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SCHOOL OF LAW
NORTH CAROLINA COLLEGE AT DURHAM

LAW REVIEW



THE REVIVAL OF A WILL	Charles W. Griffin
FOREIGN DIVORCE REVOLUTION IN NEW YORK (Case note: Rosenstiel v. Rosenstiel)	Augustus H. Davis
SHOULD CHARITABLE INSTITUTIONS BE IMMUNE FROM LIABILITY?	Zollie Richburg
A NOTE ON JUVENILE RECORDS	Norman W. Hendrickson
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THE ROLE OF THE STATE-SUPPORTED NEGRO LAW SCHOOL	Milton E. Johnson

Spring 1966

Volume One - Number One

FOREWORD

The North Carolina College Law Review is composed of articles written by members of the student body, the faculty, and local bar associations.

The students have selected and developed their subjects independently in order to increase their knowledge of special segments of the law, as well as to improve their techniques of legal research and writing.

Daniel G. Sampson
Dean of the Law School

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CONTENTS

	PAGE
THE REVIVAL OF A WILL Charles W. Griffin	1
FOREIGN DIVORCE REVOLUTION IN NEW YORK (Case note: <u>Rosenstiel v. Rosenstiel</u> . .Augustus Davis	5
SHOULD CHARITABLE INSTITUTIONS BE IMMUNE FROM LIABILITY? Zollie Richburg	8
A NOTE ON JUVENILE RECORDS. . Norman W. Hendrickson	19
ADMINISTRATIVE LAW - GOVERNMENTAL IMMUNITY A COMPARATIVE LOOK LeMarquis DeJarmon	25
THE ROLE OF THE STATE-SUPPORTED NEGRO LAW SCHOOL Milton E. Johnson	51

THE REVIVAL OF A WILL

Charles W. Griffin

Only through a revival can a will that has been revoked reacquire testamentary effect. This may require a new testamentary act on the part of the testator in re-executing or republishing the will, at least where the will has been revoked by a will containing a clause expressly revoking former wills. In some jurisdictions it is substantially provided by statute that a will cannot be revived except by a re-execution or republication. Nothing less than a re-execution or republication will suffice to revive a will which has been revoked by operation of law. In some jurisdictions a will may be revived by the revocation of the later will effected by its destruction by the testator.

If a testator tears his will into pieces with the intent to revoke the will, he cannot revive the will later by putting the pieces together and taping them. He must re-execute his will or republish it in order to work a revival. The revocation is complete and is not effected by the subsequent acts of the testator. A testator may revoke his will by cutting out his signature thereto, but he cannot restore the instrument to its effectiveness by pasting the signature in its previous position.¹

A will that has been revoked by marriage is revoked by operation of law. The testator has no control of this revocation. A mere subsequent recognition will not revive it. The same is true where a will has been revoked by the birth of a child. A will revoked by the marriage of the testatrix is not revived by the death of her husband. A will by the testator favoring his wife, which is presumptively revoked by a divorce between the parties, and settlement of their property rights cannot be revived except by acts sufficient to make a valid will.²

A will giving a daughter a specified sum of money, and a codicil giving her specified stocks owned by the testator, in lieu of the money, if the stocks are not found among the testator's assets, the daughter takes neither the money nor the stocks.³ In a few cases it has been held that the failure of a bequest made by a codicil in substitution of a bequest made by the will to the same person has the effect of revising the original bequest, especially where the codicil or later will did not contain a clause expressly revoking the original bequest.⁴

Revocation of Later Will or Codicil as
Revival of Earlier Will

A will which has been revoked by a second will may be revived by a later will which revokes the second will, provided the intention to revive it clearly appears in the terms of the later will. Some cases hold that the revocation of a subsequent will, effected by the destruction of the instrument, does not revive a prior will, at least where the subsequent will contains an express revocation clause. In the states following such a view, the courts disregard the orally expressed desire of the testator that his prior will should stand on his revocation of his later will. The theory is that the revocation of a will by a later will is effective immediately upon the execution of the later will and that once a will has been revoked, it cannot be considered as having either a present or potential existence as a will, even though the instrument has been preserved.⁵

Many authorities adhere to the view that the question whether the revocation of a later will by the destruction of the instrument revives an earlier will which has been preserved depends, in the last analysis, upon the intention of the testator. Various views are expressed as to the effect of the failure to prove his intention. There are some cases that hold the revocation, effected by the destruction of the instrument, of a will which revoked a prior will operates to revive the prior will, unless it is clearly proved that the testator revoked the later will with the intention of dying intestate, or that he revoked it with the purpose of substituting for it a third will, which was never accomplished. Some authorities state that it is presumed from the acts of a testator in destroying the latter will and preserving uncanceled the prior will that he intended to revive and restore the prior will. It has been held, however, that such presumption is of slight weight.⁶ It is clearly not a conclusive presumption. If it is established by the proof that the testator intended to die intestate, the former will cannot be admitted to probate. The presumption of revival, it is said, is rebutted by evidence of the testator's intention not to revive. The intention of the testator should control irrespective of whether the later will revoked the former expressly by a revocation of provisions inconsistent with these of the former will.⁷ The question of the intention of the testator is a question of fact to be decided by the jury. It is not a question of law.

The courts are not agreed whether the provisions of a will which are modified or revoked by a codicil are restored to their original form and effect by the destruction of the codicil with intent to revoke it. Some authorities say that a will is restored to the form in which it stood before a codicil was executed, where the codicil is revoked by destruction of the instrument. Other authorities say the will is not restored to its original status by the revocation of a codicil thereto, effected by the destruction of the instrument, at least, not in the absence of competent evidence that it was the intention of the testator to revive the provisions of the will by the revocation of the codicil. The view of these authorities is that after a revocation has been consummated by the execution of a codicil, the will could not be restored to its original form and tenor simply by the revocation of the codicil. It has been held that where several items of a will have been specifically revoked by a codicil and the codicil afterward destroyed at the testator's direction, the items of the will so revoked cannot be revived by paid declarations of the testator to others, than the original attesting witness to the will, who do not subscribe as witnesses to the will.⁸

Republication and Re-execution

The re-execution or republication of a will has been held essential in various situations to validate alterations in the will and to revive a revoked will. The terms "re-execution" and "republication" are synonymous in the sense in which they are often used. They are clearly distinct, however, in the respect that a will may be republished by re-execution of the original will or by executing a codicil to the will. A duly executed codicil operates as a republication of the original will and makes it speak from the new date, insofar as it is not deterred or revoked by the codicil. The codicil does not have to be physically annexed to the will and the will does not have to be in the presence of the testator at the time of executing the codicil, where it refers to the will in such a way as to identify that instrument beyond doubt. If a codicil revokes in terms portions of the will, it republishes the will as of the date of the codicil in respect of all parts not revoked.⁹

There are many ways that a will or codicil to a will can be revived. In the previous pages I have attempted to set out a few of the ways in which this can be accomplished. There

are many more that have been omitted. By far the safest and best ways to revive a will or codicil are to re-execute or republish the will or codicil. The two methods of revival of a will are sure methods and will eliminate much unnecessary litigation by heirs and legatees. To revive a will or codicil, re-execute or republish the prior will or codicil and be sure that the revival is complete.

FOOTNOTES

1. Henry v. Fraser, 62 A.L.R. 1386 - case in which an instrument was held entitled to probate, where the testator's signature had been erased and restored by him, appear to have been decided upon the theory that the will was revived, but that it had not been revoked.
2. In re McGraw, 42 A.L.R. 1283 (1926).
3. Owen v. Busiel, 83 N.H. 345, 59 A.L.R. 1103 (1928).
4. 59 A.L.R. 1109, 1110, note 3, supra.
5. Hawes v. Nicholas, 71 Tex. 481, 10 S.W. 559.
6. Whitehill v. Halbing, 28 A.L.R. 916, 917.
7. In re Burt, 162 A.L.R. 1053.
8. Collins v. Collins, 110 Ohio St. 105, 38 A.L.R. 230.
9. Neibling v. Methodist Orphans Home Ass'n, 51 A.L.R. 692, 123 A.L.R. 1404.

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FOREIGN DIVORCE REVOLUTION IN NEW YORK

(Case note: Rosenstiel v. Rosenstiel)

Augustus H. Davis

For 160 years, the State of New York has recognized adultery as the only cause of divorce. Domestic Relation Law, Section 170. Many people have criticized the New York law as being outmoded, heartless, cruel or even archaic. But New York defends public policy of the State as to divorce "exists to promote the permanency of the marriage contracts and the morality of the citizens of the State." Hubbard v. Hubbard, 228 N.Y. 81, 126 N.E. 508 (1920). There was once a refusal in the State to approve the practice of its residents going to other jurisdictions to evade the New York law and get divorces upon grounds forbidden in New York.

It is well established that if residents of one state so desire, they may go to another state and get a divorce and the Full Faith and Credit Doctrine will apply. Williams v. North Carolina, 325 U.S. 226 (1945). On the other hand, if the residents go to another country, the laws of the state will determine if the foreign decree is to be recognized. Where the grounds in the foreign forum do not undermine the laws of the state and the other requirements such as residence and jurisdiction have been adhered to, should not the divorce be deemed valid? But the problem arises where the foreign court grants divorces without strictly applying the rules of jurisdiction and where residency can be arrived at by minimal contact.

On July 9, 1965, the Court of Appeals set a precedent in Rosenstiel v. Rosenstiel, 16 N.Y. 2d 64, 262 N.Y.S. 2d 86. The court decided that recognition is to be given to foreign divorces based on grounds not accepted in New York where personal jurisdiction of one party to the marriage has been acquired by minimal contact and jurisdiction of the other party was obtained by the other party answering through an attorney. This was a milestone as far as divorce proceedings were concerned in New York. Now residents of New York can go to a foreign country and not have the divorce declared invalid as was the case in Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E. 2d 60 (1948). This case did not stand on all fours with Rosenstiel v. Rosenstiel, *supra*, because neither party in the Caldwell case went to Mexico. They merely secured resident

counsels in Mexico who proceeded for them and obtained the divorce.

Martens v. Martens, 284 N.Y. 363, 31 N.E. 2d 489 (1940) has long been the existing New York law. In this case at page 490 the court said:

Judgments of courts of foreign countries are received in evidence in our courts when duly authenticated, but they differ from judgments of courts of our sister states to which, by constitutional mandate, full faith and credit must be given. They must not contravene our public policy. In order to pass upon the question as to whether a judgment of a court of a foreign country is to be recognized, there must be a disclosure of the jurisdiction of the foreign court of the subject matter and of the parties.

Rosenstiel v. Rosenstiel, supra, was an action in which Lewis Rosenstiel contended that his 1956 marriage to Susan Rosenstiel was invalid and he should be granted an annulment on the grounds that Susan Rosenstiel's Mexican divorce was invalid. In 1954, Felix Kaufman went to Juarez, Mexico, registered as a resident and filed an action for divorce based on incompatibility and ill-treatment between the spouses. In all, he spent about one hour in Mexico and the divorce was granted. The wife submitted to the jurisdiction by appearing through an attorney and filed an answer in which she admitted the allegations of her husband's complaint. Mr. Rosenstiel was upheld by the New York Supreme Court but the appellate division reversed. The reversal by the appellate division was upheld by the Court of Appeals. In the majority opinion written by Judge Bergan, he declared that there was no difference in substance between a one-day divorce granted in Mexico and a six weeks' divorce granted in Nevada and that the public interest of New York was not differently affected; that in these modern days and times the marriage was an entity and traveled with the parties. In a sharp dissent, Judge Scileppi held that the Mexican divorce in the Rosenstiel case should be invalidated and so should every other one of the type coming up in the future.

It seems that the anxiety of couples in their attempts to obtain foreign divorces has caused the New York Courts to

broaden the divorce laws, and that the trend is leaning heavily toward the day when mail-order divorces will be valid.

SHOULD CHARITABLE INSTITUTIONS BE IMMUNE FROM LIABILITY?

Zollie Richburg

Tort law is never stationary. Courts are constantly making changes and this fact must always be borne in mind. What was once the rule has now become the exception. Because of the fluidity of subject-matter, some cases cited in this article may be overruled before it is off the press. It is necessary to note that some of the concepts expressed herein are my personal concepts.

As every law student knows, American courts from time to time have adopted and adhered to decisions handed down by English courts. Although English courts have repudiated some of these decisions, some American courts, nevertheless, still adhere to them as being sound law.¹ In the year 1876, a landmark decision was handed down by the Supreme Court of Massachusetts.^{1a} This case is often cited to support one principle of law--that is, one cannot sue a charitable corporation for the negligent act of its servant or agent. In making this determination, the court relied on an English case,² which held that persons entrusted with the performance of a public duty cannot be held liable for an injury sustained by an individual through the negligence of workmen employed under them.

In 1885, Maryland³ was faced with a similar problem. The Maryland court cited another English case⁴ which held that "if charity trustees are guilty of a breach of trust, the person thereby injured has no right to be indemnified by damages out of the trust fund."⁵ The Maryland case held that an action does not lie against a state House of Refuge for an assault on an inmate by an officer thereof.

The Maryland and Massachusetts decisions, cited supra, are unique in that the case Massachusetts relied on was overruled ten years previously and the case Maryland relied on was overruled nineteen years prior to that state court's decision.⁶

Many grounds have been stated in an attempt to justify the doctrine of charitable immunity.⁷ Some courts which adhere to the immunity rule base their decisions on the ground that charity exists for the benefit of the public.⁸

Another theory which is frequently used is that of public policy.⁹ This theory is predicated upon the conception that donors will be discouraged for fear their gifts or donations will go to pay tort claims.¹⁰

Many courts, however, hold that the doctrine of charitable immunity is a theory unsupported by statutory law and should not be supported by case and judicial law.¹¹ The immunity rule has been repudiated in many states and is now a minority rule in America.¹² There are some states which impose liability by statutes.¹³ Three states have restricted the immunity rule to those who receive the benefits free.¹⁴ It is difficult to place a state in a certain class and say whether it adheres to the immunity rule. Professor Prosser¹⁵ listed twenty jurisdictions which have repudiated the immunity rule. In addition to the jurisdictions listed by Professor Prosser, Ohio has repudiated it except perhaps for churches.¹⁶ The States of West Virginia,¹⁷ Mississippi,¹⁸ Alabama,^{18a} Illinois,^{18b} New Jersey,¹⁹ Washington,^{19a} Idaho,^{19b} and Pennsylvania²⁰ may be added to this list as repudiating the immunity doctrine completely.

