Open Court

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Rotation of Superior Court Judges

The principle of rotation of Superior Court judges, old as to the state itself, has profoundly influenced the life of its people. Two of the important results of the maintenance of rotation for more than a century may be summarized as follows:

First: It has to a large degree tended to remove the judiciary from the realm of partisan politics. Freedom from political pressure has been a notable characteristic of North Carolina courts. This has been made possible through removal of the bench from local entangling alliances.

Second: It has contributed largely to the homogeneity of the state, an outstanding trait. Development of a state system of schools and a state highway system has been made much easier through the acquaintance of the people with the state idea by having a state court system.

Coincident with the establishment of the colony of North Carolina, there was established a general court composed of the governor and his council, which was to be the genesis of the rotation system of Superior Courts upon which the state's stability has rested for nearly two centuries.

While it is true that the rotation idea was not incorporated into the state constitution until 1875, it really goes back to the English system of having a court in banc, where all the pleadings are made, and having the judges go out periodically for trial of questions of fact in the neighborhoods, where the parties and witnesses reside.[1]

When the judicial system was remodelled in 1729, provision was made for a Supreme or general court to be laid at Edenton, Wilmington and Edgecombe courthouse by the chief justice and three assistants. In 1746 the court of chancery and the general court was moved from Edenton to New Bern, and the judicial system was again remodelled.[2]

The Supreme or General Court continued to be held twice a year at Edenton, Wilmington and Edgecombe courthouse, but all general writs were issued out of the General Court at New Bern, and the records after issue made up for removal by writ of *nisi prius* to the

[1] History of Supreme Court, by Kemp P. Battle, 103 N. C. 315.
[2] Swan's Revisal, Ch. 2, p. 224.

proper place for trial "in the same manner, according to the method, and as near as might be, agreeable to the practice of the court of common pleas or King's Bench at Westminster."

An important date in North Carolina judicial history is 1767 because in that year was a departure from the English method of court procedure that was to have far-reaching results. Instead of the judges trying questions of fact only in the districts, leaving the questions of law to be heard before all the judges sitting in banc in New Bern, the judges went to the courthouses in each district and there heard both questions of fact and questions of law.[3]

The province was divided into six judicial districts, to wit: New Bern, Edenton, Halifax, Hillsborough, Salisbury and Wilmington.[4] A Superior Court was required to be held semi-annually in each district. This really marks the beginning of the rotation system, as we know it in North Carolina, and it was a natural outgrowth of the English system because it was suited to the needs of the colonists.

The new model was short-lived, however, because of a dispute between the Governor and the General Assembly and it was allowed to die in 1773. Although the first General Assembly of the independent colony in 1777 revised the whole body of the statute law, it made but few changes in the judicial act of 1767.[5] "All our subsequent legislation has had no other effect than to extend the system of 1767 in proportion to the growth of our settlements and the increase of our population."[6]

The judicial district of Morgan was added in 1782, that of Fayetteville in 1787 and equity jurisdiction was added in the act of 1782.[7] In 1790 the office of solicitor general was created, and the state divided into two circuits, the western circuit being composed of Morgan, Salisbury, Fayetteville and Hillsborough and the eastern circuit of Halifax, Edenton, New Bern and Wilmington.[8]

From 1777 to 1790 three judges and the attorney general constituted a Superior Court and from 1790 to 1806 two judges and the attorney general or solicitor general were assigned to hold courts on each riding.

In 1806 the circuit court system was extended to its utmost by

[3] History of Supreme Court, by Kemp P. Battle, 103 N. C. 318.
[4] Davis's Revisal, edition of 1775, p. 372.
[5] Nash's Revisal, Vol. 2, p. 528.
[6] Nash's Revisal, Vol. 2, p. 529.
[7] Martin's Revisal, p. 312.
[8] Iredell's Revisal, p. 695.

the establishment of a Superior Court in each county.[9] It is the same system that has been in operation for more than a century. Two additional judges were appointed and four new solicitors named. A single judge was clothed with authority to hear both equity and law cases. The state was divided into six circuits.

