 597, 598, 175 N.E. 102 (1931). See also *Saunders v. Shoe Lace Co.*, 293 Mass. 265, 199 N.E. 909 (1936); *Arlington Trust Co. v. Le Vine*, 289 Mass. 585, 194 N.E. 725 (1935).

⁷ 305 Mass. 470, 26 N.E.2d 374 (1940).

party after the filing of the bill, even though the bill had not been filed at the time the letter of notice was mailed.⁸

Bowmar Instrument Corp. v. Director of the Division of Employment Security,⁹ decided during the 1963 SURVEY year, casts serious doubt on the correctness of the *Famigletti* case and its value as precedent, and indirectly undermines the prior cases that construed Section 113 and from which *Famigletti* drew its construction of District Court Rule 28.

Bowmar involved an appeal by *Bowmar* to the Supreme Judicial Court from a decision of the District Court that had upheld a determination of the director.¹⁰ Rule 7 of those Rules of the District Court, which deal with appeals in employment security cases,¹¹ provides in part that:

To perfect the claim of appeal to the Supreme Judicial Court the aggrieved party shall file with the clerk a draft report within five days of the filing of the claim of appeal. . . . A copy of the draft report shall be delivered or mailed postpaid forthwith by the appealing party to all adverse parties or their attorneys and one to the trial judge.

Within five days of claiming its appeal, *Bowmar* mailed the original of a draft report to the District Court and at the same time mailed copies to the judge and to the attorney for the director. The director moved in the District Court to dismiss the draft report on the ground that "The copies of the Draft Report mailed to the trial judge and to the [attorney] for . . . the adverse [party] were mailed prior to the filing of the Draft Report with the clerk of this Court."¹² The District Court granted the director's motion but the Supreme Judicial Court reversed.

At the outset, the Court agreed with *Bowmar* that even under the *Famigletti* construction of Rule 28, "the time of mailing is not the decisive factor; it is the time of receipt of what is mailed that is controlling."¹³ The Court, however, preferred "to rest [its] decision on

⁸ We see no reason why the excepting party may not deliver the notice through the post office, if he is willing to take the chance that it will actually reach the opposing party or his counsel in person, as it did in this case, after the exceptions have reached the clerk's office and before the expiration of the twenty days." *Id.* at 472, 26 N.E.2d at 375. See also *Curran v. Burkhardt*, 310 Mass. 466, 38 N.E.2d 622 (1941), where Section 113 was held to be satisfied by a letter of notice which reached the adverse party after the exceptions were filed, although the letter inadvertently stated that the exceptions had been filed two days earlier than the actual filing date.

⁹ 346 Mass. 53, 190 N.E.2d 79 (1963).

¹⁰ The decision of the District Court formally consisted in the affirmance of the decision of the board of review (G.L., c. 151A, §42) which had modified and affirmed the director's decision (G.L., c. 151A, §§40, 41).

¹¹ It was this Rule 7 and not District Court Rule 28 that, as the Supreme Judicial Court held, governed the case under discussion.

¹² 346 Mass. 53, 54, 190 N.E.2d 81 (1963). The director advanced another ground for his motion but it is not pertinent here.

¹³ *Id.* at 57, 190 N.E.2d at 81. Interestingly, the Court cited as authority for this proposition, the *Checkoway* case, 305 Mass. 470, 26 N.E.2d 374 (1940), which, as we have seen, dealt not with draft reports under Rule 28 but with bills of exceptions under G.L., c. 231, §113.

broader grounds" and thus assumed that the copy of the draft report was received by the director before the original was received and filed in the District Court. The "broader grounds" of the Court's decision consisted in its refusal to construe Rule 1 as *Famigletti* had construed Rule 28:

We think this rule [Rule 1] is complied with if the appealing party files his report within the time required by the rule and contemporaneously, as here, mails a copy to the trial judge and to the adverse parties, and that it is not fatal if the copies are received by them prior to the time of the filing of the original in court.¹⁴

With respect to the cases which had construed Rule 28 and G.L., c. 231, §113, differently than Rule 1 was now being construed, the Court stated:

*Whether the rule laid down in these cases would now be followed we need not decide. In any event we are not disposed to apply the holding of these cases to any situation unless the applicable statute or rule in terms require it. It is a matter of common knowledge that lawyers often use the mails to file documents in court and that it is customary and convenient at the same time to mail copies to the persons entitled to receive them. It is both inconvenient and burdensome to require them to make sure that the original has been filed first . . . especially . . . where, as is often the case, they are practicing in a place at some distance from the place where the document is to be filed. Even when they mail the copy to opposing counsel subsequent to the mailing of the original they can never be sure that the copy will not arrive before the original, due to some delay in the mails. To require the original to be filed first is unrealistic and often leads to controversies of a highly technical sort. [citing as examples, *Arlington Trust Co. v. Le Vine*,¹⁵ *LaFond v. Registrars of Voters*,¹⁶ and *Checkoway v. Cashman Bros. Co.*,¹⁷ all of which involved bills of exceptions under c. 231, §113].¹⁸ (Emphasis supplied.)*

The holding in *Bowmar* seems clearly proper. Moreover, the reasoning of the case, as the opinion itself all but states, is equally applicable to draft reports under Rule 28 and bills of exceptions under G.L. c. 231, §113. As with Rule 1, neither Rule 28 nor G.L., c. 231, §113, "in terms requires" that the original be filed in court before the adverse party receives a copy;¹⁹ and it is just as "inconvenient," "burdensome,"

¹⁴ *Id.* at 56-57, 190 N.E.2d at 82.

¹⁵ 289 Mass. 585, 194 N.E. 725 (1935).

¹⁶ 296 Mass. 453, 6 N.E.2d 390 (1937).

¹⁷ 305 Mass. 470, 26 N.E.2d 374 (1940).

¹⁸ 346 Mass. 53, 57, 190 N.E.2d 79, 82 (1963).

¹⁹ The words "after" in Rule 28 and "thereof" in G.L., c. 231, §113 (see *Checkoway v. Cashman Bros. Co.*, 305 Mass. 470, 471, 26 N.E.2d 374, 375 (1940)), no more constitute this "in terms" requirement than did the word "forthwith" in Rule 7 (see the *Bowmar* case, 346 Mass. 53, 56, 190 N.E.2d 79, 82 (1963)).

and "unrealistic" to read such a requirement into Rule 28 or G.L., c. 231, §113, as it would have been to read it into Rule 1.

Curiously, however, the Court in *Bowmar* did not see fit to overrule *Famigletti* or the cases which have placed a like construction on G.L., c. 231, §113. Nor was the Court less hesitant to do so when, two months after *Bowmar* it decided *Perma-Home Corp. v. Nigro*,²⁰ a case which, unlike *Bowmar*, directly involved Rule 28.

Perma-Home was an action of contract in which the District Court had found for the plaintiff. The defendant deposited the draft report addressed to the clerk at 6 P.M. on December 7, 1961, in a mailbox "from which regular pickups were scheduled twenty-four hours a day. A few minutes later he deposited simultaneously the copies addressed to the judge and opposing counsel in another mailbox . . . from which no pickups were scheduled after 5:15 P.M."²¹ The original was received and filed by the clerk at 9 A.M. on December 8. The judge received his copy after 1 P.M. on December 8. There was no direct evidence when the plaintiff's attorney received his copy.

The Supreme Judicial Court stated:

Even if the *Famigletti* case were to be followed . . . [referring to *Bowmar*], the filing party may use the mails and take the chance that the copy intended for the opposing party will not reach him until after the report has reached and been filed in the clerk's office and yet reach him before the close of the next business day.²²

The Court held that it was "clearly inferable" that the plaintiff's attorney received his copy after the original was filed and that there thus was "compliance even with the rule as heretofore construed. *Checkoway v. Cashman Bros. Co.*, 305 Mass. 470, 472."²³

One wonders at the wisdom of the Court's reluctance, in *Bowmar* and *Perma-Home*, to overrule *Famigletti* and the parallel G.L., c. 231, §113, cases. As the Court recognized in *Bowmar*, questions of this sort are "bound to reoccur, and ought to be settled,"²⁴ and the *Perma-Home* case is itself proof that retention of the prior construction, even if only arguendo, "leads to controversies of a highly technical sort."²⁵

One may admire the strategy, if that it was, of the defendant's attorney in *Perma-Home* in his use of the two mailboxes, but one would be hard put to explain why attorneys in his position should have to continue resorting to such practices until the Court is forced to overrule the prior cases.