Whether and to what extent a person injured by a servant or employee of a charity can sue a charity in jurisdictions not abolishing the immunity rule is a difficult question. Some courts seem to be walking a tightrope, never exactly overruling the immunity rule but always making exceptions to it. One exception is that if the charitable institution carries insurance, then an injured party may sue and recover to the extent of the insurance.²¹ Another exception is that if the charitable institution exercises due care in its selection of employees, it cannot be held liable for injuries resulting from the negligence of the employees.²² Where immunity is not absolute, it is usually called the "qualified immunity rule."²³ The Restatement, Torts, takes the position that "no one, except the State, has complete immunity from liability in torts."²⁴

The immunity rule has been severely criticized by learned writers.²⁵ These writers favor an outright repudiation of the immunity rule. One theory has been advanced for circumventing the rule. If the immunity is in force in a jurisdiction, why not let the injured party waive the tort and sue in contract?²⁶ To better understand the criticism, one must understand why charities were immune in the first place.

In the early days of society, hospitals bore the true character of charitable institutions. They were a haven for the indigent ill, lame, and disabled. The expense of their operation and maintenance was, for the most part, borne by contributions from charitable inclined citizens. The indigent rarely paid for services rendered to them. Charity in its true sense prevailed. Charitable institutions had little, if any funds, and a suit by an injured party would work a depletion on the charitable funds.

Today charity is big business.^{26a} Tax deductions sometimes make it actually profitable for donors to give to charity.^{26b} Charity today is a large-scale operation with salaries, costs, and other expenses similar to business generally. "The old rule of charitable immunity was justified in its time, on its own facts. Today we have a new set of facts. It is true that the new facts are still described by the same word in our language--charities--but that is because our language has not changed as the facts of our life have changed."²⁷

The immunity rule is a doctrine built entirely on sand, as evidenced by the decisions of Massachusetts²⁸ and Maryland.²⁹ Some courts even insist that if the immunity rule is to undergo mutation, the only surgeon capable of performing the operation is the Legislature.³⁰ The rule is not the creation of the Legislature, and what the court put together it certainly should be able to dismantle. If a court can close its doors without legislative help, there is no justifiable reason why it cannot likewise open them.^{30a}

As has been stated,³¹ a charity may protest to high heaven its unwillingness to be sued and the protest avails it not. In other states charities are protected by an invisible wall immunity.³²

"The immunity doctrine began in error, lifted its head in fallacy, and climbed to its shaky height only because few dared to question whether charity was really charity."³³ The question never arose whether the rule was grounded in good moral and sound law. Courts were content to refer to the previous decisions. It is inconceivable, to say the least, that the courts, in weighing the property interest of a charity against the interest of a victim of its tortious act, value the property interest of the charity more highly than

that of the innocent victim.

In conclusion, it seems that the immunity rule assaults equality of the law and the maxim "where there is a wrong there is a remedy to redress it." The modern trend and weight of authority is that the immunity rule is definitely out. "Charity suffereth long and is kind, but in the common law it cannot be careless. When it is, it ceases to be kindness and becomes actionable wrong-doing."³⁴

FOOTNOTES

1. See e.g., *Foreman v. Canterbury Court of Queen's Bench* Law Rep. 1870-71, 214, and then see notes 2, 3, and 4.
- 1a. *McDonald v. Mass. General Hospital*, 120 Mass. 432, 21 Am. Rep. 529 (1876).
2. *Holliday v. St. Leonard*, 142 E.R. 769 (1861).
3. *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495 (1885).
4. *Heroit's Hospital v. Ross*, 8 E.R. 1508 (1861).
5. See note 4, supra (headnote).
6. *Mersey Dock Trustee v. Gibbs*, 11 E.R. 1500 (1866). It is curious to note that none of these cases really involved charity in its true sense. The *Heroit's Hospital* case, supra, involved a claim for damages on the part of an applicant for rejection from the benefit of the charity. The *Holliday* case, supra, was the performance of a public duty. The defendant was relieved of liability because of the General Highway Act, 5 and 6 W.4, c. 50. The American cases stressed certain dicta which were uttered by English judges.
7. For an excellent discussion on this point, see Harper and James, The Law of Torts, pp. 1667-1671, Sec. 29.16 (1956). Not many grounds nor lengthy criticism of this doctrine will be attempted. Those who like the doctrine are entitled to their preferences. The writer prefers to agree with the opinion of Justice Musmanno in the

- Flagiello case, infra, note 20, and the Restatement, infra, note 24. Charities should not be allowed to perpetrate injustice to some in order to bestow charity on others. If public policy demands such a rule, the legislature, not the courts, should make the first move.
8. Taylor v. Protestant Hosp. Ass'n, 85 Ohio St. 90, 96 N.E. 1089 (1911). The only question presented was whether defendant would be liable for the negligence of its nurse in leaving a sponge in the body of deceased. The court held "no," and gave the usual reason.
 9. Vermillion v. Woman's College of Due West, 104 S.E. 649 (1916). "If public policy ever required that charitable institutions should be immune from liability for the torts of their servants, that public policy no longer exists . . . to exempt charitable and non-profit corporations from liability for their torts is plainly contrary to our constitutional guaranties," infra, note 15, Noel v. Menniger Foundation, 267 P. 2d 934 (1954).
 10. See 23 A.L.R. 907 (1921). This reasoning is difficult to see with insurance so easily obtainable.
 11. Gamble v. Vanderbilt University, 138 Tenn. 616, 200 S.W. 510 (1918). This case did not exactly overrule the immunity rule, but it cut so deeply into the flesh of charitable immunity, its survival is doubtful. See Spivey v. St. Thomas Hosp., 31 Tenn. App. 12, 211 S.W. 2d 450, which intimated that the only immunity now granted to charity is the depletion of its trust fund. For a thorough investigation of the immunity rule, see Miss. Baptist Hosp. v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951). This case represents the modern trend.
 12. Roanoke Hosp. Ass'n v. Hayes, 1 A.L.R. 3d 1026 (1965). See Prosser, Torts, 3d ed., p. 1024, Sec. 127 (1964). See notes 17-20, infra.
 13. Michael v. St. Paul Mercury Indemnity Co., 92 F. Supp. 141 (W. D. Ark. 1950). See note 19, infra. See also Ark. Stats. Secs. 64-1525 and 66-517.
 14. Morton v. Savannah, 148 Ga. 438, 96 S.E. 887 (1918); Baptist Memorial Hosp. v. Marrable, 244 S.W. 2d 567

(1951); and Indiana, *Ball Memorial Hosp. v. Freeman*, 196 N.E. 2d 274 (1964). Should "a patient entirely unskilled in legal principles, his body racked with pain, his mind distorted with fever, be held to know, by intuition, the principle of law that" he can recover for the negligence of the charitable corporation's servant only if he is a paying patient? See dissent by Justice Fraser, *Lindler v. Columbia Hosp.*, 98 S.C. 25, 81 S.E. 512. For a thorough investigation of all cases prior to 1951 dealing with the immunity doctrine, see 25 A.L.R. 2d 1-200 (1950). A.L.R. listed five states that support the view that paying patients can recover. See A.L.R. 2d Supplement Service (1960 issue), p. 2080, sec. 25. This is an error. One of the cases cited was *Williams v. Hospital*, 237 N.C. 387 (1953), note 22 *infra*. The holding in the *Williams* case reads: "We are impelled to the conclusion that no exception should be made in our rule of immunity in favor of paying patrons of charitable institutions."

15. See note 12, *supra*. These jurisdictions are: Alaska, *Tuengel v. City of Sitka*, 14 Alaska 546, 118 F. Supp. 399 (1954); Arizona, *Roy v. Tucson Medical Center*, 72 Ariz. 22, 230 P. 2d 220 (1951); California, *Malloy v. Fong*, 37 Cal. 2d 356, 232 P. 2d 241 (1951); Delaware, *Durney v. St. Francis Hosp.*, 7 Terry, Del. 350, 83 A. 2d 753 (1951); Florida, *Sawannee County Hosp., Corp. v. Golden*, Fla. 1952, 56 So. 2d 911; Iowa, *Haynes v. Presbyterian Hosp. Ass'n*, 241 Iowa 1269, 45 N.W. 2d 151 (1950); Kansas, *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P. 2d 934 (1954); Kentucky, *Sheppard v. Immanuel Baptist Church*, 353 S.W. 2d 212 (1961); Michigan, *Parker v. Port Huron Hosp.*, 361 Mich. 1, 105 N.W. 2d 1 (1960); Minnesota, *Maeller v. Hauser*, 237 Minn. 368, 54 N.W. 2d 636 (1952); Montana, *Howard v. Sister of Charity of Leavenworth*, 193 F. Supp. 191 (1961); North Dakota, *Rickbeil v. Grafton Deaconess Hosp.*, 74 N.D. 525, 23 N.W. 2d 23 (1961). New York, *Bing v. Thunig*, 2 N.Y. 2d 656, 143 N.E. 2d 3 (1957); Oklahoma, *Gable v. Salvation Army*, 186 Okla. 687, 100 P. 2d 244 (1940); Oregon, *Hungerford v. Portland Sanitarium and Bener. Ass'n*, Or. 1963, 384 P. 2d 1009; Puerto Rico, *Tavarez v. San Juan Lodge No. 972, B.P.O.E.*, 1948, 68 Puerto Rico 681; Utah, *Sessions v. Thomas D. Dee Memorial Hosp. Ass'n*, 94 Utah 460, 78 P. 2d 645 (1938); Vermont, *Foster v. Roman Catholic Diocese of Vermont*, 166 Vt. 124, 70 A. 2d 230

- (1950); District of Columbia, President and Directors of Georgetown College v. Hughes, 1942, 76 U.S. App. P. C. 133, 130 F. 2d 810; and Wheeler v. Manadnock Community Hosp., 103 N.H. 366, 171 A. 2d 23 (1961). As to Virginia the writer has doubt if the immunity rule is in force there. Virginia seems to be in zone of partial immunity and repudiation. See Roanoke Hosp. Ass'n v. Hayes, 204 Va. 703, 133 S.E. 2d 559 (1963). If the person injured is an invitee, then he can recover.
16. Gibbon v. Y.W.C.A., 170 Ohio St. 280, 164 N.E. 2d 563 (1960).
 17. Adkins v. St. Francis Hosp. of Charleston, 143 S.E. 2d 154 (1965).
 18. See note 11, supra. The writer doubts if there is any immunity left.
 - 18a. Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915). This case gives an excellent discussion of the McDonald case, supra; Professor Prosser listed Alabama as one state which restricts the immunity rule to those who receive the benefits free, supra, note 12. As far as the writer can discern, Alabama has rejected the doctrine outright. See Laney v. Jefferson County, 32 So. 2d 542, 544 (1947). In the Tucker case, the court pretermitted the question as to liability for injury to a non-paying patient. But it was intimated that the charitable corporation would be liable. The Laney case expressly states that there is no immunity. The court in the Laney case was not called upon to answer that question. Since the author is basing this article on quality of reasoning as well as numerical volume, Alabama has to be placed as one of the states overruling the immunity doctrine. Even some courts which cite the Tucker case are confused to its holding. See e.g., Williams v. Hospital, 237 N.C. 387 (1953); and Muller v. Nebraska Methodist Hospital, 160 Neb. 279, 70 N.W. 2d 86 (1955).
 - 18b. Darling v. Charleston Community Memorial Hosp., 211 N.E. 2d 253 (1965). 211 N.E. 2d at page 260 reads: "We agree that the doctrine of charitable immunity can no longer stand . . . a doctrine which limits the liability of charitable corporation to the amount of liability

insurance that they see fit to carry permits them to determine whether or not they will be liable for their torts and the amount of that liability, if any."

Illinois was one of the jurisdictions which held that an injured person could sue the charity and recover to the extent of the insurance carried by the charity. See e.g., *Johnston v. Girwin*, 208 N.E. 2d 894 (1965).

19. *Anasiewicz v. Sacred Heart Church*, 74 N.J. Super. 532, 181 A. 2d 787 (1962). The court repudiated the immunity rule but it was reenacted by statute, N. J. S. 2A: 53A-7, 10, N.J.S.A.; this statute was passed for the purpose of giving the charities time to take out insurance.
- 19a. *Friend v. Cove Methodist Church, Inc.*, 396 P. 2d 546 (1965).
- 19b. *Wheat v. Idaho Falls Latter Day Saints Hosp.*, 78 Idaho 60, 297 P. 2d 1041 (1956).
20. *Flagiello v. Pennsylvania Hosp.*, 417 Pa. 486, 208 A. 2d 193 (1965). This opinion by Musmanno, Justice, is undoubtedly the best opinion handed down in many years.
21. See Sixth Decennial Digest and General Digest, Third Series, of West Publishing Company, Charities, Key Number 45 (2).
22. *Berry v. Odom*, 222 F.S. 467 (M.D.N.C. 1963). It is not the author's intention to list all exceptions to all states, but the exceptions that are common to most states. To list the various exceptions from each state would be too numerous. Take e.g., North Carolina. A servant can recover for administrative negligence of the charity. *Cowans v. Hospital*, 197 N.C. 41, 147 S.E. 672 (1929). "Thus the rule to which we adhere is that of qualified immunity." *Williams v. Hospital*, 237 N. C. 387 (1953). "The majority of the courts allow strangers to the charity such as visitors, bystanders, invitees, and employees to recover against it, but refuse to allow beneficiaries of the charity to recover." Note 30 N.C. Law Rev. 67, (1952). *Herndon v. Massey*, 217 N.C. 610, 85 S.E. 2d 914 (1940).
23. See note 12, supra.

24. Restatement, Torts, sec. 886 (1939); Restatement (2d), Trusts, sec. 402, Subsec. (2) reads: "A person against whom a tort is committed in the course of administration of a charitable trust can reach trust property and apply it to the satisfaction of his claim."
25. Appleman, The Tort Liability of Charitable Institutions, 22 A.B.A.J. 48 (1936); Feezer, The Tort Liability of Charities, 77 U. Pa. L. Rev. 191 (1928); and Zollman, Damage Liability of Charitable Institutions, 19 Mich. L. Rev. 395 (1921).
26. Note 32 N.C.L. Rev. 129 (1953-54). This seems to be a good theory where immunity is absolute, except the injured party is limited only to what he had paid. If he is receiving the benefits free, then he recovers nothing. In a state with a direct action statute, see *Oltarsh v. Aetna Ins. Co.*, 15 N.Y. 2d 11, 204 N.E. 2d 622 (1965), the injured party may by-pass the charity and sue the insurer; and if he is successful, he may recover to the content of the insurance contract. This may not be just, considering the fact that the charity may not carry a sufficient amount of insurance to compensate the injured party. See note 18a, supra, where recovery was allowed in contract even though the plaintiff could have sued on the tort. One thing has puzzled this writer. If a charity knows that it is immune from liability, why would it take out insurance? It seems as though the charity is paying premiums for nothing. Take e.g., the case of *Springer v. Federated Church of Reno, Nevada*, 283 P. 2d 1071 (1955), where the court held that exemption from tort liability may voluntarily be waived by charitable organizations for the benefit of their members. There is no logic in the decision. This type of reasoning can lead to defrauding the insurance company. If the charity is a hospital and one of its doctors is injured, then, in order to retain his service the charity waives its immunity. A charity probably will not waive its immunity for a patient who is injured, because he is neither doctor nor nurse, and his service is neither needed nor required.
- 26a. The term business has no definite or legal meaning and is not dependent on whether enterprise is profitable or has prospects of being profitable. One can best

understand how charity is big business by a comment in 1963 Duke L.J. 506, Charitable Annuities: Cost and Capital Gain in Light of 1962 Revenue Rulings. "It is not uncommon practice today for charitable institutions to issue annuities." An example is cited in footnote (2). Suppose the donor transfers to a charity property worth \$80,000. In return the charity promises to pay him \$5,000 per year for life. The donor's life expectancy is ten years so that he could have purchased a \$5,000 life annuity from an insurance company for approximately \$50,000. He has in effect made a gift of approximately \$30,000 to charity." If the donor lives for twenty years, then the charity will pay \$100,000. This will be a loss of \$20,000.

