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This month's cover shows the handsome new municipal building at Graham.

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Contents

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THE DISTRICT COURT

ITS FIRST YEAR of OPERATION

by C. E. Hinsdale

[*Editor's Note—This article appears in the February, 1968, issue of* Bar Notes, *and is printed here with the permission of the North Carolina Bar Association. A few minor changes, to accommodate the interests of a broader readership, have been made in the original text.*]

It is not surprising that the advent of the district court system in six judicial districts embracing twenty-two counties in December, 1966, produced a considerable amount of confusion. The changes were significant and detailed, and few court officials, attorneys, or law enforcement officers had become sufficiently familiar with the new law and their role under it.

It *is* surprising that the confusion has subsided so quickly. With a few very minor adjustments made by the 1967 General Assembly, the new system is operating well and is demonstrating that in time, as all the personnel who help make it work become completely familiar with their duties, efficient and even outstanding service can be expected.

The purpose of this brief article is not to dwell unduly on the early, largely inevitable, "start-up" troubles, most of which were local in nature and quickly resolved, but to alert local officials and members of the bar in the 61 counties in which the new system becomes operational in December, 1968, to the major changes which they should be prepared to face.

The District Court Judge

The legislative allocation of from two to four judges to each of the first six districts now operating under the district court system appears to have been accurate in each instance. Dockets, both civil and criminal, in each district are substantially current, and no judge appears to be underemployed. Judicial travel in the larger districts is a time-consuming burden, but so far all counties are being served as promptly, or more so, as under the old system.

Several of the judges have had previous judicial experience in the recorder-type (criminal) courts. Fifteen of them are attorneys; two are not. (The Constitution does not permit a requirement of legal training as a qualification for judicial office.) Judges who are not lawyers have been assigned primarily to preside over criminal sessions of court. They have reduced usefulness in civil cases, especially those requiring a jury, and in chambers and juvenile matters.

Since nonlawyer candidates for a number of the 73 district court judgeships to be filled in 1968 can be anticipated, it should be emphasized that the office of district judge is not comparable to that of the old recorder's court judge. A district judgeship calls for all the technical skills that the public has come to expect of a superior court judge. To the extent that district court judgeships are filled by professionally untrained persons, the system will suffer. The superior court may be burdened with more criminal appeals and more discretionary civil filings, and delays, inconvenience, and expense may mount. While the right of the people to elect whomever they please as a judge cannot be denied, it is nevertheless clear that election of nonlawyers to the judgeships to be filled in 1968 will undermine the efficiency and professional standing of the new system. There are no nonlawyers on the appellate or superior court benches. This exemplary tradition should be extended to the district court.

Jurisdiction

The criminal jurisdiction of the district court is generally the same as that of the typical recorder-type court. With certain minor exceptions set out in G.S. 7A-271, its misdemeanor jurisdiction is *exclusive*, however, and for the 70-odd counties covered by G.S. 7-64, this is a change. The North Carolina Supreme Court emphasized this in *State v. Wall*, 271 N.C. 675 (1967). While in a few situations (such as that which arose in *Wall*) some delay in prosecution may result, a return to the old concurrent jurisdiction arrangement of G.S. 7-64 might deprive the district court of much of its case load, congest superior court dockets with trivial matters, and permit forum-shopping by defense attorneys. Few complaints have been voiced so far about the new arrangement. The incidence of appeals is gratifyingly low; except for driving-under-the-influence cases, the rate is apparently in the neighborhood of 1 per cent.

On the civil side, transfer of divorce and related family matters to the district court has afforded a welcome relief to the superior court bench and effected a prompter disposition of these cases in most districts. One superior court judge estimates this change alone has resulted in a saving of a day's trial time in each weekly civil session of superior court. A second change—transfer of cases involving $5,000 or less in money value to the district court—has relieved the pressure on superior court calendars even more, although the results as yet are not precisely measurable. Once superior court calendars become current, an eventual decrease in the number of superior court civil sessions, per county, may be expected. The increased availability of civil sessions, with and without a jury has also effected earlier settlements of many cases. Fullest use of the district court to dispose of all civil litigation over which it has jurisdiction, however, depends on the professional caliber of persons elected to district judgeships.

Transfer of jurisdiction over juvenile matters from the clerk of superior court to the district court judge appears, on balance, to be a significant improvement. The need for this change was made acute by the U.S. Supreme Court's 1967 decision in the *Gault* case that counsel must be made available to indigent juveniles facing institutionalization as a result of a delinquency adjudication. Some delays may be expected, however, in the larger multi-county districts where a judge is not always conveniently available within the county to dispose of urgent cases.

Jury Trials

It is too early to measure accurately the effect of providing a twelve-man jury for civil cases in the district court. In the first several months few jury trials were demanded, and some scheduled jury sessions were curtailed or canceled. The latest figures indicate, however, that use of the jury is picking up. The extent to which counsel have resorted to trial of civil issues by the court without a jury is encouraging.

One or two court officials have suggested that a twelve-man jury is needed more in criminal cases than in civil. The overwhelming majority, however, seems to favor nonjury criminal trials in the district court. In any event, the lack of jury facilities and the need for a greatly enlarged corps of judges and prosecutors make this proposal unrealistic for the near future.

The Office of Prosecutor

The offices of prosecutor and solicitor are becoming more important and demanding, year by year. Representing the state in Uniform Reciprocal Enforcement of Support Act cases, in delinquency cases in which the juvenile has an attorney, and in probation revocation hearings are auxiliary duties of the prosecutor which take increasing amounts of his time. Hence, the idea of a full-time, state-paid prosecutor is a big improvement over the part-time, locally paid prosecutors of the replaced recorder-type courts. This is particularly true in the one- or two-county districts, where the prosecutor is more readily available to advise law enforcement officials. It is less true in the larger multi-county districts because the prosecutor may not be physically available in most counties of the district more than one day a week. Full-time and part-time assistant prosecutors, when authorized by the state, are only a partial solution to this problem. The ideal, a full-time prosecutor in every county, probably cannot be supported financially. Adequate office facilities and secretarial services, as dictated by the size of the district, would improve the prosecutor's efficiency.

The present system, while an improvement over the old arrangement, can be expected to improve further at the end of the terms of the current superior court solicitors. In January, 1971, there will be thirty full-time superior court solicitors, one for each judicial district, and an allowance of full-time and part-time assistant solicitors sufficient to take over the prosecutorial functions in both the superior and district courts, thus absorbing the present temporary

What problems have been encountered?

office of prosecutor. This will mean several full-time prosecutorial personnel in most districts, permitting increased availability of the prosecutor to law enforcement officers. The opportunity for improvement in the state's prosecutorial system, already being gradually realized in six districts, is one of the most promising developments in the entire court reorganization picture.

The Clerk's Office

Under the district court system, the clerk of superior court is also clerk of the district court, and the Administrative Officer of the Courts prescribes uniform record-keeping methods for the clerks' offices. The former change is of no particular significance in most counties, although in some it will mean considerable expansion of his duties as the clerk takes over records (and probably employees) of all superseded city and county courts. The latter change, however, is of major significance to all practicing attorneys. The statutes governing operation of the clerk's office, set out in Chapter 2 and many other chapters of the General Statutes, are at times fragmentary, ambiguous, out of date, and at odds with modern methods of record-keeping. The new system of keeping records, designed after many months of painstaking labor by a committee of lawyer-clerks of superior court and adopted by the Administrative Office for statewide use, is a refreshing but radical change from the old, outmoded system. The core of the new system is the replacement of many bound volumes by flat files, each of which contains all the original papers in a case or proceeding. The flat file is backed up, for security reasons (not for routine use), by microfilm. Implementation of the new system calls for consolidation and standardization of many old forms, a task also accomplished by the lawyer-clerks' committee. Since the state assumes responsibility for the operating expenses of the entire court system, and uniform bills of costs have been promulgated, fiscal and bookkeeping records are also changed. Attorneys who practice in more than one county will be pleased to find complete uniformity in record-keeping practices.

