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## THE COMMON LAW POWERS OF THE ATTORNEY GENERAL OF NORTH CAROLINA

RUFUS L. EDMISTEN\*

The office of Attorney General in North Carolina is a constitutional office,<sup>1</sup> the powers and duties of which have been extensively set out in the North Carolina General Statutes.<sup>2</sup> That these powers and duties are many and varied may be seen not only by examination of the Constitution of North Carolina and statutory references to the Attorney General, but also by study of the many reported court cases, both state and federal, in which the Attorney General is involved and of the frequent references in the media to activities of this office. Evaluation of these constitutional and statutory powers and duties of the Attorney General and the many activities of this office pursuant to those constitutional and statutory bases may not exhaust the inquiry as to the Attorney General's authority and responsibility. The question remains whether the common law supplies additional powers and duties of the Attorney General in this day and age. If so, what are those powers and duties? Are they being effectively utilized by modern-day Attorneys General of North Carolina and their offices?

Article III,<sup>3</sup> Section 7(1) of the North Carolina Constitution provides that the Attorney General, along with other elected department heads, shall be elected by the qualified voters of the State in 1972 and every four years thereafter, at the same time and places as members of the General Assembly are elected. Their term of office shall be four years and shall commence on the first day of January next after their election and continue until their successors are elected and qualified.<sup>4</sup>

Article III, Section 7(2) of the North Carolina Constitution provides that the duties of the Attorney General and the other elected depart-

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1. N.C. CONST. art. III, § 7(a).

2. See N.C. GEN. STAT. ch. 114 (1975 & Supp. 1977).

3. Article III is entitled "Executive" and thus places the Attorney General within the executive department of the state government.

4. Earlier versions of this section included substantially identical provisions insofar as the Attorney General's office is concerned except for the reference to the 1972 general election. N.C. CONST. art. III, § 1 (1868), as amended in 1872-73, 1944, 1954, and 1962.

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ment heads "shall be prescribed by law."<sup>5</sup>

Thus, the North Carolina Constitution establishes the office of Attorney General and provides that his "duties shall be prescribed by law." But to what law does the Constitution refer? Should we look only at the General Statutes, or should we refer back as well to common law principles, to determine what duties are prescribed for the Attorney General?

Since 1715, the North Carolina General Assembly has provided that the common law remains in full force and effect in North Carolina except as it may be inconsistent with our form of government or modified, repealed, or otherwise affected by constitutional or statutory enactment.<sup>6</sup> The North Carolina courts have repeatedly recognized that it is necessary at times to resort to the common law to determine the North Carolina law on a particular question.<sup>7</sup> However, no case has been found by this writer or previous writers discussing this office expressly determining whether the common law powers and duties of the Attorney General remain viable in the face of the extensive statutory provisions concerning this office<sup>8</sup> although several cases have suggested or implied that the Attorney General has the stature of his common law predecessors.<sup>9</sup> Other jurisdictions, however, many of which have similar constitutional provisions, have concluded that the Attorney General of the State generally retains his common law powers except in instances where a constitutional or statutory provision has abrogated those common law powers in a specific area, directly or indirectly, or where those powers and duties may have been entrusted to another official or agency of the State.<sup>10</sup> Because of the paucity of judicial

5. This provision has been part of the Constitution since 1868. N.C. CONST. art. III, § 13 (1868).

6. N.C. GEN. STAT. § 4-1 (1969).

7. *E.g.*, 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).

8. Coates, *The State's Legal Business*, 16 N.C. L. REV. 119 (1937-1938); Morgan, *The Office of the Attorney General*, 2 N.C. CENT. L.J. 165 (1970); Note, *Attorney General—Common Law Powers over Criminal Prosecutions and Civil Litigation of the State*, 16 N.C. L. REV. 282 (1937-1938).

9. YWCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972); Sternberger v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968); State *ex rel.* McLean v. Townsend, 227 N.C. 642, 44 S.E.2d 36 (1947). See also *In re Investigation of Attorney General*, 30 N.C. App. 585, 589, 227 S.E.2d 645 (1976), where the Attorney General is characterized as being "not only the State's chief law enforcement officer but a steward of our liberties," language which suggests a pre-eminence often associated with the view that a state Attorney General retains his common law stature with its accompanying powers and duties. But see Attorney General v. Railroad, 134 N.C. 481, 46 S.E. 959 (1904), where the North Carolina Supreme Court strongly implies that the Attorney General possesses no common law powers to initiate actions in the nature of *quo warranto*.

10. *E.g.*, State *ex rel.* Carmichael v. Jones, 252 Ala. 479, 41 So.2d 280 (1949); Public Defender Agency v. Superior Court, 534 P.2d 947 (Alaska 1975); Pierce v. Superior Court, 1 Cal. 2d 759, 37 P.2d 453, 96 A.L.R. 1020 (1934); Don Wilson Builders v. Superior Court, 220 Cal. App. 2d 77, 33 Cal. Rptr. 621 (1963); Cleaver v. Roberts, 57 Del. 538, 203 A.2d 63 (1964); Darling Apartment Co. v. Springer, 25 Del. Ch. 420, 22 A.2d 397, 137 A.L.R. 803 (1941); Holland v. Watson,

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discussion of the common law powers of the Attorney General of North Carolina, one must first look to the historical development and authority of the office, and then examine current statutory provisions relevant to the North Carolina Attorney General with reference to pertinent decisions of North Carolina and other states, in order to reach any conclusions about the existence, scope, and significance of common law powers of the office of Attorney General in North Carolina.

## DEVELOPMENT OF THE OFFICE OF ATTORNEY GENERAL IN ENGLAND

As far back as the Middle Ages, the English Crown conducted its legal business through attorneys, serjeants, and solicitors.<sup>11</sup> One Lawrence Del Brok is known to have pursued the King's legal business in the courts during the middle of the thirteenth century.<sup>12</sup> At that time,

