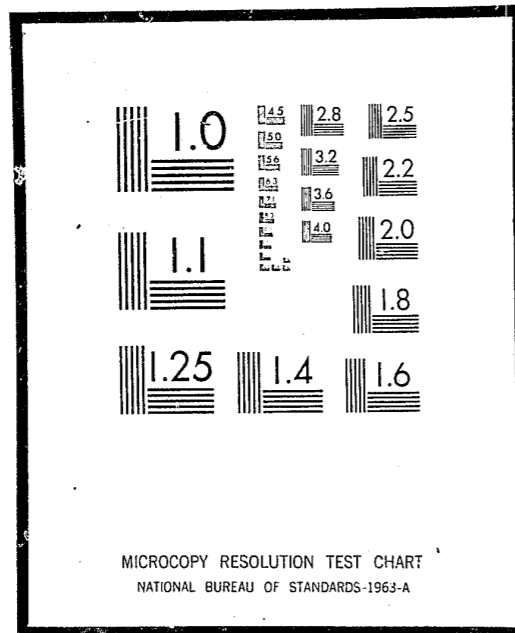


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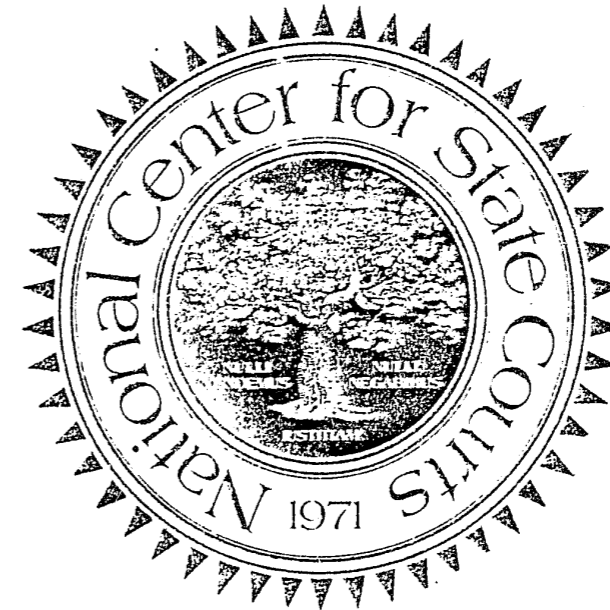
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209 Bay State Road
Boston, Massachusetts 02215
(617) 247-2102



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ADMINISTRATIVE POWER
IN THE INDIVIDUAL
MASSACHUSETTS COURTS

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Project Staff

Peter Antell

Craig E. Briggs

Claudia L. Chadwick

Petrina M. Citro

Samuel D. Conti

Jeanie Helms

Richard B. Hoffman

Wendy Kaminer

Dory Kegelman

Nels Magnuson

Dermot Meagher

Lorraine Moore

William H. Popp

Clarice E. Sackett

Benjamin L. Shapiro

Thomas H. Stanton

Gail Theodosopoulos

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ADMINISTRATIVE POWER IN THE INDIVIDUAL COURTS

A. THE SUPREME JUDICIAL COURT

THE SUPREME JUDICIAL COURT

POWERS OF THE JUSTICES

Bases and Exercises of the Power of "General Superintendence"

The Supreme Judicial Court draws its administrative power from two sources: (1) the Constitutional separation of powers and its Constitutional creation of a Judicial Department (Articles XXIX, XXX) and (2) statute. More recently, the Supreme Judicial Court has utilized the Constitutional basis of administrative power. As examples, the court, without specific statutory authorization, has adopted (with minor variation) the Code of Judicial Conduct of the American Bar Association; passed rules regarding the practice of part-time judges and clerks and their partners or associates (SJC Rule 3:25); adopted Canons of Ethics governing lawyers who practice in the Commonwealth (SJC Rule 3:26) (also a variation of the American Bar Association rules); and the court has passed an administrative rule (SJC Rule 3:23) pursuant to its decision in O'Coin's v. Treasurer of Worcester County Mass. Adv. Sheets 163 (1972), a decision which asserts the court's own inherent constitutional power.

The O'Coin decision merits discussion because it was the first broad assertion in Massachusetts of the inherent power of the courts. It involved the power of a Superior Court judge to encumber the county for the expense of a tape recorder which he determined to be necessary for operation of a session of his court. The County Treasurer, when presented with the bill for the tape recorder, refused to pay it; the

store which sold the tape recorder to the court filed a writ of mandamus to compel the Treasurer to pay for the tape recorder. The Supreme Judicial Court, in a decision written by the Chief Justice, said that, apart from a statutory provision allowing the court to encumber the county for expenses (MGLC 213 §8), the court has inherent power as a separate department of government to provide "adequate and sufficient resources to ensure the proper operation of the courts." Furthermore, the Chief Justice, writing for the court, said the court has authority to perform "certain ancillary functions, such as rulemaking and judicial administration, which are essential if the courts are to carry out their constitutional mandate." The Chief Justice further said that even though the General Court "may enact legislation which declares or augments the inherent powers of the judiciary," once having established the judiciary, no other branch of government can impair the conduct of the judiciary. As a result of this decision, which went well beyond the power to buy an \$84 tape recorder in asserting very broad inherent power in the courts, the Supreme Judicial Court passed a rule and created the procedure by which the various courts or judges could encumber the Executive Department of the Commonwealth. By the rule (SJC Rule 3:23) the Supreme Judicial Court asserted its own power to be the final arbiter of the use of inherent powers by other courts. In the words of a judge of a lower court, however, "by the O'Coin decision the Supreme Judicial Court gave the judges inherent power, by the rule pursuant to the O'Coin decision, they assumed the power unto themselves."

One reason the Supreme Judicial Court was able to assume this power unto itself was a statute, MGLC 211 §3, which was first passed in 178 , and was amended in 1956. It 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 all 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.

In addition to the foregoing, the justices of the Supreme Judicial Court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section three C; and it may 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 such courts, and the securing of their proper and efficient administration. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.
(emphasis added)

This statute and the principles in it underly much of the following discussion.

More recently the Supreme Judicial Court defined with more certainty the doctrine of separation of powers as that doctrine relates to the administrative operations of the courts (Opinion of the Justices of March 29, 1974, with respect to H. 5293). In Massachusetts, the Supreme Judicial Court can be called upon by either the House of Representatives, the Senate or the Governor

or the Governor's Council to give advisory opinions regarding prospective legislation. The legislation discussed in this advisory opinion would have created an Electronic Data Processing and Telecommunications Commission, made up of appointees from each of the branches of government to serve each of the branches of government.

The Court said that the Legislature cannot create a commission and require the court to participate in it, especially when the commission would not exercise primarily a judicial function. In the saying of that, the Court reiterated the doctrine of separation of powers, noting that in Massachusetts, the doctrine of separation of powers as stated by Article XXX "is in a most explicit form, and on its face calls for a complete and rigid division of all powers among the three branches." The Court noted that they clearly have the power to appoint or remove officers whose duties are closely connected with the judicial work of the court (and cites a case which dealt with the appointment of auditors). It also notes that, although the Executive Department may manage public buildings, the doctrine of inherent power, as pointed out in the O'Coin case, requires adequate court facilities. The Court also notes in a footnote that "Protection of the independence of the judiciary was the exclusive purpose of the original draft of the Massachusetts separation of powers clause as drafted by John Adams." That draft read "The Judicial Department of the state ought to be separate from, and independent of, the Legislative and Executive powers."

These two cases are important to any discussion of the administration of the courts, primarily because they are the most recent assertion of the doctrine of separation of powers, but also because some of the language of the cases would seem to raise serious constitutional questions about present administrative practices in the courts should those practices be brought to issue.

Besides the broad statutory grant of administrative power of MGLC 211 §3, the Supreme Judicial Court has other and more specific statutory grants of administrative power concerning other courts. It has specific approval power over the rules and forms of the Housing Court (MGLC 185A §7). Even though there is no specific provision for review of Superior Court rules by the Supreme Judicial Court, "the rules of the Superior Court shall not conflict with those of the Supreme Judicial Court." (MGLC 213 §3). The Judges of the Probate Courts may make their own rules subject to review by the Supreme Judicial Court (MGLC 215 §30), but the Chief Justice of the District Courts can make his own rules and forms (MGLC 218 §§43, 43A, 43B).

The Supreme Judicial Court, by statute, has particularly close duties of superintendence over the Probate Courts. For example: The Probate Court shall direct issues of fact to be tried by a jury "in accordance with the practice established by the Supreme Judicial Court in like cases." (MGLC 215 §16).

The Chief Justice of the Supreme Judicial Court shall appoint three probate judges to an administrative committee of the Probate Courts (MGLC 215 §30A). A justice of the Supreme Judicial Court must certify the need for additional space for Probate Court records (MGLC 215 §54). Each Register of Probate must file annual reports with the Executive Secretary of the Supreme Judicial Court (MGLC 217 §8).

The assignment of judges to the three Appellate Divisions of the District Courts by the Chief Justice of the District Courts is subject to the approval of the Chief Justice of the Supreme Judicial Court (MGLC 231 §108). Furthermore, the designation of one of these judges as presiding justice shall also be subject to the approval of the Chief Justice of the Supreme Judicial Court. If any justice, special justice, clerk, or officer of any District Court fails or refuses to comply with any order of the Chief Justice of the District Courts in the performance of his duties and powers, the Chief Justice of the District Courts shall report such person or persons to the Chief Justice of the Supreme Judicial Court (MGLC 218 §43A).

Upon such report the full bench of the Supreme Judicial Court, after notice and hearing, shall make an appropriate order as to the matter involved (MGLC 218 §43A).

The legislation establishing the office of Executive Secretary of the Supreme Judicial Court (MGLC 211 §3C) provides:

"The executive secretary, subject to the direction and supervision of the justices of the supreme judicial court, shall perform the following functions and shall make reports and recommendations to the justices of the supreme judicial court relative thereto:--

a. Examination of the administrative methods, systems and activities, relating to their offices or employment, of the judges, clerks, registers, recorders, stenographic reporters and employees of all courts of the commonwealth and the offices connected therewith.

b. Examination of the state of the dockets of the courts, securing information as to their needs of assistance, if any, and preparation of statistical data and reports of the business of the courts.

c. Examination of the arrangements for accommodations for the use of the courts and the clerks, registers and recorders thereof, and the examination of the arrangements for the purchase, exchange, transfer and distribution of equipment and supplies therefor.

d. Investigation and collection of statistical data relating to the expenditures of public moneys, state, county and municipal for the operation and maintenance of the courts and the offices connected therewith.

e. Examination, from time to time, of the operation of the courts and investigation of complaints with respect thereto.

f. Attendance to such other matters necessary to carry out the provisions of this section and sections three D, three E, and three F as may be assigned by the justices of the supreme judicial court."

Obviously, such duties require the courts to cooperate with the Executive Secretary's office. The extent of the cooperation is defined by MGLC 211 §3D:

All judges, clerks, registers, recorders and stenographic reporters and their assistants and employees, the administrative committee of the district courts, the administrative committee of the probate courts, the board of probation, and commissioner of probation and all probation officers shall comply with any and all requests made by the executive secretary for information and statistical data bearing on the state of the dockets of the courts and such other information as may reflect their activities and the business transacted by them, and the expenditure of public moneys for the courts and the offices connected therewith. The attorney general and all district attorneys shall comply with any and all requests made by the executive secretary for statistical data bearing on the operation of their offices.

The Supreme Judicial Court has exercised its superintendence power in cases and by rules, orders, directions and personal correspondence.

Rule 3:23 of the Supreme Judicial Court was enacted after the decision in the previously discussed O'Coin case. The rule requires a defined procedure to be followed whenever a judge seeks to exercise his inherent power regarding the purchase of goods, services or facilities necessary to the court's functioning. No judge shall bind or attempt to bind the Commonwealth or County in excess of an appropriation, or where there is no appropriation, without the

written approval of the Chief Justice or Chief Judge of the appropriate court. A copy of the written approval must be sent to the Executive Secretary of the Supreme Judicial Court. The request for approval shall be in the form of a memorandum which sets forth (1) the nature and cost of the goods or services, (2) why the judge considers it necessary, (3) a chronology of any prior administrative action taken to secure the goods or services, and (4) what the judge seeks to do. If the appropriate Chief Judge or Chief Justice approves the request he must send a copy of his approval to the judge making the request and to the Executive Secretary of the Supreme Judicial Court. If the Chief Justice or Chief Judge disapproves, then the judge making the request may appeal in writing to the Chief Justice of the Supreme Judicial Court. The commentary provided upon the announcement of this rule notes that judges are "to proceed cautiously, and with due consideration, for prerogatives of the Executive Department and the Legislature..."

Other rules of the Supreme Judicial Court regarding superintendence of other courts and judges are Rule 3:02 which limits the private practice of special judges and clerks or assistant clerks; Rule 3:08, which regulates the stenographic notes of all courts and says that they must be kept for up to six years, Rule 3:09, which provides for the disposal of obsolete records; and Rule 3:17, which creates a committee on complaints of three judges or former judges and two members of the Bar to be appointed by the full court

to consider complaints against judges after preliminary examination by the Executive Secretary.

The orders of the Court indicate more clearly the parameters of the court's superintendence powers. Orders are not printed and usually relate only to specific situations. For example, within the last three years, the Court has issued orders, by a vote of the justices, pertaining to such subjects as:

A. The power of attorneys in the military service to represent military personnel in the Courts of Massachusetts, even though those attorneys are not members of the Massachusetts Bar;

B. The right of third-year law students to appear in Superior Court on appeals from the District Court;

C. The creation of a standing committee of state court judges to confer with federal judges on matters of common concern;

D. The appointment of a retired Supreme Judicial Court Justice and Superior Court Judge as Special Master in the single justice session; and a definition of their duties;

E. The admission to the Bar of a non-citizen;

F. The use of a mechanized schedule of the Probate accounts exceeding 8-1/2 by 11 inches;

G. The calling of cases in the single justice session pending in excess of six months since filing;

H. The calling up of all outstanding final reports of the commissioners, Masters, Special Masters, or auditors at a particular session;

I. The resignation of lawyers with prejudice;

J. The appointment of private counsel for post-conviction remedies in place of the Massachusetts Defenders Committee;

K. Authorization to the Judge of the Housing Court of the City of Boston to permit videotaping in his court with certain conditions;

L. The procedure for filing of papers in the Appeals Court and the Supreme Court;

M. The disbarment of an attorney convicted of a felony in any court of the Commonwealth. (This order says that only the Supreme Judicial Court may take action on such attorney. Prior to this the Superior Court could disbar such attorney when convicted before it.)

N. Dates and page references to be included in briefs and other memoranda;

O. The postponement of the effective date of the new rules of civil procedure which had been approved by the court and awaited amendatory legislation.

