Open Court

North Carolina Law Review

OPEN COURT

A Ministry of Justice

The February meeting of the class in Administration of Justice at the University of North Carolina discussed the subject of "A Ministry of Justice." The following papers were presented by members of the class:

1. The Ministry of Justice in France.
2. A Ministry of Justice in England.
3. The United States Department of Justice.
4. The Office of Attorney General in North Carolina.
5. The Need for Centralization of Law Enforcement in North Carolina.
6. The Need for a Law-Recommending Body in North Carolina.
7. Proposed Legislation for a North Carolina Department of Justice.

The meeting was attended by Attorney General Brummitt and Assistant Attorney General Nash, both taking an active part in the discussions which followed the presentation of the papers. It is partly at their request that the Law Review has undertaken to publish the papers as revised in view of the class discussions. The first four papers, largely descriptive, are printed substantially as presented. The last three papers, largely argumentative, have been reworked and combined into one. The five papers are presented herewith as the views of the individual students who wrote them. It is hoped that they will arouse discussion concerning the present state of law enforcement in North Carolina and that the lawyers of this state will become actively interested in improving present conditions and in establishing a well-organized, state-wide department of justice for the enforcement of law in North Carolina.

R. H. Wettach.

I. The Ministry of Justice in France

In France, as in most continental European countries, the judiciary is not expressly provided for in the constitution. The organization of the courts, their jurisdiction, the mode of appointment and removal of judges, their qualifications, and their tenure are all matters that are regulated entirely by statute. This may be explained

by the fact that the idea persists in France that the judicial power is not a separate and distinct power of government, but merely a branch of the executive.[1] As a corollary, the Ministry of Justice in France may be regarded as not only judicial but as executive and administrative as well.

The French judicial system is so different from everything American that it is hard to frame a definition of it. Perhaps it may be best defined as "that segment of the bureaucracy of France to which the administration of justice is committed."[2] The French judicial system exhibits in its operation an amount and degree of centralization that is entirely unknown in this country. All of the courts of France are united in one great system. All the judicial machinery is regulated and directed by the Ministry of Justice, which is under the supervision of a cabinet member, the Minister of Justice.[3] This shows a marked contrast to the American judicial system.

A peculiar feature of the French judicial system is the maintenance of two entirely separate sets of tribunals, one for the trial of ordinary civil and criminal cases, and the other for the handling of controversies between administrative authorities and private individuals.[4] The administrative courts apply a separate body of law, called administrative law as distinguished from the private law applied by the ordinary courts.[5]

In the ordinary courts, French justice is administered by six orders of tribunals united by an hierarchical link. These are, beginning at the bottom of the hierarchy:

1. The Council of Prud'hommes.
2. The Justices of the Peace.
3. The Tribunals of Commerce.
4. The District Courts, which are called Courts of First Instance when sitting in civil cases, and Correctional Courts when sitting for criminal cases.
5. The Courts of Appeal, and Courts of Assizes.
6. The Court of Cassation, or the Supreme Court.[6]

[1] Garner, *The French Judiciary* (1917) 26 YALE L. J. 349.
[2] Garsonnet quoted in Crabitès, *The French Civil Bench From Within* (1928) 14 A. B. A. J. 572.
[3] Rosengarten, *The French Judicial System* (1909) 57 U. OF PA. L. REV. 279, 297.
[4] Ogg, *Governments of Europe* (rev. ed. 1926) 454.
[5] Sait, *Government and Politics of France* (1921) Chap. XXI.
[6] Classification taken from Crabitès, *op. cit. supra* note 2, and Sait, *op. cit. supra* note 5, Chap. XXII.

The first three groups outlined above are manned by laymen. The Councils of Prud'hommes are boards composed of an equal number of merchants and workmen. They deal with a special category of disputes between master and servant. They do not, however, have jurisdiction of disputes between capital and labor, such as strikes. The Justices of the Peace have a civil jurisdiction limited to six hundred francs and a criminal jurisdiction limited to petty offenses called *contraventions*. They attempt to conciliate the parties as well as decide cases. The tribunals of Commerce try cases which involve, roughly speaking, all actions brought against a trader in respect to his business. The jurisdiction of all of these courts is definitely circumscribed by statute.[7]

The District Courts, the Courts of Appeal and Assizes, and the Court of Cassation, form the general structure of the judicial system proper. The District Courts have both civil and criminal jurisdiction. One of these courts is located in each department *(arrondissement)*. Its decision may be appealed from in civil cases involving personalty of the value of more than fifteen hundred francs or realty yielding an income of more than sixty francs per year. Its criminal jurisdiction is limited to misdemeanors and petty felonies. A solicitor *(procureur)* is attached to each of these courts.[8] The Courts of Appeal are twenty-five in number and preside over areas which correspond roughly to the old provinces. They are composed of five judges, and each maintains several solicitors *(procureurs-generaux)* on its permanent staff. The principal function of these courts is the hearing of appeals from the District Courts, original jurisdiction being limited and incidental. Closely related to the Courts of Appeal are the Courts of Assizes. These are not separate or permanent courts, but are composed of three judges from the Court of Appeal. The Courts of Assizes are occupied exclusively with major felonies, and are the only courts in the whole French system which regularly employ a jury.[9] The Court of Cassation is the supreme court, and is divided into three sections composed of sixteen judges each dealing respectively with petitions for hearing, civil cases, and criminal cases. Its function is to reverse or sustain decisions of the lower courts; it cannot substitute an affirmative decree of its own.

[7] Crabitès, *op. cit. supra* note 2, 574.
[8] Sait, *op. cit. supra* note 5, at 399.
[9] *Ibid.* 400. There are also Courts of Appeal in Corsica, Algeria, and Tunis, making a total of twenty-eight in the French system.