153 Fla. 178, 14 So.2d 200 (1943) (en banc); State *ex rel.* Landis v. S.H. Kress & Co., 115 Fla. 189, 155 So. 823 (1934); People *ex rel.* Scott v. Briceland, 65 Ill. 2d 485, 3 Ill. Dec. 739, 359 N.E.2d 149 (1976); Fergus v. Russel, 270 Ill. 304, 110 N.E. 130 (1915); State v. Finch, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369 (1929); Hancock v. Terry Elkhorn Mining Co., 503 S.W.2d 710 (Ky. App. 1973); Commonwealth *ex rel.* Ferguson v. Gardner, 327 S.W.2d 947, 74 A.L.R.2d 1059 (Ky. App. 1959); Lund *ex rel.* Wilbur v. Pratt, 308 A.2d 554 (Me. 1973); Secretary of Adm'n & Fin. v. Attorney General, 326 N.E.2d 334 (Mass. 1975); Mundy v. McDonald, 216 Mich. 444, 185 N.W. 877 (1921); People v. Karalla, 35 Mich. App. 541, 192 N.W.2d 676 (1971); Head v. Special School Dist. No. 1, 288 Minn. 503, 182 N.W.2d 887 (1970); Slezak v. Ousdigian, 260 Minn. 303, 110 N.W.2d 1 (1961); Gandy v. Reserve Life Ins. Co., 279 So.2d 648 (Miss. 1973); State *ex rel.* Patterson v. Warren, 254 Miss. 293, 180 So.2d 293 (1965); State *ex rel.* Woodahl v. District Court, 159 Mont. 112, 495 P.2d 182 (1972); Woodahl v. State Highway Comm'n, 155 Mont. 32, 465 P.2d 818 (1970); State *ex rel.* Meyer v. Peters, 188 Neb. 817, 199 N.W.2d 738 (1972); State *ex rel.* Fowler v. Moore, 46 Nev. 65, 207 P. 75, 22 A.L.R. 1101 (1922); Eames v. Rudman, 115 N.H. 91, 333 A.2d 157 (1975); State *ex rel.* Bokowsky v. Rudman, 111 N.H. 57, 274 A.2d 785 (1971) (per curiam); State v. Swift, 101 N.H. 340, 143 A.2d 114 (1958) (per curiam); Van Riper v. Jenkins, 140 N.J. Eq. 399, 45 A.2d 844, 163 A.L.R. 1343 (1946); Keenan v. Board of Chosen Freeholders, 101 N.J. Super. 495, 244 A.2d 705 (1968), *aff'd*, 106 N.J. Super. 312, 255 A.2d 786 (App. Div. 1969); State *ex rel.* Derryberry v. Kerr-McGee Corp., 516 P.2d 813 (Okla. 1973); State *ex rel.* Johnson v. Bauman, 7 Ore. App. 489, 492 P.2d 284 (1971); People v. Debt Reducers, Inc., 5 Ore. App. 322, 484 P.2d 869 (1971); Hetherington v. McHale, 10 Pa. Commw. Ct. 501, 311 A.2d 162 (1973), *rev'd on other grounds*, 458 Pa. 479, 329 A.2d 250 (1974); Suitor v. Nugent, 98 R.I. 56, 199 A.2d 722 (1964); State *ex rel.* Maloney v. Wells, 79 S.D. 389, 112 N.W.2d 601 (1961); Hansen v. Barlow, 23 Utah 2d 47, 465 P.2d 177 (1969).

These cases are not intended to be an exhaustive listing either in states represented or cases from states which are represented. There are, of course, other state court decisions holding or declaring that their Attorneys General do not possess common law powers. See note 43 *infra* for sample cases of this type. In addition, some states, North Carolina among them, have not decided this question.

11. 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 458-59 (1924) [hereinafter cited as 6 HOLDSWORTH]; R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 112 (1953) [hereinafter cited as POUND]; Holdsworth, *The Early History of the Attorney and Solicitor General*, 13 ILL. L. REV. 602, 603 (1918-1919) [hereinafter cited as Holdsworth, ILL. L. REV.].

12. O. HAMMONDS, THE ATTORNEY GENERAL IN THE AMERICAN COLONIES 2 (Anglo-American Legal History Series, ser. 1, no. 2 1939) [hereinafter cited as HAMMONDS]; Bellot, *The Origin of the Attorney-General*, 25 LAW Q. REV. 400, 406 (1909) [hereinafter cited as Bellot]; Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 304 (1958) [hereinafter cited as Cooley]; Jones, *The Office of*

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the Crown did not act through a single attorney at all. Instead, the King appointed numerous legal representatives and granted each the authority to appear only in particular courts, on particular matters, or in the courts of particular geographical areas.<sup>13</sup> Gradually, the number of attorneys representing the Crown decreased as individual attorneys were assigned broader duties.<sup>14</sup> By the latter part of the fifteenth century, the title Attorney-General was used to designate one William Husee.<sup>15</sup> It may have been as late as 1530, however, before the title of Attorney General was held by a single attorney.<sup>16</sup> The Attorney General in the sixteenth century still shared his role as legal representative of the Crown with other types of legal agents.<sup>17</sup> It was not until the seventeenth century that the office assumed its modern form and the Attorney General became, at least in practice, the preeminent legal representative of the Sovereign.<sup>18</sup>

Although the early attorneys and other legal representatives of the Crown occupied much the same position as comparable legal representatives of individuals,<sup>19</sup> their development soon diverged from that of private counsel because of the peculiar role of the Crown in legal proceedings. The King was "praerogative" and in theory was always present in his courts.<sup>20</sup> As the King could not appear in his own court personally, the function of the Attorney General and his predecessors was to protect the King's interests.<sup>21</sup> Consequently, the King's counsel had superior status to that of attorneys for individuals.<sup>22</sup> Unlike an attorney representing a private party, the Attorney General or King's attorney was not an officer of the courts, but as a representative of the Crown was subject to the control only of the Crown, not to the usual

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*Attorney-General*, 27 CAMB. L.J. 43 (1969) [hereinafter cited as Jones] (Jones refers to the same person as "Lawrence Del Brok").

13. 6 HOLDSWORTH, *supra* note 11, at 459-60; POUND, *supra* note 11, at 113; Cooley, *supra* note 12, at 306; Holdsworth, ILL. L. REV., *supra* note 11, at 603-05.

14. 6 HOLDSWORTH, *supra* note 11, at 460-61; Cooley, *supra* note 12, at 306.

16. HAMMONDS, *supra* note 12, at 2; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 158 (1929); Bellot, *supra* note 12, at 410; Cooley, *supra* note 12, at 306. The dates mentioned by these writers range from 1461 to 1530.

17. 6 HOLDSWORTH, *supra* note 11, at 470; Cooley, *supra* note 12, at 306; Holdsworth, ILL. L. REV., *supra* note 11, at 615-16.

18. HAMMONDS at 2; 6 HOLDSWORTH, *supra* note 11, at 457, 470; Cooley, *supra* note 12, at 306-07; Holdsworth, ILL. L. REV., *supra* note 11, at 602, 616.

19. 6 HOLDSWORTH, *supra* note 11, at 469; Bellot, *supra* note 12, at 406; Holdsworth, ILL. L. REV., *supra* note 11, at 612-13; Van Alstyne & Roberts, *The Powers of the Attorney General in Wisconsin*, 1974 WIS. L. REV. 721, 723-24.

20. 6 HOLDSWORTH, *supra* note 11, at 466, 467; POUND, *supra* note 11, at 113; Cooley, *supra* note 12, at 305; Holdsworth, ILL. L. REV., *supra* note 11, at 612, 613.

21. 6 HOLDSWORTH, *supra* note 11, at 467-68; Cooley, *supra* note 12, at 305; Holdsworth, ILL. L. REV., *supra* note 11, at 613; Jones, *supra* note 12, at 43; Van Alstyne & Roberts, *supra* note 19, at 723.

22. 6 HOLDSWORTH, *supra* note 11, at 467-68; POUND, *supra* note 11, at 113; Cooley, *supra* note 12, at 305.