P. The Land Court's power to store papers and records at the State records centers subject to the approval of the Executive Secretary;

Q. The size and manner of filing all court papers; and

R. Admission to the Bar of persons 21 years of age and admission by motion to the Bar;

One additional significant example of the Supreme Judicial Court's exercise of its supervisory power is contained in a memorandum made public regarding a conference the Court had with the Chief Justice of the District Court concerning procedure in the Troy matter. The full bench of the Supreme Judicial Court met with the grievance committee of the District Court. The Supreme Judicial Court allowed the grievance committee of the District Court to release its report, clarified the power of the Chief Justice of the District Court to assign any District Court judge to District Courts other than those to which they were appointed and also clarified

his power of supervision of court records. The Court also clarified Chapter 218 §43A which, as noted above, requires the Chief Justice of the District Courts to report any failure to comply to the Chief Justice of the Supreme Judicial Court.¹

When dealing with a specific problem regarding a specific judge, the Court or its Executive Secretary acts by letter or through personal confrontation.

Powers of Internal Superintendence

The Supreme Judicial Court also has statutory power which allows it to govern itself to some extent. Chapter 211 §12, says "the Supreme Judicial Court shall hold sittings for the hearings and determination of questions of law arising in any cases at such times and places as the Court shall by rule determine..." (MGLC 211 §12). It further provides that the court may adjourn to other places which are "most conducive to the dispatch of business and to the interests of the public." If there are matters before the Supreme Judicial Court requiring jury trial, all such jury trials should be held in Suffolk County or as the Court otherwise decides (MGLC 211 §17). "The justices of each [Supreme Judicial or Superior] Court, except as otherwise provided, shall make such arrangements for attendance of a justice at the several times and places appointed for holding their court as will be most convenient and as will ensure the prompt performance of their duties" (MGLC 213 §9). The Court may

¹Charges had been made against District Court Judge Troy. There were hearings before a panel of three District Court judges. No one was too certain as to how to proceed on those charges or the hearings. The memorandum of the conference is significant because in it the Court defines an administrative statute administratively rather than adjudicatively - by a case.

adjourn an established sitting in one shire town to another in the same county (MGLC 213 §10). (MGLC 213 §11 says that if the judge is absent it is the sheriff's duty to adjourn the session.) The Supreme Judicial Court or the Superior Court can designate the shire town where a case may be tried (MGLC 231 §82). Most of these statutes are not pertinent since the Court has not sat outside of Boston in recent years.

Rule Making Power

With the exception of matters of ethics,² the Court has rarely passed rules without some broad or specific grant of authority from the Legislature. Besides the grants of powers listed above, there exist many other specific legislative grants to the Supreme Judicial Court of rule making powers. The principal grant is in MGLC 213 §3, which statute gives both the Supreme Judicial Court and the Superior Court power to make rules in eleven areas. It reads:

The courts shall, respectively, make and promulgate uniform codes of rules, consistent with law, for regulating the practice and conducting the business of such courts in cases not expressly provided for by law, for the following purposes:

First, Simplifying and shortening pleadings and procedure.

Second, Prescribing the terms upon which amendments will be allowed or unnecessary counts and statements stricken from the record; discouraging negligence and deceit; preventing delay; securing parties from being misled; placing the party not in fault as nearly as possible in the condition in which he would have been if no mistake had been made; distinguishing between form and substance; and substituting fixed and certain requirements for the discretion of the court.

Third, Conducting trials.

² In the area of ethics, the Court has adopted the ABA Canons of Ethics for Judges and Lawyers (SJC Rule 3:22, 3:25), limited the practice of clerks and assistant clerks (SJC Rule 3:02) and appointed a committee of Bar overseers for bar discipline problems (Rule 4:01-4:08).

Fourth, Presenting distinctly the questions to be tried by the jury.

Fifth, Giving a party such notice of the evidence which is intended to be offered by the adverse party as will prevent surprise and enable him to prepare for trial.

Sixth, Prescribing such forms of verdicts as will place upon the record the finding of the jury.

Seventh, The entry of judgment by the clerk under a general order in all cases ripe for judgment.

Eighth, Expediting the decision of causes and securing the speedy trial thereof.

Ninth, Remedying abuses and imperfections in practice and diminishing costs.

Tenth, Filing and hearing motions to set aside verdicts and notifying adverse parties thereof.

Tenth A, Making effective the declaratory procedure provided by chapter two hundred and thirty-one A.

Eleventh, The superior court may also make and promulgate such rules for the regulation of the printing, publication and distribution of trial lists and for notifying attorneys of trials in civil cases as the public convenience in the several counties requires.

The rules of the Superior Court shall not conflict with those of the Supreme Judicial Court.

Pursuant to other statutes the Supreme Judicial Court may make specific rules regarding:

the extent to which papers entered in any court will be put upon the record (MGLC 221 §27);

the destruction of obsolete and useless papers (MGLC 221 §27A);

the form of original writs (MGLC 223 §16);

the form for precepts for arrest and attachment (MGLC 223 §86);

the taking of depositions to perpetuate the testimony of witnesses (MGLC 233 §57);

the form of execution (MGLC 235 §22);

persons authorized to take bail (MGLC 276 §57). [This power is shared jointly by the Supreme Judicial Court and the Superior Court. The Superior Court has established such rules.];

exhibits and the number of copies, forms, printing, filing and disposition of all documents relating to appeals (MGLC 278 §33G);

the holding of conferences of the judges of the various courts (MGLC 211 §3F);

notice in courts of insolvency (MGLC 216 §18);

the sittings of the Supreme Judicial Court (MGLC 211 §12).

The Court has made rules in conformity with such statutes. However, the Court has made some other rules for which there is less specific statutory authority. The Supreme Judicial Court, on July 13, 1973, promulgated new rules of civil procedure, analagous to the Federal Rules of Civil Procedure. At this date, the Court has not sought enabling legislation for these rules, but instead legislation was introduced and passed which would amend the statutes which also deal with civil procedure. The significance of this approach to legislative approval

lies in the two possible interpretations which can be posited regarding it: (1) the Court is asserting its own inherent power to control its business - via civil procedure - or (2) the Court's action is in compliance with the statutory grant of power made to it in MGLC 213 §3 (supra, p. 13) which can be read as a broad mandate to deal with procedure as the Supreme Judicial Court sees fit. In either event, whether the Court's action is based on its inherent power or on its statutory rule-making grant, the enactment of the Massachusetts Rules of Civil Procedure represents a significant administrative action by the Court. The new rules substantially change civil procedure in Massachusetts. Among other things, they abolish the long-existing distinction between law and equity.

Earlier, in 1966-67, the Court faced a constitutional confrontation regarding its rule-making power. There had been several unsuccessful legislative attempts to allow greater pretrial discovery than existed at common law. Finally, on June 1, 1967, the Supreme Judicial Court passed Rule 3:15, similar to the Federal Rules of Civil Procedure regarding discovery and depositions. The Court acted in the face of possible repeal by the Legislature, but the Legislature's failure to act resolved the impasse. The passing of this rule could also have been either an exercise of the power contained in Chapter 213 §3 or an exercise of inherent power: in any event, at that time, there was a confrontation with the Legislature regarding rules and the Court's position won.

Other rules of the Supreme Judicial Court pertain to procedure and practice before it (Rules 1:01 to 1:25)

consistent with legislative grants, procedure in both the Supreme Judicial Court and the Superior Court (Rules 2:01 to 2:31); guides for masters and auditors in the Supreme Judicial, Superior and Probate Courts (Rule 2:32); the designation of special masters and commissioners by the Supreme Judicial Court (Rules 2:35A and 2:50A); single justice sittings (Rule 2:53); allocation of expenses of cases before a Single Justice (Rule 2:53A); admission to the bar (Rule 3:01); regulation of the private practice of special justices, clerks and their associates (Rule 3:02); records of the Supreme Judicial Court, Appeals Court and Superior Court (Rule 3:07); destruction of stenographic notes and obsolete records (Rules 3:08 and 3:09); assignment of counsel in indigency cases (Rule 3:10); use of third year law students in the District Courts (Rule 3:11); contingent fees (Rule 3:14); establishment of the Massachusetts Judicial Conference (Rule 3:16); establishment of a Committee on Complaints (Rule 3:17); incorporation of attorneys (Rule 3:18); limited practice of attorneys from other jurisdictions (Rule 3:19); style and size of court papers (Rule 3:20); and adoption, with variations, of the ABA canons of ethics (Rule 3:22).

Appointment and Assignment Power of the Justices

All Massachusetts courts have powers of appointment and removal. In some instances the appointments are solely within their power, while in other instances various judges of the courts are asked to approve appointments made

by other court personnel (e.g., clerks) or even members of the Executive Department (e.g., sheriffs). In the latter case, the courts' power of approval can actually become a joint power of appointment; if the courts have to approve somebody appointed by somebody else, they can refuse their approval until a candidate satisfactory to them is appointed.

The Supreme Judicial Court has been criticized for allowing itself to be bound by specific legislation creating administrative or assistance positions for itself, rather than inserting line item positions into the budget. In the Office of Executive Secretary to the Justices of the Supreme Judicial Court, for example, the professional staff is statutorily limited to three persons (MGLC 211 §3B), a limit the Court finds restrictive and has consequently sought to remove. On the other hand, the Supreme Judicial Court has not sought specific statutory appointment power over the personnel most directly serving it. The Court has the power to appoint law clerks, stenographers, and other clerical assistance it sees fit subject to appropriation from the Legislature (MGLC 211 §23). The Court submits for approval and transmittal all requests for appropriations to the Executive Department before they go to the Legislature.

MGLC 211 §3A, which says that there shall be an Executive Secretary to the Justices of the Supreme Judicial Court to be appointed by said justices to serve at their pleasure, and then lists the qualifications and salary limitations on such Executive Secretary, is an example of the Court's direct and sole appointment power. MGLC 211 §3B exemplifies the second form of appointment power mentioned above: "The Executive Secretary, with the approval of the Justices of the Supreme Judicial Court, shall appoint such employees not to exceed three."

The members of the Supreme Judicial Court can appoint the Clerk of the Supreme Judicial Court for the Commonwealth for a term of five years and an assistant clerk for a term of three years (MGLC 221 §1). They also appoint an assistant clerk for Suffolk County (MGLC 221 §4).

The Clerk for the Supreme Judicial Court for the County of Suffolk, the Clerks of the Superior Court in Suffolk County (one civil and one criminal), and the Clerks of Courts in all of the other counties, who act as clerks of the Supreme Judicial Court, the Superior Court, and the County Commissioners are all elected (MGLC 221 §3). The Clerk of the Supreme Judicial Court for Suffolk County can designate two assistants without the approval of the Court (MGLC 221 §5).

The Supreme Judicial Court has the power to appoint (MGLC 221 §4) an assistant clerk and a second assistant clerk for the County of Barnstable; an assistant clerk and a second assistant for the County of Bristol; and an assistant clerk, second assistant, third assistant, fourth assistant, fifth assistant, sixth assistant, and seventh assistant for the County of Essex; an assistant clerk, second assistant, third assistant, fourth assistant, fifth assistant, sixth assistant and seventh assistant for the County of Hampden; an assistant clerk, second assistant, third assistant, fourth assistant, fifth assistant, sixth assistant, seventh assistant, for the County of Middlesex; an assistant clerk for the County of Norfolk; an assistant clerk for the County of Plymouth; an assistant clerk for the Supreme Judicial Court in the County of Suffolk; an assistant clerk, and second, third, fourth, fifth, sixth, and seventh assistants for the County of Worcester. All such assistants are appointed for a term of three years. Other assistants are appointed by either the Clerk or the Superior Court.

As of 1973, the Sheriff of Suffolk County appoints the Court officers for the Supreme Judicial Court and the Appeals Court (MGLC 221 §69). There is no provision for Supreme Judicial Court approval of such court officers. [The Superior Court, on the other hand, has approval power over the appointment of its court officers (MGLC 221 §70).] However, court officers for the Supreme Judicial Court may be removed by the Sheriff for cause if

such removal is approved by the Justices of the Court (MGLC 221 §72). Hence, the Court is in the peculiar position of lacking power to approve the appointment of its own court officers, while having power to approve their removal by the Sheriff. The Administrative Assistant to the Justices of the Supreme Judicial Court (formerly entitled the messenger) acts as Chief Court Officer and is appointed by the Justices (MGLC 211 §76).

The Supreme Judicial Court can appoint a "Reporter of Decisions" to hold office at its pleasure (MGLC 221 §63). The Supreme Judicial Court may also appoint one or more temporary stenographers in the absence of the permanent stenographer appointed by it (MGLC 221 §83).

The Court may also appoint masters in accord with the new Rules of Civil Procedure and commissioners (MGLC 221 §55). Masters decide facts in specific cases. Commissioners find facts and report to the Court on matters other than specific cases (e.g. Retired Justice Benjamin Lurie of the Superior Court was appointed as a commissioner to investigate and report on delay in criminal cases).

Appointment to Boards or Commissions

The Justices of the Supreme Judicial Court appoint the Board of Bar Examiners [five persons, of whom at least four must be from different counties (MGLC 221 §35)].

The members of the Massachusetts Defenders Committee are appointed by the Justices of the Supreme Judicial Court. There

are eleven members of such Committee. These members may also be removed by the Supreme Judicial Court. They are not compensated, but do receive expenses (MGLC 221 §34D). The Court also appoints members of the Mental Health Legal Advisory Committee.

"A majority of the justices may, if in their judgment the public good so requires, remove from office a Clerk of the Courts or of their own Court; and if sufficient cause is shown therefor, and it appears that the public good so requires, may, upon a complaint, upon a summary hearing or otherwise, remove a Clerk of the Superior Court in Suffolk County, or of a District Court, a County Commissioner, Sheriff, Register of Probate and Insolvency, or District Attorney, or the Recorder of the Land Court." (MGLC 211 §4). This statute grants considerable power to the Court to remove people it has not even appointed and who are not members of the Judicial Department. The statute dates from the time such officials were appointed (Opinion of the Justices to the Senate, 300 Mass. 596 (1938)). The Registers of Probate, the District Attorneys, Sheriffs, County Commissioners, Clerks of Courts, and Clerks of the Superior Court in Suffolk County, as well as the Clerk of the Supreme Judicial Court for Suffolk County are all elected officials. The Court has, on occasion, removed such elected officials. There is no specific statutory power to superintend or discipline except by removal. However, on April 25, 1974, the Supreme Judicial Court amended SJC Rule 3:02 to prohibit the practice of law by Clerks, Registers of Probate, the Recorder of the Land Court and their assistants or employees, effective January 1, 1976.

The Supreme Judicial Court cannot remove judges. However, it does have the power to approve applicants to the Bar (MGLC 221 §37), allow out-of-state attorneys to petition for admission (MGLC 221 §39), and disbar attorneys (MGLC 221 §40). It has used the latter power to induce judges of the various courts to resign or to begin the removal process. Constitutionally, the Legislature can remove judges by impeachment (Mass. Const. Part 2, Chap. 1, Sec. 2, Art. 8) or the Legislature can request the Governor to remove judges by a process called address, which requires the Governor to approve the removal petition of the Legislature, then in turn requires the Executive Council to approve the request for removal by the Governor (e.g., the Troy case). The Governor and Council can also remove for disability (Mass. Const. Part 2, Chap. 3, Art. I). In some instances, the Supreme Judicial Court has disbarred a particular judge and the judge has at that point resigned (e.g., the DeSaulnier case). Because there is no constitutional or statutory provision requiring all judges to be lawyers, disbarment is not tantamount to removal for most judges.

