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# THE STATE'S LEGAL BUSINESS

ALBERT COATES\*

## I

### THE OFFICE—SELECTION—TENURE—REMOVAL

#### A. ATTORNEY GENERAL

*Office.* In the year 1767, in a letter<sup>1</sup> to the Earl of Shelburne, Governor Tryon estimated that there were forty-five lawyers practicing in the province of North Carolina. The Attorney General, wrote Governor Tryon, was selected from them, and he had all the power, authority and trusts "within the province that the Attorney General and Solicitor General of England [had] in that Kingdom." These powers and duties as set forth by Blackstone were partly criminal and partly civil in their nature.<sup>2</sup> This twofold nature of his duties accrued to the office in North Carolina, said Governor Tryon, where in every inferior court of the province "he prosecutes or defends on behalf of the Crown in such actions civil or criminal as come before those courts where the Crown is concerned."<sup>3</sup>

Not every one had a high opinion of these early Attorneys General. According to an old letter, written with as much quaintness as forthrightness, to the Lords Justices in 1696, Edward Randolph, "Surveyor General of his Majesty's Customes in the Continent of America," informed certain consultants that "William Randolph the present Attorney General in Virginia is wholly unacquainted with the Laws and practice of the courts of England; that George Platter the present Attorney General in Mariland is a favourer of illegal trade, that David Lloyd the present Attorney General in Pennsylvania has declared that he served for the Province only and thereupon refused to put several forfeited Bonds in suit, that Anthony Checkby the present Attorney General of Massachusetts Bay is not only ignorant of the Laws of England but has been himself an illegal trader."<sup>4</sup> And according to a prefatory note in the Colonial Records, the Governor of North Carolina in 1731 indicated that his own Attorney General "did not know enough law to be Clerk to a justice of the peace, and was besides a man of innumerable villainies."<sup>5</sup> It should perhaps be added that the first of these state-

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<sup>1</sup>7 N. C. Colonial Records (1890) 486.

<sup>2</sup>4 BL. COMM. (1818) 308.

<sup>3</sup>7 N. C. Colonial Records (1890) 487.

<sup>4</sup>1 *Id.* (1886) at 463-464.

<sup>5</sup>3 *Id.* (1886) at v.

ments was made by a man who was not Attorney General but wanted to be, and that the second statement was made by a Governor who had an Attorney General on his hands and wanted to get rid of him. And it should be further added that the General Assembly after 1776 did a better job of picking Attorneys General than the Crown had done. "The early Attorneys General," said a later writer, "were equal if not superior to the judges as lawyers."<sup>6</sup>

*Selection.* In the course of North Carolina history the Attorney General has been selected in a variety of ways. *Throughout colonial days* he was appointed by the Crown as its representative;<sup>7</sup> *under the Constitution of 1776* he was elected by the two houses of the General Assembly acting jointly;<sup>8</sup> *since the Constitution of 1868* he has been elected by the people.<sup>9</sup>

*Tenure.* Throughout the colonial days<sup>10</sup> and under the Constitution of 1776 he was chosen for a term of good behavior.<sup>11</sup> This term of office was reduced to four years (with privilege of re-election) by the constitutional convention of 1835.<sup>12</sup> This provision was continued in the Constitution of 1868 and is in force today.<sup>13</sup>

*Removal.* If the Attorney General resigns or dies in office his successor is appointed by the Governor.<sup>14</sup> Apparently, he may be removed by impeachment for: "(1) Corruption or other misconduct in his official capacity; (2) Habitual drunkenness; (3) Intoxication while en-

<sup>6</sup> Kemp P. Battle, *History of the Supreme Court*, 103 N. C. (1909 reprint) 307 at 323.

<sup>7</sup> 2 N. C. Colonial Records (1886) xiii.

<sup>8</sup> N. C. CONST. (1776) §13; reaff'd in the amendments of 1835, art. III, §4.

<sup>9</sup> N. C. CONST. (1868) art. III, §1.

<sup>10</sup> 2 N. C. Colonial Records (1886) xiii.

<sup>11</sup> Section 13 of the Constitution of 1776 provided: "That the General Assembly shall, by joint ballot of both houses, appoint . . . [an] Attorney General [and other officials], who shall be commissioned by the governor, and hold their offices during good behavior."

<sup>12</sup> A constitutional amendment of 1835, Article III, Section 3, provided: "The General Assembly . . . shall [quadriennially] appoint an attorney-general, who shall be commissioned by the governor, and shall hold his office for the term of four years; but if the general assembly should hereafter extend the term during which solicitors of the State shall hold their offices, then they shall have power to extend the term of the office of the attorney-general to the same period."

<sup>13</sup> "The Executive Department shall consist of [certain enumerated officials] and an Attorney-General, who shall be elected for a term of four years by the qualified electors of the State, at the same time and places and in the same manner as members of the General Assembly are elected." N. C. CONST. (1868) art. III, §1.

<sup>14</sup> "If the office . . . [of Attorney General] shall be vacated by death, resignation or otherwise, it shall be the duty of the Governor to appoint another until the disability be removed or his successor be elected and qualified. Every such vacancy shall be filled by election at the first general election that occurs more than thirty days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired term." N. C. CONST. art. III, §13. A statute further provides: "If the attorney-general should fail at any term of the supreme court to attend to the business which by law is assigned to him, the court may appoint some counsel learned in the law to discharge his duties during the term." N. C. CODE ANN. (Michie, 1935) §1422.

gaged in the exercise of his office; (4) Drunkenness in any public place; (5) Mental and physical incompetence to discharge the duties of his office; (6) Any criminal matter, the conviction whereof would tend to bring his office into public contempt."<sup>15</sup>

## B. SUPERIOR COURT SOLICITOR

*Office.* The office of solicitor was foreshadowed in 1790 with the appointment of a solicitor general.<sup>16</sup> The solicitor general exercised the same powers as the Attorney General in one-half of the State, appearing for the State in all Superior Court cases in that half of the State assigned to him and handling all cases appealed to the Courts of Conference. In 1806, the State was divided into six circuits, with the Attorney General acting in one circuit, the solicitor general in one circuit, and one solicitor in each of the other four.<sup>17</sup>

*Selection.* In the beginning these solicitors were elected by the General Assembly.<sup>18</sup> Since 1868 they have been elected by the people in their respective districts.<sup>19</sup> The number of these respective districts was fixed at twelve in 1868,<sup>20</sup> reduced to nine in 1876,<sup>21</sup> increased to twelve in 1885,<sup>22</sup> sixteen in 1901,<sup>23</sup> twenty in 1913,<sup>24</sup> twenty-one in 1937.<sup>25</sup>

*Tenure.* At first the solicitors were chosen for a term of good behavior.<sup>26</sup> This term of office was reduced to four years (with privilege of reelection) in 1827.<sup>27</sup> This four-year term was continued in the Constitution of 1868 and is in force today.<sup>28</sup>

*Removal.* If a solicitor dies in office or resigns, his successor is appointed by the Governor.<sup>29</sup> Apparently, he may be removed from office for the same causes as apply in the case of the Attorney General.<sup>30</sup>

<sup>15</sup> N. C. CODE ANN. (Michie, 1935) §6248.

<sup>16</sup> N. C. Pub. Laws 1790, c. 318.

<sup>17</sup> N. C. Pub. Laws 1806, c. 693.

<sup>18</sup> N. C. Pub. Laws 1790, c. 318; N. C. Pub. Laws 1806, c. 693.

<sup>19</sup> N. C. CONST. art. IV, §23.

<sup>20</sup> N. C. CONST. (1868) art. IV, §12.

<sup>21</sup> N. C. Pub. Laws 1876-77, c. 255.

<sup>22</sup> N. C. Pub. Laws 1885, c. 60.

<sup>23</sup> N. C. Pub. Laws 1901, c. 28.

<sup>24</sup> N. C. Pub. Laws 1913, c. 963.

<sup>25</sup> N. C. Pub. Laws 1937, c. 413.

<sup>26</sup> N. C. Pub. Laws 1790, c. 318; N. C. Laws 1806, c. 693.

<sup>27</sup> N. C. Pub. Laws 1827, c. 14.

<sup>28</sup> "A solicitor shall be elected for each judicial district by the qualified voters thereof . . . who shall hold office for the term of four years." N. C. CONST. art. III, §23.

<sup>29</sup> N. C. CONST. art. IV, §25.

<sup>30</sup> N. C. CODE ANN. (Michie, 1935) §6248. Although the statute expressly declares that this section shall be applicable to "every officer in this state," the court indicated in *People v. Heaton*, 77 N. C. 18 (1877) that there was considerable doubt as to the scope of this statute, and expressly held it inapplicable to a judge of probate. A statute enacted in 1901 further provided that if a solicitor should appear drunk in court at term time, or if to the judge's knowledge the solicitor should be in town and drunk during term time, the judge should relieve the solicitor of his duties at that term and appoint a substitute to act in his place and receive his fees. N. C. CODE ANN. (Michie, 1935) §1435.

## C. INFERIOR COURT SOLICITOR

*Office.* In 1777 each county court was authorized to appoint a county prosecutor to act for the State and prosecute all criminal cases in the court of pleas and quarter sessions.<sup>31</sup> In 1868 the county prosecutor disappeared with the county court, but his successor was foreshadowed in the constitutional provision for "special courts, for the trial of misdemeanors, in cities and towns."<sup>32</sup> His development was assured in the constitutional convention of 1875 which laid the basis for more than one hundred recorders' courts existing in the State today.<sup>33</sup>

*Selection.* The county prosecutors under the law of 1777 were selected by Justices of the Peace constituting the county court.<sup>34</sup> Since 1868 the prosecuting attorneys in recorders' courts created by special acts usually have been selected through appointment by the Governor, the governing body of the unit involved, or the people.<sup>35</sup> Under the general laws of 1919 the prosecuting attorney was selected: in city recorders' courts, by the city commissioners;<sup>36</sup> in county recorders' courts, by the county commissioners;<sup>37</sup> in municipal-county recorders' courts, by city and county commissioners jointly;<sup>38</sup> in general county courts, under the laws of 1923, by the county commissioners for the first term and thereafter by the people, or by the commissioners.<sup>39</sup>

*Tenure.* The county prosecutors under the law of 1777 were first chosen for a term of good behavior.<sup>40</sup> In 1822 this term was reduced to four years.<sup>41</sup> Since 1868 the prosecuting attorney in recorders' courts usually has been selected for a term of two or four years.<sup>42</sup>

*Removal.* A city prosecuting attorney may be removed from office by the judge of superior court for any one of the following causes: "(1) for willful or habitual neglect or refusal to perform the duties of his office; (2) for willful misconduct or maladministration in office; (3) for corruption; (4) for extortion; (5) upon conviction of a felony; (6) for intoxication, or upon conviction of being intoxicated."<sup>43</sup> No similar statute applies to a county prosecuting attorney, but he might perhaps be removed under the general law relating to removal from "offices of this state"—though some doubt has been expressed as to this

<sup>31</sup> N. C. Pub. Laws 1777, c. 115 §62.

