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THE OFFICE OF THE ATTORNEY GENERAL

ROBERT MORGAN*

I. HISTORY AND ORIGIN OF THE OFFICE OF THE ATTORNEY GENERAL

The ancient and honorable office of the Attorney General is over six hundred years old, apparently coming into existence as early as 1278 A.D.¹ The term "Attorney General" appears to have first been used in 1398 when a certificate of the Duke of Norfolk was signed by four attorneys general.²

The authority of the Attorney General in England was very extensive and is set out as follows :

- (1) To prosecute all actions necessary for the protection and defense of the property and revenue of the Crown.
- (2) By information, to bring certain classes of persons accused of crimes and misdemeanors to trial.
- (3) By "*scire facias*," to revoke and annul grants made by the Crown improperly, or when forfeited by the grantee.
- (4) By information, to recover money and other chattels, or damages for wrongs committed on the land, or other possessions of the Crown.
- (5) By writ of mandamus, to compel the admission of an officer duly chosen to his office, and to compel his restoration when illegally ousted.
- (6) By information to chancery, to enforce trusts, and to prevent public nuisances, and the abuse of trust powers.³

It is evident, therefore, that by the time the Colonial Governments were established in America, the office of the Attorney General in England had well-defined powers. In the new American Colonies, the office of the

* Attorney General North Carolina 1969: LL.B. Wake Forest Law School; Attorney General acknowledges contributions of the following in preparation of this article: James L. Blackburn, Howard Satsky, Russell G. Walker, Burley Mitchell, Ted Eastman.

¹ Bellot, "*The Origin of the Attorney General*," 25 Law Quart. Rev. 400 (1909).

² *Id.*; at 405.

³ *People v. Miner*, 2 Lans. 396 (N.Y. 1868).

Attorney General became a part of the Colonial Governments and later the State Governments.⁴

The Constitution of North Carolina provides that the Attorney General is to be elected for a term of four years by the qualified electors of the State.⁵ His term of office is to commence on the first day of January next after his election, and is to continue until his successor is elected and qualified.⁶ Any vacancy in the office of the Attorney General will be filled by the Governor.⁷

The Department of Justice, created in 1939, is presently under the supervision and direction of the Attorney General.⁸ By statute, the Attorney General must devote his full time to that office and is prohibited by law from engaging in the private practice of law while serving as Attorney General.⁹ However, no statute has been found that requires the Attorney General to be a lawyer.

The Attorney General serves on several major committees, some of which are set out as follows:

- (1) State Armory Commission¹⁰
- (2) State Eugenics Commission¹¹
- (3) Tryon Palace Commission¹²
- (4) Judicial Council¹³

In addition, the Attorney General serves, *ex officio*, as the legal adviser of the Executive Department.¹⁴

II. POWER OF THE ATTORNEY GENERAL TO REPRESENT STATE AGENCIES

In England the Attorney General was Chief Legal Advisor for the Crown and had charge of the management of all legal affairs and the prosecution of all suits in which the Crown was interested.¹⁵ It has been

⁴ Hammonds, *"The Attorney General in the American Colonies,"* Anglo-American Legal History Series, V. 1, No. 3 (1939).

⁵ N.C. Const. art. 3, § 7.

⁶ *Id.*

⁷ *Id.*

⁸ N.C. Gen. Stat. 114-1.

⁹ N.C. Gen. Stat. 114-3.

¹⁰ N.C. Gen. Stat. 143-230.

¹¹ N.C. Gen. Stat. 35-40.

¹² N.C. Gen. Stat. 121-19.

¹³ N.C. Gen. Stat. 7-448.

¹⁴ N.C. Constitution, Art. III, Sec. 14.

