



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 29 | Number 1

Article 6

12-1-1950

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Recommended Citation

J. F. Paschal, *Minimum Standards of Judicial Administration in North Carolina*, 29 N.C. L. REV. 27 (1950).

Available at: <http://scholarship.law.unc.edu/nclr/vol29/iss1/6>

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MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION IN NORTH CAROLINA

J. FRANCIS PASCHAL*

What is the present status of the administration of justice in North Carolina? Some answer is to be found in a recent book, *Minimum Standards of Judicial Administration*, edited by Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey.¹ The book is a survey of conditions in the forty-eight states with special reference to the degree to which the various states have accepted and put into practice the recommendations of the American Bar Association. These recommendations, formulated in 1938 after years of study, embody the composite thought of eminent lawyers and judges throughout the country.² Even so, their sponsors have considered the recommendations as providing only *minimum* standards. As Chief Justice Vanderbilt explained, the recommendations

make no attempt to scale the heights of perfection or to reach out for the idealistic. They are entirely utilitarian in their objective. They were prepared with a realistic consciousness of the very genuine difficulties involved in inducing our judges and our lawyers to change any of their working habits in the field of judicial procedure. Hence the recommendations . . . are limited in number to those matters which are absolutely essential if the administration of justice in America is to be responsive to the needs of our times. The recommendations are confined to matters of *fundamental importance*. . . . I might almost say of rudimentary importance. They are matters on which all who have taken the time to reflect are in substantial agreement.³

While the case for each of the recommendations may not be quite so compelling as Chief Justice Vanderbilt suggests, it is a melancholy fact that they have yet to win general acceptance. North Carolina is well above the national median but on eight of the recommendations, we follow a practice completely at variance and with fourteen others

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¹ The volume is another in the Judicial Administration series published under the auspices of the National Conference of Judicial Councils. Appropriately, it is dedicated to Judge John J. Parker "in recognition of his outstanding services over the years in the improvement of the administration of justice throughout the country."

² The recommendations, together with the committee reports explaining them, are given in full in an appendix. They may also be found at 63 AM. BAR ASSN. REP. 517 (1938).

³ *Minimum Standards of Judicial Administration*, xxii.

we are in something less than perfect accord.⁴ But to see just where North Carolina stands, let us look at the picture, chapter by chapter, as it is given by Chief Justice Vanderbilt.

JUDICIAL SELECTION, CONDUCT AND TENURE

The Bar Association, realizing the futility of urging an appointive judiciary, has offered as a practical alternative the Missouri plan. This plan provides for the filling of vacancies on the bench by the executive but the executive's freedom of choice is sharply limited. He must choose from a list named by another agency, "composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office." After a period of service, the question of whether or not the appointee shall remain on the bench, if he so desires, is submitted to the people. Rather than run against any candidate, the appointee runs solely on his record. The ballot simply reads, "Shall Judge Blank be retained in office." The process is repeated at the expiration of his term.

While Missouri is the only state which has thus far adopted this plan, Chief Justice Vanderbilt reports that there is growing sentiment for it in the thirty-five states like North Carolina which retain the elective system. In five states, a straight appointive system prevails, and in another, Rhode Island, it applies to trial justices. In California, a plan very similar to that of Missouri is in operation for appellate judges. Florida has a mixed system in which some judges are appointed and some elected. In five states judges are elected by the legislature.

Chief Justice Vanderbilt very properly recognizes that in North Carolina, as well as in other states, the Governor's power to fill vacancies has the practical result of greatly modifying the elective system theoretically prevailing. Since our judges, once in office, rarely have opposition, it may well be that we could obtain the principal advantages of the Missouri plan without tampering in any way with the machinery for *electing* judges. The problem for us is largely one of putting some checks on the Governor's power to fill vacancies. In this respect, his power far exceeds that of the President who must always take a jealous Senate into account. The fact that the Governor's choice must eventually face the people has not proved a comparable restraint. In this situation, at least that part of the Bar Association plan dealing with vacancies deserves the most careful attention. If that part should be adopted, the ultimate choice would still be left with the people. The

⁴These figures do not include the recommendations relating to administrative procedure, appellate practice, and traffic courts. These chapters are not considered in this article as here I wish to give emphasis chiefly to the problems arising in the Superior Court.