The Supreme or appellate court had its origin in an act passed in 1799[10] in which the judges were directed to meet twice a year in Raleigh to pass on question of law arising in their courts. It is interesting to note that this court was really created to provide for the trial of one state officer, but its usefulness as an appellate court was so manifest that in 1804 it was made permanent.[11] By successive stages the Superior Courts were authorized to reduce their opinions to writing and in 1810 to name one of their number chief justice.[12] In 1818, the Supreme Court, as it is now known, was created through the appointment by the General Assembly of three judges to give all their time to the hearing of appeals.[13]

Roughly this is the history of the evolution of North Carolina's judicial system into an institution, suited to the needs of its people. It isn't the English System, but a North Carolina system. It is as old as the common law, but is a North Carolina product.

For the very reason that the principle of rotation has been in operation in principle since the founding of the state, it may be argued that it ought to be abolished as obsolete. As a matter of fact this is the principal argument against continuing the system. It is urged that the state has outgrown this institution.

It is pointed out that the state's main inerest in many sections has changed from agriculure to industry and that industry and commerce bring in their train complicated problems that require men skilled in their technique to solve them. Judges from an agricultural section can't understand industrial questions so readily as those with a more intimate personal acquaintance, it is argued.

It is pointed out further that the main function of courts is to settle controversies, and that the rotation system does not make for the prompt settlement of controversies. Even though the judges are men of integrity and honor, men worthy of the confidence of the community, their unfamiliarity with complex conditions in indus-

[9] Potter's Revisal, Ch. 693.
[10] Potter's Revisal, p. 887.
[11] Potter's Revisal, p. 1020.
[12] Potter's Revisal, p. 1169.
[13] Potter's Revisal, p. 1433.

trial and commercial centers in the state makes it impossible for them to expedite the trial of civil actions involving many interests and numerous parties, it is explained.

The modern demand for softer living conditions is also a factor in the argument for abolition of rotation. It is vastly easier to get about the state than before the advent of automobiles, but there is an insistent demand that efficient judges must be able to spend the greater part of their time at home with its comforts.

This demand for a change in the court system has been met in the industrial centers in many instances through the creation of separate county courts, which have not as yet been able to command the prestige of the Superior Courts. Their judges have the advantage of familiarity with court dockets and they also have the advantage of not being bound by statutory terms of court. The county judges have the power to make their courts efficient, but because they have so far been unable to acquire the prestige of the Superior Courts, it is argued that they are inadequate for local needs.

Local judges are subject to local entangling alliances while visiting Superior Court judges have no such alliances to contend with when they hold courts. It is like calling out the National Guard to prevent or stop rioting. The efficiency of the visiting guardsmen lies largely in the fact that they do not know the most prominent citizen from the most obscure, and are as likely to fire upon one as the other, if he fail to halt.

So with the visiting judge. He does not need to acquaint himself with local political factions to make good as a judge. His efficiency depends upon keeping himself free from local factionalism. Nor does he know Republican from Democrat, or should not know, when he is holding courts, and thus is free to try cases without regard to partisan influence.

Like Paul who determined to know only Christ when visiting his congregations, the Superior Court judge can resolve to know only the problem of administering justice, and he is free to carry out this resolution without embarrassment to himself or friends.

"Active and open participation in the strife of political contests by any judge of the state, so far as we recollect, or tradition or history has informed us, was unknown to the people until the late exhibitions," wrote Bartholomew F. Moore, known then as the "Father of the Bar" of North Carolina, in a vigorous protest in 1868 when

certain justices of the Supreme Court took part in a demonstration of the Republican party in Raleigh.[14]

"From the unerring lessons of the past we are assured that a judge who openly and publicly displays his party zeal rendered himself unfit to hold the 'balance of justice,'" Judge Moore continued, "and that whenever an occasion may offer to serve his fellow-partisans, he will yield to the temptation, and the 'wavering balance' will shake.

"It is a natural weakness in man that he who warmly and publicly identifies himself with a political party will be tempted to uphold the party which upholds him, and all experience teaches us that a partisan judge cannot be safely trusted to settle the great question of a political constitution, while he reads and studies the book of its laws under the banners of a party," Judge Moore concluded in his protest which has become a classic in legal annals.

Although cited to appear before the State Supreme Court to answer for his boldness, Judge Moore was cheered by the lawyers and the people of his day for his fearless championship of a non-partisan judiciary. The ideals then voiced by him have continued to live until this day.

Though the late Chief Justice Walter Clark was a candidate for the United States Senate while still on the bench, he did not make an active campaign from the stump. Even so, there was a general feeling that it was out of place for a jurist to be running for a political office.