¹⁵ 7 Am. Jur. 2d, Attorney General, § 6 (1962).

repeatedly held that the Attorney General had the exclusive right to represent the Crown.¹⁶ When the states broke away from the Crown, the sovereign became the people as represented by their governments.¹⁷ Thus, the logical conclusion in interpreting the common law was that the Attorney General had the duty and the exclusive right to represent these governments and their agencies and officers. Beginning in the 19th Century, a trend developed in a number of states to diminish the Attorney General's common law power to exclusively represent the State agencies. Legislation was passed enabling certain State agencies to hire their own attorneys or allowing the Governor to appoint the attorneys.¹⁸ Various reasons have been given for this limiting trend, among them being the distrust of centralization and the recognition of certain weaknesses in some of the Attorneys General.¹⁹

Today the states are split into several groups with some states continuing to give the Attorneys General exclusive power to represent State agencies and others allowing these agencies to hire their own attorneys. In North Carolina several boards and commissions are given the express authority by statute to hire their own counsel, some examples being the Utilities Commission,²⁰ Employment Security Commission,²¹ and Board of Medical Examiners.²²

There have been numerous court decisions on this subject in jurisdictions other than North Carolina. One line of decisions has held that, since at common law the Attorney General had exclusive power of representation, any statute in degradation of this policy must be express and unambiguous.²³ Other courts have held that statutes can impliedly grant an agency the authority to hire its own attorney even though the particular jurisdiction recognizes the common law. Specific grants of power to an agency to sue and be sued in its own name, or to engage in

¹⁶ *Commonwealth v. Margiotti*, 325 Pa. 17, 188 Atl. 524, 527 (1936); *Rex v. Austin*, 9 Price 142, 147 Eng. Rep. 48 (1820); *Darling Apartment Co. v. Springer*, 25 Del. Ch. 420, 22 A.2d 397 (1941).

¹⁷ *Darling Apartment Co. v. Springer*, 25 Del. Ch. at 443, 22 A.2d at 407 (1941).

¹⁸ National Association of Attorney General's Committee on the Office of Attorney General, John B. Breckinridge, Chairman, Study of the Office of Attorney General, Preliminary Draft (Unpublished), Sec. 1.3-1.6, p. 1 (Jan. 1970).

¹⁹ *Id.*

²⁰ N.C. Gen. Stat. 62-21 (1963).

²¹ N.C. Gen. Stat. 96-4(d) (1957).

²² N.C. Gen. Stat. 90-21 (1915).

²³ *Darling Apartment Co. v. Springer*, *supra*; 7 Am. Jur. 2d, Attorney General, Sec. 9 (1962).

litigation, have been held to impliedly grant the authority to that agency to hire its own counsel.²⁴

A few courts have taken the view that statutory boards not contemplated by the Constitution of the State are not governed by the common law rule.²⁵ In at least three states where legal services are basically centralized in the Attorney General, universities provide exceptions on the grounds that the duties and functions of a university provide it with a legal personality of its own different from a State agency or officer.²⁶

North Carolina G.S. 114-2(2) and 114-2(3) make it the duty of the Attorney General to prosecute and defend all actions for the Governor, Secretary of State, Treasurer, Auditor, Utilities Commissioner, Commissioner of Banks, Insurance Commissioner, or Superintendent of Public Instruction if the agency heads request it, and to represent all State institutions if the head of the institution requests it. North Carolina G.S. 143-298 makes it the duty of the Attorney General to represent all departments, institutions, and agencies of the State in connection with tort claims against them. Furthermore, North Carolina G.S. 146-70 says that the Attorney General shall bring any actions or proceedings involving lands in which the State has an interest. Thus, in these two areas the Attorney General is expressly given the duty to represent the State.

The principal statute dealing with the question of representation in North Carolina is G.S. 147-17, which is set out in part as follows:

§ 147-17. *May employ counsel in cases wherein State is interested.*

—(a) No department, agency, institution, commission, bureau or other organized activity of the State which receives support in whole or in part from the State shall employ any counsel, except with the approval of the Governor. In any case or proceeding, civil or criminal, in or before any court or agency of this State or any other state or the United States, or in any other matter in which the State of North Carolina is interested, the Governor may employ such special counsel as he may deem proper or necessary to represent the interest of the State, and may fix the compensation for their services.

(b) The Attorney General *shall be counsel for all departments, agencies, institutions, commissions, bureaus or other organized activ-*

²⁴ *Watson v. Caldwell*, 158 Fla. 1, 27 So. 2d 524 (1946); *Saint v. Allen*, 172 La. 350, 134 So. 246 (1931).

²⁵ *Holland v. Watson*, 153 Fla. 178, 14 So. 2d 200 (1943).