The Solicitor General of all France, together with his assistants, is attached to this court.[10]

The courts of the judicial system proper are divided into the "sitting magistracy" and the "standing magistracy."[11] The sitting magistracy forms what is known in America as the bench. The standing magistracy is composed of all the solicitors and state attorneys, and it is from this group that the bench is largely recruited. The Solicitor General is the head of the standing magistrates, and the whole body is known as the *Ministère Public,* perhaps best translated as the "public service."[12] Both judges and solicitors may be moved from one circumscription to another by the Ministry of Justice. This tends to free them from local influence and popular sentiment.[13]

The members of the magistracy, both standing and sitting, are appointed by the President of the Republic upon the recommendation of the Minister of Justice.[14] Appointments and promotions are provided for by a cautious system. The presiding justice of the Court of Appeal and the solicitor for the appellate department prepare a list of the magistrates, sitting or standing, in their department whom they consider worthy of advancement. These are called the "promotion lists," and are submitted to a commission consisting of the President of the Court of Cassation, the Solicitor General, the senior and junior justices of the Court of Cassation, and presided over by the Minister of Justice. From the promotion lists, this commission makes the selection of the appointee for any vacancy.[15] This applies to all the members of the magistracy except members of the Council of Prud'hommes and the Tribunals of Commerce, which are elective.[16]

Judges, both standing and sitting, serve during good behavior, but this does not mean life tenure. They may be removed when by reason of age or infirmity they can no longer effectually discharge their duties of office. Then there are age limits at which retirement is virtually required. This age limit varies with the different courts; for instance, judges on the tribunals and the Court of Appeal must

[10] Waldo, *The Suprême Court of France* (1921) 7 A. B. A. J. 171.
[11] Crabitès, *op. cit. supra* note 2.
[12] Fuller, *The French Bar* (1914) 23 YALE L. J. 248, at 259.
[13] Woods, *The Efficiency of French Justice* (1929) 15 A. B. A. J. 162.
[14] Ogg, *op. cit. supra* note 4, at 455.
[15] Fuller, *op. cit. supra* note 12.
[16] Garner, *op. cit. supra* note 1, at 359.

retire at the age of seventy, and those on the Court of Cassation at seventy-five. Finally, the judges may be censored, reprimanded, suspended, or removed by the Court of Cassation, sitting as the Council Superior, which acts upon the recommendation of the Minister of Justice. Among the grounds for which a judge may be removed are felonies and misdemeanors of which he has been duly convicted, neglect of duty, scandals in private life, political activity, and acts which seriously compromise the dignity and character of the office.[17]

Apart from the investigation and prosecution of violations of the criminal law, a duty which solicitors share with municipal officers and police officials, the solicitors are charged with public duties in civil controversies. In all matters that concern the policy of the state, the functions of any branch of the government, internal order, the status of individuals, rights of minors, etc., the solicitor is to be fully informed of the proceedings. After the parties have completed their arguments, he is called upon to take part and lay his conclusions before the court, which may or may not follow them.[18] One writer has said that the standing magistrates are the agents accredited to the courts by the executive power.[19] At any rate, they are officers of the court and must assist it to do justice, not only in criminal cases but in the class of civil cases above referred to as well.

It has already been noted that the criminal law of France is administered by the same courts as the civil law, although in somewhat different capacities. The main differences are that a different procedure is used in trying criminal cases, and that a jury trial is given for felonies. The method of indictment for felonies is noteworthy here. It is the duty and function of an examining magistrate *(juge d'instruction)* to discover whether there is sufficient evidence to justify the indictment and trial of the accused. The magistrate visits the scene of the alleged crime and makes a personal investigation of all the circumstances. The next step is the examination of the accused, which takes place in the chamber of the examining magistrate and is secret. The accused may be represented by counsel, but the state is not at this hearing. The inquisitorial examination of the accused is thorough and searching, often covering his whole past

[17] *Ibid.* 372-4.
[18] Fuller, *op. cit. supra* note 12, at 260.
[19] Crabitès, *op. cit. supra* note 2, 573.

life.[20] If the magistrate finds there are sufficient grounds to justify the prosecution, the case is sent to the Chamber of Accusation, composed of five justices of the Court of Appeal, which is the indicting body. If the accused is indicted by this body, he is brought up for trial in the Court of Assizes where he must satisfy the court that he is not guilty.[21] To the Frenchman, the Anglo-American presumption of innocence is highly hypocritical.

The function of the Ministry of Justice is to regulate and supervise all this judicial machinery. For this purpose it has a permanent staff of eighty, selected by the civil service method, and engaged as officers of the various bureaus. There are four bureaus in the Ministry of Justice concerned with matters pertaining to the administration of the criminal law. These bureaus deal with matters relating to the prosecution of offenders, the execution of sentences, pardons and investigations pertaining thereto, the collection of statistics, and expenditures in enforcing the criminal law. Three bureaus are concerned in civil matters. These deal with the administration of the civil law, legislation pertaining to the administration of civil justice, supervision of the courts, and the status of foreigners. These various bureaus and others of a similar nature are the supervising agencies of the Ministry of Justice.[22] It is through them that France has achieved and maintained a unified and centralized judicial system.

At the head of the Ministry of Justice just outlined is the Minister of Justice. His duties are manifold. He must transmit orders and instructions to the courts and tribunals, correspond with the solicitors, and keep in touch with the courts throughout France. He must supervise all judges and justices of the peace, all members of the legal profession, and all members of the Ministry of Justice.[23] In short, the Minister of Justice is the supervising head of the entire administration of justice in France.

Another important function of the Minister of Justice is in the field of legislation. As a member of the cabinet, he is chosen from the French Parliament, usually from the lower house, the Chamber of Deputies. He is at the same time a member of the executive and

[20] On this topic see Sait, *op. cit. supra* note 5, at 413; and (1909) 47 AM. L. REV. 143-151, 300-312, 458-469. This shows a direct contrast to the rule in this country that a witness cannot be compelled to give evidence against himself.

[21] Garner, *Criminal Procedure in France* (1916) 25 YALE L. J. 255.

[22] 21 *La grande encyclopèdie* 352.

[23] Rosengarten, *op. cit. supra* note 3.

legislative departments of the French government. With the approval of the other members of the cabinet and the signature of the President of the Republic, he may introduce what are known as "government bills."[24] The Minister of Justice prepares and proposes to Parliament the government bills that pertain to his department, such as legislation dealing with the judicial system, procedure and the courts, and all matters pertaining to the administration of justice.

This discussion would not be complete without a brief comment on the efficiency of French justice. While in this country the criminal courts are more heavily engaged than ever in their effort to try the proportion of the law-breakers who are caught, the French criminal dockets are less heavily charged than before the World War. In France, according to a report to the Minister of Justice by the Director of Criminal Affairs, the number of trials in the Court of Assizes fell from 3,088 in 1913 to 1,800 in 1926. The population of the area covered was approximately 39,000,000.[25] This is an apparent tribute to the efficiency of French justice.

