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Chapter 23: Administration of Justice

Alan J. Dimond

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The year 1956 saw major developments in the administration of justice. The district courts were reorganized; multiple and resolute attacks were made on the congestion in the Superior Court; the Probate Courts adopted uniform forms and were knit more closely together in their administrative practices; pensions of future judges were conditioned on prompt retirement after pension rights accrue; and, above all, the Supreme Judicial Court, for the first time, was clearly entrusted with general supervision of the internal administration of all the courts of the Commonwealth, and was provided with an executive secretary to assist it in the performance of this work.

The impetus for many of the changes was the report in early February, 1956, of the Judicial Survey Commission, a twenty-seven member group of private citizens appointed by Governor Herter in January, 1955, in response to a request of the Massachusetts Bar Association, to make "a study of the administration of justice in all of the courts of the Commonwealth." The Honorable Louis S. Cox, a former justice of both the Supreme Judicial Court and Superior Court, was the chairman. Of the other members, thirteen were laymen, being newspaper editors and publishers, labor leaders, business executives and members of the clergy. The rest were lawyers.¹

Lay participation in law reform is not new.² In the past it has often played a major role in bringing about important legal changes, especially in judicial organization, procedure, and administration.

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¹ The Commission's Report was printed as House No. 2620. The names of the members of the Commission are printed in 41 Mass. L.Q., No. 1, p. xvi (Mar. 1956). The Commission's report is also printed therein. Twenty-four of the twenty-seven members participated in the Commission's deliberations and signed its report. For the action of the Massachusetts Bar Association in requesting the creation of the Commission, see the Record of the 43rd Annual Meeting, June 26, 1954, 39 Mass. L.Q., No. 3, pp. 6, 7 (1954).

Failure of laymen to take a larger part in the amendment of the law may perhaps be due to an attitude that the sole function of non-lawyers in a legal system is to serve as jurors, witnesses, and parties, but that any correction of the law should be left to the steady hands of the bench and bar. The informed layman, however, has much to contribute. Viewing the law through the broad and uncommitted lens of the non-specialist, he can often see flaws, especially in general structure, that the lawyer, with his focus confined to the immediate particular tasks of daily practice, does not always perceive. And when the lawyer and the informed layman work together in a common dedication to the public good, they can fuse professional judgment and lay common sense into a product which the bench, bar, and the public can all understand and to which they may all respond. This was certainly true of the report of the Judicial Survey Commission.

The Commission’s report was comprehensive, detailed, and candid, covering all the courts of the Commonwealth. Particular attention was paid to their administrative practices since courts, if they are to be the ultimate guarantees of freedom and justice, must not only be impartial and independent; they must be efficient as well.

The Commission observed that the Supreme Judicial Court was “maintaining the high traditions of its past”; the Probate Courts had an “enviable reputation throughout the country for their organization and substantive law”; and the Land Court was “fulfilling satisfactorily its function in the specialized field of registered real estate titles.” Congestion-breaking measures recently adopted by the justices of the Superior Court were warmly endorsed.

But the Commission also found defects, many of them serious, in the organization of the courts and in their administration. Recommendations for the correction of these defects were presented, some calling for action by the legislature, while others called for action or continued action by the courts. These various recommendations, and their outcome in 1956, make up the main subject matter of this chapter.

A. The Business of the Courts

§23.1. The Superior Court. Continuing the statistical tables contained in the previous volumes of the Annual Survey, the following figures, mostly gathered by the Judicial Council, indicate significant aspects of court business for the year ending June 30, 1956, as against like aspects in the years immediately preceding. Table I includes a new set of figures reflecting the effect of the introduction of the non-triable law docket in the Superior Court on April 1, 1956, discussed more fully at a later point in this chapter, whereby inactive cases are transferred to a suspense account some time before being written off as “disposed of” under Superior Court Rule 85.
§23.1  ADMINISTRATION OF JUSTICE  227

TABLE I

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Undisposed of cases beginning of year</td>
<td>56,318</td>
<td>59,837</td>
<td>59,504</td>
<td>66,381</td>
<td>66,483</td>
</tr>
<tr>
<td>Entries during year</td>
<td>31,587</td>
<td>33,060</td>
<td>33,946</td>
<td>32,366</td>
<td>31,586</td>
</tr>
<tr>
<td>Dispositions during year</td>
<td>27,990</td>
<td>34,045</td>
<td>29,015</td>
<td>30,611</td>
<td>32,923</td>
</tr>
<tr>
<td>Undisposed of cases end of year</td>
<td>60,043</td>
<td>50,445</td>
<td>64,027</td>
<td>67,416</td>
<td>67,529</td>
</tr>
<tr>
<td>Undisposed of law cases end of year</td>
<td></td>
<td></td>
<td></td>
<td>61,105</td>
<td></td>
</tr>
<tr>
<td>Remaining triable law docket end of year</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>48,702</td>
</tr>
</tbody>
</table>

The obvious internal discrepancy in the 1955-1956 figures is the increase of the number of undisposed cases at the end of the year over the number of such cases at the beginning of the year notwithstanding the excess of entries over dispositions. Professor Richard H. Field has called attention to similar discrepancies before. It is, however, significant to note that this year for the first time during the last ten years (except 1953 when there were general calls of the lists in Suffolk and Middlesex counties) the Superior Court disposed of more cases than were entered.