- 26b. See e.g., *Passailaigue v. United States*, 224 F. Supp. 682 (1963). Taxpayer granted use to a charitable corporation certain property. Under the Internal Revenue Code of 1954, Treasury Regulations Sec. 1.170-1 (c) provides that "if a contribution is made in property, other than money, the amount of the deduction is determined by the fair market value of the property at the time of the contribution . . ." (Emphasis added.) Taxpayer was able to deduct \$2,400 a year. See also *Orr v. United States*, 343 F. 2d 553 (1965). Taxpayer sued for refund. The taxpayer made payment for liability insurance on his automobile and airplane used by him in part for the benefit of a church. The court refused to award him a refund saying that he (taxpayer) was going to take out liability insurance anyway and that the church was not the sole beneficiary of the insurance nor airplane and automobile. See comment cited in Duke L.J., note 26a, supra.
27. *Parker v. Port Huron Hospital*, 361 Mich. 1, 105 N.W. 2d 1 (1960). "A pure charity is one which is entirely gratuitous, and which dispenses its benefits without any charge or pecuniary return whatever." In *Re Lenox's Estate*, 9 N.Y.S. 895 (1890).
28. See note 1, supra. Some courts call the doctrine of charitable immunity the "trust fund" theory, which simply means a fund which, legally or equitably, is subject to be devoted to a particular purpose and cannot or should not be diverted therefrom. No matter what the

immunity rule may be called, the injured party still suffers and the wrong, which some courts made legal, still remains.

29. See note 3, supra. Both cases represent a good job of judges and lawyers as not doing their homework. If the judges and lawyers had done their homework, they would have realized that English courts had overruled the cases relied upon not once but twice. A doctrine was built without having any supporting structure. It was like building a house without a foundation, soon the house will crumble. And just like the house, the doctrine of charitable immunity will and has crumbled in most jurisdictions.
30. *Lindler v. Columbia Hospital*, 98 S.C. 25, 81 S.E. 512 (1914). See note 20, supra, dissent by Jones, Justice.
- 30a. See note 20, supra.
31. See note 27, supra.
32. See notes 1, 3, and 22, supra. Many jurisdictions have gotten away from the immunity rule, and there is a trend among some jurisdictions to take the immunity away gradually. The erosion is too slow for the already leisurely stroll justice has taken.
33. See note 20, supra.
34. See note 18a, supra.

A NOTE ON JUVENILE RECORDS

Norman W. Hendrickson

The fundamental philosophy of juvenile court laws is that a delinquent child should be considered and treated not as a criminal, but as a person requiring care, education and protection. Therefore, the primary function of juvenile courts is not to convict or punish but to prevent crimes and rehabilitate juvenile delinquents.

The note on juvenile records speaks to the point of how these records and proceedings are treated by the court.

Chapter 97 of the North Carolina Laws of 1919 entitled "An Act to Establish Juvenile Courts," now Article 2, Section 110-21 of the General Statutes, was before the court for construction in State v. Burnett¹ where, among other things, it stated that the court shall maintain a full and complete record of all cases before it to be known as the Juvenile Records.

- (a) All records may be withheld from indiscriminate public inspection in the discretion of the judge of the court but such records shall be open to inspection by the parents, guardians, or other authoritative representatives of the child concerned.
- (b) No adjudication under the provision of this act shall operate as a disqualification of any child from any public office and no child shall be denominated a criminal by reason of such adjudication nor shall such adjudication be denominated a conviction. This act shall be construed liberally and as remedial in character.

Now in Malone v. State,² an Ohio case, the defendant was sixteen years of age. It was held therein that it was prejudicial error to permit cross-examination of a defendant in a criminal case as to the commission of offenses prior to the one for which he is being tried, when such inquiry was predicated upon a juvenile court proceeding. The court further stated: "Misdeeds of children are not looked upon in the juvenile court as crimes carrying conviction but as

delinquencies which the state endeavors to rectify by placing the child under favorable influence and by the employment of other corrective methods. Motivated by a humanitarian impulse, the law prohibits the use of juvenile proceedings or proof developed thereon against a child, in any other court, to discredit him or to mark him as one possessing a criminal history."

In State v. Kelly (La.)³ the court held that a fourteen year old witness for the state in a homicide prosecution could be impeached neither by the use of juvenile court records involving the witness nor by questions relative to juvenile proceedings.

Also in Burge v. State (Texas)⁴ the court held that a witness testifying for the state, in an effort to convict the defendant of soliciting his wife to engage in illicit relations with other persons, could not be impeached by testimony to show that the witness had been found guilty in a juvenile court.

And in State v. Guerro (Ariz.)⁵ the court held that a nineteen year old complaining witness in a prosecution for forcible rape, could not be asked impeaching questions regarding a juvenile record for the purpose of showing prior unchastity. Also in State v. Cox (Mo.)⁶ the court held in a prosecution for having carnal knowledge of a female under eighteen years of age, the defendant could not be allowed to cross-examine the prosecutrix regarding alleged conflicting statements made by her in the juvenile court, to affect her credibility and to lay grounds for impeachment regardless of the nature of the delinquent or the hearing thereon in the juvenile court, under a statute forbidding the use of such evidence in any other proceeding. Thus, the majority view appears to be that juvenile records cannot be admitted in evidence in any other proceeding.

However, in People v. Smallwood (Mich.)⁷ the court held it was a reversible error in a trial for statutory rape to refuse to allow cross-examination of the complaining witness, a girl of fifteen years of age, who was the daughter of the accused and who had shown both a lack of morals and a hostile motive for having made this charge. When the daughter was on the witness stand, she was asked on cross-examination whether he had been in trouble with the juvenile authorities before.

On objection the lower court excluded the question stating that the "juvenile records are not admissible." The reviewing court stated: "There is no question but that this salutary statute is for the purpose of protecting a child when it becomes a ward of the state. Its aim is to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past. It prohibits the use of juvenile court proceedings or evidence obtained therein against a child in any other court to discredit him as one possessing a criminal history."

However, in the present case, there was no effort to impeach the child's character but rather to ascertain her credibility. In conclusion, the court said: "We think the testimony should have been received, not in extenuation of rape, but for its bearing upon the question of whether the mind of the girl was so warped by sexual contemplation and desires as to lead her to accept the imagined as real, or to fabricate a claimed experience."

Conclusion

We can now reach the following general conclusions:

1. In regard to statutes against the use of juvenile records or proceedings therein, there seems to be no disagreement that the prohibition should receive a literal construction.
2. That proceedings in a juvenile court are not criminal in character, leaving the actors with any criminal stigma.
3. The consensus of opinion is that the best interest of the public, is to reform the juvenile offender and then protecting him from afterward being dragged back into the criminal class by the automatic operation of the law for habitual offenders.

FOOTNOTES

1. State v. Burnett, 179 N.C. 735 (1920).
2. Malone v. State, 130 Ohio St. 443, 200 N.E. 473 (1936).
3. State v. Kelly, 169 La. 753, 126 So. 49 (1930).

4. *Burge v. State*, 96 Tex. Crim. Rep. 32, 255 S.W. 754 (1923).
- 5.
6. *State v. Cox*, 263 S.W. 215 (1924).
7. *People v. Smallwood*, 306 Mich. 49, 10 N.W. 303 (1943).

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The following authorities support the proposition that proceedings in juvenile courts are not criminal cases:

- Arizona*-*Arizona State Dept. of Public Welfare v. Barlow*, 80 Ariz. 249, 296 P. 2d 298, 300 (1956).
- Arkansas*-*Ex parte King*, 141 Ark. 213, 217 S.W. 465, 467 (1919).
- California*-*Ex parte Daedler*, 194 Cal. 320, 228 P. 467 (1924).
- Colorado*-*Kahm v. People*, 83 Colo. 300, 264 P. 718, 719 (1928).
- Connecticut*-*Cinque v. Boyd*, 99 Conn. 70, 121 A. 678, 680-681 (1923).
- Florida*-*Ex parte Kitts*, 109 Fla. 202, 147 So. 573, 575 (1933).
- Georgia*-*Hampton v. Stevenson*, 210 Ga. 87, 78 S.E. 2d 32, 33, (1953).
- Idaho*-*Hewlett v. Probate Court*, 66 Idaho 690, 160 P. 2d 77, 79 (1946).
- Illinois*-*Lindsay v. Lindsay*, 257 Ill. 328, 100 N.E. 892, 45 L.R.A., N.S., 908 (1913).
- Indiana*-*Harris v. Souder*, 233 Ind. 287, 119 N.E. 2d 8, 11 (1954).
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- Kansas*-*In re Turner*, 94 Kan. 115 P. 871, 873 (1915).
- Kentucky*-*Marlow v. Commonwealth*, 142 Ky. 106, 133 S.W. 1137, 1140 (1911).
- Louisiana*-*State v. Smith*, 209 La. 363, 24 So. 2d 617, 619 (1945).
- Maine*-*Wade v. Warden of State Prison*, 145 Me. 120, 73 A. 2d 128, 132 (1950).
- Maryland*-*Moquin v. State*, 216 Md. 524, 140 A. 2d 914, 916 (1958).
- Massachusetts*-*Farnham v. Pierce*, 141 Mass. 203, 6 N.E. 830 (1886).
- Michigan*-*Robinson v. Wayne Circuit Judges*, 151 Mich 315, 115 N.W. 682, 686 (1908).

- Minnesota-Ex parte Peterson, 151 Minn. 467, 187 N.W. 226, 227 (1922).
- Mississippi-Wheeler v. Shoemaker, 213 Miss. 374, 57 So. 2d 267, 277 (1952).
- Missouri-State ex rel. Matacia v. Buckner, 300 Mo. 359, 254 S.W. 179, 180 (1923).
- Montana-State ex rel. Palagi v. Freeman, 81 Mont. 132, 262 P. 168, 170-171 (1927).
- Nebraska-State ex rel. Miller v. Bryant, 94 Neb. 754, 144 N.W. 804 (1913).
- New Hampshire-In re Poulin, 100 N.H. 458, 129 A. 2d 672, 673 (1957).
- New Jersey-Ex parte Newkosky, 94 N.J.L. 314, 116 A. 716, 717 (1920).
- New Mexico-In re Santillanes, 47 N.M. 140, 138 P. 2d 503, 508, 511 (1943).
- New York-People v. Lewis, 260 N.Y. 171, 183 N.E. 353, 355, 86 A.L.R. 1001 (1932).
- North Carolina-State v. Burnett, 179 N.C. 735, 102 S.E. 711, 714 (1920).
- North Dakota-State ex rel. City of Minot v. Gronna, 79 N.D. 673, 59 N.W. 2d 514, 534 (1953).
- Ohio-Malone v. State, 130 Ohio St. 443, 200 N.E. 473, 478 (1936).
- Oklahoma-Killian v. Burnham, 191 Okla. 248, 130 P. 2d 538, 539 (1942).
- Oregon-State v. Dunn, 53 Or. 304, 99 P. 278, 280 (1909).
- Pennsylvania-Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198, 199 (1905).
- Rhode Island-Givardi v. Juvenile Court of Sixth Judicial Dist., 49 R.I. 336, 142 A. 542, 543 (1928).
- Tennessee-Childress v. State, 133 Tenn. 121, 179 S.W. 643, 644 (1915).
- Texas-State v. Thomasson, 154 Tex. 151, 275 S.W. 2d 463 (1955).
- Utah-Mill v. Brown, 31 Utah 473, 88 P. 609, 613 (1907).
- Vermont-In re Gomez, 113 Vt. 224, 32 A. 2d 138, 139 (1943).
- Virginia-Jones v. Commonwealth, 185 Va. 335, 38 S.E. 2d 444, 447-448 (1946).
- Washington-Weber v. Doust, 81 Wash. 668, 143 P. 148, 150 (1914).
- West Virginia-State ex rel. Hinle v. Skeen, 138 W.Va. 116, 75 S.E. 2d 223, 227 (1953). Certiorari denied 345 U.S. 967, 73 S.Ct. 954, 97 L.Ed. 1385 (1953).

Wisconsin-State v. School, 167 Wis. 504, 167 N.W. 830, 831 (1918).

District of Columbia-Thomas v. United States, 74 App.D.C. 167, 169, 121 F. 2d 905 (1941).

Statutes

The following authorities support the proposition that proceedings in juvenile courts are not criminal cases:

Alabama-Ala. Code, Ch. 7, Tit. 13, 377-378 (1940); and see Love v. State, 36 Ala. App. 693, 63 So. 2d 285, 286 (1953).

Alaska-Alaska Comp. Laws Ann. 51-3-22 (1958).