J. GLENN EDWARDS.

II. A MINISTRY OF JUSTICE IN ENGLAND

There is in England no single unified department of justice such as exists in the continental countries or that corresponds to our department of justice organized in 1870. Work of the same character is performed, of course, but it is distributed among a number of officials of different departments of the government. The officials having most to do with the administration of justice in England are the Law Officers of the Crown, The Director of Public Prosecutions, The Secretary of State for Home Affairs, and The Lord High Chancellor.

The principal Law Officers of The Crown are the Attorney General, a cabinet member, and his associate and substitute, the Solicitor General, a member of the ministry but not, as a rule, of the cabinet. The duties of these officials are threefold: first, to assist the Lord Chancellor in giving legal advice to the cabinet and several departments; secondly, to defend in Parliament the legality of the government's measures; and thirdly, to represent the government in

[24] Ogg, *op. cit. supra* note 4, at 436.
[25] Woods, *op. cit. supra* note 13.

legal proceedings of unusual importance of both a criminal and political nature.

These latter functions of the Law Officials have been greatly diminished by the creation in the Prosecution of Offences Act of 1879 of a new official, The Director of Public Prosecutions. Although he is a member of the treasury department, the regulations governing his actions are made by the Attorney General with the approval of the Home Secretary. At present they provide that he may prosecute in all sorts of capital cases, in offences against coinage, in cases of fraudulent bankruptcy, and in all other cases where he is directed to do so by the Attorney General or the Home Secretary, or where it appears to him to be necessary for the public good. The Director of Public Prosecutions has the further duty of giving legal advice to police officers and clerks of justices of the peace. In spite of the activity of this official, however, a general practice of public prosecutions for crime has not arisen. The criminal cases that he conducts are comparatively few in number, the great majority of cases still being prosecuted under private direction.

Passing to another department we find that the Home Office, although as a whole it resembles our department of interior more than our department of justice, performs among its rather miscellaneous functions several that are ordinarily performed by a minister of justice. One of the most important of these is the control over pardons. Theoretically, mercy is one of the Crown's prerogatives and is exercised by and with the advice of the Home Secretary. Practically the Secretary has the discretion of granting the pardons.

The Home Secretary's control of the police is also exceedingly important. The national government bears half the cost of the police system in all the counties and boroughs in which the constabulary meets the standards fixed by the home department. The home office makes the inspections and issues the necessary certificates. The metropolitan police of London is, indeed, administered under the immediate direction of the Home Secretary. As a part of his authority over the police he supervises the prisons, both the national prisons for convicts and the county and borough jails. The Home Secretary also has many administrative powers of a judicial nature: he appoints all the stipendiary magistrates and the local criminal judges called "recorders." Moreover, he approves the arrangements for the "assizes," or circuits for the local judges.

Of all the officials in England among whom the administration of justice is centered by far the most important is the Lord High Chancellor. Not only has he been given a much larger share in administering justice than any of his colleagues but, as has often been observed among writers on the English system, the Lord Chancellor unites in his person functions of a more diverse nature than any other governmental official of the modern world. As a cabinet member and a political leader he is at once an active member of the executive, the judicial, and the legislative branches of the English government. Probably the best method of explaining the relation of the Chancellor to the administration of justice is by outlining his functions at the present time.

Historically speaking the Chancellor rose to importance as a judge and in the past his name has been associated almost entirely with the idea of a judge. This aspect, however, has largely passed away since the judicature acts and today the Chancellor appears more as a political and administrative official of government.

He is one of the prominent members of the ministry and with the other ministers is appointed by the Crown on the recommendation of the Prime Minister. The office changes, of course, with each change of ministry. He regularly sits as a member of the cabinet and participates in the deliberative and advisory work of that body. In framing measures of a judicial and legal character he actually determines the policy of the government, as measures of this character are drawn up under his immediate direction. Such is the Chancellor's relation to the executive branch of government.

The Chancellor is directly related to the legislative branch, as he is made by statute a member of the House of Lords and has been its traditional Speaker or presiding officer. As a member he may debate and vote on any question before the House. When bills of a judicial nature come up he participates freely in the discussions.

As a purely judicial official the Chancellor also has several functions to perform. He becomes the Chief Justice of the House of Lords whenever that body convenes as the highest court of appeal. Although any member of the Lords has the right to sit in a judicial session, no lay member has attempted to do so for years. Actually the court is composed of the Lord Chancellor, The Six Lords of Appeal in Ordinary, who are appointed by the Prime Minister on the advice of the Chancellor, and any other peer who has held high

judicial position in the past. At least three law members must be present before an appeal can be heard. Many of the opinions of the court are written by the Chancellor.

The Lord Chancellor also has the duty of presiding over the sessions of the Privy Council when it sits as a judicial committee to serve as the supreme court for all British jurisdictions for which the House of Lords does not perform that function. Included in the work of the court are cases appealed not only from all parts of the British Empire, which alone gives the court a jurisdiction geographically more extensive than that of any other judicial or quasi-judicial body in the world, but it also includes cases appealed from the ecclesiastical courts and the admiralty courts within England. As composed today the judicial committee consists of the Lord Chancellor, any former incumbent of his office, The Six Lords of Appeal in Ordinary, The Lord President of The Council, Privy Councillors who hold or who have held high judicial position, and a varying number of judges from overseas, altogether twenty or more judicial dignitaries. The Chancellor as a rule sits on the hearing of cases and often writes the opinions, except in cases involving political matters. The practice has grown up here as in the House of Lords for the Chancellor to absent himself in such cases, because as a member of the Cabinet he has always helped frame the policy of the government.

Aside from the Chancellor's traditional right to preside over the two highest courts in the British dominions the judicature acts have made him a statutory judge in several branches of the Supreme Court of Judicature. He is made President of the High Court of Justice, the chief trial court in England. The High Court of Justice is divided into three divisions, the King's Bench Division, The Division of Probate, Divorce and Admiralty, and the Chancery Division. The Chancellor is made a judge in the Chancery Division and also a judge of the Central Criminal Council, a branch of the King's Bench Division. In the Court of Appeal, which is the Appellate Division of the Supreme Court of Judicature and the highest court in England below the House of Lords, the Chancellor has been made President and a judge ex-officio.