TABLE II

<table>
<thead>
<tr>
<th>Average Number of Months' Waiting Period for Jury Trials</th>
</tr>
</thead>
<tbody>
<tr>
<td>1954-55</td>
</tr>
<tr>
<td>---------</td>
</tr>
<tr>
<td>Worcester</td>
</tr>
<tr>
<td>Middlesex</td>
</tr>
<tr>
<td>Suffolk</td>
</tr>
<tr>
<td>Hampden</td>
</tr>
<tr>
<td>Norfolk</td>
</tr>
<tr>
<td>Essex</td>
</tr>
<tr>
<td>Salem</td>
</tr>
<tr>
<td>Lawrence</td>
</tr>
<tr>
<td>Newburyport</td>
</tr>
<tr>
<td>Berkshire</td>
</tr>
<tr>
<td>Franklin</td>
</tr>
</tbody>
</table>

About all that can be said for these figures is that as the result of the reduction of the waiting time in Worcester, that county has


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yielded to the Supreme Court of Queens County, New York, the
doubtful distinction of being the most congested state court in the
country. But Worcester was, nevertheless, the third most congested
state court. Suffolk was the seventh and Hampden was the eleventh.2

**TABLE III**

<table>
<thead>
<tr>
<th>Number of Days That Superior Court Judges Sat</th>
<th>1953-54</th>
<th>1954-55</th>
<th>1955-56</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil jury</td>
<td>2806</td>
<td>2894½</td>
<td>2975¼</td>
</tr>
<tr>
<td>Non-jury</td>
<td>1573</td>
<td>1452½</td>
<td>1406</td>
</tr>
<tr>
<td>Criminal</td>
<td>1120</td>
<td>1272½</td>
<td>1099½</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>5499</td>
<td>5619½</td>
<td>5481</td>
</tr>
</tbody>
</table>

The average number of days that Superior Court justices sat was
171 or 34 five-day weeks, against 175½ or 35 five-day weeks in 1954-
1955. Such averages must, of course, be considered with discrimination
taking into account illnesses of particular justices and periods when
a vacancy in the office of a justice may remain vacant pending the
making of a new appointment.

§23.2. The District Courts and the Municipal Court of the City
of Boston.

**TABLE IV**

<table>
<thead>
<tr>
<th>District Court Business</th>
<th>1953-54</th>
<th>1954-55</th>
<th>1955-56</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil writs entered</td>
<td>57,102</td>
<td>63,798</td>
<td>73,868</td>
</tr>
<tr>
<td>Removals to Superior Court</td>
<td>3,998</td>
<td>9,248</td>
<td>13,569</td>
</tr>
<tr>
<td>Motor tort removals</td>
<td>2,599</td>
<td>7,756</td>
<td>11,965</td>
</tr>
<tr>
<td>Criminal cases begun</td>
<td>202,334</td>
<td>202,126</td>
<td>201,730</td>
</tr>
<tr>
<td>Small claims</td>
<td>73,182</td>
<td>70,877</td>
<td>68,153</td>
</tr>
</tbody>
</table>

The indicated increase in the number of civil writs entered in 1955-
1956 as well as in removals may be attributed to the first full year’s
operation of the Fielding Act requiring all motor tort cases to be
entered in a District Court.

The figures of the District Courts, including the Boston Municipal
Court, also show the effect of the Fielding Act. There were 35,845
motor tort actions entered in these courts, and 16,809 were removed
to the Superior Court, leaving 19,036 or 53 percent remaining. This
percentage compares favorably with a figure of 57 percent as the

2 Institute of Judicial Administration, State Trial Courts of General Jurisdiction,
Calendar Status Study (1956).
average remaining during the 1938-1942 period of the earlier Fielding Act and may be contrasted with 46 percent as the average remaining after repeal during the 1947-1951 period, 46 percent for 1952, and 47 percent for 1953, all prior to the re-enactment of the Fielding Act in 1954.

**TABLE V**

The Ratio of Trials to Entries in the District Courts

<table>
<thead>
<tr>
<th></th>
<th>1954-55</th>
<th>1955-56</th>
</tr>
</thead>
<tbody>
<tr>
<td>Summary process</td>
<td>44%</td>
<td>38%</td>
</tr>
<tr>
<td>Motor vehicle tort</td>
<td></td>
<td></td>
</tr>
<tr>
<td>cases not removed</td>
<td>18%</td>
<td>14%</td>
</tr>
<tr>
<td>Other torts</td>
<td>15%</td>
<td>15%</td>
</tr>
<tr>
<td>Contract</td>
<td>7%</td>
<td>6%</td>
</tr>
<tr>
<td>Other</td>
<td>17%</td>
<td>18%</td>
</tr>
</tbody>
</table>

The over-all percentage in 1954-1955 was 16 percent. In 1955-1956 it was 13½ percent. In the Superior Court for 1955-1956 the ratio of trials to entries was 10 percent. The District Court decline in trials of summary process actions was probably due to the expiration on April 30, 1955, of rent control legislation together with its litigation-creating limitations on the right to evict.

**§23.3. The full-bench business of the Supreme Judicial Court.** During the 1956 Survey year the full bench of the Supreme Judicial Court decided 248 cases, of which 152 (or 61.3 percent) were affirmed with an opinion, 26 (or 10.5 percent) were affirmed without an opinion, and 70 (or 28.2 percent) were reversed. The justices of the Supreme Judicial Court also rendered five advisory opinions.