When the late Judge Loyd Horton went as a delegate to the National Democratic Convention in New York in 1924, there were no protests of any consequence. It was felt that he had a right to spend his vacation as he saw fit, and he was careful to explain that it was his vacation. Even so, Judge Horton later regretted that he had permitted his name to be put down as a delegate because he realized that the precedent of keeping the Superior Court bench free from partisan activities ought to be preserved, and he did not wish to be put in the attitude of seeking to break it. His interest in politics caused him to resign from the bench in order that he might be free to indulge his fondness for political fights.

The fight for abolition of the principle of rotation has resulted in deadlocks in the last two sessions of the Legislature. In the meantime there has been evolved the make-shift arrangement for emer-

[14] Biographical History of North Carolina, Vol. 5, p. 284.

gency judges. This was such a radical departure from the accepted ideas of Superior Court judges that the last General Assembly was unanimously of the opinion that whatever was done about solving the problem of congestion, there must be no more emergency judges to serve for a week at the time out of their spare time.

The last Legislature would have increased the number of regular Superior Court judges, if it had not been necessary under the constitution to increase also the number of solicitors. As an alternative a minimum of four emergency judges, and a maximum of six, was provided for, but only with the understanding that as soon as a constitutional amendment can be gotten through, the emergency judge act shall become null and void. Nor are the emergency judges giving a part of their time. They are expected to uphold the traditions of the Superior Court bench for impartiality and non-partisanship.

While rotation was not written into the state constitution until after it had become an institution, its incorporation into the organic law has saved it from being subjected to change by a passing fancy for a change. The benefits of rotation are so apparent that the movement to amend the state constitution has never gained any considerable headway.

Nevertheless the agitation for abolition has had the result of precipitating Superior Court judges more directly into the field of active politics. Some are in favor of rotation, others are opposed to it. The Legislature is the political battlefield. All judges have friends in the Legislature. The judges come to Raleigh on visits. Naturally they put in a word for their side. With the ice broken, it is easy to extend political activities to state and national politics.

While freedom from partisan bias has been one of the outstanding beneficial results of the rotation system in North Carolina, it is not the only one. For all of its history, North Carolina has had a state system of courts. Never has it had a purely local system of courts. For most of the last two centuries, the Superior courts were the only connecting links between the people and the state. Until comparatively recently all that the people knew about government they got from the courts.

Traveling the state from county to county, Superior Court judges were ambassadors as well as jurists. They were connecting links between sections. They brought the state viewpoint to the counties and from the state viewpoint settled local controversies. The state

became a living reality to the people. This service was invaluable.

From Vance to McLean was a span of half a century of North Carolina history, but during that period no governor of the state traversed the section of North Carolina beyond the Blue Ridge under the wing of the Great Smokies in Western North Carolina. Mountaineers heard of the governor but for most of them he was a pure abstraction.

Not so the Superior Court judges. During the fifty years from Vance to McLean, there had been a hundred Superior Court judges who had traveled through the mountain valleys and over steep mountains into the remotest mountain county. The mountaineers knew there was a state because it was personified in the Superior Court judges who came among them.

In modern days the state touches its people through roads and schools, welfare workers, farm agents and home agents. The state is no longer merely a policeman. It builds a road into the remotest mountain county and plants along its banks flowers and shade trees. It erects well fitted brick school houses to which the children can go for instruction. The state has become a beneficent institution with a heart.

Courts are no longer the only way in which the people learn about the state. Governor McLean now visits the remotest mountain county with more ease than Governor Vance could travel into the next county from Asheville. The state can be spanned from east to west, a distance of more than five hundred miles, from sun to sun.

With the opening of the state through improved roads and modern transportation methods into one vast neighborhood, it has been discovered that there is a remarkable homogeneity of interests in North Carolina. Its people have similar ideals, similar tastes, similar interests. They are one people. Superior Court judges have done their work well. They have preserved for a hundred years a tradition of honor and prestige. Now that the Superior Court judges have competing agencies, it is proposed to scrap the system that did more than any other one agency for two centuries to make North Carolina a great state.

With competing interests, too, there is the temptation to attempt to uphold the ancient prestige of the Superior Courts by alliance with political movements. If the faction with which a judge allies himself succeeds, it adds to his prestige. If it fail, his prestige suffers.