<sup>32</sup> N. C. CONST. (1868) art. IV, §19.

<sup>33</sup> "The judicial power of the State shall be vested in a court for the trial of impeachments, a Supreme Court, Superior Courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law." N. C. CONST. art. IV, §2.

<sup>34</sup> N. C. Pub. Laws 1777, c. 115, §62; N. C. Pub. Laws 1816, c. 901.

<sup>35</sup> *e. g.* N. C. CODE ANN. (Michie, 1935) §1584.

<sup>36</sup> *Id.* §1554.

<sup>37</sup> *Id.* §1579.

<sup>38</sup> *Id.* §1608(i).

<sup>41</sup> N. C. Pub. Laws 1822, c. 19.

<sup>43</sup> N. C. CODE ANN. (Michie, 1935) §3208.

<sup>39</sup> *Id.* §1563.

<sup>40</sup> N. C. Pub. Laws 1777, c. 115, §62.

<sup>42</sup> See notes 36-39, *supra*.

possibility.<sup>44</sup> It is also possible that he might be removed under *quo warranto* proceedings.<sup>45</sup>

## II

## COMPENSATION

## A. ATTORNEY GENERAL

The compensation of the Attorney General has fluctuated greatly through the years: from salary and fees, to fees, to salary and fees, then to salary. *Prior to 1776*. By resolution of the Board of Lords Proprietors Deputies in Council, 1713, the Attorney General's salary was fixed at £40 *per annum*.<sup>46</sup> This salary was supplemented by fees. "I believe," said William Little in a letter to the Governor in 1731, "there will be twelve or fifteen indictments a court, one with another, which is held three times a year. The fee for each indictment is 50s besides the incidental fees of it, and often a fee from the Prosecutor too. And there is another business besides Bills of Indictment which will augment the fees so that by a moderate compensation without the salary, which is £40 *per annum* and besides his practice as a lawyer in Civil Actions, which that station recommends him to a full share if not always the choice of, I think that the income of the office can not come to less than £100 *per annum*, which is to be received in Proclamation Money."<sup>47</sup>

<sup>44</sup> See note 30, *supra*.

<sup>45</sup> The statute provides for proceedings to remove from office any "public officer, civil or military, [when he] has done or suffered an act which, by law, makes a forfeiture of his office." N. C. CODE ANN. (Michie, 1935) §870.

<sup>46</sup> 2 N. C. Colonial Records (1886) 41, 42.

<sup>47</sup> 3 *Id.* at 200, 201. Sometimes the Attorney General was authorized to receive part of the "royal revenue of Quit rents", but the theory and the practice did not always meet. In 1753, Attorney General Thomas Child complained in a letter to the Lords of the Board of Trade: "Now altho' I did at a very great expence, and at frequent hazards of my life continue to execute the said office, I have never yet been able to get one farthing of my said salaries . . . So that my said salaries, as granted to me by His Majesty's said Commission of February 1743, are wholly in arrear from that time to this. . ." 5 N. C. Colonial Records (1887) 15. On another occasion, the General Assembly took patent fees away from the Attorney General, but the Governor procured their restoration through an 'Order of Council'. Nevertheless, Attorney General George Nicholas complained to Governor Dobbs in a letter written in 1755: "This gave alarm to the Members of the Assembly and I was threatened if ever I took the Fee formerly allowed the Attorney General I should be sued. This is the unhappy Situation I am in with my office." 5 N. C. Colonial Records (1887) 347, 349. The following schedule of fees prescribed for the Attorney General in 1737 is illustrative of the colonial fee system:

"For a Spa. or other original process in each cause.....	2	£	6	{s}
For drawing, perusing, engrossing and signing each				
Bill or Information .....	1		5	
For perusing an answer or plea.....			10	
For every motion .....			7	
Every process of contempt .....			5	
Fee on each hearing or trial.....	1		10	
Drawing or signing exceptions or interrogatives.....			12	6
Drawing replication .....			5	
Perusing each deposition or affidavit.....			2	6 "

4 N. C. Colonial Records (1886) 276.

*From 1776 to 1868.*—The General Assembly provided in 1777 that "the Attorney General shall be paid fifty pounds for each and every Superior Court he shall attend, together with the fees by law established."<sup>48</sup> It was provided in 1818 that he should receive \$100 annually as full compensation for services in the supreme court, together with \$10 for every felony conviction and \$5 for every misdemeanor conviction obtained in the inferior court, third circuit, where he prosecuted the trial docket;<sup>49</sup> in 1820 the superior court fees were revised to permit \$10 for indictments for murder, perjury, forgery or burglary, \$5 for indictments for larceny, arson, frauds, deceits, and maiming, \$3 for indictments for all other crimes;<sup>50</sup> in 1854 the Code revised the superior court fee schedule by dividing crimes into three fee groups, \$10, \$5, and \$4—depending on the gravity of the crime, and fixed the attendance fee for each term of superior court at \$20, with provision for an additional \$20 for the second week of each term, when court should last that long, plus the usual fees prescribed by law.<sup>51</sup>

*Since 1868* the amount and manner of the Attorney General's compensation has changed with every decade. To illustrate: in 1870-71, the General Assembly fixed his salary at \$1500 per year plus an allowance for attendance on the supreme court and a fee of \$10 for each criminal appeal argued in the supreme court wherein no reversal was obtained;<sup>52</sup>

<sup>48</sup> N. C. Pub. Laws 1777, c. 20; 24 N. C. State Records (1905) 129, 130. Even so, the compensation was unsatisfactory. Attorney General James Iredell wrote to Judge John Williams in 1781: "I have lately suffered so much, both in pocket and health by my office, that I have wrote to the Governor desiring him to lay before the Assembly my desire of resignation. It [the office of Attorney General] is undoubtedly now much more valuable than formerly, but I have yet reaped little of the fruit of it, and the fatigue and incessant application it requires is too much for me." 15 N. C. State Records (1898) 671-672.

<sup>49</sup> N. C. Pub. Laws 1818, c. 973.

<sup>50</sup> N. C. Pub. Laws 1820, c. 1038. Subsequent legislation from time to time allowed fees for certain civil duties imposed on the Attorney General: in cases on behalf of charitable organizations, N. C. Pub. Laws 1832, c. 14; in cases against guardians, N. C. Pub. Laws 1844, c. 41; in cases of married women's trusts under certain circumstances, N. C. Rev. Code (1854) c. 68, §12.

<sup>51</sup> N. C. Rev. Code (1854) c. 105, §14. At the same time it was provided that when the Attorney General should appear for the State in a civil case he should receive the same fees—and the same attorney's fee should be taxed—as in the case of attorneys in private civil suits. N. C. Rev. Code (1854) c. 102, §16.

<sup>52</sup> N. C. Pub. Laws 1870-71, c. 81, §7. In 1871-72, the duties of Supreme Court Reporter were placed upon the Attorney General, and he fulfilled these duties and received the fees for this service which included an annual salary of \$600 along with profits derived from printing and distributing the reports until 1893. N. C. Pub. Laws 1871-72, c. 112; N. C. Pub. Laws 1893, c. 379. In 1879, it was provided that the Attorney General should receive \$1,000 for his duties as Attorney General and \$1,000 for his duties as Supreme Court Reporter, with the provision that all fees he collected should be turned over to the State treasury. N. C. Pub. Laws 1879, c. 240, §9. In 1881 an appropriation of \$300 annually plus the Attorney General's fees in the supreme court were set apart to be used for clerical assistance in the Attorney General's office. N. C. Pub. Laws 1881, c. 214. In 1889 a flat allowance of \$750 per year was made for clerical assistance. N. C. Pub. Laws 1889, c. 274. In 1893 when the duties of court reporter were taken away, the Attorney General's salary was fixed at \$2,000 per year plus an allowance of

in 1907, his salary was raised to \$3,000;<sup>53</sup> provisions were made for the appointment of an Assistant Attorney General at a salary of \$1,500, to serve for the remainder of the term of the Attorney General then in office, and for the employment of a stenographer at a salary of \$900;<sup>54</sup> in 1929, for the first time, he was required to give up private practice and devote full time to his official duties at a salary of \$7,500;<sup>55</sup> in 1937 he was authorized to appoint three Assistant Attorneys General, with salaries to be fixed by the director of the budget, and three law clerks.<sup>56</sup>

### B. SUPERIOR COURT SOLICITOR

The solicitor general appointed pursuant to the statute of 1790 received the same fees as the Attorney General.<sup>57</sup> Additional solicitors, appointed from 1806 to 1868, received the same fees as the Attorney General received for prosecuting criminal cases in the superior courts of the third circuit.<sup>58</sup> In 1870-71 the General Assembly provided that each solicitor should receive: \$20 for each term of superior court he attended together with fees for convictions as set out in the Revised Code of 1854: \$10 for every conviction for a felony and half a dozen of the more serious misdemeanors, \$5 for convictions for frauds, deceits, "maim" and escapes, \$4 for convictions for all other offenses.<sup>59</sup> Additional or different compensation was provided by the General Assembly from time to time:<sup>60</sup> in 1893, \$100 for the investigation of a lynching;<sup>61</sup>

\$100 for each term of the supreme court, plus fees, and he was to be allowed \$300 per term (\$600 per year) for clerical assistance. N. C. Pub. Laws 1893, c. 379.

<sup>53</sup> N. C. Pub. Laws 1907, c. 994.

<sup>54</sup> N. C. Pub. Laws 1907, c. 830. In 1909 provision was made for a full time "law clerk" at a salary of \$1,500, N. C. Pub. Laws 1909, c. 804, changed to an "assistant" in 1911, N. C. Pub. Laws 1911, c. 94. In 1919 the Assistant Attorney General's salary was fixed at \$2,250, and a maximum of \$1,200 was allowed for a stenographer. N. C. Pub. Laws 1919, c. 247, §6. In 1925, provision was made for three Assistant Attorneys General at salaries of \$3,600 each. One of these assistants was to be assigned to and paid by the Revenue Department, a second to be assigned to and paid by the State Highway Commission, and the third to work directly under the Attorney General, with a proviso permitting the Attorney General to assign additional duties to the two working in the Revenue Department and with the Highway Commission. The Attorney General was to be allowed "necessary clerical help" with salaries to be approved by the Attorney General and the Budget Bureau. N. C. Pub. Laws 1925, c. 207; N. C. CODE ANN. (Michie, 1935) §§7695(a), 7695(b). In 1933 the legislative reference librarian was transferred to the Attorney General's department and designated as an assistant. N. C. CODE ANN. (Michie, 1935) §6150(a).