**B. THE JUDICIAL SURVEY REFORMS**

**§23.4. Introduction.** The most important development in the administration of justice in 1956 was the enactment of Chapter 707 of the Acts of 1956. This statute, the foremost recommendation of the Judicial Survey Commission and enacted substantially as proposed, clearly entrusts the Supreme Judicial Court, for the first time, with general supervision of the administration of all the lower courts, and provides the justices of the high court with an executive secretary to assist them in their performance of this function. To place the new statute in perspective, the main features of the administration of the Massachusetts judicial system are outlined below.

**§23.5. Background in the Superior Court.** Administrative responsibility in the Superior Court is divided among the chief justice, the collective membership of the court as a whole, and the individual justices. It is not always easy to tell just where responsibility for a
particular function is lodged, for the statutes do not always speak with consistency or precision.\(^1\)

When a responsibility is to be conferred on the chief justice, a statute must say so.\(^2\) And certain statutes do. Since 1910 a statute has given the chief justice authority to assign associate justices to particular sittings and sessions.\(^3\) Prior to that date the power of assignment was vested in all the justices who were permitted to work out the problem among themselves.\(^4\) The chief justice also has authority to establish special sittings and sessions, in addition to those prescribed by statute, and to “designate the class or classes of business for which any sitting or session is established,” a function conferred on the chief justice by temporary legislation in 1927\(^5\) and 1928,\(^6\) and by permanent legislation in 1932.\(^7\) Authority to call up District Court justices to sit on misdemeanor and motor tort cases in the Superior Court and to establish sittings at which such cases shall be heard is another responsibility of the chief justice.\(^8\) To assist him in the performance of his various administrative duties, he has been provided with an executive clerk since 1924.\(^9\)

Where the applicable statutes do not specifically entrust an administrative function to the chief justice, they may confer it upon the justices of the court as a whole.\(^10\) During 1956 collective action by the justices in discharge of their common responsibility resulted in the re-establishment of the 1935-1942 motor tort auditor system, the reinvigoration of the pretrial conference, the creation of the non-triable law docket, and

\(\S 23.5.\) 1 Catheron v. County of Suffolk, 227 Mass. 598, 116 N.E. 885 (1917), draws a distinction between statutes referring to the “justices” of a court and statutes speaking only of a “court.” In the latter case any judge holding a commission as a member of the court is deemed to be vested with the authority conferred on the court whereas in the former case the collective body of all the justices of the court is regarded as the repository of the authority. See also Commonwealth v. Gedzium, 261 Mass. 299, 159 N.E. 51 (1927).

2 The responsibilities of a chief justice of any court are to some extent the result of customs and traditions within the court. But it is believed that in the Superior Court such customs and traditions do not add significantly to the prerogatives of its chief justice.

3 G.L., c. 212, \(\S 2\), enacted by Acts of 1910, c. 555, \(\S 1\).

4 Revised Laws (1902), c. 157, \(\S 2\). The change in 1910 was the result of a recommendation appearing on page 18 of the report of the Commission to Investigate the Causes of Delay in the Administration of Justice in Civil Actions.

5 Acts of 1927, c. 306.

6 Acts of 1928, c. 228.

7 Acts of 1932, c. 144, \(\S 7\), now G.L., c. 212, \(\S 14A\). Since 1897 the chief justice has had the authority to establish special criminal sittings and sessions. Acts of 1897, c. 490, \(\S 5\).

8 G.L., c. 212, \S\S 14B and 14C, as amended.

9 Acts of 1924, c. 188, now G.L., c. 212, \(\S 28\).

10 See G.L., c. 221, \S\S 6, 6A, and 6B relating to the appointment of certain assistant clerks. Compare G.L., c. 213, \(\S 8\), referring to the authority of the “courts” to make “uniform codes of rules, consistent with law, for regulating the practice and conducting the business of the courts in cases not expressly provided for by law for the following purposes: ... Third, conducting trials ... Eighth, expediting the decision of causes and securing the speedy trial thereof ... Ninth, remedying abuses and imperfections in practice and diminishing costs.”
the adoption of a rule imposing stricter limitations on continuances, all of which are discussed below.

Yet not all the important administrative responsibilities are confided to the chief justice or to the associate justices as a group. The individual justice is charged with the basic responsibility of deciding his cases promptly. But no one on the Superior Court can tell him when to hand down a decision even though an inordinate amount of time may have elapsed since the trial. General Laws, c. 220, §14A, which states that a justice holding a case for more than four months must get an extension of time from the chief justice if he desires to hold it longer, is merely an exhortation without sanctions and of doubtful efficacy.11

§23.6. Background in the Probate Courts and the Land Court. Unlike the Superior Court, which is a single tribunal, the Probate Courts are separate county courts functioning independently of each other without general uniformity in their methods of operation. Even within a single Probate Court having more than one judge, the several judges have been known to have no common administrative procedure since the "first judge" of such a Probate Court has no clearly defined authority over the administration of the court. Much the same is true of the Land Court.1