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disciplinary authority of the courts over attorneys.<sup>23</sup>

## THE ATTORNEY GENERAL IN THE UNITED STATES

The office of Attorney General was transported from the parent country of England to the American colonies.<sup>24</sup> There, the Attorneys General of the various colonies in effect served as delegates or representatives of the Attorney General of England.<sup>25</sup> Not surprisingly, these colonial Attorneys General were viewed as possessing the common law powers or then-current powers of the Attorney General in England.<sup>26</sup> During the early colonial period of North Carolina, it joined with South Carolina in comprising a single colony and apparently shared with South Carolina an Attorney General.<sup>27</sup> Certainly, by 1767, North Carolina did have an Attorney General who was selected from among the lawyers practicing in North Carolina and possessed all the powers, authority, and trusts within the colony that the Attorney General and Solicitor General possessed in England.<sup>28</sup> Thus, when the American Revolution brought this country into being, the office of Attorney General with its concomitant common law powers was firmly established in the American states as part of the heritage brought over from England and continued in the colonial period.

After the American Revolution, the newly-declared states generally continued to provide for Attorneys General with virtually the same powers and duties as their English and colonial predecessors.<sup>29</sup> The office has, in one form or another, been carried forth into the modern American states with many of the same duties and powers as existed in Attorneys General at common law. Indeed, most commentators<sup>30</sup> and

23. 6 HOLDSWORTH, *supra* at note 11, at 468; Holdsworth, *ILL. L. REV.*, *supra* note 11, at 613; 35 NOTRE DAME LAWYER 274, 275 (1959-1960).

24. Cooley, *supra* note 12, at 309; Van Alstyne & Roberts, *supra* note 19, at 726; Note, *The Role of the Michigan Attorney General in Consumer and Environmental Protection*, 72 MICH. L. REV. 1030, 1031 (1974); Note, *Attorney General—Common Law Powers over Criminal Prosecutions and Civil Litigation of the State*, 16 N.C. L. REV. 282, 284 (1937-1938); 35 NOTRE DAME LAWYER 274, 275 (1959-1960).

25. HAMMONDS, *supra* note 12, at 3; Cooley, *supra* note 12, at 309; Van Alstyne & Roberts, *supra* note 19, at 727.

26. HAMMONDS, *supra* note 12, at 3; Note, *The Role of the Michigan Attorney General in Consumer and Environmental Protection*, 72 MICH. L. REV. 1030, 1031-32 (1974); Note, *Attorney General—Common Law Powers over Criminal Prosecutions and Civil Litigation of the State*, 16 N.C. L. REV. 282, 284 (1937-1938).

27. HAMMONDS, *supra* note 12, at 11.

28. 7 N.C. COLONIAL REC. 486 (1890); *accord*, HAMMONDS, *supra* note 12, at 12; Coates, *supra* note 8, at 119.

29. Cooley, *supra* note 12, at 311-12; Thompson, Gough & Wallace, *supra* note 15, at 20-21; Note, *The Role of the Michigan Attorney General in consumer and Environmental Protection*, 72 MICH. L. REV. 1030, 1031-32 (1974).

30. *E.g.*, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMON LAW POWERS OF STATE ATTORNEYS GENERAL 21 (1977) [hereinafter cited as NAAG (1977)]; Montague, *The Office of Attorney General in Kentucky*, 49 KY. L.J. 194, 198 (1960-1961); Shepperd, *Common Law Powers and Duties of the Attorney General*, 7 BAYLOR L. REV. 1 (1955); Toepfer, *Some Legal Aspects of*

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most decisions dealing with the powers of state Attorneys General<sup>31</sup> have recognized that the majority of American states, on one basis or another, do continue to vest their Attorneys General with many, if not all, of the common law powers of the Attorney General of England and the American colonies.

It is the general consensus of opinion that in practically every state where basis of jurisprudence is the common law, the office of Attorney General, as it existed in England, was adopted as part of the governmental machinery. In the absence of express statutory or constitutional restrictions, the common law duties and powers attach themselves to the office as far as they are applicable and in harmony with our system of government.<sup>32</sup>

Virtually all states which recognize the common law powers of the Attorney General have also concluded that the powers may be varied by statutory provisions<sup>33</sup> and, of course, are frequently altered, assigned to some other officer or agent of the state, or added to by constitutional provisions.<sup>34</sup> In fact, it is often said that Illinois, in the famous case of *Fergus v. Russel*,<sup>35</sup> is the only state which does not permit modification of the Attorney General's common law powers by the state legislature. A more recent Maryland case appears to approach the view of the Illinois court in the statement "that the General Assembly may not abrogate the common law powers of the Attorney General of Maryland since his powers were the powers of a common law Attorney General, having been constitutionally stated as those 'prescribed by law' ".<sup>36</sup>

Whatever the views of the Maryland court, it is clear that most courts do view the state legislatures as having the authority to modify the du-

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*the Duty of the Attorney General to Advise*, 19 U. CIN. L. REV. 201, 206 (1950); Note, *State v. Southwestern Bell Telephone Co.: Utilities Regulation in the Public Interest by the Texas Attorney General*, 29 Sw. L.J. 978, 981 (1975).

31. *State ex rel. Carmichael v. Jones*, 252 Ala. 479, 41 So.2d 280 (1949); *Darling Apartment Co. v. Springer*, 25 Del. Ch. 420, 22 A.2d 397, 137 A.L.R. 803 (1941); *Mundy v. McDonald*, 216 Mich. 444, 185 N.W. 877, 20 A.L.R. 398 (1921); *State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813 (Okla. 1973); *Hansen v. Barlow*, 23 Utah 2d 47, 456 P.2d 177 (1969).

32. *State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813, 818-19 (Okla. 1973).

33. *E.g.*, *Cleaver v. Roberts*, 57 Del. 538, 203 A.2d 63 (1964); *Darling Apartment Co. v. Springer*, 25 Del. Ch. 420, 22 A.2d 397, 137 A.L.R. 803 (1941); *State v. Finch*, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369 (1929); *People v. Karalla*, 35 Mich. App. 541, 192 N.W.2d 676 (1971); *State ex rel. Woodahl v. District Court*, 159 Mont. 112, 495 P.2d 182 (1972); *Woodahl v. State Highway Comm'n*, 155 Mont. 32, 465 P.2d 818 (1970); *Van Riper v. Jenkins*, 140 N.J. Eq. 399, 45 A.2d 844, 163 A.L.R. 1343 (1946); *Keenan v. Board of Chosen Freeholders*, 101 N.J. Super. 495, 244 A.2d 705 (1968), *aff'd*, 106 N.J. Super. 312, 255 A.2d 786 (App. Div. 1969); *State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813 (Okla. 1973); *State ex rel. Johnson v. Bauman*, 7 Ore. App. 498, 492 P.2d 284 (1971).

34. *See, e.g.*, *Murphy v. Yates*, 276 Md. 475, 348 A.2d 837 (1975); *State v. Longo*, 136 N.J.L. 589, 54 A.2d 788 (1947); *State ex rel. Thornton v. Williams*, 215 Ore. 639, 336 P.2d 68 (1959).

35. 270 Ill. 304, 110 N.E. 130 (1915). The Illinois Supreme Court has since held that the holding in *Fergus v. Russel* was incorporated into the state constitution as revised in 1970. *People ex rel. Scott v. Briceland*, 65 Ill. 2d 485, 3 Ill. Dec. 739, 359 N.E.2d 149 (1976).