Judges, attorneys, and law enforcement officials facing this new system in December, 1968, have a considerable familiarization project ahead of them. Those who have survived the first year generally confess to an initial period of confusion, a later period of re-education, and a final period of admiration for the new system. While it may not be entirely "debugged" as yet, it is largely so, and those who are willing to take a little time to understand the new system will find it more efficient and convenient than the old. There have been occasional laments about increased workloads, but such complaints come in large part from those who fail to realize that the office of the clerk of superior court is now the *only* clerk's office in each county for all judicial record-keeping, including the magistrate's records; that the requirement for complete and accurate records, frequently court-imposed, is constantly increasing; and that, under the old system, records were sometimes kept inadequately or not at all.

Attorneys and court officials in counties with one or more additional seats of district court may find that "start-up" problems are more acute than in counties with a single seat of court, because of sometimes unavoidable conflicts in sessions of court and the clerk's duty to supply active records to several seats of court concurrently.

The Magistrate

The weakest link in the judicial chain is the office of magistrate. This was also true of the magistrate's predecessor—the justice of the peace. The criticisms that brought the justice into disfavor (an unfair fee system, varying and sometimes excessive costs, the "collection agency" practice, undignified surroundings, etc.) have been eliminated under the district court system, but new difficulties, some merely temporary and some inherent in the nature of the office, have arisen.

Under the Constitution the magistrate is nominated by the clerk of superior court and appointed by the senior regular resident superior court judge. The salary range ($1,200-$6,000 per year) is fixed by the General Assembly, and within these limits individual salaries are set by the Administrative Officer of the Courts. Working hours and office location, and to a certain extent magisterial duties, are controlled by the chief district judge. Thus *four* different officials on county, district, and state levels have a hand in settling the magistrate into office. To compound the difficulty, the prospective appointee must be informed of his salary (and tentatively accept it) before he knows his office location, his hours of work, and the extent of his duties, the chief district judge who determines these matters not yet having been elected and appointed. It is some-

What are its strengths and weaknesses?

what surprising that under these handicaps the office of magistrate has been filled as well as it has.

The legislative compromise of 1961 which wrote into the Constitution the requirement for nomination of magistrates by the superior court clerk and their appointment by the resident superior court judge has produced difficulties in more than one county, and has unrealistically insulated the appointee from more effective administrative control by his principal supervisor, the chief district judge. The solution most frequently — indeed, almost unanimously—recommended is a constitutional amendment to permit the chief district judge to appoint the magistrate directly. When the new system is first activated in any county, this change would not permit the chief judge (not yet selected) to make known in advance to the prospective magistrate his hours, office location, and duties. But this is a one-time problem, capable of solution by adjustment after the chief district judge is sworn in; in any event, it would not be an acute issue by the time such a constitutional change could be effected, since by then, the chief district judge would be in office in each county, available to tell the prospective magistrate the complete terms of his "employment contract" prior to his acceptance of it. (Of course, the office of chief district judge can turn over every four years, but this will happen much less frequently than biennial magisterial appointments.)

The second most serious complaint about the magistrate has been his lack of legal expertise, particularly in the drafting of warrants. It must be conceded that this complaint, voiced in all six districts, was—and is—a valid one. The Administrative Office of the Courts and the Institute of Government co-sponsored a two-day school for magistrates in November, 1966, and supplied them with a manual of instructions and study materials. Not all of the new magistrates attended this brief school, however, and some of those who did resigned their posts shortly thereafter in dissatisfaction with the irregular working hours, the compensation, or other conditions of service. Furthermore, in drawing warrants, without downgrading the value of thorough instruction, there is no substitute for experience. Law enforcement officers in many of the twenty-two counties first affected, long accustomed to the speed and convenience with which warrants had been obtained from police desk officers, disparaged the inexpertness of the magistrate. Their nostalgia for the old system was laid to rest in May, 1967, by the Supreme Court, however, when it ruled, in *State v. Matthews*, 270 N.C. 35, that issuance of a warrant was a judicial function which could not be performed constitutionally by a law enforcement officer. (This not-unexpected decision, it should be emphasized, came about entirely independent of the court reorganization movement.)

As for the lack-of-training complaint, a new manual on how to draft warrants is being distributed by the Institute of Government, and additional and more intensive training of both old and new magistrates will be sponsored by the Administrative Office and the Institute. Furthermore, the passage of time will assist in bringing the same degree of expertness to warrant issuance frequently reached by warrant-issuing officials of the past. It is anticipated that this problem will diminish rapidly with time. Of course, as long as magistrates lack formal legal education, it cannot be expected to disappear entirely. Judges, prosecutors, and solicitors should take official cognizance of this deficiency, and as a matter of self-interest seize every opportunity to improve the legal education and proficiency of the magistrates in their districts. (An educational program of this nature has apparently been very effective in Robeson County.)

The expanded (up to $300) small-claims jurisdiction of the magistrate has not been so much a problem as it has been a matter of education. Initially both lawyers and litigants seemed to be unaware of the law or procedure in small claims; there were no "do-it-yourself" forms available; costs were apparently higher in some counties than they had been in JP court; and the requirement for verified pleadings destroyed the informal "collection agency" practice. Extremely few small claims, requesting trial before a magistrate, were filed in the early weeks of the new system. By the end of the year, however, small-claims business, particularly of the delinquent accounts and summary ejectment variety, had picked up many fold. To date, claim and delivery papers constitute the third most common item of the magistrate's civil business. The bulk of these matters is uncontested, or settled before trial, as was true before; only a small percentage go to trial, and fewer numbers still are handled by attorneys. Forms are now available in the clerk's office; costs have been reduced by $2 (through repeal of the process tax); the public, particularly businessmen with many accounts, have become familiar

How can it be improved?

with the new-but-simple procedure and reconciled to the fact that filing a claim by telephone is a short-cut of the past. Acceptance, even approval, of the magistrate's small-claims jurisdiction and procedure by both lawyers and litigants is growing.

Awareness of the magistrate's authority to accept waivers of trial and guilty pleas to a long list of nonhazardous traffic violations has grown very slowly; further education of law enforcement officers and the general public on this matter is still needed. Numbers of minor traffic offenders still come to court when they are eligible — and desire—to waive trial and plead guilty before a magistrate. This clutters up the district court docket and inconveniences the offender and sometimes the complaining officer. Again, there seem to be few complaints about the system itself; in fact, the uniformity of procedure and punishment for traffic offenses has been praised by many of the new system's "victims" and, occasionally, by their lawyers.

It will hardly come as a surprise that many magistrates, and a number of informed observers, feel that the magistrate's state-paid compensation ($100 to $500 per month) is too low. The observation is not that the full-time magistrate, drawing $6,000 per year, is undercompensated, although in a few urban areas he may be. The chief complaint is that the large number of part-time magistrates — drawing $3,000 to $4,000 per year, and, in many cases, working long or irregular hours—are receiving inadequate compensation to attract in sufficient numbers the high-quality personnel that the duties of the office demand. There is no simple answer to this problem. If many of these magistrates were paid by piecework (number of warrants issued, guilty pleas accepted, etc.), their compensation would have to be adjudged as adequate, even liberal. Mere availability, however, is a necessary part of a magistrate's duty, especially in rural areas. The state unfortunately cannot afford to compensate the available magistrate at the same rate as the busy trial magistrate, particularly when the available magistrate is often privately employed during many of his available hours. Further experience is needed to uncover the solution to this problem.

A comment on the quality of personnel attracted to date to the seventy-odd magistracies in twenty-two counties is in order. Observations of informed judicial officials and lawyers have dwelt not so much on the lack of qualifications of magisterial appointees —indeed, a number of retired lawyers, military officers, and businessmen have performed in the office with great credit to themselves and to the system—but almost solely on the lack of training. This is encouraging, for lack of training can be overcome. It would be a mistake, however, to give the impression that there are no personnel problems in the magisterial ranks. There are, and the bar in each county would be well advised to urge the best qualified individuals that can be found to become candidates for the office. It is as true on this level as it is on the district judge level that the degree of success of the new system is largely dependent on the quality of the officials appointed (elected) to the office.