§20.4. Trustee process: Requirement of a bond. Prior to 1938,

²⁰ 1963 Mass. Adv. Sh. 977, 191 N.E.2d 745.

²¹ *Id.* at 979, 191 N.E.2d at 747.

²² *Ibid.*

²³ 26 N.E. 374, 375 (1940). The reference to the *Checkoway* case is not strictly accurate for, as we saw in connection with the *Bowmar* case, 346 Mass. 53, 190 N.E.2d 79 (1963), *Checkoway* involved a construction of G.L., c. 231, §113, and not of Rule 28. See note 13 *supra*.

²⁴ 346 Mass. 53, 56, 190 N.E.2d 79, 82 (1963).

²⁵ *Id.* at 57, 190 N.E.2d at 82.

G.L., c. 246, §1, provided that all "personal" actions, except malicious prosecution, slander, libel, assault and battery, and replevin, could be commenced by trustee process. The prohibitions contained in the excepted categories were interpreted as going "to the validity of the action and the jurisdiction of the court."¹

In *Guarino v. Russo*,² a tort action commenced by trustee writ, the original declaration contained four counts, none of which was within the excepted categories. It was held that the trial court erred in allowing the plaintiff to add a fifth count, for malicious prosecution (one of the excepted categories). In *MacCormac v. Hannan*,³ commenced by trustee writ, the declaration, in one count, alleged a cause of action in libel (an excepted category). It was held that the defendant was entitled to a dismissal of the action, and that the trial court had no jurisdiction to allow a curing amendment to the declaration. In *Poorun v. Weisburg*⁴ and *A. Sandler Co. v. Portland Shoe Manufacturing Co.*,⁵ the principle of the *MacCormac* case was extended to the situation in which the declaration contains multiple counts, one or more of which is within the excepted categories, the others being within the allowable class. The Supreme Judicial Court held in these cases that the presence of a count within the excepted categories vitiates the whole action, and that the trial court is without jurisdiction to allow an amendment striking the offending count or counts.

In 1938 a further limitation on the use of the trustee process was added to G.L., c. 246, §1, by an amendment which provided:

. . . except in the case of a writ which contains a statement that the action is upon a judgment or in contract for personal services or for goods sold and delivered or for money due under a contract in writing or in tort to recover damages on account of the operation of a motor vehicle not registered in the Commonwealth, no writ the ad damnum of which is in excess of one thousand dollars shall be served upon any alleged trustee unless there shall have been filed by the plaintiff . . . in the court wherein such action is commenced a bond.⁶

In *Farber v. Lubin*,⁷ an action of contract, the trustee writ, carrying an ad damnum of \$2500, stated that it was "an action of contract (in writing)." The declaration alleged the breach of certain provisions of a lease. No bond was filed. "[T]he questions," said the Court, "are

§20.4. ¹ *Guarino v. Russo*, 215 Mass. 83, 84-85, 102 N.E. 128 (1913).

² *Ibid.*

³ 248 Mass. 86, 143 N.E. 270 (1924).

⁴ 286 Mass. 526, 190 N.E. 804 (1934).

⁵ 291 Mass. 326, 197 N.E. 1 (1935).

⁶ "The enactment of c. 246, §1, as amended, was to prevent the abuse of the power to attach on trustee process. . . . In all but five enumerated classes of cases, the requirement of a bond is absolute. And since, in the usual case, the writ chronologically precedes the declaration, it is made obligatory that the writ contain a statement that the action is one of those five classes." *Farber v. Lubin*, 327 Mass. 128, 130, 97 N.E.2d 419, 420 (1951).

⁷ 327 Mass. 128, 97 N.E.2d 419 (1951).

whether the cause of action alleged in the declaration is 'for money due under a contract in writing' within the meaning of §1 [of c. 246] . . . and whether the writ contains a 'statement' to that effect."⁸ The Court interpreted certain of the allegations of the declaration as raising claims for damages for breach of contract, rather than for "money due under a contract in writing." For this reason, and since "[t]he statement that this is 'an action of contract (in writing)' is not a statement that it is an action 'for money due under a contract in writing,'"⁹ the granting of the defendant's motion to dismiss was sustained.

