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Advisory Opinions in North Carolina

A. K. Smith
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in reference to diagrams which were unintelligible to the jury, or meaningless, without explanation of the witness; and the court applied the expression to the use of photographs generally without adverting to the fact that some photographs are intelligible without explanation. The photographs introduced in the cases where is found this limitation, either were not representations of the actual situations or were not intelligible apart from testimony of the witness. Notwithstanding intimations in these cases, the court admitted X-ray photographs as evidence for the consideration of the jury in a recent decision, "upon the same basis as photographs." 29

It is submitted that the photographs in the Honeycutt case were properly authenticated, and warranted consideration by the jury as to the nature of the machine upon which it was alleged deceased was killed. The instructions to the jury that they were not "substantive evidence," the omission of which caused a reversal, it is believed, would have been entirely without useful influence upon the jury's consideration of them.

JOHN H. ANDERSON, JR.

ADVISORY OPINIONS IN NORTH CAROLINA

The Senate of North Carolina forwarded a resolution to the Supreme Court of North Carolina, requesting advice on the constitutionality of two bills proposing changes in the system of Superior Courts. A letter in reply, signed by the Chief Justice, expressed the view that the members of the Court would be willing to follow the precedent of their predecessors in giving opinions to the legisla-

to . . . (best evidence rule) . . . and cross-examination and opposing evidence." 30

State v. Kee, 186 N. C. 473, 119 S. E. 893 (1923), involved map drawn on floor, which it was said was not "evidence." 30

State v. Lutterloh, 188 N. C. 412, 124 S. E. 752 (1924), photograph of reconstructed scene admissible as "illustrative evidence," explanation of the reconstructed scene being necessary by witness.

State v. Mitchen, 188 N. C. 608, 125 S. E. 190 (1924), admission as "illustrative evidence" approved.

In Elliott v. Power Co., Varsar, J., said: "It was not error for the court to allow the jury to consider the pictures for this purpose (explaining witness's testimony) and to give them such weight if any, as the jury may find they are entitled in explaining the testimony." (Italics ours).

State v. Mathews, 191 N. C. 378, 131 S. E. 743 (1926), is probably the strongest support for Honeycutt v. Brick Co., supra note 14. In that case, however, the photographs were of tableaux vivants, the reconstructed scene of the crime, the admission of which would have been held error by courts which admit photographs of the actual, unreconstructed scenes, supra note 5.

tive department, when it appeared that a course of action had been agreed upon, which involved constitutional questions affecting the governmental structure and matters of grave public moment, but that in the present instance the fact that the resolution had been addressed to the court in its official capacity and the fact that the two bills showed there had been no agreed course of action, prevented the expression of opinions.1

Before the adoption of the Constitution of 1868, there were two instances in which requests for advisory opinions were granted. The first was a contested election before the Senate which involved the question of eligibility to vote.2 The second was an opinion on the meaning of the word "crime", given at the request of the governor.3 Under the Constitution in force before 1868, the duties of the Court were not prescribed, but were subject to control by the legislature.4 There is no evidence or intimation in the two opinions of that period that the legislature ever made it the duty of the Supreme Court to render advisory opinions.5 The weight given to such opinions was not that attached to a judicial decision and their conclusions were not considered as binding.6

The Constitution of 1868 provided for the separation of the powers of the three departments of government and gave the Supreme Court a constitutional jurisdiction. When the matter arose for the first time under this constitution, two of the justices took the view that it prohibited the giving of advisory opinions, but the remaining three took the view that the members of the Court, as justices, might render such opinions as acts of courtesy and respect to the

1 In the matter of Advisory Opinions, 196 N. C. Appendix (1929).
2 Waddell v. Berry, 31 N. C. Appendix (1849).
3 In the matter of Hughes, 61 N. C. 57, 64 (1867).
4 Stacy, Brief Review of the Supreme Court of North Carolina (1926) 4 N. C. Law Review 115, stating that the Supreme Court of North Carolina was created by a legislative enactment in November, 1818, and that until 1868 the Legislature had the power at any time to abolish the Supreme Court and the power to elect the members of the Court.
5 In Waddell v. Berry, supra note 2, Ruffin, C. J., said: "Although not strictly an act of official obligation, which could not be declined, yet from the nature of the questions and the purposes to which the answers are to be applied—being somewhat of a judicial character—the Judges have deemed it a duty of courtesy and respect to the Senate to consider the points submitted to them and to give their opinions thereon."
6 State v. Ragland, 75 N. C. 12, 13 (1876), stating: "This conclusion is contrary to the opinion of the judges in the contested election case, Waddell v. Berry (1848) 31 N. C. 319. We do not feel ourselves bound by the opinion in that case, because it was not a judicial opinion, that is, not given in any case which the court had jurisdiction to decide, and the reasoning is almost altogether technical."
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legislative department. The latter view has persisted. Such advice is not an official obligation, there is no authority to render it voluntarily, but it may be given, when requested. These advisory opinions have been cited in regularly decided cases as persuasive authority, but not as binding precedents. Obviously, the Court in the principal case was called on to decide a question smacking mainly of legislative policy. Its refusal of advice seems sound.