Governor would remain a decisive factor in the selection of the judiciary but we would no longer be solely dependent on his wisdom.

As to such important matters as length of terms and retirement provisions, the survey reveals that North Carolina occupies a middle position. Fifteen states have less than a five-year term for their trial court judges, while in twenty-two states, including North Carolina, the term ranges from five to ten years. In two states, all appointments are for life contingent upon good behavior, and in two others there are some life appointments.

MANAGING THE BUSINESS OF THE COURTS

Under this head, the Bar Association offers three recommendations:

That provision should be made in each state for a unified judicial system with power and responsibility in one of the judges to assign judges to judicial service so as to relieve congestion of dockets and utilize the available judges to the best advantage.

That Judicial Councils should be strengthened with representation accorded the Bar and the Judiciary Committees of the Legislative Department.

That quarterly judicial statistics should be required.

The first recommendation has more to it perhaps than appears on the surface. It contemplates a centralized responsibility in matters of judicial administration and it further suggests that this responsibility shall rest within the judicial branch of the government, preferably with the Chief Justice of the highest court. By the time this article appears, it may be that North Carolina will be well on the way to joining California, Maryland, Missouri, and New Jersey as the only states with unified judicial systems. In November the voters will be asked to transfer the power now exercised by the Governor in assigning judges to the Chief Justice of the Supreme Court.⁴⁴ As the Commission for the Improvement of the Administration of Justice explained in submitting the amendment to the Legislature, the amendment was to be the first in a series of steps to give the judicial system in North Carolina unity of direction. Control of purely administrative matters affecting the courts was to be put in the hands of the Chief Justice who was to have the assistance of an administrative office capable of supplying the necessary information.

As for the second recommendation, it is enough to say that the last General Assembly provided for a Judicial Council which conforms almost exactly to that recommended. The North Carolina State Bar elects four of the twelve members and the presiding officers of the two

⁴⁴ This amendment was adopted in November, 1950.

Houses of the General Assembly each appoint a member. Fourteen other states have Councils with a similar base of representation and twenty-two states have Councils of some kind.

In the matter of collecting judicial statistics, North Carolina has already made an excellent record, especially in respect to criminal statistics. But our statistics are not yet as complete as those of California, New Jersey, and New York, not to mention the Federal system. With the creation of an administrative office for the courts, the door will be open to further progress.

RULE-MAKING—THE JUDICIAL REGULATION OF PROCEDURE

The recommendation here, of course, is that the courts be given full power to regulate practice and procedure. The most cursory glance at the chapter on this subject reveals the fundamental importance of this recommendation. It reveals that the great procedural reforms of recent years were achieved through the exercise by the courts of their ancient prerogative to prescribe the rules of practice and procedure. It is becoming increasingly clear that this is a task which can properly be done only by the courts or under their supervision. And while a rule-making bill has been defeated several times in North Carolina in recent years, it is obvious that our Legislature is bucking a trend to which it eventually must yield if we are to have an effective procedure. In the last fifty years, the rule-making power has been given to the courts in twenty-four states. In eighteen of these the grant has been made in the years since 1935.

Of course, the Supreme Court in North Carolina has not been wholly without some authority to prescribe rules of practice and procedure. It has done so for itself now for over seventy-five years. No one can be heard today to suggest that the exercise by the Supreme Court of this authority is either improper or unwise. Some day, perhaps very soon, the General Assembly will realize that our high court can do for the Superior Courts what it has done for itself and will take this essential step towards giving the people of North Carolina a court procedure suitable to their needs.

THE SELECTION AND SERVICE OF JURORS

On this subject, the Bar Association recommends:

That jurors should be selected by commissioners appointed by the courts.

That the examination of jurors on their *voir dire* should be in accordance with the procedure outlined in Rule 47 of the new Federal Rules of Civil Procedure:

“The Court may permit parties or their attorneys to conduct

the examination of prospective jurors or may of itself conduct the examination. In the latter event, the Court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it seems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper."

That, for prospective long trials, one or more jurors in addition to the regular panel should be selected and impaneled to sit as alternate jurors, in accordance with the practice authorized and regulated by Rule 47 of the new federal rules.