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ADMINISTRATIVE LAW - GOVERNMENTAL IMMUNITY

A COMPARATIVE LOOK

LeMarquis DeJarmon

When one, who has received all his training in the common law, looks at the development of administrative law in the common-law countries and at its development in the civil-law countries, he is immediately impressed with the difference in treatment. In the common-law countries, the starting point has been the recognition of complete immunity on the part of the sovereign and yet at the same time not recognizing the right of the official to share in that immunity. The common-law countries, by stripping the official acts are called into question, have in actuality converted what should be an action between the government and the governed into an action between two private persons.¹

On the other hand the droit administratif of France has never had anything like strict personal liability of public officers. The French public officials enjoyed complete immunity along with the French sovereign. This immunity seems to have been the results of an early French procedure. In the pre-revolutionary days, under the Ancien Regime whenever an attempt was made to bring suit against one of the King's officials, the King would have the action transferred to his own council for disposition. The end product of this practice was that, for all intents and purposes, the official was immuned from suit in the ordinary courts of the country.²

It is readily apparent that the common-law countries and the civil-law countries started at opposite poles, i.e., the former giving the official no immunity, the latter affording the official complete immunity. This difference in the treatment of the administrative official may be explained in part by the impact of earlier history. England which had the experience of the pre-Magna Charta era behind it was naturally more suspicious of the actions of a despotic executive, and therefore looked to the judiciary for the protection of individual liberties. France, contrariwise, by virtue of its historical experiences was more suspicious of the judiciary.³ Thus, to the French, separation of powers meant the non-interference with the administration by the judiciary.⁴ The same general attitude prevails in most of the countries which adopted the civil law. In Germany, under the first Reich, the

judges attempted to protect the individual from police power, but the effort was rather short-lived. The judges lost their power during the police-state of the eighteenth century. Even after the Konstitutionalismus of the nineteenth century the idea was advanced that Reichstaat, itself, meant individual protection from the executive through the legislature and the judiciary, but it did not mean the protection of the individual from the legislature through the judiciary.⁵ Indeed, under the Meiji Constitution of Japan the judiciary was precluded from reviewing the actions of the administration.⁶ The civil-law countries had a different feeling for the administration from that which America and England had. Consequently, it is to be expected that one would place its confidence in the administration while the other placed its confidence in the judiciary.

The common-law countries took great pride in the fact that public officials were not covered by the immunity of the sovereign. The fact that the officials could be sued in damages for acts performed within the scope of their official duties was viewed as a significant triumph of the rule of law. "Every official," said Dicey, "from the Prime Minister down to the constable or collector of taxes is under the same responsibility for every act done without legal justification."⁷

In the United States also official responsibility was the accepted doctrine. Justice Holmes, speaking for the Massachusetts court in Miller v. Horton,⁸ took the position that the Health Statute either could provide for payment or ". . . if it does not, may leave those who act under it to proceed at their peril." At the stage neither the English nor the American courts were impressed by the idea that official responsibility would have the effect of making the officer timid in his official actions. The knowledge that his official acts may open up this officer to a personal damage action, may well cause an officer to approach his duties with extreme caution, timidity and with reduced efficiency. The civil law thought that this circumstance was a major consideration and, therefore, the judiciary should not interfere in the problems of administration. Unlike the civil law, the common law was very slow in recognizing this result, and consequently placed its primary emphasis on the official being amenable to the law.

In this light the doctrine of Miller v. Horton⁹ is still followed in a number of American states, although it has been

repudiated by a good number of the American states as well.¹⁰ However, it should be noted that on the Federal level, Miller v. Horton no longer represents the accepted view. The Federal courts have come to realize, what the civil law had long since recognized, that the threat of personal actions against the officer deprives the public generally of effective and efficient administration.

Thus, in Spaulding v. Vilas,¹¹ a defamation action, the court granted a limited immunity to a post office official against an action questioning his statements made in line of duty. It was thought that Spaulding v. Vilas did not give an immunity from tort actions in general, but was merely an expression of the doctrine of privilege, an integral part of the law of defamation. This view may require some re-thinking in the light of the court's broad language in a much later case. In Barr v. Matteo,¹² another defamation case where the complaint also alleged malice, Mr. Justice Harlan, speaking for the majority, said:

The reason for the recognition of the privilege has been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of those duties--suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous and effective administration of policies of government. . . .

We are told that we should forbear from sanctioning any such rule of absolute privilege lest we open the door to wholesale oppression and abuses on the part of unscrupulous government officials. It is perhaps enough to say that fears of this sort have not been realized within the wide area of government where a judicially formulated absolute privilege of broad scope has long existed. It seems to us wholly chimerical to suggest that what hangs in balance here is the maintenance of high standards of conduct among those of public service. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of

actual injustice which will go unredressed, but we think the price a necessary one to pay for the greater good. And there are, of course, other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner.¹³

The above quoted excerpt from Mr. Justice Harlan's opinion shows how far the American court has moved from Miller v. Horton, and much farther, indeed, from Chief Justice Holt and Lord Mansfield. In Ashby v. White,¹⁴ Chief Justice Holt declaimed that "if public officers will infringe man's rights, they ought to pay greater damages than other men, to deter and hinder other officers from like offenses." Some four decades later, Lord Mansfield put the proposition even stronger. Said Lord Mansfield:

Therefore, to lay down in an English court of Justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the great seal is accountable only to God and his own conscience; that he is absolutely despotic and can spoil, plunder and affect his Majesty's subjects both in their liberty and property, with impunity, is a doctrine that cannot be maintained.¹⁵

England did establish such "monstrous proposition," however, a hundred years later in Chatterton v. Secretary of State of India.¹⁶ The United States Supreme Court and the English courts, at least in one area, have moved closer toward the civil law's position that those who are charged with the duties of government should be left free to govern. The language of the United States Supreme Court is broad enough and the reasoning of the Court is general enough to accommodate the civil law's position as to general tort actions outside of defamation.

Both the United States and England started with the concept that the sovereign could not be sued without its consent. The English based the immunity on the old feudal concept that "the King can do no wrong." This concept was very much like the French concept under the Ancien Regime that "le roi est honest homme." In the beginning this was a privilege which adhered to the person of the king, but when the Crown became

the institutionalization of the King, the immunity which adhered to the King's person, adhered to the Crown. The same line of reasoning can be applied to the French in the post-revolutionary era. But the reason why the United States adopted the concept is more obscure. There was no historical basis for the importation of the personal immunity of the King in the United States. This may be one of the great ironies of history that a nation founded on the desire to escape a despotic executive, immediately thereafter grants to the executive an immunity. It has been rationalized by some that the immunity was a natural growth, for one could not have an action against the source on which the right depended. Thus, since all rights emanated from the state, it was illogical to claim that one could complain of a wrong as against the state which granted the right.¹⁷ This writer submits that for the most part these explanations are just rationalizations. It is more likely that the concept crept into American jurisprudence as a part of the general importation of the common law.

However, it was not long before most courts realized that complete immunity had the effect of leaving a large number of its citizens without a remedy in numerous situations in which the governmental interest came into competition with the interest of the individual. The mere withholding of the immunity of the sovereign from the sovereign's servants was not a sufficient answer or proper solution to the problem. Frequently the official was not able to respond in damages. This circumstance led the parties to make direct applications for relief to Parliament or to Congress for the correction of administrative wrongs. This practice was cumbersome and to some extent was expensive. Consequently, both England and the United States found it necessary to provide some method whereby the citizen could seek redress for alleged wrongs of the State. The wrongful collection of taxes was a great impetus behind the move, and was one of the compelling reasons behind the establishment of the United States Court of Claims. Both common-law countries came to this conclusion in contracts long before they were willing to relax the immunity in the area of torts. England allowed suits against the government in contracts in the late eighteen hundreds, along about the same time that the United States created the Court of Claims.

In tort, however, the United States did not enact the Federal Tort Claims Act until 1946 and England did not enact its Crown Proceedings Act until 1947. The main thrust of

these Acts can be readily identified as a desire to make the government liable for the torts of its servants. Thus the effort was to place the common-law citizen more nearly similar to that of the civil-law citizen. Yet even under these Acts a great deal of difficulty remained.

The Crown Proceedings Act of 1947 in both England and Scotland drew a distinction between agencies of government, as well as imposing or retaining some limitations upon the type of action which may be brought and upon the remedies available against the Crown. The United States, also, has imposed limitations on the type of actions which can be brought. On the Federal level, for example, mandamus can only be brought in the District Court for the District of Columbia, and in some instances injunction will not lie at all.¹⁸ Nevertheless, classification of agencies is more important under the Crown Proceedings Act than it is under the Federal Tort Claims Act. In England, those agencies which are not classified as Crown agencies or as Crown Servants are admittedly outside the scope of the Crown Proceedings Act of 1947. The regulation of these agencies can only be discovered in a wide range of case law and statutes.

The test for distinguishing these agencies is not too clear, but Tomlin v. Hannaford¹⁹ suggests that the true test is the degree of control exercised by the Minister over the agency. This appears to be particularly true of the public corporations in the absence of statute. Where the enabling statute is silent, the courts usually consider a number of factors, including but not limited to the following: does the Crown appoint the members of the corporation? Can it levy rates? Is the property vested in the Crown? Whether the funds are received from the Crown and must they be returned to and audited by the Government? Does it have discretionary powers of its own which can be exercised independently without consulting any representative of the Crown? Whether the corporation is incorporated under the ordinary company legislation or whether its functions were formerly performed by private enterprise? But even considering all these factors, generally public corporations of the type commonly called commercial will not be entitled to the privilege of the Crown, while as to corporations of the Social Service type may be more readily regarded as servants of the Crown.²⁰

In some instances, it should be noted, that these

difficulties have been relieved by specific statutes. For example, the Electricity Act of 1957, the Television Act of 1954, and the Atomic Energy Authority Act of 1954, provide that these public corporations do not have Crown status or do not function on behalf of the Crown and shall not be entitled to the privilege of the Crown.

The Federal Torts Claims Act of the United States also places limitations on the type of actions for which recovery can be obtained. For example, usually actions based on the administrator's act of omission are not subject to suit. The same can be said of acts which involve a wide range of discretion. The courts feel that in conscience it should not substitute judicial discretion for that which the legislature has entrusted to the executive. In addition, American courts in administrative matters have a tendency to draw a distinction between the planning or policy stage of administration and the execution stage of the administrative process.²¹ Under this distinction the court can and did hold that governmental immunity would preclude a suit for damages for negligence in a policy decision to ship fertilizer despite attendant risk, and the consequent Texas City explosion.²²

The civil-law countries and England could not have reached this result under their present approach to administration. Even though the Crown Proceedings Act creates greater problems in classification of agencies than does the Federal Tort Claims Act, yet once the classification had been made, the distinction drawn in Dalehite would probably not impress the English judges. Certainly it would not impress the Conseil d'Etat. Even in the United States the Court subsequently has shown an unwillingness to follow the Dalehite lead. On at least two occasions the Court has veered away from Dalehite without overruling it.²³ The feeling seems to be that even government must perform its "good Samaritan" tasks in a careful manner.²⁴

Another area in which the English, the American and probably the civil-law courts may have taken a different approach has been in the area of recovery. Even here this difference, if any, may be more apparent than real. In the United States and in the civil-law countries, once the judgment is rendered it is collected in the same manner as all other judgments are collected. However, in England, the Crown Proceedings Act of 1947 left the common-law rule, that

no execution could issue against the Crown, untouched. Therefore, even if the agency should be amenable to the Act, recovery rests only in the duty of the agency to pay. Section 25(3) provided that when an order is made by any court against the Crown for the payment of a sum of money, then the proper officer of the court should deliver up a certificate to that effect to the other party affected. On delivery of the order to the person acting as Solicitor of the Crown, the department incurs a duty to pay the sum. The Act also provided that no execution or attachment or process in the nature thereof should issue from any court for the enforcement of any payment by the Crown of any money or cost due under an order of court. In addition, Section 2(2) imposes liability for breach of a statutory duty upon the Crown only in those instances where the statutory provision in question is binding upon other persons as well as the Crown. Obviously this provision is not fulfilled by Section 25(3) of the Act. Therefore, any recovery under the Act as against the Crown is binding only on the conscience of the sovereign.²⁵ But as pointed out earlier, this may be of little or no difficulty. For in practically every instance the agency involved pays. "Le roi est honest homme!"

It should be noted that as against local authorities, which are not classified as Crown servants, execution can be levied against them. It appears that this phase of the problem did not bother the English courts; once the right of action for wrongful acts was awarded, execution necessarily followed. So from the time of Mersey Dock, etc. v. Gibbs²⁶ local authorities were amenable to suit for their wrongful acts on the theory that they were just corporations and consequently should be liable as corporations. Therefore, England never had anything to parallel the American distinction of "proprietary" and "governmental" functions. In the United States, municipal corporations, even in the absence of statutes, have been held liable for wrongful acts in the furtherance of "proprietary" functions, but immune from such suits for wrongs done in the furtherance of its "governmental" functions. The differences between these two functions are sometimes indefinable. But yet, these differences have permitted Ohio not to impose liability on a municipality for injury caused by a fire truck on its way to a fire (governmental) and at the same time impose liability on the municipality for injury caused by a fire truck returning from a fire (proprietary).²⁷ It is believed that Mersey Docks

blessedly daved England from such distinctions.

After Mersey Dock, there appears to have developed a principle that if the property of the local authority was acquired for a particular purpose or on trust, it would be immune from taking in satisfaction of the general liabilities of the authorities. The local Government Act of 1933 attempted to abolish this special treatment of the particular purpose property of the local authorities. However, as a practical matter it still exists. Under this Act charges against this type of property must have the consent of the Minister before they are levied, so in the practice the Minister merely withholds his consent as to this type of property. Consequently, the remedy of creditors against the authority lies primarily against the revenue rather than against the capital. Section 211 of the 1933 Act limited the rights of mortgagees to the appointment of receivers who will be concerned only with the revenue. In case of default, it appears that the proper remedy lies in an order of mandamus which would direct the levying of rates sufficient to meet the demands upon the authority.²⁸ But mandamus, being an extraordinary remedy, is discretionary and a delay in application for it may result in its not being issued.²⁹ As a practical matter, it is a very rare occasion where any successful litigant against a local authority has been unable to collect. The result is about the same as in any other country.

The big difference between the United States and England is in the status of the police. In the United States, the police are identified with the municipality and the municipality may in some instances be responsible for the actions of the police.³⁰ So the police are covered by the general issue as to whether the immunity applies or not, based on the nature of the particular function. In England it appears that the constable occupies a rather peculiar position. Apparently he is not a servant of the Crown and therefore is not covered by the Crown Proceedings Act. Although he is paid partly by the local authority and partly through grant in aid from the national government, he is not considered a servant of either. Therefore, it must be that he is subject to the control of the Minister of Justice only. But this is in the main for direction purposes only, so in the case of wrongful acts the constable seems to be suable as an individual. Although the writer has found nothing to support him, he suspects that the Minister of Justice or his department will usually assume the

burden of the constable where the suit was for acts committed in the line of duty.

Another interesting facet of the doctrine of governmental immunity comes into focus when the action is between a citizen and a foreign government or subdivision thereof. Usually when the action is between the citizen and his own country, the courts have made an effort to balance the two conflicting interests. But once the element of the foreign government is added, governmental immunity takes on new vitality. The Anglo-American courts frequently grant the immunity to a foreign sovereign usually for reasons such as: (1) foreign states are equal and therefore are not amenable to each other, (2) such suits would be vexatious to the peace of nations, or (3) such suits would be an impingement on the dignity of the foreign sovereign.³¹ France has established the rule of sovereign immunity where it can be shown that the state possesses an independent legal personality.³² With countries the immunity is a customary international rule. Where the problems arise is in connection with the political subdivisions of countries. The Commonwealth countries evidently influenced by the doctrine of the indivisibility of the Crown usually grant immunity to political subdivisions. The United States has restricted the application of the immunity on the theory that component parts have no separate independence.³³ However, a determination by the political departments of government that a subdivision is independent will usually be recognized by the court.