As a matter of practice the Chancellor never sits as a judge in any of these branches of the court, probably due largely to the pressure of his many other duties. Aside from his right to sit as a

judge, however, he does exercise wide powers of control and supervision over all the branches of the court system due to his position as president, and because of authority derived from a number of special statutes that have been passed from time to time since the enactment of the judicature acts. From the standpoint of a minister of justice these powers are very important, as they make him the actual administrative head of the entire court system.

The appointing power has been placed largely in the hands of the Chancellor. The judges of the various branches of the Supreme Court, it is true, are appointed by the Prime Minister, but this is done on the recommendation of the Chancellor alone. All of the other court officials are appointed by the Chancellor directly. These include, besides the lower judges, many clerks, masters, referees, recorders *et cetera.* His appointing power extends to the fifty-seven county judges appointed for life and the sheriffs and other local administrators of justice. These latter officials are appointed on recommendations from the Lords Lieutenants in the various counties.

The Chancellor may even create new court officers where he deems it necessary and he may fix the term of office and the salaries of the lesser officers of the court. Along with the powers of appointing and creation has been given the power of dismissing lesser officials and the power of removal of judges, even judges of the Supreme Court. It should be noted, however, that removals are very rare, due largely to the care taken in selecting the judges and the high qualifications required for appointments.

The immediate control of the Chancellor over the courts is illustrated again in his power to promote judges and to shift them temporarily from one branch of the supreme court to another whenever one branch becomes overburdened with work. Likewise he may request any one of the supreme court judges or any ex-judge to sit as a member of the court of appeals to hear special cases. The Chancellor may even redistribute the business of the court and direct to which division of the High Court an appeal from a county court must be taken. It can readily be seen that such powers in a single head make for flexibility and adaptability in the entire court system.

Quite recently the same control has been extended over the county courts. An Act in 1924 gave the Chancellor the power of altering the districts of the county courts whenever it appeared there had been a shift in population. Even more recently he has been given

the right to appoint the justices of the peace, thus bringing under his immediate control the entire court system from the House of Lords down to the lowest branch, the petty sessions.

Legislation has also closely connected the Chancellor with the rule-making power. In England the full rule-making power for the courts is vested in a committee consisting of The Lord Chancellor, The Lord Chief Justice of the Court of Appeals, The Master of The Rolls, of the Chancery Division, The President of The Probate Division, two Barristers, two Solicitors, and four other judges selected by the Chancellor. The Chancellor is chairman, appoints four of its members and his own vote is necessary for any action by the committee. Parliament may, of course, reject any rules made by the committee, but so far none has been rejected.

The Chancellor, moreover, selects five judges as a rule-making body for the county courts, but before any rule becomes effective it must be ratified by the rule-making body of the supreme court.

Finally, should be mentioned the work carried on by the Chancellor in investigating certain branches of the judicial system and making suggestions for legislative reform. The actual work is usually done by a special committee of experts who are appointed by him, work under his direction, and submit their report to him. The Chancellor takes the report before the cabinet and it becomes the basis of a government bill which is submitted to Parliament and often enacted in legislation. A number of these committee reports have resulted during the past few years in reforming the courts and extending the control of the Chancellor over the entire system.

In order to round out an outline of the Chancellor's diverse duties attention should be called to a class of miscellaneous duties, that he has accumulated during the many years' history of the office, some of which have been handed down from medieval times, such as the duty of appointing certain Church officials and the guardianship over the insane. Others of these miscellaneous duties have been heaped upon him by recent legislation; such as, his control over the land registry system, and the appointment and regulation of the Public Trustee, an official who cares for money belonging to children and the mentally incompetent.

For many years there has been a movement on foot in England to make the Chancellor head of a distinct department of justice. In order to attain such a result two lines of reform are necessary. First,

the Chancellor must be relieved of many burdensome duties that take up much of his time but have no relation to the administration of justice. Secondly, a group of functions, logically a part of the system of justice but now exercised by other officials, must be brought under his authority. The control over the police and the prisons and the pardoning power must either be transferred to him from the Home Secretary or a much closer relation must be established between the two departments. The Law Officers of the Crown should be made subordinate officials within the department of justice. The Chancellor would, of course, maintain his seat in the Cabinet and thereby become the single responsible head for the entire system of the administration of justice in the English government.

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III. THE UNITED STATES DEPARTMENT OF JUSTICE*

The possession by the national government of a Department of Justice, of a well organized, central law enforcement agency is in marked contrast with conditions existing in the states or in England.

Under the Articles of Confederation there was neither public attorney nor public prosecutor. The Judiciary Act of 1789 provided

* This paper is based largely on information contained in LANGELUTTING, THE DEPARTMENT OF JUSTICE OF THE UNITED STATES (Johns Hopkins Press, Baltimore, 1927).

for a district attorney in each federal district court to care for the interests of the United States in both civil and criminal matters, and for an Attorney General, who was to prosecute before the Supreme Court all suits in which the United States was concerned. The Attorney General was also to advise the President and the department heads on legal matters. He was given no control or supervision over the district attorneys and no power to appear on behalf of the United States in inferior courts. Except for presidential control, the district attorneys were independent officers; appeals from holdings adverse to the United States were in their discretion.

From the first, the Attorney General was a member of the President's Cabinet. His salary was below that of other members, and he was not required to give his time exclusively to national affairs. He was permitted and by the meagerness of his salary required to engage in private practice, usually away from the seat of government. But his salary was raised to a parity with the other cabinet salaries in 1853. He seldom appears even as counsel for the United States. His duties as administrative head of the Department of Justice require his entire attention, and since the creation of the office of Solicitor General, the Attorney General has not always been appointed primarily for his legal ability.

The insufficiency of the act of 1789 was apparent at the outset, and Edmund Randolph, the first incumbent of the office, recommended that the Attorney General be given control over the district attorneys and power to represent the United States in inferior courts as well as in the Supreme Court. Not until 1861 did Congress carry out the recommendations of Randolph and give to the Attorney General supervision over the district attorneys and marshals. This was the first step toward the establishment of a Department of Justice. It was not until July 1870, three years after its introduction, that the bill creating the Department of Justice was finally adopted. The chief object of the bill was to establish a staff of law officers sufficiently numerous and of requisite ability to transact the law business of the government in all parts of the United States, giving to the Attorney General administrative power to supervise law enforcement in any part of the nation where the interests of the United States were at stake. The functions of the Attorney General may be classified as follows:

1. Legal adviser and assistant to the President.
2. Chief of the law officers of the government.
3. Chief administrator of the Federal Courts.
4. Chief of one of the national police forces, U. S. marshals.
5. Director of the national penal institutions.
6. Miscellaneous duties.