It is one of the duties of the Executive Secretary to examine the operation of the courts and investigate complaints with respect thereto (MGLC 211 §3C). And there is a Committee on Complaints in the Supreme Judicial Court (Rule 3:17). The Executive Secretary must not only investigate complaints but also report to the Supreme Judicial Court regarding such investigations and recommendations (MGLC 211 §3C).

Power of the Court to Encumber the Commonwealth

Besides requesting appropriations from the Legislature through the Executive Department, the Supreme Judicial Court has power to encumber the Commonwealth in two ways; first, it can certify bills presented to it for certain services or certain other expenses; and second, it can set salaries for certain Court employees. It does both with regard to the payment of law clerks, stenographers, and other clerical assistants (MGLC 211 §23). After requesting and receiving an appropriation from the Legislature, the Chief Justice certifies that the services of such employees have indeed been rendered and that they should be paid at the appropriated rate.

The full Court is required to audit all accounts for services and expenses incident to said Court (MGLC 211 §21). The Chief Justice is required to certify the amount of expenses incurred by his Associate Justices (MGLC 211 §22). The full bench is required to allow accounts for services and expenses "incident to their sittings in the several counties" which expenses shall be paid out of the respective county treasuries (MGLC 213 §8). Since the Supreme Judicial Court no longer sits in any county other than Suffolk, although it may, this power is rarely used.

The salaries of clerical assistants for the Clerk of the Supreme Judicial Court for the Commonwealth must be approved by the Chief Justice. Furthermore, such salaries cannot exceed the appropriation sought by the Court and approved by the Executive Department and the Legislature (MGLC 221 §93).

Similarly, the Court must request an appropriation for the printing of rules and must determine the sale price of such rules. The price for the rules cannot exceed, but may be less than, the price of the printing, binding, and paper (MGLC 213 §3A).

Any Justice of the Supreme Judicial Court may approve the expenses of the Board of Bar Examiners if they are certified by the Chairman of that Board. The entire Court decides the compensation of each member of that Board (MGLC 221 §36).

Even though he is appointed by the entire Court (all the Justices) the Chief Justice may fix the salary of the Executive Secretary to the Supreme Judicial Court; such salary cannot exceed 75 percent of the salary of an Associate Justice of that Court (MGLC 211 §3A). The Supreme Judicial Court (as well as the Superior and Probate Courts) "shall award reasonable compensation to commissioners, assessors, referees, Masters in Chancery and Special Masters, for duties performed under the direction of said Court, and to arbitrators appointed under Chapter 251..." (MGLC 221 §55). The Court may award reasonable compensation and traveling expenses for auditors which will be paid by the County. Such travel expenses shall be paid only upon a signed and sworn account by an auditor (MGLC 221 §61). The Reporter

of Decisions' salary is determined by the Chief Justice of the Supreme Judicial Court with the approval of the Governor and Council. This approval power of the Governor and Council of the salary of the Reporter may be anachronistic. Otherwise in the Judicial Department, only in the Land Court do the Governor and Council retain similar power (see Land Court, infra, p. 67). The expenses of such office shall be "such sums as shall be appropriated therefor." (MGLC 221 §68).

All the Justices of the Supreme Judicial Court set the salaries of its court officers. \$850 of this salary is paid by the Commonwealth; the remainder is paid by Suffolk County (MGLC 221 §73).

Over and above what is paid to the Administrative Assistant to the Supreme Judicial Court (formerly the Messenger, who acts as Chief Court Officer) by Suffolk County, the Commonwealth shall pay to him "such sum as shall be determined by the Justices of said Court..." (MGLC 221 §76).

In addition to such powers regarding the salaries and expenses of their own Court, the members of the Supreme Judicial Court have the power to approve the salary established by the Judges of the Probate Court for Suffolk County for an official stenographer (MGLC 215 §18).

Due to recent decisions of the United States Supreme Court (e.g. the Miranda and Argersinger cases) and its own rule regarding the appointment of attorneys in criminal cases (Rule 3:10, which preceded Argersinger), the Supreme Judicial Court is able to certify expenses of attorneys for indigents who appear before it, as well as costs for transcripts and printing

(Abodeely v. Worcester County Treasurer, 352 Mass. 719, 227 N.E.2nd 486 [1967]).

POWERS OF THE CHIEF JUSTICE

Appointment Power

The first issue addressed in the report of the Judicial Survey Commission (The Herter Commission) in 1956 was the question of who should appoint and direct the Court Administrator proposed in that same report.

"With due deliberation and purpose, the Commission has left the appointment and direction of its administrative office to the Supreme Court as a whole, rather than to the chief justice as an individual. We believe that in fact the court will follow precedent leaving the direction of these duties to the chief justice himself, but the Commission felt that should there ever in the distant future be any division whatsoever in the court, it was better to invest these powers in the court rather than in the transient person of the chief justice."
(15 M.L.Q. 56 [1956], H. 2620)

This polite view was consistent with Massachusetts Court tradition. As noted earlier, almost all powers of the Supreme Judicial Court have always been vested in the full bench. The power of general superintendence stated in MGLC 211 §3 puts that power in the Supreme Judicial Court --all the Justices of the Court. This statute was first passed in the late 18th century and most later statutes have been consistent with it and put the power in the entire Court.

However, some few powers have been delegated to the Chief Justice. First, there is the power of the Chief Justice to assign the writing of opinions to different justices, although

a majority of the justices can change such assignments. There is no rule or statute on the subject; this is a traditional power of the Chief Justice.

Other powers are given to him by statute. While the Chief Justice has no rule making power, he has some assignment power. He appoints three Probate Judges to the Administrative Committee of the Probate Courts (MGLC 215 §30A). (This committee is no longer as powerful as it once was; most of its powers have been taken over by the Chief Judge of the Probate Courts.) Similarly, he approves the assignment of judges to the Appellate Divisions of the District Courts by the Chief Justice of the District Courts and he must approve the designation of one of the assigned judges to be the presiding judge (MGLC 231 §108). Also in the District Courts, if any judge, special judge, clerk or officer of that Court fails to comply with the orders of the Chief Justice of that Court, the Chief Justice of the District Courts is to report such person to the Chief Justice of the Supreme Judicial Court (MGLC 218 §43A). This is no extraordinary power because the Chief Justice does nothing except receive the report. The full Court must act on the facts stated in the report (MGLC 218 §43A).

Under the so called O'Coin rule, the Chief Justice of the Supreme Judicial Court is the final arbiter of requests for goods, facilities or services in which a Judge of a particular lower court seeks to attain by inherent power (SJC Rule 3:23).

This rule, passed in 1972, portends real power, although in the relatively short time since it was passed most disputes have been settled before formally reaching the Chief Justice.

The Chief Justice also appoints two persons to the five member Committee on Probation (MGLC 276 §99A) and he can either himself serve as a member of the Judicial Council or appoint another justice to serve from time to time. Similarly, the Chief Justice is chairman of the Judicial Conference (SJC Rule 3:16). All of the other judges of the Supreme Judicial Court serve on the Judicial Conference as do the Chief Justices of the Appeals, Superior, Probate, Land, District, and Boston Municipal Courts, as well as the Chairman of the Judicial Council and the Executive Secretary (SJC Rule 3:16). The Chief Justice also makes appointments to the Committee on Criminal Justice and the Legislative Recodification Commission.

Power of the Chief Justice to Encumber the Commonwealth

The Chief Justice certifies that the services of the Court's clerical assistants, law clerks and stenographers have been performed and that they should be paid (MGLC 211 §23). Similarly, he certifies the amount of expenses incurred by his brother Justices as well as his own (MGLC 211 §22). He sets the salary of the Executive Secretary. He may not set it, however, higher than 75 percent of the pay of an Associate Justice of the Supreme Judicial Court (MGLC 211 §3A).

It is impossible to determine exactly how much power has been informally delegated by the Court to the Chief Justice. However, the Chief Justice signs on behalf of the Court all applications for federal grants. The Executive Secretary who utilizes such federal grants and performs other administrative functions reports primarily to the Chief Justice.

In summary, it seems that the Court has continued to some extent, in the words of the Herter Commission, to follow "precedent in leaving the direction of these [administrative] duties to the Chief Justice himself..."

B. THE APPEALS COURT

THE APPEALS COURT

The Appeals Court was created in 1972 to relieve the Supreme Judicial Court of some of its appellate caseload and to permit that court to exercise its superintendence powers (MGLC 211A §1). The Court is composed of a Chief Justice and five Associate Justices (MGLC 211A §1) who sit in panels of three or more (MGLC 211A §3). The court has no administrative power outside itself and has not been in existence long enough to create the typically complicated structure of administrative power within itself. However, certain administrative powers in the Appeals Court should be noted. By reason of its appellate function, the method by which it can refer appeals to or have appeals taken from it by the Supreme Judicial Court, the Appeals Court, of necessity, maintains a very close relationship with the Supreme Judicial Court.

The jurisdiction of the Appeals Court includes all appeals from lower courts except appeals in capital cases. However, two justices of the Supreme Judicial Court may request that the Supreme Judicial Court hear any appealed case if they believe the case presents a question of first impression, a constitutional question or a question of such public interest that justice requires a determination by the state's highest court. In similar fashion, the Appeals Court, by majority vote, may certify that direct review by the Supreme Judicial Court is in the public interest.

If after decision by the Appeals Court, three justices of the Supreme Judicial Court believe that further appellate review is necessary, the case may be sent to the Supreme Judicial Court. And if the majority of the Justices of the Appeals Court decide that the question should go to the Supreme Judicial Court, it shall be heard again there. Finally, a case decided by a panel of the Appeals Court may be reviewed by the entire bench of the Appeals Court (MGLC 211A §§10, 11).

There is one curious statute relating to the Appeals Court regarding administration, MGLC 211A §8, which says "The clerk shall serve as the administrative officer of the court..." and then goes on to list what appear to be clerical duties. In no other court is the clerk called the "administrative officer". In the District Courts, administrative authority is in the First Judge and in other courts what is clearly administrative power is given to various judges without their designation as "administrative officer". In sum, it remains to be seen what this designation means.

Powers of the Chief Justice

The Chief Justice has no rule-making power. His principal power is to assign judges to sit on the panels, but even that power is somewhat restricted. "The Chief Justice, insofar as practicable, shall assign justices to panels in such manner that each justice shall sit a substantially equal number of times with each other justice" (MGLC 211A §3). The Chief Justice, furthermore,

shall arrange such sessions of the Appeals Court as may be required for it to discharge its business. However, he must have the approval of the Supreme Judicial Court for such arrangement of sessions (MGLC 211A §4). When the Chief Justice is sitting on one of the panels, he presides over the panel (MGLC 211A §3).

Otherwise, the senior Justice of the Court presides over the panel (MGLC 211A §3). The Chief Justice also has power to create and organize committees and designate members of those committees. However, it is important to note that the Appeals Court is "subject" not only "to the appellate jurisdiction" but also the "supervision and superintendence of the Supreme Judicial Court" (emphasis added) (MGLC 211A §5).

The Appeals Court may spend out of appropriated funds (requests for which are processed and negotiated by the Court through the Executive Department and the Legislature) sums for law clerks, stenographers and other clerical assistance and for printing, transportation and other incidental expenses. However, these funds can only be expended "upon the certificate of the Chief Justice." Similarly, the Chief Justice shall certify the expenses incurred by the Associate Justices, which shall be paid by the Commonwealth (MGLC 211A §2).

The legislation establishing the Judicial Council has not been amended at this date to include the Chief Justice of the Appeals Court as a member, although the Chief Justice of the Appeals Court is a member of the Judicial Conference which is established by Supreme Judicial Court rule (SJC Rule 3:16).

Even though the Chief Justice shall arrange sessions of the Court, sittings of the Court may be adjourned to other places and other times as shall appear to the Court to be "most conducive to the dispatch of its business" and the interests of the public (MGLC 211A §4). The Court usually sits in Boston.

Powers of the Full Bench

Rule Making Power

The Justices of the Appeals Court may adopt rules regulating practices, procedure and internal administration. These rules are subject to the approval of the Supreme Judicial Court; and the Supreme Judicial Court itself may make rules and orders to facilitate appellate review by either Court (MGLC 211A §13).

Appointment Power of the Full Bench

In the Appeals Court, most appointment power is in the full bench. For example, the Justices of the Appeals Court appoint the Messenger of such court and establish his salary (MGLC 221 §76). The statutes do not say who appoints the clerical assistants, law clerks, or stenographers of the Appeals Court. They are appointed in the same way as in the Supreme Judicial Court - by the Chief Justice, with the exception of law clerks who are chosen by the individual justices.

Court officers in the Appeals Court are appointed by the Sheriff of Suffolk County (MGLC 211 §69). The Sheriff is

allowed to appoint one Court Officer to act as Chief Deputy Sheriff for the Appeals Court (MGLC 221 §71). And the Sheriff of Suffolk County may designate one Court Officer to act as Assistant Chief Deputy Sheriff for the Appeals Court. (MGLC 221 §71A)

Court officers may be removed by the Sheriff for cause approved by the Justices of the Appeals Court and they may be removed for cause by the Court alone (MGLC 221 §72). Court Officers of the Supreme Judicial Court and of the Superior Court in Suffolk may be transferred by the sheriff to any other court with the approval of the Chief Justice of the court to which the transfer is being made (MGLC 221 §72). The salaries of Court Officers in the Appeals Court shall be fixed by the Judges of the Appeals Court (MGLC 221 §73). Uniforms of the Court Officers of the Appeals Court shall be designated by the Sheriff and furnished by the county (MGLC 221 §80).

The Court does not have any appointment or approval power over Assistant Clerks. This differs from the practice in other courts where the court has one or the other power. Assistants are appointed by the Clerk himself, who by statute obtains his office by reason of being the Clerk of the Supreme Judicial Court for Suffolk County, and they serve at his pleasure (MGLC 211A §6).³

³The original bill for the Appeals Court proposed that the Clerk be appointed by the Justices of the Appeals Court and that the Justices approve the appointment of Assistant Clerks. A constitutional problem may exist because the Clerk of the Supreme Judicial Court for Suffolk County is elected by the voters of that county yet thereby serves ex officio in a statewide capacity as Clerk of the Appeals Court.