In selecting jurors, North Carolina follows a practice basically at odds with that recommended by the association. Control of jury selection is in the hands of politically elected officials who are virtually independent of the courts. In twenty-four states the problem is handled as recommended—by jury commissioners appointed by the courts, and in eight other states, there are jury commissions. In only fourteen states is jury selection left to elected county or municipal officers to whom the task is merely a side line.

The *voir dire* examination of jurors in North Carolina also falls short of the standard recommended as it does in all but six states. To our credit is the fact that North Carolina is one of the twenty-six jurisdictions allowing an alternate juror.

PRE-TRIAL CONFERENCES

Much to our credit also is the fact that North Carolina is one of nineteen states in which a pre-trial conference is authorized by rule or statute. It remains for the profession in North Carolina to use the statute with the fruitful results that have been achieved elsewhere.⁵

Although the Bar Association did not officially recommend a summary judgment procedure, its Committee on Pre-Trial has recommended the device as a valuable supplement to the pre-trial conference. Twenty-eight states now provide for some form of summary judgment procedure and, in eleven jurisdictions, a rule patterned after the liberal federal practice prevails. Unfortunately, the summary judgment is not recognized in any form in North Carolina, although the necessity of a full scale trial when there is no bona fide dispute of fact is wasteful and illogical here as elsewhere.⁶

TRIAL PRACTICE

In respect to trial practice, the Bar Association made eleven recommendations. Of these, six are followed at the present time in North

⁵ For the experience thus far in North Carolina, see Paschal, *Pre-trial in North Carolina: The First Eight Months*, 28 N. C. L. REV. 375 (1950).

⁶ See James H. Chadbourn, *A Summary Judgment Procedure for North Carolina*, 14 N. C. L. REV. 211 (1936).

Carolina. Thus, the judge is permitted to sum up the evidence. (He is not permitted to do so in twenty states.) The judge gives his charge after argument of counsel. (The practice is otherwise in nineteen states.) Special interrogatories are submitted to the jury. Partial new trials are allowed when appropriate. Judgment *non obstante veredicto* may be allowed irrespective of whether a motion for a directed verdict was previously made. Finally, preliminary injunctions are not granted in North Carolina without notice, as they are in fourteen states.

The most important reform urged in trial practice, so far as North Carolina is concerned, is that the provisions of the federal rules 26 to 37 relating to discovery should be adopted. These rules authorize the liberal use of depositions, the interrogation of the parties, the production of documents and things for inspection, copying or photographing, requests for physical and mental examination of persons, and admissions of facts and genuineness of documents. While we now have available fairly liberal discovery procedures, they should be expanded if much needless and expensive proof is to be dispensed with. Sixteen states have incorporated this recommendation in their procedure. Unquestionably, the recommended rules serve to elicit the truth—simply and inexpensively. That should be argument enough in their favor.

The weight given the report of a referee in North Carolina is also not in accord with the recommendation. In jury trials, it is recommended that the findings of a referee be accepted as *prima facie* evidence, a practice that is followed in fifteen states. Of the states in which the reference procedure is available, only three join North Carolina in barring the findings of the referee as evidence in jury trials.

Two other trial procedures in North Carolina are sharply condemned. Along with thirty-five other states, North Carolina persists in denying the trial judge the privilege of commenting to the jury on the evidence. Even less defensible is the practice of allowing a voluntary non-suit to be taken as a matter of right at any time before the verdict is rendered. Sixteen states follow the obviously sensible proposal of permitting a voluntary non-suit after trial has begun only in the reviewable discretion of the trial judge.

THE LAW OF EVIDENCE

The Bar Association finds much that is praiseworthy in the North Carolina law of evidence. It approves the rule that error in the admission of evidence does not justify a new trial unless the rights of the objecting party are adversely affected by the error; it approves the practice of presuming an exception after an unsuccessful objection; it approves the limited physician-patient privilege that prevails in North Carolina as well as the state's refusal to recognize a number of novel

privileges often claimed. The Association also approves our statute relating to the introduction in evidence of copies of official records; the practice of permitting an adverse party to be called as a witness; the rule that merely a scintilla of evidence is not enough to carry a case to the jury; the practice in respect to placing business records in evidence; and the statute which permits the courts to take judicial notice of the common law and statutes of other states.