The well established and long continued practice in England by which the Crown and the House of Lords consulted the judges on matters of great moment as to matters of law cannot be compared with American practice, state and federal, because of the essential differences in governmental structure. The Federal Courts have never given advisory opinions. Following the example set by Massachusetts in 1780, several states have adopted constitutional provisions making it the duty of the Court to render advisory opin-

1 Opinion of The Justices, 64 N. C. 785 (1870), giving the replies of the five judges to a joint resolution of the Senate and House of Representatives, requesting opinions as to terms of the then members of the General Assembly. Pearson, C. J., and Dick, J., expressed their willingness to follow the precedents and give advice as an act of courtesy and respect. Rodman, J., although he declared that a court should not undertake the political question of the "legitimacy of the actual reigning sovereign," stated that as an individual he felt free to express his views. Reade, J., advanced several objections to the rendering of advice to a coordinate branch of the government: that the instances of such practice before 1868 were not precedents, because the duties and powers of the court before 1868 were prescribed by an act of the legislature; that the Constitution provides that the "Legislative, Executive and Judicial departments shall be forever separate and distinct"; and that to consider the questions as individuals is to evade the letter while retaining the spirit. Settle, J., declined to express an opinion, but expressed no reason therefor.

2 The Opinion of the Judges, 114 N. C. 923, 28 S. E. 18 (1894), the judges giving an opinion, at the request of the governor, respecting the term of office of the judges, only after the judges, whose tenures of office were affected, had joined in the request. In Correspondence Between House of Representatives of General Assembly of North Carolina and the Supreme Court of North Carolina, 120 N. C. 623, 28 S. E. 18 (1897), the judges giving an opinion, at the request of the House of Representatives, on the validity of a bill involving the lease of the North Carolina Railroad.

3 Leftin v. Sowers, 65 N. C. 251, 255 (1871), cites the Opinion of Justices, supra note 7, on the question of tenure of office; Sutton v. Phillips, 116 N. C. 502, 506, 21 S. E. 968, 969 (1895), cites the Opinion of the Justices, supra note 7, on the method of construing a constitutional provision; Rodwell v. Rowland, 137 N. C. 617, 623, 50 S. E. 319, 321 (1905), cites and quotes from the Opinion of the Justices, supra note 7, as to the duration of a term of an elective office when there is any doubt as to its duration; Farthing v. Carrington, 116 N. C. 315, 322, 22 S. E. 9, 10 (1895) cites the Opinion of the Justices, supra note 7, as a precedent for construing a statute regulating preferences by mortgages, and of general public importance, although the facts stated on the "case agreed" were not sufficient for the court to render a final judgment.


5 15 C. J. 785.
ions. There has been, however, considerable evasion of the responsibilities thus imposed. In the states which do not have such provisions, there is a division of authorities, the prevailing view, supposedly because of the separation of powers doctrine, being adverse to the rendering of advisory opinions. With the single exception of Colorado, in the jurisdictions which do allow advisory opinions, whether by constitutional provisions or not, the opinions rendered are those of the judges and not of the court.

There is a distinction between the advisory opinion and the declaratory judgment. The former is an assistance rendered to the other co-ordinate branches of the government, not in the determination of policies, but in the definition of certain duties or in the forecasting of the constitutionality of proposed acts. The declaratory judgment is a method of determining an issue, or issues, between private parties in advance of trouble or litigation. Only in the sense that it gives anticipatory and preventative relief does it resemble an advisory opinion. Perhaps the nearest approach to a declaratory judgment in North Carolina is found in Farthing v. Carrington, in which a statute regulating preferences by mortgages was construed although the facts stated on the "case agreed" were not sufficient for the court to render a final judgment.

The North Carolina attitude toward advisory opinions seems likely to prevail over the traditional hostility of the American bench and bar, if success crowns the recent efforts of Mr. Elihu Root to formulate a protocol which will be acceptable to the League of Nations and which will retain the essence, without the arrogance and obscurity, of the famed Reservation V, of the United States Senate of 1926, stipulating the terms of the United States' adherence to the World Court.

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