Costs

The new costs bill has received widespread praise for its uniformity and comparative simplicity. This is a tribute to the hard work of the lawyer-clerks' committee which attempted to reduce a complicated and confusing costs structure to a few relatively simple rules and computations. There have been some complaints that costs in certain situations are higher than before, or higher than they should be, and a few clerks have pointed out that in certain other situations costs are considerably lower than they were and perhaps too low for the services rendered. Undoubtedly a few adjustments, based on continuing experience with the system, will be required from time to time, either in the interest of litigants or the government. Meanwhile, it should be some satisfaction to attorneys and clients to know in advance the costs of litigation, and also to know that costs for similar items or services are the same from county to county. And county commissioners will be pleased to realize that assumption by the state of all operating expenses of the new system will have a favorable impact on the county budget.

Physical Facilities

Physical facilities now in use, or soon to be used, for the district court range all the way from dismal to deluxe, with a discouraging majority being closer to the former. This, of course, is not the fault of the court reorganization movement; court reorganization has merely brought the sad condition of many courthouses to increased public attention.

The district court does not necessarily bring with it an increase

What can counties where it is yet to be implemented expect?

in litigation. It may, nevertheless, bring an increased utilization of the existing courtrooms for reasons which may vary from county to county. For example, in many small counties the civil business of the district court, especially when a jury is employed, will cause additional conflicts with the superior court for the sole courtroom available. Also, in some counties, the closing of outlying seats of court and transfer of their case loads to the county seat will aggravate the problem.

In counties which now have no recorder-type court, weekly sessions of district court in midwinter in poorly heated courthouses will bring discomfort if not hardship to all participants. In all counties, the time-consuming procedural requirements dictated by recent court decisions mean that criminal dockets which formerly could be disposed of in an hour or so now take a half-day or more.

Where there is a shortage of adequate courtrooms, there is almost always a shortage of suitable space for the clerk. In fact, in a county where the clerk is taking over the records of one or more lower courts which are going out of existence, the clerk's space requirements may be more acute than those for the judge and jury. Further, the clerk's office is the filing and record office for the magistrate, and in large counties this adds significantly to the volume of paperwork.

A few counties have foresightedly met the space problem and solved it; others have ignored the problem, and conditions in some of them are, or in December, 1968, will become deplorable. Perhaps the largest group of counties is in the planning or renovating stage, and December, 1968, will find them in a "make-do" or "half-ready" state.

No county, no matter how new and expansive its facilities, should ignore the probability that the district court may increase space requirements. In those counties where planning or execution is lagging, while it may already be too late to get ready for the December switchover, it is not too late to start. The experience of a county already under the new system can be most instructive.

The extent to which the facilities fee (G.S. 7A-304) will support needed physical improvements will vary from county to county, in accordance with a number of variables, so that a useful generalization is not possible.

Jurors

The new General Statutes Chapter 9, providing procedures for the selection of jurors, eliminating statutory exemptions from jury service, and authorizing pre-session applications for excuses from jury service, should increase the efficiency of operations on both the district and superior court levels. Jury pooling, for one example, is now being undertaken in a number of counties. Since the major impact of this recent legislation has not been felt, a detailed evaluation of it would be premature. District court judges-elect should familiarize themselves with the details of the law, however, as operation of the excusing machinery will be their responsibility. Clerks of superior court, registers of deeds, and sheriffs likewise have duties under this legislation which, as to them, is already effective.

Public Respect

A valuable byproduct of the new district court is the *increased respect* which the system commands from all hands—lawyers, litigants, law enforcement officials, and the general public. In each district comments to this effect have been heard again and again. This is an intangible benefit of great value, since the growing acceptance which it indicates is utterly essential to the new court's continued success.

Summary

To summarize, the district court system, after a brief shakedown period, is now working well. It is a significant improvement over the old system, and it will function with increasing efficiency as the personnel who operate it become more efficient. There are no major statutory difficulties with the new system, although amendments to the Constitution to permit legal training as a prerequisite to judicial office and to authorize a simpler and more flexible system for the appointment of magistrates would be desirable. It can be predicted with confidence that, if capable people are elected and appointed to the district court offices, and if they and the bar make a reasonable effort to familiarize themselves with the law and procedures to be followed, the counties switching to the new system in December, 1968, will be able to do so with a minimum of confusion and a maximum of pride and satisfaction.

Credits: The cover photograph is courtesy of Bruce Turney, Graham city manager. The pictures of Justice Huskins and Mr. Montague on page 7 are by the *News and Observer*. Other photos are by Ted Clark. Lois Filley did the layout.

What facilities need to be provided?

CHANGES IN THE STATE JUDICIARY:

Huskins Named Supreme Court Justice; Montague Becomes Administrative Officer of the Courts

As J. Frank Huskins moves this month to the North Carolina Supreme Court, Bert M. Montague takes over Huskins' former job as Director of the Administrative Office of the Courts.

Huskins was appointed by Governor Dan K. Moore to succeed Associate Justice J. Will Pless, who retired on February 5. Huskins has had a long career in government, having served as mayor of his home town of Burnsville, as a member of the North Carolina General Assembly, as Chairman of the State Industrial Commission, as a special and resident superior court judge, and as Director of the Administrative Office of the expanded and revised system of state courts. His appointments came under three governors. Governor W. Kerr Scott, whom he had not supported, named him Industrial Commission Chairman; Governor Luther Hodges first made him a superior court judge; and Governor Dan K. Moore approved his selection by Chief Justice Emery B. Denny to the Court Administrative Office.

Montague has served as Huskins' assistant in the Administrative Office of Courts and also executive secretary of the North Carolina Judicial Council and administrator of the state aid fund for indigent defendants. He was named to the Administrative Office by State Supreme Court Justice R. Hunt Parker, also with Governor Moore's approval.

Frank W. Bullock, Jr., will become Assistant Director of the Administrative Office of the Courts.

Huskins

Montague

VISITING AUTHORS

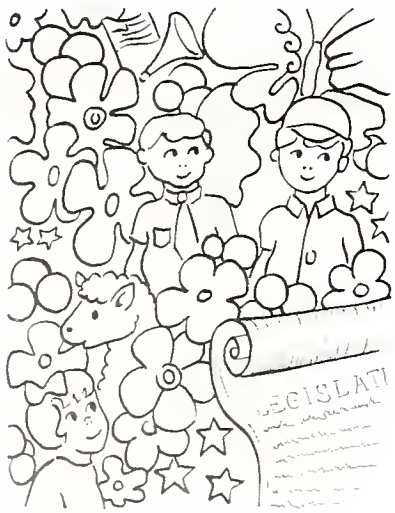
ANOTHER IMPORTANT SCHOOL CASE

Joseph E. Bryson, author of the article (p. 9) on the school case now on appeal, is Director of Extension and associate professor of education at the University of North Carolina at Greensboro. Dr. Bryson was both born and educated in North Carolina. A native of Greensboro, he graduated from Elon College and received his master's degree from the University of North Carolina at Chapel Hill and his doctorate from Duke University. He was recently elected president of the National Organization on Legal Problems of Education.

LOCAL GOVERNMENT and the PUBLIC HEALTH

The author of the article on Local Government and the Public Health (p. 11) is Ronald H. Levine, M.D., M.P.H., Director of the Community Health Division of the North Carolina State Board of Health. He is also a clinical assistant professor of pediatrics at the University of North Carolina School of Medicine. With extensive experience in pediatrics, Dr. Levine came to North Carolina as Epidemic Intelligence Service Officer of the U. S. Public Health Service, on loan to the State Board of Health, in 1963.

Laws Affecting Mentally Retarded Children in North Carolina



by William B. Benjamin and Mason P. Thomas, Jr.

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Institute of Government
P. O. Box 990
Chapel Hill, North Carolina

ANOTHER IMPORTANT SCHOOL CASE

*by Joseph E. Bryson**

[*This article reviews a recent federal court decision that struck down the track system and optional zones of the Washington, D.C., schools and required integration of faculties and busing of children who volunteered for transfer from overcrowded schools to underpopulated schools. This case is now on appeal. If it is upheld, it will be one of the more significant decisions in the area of school desegregation.*]

On June 19, 1967, Judge J. Skelly Wright handed down in *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. (1967), one of the most controversial and voluminous (184 pages) decisions ever recorded in the American judiciary. Those who criticize it do so on the basis that the decision is too harsh, unrealistic, educationally unsound, usurping the power of local boards of education, administratively impossible, "judicial activism," playing God with the judiciary, legally unsound, etc. On the other hand, those who favor the decision have pronounced it to be light in the dark, true "freedom-of-choice," educationally sound, realistic guidelines to end de facto segregation, etc.