<sup>55</sup> N. C. Pub. Laws 1929, c. 1. At the same time the number of Assistant Attorneys General was reduced to two.

<sup>56</sup> N. C. Pub. Laws 1937, c. 357.

<sup>57</sup> N. C. Pub. Laws 1790, c. 318.

<sup>58</sup> N. C. Pub. Laws 1870-71, c. 81, §11; N. C. REV. CODE (1854) c. 102, §13.

<sup>59</sup> See notes 49 and 50, *supra*.

<sup>60</sup> In 1873-74 the trial fees ranged from a minimum of \$4 in minor cases to a maximum of \$20 in capital cases, and it was further provided that in cases where a convicted defendant was insolvent, the county should pay the solicitor one-half his fees. N. C. Pub. Laws 1873-74, c. 170; in 1874-75, a fee of \$20 was provided for each criminal case in the federal courts which the solicitor assisted in prose-



in 1911, up to 5% of the amount collected in penalties and forfeited recognizances;<sup>62</sup> in 1915, \$5 for each prosecution of a case of unauthorized practice of medicine;<sup>63</sup> in 1923, the solicitor's fees were diverted to the county school funds and the solicitor was placed on a salary of \$4,500 per year, with an annual expense allowance of \$750;<sup>64</sup> in 1933, the salary was reduced to \$3,900 and the provision for an expense allowance repealed;<sup>65</sup> in 1935, the salary was restored to \$4,500;<sup>66</sup> in 1937, an expense allowance of \$500 per year was added.<sup>67</sup> Furthermore, the solicitor is still permitted to engage in the civil practice of law.

### C. INFERIOR COURT SOLICITOR

Under the laws of 1777 the county prosecutor was compensated by fees;<sup>68</sup> in 1818 these fees amounted to \$4 for each conviction;<sup>69</sup> the General Assembly in 1844<sup>70</sup> authorized the county court to add compensation for specific services and in 1854 for all extra services.<sup>71</sup> Prosecuting attorneys in recorders' courts since 1868 have been paid sometimes in fees and sometimes in salaries. Today most of them are paid in salaries fixed in the discretion of the governing boards; some are still paid in fees.<sup>72</sup> An inferior court solicitor is prohibited from appearing in any other court in any criminal action on behalf of a defendant who has been tried in the court where the inferior court solicitor handled the prosecution.<sup>73</sup> Such solicitor may engage in the criminal practice, except for this limitation, and may engage in the civil practice of law.

cutting, whenever a case arising by virtue of state law violations should be transferred to the federal courts. N. C. Pub. Laws 1874-75, c. 164; in 1885 it was provided that in cases of insolvent defendants convicted of certain enumerated major crimes, the county should pay the solicitor's fees in full. N. C. Pub. Laws 1885, c. 130.

<sup>61</sup> N. C. Pub. Laws 1893, c. 461. Solicitors' fees were also fixed with reference to other prescribed duties: cases of orphan's estates, N. C. Pub. Laws 1895, c. 14; prosecutions for violations of anti-trust laws, N. C. Pub. Laws 1913, c. 41; suits to collect delinquent inheritance taxes, N. C. Pub. Laws 1905, c. 588, re-enacted 1919, c. 90, §18.

<sup>62</sup> N. C. Pub. Laws 1915, c. 202. In 1917 it was provided that a solicitor should receive full fees for the first count in an indictment containing several counts, and one-half fee for each subsequent count—changed in 1921 to provide for one-half fee for only one of the subsequent counts on which the defendant might be convicted. N. C. Pub. Laws 1917, c. 168; N. C. Pub. Laws 1921, c. 100.

<sup>64</sup> N. C. Pub. Laws 1923, c. 157.

<sup>66</sup> N. C. Pub. Laws 1933, c. 78.

<sup>65</sup> N. C. Pub. Laws 1935, c. 278.

<sup>67</sup> N. C. Pub. Laws 1937, c. 348.

<sup>68</sup> N. C. Pub. Laws 1777, c. 115.

<sup>69</sup> N. C. Pub. Laws 1818, c. 965.

<sup>70</sup> Prosecuting attorneys were required to make regular reports to the county court as to the work of the county clerk and register. For this service, the county court was authorized to allow "adequate compensation." N. C. Pub. Laws 1844, c. 5.

<sup>71</sup> A blanket provision in 1854 authorized the county court to allow extra compensation for any extra services the solicitor might be required to perform. N. C. REV. CODE (1854) c. 1, §17.

<sup>72</sup> *e.g.* N. C. CODE ANN. (Michie, 1935) §1554. Special acts vary also, some prescribing fees and some a salary.

<sup>73</sup> N. C. CODE ANN. (Michie, 1935) §199.

## III

## POWERS AND DUTIES

## A. ATTORNEY GENERAL

*Appellate Courts: Civil and Criminal.*—From the beginning the Attorney General has had complete charge in the appellate courts of all litigation, civil and criminal, in which the state is a party or interested. In the early days he argued all cases on appeal from the superior courts, first to the courts of conference and then to the supreme court which succeeded them,<sup>74</sup> a duty shared by the solicitor general from 1790 to 1806.<sup>75</sup> By the year 1806 the General Assembly was specifically requiring him "to attend to all the business which is now pending, or which may hereafter be carried up to the supreme court of the state for adjudication, wherein this state may be concerned or have any interest therein."<sup>76</sup> The General Assembly continued this provision in 1868 and it is in force today in the following words: "It shall be the duty of the Attorney General—1. To defend all actions in the Supreme Court in which the state shall be interested or is a party."<sup>77</sup>

*Prior to 1868. Trial Courts: Civil and Criminal.* In the beginning the Attorney General handled all criminal cases in the trial courts as well as in the appellate courts. The colonial records reveal him in his first official act upon being sworn in, 1694, preparing an indictment against John Philpot for saying "God damn King William";<sup>78</sup> prosecuting for murder in 1703,<sup>79</sup> for fornication and adultery in 1705,<sup>80</sup> for assault in 1713,<sup>81</sup> for burning lightwood on the King's land and assaulting officers and stealing horses in 1745.<sup>82</sup> In brief, said an early writer, "the Attorney General prepares all indictments and carries on all prosecutions."<sup>83</sup> But when the growth and distance of the circuits began to render his attendance at court uncertain, the General Assembly authorized him "to appoint a deputy in each county in the province, which deputy shall prosecute all matters cognizable in Courts of Pleas and Quarter Sessions, for and in behalf of his Majesty."<sup>84</sup>

This appointment of deputies by the Attorney General to act for him began the transition from centralized to decentralized control of prosecutions in North Carolina courts. For the General Assembly began to appoint for the Attorney General the deputies it had formerly author-

<sup>74</sup> 7 N. C. Colonial Records (1890) 486.

<sup>75</sup> N. C. Pub. Laws 1790, c. 318.

<sup>76</sup> N. C. Pub. Laws 1806, c. 768.

<sup>77</sup> N. C. CODE ANN. (Michie, 1935) §7694.

<sup>78</sup> 1 N. C. Colonial Records (1886) 424, 431.

<sup>79</sup> *Id.* at 595.

<sup>80</sup> 2 *id.* at 86.

<sup>81</sup> 7 *id.* (1890) at 426-427.

<sup>82</sup> 23 N. C. State Records (1904) 887. This law was several times re-enacted.

<sup>83</sup> *Id.* at 622.

<sup>84</sup> 4 *id.* at 760.

ized him to appoint for himself. In 1790 it appointed a solicitor general with apparently equal powers to share the Attorney General's duties, and his fees.<sup>85</sup> By 1806 it had divided the State into six districts, put solicitors of its own choosing in charge of the criminal dockets in five of them, and in the main confined the Attorney General's trial duties to the trial courts of one circuit where he continued to prosecute the docket till 1868.<sup>86</sup> In that year it relieved him of the duty of prosecuting the trial docket in any district.<sup>87</sup>

In the beginning the Attorney General handled all civil cases in which the State was a party or interested in the trial courts as well as in the appellate courts. As early as 1749 the Colonial Records reveal the House of Representatives and the Governor directing him to put in suit all bonds entered into by persons in receipt of public monies,<sup>88</sup> and in 1791 to defend suits against purchasers of confiscated property.<sup>89</sup>

The appointment of deputies to represent the Attorney General in civil cases in courts he could not attend began the transition from centralized to decentralized control of civil matters in which the state was a party or interested.<sup>90</sup> The division of the State into six districts by 1806 and the appointment of solicitors in five of them left the Attorney General with the power to handle the afore-mentioned civil cases in one district where he continued, apparently on the same basis as a solicitor, until 1868.<sup>91</sup>

*Since 1868. Trial Courts: Civil and Criminal.* The General Assembly, which relieved the Attorney General of the responsibility of representing the state in most civil and criminal matters in the trial courts, did not intend to take him out of trial courts altogether. Apparently it held him in reserve for special occasions. For in 1868 it directed him "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 or interested." It went further and directed him to "prosecute and defend all suits relating to matters connected with" the departments of "the governor, secretary of state, treasurer, auditor, corporation commissioners, insurance commissioner, or superintendent of public instruction," at their request.<sup>92</sup> In 1901 it broadened the wording and perhaps the spirit of the 1868 enactment by requiring him to repre-

<sup>85</sup> N. C. Pub. Laws 1790, c. 318.

<sup>86</sup> N. C. Pub. Laws 1806, c. 693.

<sup>87</sup> The Constitution of 1868 provided that a solicitor should be elected in each judicial district to prosecute all criminal cases in the superior courts in behalf of the State. N. C. Consr. art. IV, §23.

<sup>88</sup> 4 N. C. Colonial Records (1886) 1024, 1025.

<sup>89</sup> N. C. Pub. Laws 1791, c. 16.

<sup>90</sup> 23 N. C. State Records (1904) 887.

<sup>91</sup> N. C. Pub. Laws 1806, c. 768.

<sup>92</sup> N. C. Pub. Laws 1868-69, c. 270, §82.

sent "every chairman, president or other official head of any state institution, including the state prison, whenever he shall be in need of counsel for his institution."<sup>93</sup> In 1925 it rephrased the 1901 law in its present day terms: "The Attorney General, with his assistants, shall be counsel for all such departments, agencies, institutions, commissions, bureaus or other organized activities of the state which receive support in whole or in part from the state."<sup>94</sup> And in nearly every legislative session since 1868 the General Assembly has directly charged the Attorney General to go into the trial courts in specific types of cases, criminal and civil.