36. *Murphy v. Yates*, 276 Md. 475, 494, 348 A.2d 837, 847 (1975).

ties of the Attorney General by statute. The Montana Supreme Court has even said that it “is *universally* recognized that the legislatures have the authority to limit and define the powers of attorneys general, except to the extent that state constitutions may grant such powers.”<sup>37</sup> State statutes, and to some extent constitutional provisions, enlarging, restricting, or modifying the duties which the Attorney General held at common law are so frequent and extensive that, as early as 1943, the Florida Supreme Court declared “that it is now generally conceded that the only safe determiner of his duties and prerogatives is to resort to the statutory and constitutional provisions of the State defining them.”<sup>38</sup> The difficulty of determining the duties and powers of the Attorney General is further complicated by the fact that, as many commentators and courts have noted, it is virtually impossible even to enumerate the common law powers of the Attorney General.<sup>39</sup> Although some courts have sought generally to set out the various common law duties of the Attorney General,<sup>40</sup> no meaningful determination of those common law powers can be made except by reference to specific situations.

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37. *Woodahl v. State Highway Comm'n*, 155 Mont. 32, 465 P.2d 818 (1970) (emphasis added).

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

39. *E.g.*, *Darling Apartment Co. v. Springer*, 25 Del. Ch. 420, 22 A.2d 397, 137 A.L.R. 803 (1941); *State ex rel. Fowler v. Moore*, 46 Nev. 65, 207 P. 75, 22 A.L.R. 1101 (1922); 7 AM. JUR.2d *Attorney General* § 6 (1963); Myhre, *The Attorney for the State and the Attorney for the People: The Powers and Duties of the Attorney General of North Dakota*, 52 N.D. L. REV. 349, 353 (1975-1976).

40. An early New York case listed the powers of the Attorney General as follows:

- 1st. To prosecute all actions, necessary for the protection and defense of the property and revenues of the crown.
- 2d. By information, to bring certain classes of persons accused of crimes and misdemeanors to trial.
- 3d. By ‘*scire facias*’ to revoke and annul grants made by the crown improperly, or when forfeited by the grantee thereof.
- 4th. By information, to recover money or other chattels, or damages for wrongs committed on the land, or other possessions of the crown.
- 5th. By writ of *quo warranto*, to determine the right of him who claims or usurps any office, franchise, or liberty, and to vacate the charter, or annul the existence of a corporation, for violations of its charter, or for omitting to exercise its corporate powers.
- 6th. By writ of *mandamus*, to compel the admission of an officer duly chosen to his office, and to compel his restoration when illegally ousted.
- 7th. By information to chancery, to enforce trusts, and to prevent public nuisances, and the abuse of trust powers.
- 8th. By proceedings *in rem*, to recover property to which the crown may be entitled, by forfeiture for treason, and property for which there is no other legal owner, such as wrecks, treasure trove, & c. . . .
- 9th. And in certain cases, by information in chancery, for the protection of the rights of lunatics, and others, who are under the protection of the crown.

*People v. Miner*, 2 Lans. 396, 398 (1868). This attempt to enumerate the Attorney General’s common law powers was not exhaustive, but it appears to be the most-cited statement of his powers in both decisions and commentators’ analyses.



Regardless of the impossibility of delineating the precise scope of the Attorney General's common law powers, the vast majority of state courts have held that their Attorneys General do have common law powers.<sup>41</sup> The states which have rejected the view that the Attorney General has common law powers have been characterized as "states which evolved from territories of the United States, which never truly adopted the common law of England . . ."<sup>42</sup> Some of the courts thought that this view may draw support from the fact that the states which do not recognize the common law powers in their Attorneys General are generally states in the far west, including Arizona, Colorado, Iowa, Washington, and Wisconsin.<sup>43</sup>

Commentators have attempted to divide the states into categories such as those which have no constitutional provisions concerning the Attorney General, those which have constitutional provisions merely providing for the establishment of the office, and those which have constitutional provisions providing for the office and also stating that their duties shall be such as are prescribed by law, but have concluded that the type of constitutional provision or lack thereof does not explain the split in jurisdictions in determining whether or not a state Attorney General has common law powers.<sup>44</sup> Some of the decisions can be easily understood upon close scrutiny of the particular constitutional or statutory provisions involved. For example, the Oregon provisions concerning the office of Attorney General provide that he shall exercise all the power and authority usually associated with that office, but restrict his power greatly in criminal matters. Thus, the Oregon appellate courts have held that the Attorney General of that state has broad civil common law powers, but does not have common law powers in the area of criminal prosecutions.<sup>45</sup> In Rhode Island, the state constitution provides that the Attorney General has such powers "as are now established, or as from time to time may be prescribed by law." The Rhode Island Supreme Court had no difficulty in determining that the

41. Cases cited note 10 *supra*.

42. *Murphy v. Yates*, 276 Md. 475, 494, 348 A.2d 837, 847 (1975).

43. See, e.g., *Arizona State Land Dep't v. McFate*, 87 Ariz. 139, 348 P.2d 912 (1960); *State ex rel. Frohmiller v. Hendrix*, 59 Ariz. 184, 124 P.2d 768 (1942); *People ex rel. Tooley v. Dist. Court*, 549 P.2d 774 (Colo. 1976) (en banc); *State v. Blyth*, 226 N.W.2d 250 (Iowa 1975); *State ex rel. Turner v. State Highway Comm'n*, 186 N.W.2d 141 (Iowa 1971); *State ex rel. Norvell v. Credit Bureau*, 85 N. Mex. 521, 514 P.2d 40 (1973); *State ex rel. Attorney General v. Reese*, 78 N. Mex. 241, 430 P.2d 399 (1967); *State v. O'Connell*, 83 Wash.2d 797, 523 P.2d 872 (1974) (en banc); *In re Estate of Sharp*, 63 Wis. 2d 254, 217 N.W.2d 258 (1974); see also *Padgett v. Williams*, 82 Idaho 28, 348 P.2d 944 (1960).

44. *Shepherd*, *supra* note 30; at 1-4, *Van Alstyne & Roberts*, *supra* note 19, at 729; Note, *Attorney General—Common Law Powers over Criminal Prosecutions and Civil Litigation of the State*, 16 N.C. L. REV. 282, 285-86 (1937-1938).

45. *State ex rel. Thornton v. Williams*, 215 Ore. 639, 336 P.2d 68 (1959); *State ex rel. Johnson v. Bauman*, 7 Ore. App. 489, 492 P.2d 284 (1971); *People v. Debt Reducers, Inc.*, 5 Ore. App. 322, 484 P.2d 869 (1971).