In connection with foreign public corporations the immunity has been granted or withheld on the theory that the corporation's acts were either public or private in nature. The result of this is similar to that discussed earlier under the American law of municipal corporations. Liability is made to turn upon whether the act complained of was a public act or a private act. England, however, extended the immunity to the Tass Agency,³⁴ even though the Soviet enabling act gave Tass all the rights of a juristic person. In addition the Soviet Ambassador to Great Britain had filed a certificate to the effect that Tass was a department of the State exercising the rights of a legal entity. The court may have thought that this action would be embarrassing to the foreign sovereign, since Tass was a department the sovereignty was indivisible. On balance it appears that both the common-law countries and the civil-law countries apply the doctrine of sovereign immunity quite consistently as a rule of international custom

whenever a citizen is complaining of the acts of a foreign sovereign or its instrumentality.³⁵

Any comparative discussion of administrative law must of necessity consider the vast difference between the common law and the civil law in the area of procedure and structure for the handling of administrative matters. It is in this area that the common law lawyer finds that he is in less familiar surroundings. On the whole, the common law and the civil law are surprisingly close to each other as far as results and substantive law are concerned. The method by which these results are achieved is where the big difference occurs.

On the whole, the United States and England have developed along parallel lines. The regular law courts have exercised some restraint on the administrative process by means of judicial review. The usual practice is to seek mandamus, certiorari or a declaratory judgment, in order to have the administrative act either directed or set aside. The injunction device has received rather limited use on the Federal level, usually because of the doctrine of indispensable parties which, in effect, would make any such action an action against the government.³⁶ Chief Justice Vinson has put it in this fashion:

Since the sovereign may not be sued, it must . . . appear that the action to be restrained or directed is an action of the sovereign. The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet the requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the power delegated to him by the sovereign. If he is exercising such power, the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented.³⁷

Both England and America have developed their administrative law through the normal channels of the common law and by way of analogies with private law. This approach once led Mr. Justice Jackson as late as 1955 to comment that ". . . the United States and England had backed into the whole problem (of administrative law) rather than face it."³⁸

On the other hand, France approached the problem of administration in an entirely different manner. The French created a series of courts outside its ordinary judicial system which were to specialize in administrative matters. The system so unfamiliar to the lawyer trained solely in the common law can best be understood by considering the background out of which it arose and by looking at its present structure. During the Ancien Regime the King transferred all actions involving his officers to his council, thereby giving the officer an immunity from suit in the ordinary court. Then Article 75 of the Constitution of Year VIII of the revolution (1800) provided that "public officers . . . may not be sued for acts performed officially except by virtue of a decision authorizing such suits by the Council of State and in such cases suits may be brought in the ordinary courts."³⁹ But, after the fall of Napoleon III, one of the first acts was the Decree of September 19, 1870, repealing Article 75. It was thought by some of the leading politicians, such as Leon Blum, that the intent of the September Decree was to make the French Administrative Official liable for his actions in the ordinary courts, much as the English and American public officials were answerable to the common-law courts.⁴⁰ If this were the intent of the Decree, it fell short of its mark. For in the period of three short years the Decree was rendered nugatory by the decision in the Pelletier case of July 28, 1873.⁴¹ In this case the Cour de Cassation, influenced more by the concept of fundamental law and history, declared that the fundamental doctrine of the separation of powers rendered the court incompetent to adjudge the regularity of administrative acts. Despite the impetus of the September Decree, the court refused to entertain the Pelletier complaint. The Pelletier case is without doubt a most significant factor in the development of the French administrative process.

Since the separation of powers doctrine rendered the ordinary courts powerless to hear and determine administrative matters, the Council of State was left free to work with the whole cloth of administrative law. This was primarily so because the French Civil Code was drafted at a time when the continent's major concern was with the private law. Although the Code was supreme and comprehensive in its area, leaving to the ordinary courts only the duty of filling up the gaps, the Code gave little thought to the realm of public law. This is understandable in the light that the Roman law, a sophisticated system indeed, gave little thought to public law.

True, classical Roman law did differentiate between ius publicum and ius privatum. But, it could hardly be regarded that ius publicum was a system of law at all. What relief that was given, was given through the funds in the Imperial Treasury, fiscus. So direct appeals were made to the fiscus, and it more or less compensated as it saw fit. Indeed, there was no formalized system in administration in the sense that the private law of the Romans was systemized. Since the Roman law was the precursor of the French civil law, it is almost to be expected that the Code would give little or no concern to the realm of public law. Consequently, the Conseil d'Etat was left to develop the public law on the basis of inclusions and exclusions, much the same as the English courts developed the common law. Since the Conseil d'Etat dealt exclusively with administration, it was able to build up a great body of judge-made law with special application to the problems of administration. To this writer it is interesting that the Conseil d'Etat on a couple of instances was able to fashion a sort of "equal protection" concept, even without benefit of a Fourteenth Amendment.

Since the common law does not have a body which might be classified as the counter-part of the Conseil d'Etat, it may be well, at this point, to look at the Conseil in its role, structure and organization. Probably the closest thing we have to the Conseil is the United States Tax Court. The United States Tax Court is the successor of the old Board of Tax Appeals, which was described in its enabling Act as an "independent agency in the executive branch of government."⁴² The Judicial Act of 1948⁴³ changed the name of the agency from the Board of Tax Appeals to the United States Tax Court and bestowed the title of "Judge" on its members. But, the Act left that section which described the old agency as an independent agency in the executive branch of government untouched. But even so, the Tax Court cannot be classified as the counter-part of the Conseil d'Etat because appeals from the Tax Court can be taken to the United States Court of Appeals and thence to the United States Supreme Court. The Conseil d'Etat is the Supreme Court for administration. In some instances, as we will see later, the Conseil d'Etat has the first and last word in matters administrative. So by and large, the Conseil d'Etat is a unique institution to the common-law lawyer.

The Conseil d'Etat is an administrative body with a great

deal of independence. It is staffed by career personnel who elected training in administration during their period of study. The Conseil recruits annually from the graduates of the National School of Administration. The school was set up by the French Government in 1945 as an administrative laboratory to prepare the young student for service in the administration. Admission to the National School is by annual competitive examinations and a fixed number of the graduates of the school are selected annually for service in the Conseil d'Etat.⁴⁴ The Conseil consists of one hundred sixty-one members, and that membership consists of three types of members; i.e., the Councilors of State, the Maitres de Requetes and the Auditors. These three positions are also the three echelons within the Conseil.⁴⁵ The promotions within the Conseil follow in that order; the graduate of the National School of Administration comes in as an Auditor and then is promoted up the scale.⁴⁶

It should be noted that the whole Conseil is not a court, the council has divided itself into two sections; i.e., the Administration Section and the Judicial Section. It is the Judicial Section which has the jurisdiction over the development of the law of administration and therefore is the section with which this paper is primarily concerned. Even though the council has divided itself into an administrative and judicial section, it is error to think that the two divisions are compartments which are entirely separate and distinct. The judicial section has a great deal of independence, but it is still a part of the council and some exchange of experience does take place between the two sections. The members of the judicial section are not as readily open to the criticism that they do not understand the problems of the Administration, as are the common-law judges. But despite this exchange of experience, the judicial section is quite independent of the administration.

Originally the judicial section of the Conseil handled all of the litigation in the area of administration; in that respect the council was the court of first and last resort in matters involving administrative law. But, through the years the case load became so heavy that the council was running about three to four years behind docket. So the Reform Act of 1954 was enacted to relieve the Conseil of some of the tremendous load. Under this Act the twenty-three prefectorial councils of seven overseas departments were transferred into

Tribunaux Administratifs. These administrative tribunals replaced the Conseil as first degree judge of administrative act, but the Conseil remained as a court of appeals from these tribunals.

Professor Langaad, University of the Saar,⁴⁷ reports that the council now has a three-fold function: (1) it is a Court of Ascription (judge d'attribution) for administrative litigation arising in extra metropolitan territories, and also for those cases directly submitted to it by law; (2) it is a court of appeals from the Tribunaux Administratifs; and (3) it is the Supreme Court of all bodies having administrative jurisdiction. The ideal of an administrative body, outside the judicial organization, being a final arbiter of the rights of the individual against the administration, is a little difficult for the common-law lawyer to apprehend. Yet, it is this factor which seems to have made the French system so effective.

Since the ordinary courts were not subordinate to the council, the question arose as to what would happen if an individual would submit an issue to the ordinary court and the court would not decline jurisdiction. Would not then the whole system break down? To resolve this difficulty, the French created another body known as the Cour de Conflit, whose sole function is to resolve the problems of conflicting jurisdiction. The Cour de Conflit consists of nine members, four chosen from the Cour de Cassation, four from the Conseil d'Etat and one, the President, is the Minister of Justice. So, if an individual would file an action in the Cour de Cassation and the issue was raised that the case involved an administrative matter, but the court would not decline jurisdiction, then on motion the case would be transferred to the Cour de Conflit. If the Cour de Conflit agreed that an administrative matter was involved, the case would be withdrawn from the law court. This would mean that the litigant, in order to secure a determination of his problem, would have to start his action anew before the Conseil d'Etat. At first blush this procedure would appear to be a little clumsy, and indeed it can prove to be time consuming and it may work some degree of hardship on the poor litigant. But on reflection the procedure is not too alien to that procedure of the common law when the actions of law and equity were not integrated. The more serious objection to this procedure may be that the motion to remove is available to the administration alone. Nevertheless, this system has made for a high degree of uniformity in French administrative law.

The Conseil d'Etat as an administrative court has a broad jurisdiction. It cannot deal with matters concerning either the legislative function--including the conduct of the legislative assembly and the relation of government with the assembly--or judicial functions--including the police judiciaire, or international matters. Yet, within the administrative field so defined the Conseil d'Etat claims and exercises an absolute and universal competence. No administrative act can be withdrawn from the council on the grounds of "act of government" or "reason of state." Thus it seems impossible that Liversidge v. Anderson⁴⁸ could have happened in France. The fact that the public official has great latitude of discretion does not affect the power of the council. Neither the question of "subjective" nor "objective" power,⁴⁹ which the English courts recognize, nor the distinction between planning and execution, which was so important to the United States Court in Dalehite, appears to deter the council.

When Professor Hamson⁵⁰ raised these distinctions with Mr. Le Tourneur, a noted French avocat, during an interview, Mr. Le Tourneur appeared quite baffled by the question. At first he thought that he had misunderstood the question, but when assured that he had not, he could not comprehend the distinction. Apparently one accustomed to dealing with a body specifically trained in administration has found it well equipped to deal with such subtleties of administration. The Conseil d'Etat did decide one case under the Ordonnance of October 14, 1944, which gave to the executive the power to intern "les individus dangereux pour la defence nationale ou la securite publique." Neither the largeness of the power nor the broad grant of discretion deterred the council in its inquiry.

There are generally two actions which are brought before the administrative court. The Recours de pleine jurisdiction is an action for damages and is brought when the individual asserts that he has been injured as a result of the fault of the service. If such assertion is sustained, damages are awarded. The other action--recour pour exces de pouvior--is an action to annul an ultra vires administrative act. The nature of this action is primarily to have the action set aside; it raises a question as to the legality of the act, it does not seek damages.

This is an action which the common-law lawyer may find

peculiar. The plaintiff can file an action with the appropriate administrative court asking that the administrative act be condemned. From that point on the plaintiff is more like a spectator of an argument between the council and the particular administrator. This is a sort of an "action in rem"; the Conseil d'Etat develops its own dossier of the case and produces the evidence in an inquisitorial manner rather than in the adversary manner with which the common-law lawyer is familiar. The council's office of Avocat Generale, who is a sort of institutionalized *amicus curiae*, usually sums up the case for the judges of the Conseil. The Avocat Generale usually does an exceptional job of this, it has been suggested that if one wants to know what a particular case was really about, the summation of the Avocat Generale will reveal more information than the court's opinion. In these cases before the council, the litigant can take part, of course, and often does. He is entitled to see every document submitted to the council and can reply to every argument advanced by the Minister, but he need not, nor is he required to be represented by counsel. The inquisitorial procedure before the council, in pasence, means that there is very little law of evidence, and in fact there is no rule of parol evidence before the council. If this seems strange, it is to be remembered that the Conseil is familiar with the problems of administration. In the United States in a proceeding before an administrative agency, the exclusionary rules of evidence are not strictly applicable on the theory that the agency is an expert in its field and is capable of sorting out the evidence. As an expert it is not so easily led astray as a lay jury might be. Indeed the Federal Courts have held that an administrative agency may utilize, as a basis for its finding of fact (which is binding on the court), evidence which would normally be relied on by reasonable people.⁵¹ "It is convincing," said one court, "not lawyers' evidence which is required."⁵² With this view in mind, the French inquisitorial procedure before the administrative courts, admittedly an expert, is not quite as shocking to the common-law lawyer as it might appear to be at first sight.

As stated earlier in this paper, the law courts from the passage of the Basic Law of August 16-24, 1790, were precluded from interfering with the administration. The Basic Law provided:

Judicial functions are and always will remain

distinct from administrative function. Judges may not under the penalty of forfeiture of office, interfere in any manner with the functions of administrative bodies, or summon administrators before it in connection with the exercise of their jurisdiction.

When the Pelletier Case⁵³ declared this concept more fundamental than the decree of September, 1870, the problem arose as to who was to decide the cases involving official acts which were not only ultra vires but were entirely foreign to the service. It was here that the regular law courts filled the gap, by developing the doctrine of Administrative Trespass (voie de fait). In fact, this is basically two doctrines. The first is to the effect that if an administrative official performs an act devoid of legality to a degree that it reduces the administrative quality to the naked fact that the act arose within the administration, provided the act is not of a general regulatory nature, then the act is disclaimed as non-administrative. The act is then the fault of the person (faute de personne) and the ordinary law courts can take cognizance of the action without running afoul of the Basic Law. This doctrine is somewhat similar to the theory behind the earlier common law view expressed in Miller v. Horton.⁵⁴ The Administration authorizes only acts within the realm of legality, if the administrator goes beyond the reasonable bounds of legality, then he should bear the full responsibility for his acts, i.e., faute de personne. It should be remembered that the French do not draw lines for personal fault as narrowly as the common law did in the Miller v. Horton era. In France, Miller v. Horton would have been handled by the Conseil d'Etat.