*Criminal Matters.* The General Assembly authorized him in 1913 to investigate and prepare and prosecute indictments for violations of the monopoly and anti-trust laws;<sup>95</sup> in 1915, to investigate and prosecute for the unauthorized practice of medicine on complaint by State Medical Examiners;<sup>96</sup> in 1917, to prosecute for violations of the "seed laws" on the advice of the Commissioner of Agriculture.<sup>97</sup>

*Civil Matters.* In the Revisal of 1883 it authorized him to bring action for the usurpation or forfeiture of office, and against groups unlawfully pretending to exercise corporate powers;<sup>98</sup> in 1901, to prepare contracts of the State Textbook Commission, with reference to textbooks, in accordance with law, and to prepare and approve bonds required of textbook contractors;<sup>99</sup> in 1909, to approve the granting of public utility easements by state institutions;<sup>100</sup> in 1915 (re-enacted in 1917), to advise and aid in the preparation of election ballots, poll books, and other election forms;<sup>101</sup> in 1929, on application of the State Utilities Commissioner, to represent the Commission before the Interstate Commerce Commission or in State or Federal courts.<sup>102</sup>

*Advisory Duties: Civil and Criminal.—State Officials.* The Colonial Records reveal the Attorney General advising the Governor and members of his council in criminal and civil matters.<sup>103</sup> This practice continued after 1776 as one of the common law duties of his office. In 1868 the General Assembly specifically directed him "to give when required, his opinion on 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,"<sup>104</sup> and in 1901<sup>105</sup> and 1925<sup>106</sup> made him counsel for all "departments, agencies,

<sup>93</sup> N. C. Pub. Laws 1901, c. 744.

<sup>94</sup> N. C. Pub. Laws 1913, c. 341.

<sup>95</sup> N. C. Pub. Laws 1917, c. 241.

<sup>96</sup> N. C. Pub. Laws 1901, c. 1.

<sup>97</sup> N. C. Pub. Laws 1915, c. 101, §25; N. C. Pub. Laws 1917, c. 218.

<sup>98</sup> N. C. Pub. Laws 1929, c. 235.

<sup>99</sup> 7 N. C. Colonial Records (1890) 425.

<sup>100</sup> N. C. Pub. Laws 1868-69, c. 270, §82.

<sup>101</sup> N. C. Pub. Laws 1901, c. 744.

<sup>102</sup> N. C. Pub. Laws 1925, c. 207.

<sup>103</sup> N. C. Pub. Laws 1915, c. 202.

<sup>104</sup> N. C. Rev. (1883) c. 607.

<sup>105</sup> N. C. Pub. Laws 1909, c. 484.

<sup>106</sup> N. C. Pub. Laws 1925, c. 207.

institutions, commissions, bureaus or other organized activities of the state." *District officials.* The General Assembly in 1868 specifically required the Attorney General "to consult with and advise the solicitors, when requested by them, in all matters pertaining to the duties of their office."<sup>107</sup> Only superior court solicitors were in existence when this statute was passed and apparently its application was confined to them. The words of the statute are broad enough to include the recorders' court solicitors later coming into the law, but the scope of these words has not yet been tested in the courts. *Local officials.* Though there may be some doubt about the law there has never been since 1868 any doubt about the Attorney General's practice of advising not only city and county solicitors but all city and county officials on matters pertaining to their offices. The Attorney General's report in 1868-69 explains the origin of the practice: "The substitution of Superior for County Courts, with its displacement of county attorneys, [prosecutors in the county courts of Pleas and Quarter Sessions] always consulted respecting the duty of county commissioners and other functionaries, with the disposition now to refer to the Attorney General as the law officer of the state and a common adviser, alone furnishes business enough for the office."<sup>108</sup> By 1902 the Attorney General is answering inquiries from county, city and town officials "in compliance with a custom which appears to be time honored in this department."<sup>109</sup> While these opinions have been recognized as entirely unofficial, the Attorney General's report in 1930 considers them "as aiding in the development of a uniform practice in the several counties and towns on the subjects covered."<sup>110</sup> And the Attorney General's report in 1936 says that this practice "will be continued as long as legislative acquiescence and the limitations of the department permit."<sup>111</sup>

*Summary of Criminal Duties.* *In appellate courts:* to appear for the State in the supreme court in all criminal actions in which the State is a party or interested, and in contempt proceedings in behalf of the court or officials issuing the contempt order.<sup>112</sup> *In trial courts:* at the request of the Governor or either branch of the General Assembly, to appear for the state in any court or tribunal in any criminal action where the state is a party or interested;<sup>113</sup> at the request of "the official head" to represent all "departments, agencies, institutions, commissions, bureaus or other organized activities of the state";<sup>114</sup> on his own initiative to investigate, send indictments to grand juries and prose-

<sup>107</sup> N. C. Pub. Laws 1868-69, c. 270, §82.

<sup>108</sup> Rep. N. C. Att'y Gen. (1868-69) 4.

<sup>109</sup> Rep. N. C. Att'y Gen. (1902) 6.

<sup>110</sup> Rep. N. C. Att'y Gen. (1936) 103.

<sup>111</sup> N. C. CODE ANN. (Michie, 1935) §7694.

<sup>112</sup> *Ibid.*

<sup>110</sup> Rep. N. C. Att'y Gen. (1930) 5.

<sup>114</sup> *Ibid.*

cute for such offenses as: violations of the monopoly or anti-trust laws (he may assign such duties to solicitors),<sup>115</sup> violations of laws against unauthorized practice of medicine (he may direct solicitors to prosecute),<sup>116</sup> violations of certain agricultural laws (he may direct city and county attorneys to prosecute).<sup>117</sup> *In advisory relations:* "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";<sup>118</sup> to consult with and advise the solicitors, when requested by them, in all matters pertaining to the duties of their office;<sup>119</sup> and, in practice, to advise county, city and town officials in matters pertaining to the duties of their offices.

*Summary of Civil Duties. In appellate courts:* to appear for the state in all civil actions in which the State is a party or interested.<sup>120</sup> *In trial courts:* at the request of the Governor or either branch of the General Assembly, to appear for the state in any court or tribunal in any civil action where the State is a party or interested;<sup>121</sup> at the request of "the official head" to represent all "departments, agencies, institutions, commissions, bureaus, or other organized activities of the state";<sup>122</sup> to represent the utilities commission before the Interstate Commerce Commission and in state and federal courts and to take such action as he deems expedient when the utilities commissioner notifies him of the violation of any law by a corporation;<sup>123</sup> to prosecute all actions and suits to require payment for being kept in state institutions when the head of such institution requests it;<sup>124</sup> to serve as legal adviser to the Soldiers' Settlement Board and to represent it in its law suits;<sup>125</sup> to advise and aid in the preparation of election ballots, poll books and other election forms;<sup>126</sup> on his own initiative (a) to bring action to restrain by injunction a corporation from assuming or exercising any franchise or transacting any business not allowed by its charter, (b) to restrain any person from exercising corporate franchises not granted, (c) to bring directors, managers and officers of a corporation, or the trustees of funds given for a charitable or public purpose to an account for the management and disposition of the property confided to their care (see similar duties of solicitor), (d) to remove

<sup>115</sup> N. C. CODE ANN. (Michie, 1935) §§2567-2571.

<sup>116</sup> *Id.* §§6622-6625.

<sup>117</sup> The Attorney General is directed, on the advice of the Commissioner of Agriculture (after the accused has been afforded a hearing or the opportunity of a hearing before the Commissioner), personally or through city and county attorneys to institute prosecutions with respect to violations of the State "seeds" laws. N. C. CODE ANN. (Michie, 1935) §4828.

<sup>118</sup> N. C. CODE ANN. (Michie, 1935) §7694.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Id.* §1075.

<sup>122</sup> *Id.* §7508.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> *Id.* §7534(k).

<sup>126</sup> *Id.* §6046.

such officers or trustees upon proof of gross misconduct, (e) to secure, for the benefit of all interested, the said property or funds, (f) to set aside and restrain improper alienations of the said property or funds, (g) generally to compel the faithful performance of duty and to prevent all fraudulent practices, embezzlement and waste;<sup>127</sup> to cause a civil action to be brought in the name of the State to dissolve a corporation for any one of a number of statutory causes;<sup>128</sup> to institute proceedings for the dissolution of fraternal insurance societies;<sup>129</sup> to bring actions similar to '*quo warranto*' and to approve bringing of actions by private persons in cases of usurpation of office or unlawful exercise of franchise rights, *etc.*,<sup>130</sup> to bring suits against textbook contractors, on request of the State Board of Education, in cases of failure to fulfil contracts;<sup>131</sup> to see that deeds are properly executed when the State acquires State forests by gift or purchase;<sup>132</sup> to pay into the treasury all moneys received for debts due or penalties to the State immediately after receipt thereof;<sup>133</sup> to compare the warrants drawn by the auditor on the State treasury with laws under which they purport to be drawn;<sup>134</sup> to approve the grant of easements by State institutions to public-service corporations;<sup>135</sup> to institute actions to recover taxes due under the Revenue Act, and to approve all tax refunds made by the state.<sup>136</sup> *In advisory relations:* "To give when required, his opinion upon all questions of law submitted to him by the General Assembly,

<sup>127</sup> *Id.*, §1143.

<sup>128</sup> One statute provides: "Corporations may be dissolved by civil action, instituted . . . by authority of the attorney general in the name of the state, in the following cases: 1. For any abuse of its powers to the injury of the public or of its stockholders, creditors, or debtors. 2. For nonuser of its powers for two or more consecutive years. 3. When it is insolvent, or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate rights. 4. Upon any conviction of the company of a persistent criminal offense." N. C. CODE ANN. (Michie, 1935) §1185. Another statute provides: "An action may be brought by the attorney general in the name of the state against a corporation for the purpose of annulling its charter upon the ground that it was procured upon a fraudulent suggestion, or concealment of a material fact, by the persons incorporated or by some of them, or with their knowledge or consent; or for the purpose of annulling the existence of a corporation, other than municipal, when such corporation—1. Offends against the act creating, altering, or renewing it. 2. Violates any law by which it has forfeited its charter by abuse of its power. 3. Has forfeited its privileges or franchises by failure to exercise its power. 4. Has done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises. 5. Has exercised a franchise or privilege not conferred upon it by law. 6. Has failed to use its power for two or more consecutive years. 7. Has become insolvent as manifested by the return of an execution unsatisfied upon a judgment against the corporation docketed in the superior court of the county where it has its principal place of business." N. C. CODE ANN. (Michie, 1935) §1187.