In other respects, judging by the Association standards, there are serious shortcomings in the North Carolina law of evidence. One of these, productive of much controversy,⁷ is the disqualification of an interested party to give testimony concerning transactions with a person deceased. The recommendation is that declarations of a decedent should be admitted if the judge finds that they were made in good faith and on the decedent's personal knowledge. Such testimony is now generally admissible in twelve states.

The Association also recommends that declarations of deceased or insane persons not be subject to objection merely because they are hearsay. North Carolina is one of forty-two states which have not yet accepted this recommendation. But the great success which has attended the recommendation in Massachusetts and other states should persuade us that the restrictions of the present rule could well be abandoned.

In the fields of opinion and expert testimony, the Association proposes two changes in North Carolina. It asks first that the rule which prohibits an ordinary witness from stating his conclusions concerning ordinary matters be abrogated and that such testimony be received subject to explanation. This is now permitted in thirteen states, in all of which it has proved satisfactory in eliminating an objection to evidence which is supported only by fine-spun technical considerations.

The Association also recommends the adoption of the Model Expert Testimony Act. In substance, the act provides: "for the appointment of expert witnesses by the court on its own motion, or on request of either party, such appointment to be made only after notice and possible agreement by the parties as to the experts to be selected; no expert witness to be called by either party unless due notice is given; after the appointment of an expert witness the parties submit their persons, things or places under their control to the expert witness for examination for the purpose of enabling the witness to testify, the scope of such examination to be determined by the judge; reports to be filed by the experts to be open to inspection by the parties; expert witnesses ap-

⁷ See Edmond M. Morgan, *Rules of Evidence and the Legal Profession*, 30 REP. N. C. BAR ASS'N 231 (1938). Professor Morgan says this statute had, up to 1919, been before the Supreme Court 221 times.

pointed by the judge to be examined as if called by an adverse party; any report made by the expert permitted to be read at the trial; an expert witness permitted to state inferences, whether based on personal observation or evidence introduced at the trial, without specifying hypothetically the data on which the inferences are based even though required during examination or cross-examination to specify those data." South Dakota is the only state where the provisions of the Act are in force.

The Association has had even tougher sledding with its recommendation that, where there is no bona fide dispute as to the fact sought to be proved, it is not error for the trial judge to admit *any* evidence which tends to prove this fact. This rule has nowhere been adopted.

After this brief survey, it is obvious that North Carolina falls far short of complying with even the minimum standards of the Bar Association. Of thirty-eight recommendations in the fields reviewed, North Carolina precisely follows only sixteen. In eight instances, our practice meets with complete disapproval and in fourteen others, we do not come up to the standard recommended. This is a poor showing compared to that of New Jersey, for example, where twenty-seven of the recommendations are in full effect.

The program of the Bar Association is cautious enough—if anything, it is too much so. But it points unerringly to a basic fault in the administration of justice in North Carolina. This fault, to which many lesser ones can be attributed, is that nowhere in our State government are both the power and responsibility for administering swift and efficient justice combined. There are too many fingers in the pie. Both the Governor and the General Assembly assign judges to hold particular courts. Both the Governor and the General Assembly say when courts shall meet. County officials control the selection of jurors. And, most serious of all, the General Assembly prescribes the procedure which the courts must follow. In short, although our courts have the nominal responsibility for administering justice, control of tools essential to the task is in other hands. All this is utterly at variance with the recommendations of the Bar Association and, it may be added, the traditional democratic idea of responsible power. The remedy is clear. The judicial department must be master in its own house. Power without responsibility is rightfully abhorrent but responsibility without power can be equally disastrous.

The Bar Association program points also to basic weaknesses in North Carolina pleading. A major shortcoming of our system of pleading is that it is not equal to the task of forcing the revelation of the matters actually in dispute between parties to an action. Other jurisdictions, when confronted by this situation, have found the remedy in

pre-trial conferences and cheap and expeditious discovery procedures. And when no bona fide dispute of fact appears, they have available a summary judgment by means of which the farce of proving what cannot be disputed is avoided. The courts of North Carolina must have similar tools.

For want of them, our State, once a leader in the administration of justice, has fallen behind. Other states have advanced while North Carolina has marked time. Clearly, the time for action has come. Our problems have been identified and solutions tested by experience have been achieved. Can there be an excuse for further delay?