Dr. Carl F. Hansen (a party to the case) resigned the superintendency of the District of Columbia schools and appealed the case. The American Association of School Administrators joined Hanson's appeal on the simple but firm grounds that Judge Wright's decision encroached too much on the D.C. Board of Education's discretion—i.e., the court had substituted itself for the board and had made educational policy, a function it is neither equipped nor permitted to do. Let me point out, however, that the American Association of School Administrators is not at odds with Judge Wright's educational policy—"just too much judiciary." The National Education Association filed an *amicus curiae* brief supporting Judge Wright's decision. The NEA affirmed the historical position of school boards with respect to public school operations, "but in this case the rights of children are paramount."

Judge Wright obviously had been impressed by recent decisions of the Fourth, Fifth and Eighth Circuit Courts of Appeals and recent Supreme Court decisions. But more than judicial decisions, I suspect the President's Civil Rights Commission's report of February, 1967, with its devastating research, was most influential. New social insight concerning the matrix of aptitude testing, levels of aspiration, and motivation and a rapidly rising crime rate, likewise played a part. May I suggest parenthetically that all school board members, superintendents, principals, and teachers study the Civil Rights Commission's report.

Specifically Judge Wright maintained that the District of Columbia school system was a racially segregated system and violated the due process clause of the Fifth Amendment. He mandated the following points: (1) The Board of Education must end all racial and economic discrimination in the public schools (economic discrimination indicated that more money was being spent on white than on Negro schools). (2) The so-called educational track system must be abolished. (3) The optional attendance zones must be done away with. (4) Free transportation must be provided for children involved in "freedom-of-choice" matters. (5) The Board of Education must file for court approval by October 2, 1967, a plan for total faculty integration. (6) The Board of Education must file for court approval by October 2, 1967, a pupil-assignment plan that

Does ability-grouping in schools constitute unequal educational opportunity?

*See "Visiting Authors," p. 8.

will end all racial discrimination.

Judge Wright's decision derives its increased significance and broader dimensions from an examination of points two and four. The other points are no different from those of other judicial decisions.

• *The Abolishment of the Track System.*—Grouping, the track system, levels of learning, college preparatory, vocational preparatory, basic honors — no matter what you call it or how you classify it — they all designate and denote a kind of class grouping based on ability, aptitude testing, or direct introspection. To abolish the "track system" is basically to cut the "idols of curriculum and administration" out of a great many public schools: the District of Columbia school system used aptitude testing in assigning students to the various tracks. Judge Wright insisted that the aptitude tests, standardized primarily on white middle-class children, do not relate to Negro children — that "track assignments based on such testing relegates Negroes and disadvantaged children to the lower tracks from which. . .the chance to escape is remote." Paraphrasing the Civil Rights Commission's report, Judge Wright said, "Children so stigmatized by inappropriate aptitude testing procedures are denied equal opportunity to obtain the white collar education available to the white and more affluent children." He insisted that the Washington school system "is a monument to cynicism of the power structure," and that "racially and socially homogeneous schools damage the minds and spirit of all children who attend them. [Such schools cannot properly promote the goals of the American democracy]."

I rather suspect that Judge Wright's description of the District of Columbia schools is applicable to most school systems in the United States. His decision is educationally and democratically sound. There is no longer any conceivable rationale that supports grouping either racially, culturally, socially, academically, and/or of any other kind. All human beings must be fused and immersed into the American society to the limits of their genetic possibilities. We have yet to scratch the surface of a teaching-learning potential.

Does the freedom-of-choice plan hav meaning without free transportation?

• *Free Transportation* — In "freedom-of-choice" plans there is no real free choice unless free transportation is provided to those who have elected a school outside their attendance area. If bus routes are gerrymandered in such a manner as to provide for transportation only to normally designated attendance areas, then "freedom-of-choice" is not freedom of choice. Transportation must be free to all schools because transportation is the key to "freedom-of-choice." The Fifth Circuit last spring looked at the issue, talked about it, but mandated no action. Judge Wright came quickly to the nub of the issue by insisting that the District of Columbia Board of Education bus children who volunteer for transfer to other schools. All public school administrative units who choose the "freedom-of-choice" plan as a means of integration either de facto or de jure would do well to heed Judge Wright's decision. Free transportation to all schools will become a part of "freedom-of-choice."

Finally, it is impossible to do justice to such a voluminous and important decision in such a short rationale. Judge Wright's decision is "must" reading for all of those concerned with the educational process. Whether you like it or not, agree with it or not, you must recognize that Judge Wright did not default his responsibility when he came face to face with important educational issues. We must say that in the truest sense of the word, Judge Wright not only knows how to "talk the talk"—he knows how to "make the walk."

POSITION AVAILABLE: Deputy Executive Director—Urban Renewal

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LOCAL GOVERNMENT and the PUBLIC HEALTH

*by Ronald H. Levine**

The economic and social vitality of a community is to a large measure dependent upon the health and well-being of its citizens. From our earliest days as a nation our representative bodies have felt and assumed responsibility for maintaining and improving the public health. This involvement by government has supplemented and supported the direct medical services offered by our practicing health professionals (physicians, dentists, pharmacists, etc.) and the health-related institutions, such as hospitals, nursing homes, and sanatoria.

Local government has always been strong in North Carolina, and thus it is not surprising that our county governments pioneered in the provision of public health services. Guilford County in 1911 was one of the very first in the nation to offer full-time county health services. And by 1949 all one hundred counties could boast of a full-time health department providing a wide range of health services for their citizens.[1]

My purpose is to review the role of local government in the provision of health services, how this function has evolved in North Carolina, and how this responsibility is increasingly being expanded. In doing so, I will trace the growth and development of the public health movement and offer some speculation as to the future of public health.

Public Health in Its Infancy

The origins of public health lie largely in the efforts to prevent communicable diseases. This category of illness has been the prime threat to life and health in this country until the very recent past, and many of our public health agencies were organized to meet this challenge. Quarantine laws were passed and health officers appointed to enforce them. Just after the turn of the century, an intensive campaign by Rockefeller teams to eradicate hookworm disease produced both sanitary privies and the first rural health department in America—the Robeson County Health

*See "Visiting Authors," p. 8.

1. *Thirty-third Biennial Report of the North Carolina State Board of Health—1948-50* (North Carolina State Board of Health, Raleigh, 1950).

Department.[2] Early attention was given to the purity of water and food, as well as to the disposal of wastes. The concept of disease *prevention* was born, dedicated to supplement the developing knowledge and skill available for the *treatment* of disease.

The Childhood and Adolescence of Public Health

From the early 1900's until today in North Carolina, public health presents a record of incredible growth and development. Some of those advances have been made by agencies other than official health agencies. Yet almost all have been primarily, if not exclusively, supported by local government.

One of the highlights of this period has been the evolution of the public health nurse. This specially trained health professional, usually employed by the local public health department, has brought skilled health supervision into the homes of countless expectant mothers, newborns, chronic disease-ridden adults and others. As a result of the professional and compassionate way in which she has delivered vital services, often in the face of formidable geographic and cultural obstacles, the trained public health nurse has, in many communities in this state, become a figure almost as legendary and beloved as the rural medical practitioner.

Local government has come to assume a very important health function in the provision of direct medical services to those unable to bear the cost of private medical care. This has been accomplished by the organization of clinics in the health department or, in some cases, in the community-supported hospital. Beginning with clinics devoted to the care of individuals suffering from tuberculosis and venereal disease, this service has expanded so that a wide range of services (such as cancer detection, prenatal and well-baby care, and immunization) are now available through our local health departments.

Local government has promoted the health of its citizens in other ways as well, giving us pure water with the construction and maintenance of community water-purification systems; a mosquito-free environment as a result of vigorous mosquito-control operations; and health programs for children in our local school systems.