The Department of Justice has seven Assistant Attorney Generals, one of whom is assigned to direct the Administrative Division. It is the duty of this officer to run the Department of Justice in Washington, and the law affairs of the national government throughout the land as a business organization. The Administrative Division is also composed of many clerks, stenographers, accountants, examiners, and other general agents and officers.

The internal organization of the Department of Justice is nowhere prescribed by law, but has been developed and funds provided as the needs arose. The technical divisions of the Department of Justice are: 1. The Solicitor General, who prepares and argues all the cases in the Supreme Court in which the United States is interested. 2. Anti-Trust Division. The Assistant to the Attorney General presides over the Anti-Trust Division, which was created in 1903. The Attorney General may assign to him any duty, but he has always been put in charge of Anti-Trust matters. 3. Claims Division. The Attorney General is by law charged with the defense of the United States in the Court of Claims. To carry this out, the Claims Division was organized to handle all claims against the United States, both in the Court of Claims and in the district courts. This division has charge of all patent and copyright litigation in which the United States is interested. Assistants from this division are sometimes sent to help the district attorneys. 4. Customs Division, which is charged with protecting the customs revenue of the nation. An assistant Attorney General is in charge. 5. Division of Prohibition and Taxation. The great weight of litigation in the Federal Courts concerns prohibition and federal taxes. The prohibition unit is now in the Treasury Department. All the cases therefore over which this division has control arise in the Treasury Department. The prohibition unit has its own legal staff. The Hoover Law Enforcement Commission has recommended that the prohibition unit be removed to the Department of Justice. Recently the House has passed a bill to this effect. 6. Admiralty Division, which includes suits in admiralty, foreign relations and state department matters, bankruptcy matters, civil

service matters and various other minor duties. 7. Public Lands Division, which is directed by an Assistant Attorney General, who deals with all matters relating to lands owned by the United States. 8. Criminal Division, also with an Assistant Attorney General, who has charge of all criminal prosecutions under the laws of the United States. 9. Bureau of Investigation. This division has no statutory authorization, but in general has charge of detection of crime. The Bureau is not confined in its activities to matters arising in the Department of Justice.

From 1789 to the Department of Justice Act in 1870, there were many law officers connected with the various governmental departments. These were not responsible to the Attorney General. Under the Act, they were therefore transferred to the Department of Justice which now includes solicitors for the following departments: Interior, State, Commerce, Agriculture, Navy, Labor, Post Office, Treasury, War, and Internal Revenue.

Within the Department of Justice there are many district attorneys, regular and special assistant United States attorneys, all of whom have a very active duty to perform in the administration of justice throughout the United States, Alaska, Hawaii, Panama Canal Zone and Porto Rico. In important cases if they wish to employ accountants, hand writing experts, physicians, engineers, and the like, permission must be had from the Attorney General.

A United States Marshal is appointed for each judicial district of the United States by the President. The powers and duties of marshals and their deputies are those of exalted policemen. They have the same power in executing the laws of the United States as sheriffs have in executing the laws of a state. Their duties are to execute the warrants and judgments of the courts in which they serve. The marshals are under the supervision of the Attorney General. There is no such connection between sheriffs and the state Attorney General.

The Attorney General renders opinions on matters of law affecting the administration of the national government. Such opinions may be required by the head of any executive department, when the opinion asked for actually involves a point in issue at the time. There has been much dispute as to whether such opinions rendered by the Attorney General should be binding or merely advisory. The Attorney Generals themselves have been at variance as to the legal effect of their opinions. Section 358 of the Revised Statutes gives

to them a "practical effect." United States Code Annotated Section 304, note 20 states that administrative officers should regard the opinions of the Attorney General as law until withdrawn by the Attorney General or overruled by the courts. The Comptroller General, however, frequently disregards the Attorney General's opinions, treating them as only of persuasive force.

Recently there has been much said about the consolidation of organizations for the detection of crime. The proposal has been made to enlarge the Bureau of Investigation and concentrate in it the entire field of criminal investigation under federal laws. There are several separate units in criminal investigation; the total force of employees in the prohibition-narcotic organization alone number 4600. There is no doubt but that the work of investigation by the national government should be concentrated more than it is, but it must be kept in mind that there is a limit to the size of any organization beyond which further concentration means decrease instead of increase in efficiency.

Since 1870 the Department of Justice has increased in size, importance and efficiency. With each increase in the power and functions of the national government, new duties and personnel have been added. The Attorney General is no longer just the chief law officer, but he is the administrative head of an elaborate, unified, centralized law enforcement agency.

A. T. DANIEL.

IV. THE OFFICE OF ATTORNEY GENERAL IN NORTH CAROLINA

Since 1929, the Attorney General of North Carolina has been a full-time officer of the Executive Department with a salary of $7,500.00 per year,[1] elected by the qualified voters of the State for a term of four years. He is required to make a biennial report to employees in the prohibition-narcotic organization alone numbers to be made at least five days previous to each regular session of the General Assembly to permit the governor to transmit this report with his message to the General Assembly.[2] The Attorney General's staff formerly consisted of three assistants appointed by him, who were paid a salary of $3,600.00. One assistant was assigned to the Department of Revenue, one to the State Highway Commission, and the

[1] N. C. Pub. Laws (1929) c. 1.
[2] N. C. Const. Art. III, §§1 and 7.

other performed such duties as were assigned by the Attorney General.[3] The Act of 1929, making the Attorney General a full time officer, required him to dispense with one assistant. The remaining assistants now receive a salary of $4,500.00. The duties of the Attorney General are prescribed by statute, the first of which is as follows: "It shall be the duty of the Attorney General to defend all actions in the Supreme Court in which the state shall be interested, or is a party; and also when requested by the governor or either branch of the General Assembly to appear for the state in any court or tribunal in any cause or matter, civil or criminal, in which the state may be a party."[4]

No instance can be found where the General Assembly has requested the Attorney General to represent the state in a trial, but the governor has used this power on extraordinary occasions. This was demonstrated recently in the Wiggins trial. Attorney General Brummitt was sent to represent the state. He moved for a change of venue, which despite the opposition of the solicitor, was granted. At the trial, he assumed active charge of the prosecution.