THE SUPERIOR COURT

The Superior Court was established by the Legislature in 1859 pursuant to the Legislature's power to create courts, (Mass. Constitution, Part 2, Chap. 1, Sec. 1, Art. 3). The court was created to replace three trial courts of varying jurisdiction and to relieve the Supreme Judicial Court of its trial work caseload. From its inception, however, the court was unique in that the Chief Justice of the court was empowered to assign the other judges to sit in the several counties as designated by the Legislature (MGLC 212 §2). This flexibility in assigning judges where needed has long been considered one of the court's greatest virtues. However, the Legislature still designates the places of sitting and requires sittings to be held not only at each county seat, but also in other specified towns, known as shire towns, within the county at least once a year. Once begun, however, the court can remove a sitting to other localities within the county (MGLC 212 §14). The statute designating the places of sitting has been changed almost every year from the origin of the court until 1921 and at irregular intervals thereafter. Although the Legislature determines the places of sitting, it has allowed the Chief Justice of the Superior Court to designate the business of any sitting--criminal, civil, equity or tort (MGLC 212 §14A).

C. THE SUPERIOR COURT

Administrative power in the Superior Court differs from administrative power in the Supreme Judicial Court. Any judge of the Superior Court acts for the court according to Catheron vs. Suffolk County 227 Mass. 598 (1917). This case held that whenever there is a statutory reference to "the Superior Court", the Legislature intended that any justice of the Superior Court be able to act. If the full bench is to act, the statute must refer to "the Justices of the Superior Court".

Powers of the Chief Justice

Assignment Power of the Chief Justice

The Chief Justice of the Superior Court has the power to assign (MGLC 212 §2, noted above) the associate justices. He may have the power not to assign an associate justice or to assign an associate justice to the library or his lobby. The Chief Justice can not, of course, prevent an associate justice from receiving his salary, but he can prevent him from sitting. The legislature can remove a judge by impeachment (Mass. Const. Part 2, C.1 §2 Art. 8, and §3 Art. 6) or with the consent of the Governor and Council by Address (Mass. Const. Part 2, C.3, Art. 1).

Besides being able to assign associate justices to particular localities, the Chief Justice can designate the type of cases the associate justices will hear--criminal, equity, etc. And he can designate particular associate justices to hear

particular cases; eminent domain cases (MGLC 80A §9); hearings regarding election petitions (MGLC 55 §28); labor disputes (MGLC 212 §30). The Chief Justice, moreover, may order special jury sittings for criminal business (MGLC 212 §21), and he can order the Grand Jury to be assembled for special business (MGLC 212 §23). This power is called special assignment. Certain judges are often specially assigned to cases in which they have expertise to hear the entire case. More often, however, there is master calendaring. The judge who happens to be sitting in any given session hears cases ready at that time.

The Chief Justice of the Superior Court may also request a justice of the District Court or the Boston Municipal Court to sit in the Superior Court to hear automobile tort cases as well as appeals to the Superior Court of any case over which the District Court had original criminal jurisdiction. The judge selected cannot be the same judge who has heard the case in the District Court or Municipal Court (MGLC 212 §14B). The Chief Justices of the District Courts and the Boston Municipal Court are required to prepare lists of judges eligible to sit in the Superior Court. The Chief Justice of the Superior Court then chooses judges from these lists. The Chief Justice of the Superior Court must certify the expenses of the District or Municipal Court judges so serving.

The Commonwealth pays such expenses and also the judge's compensation. The compensation is the judge's regular salary

computed on a per diem basis and the difference between that and \$114. In other words, it is \$114 per day (MGLC 212 §14E).

The Chief Justice may designate three associate justices of the Superior Court to be members of the Appellate Division of the Superior Court which may increase or reduce sentences imposed in the Superior Court (MGLC 278 §28A).

Even though the Chief Justice of the Superior Court may have more power than the Chief Justices of the two appellate courts above him, he does not have power to discipline an associate justice, except by refusing to assign or assigning to the lobby or the library, all of which have been done rarely and under unusual circumstances. These are his only sanctions.

Additional miscellaneous powers of the Chief Justice include opening the court on Saturday (MGLC 213 §4), keeping custody of certain papers and recordings regarding wire-tapping (MGLC 272 §99) and receiving monthly statements from persons authorized to take bail (MGLC 276 §61).

Appointment Power of the Chief Justice

The Chief Justice also has power to expend money as is appropriated for printing, transportation of documents, clerical work, administration of bail, an executive clerk and other expenses "incident to the work of the court" (MGLC 212 §28).

Pursuant to this power, the Chief Justice has been able to create an administrative office responsible to him. In

this office there is an administrative assistant, a deputy administrative assistant, legislative counsel, eighteen law clerks to the justices, two secretaries for the law clerks, four secretaries to the administrative office and two secretaries for the justices, a legal systems analyst and an assistant to the legal systems analyst. With federal funds from the Massachusetts Committee on Criminal Justice (LEAA), the Chief Justice has been able to provide law clerks and hire secretaries for the justices in four counties outside of Boston (Worcester, Norfolk, Hampden, and Middlesex), a bail commissioner, and a fiscal officer. It is important to note that the Superior Court, apart from the office of the Administrative Assistant and the deputy, is not bound by specific statutory creation of the above positions. Most positions have been requested in the budget under MGLC 212 §28 - created by appropriation, in other words.

An additional power of the Chief Justice is to appoint associate justices to committees which assist him and the court in the discharge of duties. There is no statutory basis for this power. It was delegated to the Chief Justice by a vote of Justices in 1911 and 1920. There are seven permanent committees--a bail committee, a committee on court reporters, a house committee, a library committee, a committee on personnel, a committee on rules, and a committee on Masters. All decisions of these committees must be approved by the entire court. The sole exception is the appointment of probation officers. Once

they are approved by the Committee on Personnel, the committee requests a judge sitting in the county which the probation officer is to serve to appoint him and swear him in. If that judge refuses, a member of the committee appoints him. Furthermore, the Chief Justice has established certain ad hoc committees to consider particular problems, e.g., the new criminal code in Massachusetts.

Powers of Individual Justices

The case of Catheron v. County of Suffolk (227 Mass. 598, 1917) held that even though the Probation Committee of the Superior Court could consider and recommend the appointment of probation officers, because the statute (MGLC 276 §83) said (as it still says) that "the Superior Court" could make such appointments, any justice of the Superior Court could do so. In other words, "'The Superior Court' as used in the statutes means the court held, whether by one or more judges, at a time and place established by law for the judicial administration of justice." Catheron v. County of Suffolk (227 Mass. 598, 602, 1917). Any judge sitting in the Superior Court can act for the entire court if the statute by which he is acting refers to "The Superior Court."

This case and precedent and subsequent statutes have given the individual justices of the Superior Court much administrative power. Some of this power is logical. The Superior Court is a circuit court with its judges traveling to every county (and sometimes to more than one town within that

county) in the Commonwealth throughout the year. Thus, it is necessary for the judges of the Superior Court to have authority to deal with individual cases and situations in the towns where they are sitting.

Nevertheless, it is important to note the authority which has been withheld from the court or the individual judges. Until this year MGLC 278 §1 stated that at the beginning of each session, the District Attorney shall prepare a list of each case to be tried during that session. It added that such list may be revised by a judge of the Superior Court only on motion of the District Attorney or defense attorney. This year the Legislature amended the statute allowing the court to add to the list "on its own motion" (C.228 Acts of 1974). As welcome as this change is, still neither the court nor its justices has control over the initial criminal list; the District Attorney does.

Some powers a single justice does have include the power to adjourn a sitting of the court to another shire town or another location within the same county (MGLC 213 §§10, 11, 12) or designate a particular shire town in a county (where there are two or more shire towns) for the trial of particular cases (MGLC 231 §82). A single justice may fix the time for arraignment to occur at a regular sitting or on a day specially assigned (MGLC 212 §7). Even though regular sittings must be held in locations listed in the statute,

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the court may adjourn from one place to another within a county (MGLC 213 §10). In at least one county, there is a token one-day criminal session held in a shire town. That session is promptly adjourned to the county seat.

Rule Making Power of a Single Justice

Single judges have no rule making power but a single justice has the inherent power to make standing orders for any session in which he sits. Theoretically, the orders "stand," however, until revoked by another judge of the Superior Court. Sometimes they are ignored after the departure of the particular judge who made them.

Appointment, Removal and Supervision Power of a Single Justice

A single justice is required to approve the appointment of an assistant by the District Attorney if there is no assistant already (applicable in all but Dukes and Nantucket Counties per MGLC 12 §18). He may also approve the employment of various clerical personnel for the District Attorneys in Norfolk and Plymouth (MGLC 12 §22). A single justice may appoint a substitute Attorney General or District Attorney for any sitting (MGLC 12 §26). A single justice must approve the appointment of an assistant register of deeds (MGLC 36 §4). In Suffolk County, a single justice may appoint a temporary register of deeds (MGLC 36 §8). And in Suffolk County a single justice may remove the register if there has been a presentment by the Grand jury (MGLC 36 §9). (However, MGLC 211 §4 provides for

the removal of the register of deeds by the Supreme Judicial Court.) Also in Suffolk County, the Superior Court may appoint a temporary register of deeds if there is a vacancy in the office (MGLC 36 §8).

As indicated in the Catheron case, supra, a justice of the Superior Court may appoint probation officers. He may also appoint one probation officer as supervisor of probation, another as his assistant (MGLC 276 §83) and a temporary probation officer (MGLC 276 §89). In fact, the probation officers are "recommended" to the justice by the Court's Committee on Personnel. A justice of the Superior Court may also appoint deputy probation officers for the Superior Court as counselors to juveniles to be paid by the county (as opposed to regular probation officers who are paid by the state) on vouchers approved by the court (MGLC 276 §89A).

A single justice may also appoint temporary stenographers (MGLC 221 §83) and a stenographer for the Grand Jury upon the request of the District Attorney or the Attorney General (MGLC 221 §86).

A single justice also has supervisory authority. For example, he can order an officer of a prison to exhibit a prisoner's record to anyone (MGLC 127 §29). Furthermore, jailers (who are similar to wardens of places of detention) of county jails are required to return to the court a list of all prisoners at the opening of each session as well as an indication of why they are jailed pending trial. If such list

is not entered or returned to the court the jailer can be fined at the discretion of the court. ("Jailer" is another title for the sheriff [MGLC 126 §7]). The sheriff is also required to report to the court at each session regarding the prisoners sent to labor in the house of correction and indicate the number not employed with the reasons why they are not employed (MGLC 126 §12). If the sheriff has failed to post a bond, an individual judge of the Superior Court is required to report that sheriff to the Attorney General, the Governor and the Governor's Council (MGLC 37 §7). A single justice may also set the form of the bonds for county officers (MGLC 35 §43A). If a register of deeds is discharged, the single justice has authority over the papers of that discharged register (MGLC 36 §9). A single justice is also required to receive a report of any juvenile investigation by a lower court probation officer in a de novo appeal (MGLC 119 §56). And a justice of the Superior Court can consent to have records of a delinquency case released to the public (MGLC 119 §60A).

Single justices also have removal powers. They can ratify the removal of assistant clerks appointed by the clerk if they find that good cause was shown by the clerk. Or they can remove him on their own, without stating any reason (MGLC 221 §5). Except in Suffolk County, an individual Superior Court judge may remove jailers on complaint of the county commissioners (MGLC 127 §13).

Before concluding this discussion of appointment, supervision and removal by an individual Superior Court judge, it is interesting and significant to note that there is a statute applicable to both the Supreme Judicial Court and the Superior Court, which says that "Each court may establish a seal and appoint all officers necessary for the transaction of its business" (MGLC 213 §13).

It is uncertain what this latter provision means or what "officers" means, since court officers of both courts are appointed by the sheriff, although in the Superior Court, they are approved by the Court.

Besides the above powers over permanent court related officials an individual judge of the Superior Court may appoint masters to decide questions of fact in civil cases (MGLC 221 §56). Masters receive \$30 an hour for each hour they are actually listening to cases (Superior Court Rule 85). The individual judge may also appoint masters in equity cases also to determine facts. They are paid similarly (Superior Court Rule 86) by the county. A Superior Court judge may also appoint a special master and remove him (MGLC 212 §19A). Before a master is paid a judge must certify his expenses. A judge of the Superior Court may appoint an attorney to investigate a divorce case (MGLC 208 §16). At present, to conform with the new rules of Civil Procedure, the Chief

Justice of the Superior Court is compiling a list of eligible masters.⁴

Even though they are not paid by any governmental agency, an individual Superior Court Judge has the power to appoint receivers under a number of statutes: (MGLC 108A §28, MGLC 109 §22, MGLC 109A §10, MGLC 111 §127H, MGLC 155 §52, MGLC 156B §104, MGLC 214 §21, MGLC 214 §22). The court may appoint trustees (for registered land, MGLC 185 §74; to fill a vacancy, MGLC 203 §5; for property held by minors, MGLC 203 §18). The court may also remove a trustee and appoint a successor (MGLC 203 §12).

Power of Single Justice to Encumber the Commonwealth

The primary power of a Superior Court judge to encumber the Commonwealth is contained in MGLC 213 §8 which says "The courts (Supreme Judicial or Superior Court - meaning individual judge of the Superior Court) shall, respectively, examine and allow accounts for services and expenses incident to their sittings in the several counties and order payment thereof out of the respective county treasuries." The Supreme Judicial Court based its decision in the O'Coin case, supra, in part, on this statute. However, it said that even if this statute did not exist, a justice of the Superior Court had the inherent power to charge the county treasury for the necessary and reasonable expenses.

⁴In the new rules, the distinction between auditors and masters is abolished as is the distinction between law and equity.

A single justice can also allow compensation and actual traveling expenses for an auditor (MGLC 221 §61). He can do the same regarding special masters, commissioners and referees (MGLC 221 §55).

A Superior Court judge may be called on to approve certain expenses of a District Attorney or any of his assistants, including travel expenses and expenses for expert testimony (MGLC 12 §24).

A Superior Court judge must determine the expense of transporting prisoners if there is a dispute between counties (MGLC 127 §125). A Superior Court judge may apportion between counties the pensions of court officers (MGLC 32 §76).

A judge of the Superior Court may allow expenses to a permanent stenographer for transportation out of the county he or she is appointed to serve. The presiding judge at each session must approve payment of temporary stenographers (MGLC 221 §91). An individual judge also determines the compensation for temporary clerks (MGLC 221 §100).

In criminal cases the Superior Court judge may allow extra compensation for the officers who serve process if there is written approval from the District Attorney or a District Court Judge (MGLC 262 §47).

The Judge may approve and apportion the expenses of probation officers (MGLC 276 §94). He also has the authority to fix the bond of a probation officer (MGLC 276 §84). And an individual judge may authorize an expenditure by a probation officer for temporary support and transportation of probationers (MGLC 276 §95).

The traveling expenses of the clerk and assistant clerk for the Appellate Division must be approved by a justice of the Appellate Division of the Superior Court (MGLC 278 §28D).

Finally, the court can allow reasonable compensation from the county for the assignment of counsel in all criminal cases before it. In first degree murder cases counsel is to receive \$100 for a District Court appearance and no more than \$2,500 for "all other services." For other felonies and misdemeanors, counsel may receive payment at a rate not to exceed \$30 per hour in court and \$20 per hour out of court (Superior Court Rules 95 and 95A) and such expenses are to be paid by the county. It is not clear what power the Superior Court has to control fees in the District Court. Perhaps it is because all first degree murder cases must eventually come before the Superior Court.