As the result of the diversity of forms and practices among the Probate Courts, the legislature in 1931, upon the recommendation of the Judicial Council, created the Administrative Committee of the Probate Courts, an advisory body of three probate judges to be appointed by the Chief Justice of the Supreme Judicial Court, "to recommend uniform practice and procedure."2

Experience showed, however, that a mere advisory status for the Administrative Committee was not sufficient. The various Probate Courts were continuing to go their separate ways much as they always did. The Judicial Survey Commission therefore recommended, as one of its principal proposals, that the Administrative Committee should be strengthened: first, by giving it the power to require and prescribe uniform forms, practices, procedures, and records; and second, by giving it the power of general superintendence over the Probate Courts, with authority to regulate assignments of judges, and sittings and sessions. The first of these proposals was enacted by the legisla-

11 Kerr v. Palmieri, 325 Mass. 554, 558, 91 N.E.2d 754, 757 (1950). Acts of 1935, c. 206, §14A also applies to the District Courts including the Boston Municipal Court. Permission to hold a case for more than four months must come from an appropriate justice of those courts. The Administrative Committee of the District Courts through its general power of supervision has been effective in assuring prompt decisions in the District Courts.

2 Acts of 1931, c. 404, now G.L., c. 215, §30A. The recommendation of the Judicial Council will be found at page 12 of its Sixth Report (1930). The constitutionality of this type of statute is well established. Commonwealth v. Leach, 246 Mass. 464, 141 N.E. 301 (1923); Ashley v. Three Justices of the Superior Court, 228 Mass. 63, 116 N.E. 961 (1917).
ture during the 1956 SURVEY year. Partly because of constitutional doubts stemming from Part II, Chapter 3, Article IV of the Massachusetts Constitution, the other proposal failed to pass. Meanwhile, the judges of the various Probate Courts, acting under Section 30 of Chapter 215 of the General Laws, and aided by the advice of the Administrative Committee of the Probate Courts, approved 156 uniform probate and 8 uniform divorce forms and thereby successfully completed an important four-year project.

§23.7. Background in the District Courts. The District Courts, like the Probate Courts, are also separate courts. And as among the Probate Courts, so has there also been diversity in practice among them. In order to create uniformity, the Judicature Commission in 1922 proposed the creation of an Administrative Committee of the District Courts, to consist of three District Court justices to be appointed by the Chief Justice of the Supreme Judicial Court, and to have authority "to recommend uniform practices, forms and blanks and records in all District Courts other than the Boston Municipal Court." This proposal was promptly accepted by the legislature.

In 1941 the Administrative Committee was strengthened by raising it from a mere advisory body to one with administrative authority. Its membership was increased to five District Court justices and it was given "general superintendence of all the district courts, other than the municipal court of the city of Boston." In such courts the Administrative Committee was authorized by the 1941 amendment to regulate the assignment of special justices, to determine the number of simultaneous sessions, the sittings of special justices, and the times for holding civil and criminal business. In the event of non-compliance with directions of the Administrative Committee, the Supreme Judicial Court was authorized to "make an appropriate order." Authority to prescribe uniform forms except in Suffolk County was added in 1950.

In 1956 the duties of the Administrative Committee were enlarged again. As part of the act reorganizing the District Courts, discussed below, the Administrative Committee was authorized to assign full-time justices to sit on a circuit basis in other District Courts and to prescribe the hours for holding civil trials except where such hours

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4 Stating that the legislature shall appoint the times and places of sittings of the Probate Courts, and that pending such appointments sittings shall be held "at the times and places which the respective judges shall direct."
5 Approved by the justices of the Supreme Judicial Court on July 2, 1956.

3 Acts of 1941, c. 682, now G.L., c. 218, §43A.
4 See, however, a possible conflict with G.L., c. 218, §40, which provides that no special justice, other than one of the Boston Municipal Court, shall sit in a District Court except upon the request of the presiding justice thereof.
5 Acts of 1950, c. 210, now G.L., c. 218, §43B.
6 Acts of 1956, c. 738, discussed in §23.15 infra.
§23.8 ADMINISTRATION OF JUSTICE

were otherwise fixed by law. Also, the Administrative Committee was authorized "from time to time to report to the governor and to the general court its recommendations with drafts of legislation."

§23.8. Background in the Supreme Judicial Court. Standing at the head of the Massachusetts judicial system is the Supreme Judicial Court, the final Massachusetts examiner of proceedings in the lower courts. Historically, it has reviewed lower court practices only when an aggrieved litigant has claimed that an error has been committed. General continuous supervision of lower court administration has not been regarded as the high court's function.

Section 3 of Chapter 211 of the General Laws, which dates back to 1782 without significant change,1 might seem to suggest a broad supervisory responsibility for the Supreme Judicial Court. This section reads:

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue writs of error, certiorari, mandamus, prohibition, quo warranto and all other writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

But as interpreted and applied, this statute has been confined to the issuance of extraordinary writs in particular judicial proceedings in which the court's jurisdiction has been formally invoked by an aggrieved party.2 Administrative supervision, with its requirements of continuity, flexibility, and informality, obviously cannot be carried out within these limitations.