²⁶ Study of the Office of Attorney General, Preliminary Draft, *supra* note 4.

ities of the State which receive support in whole or in part from the State. Whenever the Attorney General shall advise the Governor that it is impracticable for him to render legal services to any State agency, institution, commission, bureau or other organized activity, or to defend a State employee or former employee as authorized by article 31A of chapter 143 of the General Statutes, the Governor may authorize the employment of such counsel, as in his judgment, should be employed to render such services, and may fix the compensation for their services. [Emphasis added]

In examining the origins of this statute, it appears that subsection (a) was originally meant to confer powers on the Governor to employ private counsel without consulting the Attorney General, at least with regard to legal services involving an adversary proceeding.²⁷ It seems likely that subsection (b) was intended to serve as a limitation on these powers.

III. POWER OF THE ATTORNEY GENERAL TO REPRESENT THE PUBLIC INTEREST

While the existence of a common law power or duty in the Attorney General to represent the public interest has not been unquestionably established, it very likely does exist. The common law of England²⁸ is, by statute, in force in North Carolina to the extent that it has not been repealed or abrogated nor become obsolete or repugnant to freedom.²⁹ The North Carolina Constitution provides that the duties of the Attorney General shall be prescribed by law.³⁰ Other states, relying on similar constitutional and statutory provisions, have found the office of Attorney General to be clothed with common law powers and duties.³¹ In the early case of *Hunt, Attorney General v. Chicago Horse and Dummy Ry. Co.*,³² the Illinois Supreme Court said:

The duties of such an office are so numerous and varied that it has not been the policy of legislatures to attempt the difficult task of enumerating

²⁷ N.C. Pub. Laws 1868-69, c. 270; N.C. Pub. Laws 1873-74, c. 160; N.C. Pub. Laws 1901, c. 744; N.C. Pub. Laws 1925, c. 207; See Coates, *The State's Legal Business*, 16 N.C.L. Rev. 119 at 137, 138 (1937-38).

²⁸ *State Ex Rel. Bruton v. Flying "W" Enterprises, Inc.*, 273 N.C. 399, 160 S.E.2d 482 (1968).

²⁹ N.C. Gen. Stat. § 4-1.

³⁰ N.C. Const. art. III, § 13.

³¹ *Hunt, Attorney General v. Chicago Horse and Dummy Ry. Co.*, 121 Ill. 638, 13 N.E. 176 (1887); *State v. Missouri Public Service Commission*, 352 Mo. 29, 175 S.W.2d 857 (1943).

³² 121 Ill. 638, 13 N.E. 176 (1887).

them exhaustively, but they have ordinarily been content, after expressly defining such as they have deemed the most important, to have the residue as they exist at common law, so far as applicable to our jurisprudence and system of government.³³

No North Carolina case has been found dealing specifically with the question of whether the Attorney General possesses a common law power and duty to represent the public interest. Even absent a case responding specifically to this question, there is authority on which to assume the existence of this power and duty. In the recent case of *Sternberger v. Tannenbaum*,³⁴ the North Carolina Supreme Court, speaking through Chief Justice Parker, stated that the Attorney General has retained his common law power and duties regarding charitable trusts. From this statement the conclusion can be reasonably drawn that the Attorney General has retained his full common law power; it would be unreasonable to assume the retention of common law power only in the charitable trust field.

However, the existence of a common law power and duty to represent the public interest is an academic question in North Carolina due to action taken by the General Assembly in 1969. During that legislative session a bill,³⁵ codified as G.S. 114-2(8), was enacted which amended the list of duties of the Attorney General. As amended, that statute now reads, in pertinent part, as follows:

[It shall be the duty of the Attorney General:]

- (8) a. To intervene, when he deems it to be advisable in the public interest, in proceedings before *any* courts, regulatory officers, agencies and bodies, both State and federal, in a representative capacity for and on behalf of the using and consuming public of this State. *He shall also have the authority to institute and originate proceedings before such courts, officers, agencies or bodies and shall have authority to appear before agencies on behalf of the State and its agencies and citizens in all matters affecting the public interest.* [Emphasis added]
- b. Upon the institution of any proceeding before any State agency by application, petition or other pleading, formal or informal, the outcome of which will affect a substantial number of residents of North Carolina, such agency or agencies shall furnish the Attorney Gen-

³³ *Id.* at 180.