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Attorney General had common law powers, or those powers possessed by the occupant of the office at the time the state constitution was adopted, in view of this state constitutional provision.<sup>46</sup> Other state courts have readily concluded that their respective Attorneys General possessed common law powers where statutory provisions either expressly provide that the Attorney General of the state shall exercise common law powers or provide that the Attorney General shall exercise powers normally associated with the office of Attorney General.<sup>47</sup> Another group of states has a statutory provision that the common law generally remains in force and effect in those states except to the extent it is inconsistent with the system of government or as modified by constitutional or statutory law. These states, also, have generally concluded that the Attorney General does possess common law powers except where there are specific statutory or even constitutional provisions altering those powers or entrusting powers traditionally associated at common law with the Attorney General to other officers or agencies of the state.<sup>48</sup> There remain many cases which follow no discernible pattern or logic in concluding that the state Attorney General does or does not have common law powers. There are also a number of jurisdictions, North Carolina among them, which have not directly addressed the question at all, even in dicta.

North Carolina is among those states in which the constitution provides that the duties of the Attorney General "shall be prescribed by law."<sup>49</sup> As far back as 1715 and continuing up to the present time, North Carolina has by statute been governed by the common law "or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete."<sup>50</sup> The "common law" as used in North Carolina General Statutes §4-1 refers to the common law of England.<sup>51</sup> The common law as adopted by statute may also be modified or repealed by statute except where the North Carolina Constitution has incorpo-

46. *Suitor v. Nugent*, 98 R.I. 56, 199 A.2d 722 (1964).

47. *Public Defender Agency v. Superior Court*, 534 P.2d 947 (Alaska 1975); *Hancock v. Terry Elkhorn Mining Co.*, 503 S.W.2d 710 (Ky. App. 1973); *Commonwealth ex rel. Ferguson v. Gardner*, 327 S.W.2d 947, 74 A.L.R.2d 1059 (Ky. App. 1959). See also *Wade v. Mississippi Cooperative Extension Serv.*, 392 F. Supp. 229 (N.D. Miss. 1975).

48. *State v. Finch*, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369 (1929); *State ex rel. Woodahl v. District Court*, 159 Mont. 112, 495 P.2d 182 (1972); *State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813 (Okla. 1973); cf. *Ryan v. Eighth Judicial District Court*, 88 Nev. 638, 503 P.2d 842 (1972).

49. N.C. CONST. art. III, § 7(2).

50. *Supra* note 6.

51. *State v. Lackey*, 271 N.C. 171, 173, 155 S.W.2d 465 (1967); *State v. Willis*, 255 N.C. 473; 475, 121 S.E.2d 854 (1961).

rated the common law into its provisions.<sup>52</sup> From these principles, it might be concluded that the Attorney General of North Carolina should be vested with all common law powers of the English Attorney General at the time of the American Revolution except where specific constitutional or statutory provisions dictate otherwise. The North Carolina courts have not so held although the North Carolina Supreme Court has suggested that the Attorney General may exercise common law powers.<sup>53</sup> Still, the courts of this state have never held that the Attorney General does not have common law powers. Considering the conclusion in states with similar constitutional and statutory provisions to those of North Carolina and the general view that state Attorneys General do exercise common law powers, it seems likely that the North Carolina courts, if directly confronted with the question, would conclude that the Attorney General does have common law powers except where abrogated or modified by statute. In order to determine what those powers might be, it is necessary to look at specific common law powers of Attorneys General as determined by other states in relationship to particular statutory provisions governing the Attorney General of North Carolina.

#### ATTORNEY GENERAL'S PROTECTION OF THE STATE AND PUBLIC INTERESTS

The Attorney General, as primary legal officer of the state, has consistently been viewed in common law jurisdictions as possessing the power to initiate, conduct and maintain any suits necessary for enforcement of the laws of the state, preservation of order, and protection of public rights.<sup>54</sup> This broad authority, if interpreted generously in light of the changing legal, governmental, and social structures of our society, can be viewed as permitting the Attorney General to protect the public from many abuses of law which, from a practical standpoint, they are helpless to protect themselves. Recent commentators have suggested that the common law powers of state Attorneys General have not been fully utilized and adapted to the current needs of the public for protection from abuses of law.<sup>55</sup> In a 1969 law review article, Rob-

52. *State v. Mitchell*, 202 N.C. 439, 444, 163 S.E. 581 (1932).

53. "It seems that the State as *parens patriae*, through its Attorney General, has the common law right and power to protect the beneficiaries of charitable trusts and the property to which they are or may be entitled." *Sternberger v. Tannenbaum*, 273 N.C. 658, 678-79, 161 S.E.2d 116 (1968); *accord*, *YWCA v. Morgan*, 281 N.C. 485, 494, 189 S.E.2d 169 (1972).

54. *E.g.*, *Pierce v. Superior Court*, 1 Cal. 2d 759, 37 P.2d 460, 96 A.L.R. 1020 (1934); *Don Wilson Builders v. Superior Court*, 220 Cal. App. 2d 77, 33 Cal. Rptr. 621 (1963); *Head v. Special School Dist. No. 1*, 288 Miss. 503, 182 S.W.2d 887 (1970); *Gandy v. Reserve Life Ins. Co.*, 279 So.2d 648 (Miss. 1973); *Zweifel v. State ex rel. Brimmer*, 517 P.2d 493 (Wyo. 1974).

55. *See* W. THOMPSON & B. SMITH, *STATE ATTORNEYS GENERAL AND THE ENVIRONMENT* (1974); Note, *The Role of the Michigan Attorney General in Consumer and Environmental Protec-*

ert Morgan, then Attorney General of North Carolina, did not even discuss the possibility of common law powers as a tool for the Attorney General in protecting consumers.<sup>56</sup> One reason for the failure of the North Carolina Attorney General's office to rely specifically on common law powers in protecting the public interest may be the extensive statutory powers to represent both the state and the public interest granted to the Attorney General. Those statutory duties include the following:

- (1) To defend all actions in the appellate division in which the State shall be interested, or a party, and 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.
- (2) To represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State.
- . . . . .
- (8) Subject to the provisions of G.S. 62-20:
  - a. To intervene, when he deems it to be advisable in the public interest, in proceedings before any court, 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.
  - 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 General 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.<sup>57</sup>

The Attorney General of North Carolina has, from the earliest day of this state's existence, represented the state in matters in which the state was directly a party, as for the collection of money owed to the

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tion, 72 MICH. L. REV. 1030 (1974); Note, *The Attorney General as Consumer Advocate: City of York v. Pennsylvania Public Utility Commission*, 121 U. PA. L. REV. 1170 (1973).

56. Morgan, *The People's Advocate in the Marketplace—The Role of the North Carolina Attorney General in the Field of Consumer Protection*, 6 W.F. INTRA. L. REV. 1 (1969).