Other statutory provisions conferring on the Supreme Judicial Court a measure of administrative control over the lower courts are indirect in their effect or confined to a few specific subjects. A provision of the first type is the one which authorizes the Chief Justice of the Supreme Judicial Court to appoint the members of the Administrative Committees of the Probate and District Courts.3 Similar provisions are those which authorize the high court to "make an appropriate order" upon non-compliance with an order of the latter Committee;4 to appoint assistant clerks in certain lower courts;5 and to remove clerks, registers of probate, recorders, district attorneys and sheriffs "if it appears that the public good so requires."6

3 G.L., c. 215, §30A (Probate Courts); G.L., c. 218, §43A (District Courts).
4 G.L., c. 218, §43A.
5 G.L., c. 221, §4.
Statutes having a more direct impact are those which authorize the Supreme Judicial Court to "alter or amend" the rules and forms prepared by the judges of the various Probate Courts under Section 30 of Chapter 215 of the General Laws and "to make such other rules and forms for regulating the proceedings in the probate courts as it considers necessary in order to secure regularity and uniformity"; and to prescribe the manner in which papers entered in the lower courts shall be extended on the records, and to prescribe the method of disposal of obsolete records and stenographers' notes.

Resort to the Supreme Judicial Court's inherent power over the practice of law has had the most direct impact of all on the administration of the lower courts. Without the aid of any statute, and solely by virtue of this inherent power, the Supreme Judicial Court has issued a general rule preventing justices, special justices, clerks, and assistant clerks of the District Courts from practicing criminal law and also from practicing on the civil side of their own courts.

§23.9. Background in the Judicial Council. Adding up these various responsibilities and the Supreme Judicial Court's inherent control over the practice of law we do not find any general and continuous supervision of the administration of the lower courts. Until this past Survey year the only agency charged with such supervision was the Judicial Council created in 1924, upon the recommendation of the Judicature Commission, to make a "continuous study of the organization, rules and methods of procedure and practice of the judicial system of the Commonwealth, the work accomplished and the results produced by that system and its various parts." The Council is charged with the duty of reporting annually to the Governor and it "may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable." Its membership consists of a judge or former judge of the Supreme Judicial Court, the Superior Court, the Land Court, and the Boston Municipal Court; one probate judge, one District Court judge and not more than four members of the bar. Since its creation the Judicial Council has sponsored much valuable legislation that has materially improved the practices and efficiency of the courts. But the Council has been handicapped by being situated outside the judicial system rather than within it, and thus not possessed of the authority and responsibility necessary to obtain the maximum results from its work.

§23.9. 1 Acts of 1924, c. 244, as amended, now G.L., c. 221, §§34A-34C.

1 G.L., c. 215, §30.
2 G.L., c. 221, §§27 and 27A, implemented by Supreme Judicial Court General Rules Nos. 7, 8, and 9 (1952).
§23.10. Unified supervision and the 1956 legislation. If there is to be fully effective supervision of the procedures and practices of the courts, an agency forming a part of the judicial system itself must be charged with the authority and responsibility for supervision. That there should be such an agency is the opinion of many distinguished authorities on judicial administration. As one of them has said, "Modern conditions of our urban, commercial and industrial civilization require that there must be some head to a state judicial department. Some judge or court should be charged with the efficient operation of the whole system." ¹

The Judicial Survey Commission and the legislature reached the same conclusion. As a result, Chapter 707 of the Acts of 1956 was passed.² This act amends G.L., c. 211, §3 by adding a paragraph entrusting to the Supreme Judicial Court "general superintendence of the administration of all courts of inferior jurisdiction" and empowering it "to issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of the courts, and the securing of their proper and efficient administration."³

The Commission and the legislature both realized that the Supreme Judicial Court should not be burdened with administrative tasks that would interfere with its primary appellate function of supervising the application of the substantive law. The Commission therefore recommended and the legislature created an administrative office of the courts to assist the Supreme Judicial Court in its administrative functions. This new office is headed by a full-time executive secretary appointed by the justices of the Supreme Judicial Court to hold office at their pleasure. Subject to the direction and supervision of the justices of the high court, the executive secretary has been given a number of functions to perform, primarily of an information-gathering nature relating to administrative methods, the condition of dockets, physical accommodations, supplies, equipment, expenses of operating the courts, and the investigation of complaints. Annually he is to submit a report of the activities of the administrative office together with his recommendations, and this report shall be a public document. To avoid duplication of function, the act transferred the statistical functions of the Judicial Council to the executive secretary.

By passing this legislation, Massachusetts has joined the "unmis-

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² The measure was originally defeated in the House, but was ultimately passed after being revived by a special message from Governor Herter.

³ This authority is clearly within the constitutional powers of the Court. Case of Supervisors of Elections, 114 Mass. 247 (1873); Opinion of the Justices, 300 Mass. 596, 14 N.E.2d 465, (1938); Attorney General v. Dover, 327 Mass. 601, 605, 100 N.E.2d 1, 4 (1951).
takable forward movement in achieving greater integration, efficiency and responsibility in state court systems." Administrative offices of various types have been created in seventeen other states as well as in the federal courts, the District of Columbia, and Puerto Rico.

C. REORGANIZATION OF THE DISTRICT COURTS

§23.11. Introduction. After many years of study and effort, including a comprehensive report and an emphatic recommendation of the Judicial Survey Commission, a District Court reorganization act was finally passed in 1956, to become effective July 1, 1957. Central to this act, as to all previous District Court reorganization plans, was the objective of putting an end, as far as practicable, to the dual and sometimes conflicting activities of the lawyer-judge. In recent years, various restrictions, some already mentioned, have been imposed on the scope of the private law practice in which the lawyer-judge may engage. But this approach, important as it has been, has been piece-meal at best and has furnished no fundamental solution. The time had arrived for basic changes.