In all criminal cases that are appealed to the supreme court the Attorney General represents the state before that tribunal, both by brief and argument. The statute also says: "At the request of the Governor, Secretary of State, Treasury, Auditor, Corporation Commissioners, Insurance Commissioner or Superintendent of Public Instruction, he shall prosecute and defend all suits relating to matters connected with their departments."[5] In looking over the North Carolina reports we find a number of these cases.[6] These are only a few civil actions that have been handled through the Attorney General's office.

The statute says that the Attorney General is to represent all state institutions and also the state prison. The Attorney General cannot represent these institutions unless the official head request it or he is requested by the governor to do so.[7] The Attorney General has

[3] N. C. CODE (Michie, 1927) §7695 (a).
[4] N. C. CODE (Michie, 1927) §7694.
[5] N. C. CODE (Michie, 1927) §7694.
[6] State in rel Attorney General v. Roma Rural Community, 182 N. C. 861, 106 S. E. 28 (1921); Corporation Commission v. Southern & A. C. L. R. R., 185 N. C. 435, 117 S. E. 563 (1923); Lacy, Treasurer v. Globe Indemnity Co., 189 N. C. 24, 126 S. E. 316 (1924); Town of Newton v. Highway Commission, 192 N. C. 54, 133 S. E. 522 (1926).
[7] N. C. CODE (Michie, 1927) §7694.

represented the state prison,[8] but it appears that private counsel has represented the University of North Carolina.[9]

It shall be the duty of the Attorney General "to give when required, his opinion upon all questions of law submitted to him by the General Assembly, or by either branch thereof, or by the governor, auditor, treasurer, or any other state officer." These opinions are published in the Attorney General's Reports. Although the acceptance of these opinions is not compulsory, it is the uniform practice of state officials to follow them. These opinions cover a wide range of subjects. Most of them concern the duties of the various state officers and the extent of their powers.

Penalties and all moneys received for debts are paid into the treasury by the Attorney General. He receives no fees except his salary. The Attorney General also examines the warrants drawn by the auditor on the state treasury to see whether they come within the laws under which they are purported to be drawn.[10] The Clerks of the Superior Courts are required to file with the Attorney General's office a record of all criminal cases that have been tried in that court.[11] Criminal statistics, based on these reports are included in the Attorney General's reports to the governor.

In the reports of 1899-1900 Attorney General Robert Douglas made three recommendations to the governor. They were first, a new code, second, more superior courts, and third, a reform school. All these recommendations seemed to be carried out by the legislatures of the next few years. In looking over the later reports it is found that the Attorney General does not make any recommendations. The later reports include a list of the cases that the Attorney General has appeared in, criminal statistics of the superior courts, and his opinions rendered to the different state officials, as well as his opinions to different individuals. By way of criticism we would say that the reports are not complete. The criminal statistics are of little use. In each report we think the Attorney General should say more about what has gone through his office and give some idea about the work as a whole, adding his personal opinions and also any recommodations that he may see fit to give. From the reports as constituted at present we can not derive an adequate picture of the office.

[8] State Prison v. Hoffman, 159 N. C. 564, 76 S. E. 3 (1912).
[9] The present practice of the Attorney General's Office is to represent all state institutions. See Cullins v. State College, 198 N. C. 337 (1930).
[10] N. C. CODE (Michie, 1927) §7694.
[11] N. C. CODE (Michie, 1927) §955.

The Attorney General is "to consult and advise the solicitors, when requested by them, in all matters pertaining to their office."[12] This seems to be the weakest link in his whole line of duty when it should be the strongest. There are doubtless many times when the Attorney General should take a hand, but he is permitted to do so only on request or by direction of the Governor, as in the Wiggins case. Mr. Dodd in his work on state government says: "In the prosecutions of violations of state law, the Attorney General has in most cases some broad general authority to intervene in cases and to aid in their prosecution. Sometimes his authority extends to the point of completely superseding the locally elected prosecuting officer. However, the Attorney General, even though he possesses such powers, will be able to intervene only in occasional cases of great importance; he must necessarily leave to the local prosecuting officers the general task of law enforcement within their respective territories."[13]

One of the most important functions of government is the enforcement of law, and that responsibility is placed upon the chief executive, but the officer directly in charge in the state is the attorney general. He is far from having the position or powers that should be possessed by one upon whom rests the direct responsibility of seeing that the laws are duly enforced. Willoughby says: "In the first place the attorney-generals in the states are for the most part largely independent of the governor due to the fact that they are generally neither appointed nor removable by the governor, but hold office as the result of a popular election. Secondly, as a matter of law, they are not given the direction and control of the agencies made use of by the state for the enforcement of law. And, finally, they are not required by the public as officers whose duty it is to take action required to ensure a rigid enforcement of the law of the land."[14] In fact the Attorney General is little more than a legal adviser to the governor. He can do very little in the actual prosecution of criminals or in the large field of law enforcement.

O. A. WARREN.

[12] N. C. CODE (Michie, 1927) §7694.
[13] Quoted in WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION (1929) 116.
[14] *Ibid*, 115.

V. A Department of Justice for North Carolina

The preceding surveys compel a comparison of the office of the North Carolina Attorney General with the well organized and powerful United States Department of Justice, the highly centralized French Ministry of Justice and the efficient English organization for law enforcement. The comparison clearly raises the question of establishing in North Carolina a real department of justice modeled to a large extent after the United States Department of Justice.

It is herewith submitted that a department of justice be established in North Carolina with the Attorney General at its head. He should be appointed by the Governor in order to obtain the greatest coöperation between the Chief Executive and the department which is responsible for law enforcement in the state. The Executive would thus be responsible, through the Attorney General, for the administration of justice in North Carolina.

The duties of the Attorney General as chief legal adviser to the governor and the heads of the different state departments and institutions should remain about as they are. In addition, he should have more extensive powers. The limits of his control over the enforcement of laws and administering of justice should be the state boundaries. Mr. Roy M. Brown, of the Institute of Social Research at the University of North Carolina, while collecting statistics on nol prosses in the state, found the highest percentage of nol prosses to be in the solicitor's home counties. This is at least some evidence that solicitors consider themselves local instead of state officers. Sheriffs are usually thought of as local officers. They should be relieved of their non-police duties in the county as tax collectors, etc. and become full-fledged state police officers under the control and supervision of the solicitors (also state officers) and the Attorney General. Under the present organization, neither solicitor, judge, nor sheriff is directly responsible to any one. Public opinion is the only means of control.