³⁴ 273 N.C. 658, 161 S.E.2d 116 (1968).

³⁵ Session Laws of North Carolina, Chapter 535 (1969).

eral with copies of all such applications, petitions and pleadings so filed, and, when the Attorney General deems it advisable in the public interest to intervene in such proceedings, he is authorized to file responsive pleadings and to appear before such agency either in a representative capacity in behalf of the using and consuming public of this State or in behalf of the State or any of its agencies.³⁶

It seems certain that the General Assembly intended, by this amendment, to clearly establish the power and duty of the Attorney General to represent the public interest quite separate and apart from the existence of any such power and duty at common law. The language used, particularly in the last sentence of (8)a, above provides solid statutory authority to support the existence of a broad, general power and duty to represent the public interest.

IV. POWER OF THE ATTORNEY GENERAL TO ABATE PUBLIC NUISANCES

As a rule the Attorney General of a state retains the common law powers of that office except where they are expressly modified by statute.³⁷ As mentioned earlier, North Carolina has by statute³⁸ declared the common law to be in full force except where repealed, obsolete, abrogated or repugnant to freedom and independence. The "common law" referred to in the General Statutes of North Carolina has been held to be the common law of England³⁹ at the time of the American Revolution in 1776.⁴⁰

In 1939 the Attorney General was given the duty of performing "all duties now required of his office by law."⁴¹ The Supreme Court of North Carolina has clearly adopted the view, without expressly stating it, that the phrase "all duties now required of his office by law" includes the Attorney General's common law powers. The Court has stated that:

In the absence of statute and barring those instances where an individual may take action because of his special damage . . . , "The State is the

³⁶ N.C. Gen. Stat. § 114-2(8).

³⁷ 7 Am. Jur. 2d *Attorney General* § 7 (1962).

³⁸ N.C. Gen. Stat. 4-1.

³⁹ State Ex rel. Bruton v. Flying "W" Enterprises, Inc., 273 N.C. 399, 160 S.E.2d 482 (1968); State v. Lackey, 271 N.C. 171, 155 S.E.2d 465 (1967); State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

⁴⁰ State Ex rel. Bruton v. Flying "W" Enterprises, Inc., 273 N.C. 399, 417; 160 S.E.2d 482, 494 (1968).

⁴¹ N.C. Gen. Stat. 114-6.

proper party of wrongs done to its citizens by a public nuisance'; . . . and we are of the opinion that this must be done, *as heretofore*, on the relation of its Attorney General.⁴² [Emphasis added]

Further, the Court, expressly relying on pre-revolutionary English case law, has very recently stated that the Attorney General retains his common law powers as to charitable trusts.⁴³ As stated previously there seems to be no reason why the Attorney General's common law power to protect charitable trusts would be retained in preference to others. Therefore, it must be assumed that his full common law powers have been retained.

Under the common law the Attorney General was given broad powers to institute actions in equity, as relator, to abate purprestures⁴⁴ and public nuisances.⁴⁵

Common law actions for nuisance, purpresture or any other matter affecting the people generally in the same manner as individual complainants, could only be maintained by the Attorney General.⁴⁶ Some of the cases stating the extent of these common law powers are particularly relevant to current ecological problems. At common law for example:

. . . any invasion of or encroachment on the sea shore or bed of an estuary or navigable tidal river between high and low-water mark, while the same remains in the Crown is a purpresture.⁴⁷

Such invasions and encroachments were abated by the Courts of England in actions brought by the Attorney General.⁴⁸ Current problems of pollution and abuse of estuaries may well result in public demand for reassertion of these powers over the physical environment.

⁴² McLean v. Townsend, 227 N.C. 642; 44 S.E.2d 36 (1947).

⁴³ Sternberger v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968).

⁴⁴ Def.—“An inclosure by a private party of that which belongs to . . . the public at large. . . . A public nuisance must be something which subjects the public to some degree of inconvenience or annoyance; but a purpresture may exist without putting the public to any inconvenience whatever.” BLACK'S LAW DICTIONARY 1401 (4th ed. 1951).