Powers of the Full Bench

Rule Making Power of the Full Bench

Certain powers are reserved to the full bench of the Superior Court. Most prominent among those powers is the general power to make procedural and practice rules (MGLC 213 §3) and the power to make rules for equity cases (MGLC 214 §6). It also has power to provide by general rule for the reporting of all testimony in equity cases (MGLC 214 §24). The full bench of the Superior Court may change the forms of pleading subject to the approval of the Supreme Judicial Court (MGLC 231 §147). It may establish by rule

the form for a waiver of indictment and also may regulate the procedure for waiving of indictments (MGLC 263 §4A). It may pass rules regarding pleadings and motions in criminal proceedings (MGLC 277 §47A). The Court can establish by rule forms for appeal to the Appellate Division and make rules regarding the procedure for appeals to the Appellate Division (MGLC 278 §28B).

The entire court has the power to regulate stenographers (MGLC 221 §87). It can also regulate its own clerical assistants (MGLC 221 §89). The full bench can make rules regarding persons authorized to take bail (MGLC 276 §57) and rules governing professional bondsmen or surety agents (MGLC 276 §61B). It may also make rules regarding alleged corrupt practices in election petitions (MGLC 55 §28).

There exists a statute which seems to have been superseded by the statute authorizing the Chief Justice to make assignments, which allows the Justices of the Superior Court to arrange for attendance of a justice at the times and the places for holding court (MGLC 213 §9).

Appointment Power of the Full Bench

The justices of the Superior Court must approve the appointment of court officers by the sheriffs of the larger counties (MGLC 221 §70). However, the sheriff alone designates the chief court officer or the deputy sheriff to supervise the other court officers (MGLC 221 §71). In the other counties, the Sheriff assigns deputy sheriffs to act as court officers and the Judge at the and of the session certifies their expenses (see MGLC 221 §75).

The court must approve the removal or transfer or interchange of court officers (MGLC 221 §72). The justices of the Superior Court may appoint a messenger to act as a clerical assistant for their court at a salary to be established by them (MGLC 221 §76). Similarly, they may appoint an assistant messenger (MGLC 221 §76A).

The justices of the Superior Court may appoint stenographers removable at their pleasure (MGLC 221 §82), and Presiding Justices may appoint temporary stenographers at a compensation to be fixed by the court (MGLC 221 §§83 and 91). They may also appoint interpreters to serve at their pleasure. They have the authority to employ other interpreters when official ones are not available (MGLC 221 §92). In Suffolk County they may fill a vacancy in the office of the clerk for criminal business or the clerk for civil business (MGLC 54 §142).

They may appoint 19 assistant clerks for civil business in Suffolk County (MGLC 221 §6). They may designate an equity clerk in Middlesex County (MGLC 221 §6A), Worcester County and in Essex County (MGLC 221 §6B). They may appoint a criminal clerk in Essex County (MGLC 221 §6C) and criminal assignment clerks in Worcester and Middlesex Counties (MGLC 221 §§6F and 6G). In Norfolk and Bristol Counties, the clerk designates an assistant clerk as clerk for criminal proceedings (MGLC 221 §§ 6D and 6H). The court may also appoint temporary clerks (MGLC 221 §§8 and 10).

The court also approves the appointment of professional bondsmen (MGLC 276 §61B), appoints bail commissioners outside of Suffolk County (MGLC 276 §57) and approves bail commissioners in Suffolk County who are appointed by the sheriff (MGLC 276 §57).

Power of the Full Bench to Encumber the Commonwealth

The full bench also has power to encumber the Commonwealth. The Judges may designate the court officers to serve for the jury pool and may establish their original compensation to be paid by those counties which have such officers (MGLC 212 §20A). Additional increases must be approved by the County Commissioners (MGLC 35 §34). As noted above, the full bench may set the salary for the messenger and the assistant messenger of the court and their own clerical assistants (MGLC 221 §76, §76A, MGLC 221 §89). Furthermore, the court may establish the salaries for the official stenographers and the court may certify the compensation to be received by temporary stenographers (MGLC 221 §91).

D. THE PROBATE COURTS

THE PROBATE COURTS

The Probate Courts are statutory courts and derive their authority and power from the statutes passed by the legislature.

In considering the effect and intent of the legislature in establishing the courts and defining their jurisdiction and their authority, it is helpful to keep in mind the context in which some statutes were enacted as well as the contradiction of such statutes with later statutes which seem to have overlapped the subject matters of such early statutes.

In 1783 the legislature established the present Probate Courts and continued a court system which had origins in 1692 (St. 1783, C. 46, §§1, 2 eff. 12 March 1784). Jurisdiction was continued over decedents' estates and guardians. Appellate jurisdiction of such matters was transferred from the Governor to the Supreme Judicial Court. The concept of the Probate Courts as county courts was established, which concept remains basically unchanged today. All judges and registers of probate were paid from the individual fees paid to the judges in the same manner as some deputy sheriffs are compensated to this day. Each judge was his own administrator answerable only to the Supreme Judicial Court on appeal.

In 1858 the Probate Courts were re-established as Courts of Probate and Insolvency. They became courts of record in 1862. Jurisdiction was extended to matters of divorce in 1921 and general equity jurisdiction was granted in 1965. Other matters of lesser significance came under the jurisdiction of the Probate Courts during these years.

The compensation of Probate Judges was increased at first to supplement fees received and later fees were required as a source of compensation. Part-time and special judges, as population increased, became full-time judges. However, the framework of the original county system remained.

It was not until 1931, on the recommendation of the Judicial Council, that an Administrative Committee was established as an advisory body to recommend uniform practice and procedure. "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." (1956 Annual Survey of Massachusetts Law, p. 231.)

The advisory function of the Administrative Committee was not sufficient and in 1956 the power to require and

to prescribe uniform forms, practices, procedures and records was added to MGLC 215 §30A. Preceding the adoption of these powers by less than one month was the approval by the Supreme Judicial Court of the present uniform probate and divorce forms adopted by the Judges with the advice of the Administrative Committee under MGLC 215 §30.

In 1963, following successive recommendations of independent survey commissions, the office of Chief Judge was established. The administrative powers of the Administrative Committee were transferred to the Chief Judge, and the power of assignment of judges to sit in counties outside of their own was given to the Chief Judge. Presumably the constitutional vesting of power to establish sittings in the Probate Judges in the absence of specific legislative direction prevented the legislature from adding the power of establishing sittings. (Mass. Const. Part 2, C3, Cent. IV) ⁵

In such a context questions of administrative power in the Probate Courts may result in equally well-reasoned, but contradictory conclusions which are considered herein.

Rule-making Power - Generally

General Laws chapter 215 §30 and chapter 216 §16 (now obsolete relating to insolvency rules) established the power in the Probate Courts to make rules for regulating practice for conducting the business of the Court and for prescribing forms with the concurrence of the Supreme Judicial Court.

⁵ Compare 1963 Annual Survey of Massachusetts Law, pp. 251-52. Note also the final sentence of MGLC 217 §8.

The statute establishing the office of Chief Judge in 1963 seemingly contradicts such authority and conceivably vests such authority in the Chief Judge. The prior statutes date from 1836 and 1838. It can be argued on the one hand that the legislative intent of the prior statutes intended to restrict such power to the separate Probate Courts as they existed in 1836 and 1838, and that the 1963 statute vested such powers in a single administrator - the Chief Judge. On the other hand, an argument can be made that the failure of the legislature to repeal the prior statutes was indicative of an intent to retain the rule-making power in a majority of the Probate Judges; or to retain rule-making power in the judges and power to create uniform procedures in the Chief Judge; or retain dual jurisdiction of such power in a majority of the judges and the Chief Judge; or it can be argued that the legislature did not see the conflict its contradictory statutes created.

Similar conflicts attributable to an oversight or failure to up-date in accord with the intent to retain a dual structure are evident in the statutes.

For example, the retention of approval in the Administrative Committee over the transfer of equity cases from the Superior Court to Probate Courts seems to be an oversight (MGLC 214 §32A). The requirement that judges so arrange the performance of their duties as to insure a prompt and punctual

discharge thereof (MGLC 217 §2) preceded and presumed the absence of any central power of assignment now covered by MGLC 217 §8. The statute allowing assignment of the special judge of Hampshire County upon written request of any one of the judges of the four western counties preceded the statute creating the Chief Judge with a power of assignment (MGLC 217 §3).

The statute establishing the Judicial Council, which preceded the creation of the office of Chief Judge (and Chief Justice of the District Courts and the Appeals Court) fails to include such office and suggests a similar oversight (MGLC 221 §34A).

POWERS OF THE CHIEF JUDGE

The specific powers of the Chief Judge of Probate include:

1) Assignment of Judges

The statute contemplated an exercise of such power and placed no limitation of time on such assignments. Exercise of this power has been used for filling of vacancies caused by absence, illness or retirement and a succession of week-long re-assignments of all judges to familiarize the judges, particularly new judges, with the different courts and different approaches in procedure employed from court to court.

Following such week-long re-assignments in September of 1973, and January and May of 1974, approximately eight rules or amendments have been adopted by vote of a majority

of the judges under MGLC 215 §30, and approximately twenty uniform practices, after all judges were polled, have been adopted under MGLC 217 §8, proving the usefulness of the power of assignment.

2) Visitations of the Chief Judge

The Chief Judge is authorized to visit the Probate Courts. In practice the Chief Judge has, during the past twelve months, visited every Probate Court, on most occasions in the company of a judge of the Administrative Committee. Such visitations reveal first hand the necessity and, in some cases, the urgency of physical changes and personnel requirements which have been, in turn, communicated to the legislature and appropriate state agencies.

3) Establish and Require Uniform Practice and Procedure

As previously described this power seems to overlap another statute; however, to preserve the distinction, uniform practices intended to relate to procedural matters rather than other matters have been promulgated in instances where procedure was not uniform in the several courts.

4) Records of the Nature and Volume of Work

Since 1963, the office of Chief Judge has kept records previously established and kept by the Administrative Committee.

Such records have recorded the case volume of the courts by subject matter, and have reported the decrees issued and receipts received. A current re-evaluation of statistics received and their usefulness has been undertaken to determine how the time of the courts may be most meaningfully employed.

5) Conferences of Judges and Other Officials

Through the financial assistance of the Massachusetts Court Education Program, semi-annual conferences of judges have been held providing an opportunity for review of new approaches in judicial decisions, legislation and discussion of topics of mutual interest and concern.

6) Executive Secretary and Staff

The Chief Judge may, subject to appropriation, appoint an Executive Secretary and others as he may require (MGLC 217 §8A).

7) Administrative Committee

The Administrative Committee is not appointed by the Chief Judge of Probate but rather by the Chief Justice of the Supreme Judicial Court (MGLC 215 §30A). This statute preceded the establishment of the office of Chief Judge. Such Committee, after its original powers were transferred to the Chief Judge in 1963, now serves as an advisory committee to the Chief Judge. Although the statute authorizes the payment by the Commonwealth to its members of expenses (including clerical expenses), no member has in recent years requested reimbursement of expenses nor employed clerical assistance as authorized.

8) Expenses of the Chief Judge

The office of the Chief Judge submits a budget to the Budget Director annually; appropriations are voted by the legislature and signed by the Governor. Such a budget relates only to the operation of the Administrative Office including assignments of the part-time judge (MGLC 217 §40) and travel expenses of judges on assignment outside of the county to which

they were appointed. Such traveling expenses must be certified for payment by the Chief Judge (MGLC 217 §42).

POWERS OF INDIVIDUAL JUDGES OF PROBATE COURTS

Judges of single-judge courts appoint such assistant registers, probation officers, court officers or messengers as the legislature may authorize and fund. Court officers and messengers are paid from county budgets.

In multiple-judge courts, such as Middlesex (four judges), Suffolk and Norfolk (three judges), Bristol, Essex, Hampden, Plymouth and Worcester (two judges) decisions as to such appointment are generally made collectively as they are to sessions of the court, trial lists and budget requests for materials, supplies, court officers and other expenses provided by the respective counties. The improvements to physical facilities are generally initiated by the local judge or judges or the Chief Judge by request to the County Commissioners.

Local judges, in the conduct of cases, may appoint stenographers, guardians ad litem for minors or incompetents and certain others, including a psychologist in Middlesex County and a psychiatrist in Norfolk County assigned by the Department of Mental Health to court clinics in those counties. The stenographers in Suffolk and Hampshire counties are appointed by the local judges on a permanent basis, whereas other courts employ freelance stenographers on a per diem basis at county expense (MGLC 215 §18).

Guardians ad litem are appointed to review accounts on behalf of minors and incompetents, to investigate domestic relations matters, to represent the interests of incompetent survivors or omitted children and to prosecute contempts for failure to support (MGLC 206 §24, 208 §16, 192 §§ 1B, 1C, 215 §56B).

Probation officers have similar duties in domestic relations cases (MGLC 209 §32, 276 §85A). Probate judges may also appoint masters and auditors to hear probate accounts (MGLC 221 §57), and domestic relations matters by virtue of ecclesiastical power (MGLC 208 §33).⁶

OBLIGATIONS OF COUNTIES

Through the County Commissioners, counties must provide space for the use of the Probate Courts and for storage. Materials for keeping records, printed forms and stationery must also be provided by the County. Upon application of a local judge or register, a justice of the Supreme Judicial Court may certify the need for fireproof rooms and other necessary accommodations which shall be provided by the County Commissioners (MGLC 215 §§ 53,54). The County Commissioners may, if in their judgment public convenience requires, cause

⁶C.F. Hitch, Practice and Procedure in Probate Courts (1952) p. 392.

the files and records to be rearranged, indexed, docketed, worn docketed to be renewed and indexes consolidated under the direction and supervision of the register (MGLC 215 §55).

POWERS AND DUTIES OF THE REGISTERS OF PROBATE

With respect to decedents' estates, Probate Courts are the custodians of records. The duty to maintain such records is imposed on the register, together with such other duties as are required by law or prescribed by the judge (MGLC 217 §15). To assist the register, judges may appoint assistant registers to perform duties under the direction of the register (MGLC 217 §27).

The register may appoint such clerical assistants as may be authorized by appropriation of the legislature and approved by the Director of Personnel and Standardization for the Commonwealth (Reg. G-5 of Division of Personnel and Standardization issued under MGLC 7 §28).

Such clerical assistants are subject to the same rules and regulations relative to vacation, sick leave, travel and overtime as all other state employees.

The register shall account to the State Treasurer quarterly and pay over to him all fees and compensation collected by him (MGLC 217 §19).

The records and doings of the register shall be inspected semi-annually by the judges of Probate (MGLC 217 §11) and the register shall report public funds or estates filed for record to the Division of Public Charities (MGLC 217 §19). He shall also report

divorce statistics and changes of name annually to the Secretary of the Commonwealth (MGLC 208 §46, 210 §14).

POWER TO ENCUMBER FUNDS IN THE ABSENCE OF APPROPRIATIONS

Local judges, in the absence of a specific application of the O'Coin inherent power rule, have no specific authority or autonomy to encumber funds in excess of appropriations.