Thus, during what I have chosen to term the childhood and adolescence of the public health movement, the concept of prevention of death and disability from disease has come to occupy a place of equal importance with the treatment of disease.

The Maturity of Public Health—What Lies Ahead?

The responsibility of government for providing an optimally healthful environment is increasing even now. Our citizens need to be assured of pure air to breathe. Accident prevention needs more study, and the results of the studies need to be applied. The people have asked for improved emergency services, both in terms of transportation of the injured and in efficient and available emergency-room care. Local government will play its part in coping with these kinds of concerns.

Multiphasic screening, the method by which blood specimens or other characteristics in large numbers of individuals are examined for early signs of a whole host of diseases, is being suggested as a means for early discovery and prevention of disability. Diabetes, glaucoma, cancer, and other conditions are targets of early detection. Local health agencies are likely to be asked to make available services such as this, as well as other innovations in disease prevention.

Ultimately the term "public health" as we are using it might be replaced by "community health." The local health agency may come to be viewed as the community's physician.[3] But its predominant role will be coordination rather than directing—coordination of the many health-related activities already being carried out by the myriad of governmental and private agencies, groups, and individuals. Local and state government will be called upon to strengthen local health departments so that they can effectively carry out this all-important function.

While the treatment of disease has improved greatly and will continue to improve, the investment made in preventive efforts must continue in order to achieve optimum health for the people. It is now said that health is not simply the absence of disease but the presence of well-being. The future ability of the health profession to promote this state of health depends to a great extent upon research in the medical sciences but, equally important, upon development of new patterns in the delivery of health services, which in turn must be encouraged and supported by local government.

Summary

As the concept of disease prevention has evolved and become basic to the medical care field, the responsibility of government for the provision of a wide range of health services has also grown and developed. Although important support has been provided by state and federal sources, a major burden of this development has been borne in North Carolina and in many other states by local government.

Health programs are now carried out in our communities by a wide variety of public and private providers of health services. If our local health departments are to coordinate these diverse activities toward greater efficiency, economy and effectiveness in the promotion of health, they will need to be strengthened. It is essential that the local health department be provided the technical expertise and necessary financial support to assume and carry out its responsibility as the community's physician.

2. McIntosh and Kendrick, *Public Health Administration in North Carolina*, North Carolina State Board of Health, Raleigh, 1940.

3. McGavran, E. G., *The Community as the Patient of Public Health*, Texas State J. Med. 54:1, 1958.

NORTH CAROLINA

JAILS and PRISONS –

A BRIEF HISTORY

by Allan Ashman

[*Editor's Note: This article is the first of a series of special studies prepared by the Institute of Government for the North Carolina Jail Study Commission. When the series is completed, it is expected to be published in full in a single separate publication.*

The author's field at the Institute is criminal law and procedure.]

Pre-Colonial and Colonial History

Originally, jails were institutions used to detain suspected or arrested offenders until they could be tried by the courts.[1] However, another type of facility called the "house of correction" and used primarily as a place of punishment for minor offenders evolved in England during the fifteenth and sixteenth centuries.[2] During the eighteenth century in England the jail and the "house of correction" gradually merged and often were located under the same roof and administered by the same person. The jail became not only a place for the temporary detention of suspects but also a penal institution for convicted petty offenders and vagrants.[3]

The early settlers of America brought with them the customs and institutions of their mother countries. For example, the treatment of offenders included sentences to jail, the whipping post, the pillory, the stocks, and the ducking stool.[4] Imprisonment, as such, was of short duration and limited to the lesser offenders. Persons suspected of crimes were held in these "houses of detention" until the meeting of the court—termed "Quarter Sessions and General Gaol Delivery."[5]

Theories of Punishment

In colonial America and North Carolina practically all serious crimes were punished by death or some form of corporal punishment.[6] Penal administration in North Carolina did not require an elaborate organization nor highly trained personnel. Every county was required by law to build "a courthouse, prison, and stocks."[7] The sheriff apprehended offenders, the county court and local justices of the peace tried them and imposed sentence, and the sheriff carried it out.[8]

Retribution was the primary aim of the penal law. The means employed placed emphasis upon exacting expiatory suffering from the offender. For a serious crime an offender might be hung, whipped, branded, or cropped. For a less serious crime, he might be placed in the pillory or stocks and exposed to public scorn and ridicule.[9] Those who could pay usually

1. Barnes and Teeters, New Horizons in Criminology 842 (1946).
2. *Id.*
3. *Id.*
4. Richmond, Prison Profiles 2 (1965).
5. Barnes and Teeters, *supra* note 1, at 843.
6. See Coates, *Punishment for Crime in North Carolina*, 17 N.C. L. Rev. 205 (1937), at 208.
7. N.C. Pub. Laws 1741, c. 28.
8. See Bounds, Evolution of Correctional Organization in North Carolina (unfinished and unpublished manuscript).
9. *Id.*

escaped with a fine. Jails were used chiefly for persons awaiting trial or sentence. Often jail populations were composed of vagrants, debtors, and run-away slaves. Sentences of imprisonment, rare and usually limited to minor offenses, were served in local jails.[10]

Condition of Jails

The early jails did not have cells but only small rooms into which twenty to thirty prisoners might be herded. No heat was provided in these jails, but the inmates, if they were enterprising, could furnish heat for themselves by burning material in the fireplaces that might be found in each room.[11] Inmates either "bought" their food from the jailer or got it from sympathetic relatives or friends.[12]

As late as 1870 the North Carolina Board of Public Charities, the predecessor of the existing State Board of Public Welfare, undertook the investigation and supervision of the entire system of charitable and penal institutions in North Carolina.[13] It wrote:

> (The jails) . . . seem to have been established to intimidate and deter, than to reform. They punish, but do not, in but few instances, correct. . . . As a general thing our jails are miserably constructed, and there is little or no attention paid to the division and classification of prisoners. Every offender, or even one accused of crime—the boy of twelve, put in for a street fight, or some slight misdemeanor, and the hardened criminal, deep dyed in infamy, are all thrown together in filth and idleness, thereby making the jail a seminary of crime and corruption. . . . I find that another great evil appertaining to the affairs of our prisons is that the accommodations and appropriations provided for prisoners by the public contemplate scarce anything beyond the bare necessaries of life and secure confinement . . . [with] no effort at the reformation of prisoners, and no attempts at improvement or discipline.[14]

The Penitentiary Movement

Shortly after the conclusion of the Revolutionary War new concepts about the treatment of convicted offenders began to gain support in America. The prevention of future crimes by measures designed not merely to punish but also to reform offenders was advanced as a worthwhile and practical objective. In 1790 the Pennsylvania legislature passed legislation that converted the Walnut Street jail in Philadelphia into a state penitentiary for convicted felons sentenced to imprisonment. This act is considered the beginning of the modern prison system.[15]

Within a year after the penitentiary movement was launched in Pennsylvania, the idea began to receive support in North Carolina. Although a bill introduced in the General Assembly of 1791 providing for the construction of a penitentiary failed to pass,[16] the prison sentence steadily grew in favor in the United States and in North Carolina throughout the early part of the nineteenth century, first as an alternative to, and later as a substitute for, various forms of corporal punishment and for the death penalty. By 1854 punishment in the pillory in North Carolina was limited to certain "infamous" crimes or ones committed in secrecy and with malice, or committed with deceit and intent to defraud. All other statutory misdemeanors and felonies where no specific punishment was prescribed were punished by a sentence of imprisonment.[17]

Many abortive efforts were made during the early part of the nineteenth century to secure legislative authority for a penitentiary in North Carolina, but not until 1868 did a bill pass providing for the construction of a penitentiary as required by the Constitution of that year.[18] The site upon which Central Prison now stands was purchased in 1870 and actual construction started in the later part of that year, but political and financial difficulties slowed progress so that the first "State's Prison" was not completed until December, 1884.