<sup>129</sup> N. C. CODE ANN. (Michie, 1935) §§6524, 6525.

<sup>130</sup> *Id.* §§869-884.

<sup>131</sup> *Id.* §5749(e).

<sup>132</sup> *Id.* §7694.

<sup>133</sup> N. C. CODE ANN. (Michie, 1935) §7525.

<sup>134</sup> See Rep. N. C. Att'y Gen. (1936) 104, citing N. C. CODE ANN. (Michie, 1935) §§7880(167), 7979(a).

<sup>135</sup> *Id.* §6124.

<sup>136</sup> *Id.*

or by either branch thereof, or by the governor, auditor, treasurer, or any other state officer;<sup>137</sup> to consult with and advise the solicitors, when requested by them, in all matters pertaining to the duties of their office;<sup>138</sup> and, in practice, to advise county, city, and town officials in matters pertaining to the duties of their offices.

*Boards and Commissions.* The Attorney General is a member of the following boards and commissions: (1) State Board of Education;<sup>139</sup> (2) State Board of Assessments;<sup>140</sup> (3) Advisory Board of Parole;<sup>141</sup> (4) Advisory Commission for the Commissioner of Banks;<sup>142</sup> (5) State Textbook Purchase and Rental Commission;<sup>143</sup> (6) Board of Public Buildings and Grounds;<sup>144</sup> (7) Municipal Board of Control;<sup>145</sup> (8) Eugenics Board;<sup>146</sup> (9) State Board of Pensions, etc.<sup>147</sup>

#### B. SUPERIOR COURT SOLICITORS

*Appellate Court Duties: Criminal and Civil.* The General Assembly required the solicitor general in 1790 to argue cases on appeal from his districts in the supreme court.<sup>148</sup> In 1806 the solicitor general became in fact, if not in name, one of the superior court solicitors whose offices were created that year.<sup>149</sup> Their duties from the beginning appear to have begun and ended in the trial courts. They do not now prepare briefs in cases on appeal from their districts and they do not appear in the argument of these cases in the supreme court.

*Trial Court Duties: Criminal and Civil.* The deputies appointed by the Attorney General in colonial days to prosecute the criminal docket in courts where he could not appear, and to handle civil matters in which the State was a party or interested, may perhaps be described as the forerunners of the superior court solicitor.<sup>150</sup> By 1806 the General Assembly had divided the state into six districts with the Attorney General in charge of civil and criminal matters in which the state was a party or interested in one district, and solicitors of its own choosing in charge of the State's litigation in the other five.<sup>151</sup> The General Assembly reduced the districts and solicitors from twelve in 1868 to nine in 1875, then increased them to twelve in 1885, sixteen

<sup>137</sup> N. C. CODE ANN. (Michie, 1935) §7694.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Id.* §5394.

<sup>140</sup> *Id.* §7757(1).

<sup>141</sup> N. C. CODE ANN. (Michie, 1935) §5754(1).

<sup>142</sup> *Id.* §7025.

<sup>143</sup> *Id.* §2304(q).

<sup>144</sup> N. C. Pub. Laws 1790, c. 318.

<sup>145</sup> 5 N. C. Colonial Records (1887) 347.

<sup>140</sup> *Id.* §7971(3).

<sup>142</sup> N. C. Pub. Laws 1931, c. 243.

<sup>143</sup> *Id.* §2779.

<sup>147</sup> *Id.* §5168(a).

<sup>149</sup> N. C. Pub. Laws 1806, c. 768.

<sup>150</sup> 5 N. C. Colonial Records (1887) 347. The word "solicitor," however, was first used with the appointment of a "Solicitor-General" in 1790 who shared the Attorney General's duty to prosecute cases in the trial courts. N. C. Pub. Laws 1790, c. 318.

<sup>151</sup> N. C. Pub. Laws 1806, c. 768.



in 1901, twenty in 1913, twenty-one in 1937.<sup>152</sup> Prior to 1868 the duties of the superior court solicitors in their respective districts appeared to parallel the duties of the Attorney General in his district.<sup>153</sup> The Constitution of 1868 required the solicitor in each judicial district "to prosecute on behalf of the State in all criminal actions in the superior court".<sup>154</sup> From time to time the General Assembly directed the solicitor's particular attention to specific prosecutions such as: in 1874-75, with the judge's permission, to prosecute or assist in the prosecution in federal courts of criminal cases involving state laws;<sup>155</sup> in 1893, to go to the county where a lynching occurs, make investigation, and furnish information about lynchings to grand juries of all adjoining counties;<sup>156</sup> in 1905, to subpoena and examine on oath before the grand jury witnesses believed to have information about the violation of liquor laws and to appear in contempt proceedings for the superior court judge issuing a contempt order;<sup>157</sup> in 1927, on report from the chairman of the county board of commissioners to prosecute for violations of the county finance act.<sup>158</sup>

The Constitution of 1868 made no reference to the civil duties of the solicitor, but the General Assembly continued, as in the past, to add specific civil duties from time to time, such as: in 1868-69, on the failure of the county commissioners to require proper bonds from the sheriff, to sue the commissioners for all losses sustained by the county as the result of such neglect;<sup>159</sup> under the Code of 1883, to inspect the clerk of court's office at each term of court and to report to the court thereon in writing;<sup>160</sup> in 1899, to sue on injunction bonds with respect to corporation disputes with the corporation commission as to fares and rates and to sue on behalf of the corporation commission (utilities commission since 1933)<sup>161</sup> to recover penalties;<sup>162</sup> in 1905 (re-enacted in 1919), to sue delinquent taxpayers for inheritance taxes.<sup>163</sup>

*Advisory Duties: Criminal and Civil.* The Constitution of 1868 required each solicitor to "advise the officers of justice in his district."<sup>164</sup>

<sup>152</sup> See notes 20-25, *supra*.

<sup>153</sup> Examples of these duties are: to bring suits in behalf of charitable trusts, N. C. Pub. Laws 1832, c. 14; to bring suits in equity to remove guardians, require accountings, *etc.*, N. C. Pub. Laws 1844, c. 41; to bring suits for injuries to bridges, N. C. Pub. Laws 1846, c. 11; to sue persons attempting to defraud the State of revenue, N. C. Pub. Laws 1850, c. 121 §13; to bring suits to protect married women's trusts under certain circumstances, N. C. REV. CODE (1854) c. 68, §12.

<sup>154</sup> N. C. CONST. art. IV, §23. In 1868-69, solicitors were required to send reports on criminal statistics to the Attorney General. N. C. Pub. Laws 1868-69, c. 270, §83.

<sup>155</sup> N. C. Pub. Laws 1893, c. 461.

<sup>156</sup> N. C. Pub. Laws 1874-75, c. 164.

<sup>157</sup> N. C. Pub. Laws 1927, c. 146, §23.

<sup>158</sup> N. C. Pub. Laws 1905, c. 498.

<sup>159</sup> N. C. CODE (1883) §88.

<sup>160</sup> N. C. Pub. Laws 1868-69, c. 245.

<sup>161</sup> N. C. CODE ANN. (Michie, 1935) §1112(g).

<sup>162</sup> N. C. Pub. Laws 1899, c. 164.

<sup>163</sup> N. C. Pub. Laws 1905, c. 588, §18; N. C. Pub. Laws 1919, c. 90, §18.

<sup>164</sup> N. C. CONST. art. IV, §23.

This provision is in force today. Its meaning has not been defined in legislative enactments or in court decisions, and the practice varies with solicitors.

*Summary of Criminal Duties.* The Constitution requires the solicitor to prosecute on behalf of the State in all criminal actions in the superior court of his district.<sup>165</sup> The General Assembly has directed his particular attention to specific cases, such as: with the judge's permission, to prosecute or assist in the prosecution in federal courts of criminal cases involving state law violations removed under federal laws to federal courts;<sup>166</sup> to go to the county where a lynching occurs, investigate, and if necessary subpoena and examine witnesses under oath;<sup>167</sup> to furnish information relating to a lynching to the grand juries of all counties adjoining the county of the lynching;<sup>168</sup> to prosecute for violations of certain pure food and health laws;<sup>169</sup> to subpoena and examine before a grand jury persons believed to have knowledge of liquor law violations;<sup>170</sup> to prepare indictments and prosecute or assist in prosecution for anti-trust law violations when directed to do so by the Attorney General;<sup>171</sup> in contempt cases in the superior court to appear for the superior court judge issuing the contempt order;<sup>172</sup> on order of the Attorney General, to prosecute cases of unauthorized practice of medicine;<sup>173</sup> to prosecute officers for escape;<sup>174</sup> on report from the chairman of the county board of commissioners, to prosecute for violations of the County Finance Act;<sup>175</sup> to order the coroner to make such additional investigations as the solicitor may think necessary, whenever he is notified by a coroner that the circumstances of a homicide warrant investigation;<sup>176</sup> to order that a *post mortem* examination be made in a homicide case;<sup>177</sup> to be notified of habeas corpus proceedings in criminal cases;<sup>178</sup> as criminal cases are disposed of in court, to call and discharge witnesses in open court, and file certificates of their attendance with the clerk of court;<sup>179</sup> to be present and be allowed to cross-examine when a deposition is taken.<sup>180</sup> In addition to the general duty to prosecute the criminal docket, including the foregoing criminal duties specifically enumerated, the superior court solicitor is required "to advise the officers of justice in his district."<sup>181</sup>

<sup>165</sup> *Ibid.*

<sup>166</sup> N. C. CODE ANN. (Michie, 1935) §7696.

<sup>167</sup> *Id.* §4570.

<sup>168</sup> *Id.* §4600.

<sup>169</sup> *Id.* §§4746, 4747, 4755, 4797. The statutes specify violations with respect to the laws concerning foods, flours, poultry tonics—usually with the stipulation that the solicitor shall take action upon receiving information from the Commissioner of Agriculture or some similar official.

<sup>170</sup> N. C. CODE ANN. (Michie, 1935) §3371.

<sup>171</sup> *Id.* §§2567-2571.

<sup>172</sup> *Id.* §980.

<sup>173</sup> *Id.* §§6622-6625.

<sup>174</sup> *Id.* §4394.

<sup>175</sup> *Id.* §1334(74).

<sup>176</sup> *Id.* §1020.

<sup>177</sup> *Id.* §4518.

<sup>178</sup> *Id.* §2232.

<sup>179</sup> *Id.* §1286.

<sup>180</sup> *Id.* §1812.

<sup>181</sup> N. C. CONST. art. IV, §23.