In *Buono v. Nardella*,¹⁰ an action of contract, the trustee writ, carrying an ad damnum of \$10,000, stated that it was "an action of contract for goods sold and delivered and money due under written contract." No bond was filed. The declaration was in five counts, some of which were within the exception for "money due under a contract in writing." One count, however, was interpreted to be within neither that exception nor the exception "for goods sold and delivered." Analogizing the situation to that existing in *A. Sandler Co. v. Portland Shoe Manufacturing Co.*,¹¹ the Court held that the defendant's motion to dismiss was properly granted and that the plaintiff attempted waiver of the offending count prior to the defendant's motion to dismiss was to no avail.

The 1963 SURVEY year produced a new wrinkle in this area. *Tennessee Plastics Inc. v. New England Electric Heating Co.*,¹² was an action of contract commenced by trustee writ, the ad damnum of which was \$5000. No bond was filed. The writ stated that it was "an action of contract for goods sold and delivered." The declaration, however, alleged claims for money due the plaintiff from the defendant on eight promissory notes. The defendant moved to dismiss the action under G.L., c. 246, §1. The plaintiff moved to amend the writ by adding the words "or for money due under a contract in writing." The trial judge granted the defendant's motion and denied the plaintiff's.

The Supreme Judicial Court held that the motion to dismiss should not have been granted and that the trial judge had jurisdiction to allow, in his discretion, the plaintiff's motion to amend the writ.¹³ The Court stated that without an amendment to the writ, dismissal of the action would have been proper, "for the action was not for 'goods sold and delivered,' even though, as the record suggests, the notes may have been in payment for goods sold."¹⁴ It was of the opinion, however, that when "a writ contains a statement that comes within one of the exceptions in §1 and the action is not grounded on that exception but upon one of the other exceptions mentioned in that section, . . . the

⁸ *Id.* at 130, 97 N.E.2d at 420.

⁹ *Ibid.*

¹⁰ 344 Mass. 257, 182 N.E.2d 142 (1962).

¹¹ 291 Mass. 326, 197 N.E. 1 (1935).

¹² 345 Mass. 575, 188 N.E.2d 569 (1963).

¹³ Since the Court thought that the trial judge probably denied the plaintiff's motion to amend because of a mistaken conclusion that he had no power to grant it, the Court vacated the denial so that the motion could be reheard.

¹⁴ 345 Mass. 575, 577, 188 N.E.2d 569, 571 (1963).

court in which the action [is] brought [is] not without jurisdiction and has the power to entertain a motion to amend." ¹⁵

§20.5. Transfer Act: Trial upon retransfer. Under G.L., c. 231, §102C, inserted by Acts of 1958, c. 369, §3, the Superior Court is authorized, in any action of tort or contract, sua sponte or on the motion of a party, to transfer the case to an appropriate District Court for trial by a full-time justice "after determination . . . that if plaintiff prevails, there is no reasonable likelihood that recovery will exceed two thousand dollars."¹ A party aggrieved by the result of the District Court trial may as of right have the case retransferred to the Superior Court. "The action," Section 102C further provides, "shall thereafter be tried in the Superior Court. The decision of . . . a district court shall be prima facie evidence upon such matters as are put in issue by the pleadings. . . ." ²

In *Nuger Sales & Service, Inc. v. Pioneer Credit Corp.*³ an action of contract filed originally in the Superior Court was transferred, pursuant to Section 102C, to the District Court which, after trial on the merits, filed a decision in favor of the plaintiff. On the defendant's request, the case was retransferred to the Superior Court. The plaintiff thereupon filed a motion for judgment based solely on the District Court decision. The motion was subsequently granted, in the defendant's absence. The Supreme Judicial Court held that the allowance of the plaintiff's motion was error. "The statute gives the defendant, upon retransfer, the right to a trial in the Superior Court. This means a trial on the merits, not a routine allowance of a motion for judgment on the finding of the District Court judge." ⁴

§20.6. Petition for late appeal in equity: Discretion of single Justice. Prior to 1960, a party who failed to file a timely claim of appeal

¹⁵ *Ibid.* In *Buono v. Nardella*, 344 Mass. 257, 258, 182 N.E.2d 142, 143 (1962), the Court had said: "In order to comply with G.L., c. 246, §1, each count must fall within the categories stated in the writ . . . [citing *Farber v. Lubin*, 327 Mass. 128, 97 N.E.2d 419 (1951).]" (Emphasis supplied.) This language, if intended as a statement of a jurisdictional prerequisite, is, in the light of the *Tennessee Plastics* case, no longer accurate. Under *Tennessee Plastics* the jurisdiction of the trial court is not defeated if each count falls within the exceptions stated in G.L., c. 246, §1, and the writ states that the action falls within one such exception.