The Constitution of 1868

It probably can be said that the turning point in North Carolina's penal policy came in 1868. Apart from directing the General Assembly to make provisions for a state prison, the Constitution in that year abolished corporal punishment in all forms, limited the death penalty to four crimes (arson, murder, rape, and burglary) and further limited other types of punishment to "imprisonment with or without hard labor, fines, removal from office and disqualification to hold any office of honor, trust or profit under the State."[19] In 1868 the General Assembly fixed the limits of punishment at "not less than four months nor more than

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10. *Id.*

11. Barnes and Teeters, *supra* note 1, at 843-44.

12. *Id.*

13. Aydlett, *The North Carolina State Board of Public Welfare*, 24 N.C. Hist. Rev. 2-4 (1947), at 4. At the same time of the 1868 Constitutional Convention there was no state prison system in North Carolina as we know it today. Individual local governments throughout the state bore the responsibility for running jails and prison farms.

14. *Id.*, at 5-6. The *First Annual Report of the Board of Public Charities* published in 1870 also noted the presence of from "400 to 500 insane persons confined in jails." See Aydlett, *supra* note 13, at 6.

15. 5 Attorney General's Survey of Release Procedures 1 (Prisons, 1939).

16 See Johnson, Antebellum North Carolina: A Social History 661-82 (1937).

17. See Coates, *supra* note 6, at 208.

18. N.C. Pub. Laws 1868. c. 61; N.C. Const. Art. XI, § 3 (1868) required the General Assembly, at its first meeting, to "make provisions for the erection and conduct of a State's prison or penitentiary, at some central and accessible point within the State."

19. N.C. Const. Art XI, § 3 (1868).

ten years" in the state prison or county jail for crimes previously punishable corporally, and at "not less than five nor more than sixty years in the State prison" for crimes previously punishable by death.[20]

Evolution of a State Prison System

As corporal punishment gave way to imprisonment, and as imprisonment itself became more of a rehabilitative and less of a punitive step in the sentencing process, the administration of the prison sentence had to be entrusted to officials and employees who were not officers of the court and who were beyond the court's control.[21] The problem of administration began with the county jail. As old, existing jails filled and individual counties began building systems of jails, work houses, and prison camps, the administrative burdens increased. In fact, the system had so far outgrown county jails and city lockups that when the first state prison was opened, the General Assembly directed that it receive transfers of prisoners who were then serving twelve months or more in county jails. It further directed that in the future the state prison receive all persons convicted of crimes (arson, rape, murder, and burglary excepted) for which previously the death penalty, public whipping, or other corporal punishment had been imposed.[22]

Thus the administration of prison punishment, borne almost entirely by the counties prior to 1868 with some help from cities and towns, began to shift to the state. The shift continued as the state prison system expanded with separate plants and buildings for separate classes of offenders from 1907 to 1937.[23] While this shift was taking place, the condition of "local prisons" continued to deteriorate to the point that judges hesitated to use them for anything more than periods of detention or confinement. In 1878 Justice Reade noted in *State v. Driver*[24] that ". . . a county jail is a close prison, where life is not only useless, but a heavy public expense." In another case the court opposed a long term in the county jail because "it is strongly probable that confinement and foetid air would cause a lingering death."[25]

Finally, in 1933, the state prison system was (1) required to receive all prisoners from all local units sentenced to prison for 30 days or more, and (2) to build nearly a hundred prison camps to house them.[26]

20. N.C. Pub. Laws 1868-69, c. 167.

21. See Coates, *supra* note 6, at 217.

22. N.C. Pub. Laws 1868, c. 85, §§ 42, 43; But see N.C. GEN. STAT. § 14-1 (1953), enacted into law in 1891, which defined a felony as a crime "which is or may be punishable by either death or imprisonment in the State's prison."

23. For example, the Jackson Training School for children under 16 years of age was opened in 1907; the State Industrial School for Women in 1917; Morrison Training School for Negro boys in 1921; East Carolina Training School for white boys under 18 in 1923; and the Industrial Colony for Women in 1937.

24. 78 N.C. 423, 427 (1878).

25. State v. Miller, 75 N.C. 73, 77 (1876).

26. N.C. Pub. Laws 1933, c. 39. This provision lowered the minimum term for commitment of misdemeanants to institutions in the state prison system (other than Central Prison, where only felons could be sent) from 60 to 30 days. See N.C. Pub. Laws 1931, c. 145, § 32, and N.C. GEN. STAT. § 14-1 (1953).

Merger With Highway Department

In 1933 the state prison system, as it then existed, was merged with the State Highway Department.[27] Evidently, the facts influencing the decision of the 1933 General Assembly to consolidate the highway and prison systems were (1) the prison system's increasing supply of idle prisoners along with an acute need for new housing to accommodate the growing prison population; (2) a mounting financial deficit to be met from an over-burdened General Fund; and (3) the fact that the highway system could make constructive use of prison labor in road work and pay the cost of prison construction and maintenance from appropriations out of the Highway Fund.[28] There seems no question that it was a merger motivated by financial and not penal considerations.

For many years this solution to the problem of prison support seemed to be satisfactory, and no significant attacks were made upon the administrative arrangement that vested control of prison affairs in the State Highway and Public Works Commission. However, in 1950 the State Highway and Public Works Commission, at the request of the newly created Prison Advisory Council, retained Dr. Austin H. MacCormack, a noted penologist, to make a survey of the state's penal system.[29] His chief recommendation was that a separate department be created to receive control of the prison system from the Highway Department. Dr. MacCormack made critical comments on North Carolina's prison system, and his views gave support to the idea of a possible separation of the prison system from the Highway Department. Studies were undertaken to determine the feasibility of separating the prison and highway systems.[30] The feeling was growing that the prison system should not be controlled by administrators primarily interested in road construction and maintenance.

Creation of State Prison Department

In 1957 the reform effort culminated with legislative approval of the separation of the state prison system from the State Highway Commission.[31] A new State Prison Department was created to which were transferred all the powers regarding prison control and management and all prison properties formerly held by the State Highway and Public Works Commission.

Conclusion

During the current years of evolution and change in the state penal system, we should also be

27. N.C. Pub. Laws 1933, c. 172.

28. Bounds, *Penal-Correctional Administration*, POPULAR GOVERNMENT (Sept. 1957) at 65.

29. *Id.*

30. See in particular a report entitled THE FEASIBILITY OF SEPARATING THE STATE PRISON SYSTEM FROM THE STATE HIGHWAY AND PUBLIC WORKS COMMISSION (1957), submitted by the Chairman of the State Highway and Public Works Commission, the Chairman of the Prison Advisory Council, and the Director of Prisons.

31. N.C. Sess. Laws 1957, c. 349.

aware of the course of development in local confinement facilities. Today the jail still serves, in essence, the same functions it served in colonial times. It is still a place of detention for those awaiting trial (its original function) while serving as a prison for the incarceration of certain misdemeanants and petty offenders. North Carolina jails continue to be "parking places" for chronic alcoholics, drug addicts, and juveniles. There are those in jail who are awaiting the outcome of an appeal from a conviction of a felony or a misdemeanor, or who are awaiting transfer to Central Prison after conviction of a felony or to one of the other units in the state prison system after being sentenced upon conviction of a misdemeanor.[32] We can still criticize the promiscuity and complete lack of segregation in some jails.[33]

Those interested in corrections have argued to no avail against the evils of intermingling first offenders, in most cases boys and young men, with older and more experienced types of depraved persons and the potential danger of permitting men to be confined in small spaces for long periods of time without proper recreational or vocational facilities. A combination of local political interests, ignorance of modern correctional philosophy, and intolerance toward change generally have perpetuated (1) the existence of jails in areas where there is no economic or judicial rationale for their existence, and (2) their administration by men least qualified to run them. Our "enlightened" state correctional system should not be a source of pride to North Carolinians if that system is permitted to exist side by side with shabby, unsanitary, insecure, and poorly staffed local confinement facilities.

32. See N.C. GEN. STAT. §§ 148-28, -29, -30, (1964); see also, HARPER, NORTH CAROLINA SHERIFFS' MANUAL (1964), at 309-10.
33. See BARNES AND TEETERS, *supra* note 1, at 851; See also, Aydlett, *supra* note 13, at 4.

SANDERS NAMED TO COMMITTEE ON FEDERAL JUDICIAL CENTER

John L. Sanders, Director of the Institute of Government, has been named to a national committee charged with implementing the establishment of a Federal Judicial Center. The appointment was made by Chief Justice Earl Warren of the United States Supreme Court in his capacity as Chairman of the Judicial Conference of the United States.