57. N.C. GEN. STAT. § 114-2(1), (2) (1975), § 114-2(8) (Supp. 1977).

state such as taxes or dividends from a corporation in which the state was a shareholder.<sup>58</sup> Similarly, the Attorney General represented the state in actions to have grants of land declared void.<sup>59</sup> Although there may have been express statutory authority for the Attorney General to bring a particular type of action or even a specific suit, the Supreme Court of North Carolina often did not discuss the authority upon which the Attorney General brought the action in these early cases. However, it appears that no general effort to outline the Attorney General's powers was made until after the Constitution of 1868 provided that the Attorney General's duties should "be prescribed by law," and thus one may infer that the state generally accepted the office as it had existed at common law and in colonial North Carolina from the time of the constitutional convention in 1776 at Halifax until 1868.<sup>60</sup>

Cases from other jurisdictions have upheld the power of the Attorney General to bring a wide variety of suits in the name of the public interest. Examining these suits closely and comparing them to North Carolina cases, one concludes that the Attorney General in North Carolina may have express statutory authority to bring numerous actions for which Attorneys General of other states may have to rely on common law powers. However, one may yet conclude that the Attorney General of North Carolina could resort to common law powers for suits in addition to those authorized by statute or as an alternative basis of decision in cases in which there may be some dispute as to the statutory authority to bring such a suit. Unquestionably, an Attorney General may represent his state in one capacity or another in actions challenging the integrity of the judicial or criminal system of that state.<sup>61</sup> Thus, state courts have upheld the right of the Attorney General to represent the defendant in an action against a judge or members of a grand jury for libel arising out of actions performed in their official capacities, respectively, as judge and grand jurors.<sup>62</sup> "It is too narrow a view of the case sub judicate to say that the people of the state at large are not interested, as citizens, in the defense of a case of this nature which involves the legal rights and liabilities of members of grand juries generally, who represent the people of the entire state and serve by compulsion of law and not voluntarily. Certainly if the people of the

58. *Attorney-General v. Pierce*, 59 N.C. 240 (1861); *Attorney General v. Bank of Charlotte*, 57 N.C. 287 (1858); *Attorney-General v. Bank of Cape Fear*, 40 N.C. 71 (1847); *Attorney-General v. President and Directors of State Bank*, 21 N.C. 545 (1837); *Attorney-General v. Bank of New Bern*, 21 N.C. 216 (1835).

59. *Attorney-General v. Osborn*, 59 N.C. 298 (1862); *Attorney-General v. Carver*, 34 N.C. 231 (1851).

60. Coates, *supra* note 8, at 140.

61. *Mundy v. McDonald*, 216 Mich. 444, 185 N.W. 877, 20 A.L.R. 398 (1921).

62. *Id.*; *O'Regan v. Schermerhorn*, 25 N.J. Misc. 1, 50 A.2d 10 (1946). See also *Lipton v. Friedman*, 2 Misc. 2d 165, 152 N.Y.S.2d 261 (1956).

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state can be said to be interested in their grand jury system and the unfettered operation of it within lawful limits, they are, we think, equally interested in this action growing out of it . . .”<sup>63</sup> The interests of the state are equally involved where persons under indictment sue a sheriff to restrain him from taking their fingerprints and photographs in advance of conviction.<sup>64</sup> In fact, the Attorney General is clearly authorized at common law to intervene in any suit affecting such rights.<sup>65</sup>

Actions by the Attorney General in the public interest may take the form of suits against state or local officials to prevent illegal actions by them.<sup>66</sup> Such an action was brought by the Attorney General of North Carolina against the State Board of Accountancy to restrain allegedly improper acts by the board and upheld by the North Carolina Supreme Court on the grounds of the Attorney General’s statutory authority to prevent ultra vires acts by corporations. “The Attorney-General is doing only what the statute permits him to do in the interest of the public, of his own motion, or upon the complaint of a private party.”<sup>67</sup> This action, while based on statutory authorization, certainly provides an example of North Carolina law incorporating, continuing, and to some extent adapting, common law principles to more modern situations.

The Attorney General may also exercise common law powers to protect the integrity of state laws and act in the public interest by seeking administrative review of the action of a regulatory or licensing board,<sup>68</sup> or by appearing in an administrative procedure such as a rate-making hearing on behalf of the public.<sup>69</sup> The North Carolina Attorney General has repeatedly intervened in rate making cases, an act which is often considered indicative of common law powers in the particular state Attorney General, but has done so consistently on the basis of express statutory authority.<sup>70</sup> In view of the broad-ranging statutory authority of the Attorney General of North Carolina to intervene in

63. *O'Regan v. Schermerhorn*, 25 N.J. Misc. 1, 50 A.2d 10 (1946); *accord*, *Mundy v. McDonald*, 216 Mich. 444, 185 N.W. 877, 20 A.L.R. 398 (1921).

64. *Van Riper v. Jenkins*, 140 N.J. Eq. 399, 45 A.2d 844, 163 A.L.R. 1343 (1946).

65. 7 AM. JUR. 2d *Attorney General* § 14 (1963); Annot., 163 A.L.R. 1346 (1946). *But see* *State ex rel. Attorney General v. Reese*, 78 N. Mex. 241, 430 P.2d 399 (1967), decided in a state not recognizing the common law powers of the Attorney General.

66. *See, e.g.*, *Head v. Special School Dist. No. 1*, 288 Minn. 503, 182 S.W.2d 887 (1970); *State ex rel. Patterson v. Warren*, 254 Miss. 293, 180 So.2d 293 (1965); NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, THE OFFICE OF ATTORNEY GENERAL 45-46 (1971) [hereinafter cited as NAAG]; NAAG (1977), *supra* note 30, at 39-40; 7 AM. JUR. 2d *Attorney General* § 20 (1963).

67. *State ex rel. Attorney-General v. Scott*, 182 N.C. 865, 109 S.E. 789 (1921).

68. *E.g.*, *People ex rel. Scott v. Illinois Racing Bd.*, 54 Ill. 2d 569, 301 N.E.2d 285 (1973).

69. *E.g.*, *State ex rel. Shevin v. Yarborough*, 257 So.2d 891 (Fla. 1972) (*per curiam*). *See generally* NAAG (1977), *supra* note 30, at 37; Note, *State v. Southwestern Bell Telephone Co.: Utilities Regulation in the Public Interest by the Texas Attorney General*, 29 Sw. L.J. 978 (1975).

70. *E.g.*, *State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 327, 230 S.E.2d 651 (1976); *State ex rel. Comm'r of Ins. v. State ex rel. Attorney General*, 19 N.C. App. 263, 198 S.E.2d 575

administrative proceedings, it is difficult and perhaps pointless to speculate about the existence of common law powers of the Attorney General of North Carolina in this type of proceeding.

The Attorney General, by virtue of the inherent authority of his office,<sup>71</sup> may bring an action on his own initiative to challenge the constitutionality of state statutes. This right has frequently been recognized by commentators<sup>72</sup> and state court decisions.<sup>73</sup> The North Carolina Attorney General, as far back as 1915, challenged the constitutionality of a state law in an action questioning the validity of an act authorizing women to be appointed by the Governor as notaries public.<sup>74</sup> The Supreme Court did not consider it necessary to cite any authority for the Attorney General to bring such an action, and neither the majority opinion nor the dissent discusses the authority of the Attorney General to challenge the constitutionality of state laws. Consequently, regardless of whether the action was considered to be based on statute or inherent authority of the Attorney General, North Carolina is apparently among those states according the Attorney General the right arising out of the common law powers of the Attorney General to challenge the constitutionality of state legislative enactments. This view of the Attorney General's powers has been adopted despite the general principle that persons directly affected by the constitutionality of legislation may not challenge a statutory enactment.