¹ The amount was increased from \$1000 to \$2000 by Acts of 1962, c. 305.

² In *Lubell v. First National Stores, Inc.*, 342 Mass. 161, 172 N.E.2d (1961), noted in 1961 Ann. Surv. Mass. Law §21.3, it was held that implicit in the statutory provision for a "trial" in the District Court to which the action is transferred was the right of a party to have questions of law arising at such "trial" reported to the Appellate Division; that disposition by the Appellate Division of questions of law so reported was a prerequisite to the District Court decision's attaining its prima facie effect upon retransfer, if any, to the Superior Court; that questions of law decided by the Appellate Division in this procedure were not subject to review by the Supreme Judicial Court under G.L., c. 231, §109; and that the case could be reviewed by the Supreme Judicial Court only (1) after final disposition by the Appellate Division of any questions of law reported to it, and (2) after trial in the Superior Court upon retransfer.

³ 345 Mass. 249, 186 N.E.2d 709 (1962).

⁴ *Id.* at 251, 186 N.E.2d at 710-711.

in equity, could obtain relief under G.L., c. 214, §28, only by a petition to the full bench of the Supreme Judicial Court and only on grounds of "accident or mistake." Acts of 1960, c. 207, amended G.L., c. 214, §28, so that petitions for leave to appeal in equity now "may be granted upon terms by *any of the justices*" of the Supreme Judicial Court and on the grounds of "mistake or accident or *other sufficient cause.*"¹ (Emphasis supplied.)

Two cases decided during the 1963 SURVEY year would appear to indicate that the 1960 amendment will be liberally applied. In *Trager, Petitioner*,² the trial judge who had heard the evidence did not complete consideration of the case. The evidence, by agreement of the parties, was submitted to another judge who made findings and entered a decree on June 26, 1962. At that time, or shortly thereafter, the petitioner's attorney received a copy of the findings and was sent a copy of the decree bearing the notation "filed." The single Justice found that "[b]y mistake and in good faith, counsel for the petitioner assumed this decree to be a form of draft decree upon the entry of which a hearing would later be held"; that upon returning from a vacation the petitioner's attorney discovered about July 22 or 23, 1962, that he had failed to file a timely claim of appeal; that at all times he intended to appeal; and that there had been no prejudicial change of position by any defendant. The Supreme Judicial Court held that these facts could be found to constitute "mistake or accident or other sufficient cause" within G.L., c. 214, §28, as amended.

*City of Fall River, Petitioner*³ involved a suit by city employees (Albernaz et al) against the city to enforce certain provisions of the civil service law. On May 29, 1962, an order for a decree was entered. At the same time an order for a decree was entered in a companion case, brought by other employees (Bishop et al). Both decrees were to be adverse to the city. After attorneys for Albernaz et al and for the city had conferred and agreed as to the form of the decree, the final decree was entered on July 25, 1962, and notice of its entry was sent to both sides. A final decree in *Bishop* was not entered until August 15, 1962, notice again being sent to both sides. An appeal was seasonably claimed by the city in *Bishop* but not in *Albernaz*. The attorney for the city stated that the notice of the *Albernaz* decree first came to his attention on August 23, 1962, when he began to prepare

§20.6. ¹ General Laws, c. 214, §28, as amended reads in full: "A party who has, by mistake or accident or other sufficient cause, omitted to claim an appeal from a final decree within the time prescribed therefor may, within one year after the entry of the decree from which he desires to appeal, petition the supreme judicial court for leave to appeal, which may be granted upon terms by any of the justices of that court. Such petition shall be filed with the clerk of the supreme judicial court for Suffolk county." Acts of 1960, c. 207, also amended G.L., c. 211, §11 [late entry of appeals, bills of exceptions, and reports], and G.L., c. 215, §15 [late claim of appeal from probate decrees].