⁴⁵ 1 Wood, The Law of Nuisances 107-110 (3d ed. 1893).

⁴⁶ Baines v. Baker, 1 Amb. 158, 27 Eng. Rep. 105 (1752); Anno., 3 Atk. 750-751, 26 Eng. Rep. 1230 (1752).

⁴⁷ Attorney General v. Chamberlaine, 4 K & J 292, 70 Eng. Rep. 122 (1858).

⁴⁸ 2 Storey Equity Jurisdiction 223, §922 (13th ed. 1886); 1 Wood, The Law of Nuisances 107-109 (3d ed. 1893); Attorney General v. Richards, 3 Anstruther 753, 145 Eng. Rep. 1028 (1794) and cases cited: Anno. 3 Atk. 750, 26 Eng. Rep. 1230 (1752).

V. POWER OF THE ATTORNEY GENERAL TO CHARITABLE TRUSTS

The Attorney General of North Carolina is charged by statute⁴⁹ and by common law⁵⁰ with the duty of protecting charitable trusts. In cases of mismanagement of charitable trusts, the clerk of the superior court is required to give notice to the Attorney General or the solicitor who represents the county. It is then the duty of the one so notified to bring an action, in the name of the State, for an accounting by the grantees, executors, or trustees of the charitable fund.⁵¹

The Attorney General may enforce, by a suit for writ of mandamus, any transfer for charitable purposes.⁵² Should a specific charitable purpose become illegal, impossible, or impracticable of fulfillment, the Attorney General may, where the settlor or testator manifested a general charitable intent, apply to the superior court for an order requiring administration to fulfill the general charitable intent.⁵³

In an action against the trustee of a charitable trust, upon a contract within his power as trustee, the plaintiff is required to give notice by mail to the Attorney General of the existence and nature of the action.⁵⁴ Failure to give the required notice bars enforcement against the trust property of an ensuing judgment in the plaintiff's favor.⁵⁵ The Attorney General may intervene in such actions to contest the right of the plaintiff to recover.⁵⁶

The statutes requiring the Attorney General to perform certain duties relative to charitable trusts should not be construed as limitations upon his powers. He retains extremely broad statutory⁵⁷ and common law⁵⁸ powers in this area. It seems that, at common law :

Any question affecting a charitable trust may be brought before the court by information in the name of the Attorney General.⁵⁹

⁴⁹ N.C. Gen. Stat. 36-20, 36-23.1, 36-23.2, 36-35.

⁵⁰ *Sternberger v. Tannenbaum*, 273 N.C. 658, 678-679, 161 S.E.2d 116 (1968).

⁵¹ N.C. Gen. Stat. 36-20.

⁵² N.C. Gen. Stat. 36-23.1(c).

⁵³ N.C. Gen. Stat. 36-23.2(a).

⁵⁴ N.C. Gen. Stat. 36-35(b).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ N.C. Gen. Stat. 36-23.1(d), 114-6.

⁵⁸ *Sternberger v. Tannenbaum*, 273 N.C. 658, 678-679; 161 S.E.2d 116 (1968).

⁵⁹ *Hill on Trusts* 458 (1846) citing numerous English cases.

The Supreme Court of North Carolina seems to have adopted this broad view in its statement that, where charitable trusts are concerned, "If the Attorney General is not a necessary party, he surely is a proper party."⁶⁰

The original common law powers of the Attorney General were based on the interest of the Crown. As the theory of the divine rights of monarchs declined, however, the interest of the sovereign came to be expressed in terms of "public interest." The power of the Attorney General to protect charitable trusts has in recent years, therefore, been found necessary:

Because of the public interest necessarily involved in a charitable trust or gift to charity and essential to its legal classification as a charity, it is generally recognized that the attorney general, in his capacity as representative of the state and of the public, is the, or at least a, proper party to institute and maintain proceedings for the enforcement of such a gift or trust.⁶¹