State Attorneys General have been upheld in their attempts to bring court actions or intervene in suits for the protection and promotion of public interest in a wide variety of situations.<sup>75</sup> In a suit to enjoin defendants from violating weight limitations and regulations on public highways and thus damaging certain highways, the Court of Appeals of Kentucky heartily endorsed the action of the Attorney General in seeking to intervene in the class action brought by private persons.

The Attorney General, as chief law officer of this Commonwealth, charged with the duty of protecting the interest of all the people, the

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(1973); *State ex rel. Comm'r of Ins. v. State ex rel. Attorney General*, 16 N.C. App. 279, 192 S.E.2d 138 (1972).

71. *Hansen v. Barlow*, 23 Utah 2d 47, 456 P.2d 177 (1969); 7 AM. JUR. 2d *Attorney General* § 18 (1963).

72. NAAG (1977), *supra* note 30, at 35-36; NAAG, *supra* note 66, at 44; 7 AM. JUR. 2d *Attorney General* § 18 (1963); Comment, *An Attorney General's Standing before the Supreme Court to Attack the Constitutionality of Legislation*, 26 U. CHI. L. REV. 624, 629 n.27 (1959).

73. *E.g.*, *People ex rel. Scott v. Briceland*, 65 Ill. 2d 485, 3 Ill. Dec. 739, 359 N.E.2d 149 (1976); *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865 (Ky. App. 1974); *State ex rel. Meyer v. Peters*, 188 Neb. 817, 199 N.W.2d 738 (1972); *Hansen v. Barlow*, 23 Utah 2d 47, 456 P.2d 177 (1969). *See also* *Hetherington v. McHale*, 10 Pa. Commw. Ct. 501, 311 A.2d 162 (1973), *rev'd on other grounds*, 458 Pa. 479, 329 A.2d 250 (1974).

74. *State ex rel. Attorney-General v. Knight*, 169 N.C. 333, 85 S.E. 418 (1915).

75. *See generally* NAAG (1977), *supra* note 30, at 31-34; NAAG, *supra* note 66, at 43-44. *See also* Myhre, *supra* note 39, at 356-57; Note, *The Role of the Michigan Attorney General in Consumer and Environmental Protection*, 72 MICH. L. REV. 1030, 1035-37.

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traveling public, the school children in the school buses, and the very existence of the roads, had such a vital interest in this litigation that he had a right to intervene at least insofar as the public issues advanced in the action were involved.<sup>76</sup>

This public interest has been held to be ample authority for suits by state Attorneys General to restrain defendants from racial discrimination in violation of state law in connection with a housing development,<sup>77</sup> to restrain an insurance company from increasing premium rates on the policy and order reinstatement of policies terminated because of rate increases in the past,<sup>78</sup> and to enforce state laws concerning the filing, recordation, and perfection of mining claims.<sup>79</sup>

Even where the common law authority of the Attorney General to bring the action in question is recognized by the state courts, the Attorney General may not be able to bring a particular action if the appellate courts believe that authority to enforce laws concerning the subject matter of the suit has been entrusted to other state officials or agencies.<sup>80</sup> Although some courts may less readily find statutory entrustment of authority to other agencies or officials, state Attorneys General must be able to show that none of the wide range of statutes authorizing particular public officials and agencies to act with respect to enforcement of particular public interests alter or abrogate the common law power of the Attorney General to bring the action in question. Even if a state Attorney General can rebut the claim of statutory entrustment of the power to other officials or agencies, he or she may be thwarted in his or her attempts to protect citizens from certain types of abuses and frauds. The California Supreme Court has ruled that even the Attorney General could sue a defendant for misleading advertising and false competition and obtain damages in restitution to the defendant's victims under the common law theory that the state, through its Attorney General, acts as *parens patriae* for its citizens.<sup>81</sup> Whether or

76. *Hancock v. Terry Elkhorn Mining Co.*, 503 S.W.2d 710 (Ky. App. 1973).

77. *Don Wilson Builders v. Superior Court*, 220 Cal. App. 2d 77, 33 Cal. Rptr. 621 (1963).

78. *Gandy v. Reserve Life Ins. Co.*, 279 So.2d 648 (Miss. 1973).

79. *Zweifel v. State ex rel. Brimmer*, 517 P.2d 493 (Wyo. 1974).

80. *State ex rel. Johnson v. Bauman*, 7 Ore. App. 489, 492 P.2d 284 (1971); *People v. Debt Reducers, Inc.*, 5 Ore. App. 322, 484 P.2d 869 (1971).

81. *People v. Superior Court*, 9 Cal. 3d 283, 107 Cal. Rptr. 192, 507 P.2d 1400, 55 A.L.R.3d 191 (1973) (en banc). See also Annot., 55 A.L.R.3d 198 (1974); Note, *The Role of the Michigan Attorney General in Consumer and Environmental Protection*, 72 MICH. L. REV. 1030, 1035-36 (1974).

But see *State ex rel. Edmisten v. J.C. Penney Co., Inc.*, 292 N.C. 311, 233 S.E.2d 895 (1977), where the court interpreted N.C. GEN. STAT. § 75-1.1 (1975) restrictively to exclude unfair or deceptive acts or practices not specifically part of or motivating the sale. The court did not consider the possibility of any inherent authority in the Attorney General to bring such an action. The General Assembly has since amended the statute, apparently with the purpose of reaching the debt collection activities involved in the J.C. Penney case and similar practices. N.C. GEN. STAT. § 75-1.1 (Supp. 1977). Note also that N.C. GEN. STAT. § 75-15.1 (1975) expressly provides for



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not courts will generally come to accept this approach remains to be seen. Certainly, state Attorneys General will be in a much stronger position to pursue vigorously the interests of consumers against misleading, fraudulent, and unfair practices if they may obtain restitution for the victims.

Of course, regardless of whether or not a state Attorney General is deemed to have common law powers, an action cannot be brought if the court does not view it as one within the authority of the Attorney General at common law or one adapting to modern situations the common law powers of the Attorney General. Thus, in *State ex rel. Fowler v. Moore*, the Nevada Supreme Court held that the Attorney General lacked the power to intervene in a divorce suit or to bring an action to set aside a divorce judgment despite the interest of the state in divorce actions.<sup>82</sup> If the court does not agree with the Attorney General that public rights and interests are involved in the matter, the Attorney General will naturally not be held to have power to initiate or intervene in a suit.<sup>83</sup> Finally, of course, if a state does not recognize common law powers of the Attorney General, actions very similar to those discussed in the preceding paragraphs will be viewed as outside the authority of the Attorney General to initiate.<sup>84</sup>

The Attorney General's authority to litigate in the public interest or on behalf of the State is widely held to include the power to control litigation concerning state and public interests.

Ordinarily, the attorney general, both under the common law and by statute, may control and manage all litigation in behalf of the state and is empowered to make any disposition of the state's litigation which he deems for its best interest. His power effectively to control litigation involves the power to discontinue if and when, in his opinion, this should be done. Generally, therefore, the attorney general has authority to direct the dismissal of proceedings instituted in behalf of the state. . . . And the attorney general may enter into compromises and settlements of suits in which the state is an interested party, which will be binding on the state where there is doubt and an honest dispute as to the lowest state's rights and the compromise or settlement is a bona fide

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restitutionary remedies. If the Attorney General can persuade the court that a particular practice is within the statutory prohibition, restitution may thus be available as a statutory remedy. But the narrow vision of the court in the J.C. Penney case, along with its consistent failure even to consider common law powers of the Attorney General as the basis for consumer protection suits, does not bode well for the prospects of the North Carolina Attorney General's office in utilizing common law principles as a tool for modern-day consumer protection advocacy.