The second doctrine is, if the degree of illegality is so high as to go beyond the domain constitutionally occupied by the aggregate of administrative authority, the act then becomes a usurpation of power and therefore non-existent. The act is a nullity. Since it is no longer administrative, the law courts are competent to adjudicate the rights of the parties, again without running afoul of the Basic Law. It should be pointed out here that usurpation of power is not the same as excess of power. Excess of power is still administrative and is within the exclusive jurisdiction of the Conseil d'Etat. But usurpation of power is beyond the administration and the law courts have jurisdiction. Harry Street⁵⁵ has put

it this way: "A mere violation des formes would be an excess de pouvoir but would remain administrative; l'absence totale des formes, i.e., something outside the administrative sphere, would be voie de fait."

The doctrine of Administrative Trespass is an important doctrine in that it fills the gap that might have been left in administrative relief. There may be a voie de fait for which the administration alone can be sued, and the remedy may be not only damages but an order for the administration to cease and desist from the continuance of a complained of activity.

L'Action Francaise⁵⁶ illustrates the workings of this concept. A Paris newspaper had been seized by the order of the Paris Prefect of Police. In the civil action brought by the publisher, it was held that there was no faute de personnel, but since the order authorized seizure anywhere although no menace to public safety was either present or contemplated, there was a voie de fait, for which the administration was liable in the civil courts. In the common law world the order may have been stricken on the grounds that it did not provide adequate standards, but in the absence of finding fault, no basis for damages would have been present. In addition the common law courts could have easily found this to be a discretionary order and the courts should not substitute its discretion for that of the executive.

In looking at the French administrative structure, it should be kept in mind that in addition to the exception of the voie de fait, the jurisdiction of the Conseil d'Etat has also been limited by statute. The liability of the state for acts of teachers to students is decided by the civil courts by virtue of statute.⁵⁷ Claims against the railroads, postal and telegraph services are dealt with in the same fashion.⁵⁸ War damages, damages caused by manoeuvres soldiers pension rights, and workmen's compensation are all enforceable in the civil courts rather than the Conseil d'Etat by virtue of specific statutes.⁵⁹

Aside from these two exceptions--voie de fait and statutory liability--the French administrative system has two meritorious factors worthy of common law consideration. They are the tendency of the Conseil to base administrative liability on the risk created by the administration rather than on the fault of the agency;⁶⁰ and the subjection of all

administrative bodies, whether central or local, to the same law. Through these two factors, the French, who under the Ancien Regime, began with almost complete immunity for public officials, have now approached almost complete responsibility for public officials. Meanwhile, the common law world, which originally provided no immunity for public officials, has now, at least in defamation and perhaps in other torts, moved toward complete immunity.

The French influence can be seen in other civil law countries. Article 96(1) of the Basic Law of West Germany⁶¹ created separate courts, similar to the French Conseil d'Etat, for administration, tax, labor, and social matters. Administrative law in West Germany is developed, like in France, by a body which is an expert in the field. In addition West Germany also has a method--Constitutional Complaint--whereby an individual may initiate directly before the civil court a complaint that his constitutional rights have been violated. This action is not too dissimilar to the French doctrine of voie de fait, and like administrative suits in the United States the action is conditioned on the exhaustion of administrative remedies and on the doctrine of ripeness. This last item may reflect the effects of American occupation. But, under the action the court can annul or order a new trial, this writer is not sure whether the court could also issue a damage award.

In at least one of the new nations, it is noted that the Supreme Court of the Ivory Coast is divided into four chambers: Constitutional Chamber, Judicial Chamber, Administrative Chamber, and the Chamber of Claim.⁶² Of course, this is to be expected since the Ivory Coast has had a past of French influence.

The Meiji Constitution of Japan vested a rather limited jurisdiction over administrative matters in a separate administrative court, but the Constitution of 1946 abolished that court.⁶³ The Constitution of 1946, reflecting American occupation influence, vested jurisdiction over administration in the ordinary law courts. Since the war, administration suits in Japan, like West Germany under the Constitutional Complaint, have increased to the point that these suits comprise the bulk of the court's work. The number of administrative cases before the Japanese courts from May 3, 1947, to December 31, 1957, totaled more than 17,916.⁶⁴

The separate system of courts for administrative matters--the heart of the civil law system--has in recent years received some support from common-law lawyers. In both the United States and England there have been proposals for the creation of separate administrative courts. Professor Robson, before the Committee on Minister's Powers, advocated the creation of an administrative Appeals Court which would be grafted onto the Privy Council. Under this proposal the English High Court would be divested of its supervisory and appellate jurisdiction over administrative matters. Thus, the administrative tribunal would be vested with the ultimate control of administrative matters.⁶⁵

In the United States as well, there has been proposed an administrative court. Under the proposal the court would have jurisdiction over (1) cases involving the judicial review of administrative action otherwise cognizable in other federal courts, other than the Supreme Court, and (2) cases involving the civil enforcement of rules, orders or investigative demands of administrative agencies.⁶⁶ It is doubted that any of these proposals will get too far.

As indicated earlier, the civil law tendency to base governmental liability on the risk created by the administration rather than on the concept of fault of the agency, is a factor worthy of common law consideration. It is unconscionable that one should be required to suffer requited and injury inflicted within the risk of the administrative action, on the theory that the act causing the injury was discretionary or an act of government. Dalehite serves no societal interest. Even the "Good Samaritan" should be required to do his good deeds carefully. If the concept of liability on the basis of risk created is imported into the common law, then there is no need for the separate court system as has been proposed for the United States and England. There is nothing sacrosanct about separate courts, except that the French have had a background recognizing a sort of reserve power in the executive. The common law has never had such; the keystone of the common law has been the concept of the limited executive. The common law courts are not unfamiliar with the concept of strict liability and are quite capable of applying similar principles to an action between the state and its citizens. This writer is cognizant of the fact that those charged with the duty of government should be left free to govern. But, at the same time, like Lord Mansfield, he thinks

that it is a "monstrous proposition" that a public official is "accountable only to God and his own conscience." It is a doctrine which should no longer have a place in the common law.

FOOTNOTES

1. Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891). See also: Attorney General's Committee on Administration Procedure in Governmental Agencies, S. Doc. No. 8, 77th Congress, 1st Session 80-82.
2. Schwartz, Bernard, French Administrative Law and the Common Law World. (1953) New York University Press.
3. Ibid.
4. Ibid.
5. Gottfried Dietze, America-Europe-Decline and Emergence of Judicial Review, 44 Va. L. Rev. 1233 (1958).
6. Kiminebo Hashimoto, Professor of Law, Chuo University, Tokyo, Japan. Conference on Japanese Law, Harvard University (1961).
7. Dicey, Law and the Constitution (9th edition, London, 1939).
8. Note 1, supra.
9. Ibid.
10. See Davis, Administrative Law Cases, p. 469 (1959).
11. 161 U.S. 483, (1896). See also Glass v. Ickes, 117 F. 2d 273 (D.C.Cir., 1940), in which the Secretary of Interior was held to be absolutely privileged to include allegedly defamatory matter in a press release that was related to his official functions. cf. Howard v. Lyons, 360 U.S. 593 (1959). Also MEMORANDUM TO THE HEADS OF ALL DEPARTMENTS AND AGENCIES FROM ATTORNEY GENERAL WILLIAM P. ROGERS, July 13, 1959.
12. 360 U.S. 564, 79 S.Ct. 1335 (1959).

13. Ibid.
14. 2 Ld. Raym. 938, 956 (1703).
15. *Mostyn v. Fabrigas*, 1 Cowp. 161, 175 (1744).
16. *Chatterton v. Secretary of State of India* (1895), 2 Q.B. 189. This case is credited with being the birth of the doctrine of executive privilege in England.
17. See Schwartz, Bernard, note 2, supra. Also, Street, Harry, *Governmental Liability--Comparative Study*. Gellhorn and Schenck, *Tort Action Against the Federal Government*. 47 Colum. L. Rev. 722 (1947). New York has gone farthest among the states by waiving the immunity. Statute provides ". . . State hereby waives its immunity from liability and consents to have the same determined in accordance with the same rules of law as applied to actions . . . against individual or corporations. (N.Y. Ct. of Claims Act, Sec. 8).
18. Clark Byse, *Judicial Review: Sovereign Immunity--Indispensable Parties*. 75 Harv. L. Rev. 1479 (June, 1962).
19. 1 K. B. 18 (1950).
20. *Nottingham Hospital Board v. Owens* (1957), 2 All E.R. 358.
21. *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956 (1953).
22. Ibid.
23. See *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 61 (1955). Also *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957).
24. *Indian Towing Co. v. United States*, supra. Also Mitchell, J. D. B., *Edinburgh University of Scotland, Brussel Conference of Comparative Law* (1958).
25. Mitchell, supra, note 24.
26. (1866) L. R. 1 HL 93.

27. *Federick's Adm's v. City of Columbus*, 58 Ohio St. 158, 51 N.E. 35 (1898) (going to fire) and *Fowler v. City of Cleveland*, 100 Ohio St. 158, 126 N.E. 72 (1919) (coming from the fire).
28. *Hendry*, James McLeod, *Sovereign Immunity from Jurisdiction of Courts*, 36 Can. Bar Rev. 145.
29. See *Rural District* (1899) 1 Q. B. 836. Also *Croyden v. Croyden Rural District* (1908) 2 Ch. 321.
30. *Monroe v. Pope*, 365 U.S. 167, 81 S.Ct. 473 (1961).
31. *Hendry*, supra, note 28.
32. *Dumont v. State of Amazons*, Tribunal Civil de la Seine 1948, Case No. 44, Annual Digest.
33. *Schneder v. City of Rome, Italy*, 83 N.Y.S. 2d 756 (1948), refused immunity to the City of Rome - no analogy between City of Rome and State of Union. Although the City had substantial governmental powers. cf. *Sullivan v. State of San Paulo*, 122 F. 2d 355, 360 granted immunity on theory that determination by Secretary of State held binding on the court.
34. *Krajina v. Tass Agency*, 2 All E.R. 274 (1949).
35. See *Hendry*, note 31, supra.
36. See Byse, *Judicial Review--Indispensable Party*, 75 Harv. L. Rev. 1479 (1962).
37. *Larson v. Domestic and Foreign Consumers Corporation*, 337 U.S. 682.
38. *Jackson*, *Supreme Court in American System of Government*, pp. 46-47 (1955).
39. Street, Harry, *Governmental Liability, A Comparative Study*. Cambridge University Press (1953).
40. Ibid.
41. *Dalt. Per* (1874) 3, 5.

42. Internal Revenue Code 1924.
43. Internal Revenue Code 1954, Subchapter C, Sec. 7441.
44. For fuller treatment of this phase, see Schwartz, note 2, pp. 23-42, supra.
45. The membership is broken down as follows:
 1. Vice President (who is actual head of the Council)
 5. Presidents of Sections
 46. Councilors of State in Ordinary Service
 12. Councilors of State in Extraordinary Service
 49. Maitres des requetes
 38. First Class Auditors
 10. Second Class Auditors
46. Note 44, supra.
47. Langaad, George. French Council of State, 47 Am. Poli. Sci. Rev. 673 (1959).
48. 11 Cambridge L. Rev. 258-79.
49. See Pont of Ayr Collereen v. Lloyd George or Carltonin Ltd. v. Com. of Works. Objective power where the English Courts will inquire as to whether the condition for the exercise of the power did in fact exist. Subjective power--where the Court thinks it is enough that the Minister should honestly believe that the conditions are fulfilled and his statement that he does so believe is conclusive.
50. LeTourneur and Hamson, Control of Discretionary Executive Power in France. 11 Cambridge L. J. 258 (1953).
51. N.L.R.B. v. Service Wood Heel Co. Inc. (CCA 1st-1941), 124 F. 2d 470.
52. Int. Ass'n of Machinist, Tool & Die Makers Lodge, No. 35 v. N.L.R.B. (App. D.C. 1939--110 F. 2d 29).
53. Note 41, supra.
54. Note 1, supra.

55. Street, Harry, supra, pp. 74-6; also Armin Uhler, Doctrine of Administrative Trespass in French Law, 37 Mich. L. Rev. 209 (1939).
56. Reported in Street, Harry, supra, p. 75.
57. Act of 10 July 1899 and of 5 April 1937.
58. Laws of 5 April 1897 and 31 March 1931.
59. See Laws of 16 April 1914; Workmen's Compensation Laws of 9 April 1898 and Laws of 17 April 1901.
60. Friedmann, W. Law in a Changing Society. University of California Press (1960).
61. Mason, J. B. Government, Administration and Politics in West Germany. 52 Am. Poli. Sci. Rev. 513-30; also Rupp. Judicial Review in Federal Republic of Germany, 9 Am. J. Comparative Law 39-40 (1960).
62. Speech, Konan Bebee, Annual Meeting of American Foreign Law Ass'n, April 14, 1961, New York.
63. Judicial Review of Administrative Actions in Japan: Restricted too Much by the Concept of Administrative Discretion, Rendered too Extensive by Trial De Novo. Conference on Japanese Law; Harvard Law School (1961). Kiminebo Hashimoto.
64. Ibid.
65. Robson, Justice and Administrative Law (2d ed - 1947), p. 327. Also Seigert, Government by Decree, p. 317 (1950). Fitzgerald, Safeguards in Administrative Bodies, 28 Can. Bar Rev. 538, 556 (1950).
66. Davis, Suggested Judicial Reforms. 3 Davis Adm. L. Treaties. Sec. 23. 10; also, ABA Code of Federal Procedure, S. 1070-86th Congress, 1st Sess. (1959); S. 1887, 87th Congress, 1st Sess. (1961). H.R. 1960 which passed the House of Representatives but has not been considered by the Senate, would only decentralize the use of Mandamus, i.e., would give Mandamus remedy in administrative actions to other Federal Courts instead of only to the District Court of the District of Columbia.

THE ROLE OF THE STATE-SUPPORTED
NEGRO LAW SCHOOL

Milton E. Johnson

During the era of the "separate but equal doctrine" in public education in the United States, inherited from the decision in Plessy v. Ferguson¹ several Southern States established separate law schools for the exclusive training of Negroes in legal education. The courts continued to restrict the meaning of the original doctrine when applying it to education until it was totally rejected in the school segregation cases of 1954.² Now that the state laws requiring and permitting segregation in public education, including higher education, solely on account of race have been declared unconstitutional,³ the future of the state law schools established for the training of Negroes only have become a concern of many people in and out of education. This is especially true in those states where the pattern of segregation in all the law schools is no longer one hundred per cent segregated. In order to make an appraisal of the worth of these schools, perhaps it would be helpful to consider their backgrounds, physical facilities, teachers, curricula, students, etc. This paper is in light of present day conditions and probable future needs. At the present there are five state-supported law schools operating that were established exclusively for Negroes. These are: The School of Law, North Carolina College at Durham, Durham, North Carolina; The School of Law, Texas Southern University, Houston, Texas; The School of Law, Southern University and A. & M. College, Baton Rouge, Louisiana; The School of Law, South Carolina State College, Orangeburg, South Carolina; and The College of Law, Florida A. & M. University, Tallahassee, Florida.