VI. POWER OF THE ATTORNEY GENERAL IN CRIMINAL ACTIONS

The common law powers of the Attorney General of England have been enumerated as: (1) To prosecute all actions necessary for the protection and defense of the property and revenues of the Crown, and (2) by information, to bring certain classes of persons accused of crimes and misdemeanors to trial.⁶² These broad powers gave the Attorney General of England control over a criminal case from its very inception at the trial court level through the appellate procedure. During Colonial North Carolina, the duties of the Attorney General included the supervision of "all details of the King's cases from beginning to end,"⁶³ and "all the powers, authority, and trust that the Attorney and Solicitor of England had in that Kingdom."⁶⁴

The North Carolina constitutional provision establishing the office of Attorney General declares that, in addition to specified duties, the Attorney

⁶⁰ Sternberger v. Tannenbaum, 273 N.C. 658; 161 S.E.2d 116 (1968).

⁶¹ 15 Am. Jur. 2d, Charities, § 119, as quoted with approval in Sternberger v. Tannenbaum, 273 N.C. 658; 161 S.E.2d 116 (1968).

⁶² People v. Miner, 2 Lans. (N.Y.) 396 (1868).

⁶³ Hammonds, "The Attorney General in the American Colonies," Anglo-American Legal History Series V. I, No. 3 (1939), at p. 11.

⁶⁴ North Carolina Colonial Records, Vol. 7, p. 486, 1765 to 1768.

General shall exercise all other duties prescribed by law.⁶⁵ The General Assembly is authorized to enact laws defining the authority of the Attorney General concerning prosecution of crimes and the administration of the State's criminal laws.⁶⁶

As provided by statute, the Attorney General's duties in the appellate courts are "[t]o defend all actions in the appellate division in which the State shall be interested, or is a party."⁶⁷ In all criminal cases that are appealed to the North Carolina Supreme Court or Court of Appeals, the Attorney General represents the State before those tribunals, both by brief and argument.

Also, under the North Carolina Constitution, Art. III, § 16, the solicitor shall "perform such duties related to appeals therefrom [Superior Courts of his district] as the Attorney General may require." It would appear that under the provision the Attorney General could require that a solicitor assist him in preparing the State's brief or upon argument in the appellate courts when there is an appeal from a criminal action in the Superior Courts of the respective solicitor's district.

It shall be the duty of the Attorney General "when requested by the Governor or either branch of the General Assembly to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested."⁶⁸ This appears to be the only way that the Attorney General can prosecute a criminal action in the trial courts unless a specific statute gives him power to prosecute a particular offense. At the request of a designated executive officer or the official head of a State institution, the Attorney General shall prosecute and defend suits related to matters connected with their departments or institutions.⁶⁹ This is distinguishable from general criminal prosecutions at the trial level.

The statute that the North Carolina Supreme Court has relied heavily upon to restrict the powers of the Attorney General over local prosecutions is North Carolina General Statute 114-2(4), which provides that the duty of the Attorney General shall be "[t]o consult with and advise the solicitors, when requested by them, in all matters pertaining to the duties of their office." This language implies that if the Attorney General, upon

⁶⁵ North Carolina Constitution, art. III, sec. 13.

⁶⁶ North Carolina Constitution, art. III, sec. 18.

⁶⁷ N.C. Gen. Stat. 114-2(1).

⁶⁸ *Id.*; See example in 8 N.C. Law Rev. 344 (1930).

⁶⁹ N.C. Gen. Stat. 114-2(2), (3).

the solicitor's request, sent an attorney from his office to assist a solicitor, it would be only in an advisory capacity.

The two North Carolina cases that have considered this problem are *State v. Loesch*,⁷⁰ and *N.A.A.C.P. v. Eure, Secretary of State*.⁷¹ The court in *State v. Loesch*, *supra*, concluded that the several solicitors of the State, as well as the Attorney General, are constitutional officers, so that the Attorney General has no constitutional authority to issue a directive to solicitors concerning their legal duties. The Court relied on Art. III, Sec. 18, of the North Carolina Constitution, giving the General Assembly the authority to enact suitable laws defining the powers of the Attorney General, and pursuant to the above authority, the General Assembly enacted N.C. General Statute 114-2 prescribing the Attorney General's duties. Subsection 4 provides that he shall consult with and advise the solicitors when requested by them. Therefore, the court reasoned, the duty of the Attorney General insofar as it extends to the solicitors of the State is purely advisory. The Attorney General has no constitutional authority to issue a directive to any other constitutional officer concerning his legal duties. The court in *N.A.A.C.P. v. Eure, Secretary of State*, *supra*, also concluded that the duty of the Attorney General insofar as it extends to the State's solicitors is purely advisory, when the Attorney General has no specific enforcement duty in connection with the statute under which prosecution is sought.