² 345 Mass. 650, 189 N.E.2d 507 (1963).

³ 1963 Mass. Adv. Sh. 959, 191 N.E.2d 774. See further discussion of the basic dispute among the parties in §20.1. 20.2 *supra*.

both the *Albernaz* and *Bishop* cases for appeal. Petition for late appeal was filed by the city in the *Albernaz* case on September 5, 1962.

The single Justice found that "the notice of final decree dated July 25, 1962 was received in the office of the corporation counsel in due course, but through accident or mistake did not come to the attention of the corporation counsel or his assistant in charge of the case." He ruled that the failure to claim the appeal seasonably "was by accident and mistake within the requirements of G.L. c. 214, §28" and "that the appeal will present a meritorious case."⁴

The Supreme Judicial Court affirmed, concluding that the single Justice "did not exercise his discretion improperly." The Court was of opinion that "at least since the amendment of G.L., c. 214, §28, by St. 1960, c. 207, §2, a justice of the Supreme Judicial Court has authority and discretion to permit a late appeal in circumstances where such action will tend to accomplish justice and prevent the loss of an appeal because of a mistake of counsel made in good faith."⁵

§20.7. Auditors: Supplementary report on damages. In 1961, Rule 86 of the Superior Court was amended to provide that an auditor whose findings of fact are not to be final, is "to hear the parties, examine their vouchers and evidence, state accounts, find the subsidiary facts on each issue tried, including the issue of damages, and report them and his general findings based on such subsidiary findings to the court . . ." At the time the amendment was adopted, the committee on rules of the Superior Court issued a notice with respect to auditors whose findings were not to be final, stating, *inter alia*:

If the general finding of the auditor is for the defendant, the auditor shall, nevertheless, find the subsidiary facts, if any, on the issue of damages alleged; and, if damages are proved upon the subsidiary facts found, he shall assess full damages thereon. (It is recommended in such case that all the findings on damages shall be reported in a supplementary report . . . filed with his report.)

In *Clarke v. Turke*¹ the Supreme Judicial Court held that when an auditor, whose findings were not to be final, submitted an "auditor's report" in which he found for the defendant and an "auditor's supplementary report" in which he found the amount of plaintiff's damages, it was not error to allow the "supplementary report" on damages to be read to the jury and to instruct the jury that, if they found the

⁴ *Id.* at 960, 191 N.E.2d at 776.

⁵ *Ibid.* The Court stated that "while we are not disposed to interpret this and the related statutes amended by St. 1960, c. 207, so as to encourage or condone 'carelessness, ignorance, [or] laxity' on the part of counsel . . . neither are we disposed to construe them so as to thwart their purpose: the relief from hardship in meritorious cases." *Id.* at 961, 191 N.E.2d at 776. The attorney for the city, in his brief to the full Court, admitted that "no reason can be ascribed for failure to become cognizant of the postcard [giving notice of the entry of the final decree in the *Albernaz* case] but," he stated "the fact remains that counsel for the city was not aware in time to seasonably file its appeal." *Id.* at 960-961, 191 N.E.2d at 776.

§20.7. 1 345 Mass. 516, 188 N.E.2d 560 (1963).

defendant liable, the "supplementary report" was to be given prima facie effect.

§20.8. **Auditors: Inclusion of exhibits as part of report.** In *City of Medford v. Fellsmere Realty Co.*,¹ the bill of exceptions purported to incorporate seven exhibits introduced in the proceedings before an auditor, and to provide for their use at the oral argument or on the briefs before the Supreme Judicial Court. Although the Court did not refuse to consider the exhibits, noting that certain of them had been so mentioned in the auditor's report as to be incorporated therein by reference, it did note that good practice called for the filing with the clerk, as an express part of the report, any exhibits intended to be included therein.

§20.9. **Peremptory challenges in civil cases.** Acts of 1963, c. 187, amended G.L., c. 234, §29, to increase to four the number of peremptory challenges allowed in civil cases.

§20.8. ¹ 345 Mass. 477, 187 N.E.2d 849 (1963).