*Summary of Civil Duties.* The major civil duties of the solicitor today are: to apply to the judge for appointment of receivers for orphans without guardians and with estates, on notification by the clerk of court that the grand jury has reported such facts to him; to institute action on the guardian's bond to secure the ward's estate, when a guardian is removed without a successor being appointed;<sup>182</sup> on notice from superior court clerk as to failure of trustees of charitable trust to make proper reports, to bring action to compel an accounting (see similar duties of Attorney General);<sup>183</sup> to inspect the office of the clerk of superior court as often as he thinks advisable, and report to the court in writing;<sup>184</sup> to pass upon and approve petitions in removal proceedings against a city prosecuting attorney, sheriff, constable or police officer, and on approval to prosecute such proceedings;<sup>185</sup> concurrent powers with city prosecuting attorney and county attorney to institute injunction proceedings in nuisance cases involving gambling, prostitution or liquor;<sup>186</sup> to advise the officers of justice in his district.<sup>187</sup>

### C. INFERIOR COURT SOLICITORS

Just as the superior court solicitor gradually relieved the Attorney General of the burden of prosecuting criminal cases and civil cases where the State was a party or interested in the superior court, inferior court solicitors have gradually relieved the superior court solicitors of a portion of their burden: *In criminal cases*, in 1777<sup>188</sup> by prosecuting all criminal cases in the county courts of pleas and quarter sessions, and under the Constitutional provisions of 1868<sup>189</sup> and 1875<sup>190</sup> by prosecuting criminal cases in recorders' courts. The solicitor in a municipal recorder's court established under the general law, is required on request of the recorder or city governing body to assist in the prosecution of cases appealed or bound over to the superior court.<sup>191</sup> Likewise, the solicitor of a general county court is required, on request of the judge, to assist in the prosecution of criminal cases appealed to the superior court.<sup>192</sup> *In civil matters* the prosecuting attorney in the county courts of common pleas and quarter sessions relieved first the Attorney General and later the solicitors: in 1801, by instituting suits for breaches of

<sup>182</sup> N. C. CODE ANN. (Michie, 1935) §§2198-2199.

<sup>183</sup> *Id.* §4024.

<sup>184</sup> *Id.* §934.

<sup>185</sup> *Id.* §3209.

<sup>186</sup> *Id.* §§3181, 3182.

<sup>187</sup> N. C. CONST. art. IV, §23.

<sup>188</sup> N. C. Pub. Laws 1777, c. 115, §62.

<sup>189</sup> N. C. CONST. (1868) art. IV, §19.

<sup>190</sup> N. C. CONST. art. IV, §2, as provided in 1875.

<sup>191</sup> N. C. CODE ANN. (Michie, 1935) §1554.

<sup>192</sup> *Id.* §1608(i). Inferior court solicitors were required to send criminal statistics to the Attorney General under the provisions of N. C. CODE ANN. (Michie, 1935) §1588, but a 1937 statute provides that these statistics be sent to the newly authorized Bureau of Identification and Investigation after it is set up. N. C. CODE ANN. (Michie, 1937 Supp.) §§7534(9)-(18).

bonds given by masters of colored apprentices;<sup>183</sup> in 1850, by bringing suits for penalties against justices of the peace, ministers or court clerks neglecting their duties in the administration of the marriage laws;<sup>184</sup> under the Code of 1854, by suing sheriffs for escapes,<sup>185</sup> and by suing school superintendents, committeemen or county court clerks neglecting to perform their duties under the "Literary Fund and School" laws.<sup>186</sup> Few civil duties have devolved upon the inferior court solicitor under the Constitutions of 1868 and 1875. A city prosecuting attorney is by statute given concurrent powers with solicitors and county attorneys to institute injunction proceedings in nuisance cases involving gambling, prostitution or liquor.<sup>187</sup> A city governing body may require a municipal recorder's court prosecuting attorney to act as city attorney;<sup>188</sup> the county commissioners may require the prosecuting attorney of a county recorder's court to act as county attorney.<sup>189</sup>

## IV

## SPECIAL COUNSEL: CRIMINAL AND CIVIL

In 1868 the General Assembly authorized the Governor to "employ such additional counsel as he may judge expedient," . . . "whenever any suit or legal proceeding is pending against the state, or which may result in any claim against the state, or affect the title of this state to any property," or "direct the Attorney General to appear on behalf of the state."<sup>200</sup> In 1873-74 the General Assembly broadened this power by authorizing the Governor "to employ such counsel as he may deem proper to represent the interest of the state . . . in every . . . case, civil or criminal, in any court in the state or any other state or territory, or in any United States Court. . . ."<sup>201</sup> In 1901 the General Assembly provided that when the Attorney General found it impractical to represent State departments or agencies in need of counsel, "the Governor shall . . . if in his opinion such counsel be necessary, employ such counsel as in his judgment should be employed."<sup>202</sup> In 1925 it went further and provided that no State department or agency "shall employ any counsel except by and with the consent and approval of the Governor."<sup>203</sup> These laws are in force today.<sup>203a</sup>

Do they mean that the Governor may not employ special counsel to represent State agencies unless the Attorney General finds it impractical

<sup>183</sup> N. C. Pub. Laws 1801, c. 583.

<sup>184</sup> N. C. Pub. Laws 1850, c. 84.

<sup>185</sup> N. C. REV. CODE (1854) c. 12, §6.

<sup>186</sup> *Id.* c. 66, §53.

<sup>187</sup> N. C. CODE ANN. (Michie, 1935) §§3181, 3182.

<sup>188</sup> *Id.* §1554.

<sup>189</sup> *Id.* §1579.

<sup>200</sup> N. C. Pub. Laws 1868-69, c. 270.

<sup>201</sup> N. C. Pub. Laws 1873-74, c. 160.

<sup>202</sup> N. C. Pub. Laws 1901, c. 744.

<sup>203</sup> N. C. Pub. Laws 1925, c. 207.

<sup>203a</sup> In 1931 the Governor was authorized to hire special counsel for the Commissioner of Banks. N. C. Pub. Laws. 1931, c. 243.

to represent them? The 1873-74 enactment grew out of an emergency situation indicated in the preamble to the bill: "Whereas, from information received at the Executive Department it is probable that [a named person] will be delivered to the civil authorities to be tried in Buncombe County, North Carolina, for embezzlement or other crimes . . . the Governor of the state is authorized to employ such counsel as he may deem necessary and proper to assist the Solicitor."<sup>204</sup> The statute then ceases to particularize and begins to generalize in the words set out above. These words appear to be broad enough to permit the Governor to employ special counsel to assist solicitors as well as to represent State departments without consulting the Attorney General. This appears to be in line with the 1868 enactment. The question remains whether the 1901 enactment was intended to place any limitation on this power.

## V.

### INTERRELATIONSHIPS: ATTORNEY GENERAL, SUPERIOR AND INFERIOR COURT SOLICITORS, CITY AND COUNTY ATTORNEYS AND SPECIAL COUNSEL

#### A. IN CRIMINAL MATTERS

It is apparent from the foregoing analysis that prosecution in the criminal courts of North Carolina has traversed all the stages: from complete centralization to well nigh complete decentralization; from the centralization of all criminal prosecutions in the hands of the Attorney General to the present decentralization in the hands of the Attorney General, twenty-one superior court solicitors and one hundred or more inferior court solicitors.

*In the supreme court* all criminal prosecutions are still centralized in the hands of the Attorney General. Private prosecution, solicitors of inferior and superior courts, and special counsel alike end their labors in the trial courts and are not allowed to follow even their own cases across the appellate court line.

*In the superior courts* twenty-one solicitors are free to follow twenty-one different policies, in twenty-one different districts, pursuant to the constitutional requirement that they "shall . . . prosecute on behalf of the state, in all criminal actions in the Superior Courts."<sup>205</sup> If this provision is taken at its face value, each solicitor not only may but "shall" prosecute in *all* criminal actions in the superior courts of his district. In practice he often does, though he does not have to, permit private prosecution to assist him, even to the extent in some cases of assuming active direction of the case. In practice he permits, and some-

<sup>204</sup> N. C. Pub. Laws 1873-74, c. 160.

<sup>205</sup> N. C. CONST. art. IV, §23.

times invites, solicitors from the courts below him and the Attorney General from the court above him, to appear with him in criminal cases. But is his power to prosecute an *exclusive* power? Can he refuse the assistance of private prosecution? Can he refuse the assistance of an inferior court solicitor who is authorized by statute to follow his cases to the superior court and assist in the prosecution there? Can he refuse the assistance of the Attorney General when he appears under statutory authority: at the request of State departments, agencies and institutions? At the request of the Governor or either branch of the General Assembly? At the request of the legislature in specific types of cases? Can the solicitor accept the assistance of the Attorney General and refuse him control of the proceedings in the foregoing cases? Can he waive his constitutional right (or is it duty?), and surrender the responsibility of the prosecution to the Attorney General in a particular case? Can he refuse the foregoing privileges (or rights?) to special counsel employed by the Governor? Or, to phrase the same questions from another standpoint: under the afore-mentioned statutory authority, can the Attorney General or special counsel appear with the solicitor and without his consent supplement his efforts? Supersede him in control? Or supplant him altogether? Can the General Assembly go further than it has gone and give the Attorney General power to intervene *on his own initiative in any criminal case*? The statutes are silent on these specific points; and so apparently is the Constitution.

*In the inferior courts* one hundred or more solicitors, in as many communities, are free to follow different policies of prosecution. Authorized on a limited scale by the Constitution of 1868<sup>206</sup> and on a broader scale by the Constitution of 1875,<sup>207</sup> they are creatures of the General Assembly charged with the duty of prosecuting criminal actions in their respective courts. The statutes are silent on the extent to which they can refuse assistance from private prosecution, from solicitors of the superior court or from the Attorney General. But there appears to be nothing in the Constitution to prevent the General Assembly from giving both superior court solicitors and the Attorney General power to appear in these courts on such terms as it wishes, be it to supplement, supersede or supplant.

*Common law powers.* In the absence of specific answers to the foregoing questions in statutes and in constitutions we may be pardoned for inquiring of the common law. "Under the common law," says Justice Schaffer, "... the Attorney General ... was the chief law officer of the crown and the direct ancestor of the chief law officer of the American states. In England he was the legal advisor of the crown intrusted with

<sup>206</sup> N. C. CONST. (1868) art. IV, §19.