The trend has been from a centralized to decentralized control of prosecutions in North Carolina by the Attorney General. When the circuit that the Attorney General covered during Colonial North Carolina became too large, he was given the right to appoint deputies in each county. Then the General Assembly began to appoint his deputies. A Solicitor General was thereafter created with control over the solicitors, and by 1806 the Attorney General was restricted to one of six State districts in which he could prosecute at the trial level. In 1868 the General Assembly gave the solicitors power to prosecute in the trial courts, thus relieving the Attorney General of the duty of prosecuting trial dockets in any district in the State.

Perhaps the primary consideration that must be borne in mind when examining the relationship between the Attorney General and the local prosecutor is that the office of Attorney General is of common

⁷⁰ 237 N.C. 611, 75 S.E.2d 654 (1953).

⁷¹ 245 N.C. 331, 95 S.E.2d 893 (1957).

law origin while that of the local prosecutor is purely statutory. The courts of at least four states,⁷² although recognizing the general capacity of the Attorney General to use common law powers, have reasoned that, when the Legislature delegates duties, which were the Attorney General's function under common law, to a prosecuting attorney, the powers so delegated vest exclusively in the local prosecutor. The rationale behind these decisions is that the office of prosecuting attorney is carved out of the office of Attorney General, and vesting such duties in the prosecuting attorney necessarily divests them from the Attorney General. Yet the Minnesota,⁷³ New York⁷⁴ and Pennsylvania⁷⁵ courts have held such powers to be concurrent in like situations. It is unclear whether the North Carolina Supreme Court is saying that the office of solicitor has been carved out of the office of the Attorney General, or whether it is basing its decision solely on our statute that says the Attorney General shall advise and consult with the solicitors, and concluding therefrom that he has no active duties as a prosecutor.

Various authorities⁷⁶ have advocated centering authority for criminal prosecutions in a central state office such as that of the Attorney General. They contend that such centralization would be more effective than the existing patchwork of prosecutors in combating organized crime, assuring more uniform application and enforcement of the criminal laws, providing for better qualified and better compensated local prosecutors, and generally improving the level of administration of criminal justice. However, if the Attorney General possessed such power, he would be able to intervene only in occasional cases of great importance; he must necessarily leave to the local prosecuting officers the general task of law enforcement within their respective territories.

⁷² Kansas: *See State v. Finch*, 128 Kan. 665, 280 P. 910 (1929). New Jersey: *See Bd. of Pub. Util. Comm'rs of N.Y. v. Lehigh U.R.R.*, 106 N.J. Law 411, 149 A. 263 (1930). Oregon: *See In Re State v. Millis*, 61 Ore. 244, 119 Pac. 763 (1912). West Virginia: *See State v. Ehrlick*, 65 W. Va. 700, 64 S.E. 935 (1909).

⁷³ *State Ex Rel. Young, Att'y Gen. v. Village of Kent*, 96 Minn. 225, 104 N.W. 948 (1905); *State Ex Rel. Young v. Robinson*, 101 Minn. 277, 112 N.W. 269 (1907).

⁷⁴ *People v. Brennan*, 69 Misc. 548, 127 N.Y. Supp. 958 (1910); *People v. Tru-Sport Pub. Co.*, 160 Misc. 628, 291 N.Y. Supp. 449 (1936).

⁷⁵ *Commonwealth Ex Rel. Miner v. Margiotti, Att'y Gen.*, 325 Pa. 17, 188 A. 524 (1936).

⁷⁶ American Bar Association, *The Prosecution Function*, 2.2(b), and 20 A.B.A.J. 651 (1934); *The Challenge of Crime in a Free Society*, a report by the President's Commission on Law Enforcement and Administration of Justice, p. 149 (1967); *1952 National Conference of Commissioners on Uniform State Laws, Model Department of Justice Act*, Section 7.