One approach, direct and simple but hardly feasible, was to put all part-time District Court justices on a full-time basis by barring them completely from the practice of law and giving them a salary increase to compensate to some extent for their lost law practice. The obvious weakness of this solution was the lack of enough District Court business to keep all the justices busy on a full-time basis. A more feasible plan was to put on a full-time basis, with a salary increase, only the justices from the busier courts; bar all other District Court justices, regular or special, from hearing any civil cases other than minor controversies; and, in order that all District Courts would have full-time justices available to hear major civil cases, require these justices to sit on a circuit basis in any District Court upon the order of the Administrative Committee of the District Courts. This latter plan was the one recommended by the Judicial Survey Commission, as well as by prior groups which had studied the matter, and was the one adopted by the legislature.

§23.12. The reorganization plan. Specifically, the act selected thirty-one part-time justices and converted them into full-time justices. As a result, the number of full-time justices, including the nine already in the Boston Municipal Court, was increased from twenty to fifty-one in thirty-nine courts. Salaries were fixed at $12,000 a year

5 The other states are Colorado, Connecticut, Idaho, Iowa, Kentucky, Louisiana, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, Virginia, and Wisconsin. See Institute of Judicial Administration, Chart of Functions Performed by Court Administrative Offices, July 18, 1956.

2 Id. §27.12.
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except in the Boston Municipal Court where in 1955 the salaries of the associate justices had been set at $15,000 and the salary of the chief justice at $16,000.

The act provides that (except in the Boston Municipal Court, on the Islands, and on part of the Cape) no justice other than a full-time justice shall hear civil cases other than supplementary proceedings, summary process, small claims, and proceedings relating to juveniles and insane persons without the authorization of the Administrative Committee of the District Court. To assure all District Courts that they will have full-time justices to hear cases requiring such justices, the act authorizes the Administrative Committee to assign the full-time justices, except those in the Boston Municipal Court, to sit in the various District Courts on a circuit basis.

The act retains part-time justices, both regular and special, for criminal business and for the minor civil matters already mentioned. A section inserted in the act by the Joint Judiciary Committee qualifies the sitting of part-time justices, however, by stating that no part-time justice shall hear a case "if he shall know that a partner or office associate of his has been directly or indirectly retained in the case.”

Contrary to various proposals, including that of the Judicial Survey Commission, that part-time justices (regular and special) be ultimately eliminated by not filling vacancies occurring in their offices, the act states that such vacancies shall be filled subject to the limitation that a vacancy in the office of a special justice shall be filled only if the number of special justices in the court involved will not thereby exceed the number of that court's full-time and part-time regular justices.

§23.13. Salaries of District Court clerks. The question of the salaries of clerks and other administrative personnel was a matter on which there was considerable difference of opinion. In the past, such salaries have been simply a percentage of the salary of the justices. With the increase in the salaries of the new full-time justices to $12,000, the automatic continuation of the percentage method would have resulted in a large expense that could not be justified on the basis of work load, since the work of individual District Court administrative personnel will continue substantially as before. The matter was finally settled by giving the clerks in the new full-time courts a flat 20 percent increase.

§23.14. Six-man juries. As an experiment for two years beginning July 1, 1957, the act authorizes trials with juries of six in the Central District Court of Worcester in all civil actions, upon the consent of both parties, subject to direct review by the Supreme Judicial Court. If one party refuses a claim made by the other party for a trial by such a jury, the party making the claim may remove the case to the Superior Court for trial with or without jury. Otherwise the case will stand for trial without jury in the Central District Court.

The statute fully satisfied all constitutional requirements, there
being no infringement on the right of removal to the Superior Court for trial by jury. In fact, it is believed that the statute by affording an opportunity to refuse a claim for a jury of six goes beyond the minimum constitutional requirements since the right of removal upon entry that is afforded a defendant (and the plaintiff where he must start his action in a District Court) is, without more, a sufficient constitutional safeguard to the defendant (or to such a plaintiff) and the right to start an action in the Superior Court is likewise a sufficient protection to the plaintiff in all other cases.¹

D. REFORMS IN THE SUPERIOR COURT

§23.15. Strengthening the pretrial conference. On December 20, 1955, the justices of the Supreme Judicial Court issued a Notice to the Bar designed to reinvigorate pretrial conference practice under Superior Court Rule 58. Formerly an issue-shaping encounter of accredited trial counsel, the pretrial conference had declined to a shapeless meeting of uninstructed juniors. This year's Notice, patterned after a Notice to the Bar of the late Justice Wilford Gray on June 30, 1935,¹ establishing the first pretrial session in Massachusetts, stated (like the earlier one) that "litigants must be represented at the pretrial call by an attorney having full power to act in all matters pertaining to the case." Another provision in this year's Notice — not present in the Notice of 1935 — reminded the bar that the court at pretrial has the power to enter nonsuits and defaults "if the attorney should not have power to act in all matters pertaining to the case."