TIMES AND SITTINGS OF COURTS

The Constitution, Part 2, Chapter 3, Article IV, prescribes sittings to be designated by the judges where not specifically required by the legislature (MGLC 215 §62).

The discretionary power as to time of sittings is left with the judges notwithstanding the mandatory sessions prescribed. The courts shall be open daily including Saturdays, if necessary, but not on Sundays or legal holidays. Notices (citations) shall not be returnable on a state election day or legal holiday (MGLC 215 §58).

SUMMARY

Administrative power in the Probate Courts is, in many instances, not clearly defined due to the superimposition of reform statutes on an existing framework. Legislation was filed in 1974 to rectify many of the discrepancies above described; however, due to a shortened legislative year, these reforms were referred to study committees and hopefully will be given further consideration in a future session of the legislature.

E. THE LAND COURT

THE LAND COURT

The Land Court was created in 1898. It has one Judge and two Associate Judges, appointed by the Governor with the consent of the Governor's Council (Massachusetts Constitution, Part 2, Chap. 2, §1, Article 9, MGLC 185 §2). The exclusive original jurisdiction of the Land Court extends to all petitions to register land and for confirmation of title under the Torrens system, set out generally in MGLC 185, and, in addition, to various actions involving property interests not governed by the provisions of MGLC 185 (MGLC 185 §1). These areas, specifically enumerated by the basic jurisdictional grant, are foreclosure and redemption procedures for tax titles (MGLC 60), actions to recover freeholds (MGLC 237), petitions to "require actions to try title" (MGLC 240 §1-5), to determine the validity of encumbrances (MGLC 240 §11-14), to discharge mortgages (MGLC 240 §15), petitions requiring transfer of interest (MGLC 240 §27), petitions to determine flats boundaries (MGLC 240 §119), to determine enforceability of equitable restrictions (MGLC 240 §16-18), to determine public boundaries (MGLC 42 §12), and to evaluate municipal zoning ordinances (MGLC 240 §14A[MGLC 185 §1]).

The Court has general equity jurisdiction concurrent with the Supreme Judicial Court and Superior Court of cases involving right, title, and interest in land, except for specific performance of contract and concurrent jurisdiction in actions involving real estate under MGLC 214 §3. Concurrent jurisdiction is extended to all procedures transferred under MGLC 211 §4A. (MGLC 185 §1.)

Additional jurisdictional grants involve determination of compliance with subdivision control laws (MGLC 41 §81FF) and jurisdiction of civil actions transferred by the Superior Court (MGLC 212 §26A).

POWERS OF THE JUDGE

Rule-Making Power
of the Judge

"The court shall from time to time make general rules and forms for procedure, which before taking effect, shall be approved by the Supreme Judicial Court or by a justice thereof." (MGLC 185 §1) It has not been formally decided whether this statute means the Judge of the Land Court or the Judge and the two Associate Judges have the power to make rules. However, as a matter of practice, the Judge alone now promulgates rules. The proceedings in the Land Court, by its own rule, are governed by the Rules of the Superior Court (Land Court Rule 6). However, any suspension of any of the Superior Court rules will not be operative in the Land Court unless the Judge of the Land Court so orders.

It has never been formally decided if the judges must sit en banc or singly, but they do sit singly.

Appointment Power of the Judge

The Judge of the Land Court has appointment power which is peculiar to the Land Court, when compared to appointment power in the other courts. He may appoint Deputy Recorders (Recorders act as Clerks) and such Recorders shall perform the duties the court assigns to them (MGLC 185 §6). However, these Deputy Recorders are appointed subject to the approval of the Governor and the Governor's Council. The Recorder, who also acts as the Clerk, like the appointed Clerks of other courts, is appointed by the Governor and the Council (MGLC 185 §6). The Recorder may appoint two Assistant Clerks of the Court with the approval of the Judge (MGLC 185 §6). (This is not inconsistent with the practice in the District Courts. See District Courts, infra.) The Recorder may also designate two employees to be Deputy Assistant Clerks with the approval of the Judge. They perform the Recorder's duties as clerk of the Court (MGLC 185 §6).

Because the Land Court sits in Boston and the Recorder's Office is there, the business of registering land outside of Boston is performed by the Registers of Deeds who ex officio have the title of Assistant Recorders (MGLC 185 §10). The Assistant Recorders in the various registries (who are the Registers of Deeds) may appoint technical assistants with the approval of the Judge of the Land Court (MGLC 185 §10A).

The compensation for such technical assistants is the same as that of the First Assistant Register of Deeds in any county registry, except in Middlesex County where the compensation is the same as that of the First Assistant Register in Suffolk (MGLC 185 §10A).

The Judge of the Land Court may also appoint one or more attorneys to be Examiners of Title. He may also appoint a Chief Title Examiner, who shall perform the Recorder's duties in the Recorder and Deputy Recorder's absence (MGLC 185 §12).

The Land Court budget is officially signed and submitted by the Recorder alone. It is reportedly prepared with the advice and approval of the Judge, but the Judge does not appear to exercise the final, formal authority over the budget.

Most hiring is done by the Recorder; about 90 percent of the Court's personnel are reportedly employed by her. The Judges appoint their own law clerks (there are now two), title examiners (MGLC 185 §12), deputy recorders (MGLC 185 §6), and court officers in Suffolk (MGLC 185 §13). Clerical and administrative staffing is generally done by the Recorder; she has the statutory authority to employ "necessary assistants and messengers," but this is subject to the "court's approval." The Recorder is generally described as "under the direction of the court" (MGLC 185 §7).

Engineers are interviewed and selected by the Chief Engineer, but are officially hired by the Recorder. There is not any specific statute authorizing engineers in the Land Court. According to the Court, the Engineering Department was created around 1910 by the Judge, relying on MGLC 185 §7⁷ providing for assistants and messengers. Apparently, there has always

⁷§117 provides for the hiring of draftsmen and assistants to make sectional plans, but engineers do not come under this provision.

been some conflict between the Judge and Recorder concerning hiring and administrative authority. MGLC 185 §7 does seem to clearly confer the final authority on the Judge.

Power of the Judge of the Land Court to Encumber the Commonwealth

The Judge shall certify the expenses of himself and the other Judges of the Land Court (MGLC 185 §14). The salaries of the Recorder and the Deputy Recorders shall be fixed by the Judge subject to the approval of the Governor and the Council (MGLC 185 §14). The salaries of the Examiners of Title are fixed by the Governor and the Council (MGLC 185 §14).

Except in the case of the Reporter of Decisions of the Supreme Judicial Court, there is no other court for which the Governor and the Council have the power to approve or themselves determine the salaries of court employees. Note that MGLC 185 §14 says that "... the compensation and salaries of...all assistants and messengers in the Land Court shall be fixed by the Governor and Council." Paradoxically, there is no specific statutory provision for the appointment of messengers for the Land Court, and there are no messengers.

Power to Arrange Sittings

The Court regularly sits in Boston but may adjourn from time to time to such other places in the state as public convenience requires. In Suffolk County, the City Council, which acts as the County Commissioners for Suffolk County, is required by statute to provide suitable rooms for sittings of the Court

in the same building with or convenient to the Probate Court or the Registry of Deeds (MGLC 185 §1). The same mandate applies to County Commissioners in other counties (MGLC 185 §1).

There is no statutory provision as to who is to arrange the sessions. However, there is a provision allowing simultaneous sessions. This provision says that simultaneous sessions "shall be so arranged as to insure prompt discharge of its (meaning the Court's) business" (MGLC 185 §3).

POWERS OF THE FULL COURT AND INDIVIDUAL JUDGES

Appointment Power of the Full Court and Individual Judges

All three Judges appoint the court officers (MGLC 185 §13). If the court sits outside Suffolk County, the sheriff is to assign a deputy sheriff to act as court officer (MGLC 185 §13). The individual judges may appoint stenographers in individual cases (MGLC 185 §13A), and they may appoint title examiners to be masters in individual cases (MGLC 185 §43). They may also appoint guardians ad litem in individual cases (MGLC 185 §40).

Power of the Full Court and Individual Judges

By reason of their power to appoint court officers in Suffolk County, the judges of the Land Court have the power to encumber the Commonwealth. There is no specific provision for the salaries of such officers. Presumably the salary is negotiated by the judges and the Commonwealth. Land Court officers appear to be the only state-paid court officers. The stenographers

who are appointed by individual judges in individual cases are paid by the county in which the land in question lies upon the judge's certification (MGLC 185 §13A). Similarly, compensation of masters who are title examiners is paid by the county where the land is situated except that it may be awarded as part of the costs of the proceeding, in which case it is paid by one of the parties (MGLC 185 §43). The court may also determine the compensation of a guardian ad litem to be paid as the court may direct (MGLC 185 §40).

F. THE BOSTON HOUSING COURT

THE BOSTON HOUSING COURT

The Housing Court of the City of Boston was created in late 1971. It is the only court in the Commonwealth which is not funded by the state or a county. The Boston Housing Court is funded directly by the City of Boston.⁸At present, the Housing Court has two judges who sit in the Suffolk County courthouse. Its jurisdiction is limited to cases arising under laws, ordinances, rules or regulations concerned with "the health, safety, or welfare of any occupant of any place used, or intended for use, as a place of human habitation" (MGLC 185A §3) and zoning cases (§1, C. 700, Acts of 1974). It has civil, criminal and equity jurisdiction at the Superior Court level (MGLC 185A §3) and must conduct jury trials when they would be required in the Superior Court (MGLC 185A §23). Appeals go directly to the Appeals or Supreme Judicial Court (MGLC 185A §26).

Rule Making Power

The Chief Judge of the Housing Court may make rules and forms for procedure which must be approved by the Supreme Judicial Court or a justice thereof (MGLC 185A §7). In these rules the Housing Court must provide for some convenient and effectual means of having the testimony of witnesses reported to the full bench of the Supreme Judicial Court or the Appeals Court (MGLC 185A §27). The Housing Court was the first court in the Commonwealth to use tape recorders for preserving testimony pursuant to permission of the Supreme Judicial Court.

⁸The Boston Municipal Court and the District Courts in Suffolk County are funded by the City of Boston because the City Council of Boston acts as the county commissioners for Suffolk County.

Appointment Power

The Judges of the Housing Court are appointed by the Governor with the consent of the Governor's Council (Mass. Constitution Part 2, Chap. 2, §1, Art. IX). They must be members of the bar. The Clerk is appointed by the Governor without the approval of the Council (MGLC 185A §9). If the office of Clerk is vacant due to absence, death or removal, the Chief Judge may appoint a temporary Clerk to act until the Clerk resumes his duties or until the vacancy is filled (MGLC 185A §10). The Clerk may appoint, with the approval of the Chief Judge, such Assistant Clerks "as the City Council of the city, with the approval of the mayor of the city, may from time to time determine." Assistant Clerks are removable at the pleasure of the Clerk or the Chief Judge (MGLC 185A §11). The Chief Judge may appoint "such number of court officers...as the City Council of the City, with the approval of the Mayor of the City, may from time to time determine." The court officers may be removed for any cause considered sufficient by the Chief Judge (MGLC 185A §15). Furthermore, the Chief Judge shall approve the uniform of the court officers (MGLC 185A §15). "The Chief Judge may appoint such number of housing specialists as the City Council of the City, with the approval of the Mayor of the City, may from time to time determine." One may be designated as "Chief Housing Specialist" by the Chief Judge. All hold office at the pleasure of the Chief Judge and have powers and perform duties as the Chief Judge prescribes (MGLC 185 §16).

The Chief Judge of the Housing Court may appoint temporary stenographers in individual cases at the same rate as a Superior Court temporary stenographer (MGLC 185A §18). This provision is rarely used because the Court has electronic recording equipment.

Power to Encumber the City

Regarding the appointment of court officers, Housing Specialists and Assistant Clerks, the Court must negotiate very closely with the City Council and the Mayor for funds to pay such personnel (MGLC 185A §§11, 15 and 16).

Stationery and office supplies of the Housing Court must be approved by the Chief Judge and are paid upon vouchers approved by the Chief Judge within the limits of available city appropriations (MGLC 185A §18).

Sittings

The Housing Court sits in Boston. An appropriate space is to be provided in the Suffolk County Courthouse for the court. Space may be provided in other courthouses in the city with the approval of the city (MGLC 185A §4). The court has conducted sessions in non-court facilities in Boston's neighborhoods on several occasions. The Housing Court is open on business days. However, if the Chief Judge determines that it should be open at other times, he can open it (MGLC 185A §5) and he has - even to the point of hearing ex parte cases requiring speedy action at his home after business hours.

G. THE HAMPDEN COUNTY HOUSING COURT

THE HAMPDEN COUNTY HOUSING COURT

The Housing Court of Hampden County was created in 1973 (C.591 Mass. Acts of 1973). At present the Hampden County Housing Court is a one Judge court and sits in the Hampden County Courthouse in Springfield. Its jurisdiction is limited to cases arising under laws, ordinances, rules or regulations concerned with "the health, safety or welfare of any occupant of any place used, or intended for use, as a place of human habitation" (MGLC 185B §3). It has civil, criminal and equity jurisdiction for the above cases (MGLC 185B §3) and may conduct jury trials (MGLC 185B§23).

Rule Making Power

The Housing Court may make rules and forms for procedure which must be approved by the Supreme Judicial Court or a justice thereof (MGLC 185B §7). In these rules the Housing Court must provide for some convenient and effectual means of having testimony of witnesses reported to the full bench of the Supreme Judicial Court or the Appeals Court (MGLC 185B §27).

Appointment Power

The Judge of the Hampden County Housing Court is appointed by the Governor with the consent of the Governor's Council (Mass. Constitution Part 2, Chap. 2, §1, Art. IX). He must be a resident of the County after his appointment and a member of the bar. The Hampden

County Housing Court Judge "shall receive the same salary as an Associate Justice of the Superior Court" (MGLC 185B §8).

In the absence of the Judge, his duties are to be performed by an Associate Justice of the Superior Court. He can request assistance from either the Superior or District Courts. (MGLC 185B §8). The Clerk is appointed by the Governor (MGLC 185B §9). If the office of Clerk is vacant due to absence, death or removal, the judge may appoint a temporary Clerk to act until the Clerk resumes his duties or until the vacancy is filled (MGLC 185B §10). The Clerk may appoint, with the approval of the Judge, one or more Assistant Clerks to be paid by him "unless salaries payable by the County are authorized by the General Court" (MGLC 185B §11). Assistant Clerks are removable at the pleasure of the Clerk or the Judge (MGLC 185B §11). "The Judge may appoint a court officer who may be removed for any cause considered sufficient by the Judge" (MGLC 185B §15). Furthermore, the Judge shall approve the uniform of the court officers (MGLC 185A §15).

"The Judge may appoint such number of Housing Specialists as the County Commissioners may from time to time determine". One of these may be designated chief Housing Specialist by the Judge. All hold office at the pleasure of the Judge and have powers and perform duties as the Judge prescribes (MGLC 185B §16).