<sup>207</sup> N. C. CONST. art. IV, §2, as provided in 1875.

the management of all its legal affairs and the prosecution of all suits, civil and criminal, in which the crown was interested."<sup>208</sup>

The Attorney General in North Carolina succeeded to these common law powers and duties: The charter from the Crown in 1663 authorized laws for the "province of Carolina" "as near as may be conveniently agreeable to the laws and statutes of this our Kingdom of England."<sup>209</sup> In 1715 the Colonial Assembly recognized as "in force and use within this state . . . so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this state and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated or repealed, or became obsolete . . . ;"<sup>210</sup> and this statute is in force today. The earliest forms of government set up in the colony included the Attorney General. The Colonial Records reveal him in the exercise of the common law powers of the office. In 1767 Governor Tryon wrote that the Attorney General in North Carolina had all the power, authority and trusts "within the province that the Attorney General and Solicitor General of England [had] in that Kingdom . . . he prosecute[d] or defend[ed] in behalf of the crown in such actions civil or criminal as [came] before those courts where the crown [was] concerned."<sup>211</sup> In 1776 the constitutional convention at Halifax provided for an Attorney General, to be elected by joint ballot of both houses of the General Assembly, to be commissioned by the Governor, to hold office during good behavior and to have adequate salary.<sup>212</sup> The constitutional convention appears to have accepted the office as it existed at the time—clothed with its common law powers and duties, civil and criminal, for no effort was made to outline or define his powers. The Constitution of 1835 reduced the term of office to four years but placed no further restriction on the General Assembly's power.<sup>213</sup> The Constitution of 1868 provided that the duties of Attorney General shall "be prescribed by law,"<sup>214</sup> and this provision is in force today. In 1888 Kemp Plummer Battle was so firmly convinced of the Attorney General's common law powers that he did not think the General Assembly could take them from him. "The Constitution contemplates," he wrote in his *History of the Supreme Court*, "that, as in England, the office of Attorney General should be of great importance. . . . It is very

<sup>208</sup> *Commonwealth v. Margiotti*, 325 Pa. 17, 188 Atl. 524, 527 (1936).

<sup>209</sup> *Charter of Carolina* (1663) §6, 5 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS (1909) 2743, 2746.

<sup>210</sup> N. C. Pub. Laws 1715, c. 5, §§2, 3; N. C. Pub. Laws 1778, c. 133; N. C. CODE ANN. (Michie, 1935) §970.

<sup>211</sup> 7 N. C. Colonial Records (1890) 487.

<sup>212</sup> N. C. CONST. (1776) §13.

<sup>213</sup> N. C. CONST. (1835 Amdt.) art. III, §3. See note 12, *supra*.

<sup>214</sup> N. C. CONST. art. III, §13.

doubtful whether the act of 1790, which provided for a Solicitor General for one half of the counties, and that of 1806, which reduced the Attorney General to little better than a Solicitor for the metropolitan circuit, were not in this respect unconstitutional. They were certainly extra-constitutional."<sup>215</sup>

Undoubtedly, then, the Attorney General in North Carolina started out with common law powers. Has he lost them along the way? The Constitution of 1776 did not take them from him—it apparently assumed he had them. The Constitution of 1835 did not take them from him—it apparently left undisturbed the assumption of 1776. The Constitution of 1868 did not take them from him unless this effect is given to the following words in Article 4, Section 23: "A solicitor shall be elected for each judicial district by the qualified voters thereof . . . who shall . . . prosecute on behalf of the state, in all criminal actions in the Superior Courts. . . ."

Does this provision operate as a limitation on the General Assembly's power "to prescribe by law" the duties of the Attorney General? Did it give the superior court solicitors an *exclusive* power to "prosecute on behalf of the State, in all criminal actions" through which they could refuse to allow the Attorney General, special counsel, or inferior court solicitor to appear with them in criminal cases in their respective districts, even when the General Assembly authorized them to appear? If so, what becomes of the legislation authorizing the Governor to send the Attorney General into the superior courts? Or either branch of the General Assembly to send him? Or himself to go on his own initiative in specific types of cases? If not so, what is to prevent the General Assembly from authorizing him to appear on his own initiative in all criminal actions? And does this power to appear carry with it the power to supersede or supplant?

These questions were not present in the eighteenth century when the constitutional convention met at Halifax, for in those days the Attorney General was complaining of powers he had and could not use. They were not present in the nineteenth century when the constitutional convention met in Raleigh, for this convention simply completed the process already begun of relieving the Attorney General of the routine trial duties of a superior court solicitor. They are twentieth century questions—born of railway, highway and airway—of telegraph, telephone and radio—of organized crime which does not confine itself or its effects to the community of its origin—of organized criminals with modern communications, transportation, weapons and equipment at their finger tips. The answers may perhaps be found in common law

<sup>215</sup> See note 6, *supra*.



powers heretofore discussed, in the framework of nineteenth century constitutional provisions, or in twentieth century amendments.

The proposed constitutional amendment now before the people authorizes the General Assembly "to create a Department of Justice under the supervision and direction of the Attorney General."<sup>216</sup> Does this mean a Department of Justice with a high, low or medium degree of centralization? In some states with Departments of Justice the Attorney General has power to intervene in any criminal proceeding and supersede or supplant the solicitor. In other states with Departments of Justice he is simply given concurrent power to prosecute with the solicitor. And other states have variations of these powers.<sup>217</sup> Apparently the Supreme Court of North Carolina might have a logical background and basis for any of these constructions it might choose to follow. And the issues involved might thus be tossed from the lap of the voters to the lap of the General Assembly, to the lap of the court.

The proposed amendment further authorizes the General Assembly "to enact suitable laws defining the authority of the Attorney General and other officers and agencies concerning the prosecution of crime and the administration of the criminal laws of the State."<sup>218</sup> The present Constitution says that the duties of the Attorney General shall be "prescribed by law."<sup>219</sup> Does the proposed amendment give the General Assembly any added power by virtue of the fact that it comes later and therefore must be presumed to add something? Does it give added power by virtue of the fact that in addition to authorizing the General Assembly to define "the authority of the Attorney General," it au-

<sup>216</sup> N. C. Pub. Laws 1937, c. 447, §1.

<sup>217</sup> In Rhode Island the Attorney General is required to prosecute all cases in the superior courts, but he is authorized to appoint assistants to exercise similar powers. R. I. GEN. LAWS (1923) §§294, 298. In California he is given "direct supervision over every District Attorney . . . in all matters pertaining to the duties of" his office including full power to assist a District Attorney or supersede him and take full charge of the prosecution for any violations of law "whenever in his opinion any law of the state is not being adequately enforced and the public interest requires." CAL. CONST. art. V, §21; CAL. POL. CODE (Deering Supp., 1935) §§476-479. In Louisiana and Iowa he is given power to "exercise supervision over the several district attorneys throughout the state;" and to intervene and supersede the district attorney in any criminal proceeding when in his opinion the public interest requires," and his action cannot be questioned in any court. LA. CONST. art. VII, §56; Iowa Code (1935) c. 12, §149(7). In Nebraska and South Dakota he has no direct power to supervise prosecuting attorneys, but is given concurrent power with prosecuting attorneys in all counties of the state to initiate and carry forward prosecutions through all steps of the proceedings. NEB. COMP. STAT. (1929) c. 84, art. 203; S. D. Laws 1931, c. 129. In Pennsylvania he has no statutory power to supervise prosecuting attorneys, but he may intervene in local prosecutions when the presiding judge requests him in writing to do so, and when he does intervene on such request he supersedes the district attorney. 71 PA. STAT. ANN. (Purdon, 1930) §§294, 297. However, the Pennsylvania Supreme Court has recently held that the Attorney General has the common law power to institute criminal proceedings and prosecute criminal cases in the trial courts. *Commonwealth v. Margiotti*, 325 Pa. 17, 188 Atl. 524 (1936).

<sup>218</sup> N. C. Pub. Laws 1937, c. 447, §1.

<sup>219</sup> N. C. CONST. art. III, §13.

thorizes the General Assembly to define the authority of "other officers and agencies concerning the prosecution of crime and the administration of the criminal laws of the state"? Does it thus give the General Assembly power it does not now possess to redefine the authority of "other officers and agencies" so as to avoid possible conflicts with such powers as it chooses to give the Attorney General? Thus the proposed amendment comes to resolve doubts and remains to raise issues.

#### B. INTERRELATIONSHIPS IN CIVIL MATTERS

If it is true that the handling of the State's criminal business has traversed all the stages from complete centralization to well nigh complete decentralization, it is equally true that the handling of the State's civil business has followed a similar course. For civil matters in which the state is a party or interested were once handled by the Attorney General alone and, are now handled by the Attorney General, twenty-one superior court solicitors, and perhaps to a limited extent by inferior court solicitors and city and county attorneys.

*In the supreme court* the Attorney General under common law powers, confirmed by statute in 1806, and again in 1868, has been required to handle all civil as well as criminal matters in which the State is a party or interested.<sup>220</sup> *These words have been applied to all criminal cases reaching the supreme court on appeal:* inferior court solicitor, superior court solicitor, special counsel and private prosecution alike, and their labors in the trial courts and are not allowed to cross the appellate court line; and counsel to particular state departments create no exception to this interpretation of the law. *But they have not been applied to all civil cases reaching the supreme court in which the State is a party or interested:* counsel for particular state departments have frequently followed their cases through the trial courts, prepared the briefs and presented the arguments on appeal; on the same theory solicitors or special counsel in other civil matters in which the State is interested might be allowed to do the same. This difference of interpretation may perhaps be explained on the theory that the Attorney General, having the same power in both types of cases coming to the supreme court, invokes it in criminal cases and not in civil.

*In the trial courts* these interrelations are even less distinct. Superior court solicitors fell heir to those civil cases in which the State was a party or interested formerly handled by the Attorney General, and to other types of cases specifically assigned to them by the General Assembly.<sup>221</sup> Inferior court solicitors occasionally appear in similar types

<sup>220</sup> N. C. CODE ANN. (Michie, 1935) §7694.

<sup>221</sup> N. C. Pub. Laws 1806, c. 693 (appointment of five solicitors). N. C. CONST. art. IV, §23 (provision made for solicitors in every judicial district).

of civil cases.<sup>222</sup> The Attorney General can go into the trial courts: (1) when his duties as counsel and advisor to state officials take him there, or (2) when specific statutes take him there, or (3) when the request of the Governor or of either branch of the General Assembly takes him there in cases where the State is a party or interested.<sup>223</sup> When the Attorney General goes as counsel to state officials he would naturally take precedence over the solicitor—if, indeed, the solicitor may appear at all. But what of the case where he is authorized by specific statute either to appear himself or to direct the solicitor to appear? What of the case where the Attorney General's duties are concurrent with those of the solicitor and the statute is silent about precedence? What of the case where the Governor or either branch of the General Assembly sends him and the statute is silent about precedence? When these relative rights are not clear, the General Assembly has the power to make them clear and give precedence to either Attorney General, or solicitor, or special counsel. It may even oust the solicitor of jurisdiction altogether if it wishes to do so; for no constitutional provision gives the solicitor the right to appear in civil cases as in criminal.