§23.16. Reinstallation of the auditor system. In order to handle the engulfing numbers of motor tort cases, the justices of the Superior Court on March 15, 1956, re-established the 1935-1942 motor tort auditor system whereby all motor tort cases are referred to auditors for findings of fact. Although not universally acceptable to the bar, the results of the 1935-1942 experience demonstrate the efficacy of auditors in disposing of many cases in a manner satisfactory to most litigants. Of the 35,930 motor tort cases referred to auditors during the 1935-1942 period, only 1606 (1392 jury and 214 non-jury) were actually tried after the filing of the auditor's report, the balance having been disposed of by settlement, by discontinuance or nonsuit, or by motion for judgment on the report.¹

By contrast, in the year ending June 30, 1955 — certainly no less busy than the entire 1935-1942 period — the Superior Court tried 1333 motor tort cases of which 1175 were jury and 158 were non-jury.

§23.17. Continuances for engagements of counsel. Continuances naturally prevent cases from being tried in their regular turn. Partly


¹ From unpublished figures compiled by the late Edmund S. Phinney, executive clerk to the chief justice of the Superior Court.
perhaps as the result of a belief that the delay in the trial of cases was due to an insufficient number of trial counsel, the justices of the Superior Court during the 1956 Survey year issued a rule imposing a strict limitation on the granting of continuances for engagements of counsel in civil cases. The new rule, here given in full, provides:

No party shall have a right to a postponement of trial because of engagement of counsel or for the convenience of counsel or parties, but the Court will grant a postponement if counsel is actually engaged before the Supreme Judicial Court and may grant a postponement because of engagement of counsel for not more than ten days or until said engagement is concluded.

No other postponement shall be granted to the same counsel except for good cause arising subsequent to the granting of the postponement. 1

The problem of continuances for engagements of counsel is not a new one. In 1890 a statute, obviously designed to protect trial counsel, provided that an attorney actually engaged in trial before either the Supreme Judicial Court or the Superior Court should not be obliged to try any other case in those courts unless it should appear "that it is just and equitable that he should so proceed." 2 Engagements before the Land Court and auditors were similarly protected in subsequent years. 3 But in 1912, following a 1910 survey commission conclusion that the effect of the statute was to reduce the number of available trial counsel and thereby impede the flow of judicial business, the statute was repealed. 4

§ 23.18. The non-triable docket. In order to clear law dockets of inactive cases before their formal dismissal under Rule 85, the justices of the Superior Court issued an order effective April 1, 1956, creating a "non-triable docket" applicable to all counties except Dukes and Nantucket. This order enumerates various docket-blocking events upon the occurrence of which a case shall be transferred to the new docket. The effect of such a transfer is that "no further proceedings other than entry for final disposition by dismissal or agreement may be had therein without special order of the Court."

Conceived originally perhaps as an inventory-taking device, the non-triable docket in its few months of operation is believed to be serving the important administrative function of enabling the judicial manpower of the Superior Court to be deployed where litigation continues to remain alive. 2

§ 23.17. 1 Superior Court Rule 57A.
3 Acts of 1900, c. 418, §2 (auditors); Acts of 1904, c. 448, §9 (Land Court).
4 Acts of 1912, c. 542. The commission is referred to in §23.5, note 4, supra.

§ 23.18. 1 Such as a general continuance, death, or bankruptcy, followed by a six-month period of inaction.
2 An additional administrative change adopted after the close of the Survey year was the establishment of a Civil Trial List Assignment Session in Suffolk County, effective November 5, 1956. This session appears to have been established by the
E. OTHER LEGISLATION CONCERNING THE COURTS

§23.19. Judicial pension legislation. Under the Massachusetts Constitution of 1780 all judges in the Commonwealth “hold their offices during good behavior.”¹ For misconduct they may be removed by the Governor and Council upon the address of both houses of the legislature,² or by the Senate in impeachment proceedings based on articles prepared by the House.³ Article 58 of the amendments adopted in 1918 authorizes the Governor and Council, after notice and hearing, to retire a judge involuntarily because of “advanced age or mental or physical disability.” Age alone, the Supreme Judicial Court has said, is not a ground for involuntary retirement under Article LVIII.⁴ For the amendment to apply, there must be first a specific inability of a particular judge to perform his judicial functions. Any establishment of a uniform compulsory retirement age for all judges would therefore be an unconstitutional encroachment on a judge’s tenure during good behavior.

A judge may, of course, voluntarily relinquish his office. But if he does so, his salary stops. Partly in recognition of the financial hardship that might ensue, partly due perhaps to a desire to encourage older judges to retire, and partly no doubt out of a sense of appreciation for the performance of a high public trust, the legislature has from time to time provided pensions for judges.

The first judicial pension legislation was enacted in 1885 when pensions were provided for justices of the Supreme Judicial Court.⁵ Pensions for other judges were later added until by 1911 all judges in the Commonwealth, except special justices of the District Courts, were covered by a pension program.⁶ All were noncontributory in nature.

Subsequent years saw various changes. In 1918 Article LVIII of the amendments, already mentioned, was adopted with a clause providing that when a judge retires involuntarily, his retirement should “be subject to any provisions made by law as to pensions or allowances payable to such officers upon their voluntary retirement.”