Responsibility for law enforcement needs to be fixed and certain. If it were given to the Attorney General, it would be his business to see that all engaged in enforcing North Carolina laws performed their duties. He would initiate any movement for securing better performance. Instead of aiding or advising solicitors at the request of the latter, he should have the power to take the initiative. Should a criminal case of unusual importance arise, he should have power to

choose the solicitor for the case, employ other counsel, or aid in the prosecution personally. There should be established in connection with the Attorney General's office a bureau of investigation, employing trained detectives, to be at the service of the Attorney General at all times. Such centralization of law enforcement in the office of the Attorney General will aid in the procurement of uniform enforcement of state-wide laws. Lack of uniformity in enforcement of laws in regard to child labor, women in industry, school attendance, and prohibition are outstanding examples of the result of piece-meal application of laws. Lack of direct responsibility is probably the greatest factor in this diversity.

The Attorney General should provide for a reasonable number of state-wide conferences for solicitors, the primary purpose of the conferences being to work out a systematic and business-like approach to the prosecution of cases. Some problems to be considered are methods of relieving congested criminal dockets, which make it now almost impossible to get a civil case tried within twelve months. A delay of over six months prevents full justice from ever being done. Procedure should be simplified so as to permit speedy consideration of cases.

Prevention of crime is the chief purpose of punishment. But the most efficient organization for the punishment of offenders will not obliterate crime. If the underlying causes of crime could be removed, more good would obviously be done than by punishing the criminal after he has committed a crime. A department of justice should be interested in alleviating and removing such causes of crime as ignorance, poverty and unemployment. As a basis for approach to this problem, there should be a bureau of statistics and information in the department. By gathering statistics on various phases of crime in different localities, investigating conditions and causes of crime, valuable information could be given both the welfare department and the department of justice. Such statistics are not at present available in North Carolina.

Another factor in the prevention of crime is the condition of jails and penal institutions. A convict should be given a chance to become a better citizen instead of a worse criminal. Our jails are not generally equipped to train the inmates in useful pursuits. They are not even arranged to provide for necessary segregation of prisoners or for a minimum of privacy. Proper attention to these matters can

not be given in hundreds of little jails scattered throughout the state. Present-day transportation renders practicable a consolidation of jails, one for every two, three, or more counties. By consolidation, the state could finance maintenance of jails that would serve as reformatories as well as places for confinement. It might be suggested that if the sheriff were a strictly state officer, as herein proposed, that provisions be made for one sheriff to serve as superintendent for each consolidated jail. All state penal institutions should be under the control of the department of justice.

The need of change in the legal rules which prevail in criminal trials has been the subject of frequent comment by judges and lawyers and by those who are prominent in our public life. The following are merely a few of the more significant things that need to be remedied: the prosecution is not permitted to introduce depositions in evidence,[1] although its chief witnesses are beyond the jurisdiction or may be unable to be present in court and although proper safeguards may be placed around the taking of such depositions; the defendant may refuse to take the witness stand and his refusal cannot be commented upon (The French practice is directly opposite and defendant is required to take the stand); North Carolina judges cannot comment on the weight of the evidence or the credibility of the witnesses. Other examples might be added, but it is clear that some changes are needed. We have no authoritative body in North Carolina to study these matters and suggest the remedy.

Numerous changes are needed in our code of civil procedure.[2] Likewise, many changes are needed in our substantive law. What are the rights of a guest against the owner of an automobile? There is a wide variation of law on this point. Statutes have been passed in Connecticut, Iowa, and Oregon releasing the owner or driver from liability for injuries to a guest arising from negligent driving. The Connecticut statute has been held constitutional.[3] These quotations from the North Carolina Supreme Court show a need of changes in the field of real property: "This estate by entirety is an anomaly, and it is perhaps an oversight that the legislature has not changed it into a co-tenancy, as has been done in so many states.[4] ". . . the rule in Shelley's case, the Don Quixote of the law, which, like the last

[1] State v. Webb, 2 N. C. 103 (1794).
[2] McIntosh, *Suggested Changes in North Carolina Civil Procedure* (1929), 7 N. C. L. Rev. 162.
[3] Silver v. Silver, 280 U. S. 118, 50 Sup. Ct. 57, 74 L. ed. 67 (1929).
[4] Bynum v. Wicker, 141 N. C. 95, 96, 53 S. E. 478 (1906).

knight-errant of chivalry, has long survived every cause that gave it birth and now wanders aimlessly through the reports, still vigorous, but equally useless and dangerous."[5] "After testing Consolidated Statutes 4103 by all known rules of interpretation, I am unable to determine, with any reasonable degree of certainty, its meaning or what the legislature intended to accomplish by its enactment."[6] Corporation taxes, excessive when compared with such taxes in many states, approximately prohibit foreign corporations coming into the state, and induce corporations that are, in fact, native to incorporate elsewhere.[7]

It is the legislature's duty to make such needed changes. Yet, regretfully, there is no connecting link, no point of contact, between the legislative and judicial branches of our government. The proposed department of justice should afford such contact. There should be a law recommending body, composed of a workable number of representatives from different fields of activity, i.e. lawyers, judges, scholars, and business men, with the Attorney General as chairman. Profiting by the mistake made in appointing too many members to the North Carolina Judicial Conference[8] this law-recommending body should have not more than seven or nine members. Recommendations of the body should be presented to the legislature by the Attorney General in the form of bills, and these recommendations should be the product of such intensive study of the adaptation of laws to present-day needs that they should be passed almost as a matter of course.

The legislature of Virginia is at present considering the establishment of a department of justice. In 1923 the legislatures of Ohio and Oregon passed statutes providing for a law recommending body. A similar statute was passed in Massachusetts in 1924. There has been much agitation for a body of this kind.[9] The need for it is apparent. Our present system of law enforcement, established in pioneer days to meet the demands of rural communities " . . . is not competent to cope with present day crime which is educated, syndicated, financed and organized," says Mr. James H. Pou, of the Raleigh Bar.