Sanders is one of four educators or practicing lawyers invited to serve on the twelve-member committee which is chaired by Justice Tom Clark of the United States Supreme Court. Other members include five federal judges, the Solicitor General of the United States, and the Director of the Administrative Office of the United States Courts. The committee has been asked by the Chief Justice to make a careful study of the general policy to be followed by the Center and to report its findings to the next meeting of the Judicial Conference on February 27. Committee recommendations are expected to relate specifically to the Center's depth and type of research and study of the federal courts; its administration and management; the nature of its staff, research and planning assistance to the Judicial Conference; the type and design of programs of continuing education and judicial personnel training and their conduct and development; and the use of automatic data processing and systems analysis in federal court administration.

The establishment of the Federal Judicial Center was provided by the 90th Congress in legislation passed in December, 1967. The Center's functions are to include conducting, stimulating, and coordinating research and study by public and private agencies of the operation of the federal courts; developing and presenting to the Judicial Conference recommendations for improvement in court administration and management; stimulating, creating, developing, and conducting programs of continuing education and training for judges and other personnel of the judicial branch; and providing staff, research, and planning assistance to the Judicial Conference and its committee.

CHANGING CONCEPTS of HOSPITAL LIABILITY

CHARITABLE IMMUNITY IS NO LONGER A DEFENSE IN NORTH CAROLINA

by David G. Warren

[*Editor's Note: The author's primary field at the Institute is health law. He lectures in the Schools of Medicine, Nursing, and Pharmacy at the University of North Carolina.*]

There has traditionally been more concern about individual physician liability for malpractice than for hospital liability for the torts of physicians and other hospital staff. The concepts of *charitable immunity* for non-governmental hospitals and *sovereign immunity* for government hospitals undoubtedly have protected many hospitals from suit.

The courts have developed other protective doctrines as well, based for the most part on considerations of desirable public policy. The "captain of the ship" and "borrowed servant" concepts make the surgeon in the operating room or the attending physician responsible for actions of nurses and technicians they direct, freeing the hospital from liability unless the surgeon or physician is a hospital employee.[1]

Other distinctions have been made over the years to insulate hospitals even further, such as determining whether the injury-producing act was "administrative" or "medical,"[2] basing the standard of care on the customs of hospitals in the *local* area,[3] and classifying hospital-supplied blood for transfusions as "services" without the usual warranty that "products" carry.[4]

1. See, *e.g.*, Byrd v. Hospital, 202 N.C. 337, 162 S.E. 738 (1932).
2. Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 105 N.E. 92 (1914); see, Berg v. N.Y. Soc. for Relief of the Ruptured & Crippled, 1 N.Y.2d 499, 136 N.E.2d 523 (1956).
3. See Jackson v. Joyner, 236 N.C. 259, 72 S.E.2d 589 (1952); Roberts v. Young, 369 Mich. 133, 119 N.W.2d 627 (1963). See generally, McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549 (1959).
4. Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792 (1954). In North Carolina, as in most states, blood transfusion cases are based on negligence; see, Davis v. Wilson, 265 N.C. 139, 143 S.E.2d 107 (1965).

In recent years some of these concepts have begun to change. Charitable immunity has been abolished or limited in nearly every state. Sovereign immunity has been tempered by governmental tort claims acts. Hospitals are being held liable for torts not strictly on the basis of fault, and the principle of *res ipsa loquitur* is being applied to hospitals.[5]

This article surveys the liability status of various types of hospitals in North Carolina and discusses the recent abolition of charitable immunity in this state.

• **Proprietary Hospitals.**—Some hospitals are classed as private, profit-seeking, proprietary organizations. They are fully responsible for the negligence and other torts of their staff and employees just as any other corporation is. The question of what constitutes negligence in a hospital setting is more complex, however, and is the subject of considerable comment and litigation.[6]

• **Governmental Hospitals.**—Other hospitals are classed as governmental and are protected to some degree by the defense of "governmental immunity." Persons who suffer injury at the hands of employees of state hospitals, however, may be recompensed under the State Tort Claims Act,[7] which provides for damage awards through the Industrial Commission. Legislation in the 1967 General Assembly increased the maximum award to $15,000.

5. Beaudoin v. Watertown Memorial Hosp., 145 N.W.2d 166 (Wisc. 1966); Gormley v. Montana Deaconess Hosp., 423 P.2d 301 (Mont. 1967).
6. See generally, GOODMAN AND TOZER, MODERN HOSPITAL LIABILITY—LAW AND TACTICS (1967); Southwick, *Vicarious Liability of Hospitals*, 44 MARQ. L. REV. 153 (1960).
7. N.C. GEN. STAT. § 143-291 *et seq.*

In the case of hospitals operated by a city or county, the question of liability has not yet been clarified by the North Carolina Supreme Court. If the Court determines that hospital activities are governmental in nature, then the city or county would *not* be liable. However, if the activities are deemed proprietary in nature, there would be no "governmental immunity" and the city or county would be subject to liability.[8]

A county which has waived its governmental immunity by purchasing liability insurance is liable for employees' torts under G.S. 153-9(44) to the extent of the coverage. Cities may also waive governmental immunity to the extent of liability insurance coverage, but only for the negligent operation of motor vehicles.[9]

● **Charitable and Private Nonprofit Hospitals.**—Churches and some hospitals, clubs, orphanages, rescue missions, and other nonprofit organizations have long been protected from personal injury suits by the common law doctrine of "charitable immunity." This defense is raised principally in lawsuits stemming from negligence by hospital employees, and it prevents recovery from the charitable institution. It has resulted in obvious inequities to patients who suffer injury after entering a hospital that happens to be classified, because of its means of support, as a "charitable institution."

The charitable immunity doctrine in North Carolina was qualified over the years by court decisions which allowed recovery of damages in only three instances: (1) for the hospital's negligent selection or retention of the wrongdoing employee;[10] (2) perhaps for providing defective equipment or supplies;[11] and (3) for injury to a person not a "beneficiary of the charity," i.e., one other than a patient.[12]

It is axiomatic that an injured plaintiff can always sue the negligent employee directly, regardless of the defenses the employer may have. But sometimes the employee is "judgment proof" (i.e., unable to pay the damages because he lacks financial resources), leaving the injured plaintiff without compensation.

Thus, the success of an action by an injured or reinjured patient against a hospital in this state has depended on the classification of the institution he is in.

● **The End of Charitable Immunity.**—Two recent events have changed this picture in favor of the patient. First, on January 20, 1967, the North Carolina Supreme Court overruled a long line of immunity cases and decided in *Rabon v. Hospital*[13] that North Carolina would henceforth join the thirty other states which impose full liability upon charitable hospitals for the actionable negligence of their employees. Of these thirty, eighteen abandoned the immunity rule by overruling prior judicial decisions, and two abolished the rule by legislative action. The North Carolina Court limited the application of its ruling to hospitals.[14]

Next, the 1967 General Assembly passed legislation[15] which entirely abolishes the defense of charitable immunity for *all* institutions. It is not a valid defense to any action or cause of action arising on or after September 1, 1967. Thus, any questions which were raised by *Rabon* about application of the defense were summarily resolved by the legislature.