For a long time some of the Southern states practicing segregation in public education provided out-of-state aid for Negroes to attend universities outside of the state when training offered whites in the state was not provided for Negroes.⁴ Since the law in these states required separate but equal educational facilities for the races, this arrangement was considered by these states as equality of treatment in education.

In 1938, the Supreme Court, in the case of Missouri ex rel Gaines v. Canada,⁵ began to cut at the very foundation of the separate but equal theory of law in education by more strictly

defining separate but equal. The State Supreme Court of Missouri, in construing and applying the separate but equal theory of law to education decided that substantial equality was sufficient but there was a difference of opinion as to the meaning of substantial equality by the State Supreme Court of Missouri and the Supreme Court of the United States. In the instant case, Gaines, a Negro citizen of the State of Missouri, applied to enter the law school at the University of Missouri, the state university attended solely by whites. There was no law school provided at Lincoln University, a state university for Negroes. The curators of Lincoln University were empowered and directed to establish a law school in connection with the University whenever in their opinions it became necessary and practicable. Pending such development, the curators were authorized to arrange for legal education of Negro citizens and pay their tuition at law schools in adjacent states where the training was equal to that obtainable at the Missouri State University.

The curators of the state university, following the state's law and policy of segregation in education, refused to admit Gaines as a student in the law school of the State University of Missouri solely because of his race. He was a graduate of Lincoln University and it was admitted that his "work and credits at Lincoln University of Missouri would qualify him for admission to the school of law of the University of Missouri if he were found otherwise eligible."

Although applying the separate but equal theory, the Court speaking through Chief Justice Hughes, concluded that a Negro living in Missouri was entitled to study law at the University of Missouri, a state school, because there was no other law school maintained by the state which he could attend.⁶

The Court further concluded that the Fourteenth Amendment was applicable by reason of state action through representatives or agents of the state denying a Negro admission to the state university law school. Under the due process and the equal protection clause of the Fourteenth Amendment, it was discriminatory for the state to furnish a law school in the state for whites and not furnish one within the state for Negroes. The obligation of a state to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction, and therefore the equality of

right must be maintained within the state. Providing legal education within the state for white residents while Negro residents having the same qualifications were refused it there and were required to go outside the state to obtain it, constituted denial of "equal protections of law," notwithstanding, there was a limited demand in the state for the legal education of Negroes, and notwithstanding state-made provisions for payment of tuition outside the state for Negroes desiring legal training.

I

Recognizing the legal significance of the Gaines case, the North Carolina General Assembly in 1939 amended the charter of the North Carolina College for Negroes to read in part as follows: ". . . Sec. 2, The Board of Trustees of the North Carolina College for Negroes is authorized and empowered to establish departments of law, pharmacy and library science at the above-mentioned institution whenever there are applicants desirous of such courses. The said Board of Trustees of North Carolina College for Negroes may add other professional courses from time to time as needed for the same is found and the funds of the state will justify."⁷ In 1925, the North Carolina College for Negroes was made the first state-supported liberal arts college in the South for the training of Negro students.

In accordance with the amended charter of North Carolina College for Negroes, the North Carolina College Law School was established in 1939 as a part of that institution and exclusively for Negroes.⁸ Dean M. T. Van Hecke, who was at that time Dean of the University of North Carolina Law School, was responsible for setting up the North Carolina College Law School with the first law teachers coming from the faculties of the University of North Carolina Law School and Duke University School of Law.⁹ For lack of students the law school did not operate until 1940 and has run continuously ever since. During the 1940-41 session, the faculty was composed entirely of members of the University of North Carolina Law School. Three full-time resident Negro instructors and a full-time law librarian were added to the faculty in 1941. In 1942, the present Negro dean was appointed to succeed Dean Van Hecke who resigned. At present the Law School has a full-time resident dean, a staff of full-time faculty members, a librarian, and the continued cooperation of the members of the faculty of the Law Schools of the Universities of North Carolina and Duke

along with the practicing attorneys of the City of Durham. The Law School is fully accredited by the American Bar Association and the State Board of Law Examiners.

The question of legal education for Negroes in the State of Texas was raised in 1946 when Herman Marion Sweatt, a Negro, applied for admission to the Law School of the University of Texas, as a first year student.¹⁰ It was admitted that he was qualified in every way except that he was a Negro and Texas law required the separation of the races in public education. Therefore, Sweatt was denied admission. He promptly filed suit in the State Court to compel his admission upon the ground that its denial constituted an infringement of rights guaranteed to him under the Fourteenth Amendment of the Federal Constitution.¹¹

While this action was pending the Legislature of Texas passed the Act of 1947, S.B. 140 29, Acts 50th Leg., Vernon's Ann. Civ. St., Art. 2643 b, which provided for the establishment of a law school for Negroes at Austin, Texas, immediately and for the establishment of "The Texas State University for Negroes" at Houston, including the Law School when the University is established. Pursuant to this act, the school for first year Negro law students was established at Austin. Sweatt refused to attend after being notified and pursued his case in court. The State Court found that the separate facilities were substantially equal and denied the relief sought whereupon the plaintiff appealed. The Court of Civil Appeals affirmed.¹² The Texas Supreme Court denied writ of error, but the United States Supreme Court granted certiorari and reversed the State Court.¹³ Subsequent to the trial of this same case and before the decision was handed down by the United States Supreme Court, a law school had been established at the Texas State University for Negroes. However, the Court said:

Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior.

As heretofore stated, the School of Law of what is now Texas Southern was created by act of the State Legislature, March, 1947, as a part of the university. During the first operation, the School of Law was located at Austin, Texas. On September 1, 1948, the School of Law was transferred to Houston where it is an integral part of the University campus.

It appears that the State of Louisiana, like North Carolina, made preparations for and established a separate law school for Negroes before applications by Negroes to attend the State University law school were made.

As a result of the Gaines case,¹⁴ The State Board of Education at its meeting in Lafayette, Louisiana, on October 22, 1946, approved the report and recommendations of a special joint committee of the Board of Supervisors of Louisiana State University and the State Board relative to establishment of a School of Law at Southern University. Pursuant to this action, the School of Law at Southern University commenced its first year of operation September, 1947.¹⁵ Except for the Law School Southern was merely a college and not a university, and although there was no statute or provision of the Constitution of the State of Louisiana which by its terms denied the Negroes admission to Louisiana State University and Agricultural and Mechanical College, it was, however, the policy of the Board of Supervisors to deny Negroes admission. The admissions to Southern University were in like manner limited to Negroes by the policy of the Board of Supervisors.¹⁶

The State of South Carolina followed the usual pattern of the Southern states in failing to establish legal education for Negroes within the State until ordered to do so by the courts. John H. WRIGHT, a Negro resident and citizen of South Carolina, over the age of 21, desirous of obtaining a legal education, made application on July 2, 1946, to the Law School of the University of South Carolina and was refused.¹⁷ The refusal was based upon the fact that the applicant was a Negro and that the officials of the university were charged with the duty of operating the same for white persons only, and that they had no right or authority, under the Constitution and law of the State of South Carolina governing the University, to accept the application of anyone other than a white person. The applicant was qualified in every way except for the fact that he was a Negro.

After being refused admittance to the Law School of the University of South Carolina solely because he was a Negro, WRIGHTEN brought an action in Court seeking a declaratory judgment, injunctive relief, and damages.¹⁸ The evidence showed that the General Assembly of South Carolina, in its general appropriation bills for the years 1945, 1946, and 1947, provided that the Board of Trustees of the Colored Normal Industrial, Agricultural and Mechanical College of South Carolina shall use so much of the funds appropriated for Graduate and Law School as is necessary to maintain and operate a law school during the coming year.²⁰

WRIGHTEN contended that it was probable that there would not have been an adequate appropriation and certainly not a mandatory requirement to establish a law school at State College had not his case been brought. At the time the case was heard in the Federal District Court for the Eastern District of South Carolina, Columbia Division, no law school for Negroes had been established by the State. The Court, therefore, ordered the State of South Carolina to furnish WRIGHTEN and others, in like plight, law school facilities equal to those at the University of South Carolina, either at the University itself, the State College, or at any other satisfactory institution in the State; otherwise, furnish none to anyone; and that the State be given until September, 1947, to comply.²¹

Pursuant to the authorization and requirement of the General Assembly of South Carolina of 1947, the School of Law of South Carolina State College at Orangeburg, South Carolina, was established and began operation on September 17, 1947.²² The school opened with nine students, a dean, secretary to the dean, four full-time instructors, and a law librarian. The physical plant now consists of a law building which cost approximately \$200,000, containing six classrooms, offices for the entire Law School staff, two seminar rooms, a student lounge, two reading rooms, librarian's office, moot court room and stack rooms designed to accommodate a law library of 50,000 volumes.²³ The School of Law is approved by the American Bar Association, The State Board of Law Examiners, and the Veterans Administration. The library now contains approximately 20,000 volumes, and is a member of the American Association of Law Libraries.²⁴

For admission as a regular student, an applicant is

required to have completed at least three full years of college work at an accredited institution and must take the Law School Admission Test. However, no particular score on the test is mentioned in the school bulletin as a requirement for enrollment.

The College of Law, Florida Agricultural and Mechanical University, Tallahassee, Florida, was established as a direct result of court action by a Negro applicant to the College of Law of the University of Florida, a State institution providing legal training for the white race only.²⁵ In April, 1949, Virgil D. Hawkins, a Negro citizen and resident of the State of Florida, applied for admission to the first year class of the College of Law of the University of Florida. His application was denied by the Board of Control, the governing body of the State University System, solely because he was a Negro and the Constitution and statutes of Florida prohibited the admittance of any but white students to the University of Florida.²⁶ After being refused admission to the University of Florida's Law School, the applicant initiated court action on May 30, 1949, by filing a petition for a writ of mandamus in the State Court to require the members of the State Board of Control to admit him to the College of Law of the University of Florida for attendance at a summer of 1949.²⁷ The record disclosed that Hawkins passed all the scholastic, moral and other qualifications, except as to race and color, prescribed by the laws of Florida and the rules and regulations of the State Board of Control for admission to the first year class of the College of Law of the University of Florida.

The case went to the Supreme Court of Florida three different times and that Court finally decided on August 1, 1952, that the action be dismissed on the ground that at that time there was in operation at the Florida Agricultural and Mechanical College a duly established and tax-supported law school maintained exclusively for Negroes, at which was offered law courses similar in content and quality to those offered at the College of Law of the University of Florida operated exclusively for white students.²⁸ On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, the petition was granted and in a per curiam opinion the judgment was vacated and the case remanded for consideration in the light of the decision in Brown v. Board of Education.²⁹

The Florida Agricultural and Mechanical University College of Law at Tallahassee, Florida, was established for the legal training of Negro students on December 21, 1949, by the Board of Control of the State of Florida, and the legislative appropriation for the building and operation of the college was made in 1951.³⁰

The College of Law was first known as The Division of Law of Florida Agricultural and Mechanical College, and commenced instruction with the beginning of the 1951-52 school year.³¹ At present the college is located in the center of the University campus and housed in a separate four-story building containing three classrooms, a reading room, stack room, student lounge, moot court room and individual offices for the faculty.³²

The College of Law is approved by the Supreme Court of Florida and the American Bar Association. In order to qualify for admission to the three-year course in law leading to the degree of Bachelor of Laws, the applicant must have earned a four-year baccalaureate degree from an accredited college or university and a Law School Admission test score of at least 350, except in the case of veterans who will be considered for admission after having completed 94 hours of satisfactory work in an accredited college or university.³³

II

Any discussion of the role or worth of an institution, in the opinion of this writer, should consider the aims of that institution, facilities, curriculum and other related matters pertaining to its operation. It is evident from what has been said so far that as far as the states were concerned, these schools were established primarily to avoid integration in this area at that particular time, and the fact that they have and may serve other purposes is purely coincidental.

Facts and opinions stated in connection with the operation and achievements of the school are based on information contained in their catalogues or bulletins, and information gained by the writer from personal interviews and observations. This writer has visited three of the schools in question, talked with the deans of four, and has met with and discussed matter concerning the schools with faculty members from all five law schools within the past three years.

Although these state-supported law schools accept non-resident students, their primary objective is the training of qualified men and women for the practice of law in the state in which they are located. To this end, special emphasis is placed on a comprehensive knowledge of the substantive and procedural law of that state. However, students receive thorough training in the fundamental principles, rules, standards and techniques of law. The program of instruction is designed to enable the student to practice law wherever the Anglo-American system of law prevails. Non-resident students, with the help of the instructors, can learn to make specific application of the rules and principles learned to the law of the states in which they expect to practice.

It appears that all of these law schools use variations of the case method of instruction requiring students to participate actively in the classroom discussions.

Their curriculum varies to some extent in that Texas and Louisiana, by virtue of their environment, offer mineral rights, oil and gas, and some other courses peculiar to practitioners of those states. All are accredited by the American Bar Association and offer the basic courses required. The entire curriculum is composed of required courses at all the schools except Texas which has approximately twenty-five elective courses from which a student may choose three hours during the first semester of his senior year and two hours during the second semester of his senior year. The number of hours required for graduation are as follows: The School of Law, North Carolina College at Durham, Durham, North Carolina, 93; The School of Law, Texas Southern University, Houston, Texas, 86; The School of Law, Southern University and A. & M. College, Baton Rouge, Louisiana, 92; The School of Law, South Carolina State College, Orangeburg, South Carolina, 78; and the College of Law, Florida A. & M. University, Tallahassee, Florida, 96.

Three years of satisfactory work at an accredited college are required for the admission of a degree candidate to the study of law at the named law schools, except the College of Law, Florida A. & M. University, which requires a degree from an accredited college or university. All of the schools require applicants to take the Law School Admission Test and have their score reported, but Florida is the only law school in question with a minimum required score on the test and that is 350.

A combined-degree program is available at those law schools that admit applicants with three years of college work whereby the student may receive from the college or university the degree of Bachelor of Arts or Bachelor of Science upon the satisfactory completion of the first year of work in the law school, and upon the successful completion of the third year's work in law he will be granted the degree of Bachelor of Laws. This arrangement does not pertain to students who have done their undergraduate work in any other college unless such college itself is willing to grant them an undergraduate degree after their first year in the law school.