*City and county attorneys* further complicate the picture in civil cases as they do not in criminal. The prosecuting attorneys, first appointed by the Attorney General in the latter part of the 18th century,<sup>224</sup> and later appointed by the county courts of pleas and quarter sessions,<sup>225</sup> may perhaps be called the forerunners of the modern city and county attorney. For, just as the Attorney General in England was adviser to the Crown in criminal and civil matters, and just as the Attorney General in the colony succeeded to these traditional duties as adviser to the Governor,<sup>226</sup> so when the Attorney General could not attend distant courts the deputies appointed represented the State in the county courts in both criminal and civil capacities as the Attorney General had done before them.<sup>227</sup> When these deputy prosecuting attorneys, or county attorneys as they came to be called, disappeared with the county courts in 1868, their duties as prosecuting attorneys were transferred to the superior court solicitors<sup>228</sup> but their duties as

<sup>222</sup> *e. g.*, Injunction proceedings in nuisance cases. N. C. CODE ANN. (Michie, 1935) §3181.

<sup>223</sup> See preceding paragraphs on the Attorney General's powers and duties in the trial courts.

<sup>224</sup> 23 N. C. State Records (1904) 887.

<sup>225</sup> N. C. Pub. Laws 1777, c. 115, §62.

<sup>226</sup> 7 N. C. Colonial Records (1890) 487.

<sup>227</sup> Governor Tryon wrote in 1767, "None but younger practitioners will act as deputies, for the Attorney General usually declines to attend only the most distant courts." The Attorney General, according to Governor Tryon, had a deputy in every 'inferior' court. 7 N. C. Colonial Records (1890) 486.

<sup>228</sup> N. C. CONST. art. IV, §23.

advisers to local officials in civil matters apparently did not follow suit—perhaps because local officials had not formed the habit of turning to the solicitors for such advice in the sixty-two years since 1806, and perhaps because the solicitors themselves took none too seriously the 1868 constitutional requirement to “advise the officers of justice” in their districts<sup>229</sup> and at any rate did not extend it beyond, even when they extended it to, criminal matters. For the Attorney General in his report for the two-year period ending in 1869 observed that the prosecuting attorneys in the county courts of pleas and quarter sessions were “always consulted respecting the duty of county commissioners and other functionaries” and that with the “displacement of [these] county attorneys” by “the substitution of Superior for County Courts,” local officials show a “disposition now to refer to the Attorney General as the law officer of the state and a common adviser”.<sup>230</sup> The extent to which they referred to the Attorney General for advice is indicated in his statement that their inquiries “alone furnish enough business for this office”.

The growth in the number and activities of counties, cities and towns, the absence or scarcity of county or city criminal courts and solicitors for nearly fifty years following the disappearance of the county courts in 1868, the fact that local units and officials could call on the Attorney General by way of sufferance and not by way of right, the fact that many Attorneys General as a matter of policy refused to furnish this needed advice on a gratuitous basis and the fact that most Attorneys General have refused to give this advice in matters that might involve them in local controversies, together conspired to give rise to the offices of city attorney and county attorney as we know them today—a full time job in the larger cities, a part time job in others. With cities, counties, and State developing adverse interests in civil matters to a far greater extent than in criminal matters it is likely that the relative importance of city and county attorneys will increase.

The proposed amendment to the North Carolina Constitution authorizing the General Assembly “to create a Department of Justice under the supervision and direction of the Attorney General, and to enact suitable laws defining the authority of the Attorney General and other officers and agencies concerning the prosecution of crime and the administration of the criminal laws of the state,”<sup>231</sup> says nothing about authorizing the General Assembly to enact suitable laws defining the authority of the Attorney General and other officers and agencies concerning the administration of the *civil* laws of the State. The omission may be explained on the theory that the Department of Justice would

<sup>229</sup> *Ibid.*

<sup>230</sup> Rep. N. C. Att’y Gen. (1868-69) 4.      <sup>231</sup> N. C. Pub. Laws 1937, c. 447, §1.

apply only to the administration of the criminal laws, or on the theory that the General Assembly already has in civil law administration the power the proposed amendment is designed to give it in criminal law administration, and the draftsman assures us that the latter theory is correct.

### C. INTERRELATIONS OF ADVISORY OPINIONS

The status of advisory opinions is far from clear. The Attorney General must give "his opinion when required . . . on all questions of law submitted to him" by the Governor, General Assembly and State department heads, said the statute in 1868.<sup>232</sup> He "shall be counsel for all . . . departments, agencies, institutions, commissions, bureaus or other organized activities of the state," said the statute in 1925.<sup>233</sup> He shall "consult with and advise the solicitors, when requested by them" said the statute in 1868.<sup>234</sup> Do these statutes mean that these officials must get legal advice as to their rights, powers and duties before taking action? If they get legal advice at all must they get it from the Attorney General? If they get it from the Attorney General must they follow it if it is not to their liking unless and until it is overruled by the Supreme Court? If they follow it and it is later overruled, are they protected by it? And what of the effect of the opinion of special counsel employed by the Governor? Of departmental counsel? If it conflicts with the opinion of the Attorney General? Suppose the opinions of Attorney General and solicitor to local officials are in conflict? What is the effect of an opinion given by the solicitor to the "officers of justice" in his district? Here are questions now going by default and calling for the clarity of light.

### RETROSPECT AND PROSPECT

In the latter days of the seventeenth century the Crown's legal business, civil and criminal, of advisory, trial or appellate character, was handled by the Attorney General.<sup>235</sup> In these early days of the twentieth century the State's legal business is distributed among the Attorney General, State departmental counsel, special counsel, superior and inferior court solicitors, county and city attorneys. The processes through which we have arrived at our present status may be called processes of decentralization. They may with even greater accuracy be called processes of expansion. For the motivating theme running through these processes has come not so much from the pressure of

<sup>232</sup> N. C. Pub. Laws 1868-69, c. 270, §82; N. C. CODE ANN. (Michie, 1935) §7694.

<sup>233</sup> N. C. Pub. Laws 1925, c. 207, §3.

<sup>234</sup> N. C. Pub. Laws 1868-69, c. 270, §82; N. C. CODE ANN. (Michie, 1935) §7694.

<sup>235</sup> 7 N. C. Colonial Records (1890) 486.

political theories as from the pressure of legal business. Work has seldom if ever been taken from the hands of the Attorney General and given to the hands of others in order to vindicate a theory of decentralization in government; the work to be done has grown so fast that one man could not do it and had to call for help. "The Circuit of Edenton, Edgecomb and Wilmington obliged me to ride six hundred miles twice a year," complained Attorney General George Nicholas to Governor Dobbs in 1755. "With the addition of Salisbury Court at Rowan," he continued, "I am obliged to ride five hundred more. . . . As it is impossible for me to attend all the courts, the last act of Assembly impowers me to appoint a deputy in each county."<sup>236</sup> Attorney General Marmaduke Jones in a letter to Governor Tryon in 1767 recommended the appointment of a solicitor general to share the powers, the duties and the fees of the Attorney General.<sup>237</sup> And in 1781 Attorney General James Iredell, wrote: "[The office] is undoubtedly now much more valuable than formerly, but . . . the fatigue and incessant application it requires is too much for me."<sup>238</sup>

This growing pressure of work called superior court solicitors into being, then increased and keeps on increasing the number of superior court districts; it added and keeps on adding inferior court solicitors. It took the Attorney General off the circuit and out of the regular routine of trial court dockets and planted him at the state capitol as the legal counsel to State departments, institutions and agencies, with occasional excursions into the field; it gave him one Assistant Attorney General,<sup>239</sup> then two, and then three,<sup>240</sup> and then began to add departmental counsel and special counsel—one stenographer,<sup>241</sup> then two

<sup>236</sup> 5 N. C. Colonial Records (1887) 347. The Attorney General further complained, "And it is with difficulty I can get an Attorney to accept of the office altho' they receive all the fees incident to the office."

<sup>237</sup> "The most distant courts . . . will generally be those which an Attorney General may think himself privileged to decline, and as it is not to be expected that any but the youngest practisers will act as his deputies, it may be found that in those courts, criminals may often evade the justice of the law and imboldened by impunity spread the contagion of vice . . . . The danger may perhaps be avoided by the appointment of a Solicitor General; the circuit would be divided between the Attorney General and him, the Crown business be always the immediate attention of one of them and the other alternately await your Excellency's commands." 7 N. C. Colonial Records (1890) 426. And in 1767 Governor Tryon, in a letter to the Earl of Shelburne, also recommended that provision be made for a Solicitor General: ". . . Inconveniences are certainly evident from the Governor's not having at all times within a reasonable distance of his residence, an officer of the Crown conversant in law matters, a circumstance he is at present deprived of near half the year, on account of the extensive circuits both the Chief Justice and the Attorney General are obliged to take." 7 N. C. Colonial Records (1890) 425.

<sup>238</sup> 15 N. C. State Records (1898) 670-672.

<sup>239</sup> N. C. Pub. Laws 1907, c. 830; N. C. Pub. Laws 1909, c. 804.

<sup>240</sup> N. C. Pub. Laws 1925, c. 207; N. C. Pub. Laws 1929, c. 1; N. C. Pub. Laws 1937, c. 357.

<sup>241</sup> N. C. Pub. Laws 1907, c. 830.

and then three—one law clerk, then two and then three.<sup>242</sup> And still the pressure goes on. There were fourteen State departments, agencies and institutions when the Attorney General was located at the state capitol as their legal counsel in 1868; by 1900 there were thirty; by 1919, fifty-three; by 1937, one hundred fifteen.<sup>243</sup> These multiplying agencies, with multiplying activities call for increasing legal counsel with growing knowledge and specialized skill if the State is to hold its own in commission, court and council. Shall the Attorney General's staff be enlarged to the point that his office can handle all the legal business of all departments of the State? Shall each State department be allowed to employ its own departmental counsel? Shall special counsel be employed to absorb the ever increasing legal load? The plot further thickens as the qualified voters are called on to decide whether the State of North Carolina shall create a Department of Justice under the direction of the Attorney General with supervision and control over the officers and agencies concerned with the prosecution of crime and the administration of the criminal laws. It is still a condition and not a theory that confronts us. And the issue still turns not so much on theories of government centralized or localized as on efficient and effective performance of governmental functions, by efficient and effective governmental officers, responsible and responsive to the people.

<sup>242</sup> N. C. CODE ANN. (Michie, 1935) §§7695(a), (b).

<sup>243</sup> ALEXANDER, *STATE GOVERNMENTAL AGENCIES* (1937) 4, 6 (a study to be released at an early date by the Institute of Government, Chapel Hill, N. C.)