● **Other Legal Questions for Hospitals.**—While the charitable immunity issue is dead, numerous other questions still remain as to the liability of hospitals. A beginning list would include:

(1) The applicability of governmental immunity to city and county hospitals;

(2) The extent of the doctrine of *respondeat superior* or agency, as applied to "staff" physicians (a recent Illinois case, *Darling v. Charleston Community Memorial Hospital*,[16] held that a hospital not reviewing a physician's work and requiring consultation was liable over objections that the doctor was not an agent of the hospital);

(3) The extent to which the increasing capability for treatment in some hospitals will affect the standard of care required in all hospitals (the *Darling* case held not only that community customs and the hospital's own regulations are relevant but also that state licensing standards and national accreditation standards bear on the standard of care required);

(4) The applicability of the physician-patient privilege and the newly developing "invasion of privacy" tort to hospital records and research;

(5) The question of whether blood from commercial and hospital blood banks can continue to be considered a medical *service* which carries no warranties as do sales of *products*;[17]

(6) The effect on the statutory definition of the practice of medicine as nurses, hospital techni-

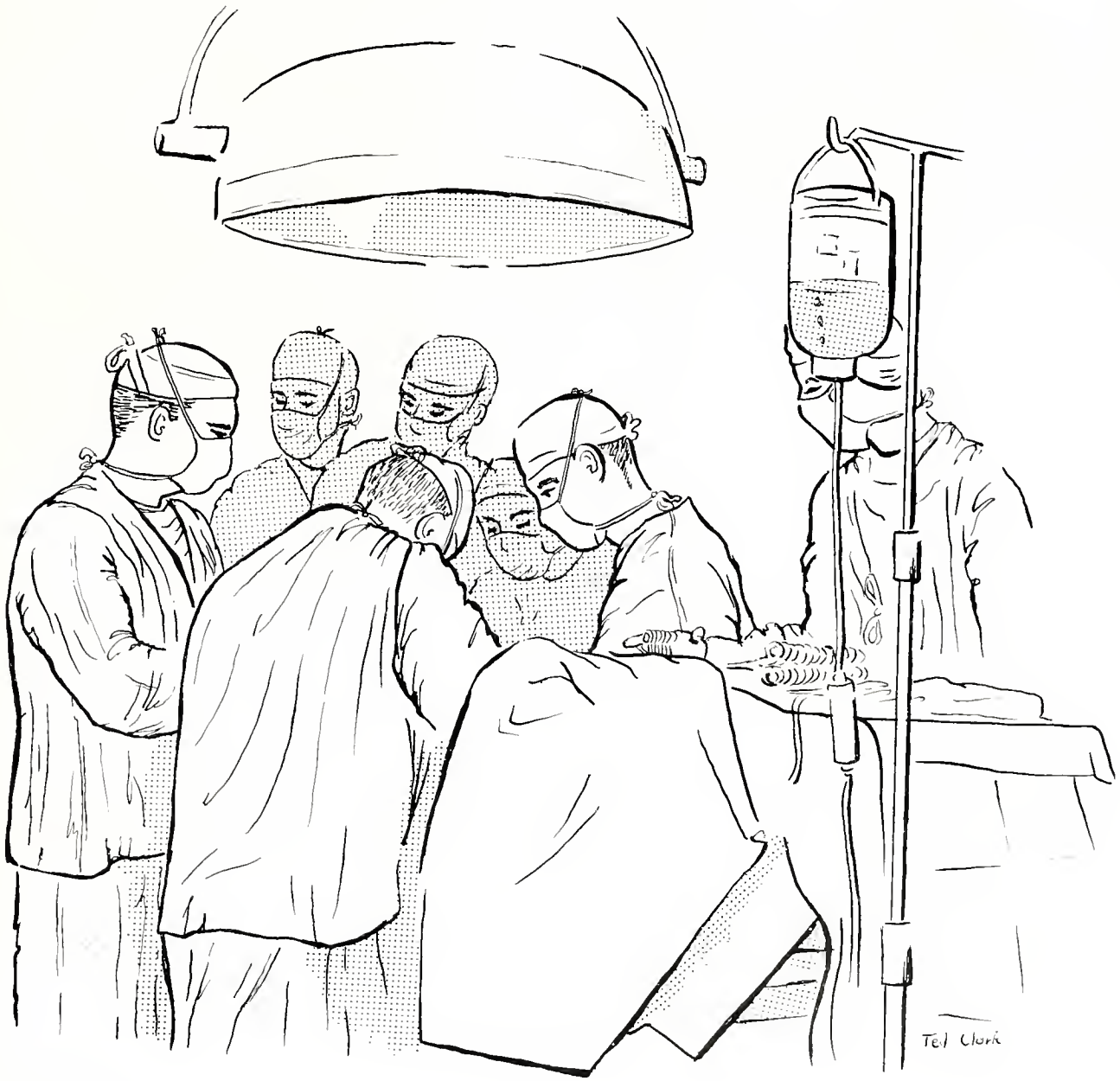
8. For a discussion of some of the considerations involved in making such a determination, see Ligon, North Carolina Hospital Law 153 (Institute of Government, 1964).
9. N.C. Gen Stat. §§ 160-191.1 to -191.5.
10. Williams v. Hospital, 237 N.C. 387, 75 S.E.2d 303 (1953).
11. Payne v. Garvey, 264 N.C. 593, 142 S.E.2d 159 (1965).
12. Cowans v. Hospital, 197 N.C. 41, 147 S.E. 672 (1929).
13. 269 N.C. 1, 152 S.E.2d 485 (1967).
14. For further discussion of this case, see 45 N.C. L. Rev. 893, 972, 1020 (1967).
15. N.C. 1967 Sess. Laws Ch. 856, codified as N.C. Gen. Stat. § 1-539.9.
16. 33 Ill.2d 326, 211 N.E.2d (1965). Many articles have been written about this case, including a note in 43 N.C. L. Rev. 469 (1965), discussing the lower court's opinion which was later affirmed.
17. See Russell v. Community Blood Bank, Inc., 185 S.2d 749 (Florida, 1966) ("sale" by commercial blood bank with implied warranty); Jackson v. Muhlenberg Hospital, 232 A.2d 879 (N.J., 1967) ("sale" by commercial blood bank with express warranty).

cians, and doctor assistants assume more responsibility for care and treatment in busy hospitals; and

(7) The effect that the growing social independence of minors has on their legal capacity to consent to medical treatment (in North Carolina the minimum age for authorizing treatment is still 21, except for certain emergencies).[18]

These questions can be expected eventually to come up for re-examination by the courts or the legislature, just as did charitable immunity.

18. N.C. GEN. STAT. § 90-21.4.



SCHOOLS and CONFERENCES

The winter months are obviously a time of hard work at the Institute of Government, as these photographs of some groups that have met here recently indicate. *State and County A.B.C. Officers*, upper and middle left, attended schools in January and February. The picture at the lower left shows some participants in the *Building Inspectors'* course, a continuing school with sessions held periodically over several months' time. Immediately below, three participants in the *Council on Mental Retardation* held at the Institute in December. The Institute of Government and the Department of Political Science at the University of North Carolina at Chapel Hill cooperate in a program leading to a master's degree in public administration. Some students who are candidates for the *M.P.A.* are shown, bottom, in a seminar held at the Institute.

The Institute Calendar

March

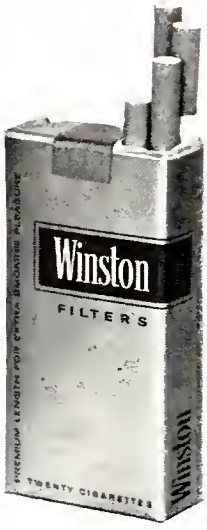
Highway Patrol In-Service School	4-6
	18-20
	25-27
Wildlife Supervisors School	4-8
Public Finance Officers	6-7
Law Enforcement Conference	7-8
Local Government Purchasing School	7-8
City and County Planners	8
Physical Therapy Association	9
County Accountants	11-13
Highway Patrol Management School	11-15
	18-22
Wildlife Basic School	11-16
Personnel School	13-14
Historic Preservation Seminar	10-16
District Court Judges	15-16
School Board Members	15-16
Jail Study Commission	16
Bench-Bar-Press-Broadcasters Committee	16
Public Welfare Supervisors	18-20
N. C. Tax Collectors Association	20-22
Superior Court Judges	23
Wildlife Patrolmen School	25-29
Magistrates School	27-28
Public Information Seminar (tentative)	29-30

April

Highway Patrol In-Service School	1-3
	8-10
	22-24
	April 29-May 1
State Probation In-Service School	3-5
Wildlife Testing	8-11
Eleventh Annual Planning Conference	17-19
Highway Patrol Basic School	April 21-July 26
New Tax Collectors	22-26
Assistant Probation Supervisors	24-26

Continuing Schools

Municipal and County Administration	March 1-2
	March 22-23
	April 5-6
	April 25-27
Building Inspectors	March 1-2
	March 15-16
	March 29-30
	April 5-6
	April 26-27
Police Administration	March 11-14



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