The general cost per student per year to attend the Negro law schools is shown in the following schedule, not including books, supplies, personal and incidental expenses:

State	Total State Boarding Students	Total State Non-Board- ing Students	Total Out- of-State Boarding Student	Total Out-of- State Non- Boarding Student
North				
Carolina	\$ 701.50	\$ 251.50	\$ 1,051.50	\$ 601.50
Texas	529.00	146.00	829.00	446.00
Louisiana (Room & board not available)		72.00	-	672.00
South				
Carolina	731.50	337.50	931.50	537.50
Florida	650.00	180.00	1,000.00	530.00

The general cost of attending the state schools of law operated for white students is higher than that for attending the law schools operated by the state for Negroes, but it is impossible to make an exact comparison because of the variations in living and boarding expenses at the white law schools.

In the schedule shown on page 62, the registration of the law schools is listed by years as reported annually by John G. Hervey under the heading "Law School Registration" in the Journal of Legal Education. The columns under the heading of each state supporting a law school for Negroes show the number of students in the first, second and third year classes reading from left to right. The number in the square shows the number of special students and the number in parenthesis shows the total registration for the year.

As to the physical facilities of the law schools, each law school is housed in a separate building designed for the law school and affords ample space for offices, classrooms, moot court, law library, stacks, student lounge and reading room for fifty or more students, except the School of Law, Texas Southern University, which occupies spacious quarters on the second floor of the south wing of the administration and classroom building of the University which also offers ample space for necessary operations. The libraries contain from 20,000 to 30,000 volumes each, and can seat from fifty to seventy students in their respective reading rooms.

Approximately ninety-eight per cent of the teaching faculties obtained their legal training at outstanding law schools outside the South, and more than fifty per cent have advanced law degrees or have done work toward same. Their teaching experience varies, but in most cases it extends over a period of from five years to the life of the school.

III

Notwithstanding criticism to the contrary, the Negro law schools have made a definite contribution to the administration of justice, and to the civic and political life of the communities served by the schools and their graduates.

In July of 1963, four professional men, one of whom was a Negro doctor, filed action in Leon Circuit Court in Tallahassee, Florida, to have the College of Law, Florida A. & M. University closed on the grounds that it was inferior and illegally segregated.³⁴ The alleged inferiority was based on the small percentage of graduates alleged to have passed the bar after graduation and the fact that only one member of the student body was qualified to be admitted to the University of Florida Law School. It was further alleged that it cost the

LAW SCHOOL REGISTRATION BY YEARS

Year	Florida	North Carolina	Louisiana	South Carolina	Texas
1947		(27)	(8)	(9)	(27)
1948		(28)	(13)	(12)	(27)
1949		7-8-11	6-6-6	8-6-2	10-14-3
1950		11-7-8	3-5-2 4	8-6-5	7-6-12
1951		4-7-3 2	2-2-5 1	3-6-5 6	10-4-8
1952		7-4-6 3	4-3-1 2	4-3-4	22-5-3 3
1953	1-3-3 10	2-4-4 2	4-2-3 4	3-0-5	25-5-4
1954	6-2-3 1	6-2-4 2	4-1-2 1	3-3-0	31-7-2
1955	10-3-1 1	11-4-4	6-2-4 5	2-3-1	8-9-8
1956	11-6-1 2	9-10-4	3-3-2 2	3-1-2	9-5-4 2
1957	4-6-6 1	10-9-6 1	5-1-2	4-2-3	10-9-5
1958	4-5-6 3	8-5-10	2-2-2 2	3-3-2	27-8-4 1
1959	4-1-6 1	5-8-5 1	3-5-1	3-3-3 1	15-10-6 2
1960	6-2-1 1	10-4-6 1	7-4-0 1	7-2-4	9-6-10 4
1961	3-7-2 2	4-7-3	6-4-4	6-6-2	17-7-5 1
1962	5-3-6 1	13-7-7	6-0-4 8	5-4-5	22-7-6 1

State of Florida \$200,000 to produce one qualified lawyer at the College of Law, Florida A. & M. University as opposed to \$20,000 at the University of Florida, that the taxpayers would save \$75,000 per year by closing the school, sending the one qualified student to the University of Florida, and letting the other students devote themselves to other studies or work for which their qualifications fit them. The allegations were denied as to statistics, and the suit was subsequently dismissed on grounds unknown to this writer.

Before making any statements as to the quality of contributions made by Negro law schools to American communities through their graduates and thereby assessing the often repeated claim that Negro law schools are inferior, and perhaps so inferior that they do not justify their existence, we should consider the following facts. The table below covers only three of the law schools since the information is not available for the others.³⁵ However, it is the belief of the writer that these schools are typical of the others.

School	Number Admitted	Number Graduated	Number Taking Bar	Number Passing	Per Cent Passing
North Carolina		84	Unknown	52	62
South Carolina		39	39	29	74
Florida	169	32	22	17	77

(This schedule covers totals through 1962.)

In 1960, the percentage of those passing the bar examinations nationally was 62 per cent of the total taking the examinations and 71 per cent of those taking the examination for the first time. This was an increase over the years since 1952, when the figures were 59 per cent and 67 per cent, respectively.³⁶

From the above statistics the experience on bar examinations of students from the Negro law schools compare favorable with the national average. However, it is admitted that the percentage of graduates of the Negro law schools passing the

bar is less than that of the graduates of the state law schools for whites. But when we consider the qualifications of the students admitted, this difference of performance is readily understandable.

In most cases the Negro law schools accept students without regard for his LSAT score, and solely on the basis that he satisfactorily passed his college work. Very few of these students, if any, could qualify to enter the state law schools for whites. In many cases those Negro students who can qualify and are accepted enter the white law schools of the South leaving fewer top ranking college students available to the Negro law schools.

If we question the reasons for the poor showing on the LSAT by most of the Negro college graduates, we will have to go back to the student's earlier inferior education in a segregated society with inferior facilities, his family background, culture and economics.

I was informed by a college president that the freshmen entering his school averaged 675 on the admission test used nationally, and the entrance requirement at the state colleges for whites was 800. Only twenty-two out of approximately one thousand Negro freshmen could qualify for entrance to the white schools. Inferior education of Negroes at lower levels and other social factors have severely cut down the number of Negroes qualified to study at higher levels. However, failure to respond well is not attributable to schooling alone--there are other types of segregation and inequality which bear influence--but lower testing level obviously reflects deficient education. On the average Negroes have done more poorly on standard educational tests than others.³⁷

Furthermore, when you consider that the standard entrance tests are prepared by white men, it is possible that these tests do not always reflect the potential of the Negro student. Therefore, it has been possible for the Negro law schools to take the mediocre student who might otherwise become lost in the crowd, and, through a great deal of individual attention which their size permits, qualify him as a lawyer or for service in other areas where a legal education is required or helpful.

The South is in great need of Negro lawyers to protect

the rights of Negroes at a time when their cause is unpopular, be it a property right, tort claim or civil rights, if the opposition is white. The mere presence of a Negro lawyer in a southern community helps the administration of justice and the Negroes' participation in community affairs. With racial discrimination so prevalent in the southern region, it is natural as well as necessary for lawyers to emphasize or point up the importance of human rights, especially as they affect minority groups.

This need has been served to some extent by the Negro law schools, but there is still a great gap to fill. Fourteen of the eighteen Negro attorneys practicing in the State of South Carolina are graduates of the School of Law, South Carolina State College, and three other graduates are practicing in Southern states.³⁸ Thirty-four of the graduates from North Carolina College Law School are practicing in Southern states.³⁹ It is reasonable to assume that the majority of the graduates of the other schools passing the bar in Southern states are also practicing there.

To further emphasize the need for Negro lawyers in the South, there are approximately seventy-five in the State of North Carolina;⁴⁰ eighteen in South Carolina;⁴¹ forty-one in Florida;⁴² and four in Mississippi.⁴³ About the time most of these schools were established, the ratio of Negro lawyers in the United States to Negro population was 1:24,997 as opposed the ratio of white lawyers to white population of 1:702.⁴⁴

In addition to providing legal training to prospective lawyers and others, the law school renders a service to the practicing Negro bar by giving counsel on important issues of the day in the form of institutes and private consultations. The school may also provide for assistance in research and brief writing by qualified students under the supervision of a law teacher. The law school also serves social agencies and indigent persons from time to time in the form of legal aid. And last but not least, the law school is an integral part of the university or college and provides library services for students in other disciplines in need of information peculiar to the law library, and may be constant adviser to the administration in legal matters.

CONCLUSION

Considering the contributions made by the Negro law school in the field of legal education and community service, particularly in the South, it is evident that they are serving a need and useful purpose. During a period of social revolution as we are now experiencing, the Negro minority is in need of more Negro lawyers to help chart the course to complete freedom and equality under the law. His need cannot be fulfilled as well without the Negro law schools as it can with them even though attendance at other state law schools is no longer based on race as a matter of law. This is true because Negro students cannot now qualify in any appreciable number for admission to the other state law schools because of their inability to meet the educational and financial requirements.

The Negro is not entirely responsible for his plight. For years in the South he has been subjected to an inferior segregated education, and to job discrimination, which are partly responsible for his inability to compete favorably with whites for admission to law schools.

However, this does not mean that all students who fail to make a specified score on the admission test cannot become good lawyers. Many students of the small Negro law schools who could not have made, or did not make, a high score on the Law School Admission Test performed satisfactorily in law school and turned out to be good lawyers.

There are some who take the position that since Negroes now have the legal right to attend the white state-supported law schools, the law schools originally established for the exclusive training of Negroes should be closed. The reasons given in support of this position are that it would save the state some money and would achieve complete integration in the law schools. These may be worthy causes, but the results would be unjust at this time, in my opinion. This course of action would lead to de facto segregation, or token integration at best, for at least a student generation. Since the pattern of Negro education in the South has been segregated and inferior, it would take that long for Negro students, studying in an equal educational system, when that is achieved, to be able to qualify in large numbers for admittance to the white law schools. The state would lose the use of needed facilities if the predicted increase in student

population takes place in the near future. Unless the facilities of the Negro law schools were integrated with the facilities of the white law schools, which is not likely at this time, the services of experienced law teachers would be lost.

In my opinion, there are other more practical courses of action in reference to the future of segregated Negro law schools supported by the state. The following are some suggested possibilities:

1. Maintain them on an integrated basis for an interim period based on a student generation of equality in public education for all, and then transfer faculty and students to the other state-supported law school.
2. Maintain them on an integrated basis for the interim period with a steady increase in admission requirements, and then consolidate them with the other state-supported law school utilizing present facilities and faculty.
3. Integrate the present colleges or universities supported by the state exclusively for Negroes along with the law schools and maintain the law schools as a part of the college or university as they are now, and increase the admission requirements over the interim period until they reach a point where success in law school could be expected from all students admitted.

The third possibility seems to me to be the most attractive one. In my opinion, a law school on the campus of a college or university adds more dignity to that college or university and serves the administration and student body as a whole in many tangible ways.

FOOTNOTES

1. Plessy v. Ferguson, 163 U.S. 537 (1896).
2. Brown et al v. Board of Education of Topeka, Shownee County Kansas et al; Briggs, Jr. et al v. Elliott et al; Davis et al v. County School Board of Prince Edward County, Virginia, et al; and Gebhart et al v. Belton et al, 347

U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954); *Bolling et al v. Sharpe, et al*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884.

3. *Leroy Benjamin Frazier, Jr., et al v. Board of Trustees of the University of North Carolina et al*, 134 F. Supp. 589, 350 U.S. 979, 76 S. Ct. 467 (1956). [The Court held that the rule prohibiting segregation of white and Negro children in public schools of a state solely on basis of race is applicable to schools for higher education as well as schools on the lower level, U.S.C.A. Const. Amend. 14.]
4. N. C. G. S. Sec. 116-100 (1939), Mo. St. Ann. Sec. 9618, 9622, pp. 7327, 7328.
5. *Missouri ex rel Gaines v. Canada*, 305 U.S. 337, 59 S. Ct. 232, 83 L. Ed. 208 (1938).
6. Ibid., p. 350.
7. North Carolina College Law School bulletin, p. 4.
- 8.
- 9.
10. *Sweatt v. Painter*, 210 S.W. 2d 442 (1948).
11. Ibid.
12. *Sweatt v. Painter*, 339 U.S. 629 (1950).
13. Ibid.
14. *Missouri ex rel Gaines v. Canada*, 305 U.S. 337; 59 S. Ct. 232; 83 L. Ed. 208 (1938).
15. Bulletin, The School of Law, Southern University and A. and M. College, p. 7 (1962-63); *Wilson v. Board of Supervisors*, 92 F. Supp. 986, aff'd 340 U.S. 990 (1951).
16. *Wilson v. Board of Supervisors*, 92 F. Supp. 986 (conceded by both sides in the argument.).

17. *Wrighten v. Board of Trustees of University of South Carolina*, 72 F. Supp. 948 (1947).
18. Ibid.
19. Act No. 233 of Acts of the General Assembly of South Carolina for 1945, 44 Stat. at Large, p. 401.
20. General Act of 1947-48 (House 240, Senate 276, Secretary State 312). Approved 2 May, 1947, 45 St. at Large, p. 622.
21. *Wrighten v. Board of Trustees of University of South Carolina*, 72 F. Supp. 948 (1947).
22. Bulletin, The School of Law, South Carolina State College, 1963-64.
23. Ibid.
24. Ibid.
25. *State ex rel Hawkins v. Board of Control of Florida et al*, 47 So. 2d 608 (1950).
26. Sec. 12, Article XII, Constitution of Florida, F. S. A.; Sec. 228.9, 239.01, as amended, Florida Statutes, 1941, F. S. A.
27. *State ex rel Hawkins v. Board of Control of Florida*, 47 So. 2d 608 (1950).
28. *State ex rel Hawkins v. Board of Control of Florida*, 60 So. 2d 162 (1952).
29. *Florida ex rel Hawkins et al v. Board of Control of Florida et al*, 347 U.S. 971 (1954); *Brown v. Board of Education of Topeka et al*, 347 U.S. 483; 74 S. Ct. 686; 98 L. Ed. 873 (1954).
30. Gen. Laws 1951, C. 26859, 1951-53, General Appropriation Statute for State of Florida (1951).
31. The College of Law, Florida A. & M. University, bulletin.

32. Ibid.
33. Ibid.
34. Meiklejohn, Negro Law School Closing Sought, St. Petersburg Times, Wednesday, July 10, 1963.
35. This information was given by the dean's office and taken from report or schedule on page 62.
36. Taken from the Annual Reports published periodically in The Bar Examiner.
37. Greenburg, Race Relations and American Law, p. 210 (Columbia University Press, 1959).
38. Furnished by Dean of South Carolina State College Law School.
39. From dean's office and bar records.
40. Ibid.
41. Ibid.
42. Ibid.
43. Information furnished by Mississippi Attorney.
44. Emerson & Haber, Politics and Civil Rights in the United States, p. 1271, as taken from To Secure These Rights, the report of the President's Committee on Civil Rights (Washington: United States Government Printing Office, 1947, pp. 62-7.)