Power to Encumber

Regarding the appointment of Court Officers, Housing Specialists and Assistant Clerks, it appears that the Court must negotiate very closely with the County for funds to pay such personnel (MGLC 185B, §§11, 15, and 16). The Judge is authorized to provide for a proper recording system to be paid for by the County (MGLC 185B §18).

Expenses for stationery and office supplies of the Housing Court may be approved by the Judge.

Sittings

The Housing Court usually holds its sittings in the Hampden County Superior Courthouse. Space may be used in the County District courthouses as the Judge sees fit (MGLC 185B §4). The Housing Court is open on business days. However, if the Judge determines that it should open at other times he can open it (MGLC 185B §5).

H. THE DISTRICT COURTS

THE DISTRICT COURTS

Administrative power in the District Courts is shared by the Chief Justice and the First or Presiding (senior) Justices of each of the 72 District Courts.⁹ The Office of Chief Justice of the District Courts was created in 1963. Previously, the District Courts, which evolved from the English Justice of the Peace system, were 72 independent courts, each with its own procedures, rules, and forms. Prior to the creation of the Office of Chief Justice, the District Courts were loosely organized under an Administrative Committee of District Court Justices. There still exists in the statutes and in the courts (as in the plural title "District Courts") the notion that each of the courts is autonomous, separate, and independent. However, the recent history of the District Courts has seen greater uniformity in the District Courts.

This section will consider the rule making, appointment and assignment powers, and the power to encumber the county or the Commonwealth, of the Chief Justice of the 72 District Courts, the First Justice of each court, and, finally, any District Court Judge.

⁹This section will consider only the District Courts, which include all courts of limited civil and criminal jurisdiction outside of a certain section of the city of Boston under the jurisdiction of the Boston Municipal Court, a separate court with a separate Chief Justice which is administered differently from the 72 District Courts.

Powers of the Chief Justice

In a memorandum dated April 27, 1972, the Supreme Judicial Court, meeting off the bench, administratively, spelled out the powers of the Chief Justice of the District Courts:¹⁰

"...Since it had been apparent in correspondence that Chief Justice Flaschner was concerned about the extent of his powers as Chief Justice he was advised as follows:

- 1) Chief Justice Flaschner and the other members of the Grievance Committee have full power to release the report on the investigation into the administration of justice in the Municipal Court of the Dorchester District.
- 2) Chief Justice Flaschner has full power to assign Judge Troy and other District Court Judges to District Courts other than those to which they were originally appointed.
- 3) Under MGLC 218 §43A, Chief Justice Flaschner has general superintendence of all the District Courts, including the ordering of uniform practices.
- 4) Under MGLC 218, §43A, Chief Justice Flaschner has power of supervision of general court records of every District Court.
- 5) In case of the refusal of any Judge, Clerk or Officer of any District Court, other than the Municipal Court of the City of Boston, to comply with the order of the Chief Justice of the District Courts in the performance of his duties and powers, Chief Justice Flaschner, under MGLC 218, §43A, shall report such person, with a statement of noncompliance, to the Chief Justice of the Supreme Judicial Court, and the Supreme Judicial Court shall thereafter forthwith make an appropriate order as to the matter involved.

¹⁰This is a memorandum of a meeting between the full bench of the Supreme Judicial Court, the Chief Justice of the District Courts and two other Judges of that Court, who, with the Chief Justice, were the members of the Grievance Committee of the District Courts, relating to an investigation of the Municipal Court of the Dorchester District.

It was pointed out to Chief Justice Flaschner that the Supreme Judicial Court will promptly consider any report by him of such a refusal or failure to comply with his order."

Rule Making Power of the Chief Justice

Although there is no statute which specifically says so, it is generally believed that all rule making power in the District Courts is vested in the Chief Justice. He derives this power from a variety of statutory sources. First, MGLC 218, §43¹¹ gives to the Chief Justice the power to make rules for certain specific situations - principally, civil matters. (The power was previously in the Administrative Committee). But he also derives his rule making power from MGLC 218 §43A which says, "The Chief Justice of the District Courts shall be authorized ... to require uniform practices,..." and "The

¹¹MGLC 218 §43: The Chief Justice of the district courts shall from time to time make and promulgate uniform rules regulating the time for the entry of writs, processes and appearances, the filing of answers in civil actions, the preparation and submission of reports, the allowance of reports which a justice shall disallow as not conformable to the facts, or shall fail to allow by reason of physical or mental disability, death or resignation, the reporting of cases reserved for report when a justice shall fail to report the same by reason of physical or mental disability, death or resignation, the granting of new trials, and the practice and manner of conducting business in cases which are not expressly provided for by law, including juvenile proceedings and those relating to wayward, delinquent and neglected children. Such rules shall not apply to the municipal court of the city of Boston.

Chief Justice shall have general superintendence of all the District Courts...and their Clerks and other Officers.¹²

To insure that rule-making is preceded by due deliberation and thought, the Chief Justice normally seeks the advice and opinion of the Administrative Committee before promulgating rules.

Until 1963, when the Office of Chief Justice of the District Courts was created, the rule-making authority of the District Courts was in "the justices, or a majority of them." Rule-making was thus a collegial matter. Since 1963 rule making power has been in the Chief Justice.

The Chief Justice of the District Courts also has power to prescribe official forms to be used in all District Courts except in the County of Suffolk (MGLC 218 §43B). It is unclear why the Chief Justice does not have the power to make forms for use in the seven Suffolk County District Courts over which he has jurisdiction. Nor is it clear who does have the authority to prescribe such forms.

The Chief Justice has other specific rule-making power. He establishes the forms for waiver of trial and guilty pleas for traffic offenses in the various district courts where the fine is less than \$50 and approves the fine schedule set by the First or Presiding Justice for the same offenses (MGLC 90C §4A). He promulgates rules and forms for the operation of equity sessions in the District Courts (MGLC 218 §19C). The Chief Justice makes rules

¹² In the recent report regarding preservation of testimony in the District Courts, the rule-making authority of the Chief Justice is cited to MGLC 218 §43. The report at this point is talking about a rule promulgated by the Chief Justice allowing electronic recording by counsel in the District Courts. Yet C. 218 §43 does not make any specific reference to any such rule-making power over court reporting.

regarding small claims procedures in the District Courts (MGLC 218 §21). He is also empowered to make rules regulating the procedure for compensation for victims of violent crimes (MGLC 218 §43B). The Chief Justice of the District Courts also prescribes the form for violations of the pedestrian traffic law (Jaywalking) (MGLC 9C §18A). The Chief Justice of the District Courts may also make regulations relating to assignments, duties and services of stenographers appointed for any District Court and any other matter concerning these stenographers (MGLC 218 §27A, regarding six man juries). Finally, he is to prescribe the forms used in the District Courts for the appeal of bail decisions to the Superior Court (MGLC 276 §58).

The Chief Justice of the District Courts is ex officio a member of the Committee on Probation (MGLC 276 §99A) and a member of the Judicial Conference (SJC Rule 3:16). He is not an ex officio member of the Judicial Council although a District Court judge can be appointed to it by the Governor (MGLC 221 §34A). This omission occurs in the absence of an amendment to MGLC 221 §34A, which creates the Judicial Council.

Appointment Power of the Chief Justice

The Chief Justice has no appointive authority by statute. However, he can have an administrative assistant and there is an office of administration, the Director and staff members of which he appoints. Some personnel in this office are paid with

Federal funds from the Massachusetts Committee on Criminal Justice. Others have become state employees by inserting the position into the state budget rather than by specific statute - by appropriation rather than specific statute.

Assignment Power and Power to Determine Sittings and Sessions

The Chief Justice of the District Courts may assign District Court judges to sit at the times and places already designated by the Legislature for holding court. The Legislature has determined that court shall be open at all times except Sunday and legal holidays (MGLC 218 §38). The Chief Justice may also provide for additional sessions of the court. And such sessions may be staffed by special judges¹³ at the request of either the Chief Justice, the First or Presiding Judge of the court, or the judge who is in charge of the particular session. In other words, a Special Judge of X Court can be assigned to sit in a session in that court either by the Chief Justice, the First Judge, or the judge in charge of that session (MGLC 218 §52). The Chief Justice may also order the sittings of Special Judges outside the court where they are appointed (MGLC 218 §6). The Chief Justice may assign any justice to sit in the Juvenile Courts at the request of a Judge of the Juvenile Court (MGLC 218 §58).

¹³Special judges are part-time judges allowed to practice law. They can be assigned to criminal, juvenile, supplemental and summary process, and small claims sessions.

MGLC 218 §77A says: "Each of said Justices [the District Court Justices] shall sit in his own Court and, in addition, shall perform such other duties as a District Court Justice in such other Courts and on such occasions as shall be ordered by the Chief Justice." This is consistent with the Chief Justice's power of general superintendence. All District Court Judges may be assigned by the Chief Justice to sit in other courts. Special and part-time judges cannot sit on civil cases, however, without the authorization of the Chief Justice. Such authorization may be extended for only a limited period of time (MGLC 218 §40).

Some District Courts in Massachusetts have part-time justices. Even though their courts are always open, the justices of these courts may also be ordered to sit in other courts at the discretion of the Chief Justice (MGLC 281 §78) in which instance they are paid by the county in which they sit.

The Chief Justice also appoints the five members of the Administrative Committee (MGLC 218 §43C), designates the five members of the three Appellate Divisions of the District Courts and selects a presiding judge from them, subject to the approval of the Chief Justice of the Supreme Judicial Court (MGLC 231 §108).

He shall prescribe "reasonable daily office hours for the Clerks and he may authorize the Clerks to operate on Saturdays with reduced personnel" (MGLC 218 §15).

The Chief Justice also selects the District Court judges to be put on a list for service in the Superior Court for appeals in criminal cases over which the District Court had original jurisdiction and for automobile tort cases (MGLC 212 §14B). He also selects those District Court judges who may sit in the Boston Municipal and Juvenile Courts and the Hampden County Housing Court at the request of its Chief Justice or their judges (MGLC 218 §§40, 58; MGLC 231 §102C; MGLC 185B §8).

The Chief Justice may also call for conferences of the judges, including the judges of the Boston Municipal Court (MGLC 218 §43A).

Power to Encumber the Commonwealth

The Chief Justice submits the budget for the Administrative Office. The only other power to encumber the Commonwealth that the Chief Justice has is to certify the quarterly travel expenses of Justices of the various District Courts who are assigned by the Chief Justice to sit outside their regular courts (MGLC 218 §81).

POWERS OF THE FIRST JUSTICE

Rule Making Power of the First Justice

The First Justice of each individual District Court, who is the judge with senior service in that court, or the Presiding Justice in one-judge courts has little formal statutory rule-making power except to prescribe the fines for waiver of trial and guilty pleas in traffic cases where the fine is less than \$50 with the approval of the Chief Justice (MGLC 90C §4A).

However, the First or Presiding Justice is the "administrative head" of the court (MGLC 218 §6) and as administrative head he can determine by rule or act, to a great degree, the procedure in his court.

Appointment Power of the First Justice

Each District Court has at least one "justice." Some have more than one. There is a senior or First Justice in each multi-judge court or a Presiding Justice in each one-judge court. In the words of the statute, "the first [or presiding] justice shall be the administrative head of the court and...shall appoint temporary clerks, court officers and probation officers and shall approve the appointment of assistant clerks and temporary assistant clerks" (MGLC 218 §6). Clearly, the power of the First or Presiding Justice is considerable. District Courts have evolved from the English Justice of the Peace system, and it was probably necessary that each court have its own autonomous existence in a less-mobile age. Today the reason for complete autonomy no longer exists. One slight move towards centralization of appointment power has been made. If there is no First Justice and no other justice is available in the individual court, the Chief Justice can act as the administrative head of the court (MGLC 218 §6).

The First Justice's power to appoint probation officers is reiterated in another statute (MGLC 276 §83). Besides being able to appoint the probation officers, the First or Presiding

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Justice may appoint such clerical assistants as are necessary for the probation office (MGLC 276 §88). And he may appoint temporary probation officers for periods of less than 90 days or probation officers for a term of 90 days with the approval of the administrative committee (MGLC 276 §89). The First or Presiding Justice may also appoint unpaid deputy probation officers (MGLC 276 §89A). Probation officers may retire on the recommendation of the court with the approval of the County Commissioners. If they retire medically, the court must designate a physician to examine them (MGLC 32 §75).

The First Justice has power to approve the appointments of assistant clerks appointed by the Clerk and has authority to remove them (MGLC 218 §10). We have indicated earlier that this power to approve appointments is tantamount to a joint appointment power. In at least one instance a First Justice has refused to approve the appointment of non-lawyer clerks. Assistant clerks are removable at the pleasure of the clerk or the First Justice unless they are paid by the county and have been employed for three consecutive years in which case they shall hold office during good behaviour (subject to retirement rights). They may be removed by the First Justice or the Clerk only for cause shown subject to a review by a justice of the Superior Court

(MGLC 218 §10). This is the only instance of administrative control by the Superior Court over the District Court: and it may not be administrative control so much as judicial review of administrative action. Clerical assistance for the Clerks' offices must be approved by the Mayor and the City Council of Boston for District Courts in Suffolk County, and by the County Commissioners for District Courts outside of Suffolk County (MGLC 218 §69).

Court officers in the District Courts are appointed by the First or Presiding Justice of the Court (MGLC 218 §61) and may be removed "for any cause considered by such justice... to be sufficient" (MGLC 218 §61). This practice differs substantially from the higher courts where court officers are appointed by the sheriff and approved by the court. There are some local variations on the appointment of chief court officers. In Roxbury and Dorchester the First Justice may appoint a chief court officer and an assistant chief court officer. In Chelsea and East Boston the First Justice may appoint a chief court officer (MGLC 218 §62).¹⁴

In the East Boston Court the First Justice may appoint an Italian interpreter (MGLC 218 §68).

¹⁴Even though the Dorchester District Court is a very busy one, it is not the busiest. The Cambridge and Worcester District Courts, which do not have this statutory power to designate chief court officers, are busier than the other courts listed above. (District Court statistics, Annual Report of the Executive Secretary, 1973.)

Clerical assistants to the Clerks of the District Courts are appointed by the Clerk with the approval of the County Commissioners and must be included in the County Commissioners' budget.

Power of the First Justice to Encumber the Commonwealth

A First or Presiding Justice may encumber the Commonwealth in a number of ways on behalf of the probation office. For example he may certify the expenses of deputy probation officers, who serve without pay (MGLC 276 §89A). He may certify the vouchers of regular probation officers for their expenses (MGLC 276 §94), and must authorize expenditures by the probation officers for the temporary support and transportation of probationers (MGLC 276 §95).

The First Justice can also allow compensation to persons entitled to expenses and fees in criminal prosecutions, including defense services (MGLC 280 §16).

All Justices and Clerks may procure law books, stationery, and other supplies with the approval of the First Justice. These expenses are to be certified monthly and transmitted to the County Commissioners (MGLC 218 §39).

Other Powers of the First Justice

The First or Presiding Justices of the Central District Court of Worcester may schedule the six-man civil jury sessions of that Court (MGLC 218 §19A). In the Northern Essex District Court the Chief Justice schedules the six-man civil jury session (MGLC 218 §19B).