The years 1920 and 1921 saw the practical elimination of all judicial pensions upon voluntary retirement. Legislation was enacted denying voluntary retirement pensions to all future judges, and also to those

chief justice acting under G.L., c. 212, §14A to establish special sessions and to designate the class of business to be transacted in them.

existing judges who accepted certain salary increases then granted.\textsuperscript{7} Mitigating changes were added in 1931 for the benefit of certain justices of the Supreme Judicial Court and for certain probate judges.\textsuperscript{8} But pension coverage upon voluntary retirement of most judges continued to be nonexistent until 1937 when a simple and workable pension statute, like those in effect prior to 1920 and 1921, was adopted granting noncontributory voluntary retirement pensions at three fourths of salary to all judges of all courts (other than special justices of the District Courts), whenever appointed, who had attained the age of seventy and who had at least ten continuous years of judicial service.\textsuperscript{9}

So the law stood when the Judicial Survey Commission took up the subject of judicial pensions. All members of the Commission were impressed with the desirability of offering an inducement to older judges to leave the bench even though in certain cases valuable and indeed irreplaceable services might thereby be lost. Compulsory retirement upon attaining a specified age was, as we have seen, not permissible. After consideration of various alternatives, the solution that finally recommended itself to the Commission was to condition the pension rights of a future judge upon his prompt resignation after he becomes eligible for a pension. Failure to resign at that time would deprive a future judge of his pension upon his voluntary retirement at a later date. A majority of the Commission recommended seventy as the age for resignation after ten years of service. A minority felt that the age for justices of the Supreme Judicial Court should be seventy-five. The legislature adopted the majority view and passed the bill as submitted.\textsuperscript{10}

There seems to be little doubt about the constitutionality of the legislation. Recent decisions have held that governmental pensions, especially those of a noncontributory nature like a judicial pension, are gratuities which may be withdrawn at the pleasure of the legislature.\textsuperscript{11} It would seem to follow that a pension may be provided on such terms

\textsuperscript{7} Acts of 1920, c. 627, §4 (Supreme Judicial Court, Superior Court, and Land Court); Acts of 1920, c. 614, §1 (Boston Municipal Court); Acts of 1921, c. 487, §7 (Probate Courts); Acts of 1921, c. 413 (District Courts). Judges involuntarily retired under Article LVIII were still entitled to pensions.

\textsuperscript{8} Acts of 1921, c. 426, §142.

\textsuperscript{9} Acts of 1937, c. 409, G.L., c. 32, §65A. Pensions for special justices of the District Courts were provided by Acts of 1941, c. 689.

\textsuperscript{10} Acts of 1956, c. 670. The act applies only to judges appointed to their respective offices after July 31, 1956. Observe that a judge first appointed to the bench after attaining the age of sixty will be entitled to his pension rights provided that he resigns after completing ten years service even though he will thus be over seventy at the time of his resignation. To become entitled to receive a pension, future judges must resign within thirty days after they become eligible.

as the legislature may see fit to impose, including the relinquishment of a judicial office at a specified time.

§23.20. District Court judges sitting in the Superior Court. Chapter 472 of the Acts of 1956 carried out a recommendation of both the Judicial Council and the Judicial Survey Commission by continuing until September 1, 1961, with perfecting administrative amendments, the temporary statute providing for sittings of District Court justices, other than those in the Boston Municipal Court, on misdemeanor and motor tort cases in the Superior Court. The new statute is being extensively employed, particularly in motor tort litigation.

§23.21. Transfer to District Courts of motor tort cases erroneously entered in the Superior Court. Chapter 426 of the Acts of 1956 amends the Fielding Act by permitting transfer to the District Courts of motor tort cases erroneously entered in the Superior Court. This amendment had been recommended by Professor Richard H. Field in the 1955 Annual Survey.

§23.22. Forms of pleadings. Chapter 313 of the Acts of 1956 amends G.L., c. 231, §147 by permitting the various lower courts, rather than the Supreme Judicial Court alone as under prior law, to prescribe forms of pleadings subject, however, to final approval of the justices of the high court. This amendment had been recommended by the Judicial Council and the Judicial Survey Commission, partly in the hope that the Superior Court justices would thereby eliminate the use of the general denial.

§23.23. Jury claims on removals to the Superior Court. Chapter 302 of the Acts of 1956 eliminates the need for a claim for a trial by jury in order to remove a case to the Superior Court. This act resulted from a recommendation of the Judicial Council.

§23.24. Defeated legislation. In a year such as that of the 1956 Survey, in which so much far-reaching and important legislation was enacted, it may seem ungracious to point out that other important legislation was defeated. However, some of the defeated bills were of particular significance and should receive some notice in a review of the year's events. Three bills which failed of passage seem most worthy of comment. A fifteen-dollar jury fee, a recommendation of the Judicial Survey Commission as well as of the Judicial Council, was defeated. A proposal to permit the use of limited oral depositions of parties before trial in the Superior Court, a recommendation of both the Judicial Survey Commission and the Judicial Council, also failed to pass. A substitute measure passed by both houses proved


§23.22. The Judicial Council recommendation will be found in its Thirtieth Report 14 (1954), and in its Thirty-first Report 13 (1955).

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...to be so ambiguous and so narrow in its application that, upon request of Governor Herter, the measure was recalled and thereupon rejected by the Senate. Finally, a bill recommended by the Judicial Survey Commission for the purpose of entrusting full rule-making power to the Supreme Judicial Court failed to pass but was referred to the Judicial Council for study.

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