[5] Stamper v. Stamper, 121 N. C. 251, 254, 28 S. E. 20, 22 (1897).
[6] Boyd v. Brooks, 197 N. C. 644, 652 (1929).
[7] Note (1930) 8 N. C. L. Rev. 187.
[8] McCall, *North Carolina Judicial Conference* (1929) 15 A. B. A. J. 563.
[9] Cardozo, *A Ministry of Justice* (1921) 35 Harv. L. Rev. 113; Wigmore, *Wanted—A Judicial Superintendent* (1917) 1 J. Am. Jud. Soc. 7.

The model for a state department is to be found in the United States Department of Justice. North Carolina may look forward to the day when a department of justice will supplant the present inefficient and unsatisfactory system. It is a program that calls for constructive leadership of the highest order.

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EFFECT OF SUBSEQUENT ACT OF MORTGAGOR IN TAKING OUT ADDITIONAL INSURANCE

In cases where there are several policies of insurance issued by different companies on a risk where mortgages upon the property are involved, complications frequently arise. If all of the policies on the risk are valid, and if the New York Standard Mortgage clause is attached to all of said policies, no complication should arise, and each company on the risk is liable for its proportionate part of the insurance in force, and this rule applies, whether the policies were all actually delivered to the mortgagee or not. This seems to be well settled, as indicated by the case of *Federal Land Bank v. Globe and Rutgers Fire Insurance Co.*, 187 N. C. 97, 121 S. E. 37 (1924) and cases therein cited.

The cases in which several policies have been issued by different companies, some containing the New York Standard Mortgage clause, and others not containing it, are the cases that have given rise to more serious controversies.

One phase of this very important question has just been decided in North Carolina in the consolidated cases of *Bennett and Sample, Trustee, v. Insurance Companies,* 198 N. C. 174, 151 S. E. 98 (1930). In that case, Bennett, the owner of the property, gave a deed of trust upon the same to secure the payment of $5,000.00. He procured from the Piedmont Fire Insurance Company policies totalling $6,000.00, with the New York Standard Mortgage clause attached, making the loss payable to J. H. Sample, Trustee, all in accordance with the provisions of the deed of trust. Thereafter, Bennett, without the knowledge or consent of J. H. Sample, Trustee, procured from the Provident Fire Insurance Co. policies totalling $9,000.00, but said policies did not have the New York Standard Mortgage clauses attached.

Thereafter, the property was damaged by fire, but the damage was in a sum slightly less than the amount of the indebtedness secured by the deed of trust. J. H. Sample, Trustee, brought suit against the Piedmont Fire Insurance Co., claiming the full amount of the damage under and by virtue of the New York Standard Mortgage clause. Bennett brought suit against the Provident for the collection of its alleged proportionate part of the loss. The cases were consolidated for the purpose of trial, and cross pleadings were filed, in which Sample, Trustee, claimed the benefit, if any, of the insurance issued by the Provident to Bennett, and the Piedmont claimed that it was not liable for the full amount of the loss, but only for its proportionate part thereof, based upon the total amount of insurance issued. The Provident was denying liability on the ground that the policies had been issued without notice to it of the existing mortgages, and without notice to it of the other insurance, but these facts were found against it by the jury, the jury finding that its local agent knew of the existence of the mortgages, and knew of the existence of the other insurance. The Provident also defended on the ground that its policies, if valid, merely covered the interest of Bennett, which was an equity of redemption, and the loss having been in a sum less than the amount of the mortgage, that he, Bennett, had sustained no loss, and that the Piedmont Company was liable for the full amount of the loss under and by virtue of the provisions of the New York Standard Mortgage clause attached to its policies and delivered to the Trustee. The trial court held that J. H. Sample, Trustee, was entitled to recover from the Piedmont Company the full amount of the loss, and that the Provident Company was not liable for any sum whatsoever. Upon appeal, the judgment of the lower court was affirmed, and in writing the opinion of the Court, Chief Justice Stacy said:

"The appeal presents, for the first time in this jurisdiction, the question as to whether the subsequent act of an owner or mortgagor in taking out additional insurance, without the knowledge or consent of the mortgagee, to protect alone his interest in mortgaged property, *ipso facto* reduces proportionately the amount of prior insurance held by a mortgagee or trustee on the same property under a New York Standard Mortgage Clause.

"At least six courts have passed upon the question, two deciding it in the affirmative (*Hartford Fire Ins. Co. v. Williams,* 63 Fed., 925, *Sun Ins. Co. v. Varable,* 103 Ky. 758), and four in the negative

(*Eddy v. London Assurance Corp.*, 143 N. Y. 311, *Hardy v. Lancashire Ins. Co.*, 166 Mass. 210, *Germania Fire Ins. Co. v. Bally*, 19 Ariz., 580, *Martin v. Sun Ins. of London*, 83 Fla. 325).

"The question was adverted to, but not decided, in *Bank v. Ins. Co.*, 187 N. C. 97, 121 S. E. 37, where it was held that the standard or union mortgage clause, engrafted upon a policy of insurance, operates as a distinct and independent contract of insurance for the separate benefit of the mortgagee, as his interest may appear, to the extent, at least, of not being invalidated, *pro tanto* or otherwise, by any act or omission on the part of the owner or mortgagor, unknown to the mortgagee.

"It is provided by each of the standard mortgage clauses in question that the Piedmont Fire Insurance Company shall not be liable under its policies for a greater proportion of any loss or damage sustained thereunder than the amount of such insurance bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise. It is also provided in said standard mortgage clauses that the insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property.

"Why these two apparently conflicting provisions should have been inserted in the same contract is not easy to perceive, but in keeping with the general rule of construction, with respect to ambiguously-worded policies of insurance, where they are reasonably susceptible of two interpretations, we think the one more favorable to the assured should be adopted. *Underwood v. Ins. Co.*, 185 N. C. 538, 117 S. E., 790."

It is of interest to note that, of the authorities relied on by the court, the Eddy case was decided in 1894, the Bally case in 1918 and the Martin case in 1922.

This North Carolina decision gives an added feeling of security to all financial institutions lending money on mortgage security and taking insurance policies containing the New York Standard Mortgage Clause in connection therewith. The decision likewise is of advantage to all fire insurance companies, as it clearly fixes their rights under circumstances set forth in the facts of the instant case. Such circumstances frequently exist.

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(Mr. Smith informs us that the above discussion was written for the February Fire and Marine edition of *Best's Insurance News.*)