POWERS OF AN INDIVIDUAL DISTRICT COURT JUDGE,
THE ADMINISTRATIVE COMMITTEE AND THE APPELLATE DIVISION.

Rule Making Power

Individual District Court Judges have no formal statutory rule-making power. First or Presiding Justices can and do make some internal administrative rules for their courts alone, but District Court Judges no longer have collective rule-making power. If one happens to be a member of the Administrative Committee, he has advisory power to the Chief Justice. The Administrative Committee itself has some minor, specific, rule-making power: the notice to appear for parking violations is on a form prescribed by the Administrative Committee (MGLC 90 §20A). This power probably preceded the creation of the office of Chief Justice.

Appointment Power

Apart from the appointment of counsel in criminal cases (S.J.C. Rule 3:10, Dist. Ct. Rule 10), individual judges have little appointment power, although in a civil case, an individual judge may appoint an auditor with the assent of both parties (MGLC 221 §56). However, auditors are paid by one of the parties (MGLC 221 §61). In regard to certain claims for compensation, the individual judge may appoint a physician to make an examination and report (MGLC 258A §4).

An individual judge holding an inquest may appoint an officer to investigate the case and allow him additional compensation (MGLC 38 §10).

The Administrative Committee may combine certain District Courts for regional probation offices in juvenile cases outside of Suffolk County, but that seems to be its only administrative power at present. The Committee may designate one justice within the region to certify the salary vouchers of these special probation officers (MGLC 276 §88).

The Power of Individual Judges to Encumber the Commonwealth

The individual judge may allow additional compensation for a medical examiner (MGLC 38 §10). An individual judge may certify his own expenses in attending a conference called by the Chief Justice (MGLC 218 §43A) and may be reimbursed for travelling expenses outside his district on the certificate of the Chief Justice (MGLC 218 §81).

However, the individual judge, if appointed to and sitting in a district, which includes more than one town, may himself certify his expenses in travelling from his home to a town which is in a location other than the town of the principal office of the court. These expenses, however, are subject to the approval of the County Commissioners. The Commissioners decide where the principal office of the court is by deciding the location of the Clerk's office (MGLC 218 §81).

Judges of the Appellate Division may charge their travelling and incidental expenses while acting in the Appellate Division to the Commonwealth on their own certificate (MGLC 231 §108). Judges of the Appellate Division now receive \$2,000 more a year from the state over their regular salary (Chap. 940 of Mass. Acts of 1973).

I. THE BOSTON MUNICIPAL COURT

THE BOSTON MUNICIPAL COURT

The Boston Municipal Court was established in 1866. Its subject matter jurisdiction is similar to that of the 72 District Courts. But, it also has independent jurisdiction over appeals to 12-man juries (MGLC 278 §18A); Workmen's Compensation claims of review (MGLC 152 §§8A & 11); Motor Vehicle Appeals Board cases (MGLC 175 §113D), election cases in Boston and broader venue in civil actions. Its territorial jurisdiction is bounded by Charlestown, the Charles River and Cambridge on the north, South Boston in the south, East Boston in the east and Roxbury and Brighton-Allston in the west.

The Boston Municipal Court sits only in Boston and has a Chief Justice and eight Associate Justices (MGLC 218 §50). Although the Chief Justice has some administrative power, most power is exercised collegially.

POWERS OF THE CHIEF JUSTICE

Rule Making Power

All rule-making power in the Boston Municipal Court to regulate practice and conduct business in all cases, if not expressly provided for by law, is in the full bench. (MGLC 218 §50). However, the Chief Justice may create certain forms, including a notice to appear in jaywalking cases

(MGLC 90 18A), and the notice to appeal in a parking case (MGLC 90 §20C). Forms for waiver of trials and guilty pleas for traffic offenses with fines less than \$50 in the Boston Municipal Court must be established by the Chief Justice. The fines on such waiver of trial and guilty pleas must be established by the Chief Justice (MGLC 90C §4A). The Chief Justice is to determine procedure for equity cases in the Boston Municipal Court (MGLC 151A §42). Small claims rules and procedures must be made by the Chief Justice of the Boston Municipal Court (MGLC 218 §21). These may differ from small claims procedures in the 72 District Courts. The procedure and rules for victims of violent crimes must be established by the Chief Justice (MGLC 218 §43D), and the forms of petition for review by the Superior Court of bail decisions made in the Boston Municipal Court are established by the Chief Justice of the Boston Municipal Court (MGLC 276 §58).

Appointment Power of the Chief Justice

From the 17 court officers appointed by all the Justices of the Boston Municipal Court or a majority of them, the Chief Justice is to appoint a chief court officer for criminal business, two assistant court officers for criminal business, a chief court officer for civil business, and an assistant

court officer for civil business (MGLC 218 §62A). The Chief Justice may also appoint probation officers, subject to the approval of his associates, if qualified by the Department of Probation (MGLC 276 §83).

The Chief Justice also appoints an Administrative Assistant, a Legal Assistant, and a secretary who are paid from a grant by the Massachusetts Committee on Criminal Justice (LEAA). The maximum salary for the Administrative Assistant is \$18,000; for the Legal Assistant, \$14,000; and \$8,300 for the secretary.

Assignment Powers of the Chief Justice

The Chief Justice may assign any of the other Municipal Court Judges. He may provide for additional sessions (MGLC 218 §52) and prescribe the times for civil and criminal trials (MGLC 218 §15). The Chief Justice, at the written request of the Chief Justice of the Superior Court, assigns Boston Municipal Court judges to sit in the Superior Court in automobile tort cases and in appealed criminal cases over which the Boston Municipal Court or other Suffolk County District Courts had original criminal jurisdiction (MGLC 212 §14B). The Chief Justice may request District Court special judges to sit in the regular sessions of the Municipal Court. He may request District Court special judges to hear civil cases transferred from the Superior Court (MGLC 231 §102C). The Chief Justice may also designate the members of the Appellate Division of the Boston Municipal Court (MGLC 231 §108).

Power of the Chief Justice to Encumber the County

The Chief Justice allows and certifies expenses of the Boston Municipal Court after expenditure to the public officer of the county by whom they are payable (MGLC 218 §51). He also must approve the vouchers for stenographers appointed by the Justices and for medical services and equipment (MGLC 218 §55).

POWERS OF THE FULL BENCH

Rule Making Power of the Full Bench

The Court may make rules regulating the practice and the business of the Court in all cases not expressly provided for by law (MGLC 218 §50) and the Court is to make rules regarding the procedure and the sittings of the Appellate Division (MGLC 231 §108). The Justices are to prescribe the times for civil and criminal trials as well as the office hours for the two Clerks' offices (MGLC 218 §15).

Appointment Power of the Full Bench

There are two separate Clerks in the Boston Municipal Court for criminal and civil business. They are appointed by the Governor for life with the consent of the Governor's Council (Mass. Const. Part 2, C2, §1, Art.9).

There are 12 assistant clerks for criminal business and 12 assistant clerks for civil business who are appointed by the respective Clerks subject to the approval of the justices.

Removal, after three years, of such assistant clerks must be for good cause shown and is subject to the approval of the Justices or a majority of them (MGLC 218 §53). Temporary assistant clerks may be appointed by the respective Clerk with the approval of the Justices or a majority of them (MGLC 218 §53A), but deputy assistant clerks are designated by the respective Clerk without any requirement of court approval (MGLC 218 §53). The Justices must approve requests for clerical assistance for the Clerks (MGLC 218 §70), which must then be approved by the Mayor and City Council who act as County Commissioners of Suffolk County.

The Justices may employ stenographic services not to exceed \$3,000 annually and also medical services and equipment not to exceed \$15,000 annually. This expenditure is subject to the approval of the Mayor of Boston (MGLC 218 §55). The Justices may appoint a secretary and assistant secretary for the court (MGLC 218 §80A). Court officers are appointed by a majority of the Justices and removed similarly (MGLC §61). There are twelve court officers for criminal business and five for civil business (MGLC 218 §62A). The Justices may appoint temporary court officers whenever the business of the court requires (MGLC 218 §65). There may also be a messenger of the Boston Municipal Court appointed by a majority of the Justices (MGLC 218 §66). The secretary and

assistant secretary for the Justices are paid by the county at rates determined by the Justices (MGLC 218 §80A). Interpreters may be appointed by the Justices; when official interpreters are not available, others may be appointed (MGLC 218 §67).

As noted earlier, probation officers are appointed by the Chief Justice subject to the approval of the Justices (MGLC 276 §83), and clerical assistants for the probation officers are to be provided as the Court deems necessary and are to be appointed by the Court (MGLC 276 §88).

Power of the full bench to Encumber the County

The full bench may encumber the County of Suffolk, subject to the approval of the Mayor and City Council, by their decisions as to the clerical assistance required by the two Clerks (MGLC 218 §70), the clerical assistance required for the probation office (MGLC 276 §88), as well as the pay to be given the secretary and assistant secretary to the Justices (MGLC 218 §80A).

INDIVIDUAL JUSTICES

Individual Justices have no rule making power and no appointment power except the power to appoint auditors when both parties agree (MGLC 221 §56, BMC Rule 44). Any Justice who sits in regular session may designate a substitute to

fill that session in his absence. The substitute must be a special justice of the District Court who has been approved by the Chief Justice (MGLC 218 §52). Individual Justices may appoint counsel for indigent defendants in cases before them (SJC Rule 3:10). Payment is by the county. There are no Boston Municipal Court rules regarding the amount to be paid to such attorneys at present.

J. THE JUVENILE COURTS

THE JUVENILE COURTS

In Massachusetts, four courts deal exclusively with juvenile cases. In addition, juvenile cases are heard in special separate sessions of the District Courts and de novo in the Superior Court and the Boston Juvenile Court. This section is concerned with only the four Juvenile Courts. The first was established in Boston in 1906. Its geographical jurisdiction now includes the same territory as the Boston Municipal Court (basically downtown Boston) and Roxbury. In 1969 Juvenile Courts were established in the cities of Worcester and Springfield. These Courts exercise jurisdiction in their respective cities and some adjacent towns. Worcester and Springfield are, respectively, the second and third largest cities in the Commonwealth. In 1972 a Juvenile Court was established for Bristol County which, among other municipalities, includes the cities of Fall River, New Bedford, Taunton and Attleboro, where District Courts are located. This court has county-wide jurisdiction, unlike the three other Juvenile Courts and sits throughout the county.

All these courts are one-judge courts with the possible exception of Boston which has two special (part-time) Judges attached to it. However, these part-time judgeships will terminate by attrition. In all, simultaneous sessions or multiple sessions may be conducted by judges assigned by the Chief Justice of the District Courts and requested by the Judge of the Juvenile Court. The Judges of the Juvenile Courts must be lawyers (MGLC 218 §58).¹⁵

¹⁵ This provision is unique to these courts and the Housing Courts.

Basically, the Juvenile Courts are modelled on the District Court system (See District Courts, infra) with the one Judge of each Court acting analagously to the First or Presiding Justice of a District Court.

Rule Making Power

Rule making power "in reference to procedure" is given to the Juvenile Courts by MGLC 218 §60. However, MGLC 218 §59 says "except as otherwise provided by law, said courts [Juvenile Courts] shall have and exercise, within their jurisdiction, the same powers, duties and procedure as District Courts; and all laws relating to District Courts or Municipal Courts in their respective counties or officials thereof or proceedings therein shall so far as applicable apply to said courts."

(emphasis added.) Both courts are allowed to make rules regarding procedure. Which court's rules have supremacy?

A further question arises regarding the Boston Juvenile Court, because its territorial jurisdiction includes both that of the Boston Municipal Court (which as we have noted earlier is a separate individual court with its own Chief Justice, rules and administrative structure) and that of the Roxbury District Court (which is part of the state-wide District Court system and governed by District Court rules). A recent case said that the rules of the District Courts do not apply since the Boston Juvenile Court emanates from Boston (Comm. v. White, ___ Mass. ___, (1974)).

Appointment Power

As in the District Courts, the Judges of the Juvenile Courts (because they are not only the "First Justices" but also the only Judges) have a considerable amount of appointment power. Although Clerks are appointed in the usual manner, by the Governor with the consent of the Governor's Council (Mass. Const. Part 2, Chap. 2, Art. 9), the Juvenile Court Judges have approval power over the appointment of Assistant Clerks (MGLC 218 §58). In Boston there are three Assistant Clerks and in Worcester, Springfield and Bristol there is one Assistant Clerk.

Also, as in the District Courts, the Judges of the Juvenile Court appoint probation officers (MGLC 276 §83).

The Judges of the Juvenile Courts can also appoint their own court officers (MGLC 218 §61). In the Boston Juvenile Court there are eight court officers. In Worcester and Springfield there are two; there is one in Bristol.

Power to Encumber the County

In the Boston Juvenile Court the Judge shall approve the clerical assistance in the Clerk's office (MGLC 218 §70). Simply stated, he shall approve the amount of money to be spent on secretarial and other clerical help. In Worcester, Springfield and Bristol the Clerks do not have to secure judicial approval for such clerical assistance. They are "allowed annually for clerical assistance such amount as the County

Commissioners may approve." In those courts, the Clerks deal directly with the County Commissioners for their own clerical assistance (MGLC 218 §70).

However, the Judges of the Juvenile Courts do approve the clerical assistance for the probation officers (MGLC 276 §88) and approve the expenses of the probation officers, (MGLC 276 §94), as well as the expenses of deputy and temporary probation officers (MGLC 276 §94).

Other Powers

The Judges of the Juvenile Courts can arrange sittings of their respective courts (MGLC 218 §59). In the Boston Juvenile Court appeals may go to a 12-man jury session conducted by the Juvenile Court. The Judge has the power to arrange these sessions (MGLC 119 §56). From juvenile sessions of all District Courts (except District Courts in Suffolk County) and in the other Juvenile Courts appeals go to the Superior Court for a new trial (MGLC 119 §56).

Because these are Juvenile Courts, there are a number and variety of probation and diversion programs in them. These programs are not now specifically authorized by statute but are utilized by these courts and the juvenile sessions of the District Courts, and the Judge has a great deal to say about the structure and activities of such programs.

The County Commissioners of Bristol, Worcester and Hampden counties are charged by statute with providing suitable rooms for the Juvenile Courts (St. 1969, 859 §§1, 2 1972 c 731 §§1, 2). In Boston a recent report from a Master appointed by the Supreme Judicial Court condemned the facilities of the Boston Juvenile Court. (The Bolster Report, March 1974).

SUBJECT INDEX TO ADMINISTRATIVE POWER IN
THE INDIVIDUAL MASSACHUSETTS COURTS

Court Abbreviation Code

SJC	The Supreme Judicial Court	BHC	The Boston Housing Court
AC	The Appeals Court	HCHC	The Hampden County Housing Court
SC	The Superior Court	DC	The District Courts
PC	The Probate Courts	BMC	The Boston Municipal Court
LC	The Land Court	JC	The Juvenile Courts

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