82. 46 Nev. 65, 207 P. 75, 22 A.L.R. 1101 (1922). See generally Annot., 22 A.L.R. 1112 (1923).

83. *Andersson v. Franklin Soc'y Fed. Sav. & Loan Ass'n*, 39 Misc. 2d 7, 239 N.Y.S.2d 765 (1963).

84. E.g., *Arizona State Land Dep't v. McFate*, 87 Ariz. 139, 348 P.2d 912 (1960); *In re Estate of Sharp*, 63 Wis. 2d 254, 217 N.W.2d 258 (1974).

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one, at least when he acts with the approval of the executive head of the department having charge of the matter involved in the suit.<sup>85</sup>

Acting as he does on behalf of the state or the public interest, the Attorney General must determine in his own discretion whether or not a suit should be brought, and, if so, whether it should be pursued to judgment. He cannot be ordered to bring a suit;<sup>86</sup> nor can he be barred from bringing a suit or participating in a suit within his statutory and common law authorities even if the sole extent of his participation is to initiate the suit in order to permit private parties to obtain judicial resolution of their claims.<sup>87</sup> Similarly, the Attorney General, not the agency or official involved, may decide whether or not to appeal an adverse decision relating to implementation or enforcement of particular governmental functions. The relationship between the Attorney General and the officials dealing with the affected areas of state law is not that of the traditional attorney-client relationship.

The Attorney General represents the Commonwealth as well as the Secretary, agency or department head who requests his appearance. G.L. c. 12, § 3. He also has a common law duty to represent the public interest. *Attorney Gen v. Trustees of Boston Elev. Ry.*, 319 Mass. 642, 652, 67 N.E.2d 676 (1946); *Jacobson v. Parks & Recreation Comm. of Boston*, 345 Mass. 641, 644, 189 N.E.2d 199 (1962). Thus, when an agency head recommends a course of action, the Attorney General must consider the ramifications of that action on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency. To fail to do so would be an abdication of official responsibility.<sup>88</sup>

The exercise of his discretion as to whether or not the public interest and the interests of the state will be served by litigation may be the basis for a decision by the Attorney General to compromise or settle a suit and enter into a consent judgment or dismiss the proceeding on the basis of compromise or settlement. Courts have freely upheld the right of the Attorney General to make such decision in common law states and even in states which do not recognize the common law powers of the Attorney General where the Attorney General has authority over the particular action.<sup>89</sup>

85. 7 AM. JUR. 2d *Attorney General* § 15 (1963). See also NAAG (1977), *supra* note 30, at 57-59; NAAG, *supra* note 66, at 55-56.

86. See, e.g., *Public Defender Agency v. Superior Court*, 534 P.2d 947 (Alaska 1975).

87. *Evans-Aristocrat Indus., Inc. v. City of Newark*, 140 N.J. Super. 226, 356 A.2d 23 (App. Div. 1976). See also discussion of Attorney General's control and discretion concerning actions in the nature of *quo warranto*, *infra*.

88. *Secretary of Adm'n & Fin. v. Attorney General*, 326 N.E.2d 334 (Mass. 1975).

89. *State ex rel. Carmichael v. Jones*, 252 Ala. 479, 41 So.2d 280 (1949); *Lyle v. Luna*, 65 N. Mex. 429, 338 P.2d 1060 (1959) (a non-common law state); *State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813 (Okla. 1973); *Cooley v. South Carolina Tax Comm'n*, 204 S.C. 10, 28 S.E.2d 445 (1943) (*per curiam*); *State ex rel. Wilson v. Young*, 44 Wyo. 6, 7 P.2d 216, 81 A.L.R. 114 (1932). See also Annot., 81 A.L.R. 124 (1932).

The rule fairly deducible from these authorities would seem to be that the Attorney General has power to settle and compromise a suit, when the rights of the state are in doubt or are in honest dispute, at least when he acts with the approval of the executive head of the department which may, in any case, have the matter involved in the suit in his particular charge.<sup>90</sup>

Illinois apparently recognizes the power of the Attorney General to dismiss a suit in his discretion even where it is claimed that the dismissal is based on fraud and bad faith.<sup>91</sup>

Like so many other questions involving the common law powers of the Attorney General, his control over litigation has not been accorded significant consideration by the appellate courts of North Carolina. However, one case in the criminal prosecution area, where the Attorney General clearly had authority to prosecute, recognized the authority of the Attorney General to direct a *nolle prosequi* to be entered without giving any particular reason for doing so. "It seems from the authorities cited that the Attorney-General has a discretionary power to enter a *nolle prosequi*, for the proper exercise of which he is responsible. We know of no case where the Court has interfered with the exercise of this power, though they certainly would do so if it were oppressively used."<sup>92</sup> Despite the lack of significant analysis of the question, it appears that the North Carolina Supreme Court did recognize the discretionary power of the Attorney General to control litigation within his sphere of responsibility. Presumably, this power exists equally in relation to civil litigation within the authority of the North Carolina Attorney General.

#### REPRESENTATION OF STATE AGENCIES

One of the powers or duties of the Attorney General most commonly associated with his office is the authority or responsibility to represent state agencies and officials in matters involving the enforcement of state law. Frequently, state officials have sought to retain counsel other than the Attorneys General of their respective states, and the courts have had to grapple with the question of whether or not the Attorney General's common law power to represent the state excludes the possibility of representation by other persons. One of the earliest and best known cases on this point is frequently quoted.

It is true there were other representatives of the crown in the courts at common law, but they were all subordinate to the Attorney General. By our constitution we created this office by the common law designa-

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90. *State ex rel. Wilson v. Young*, 44 Wyo. 6, 7 P.2d 216, 81 A.L.R. 114 (1932).

91. *People v. Sterling*, 357 Ill. 354, 192 N.E. 229 (1934).

92. *State v. Thompson*, 10 N.C. 613 (1825). See also the discussion concerning Attorneys' General's power to enter *nolle prosequis* in criminal prosecutions, *infra*.

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tion of Attorney General and thus impressed it with all its common law powers and duties. As the office of Attorney General is the only office at common law which is thus created by our constitution the Attorney General is the chief law officer of the State, and the only officer empowered to represent the people in any suit or proceeding in which the State is the real party in interest, except where the constitution or a constitutional statute may provide otherwise. With this exception, only, he is the sole official advisor of the executive officers and of all boards, commissions and departments of the State government, and it is his duty to conduct the law business of the State, both in and out of the courts.<sup>93</sup>

In deciding whether or not the Attorney General of a particular state had authority to represent a specific agency or board to the exclusion of others, some courts have ruled or suggested that even a statute providing expressly for appointment of other counsel would invade the constitutional authority of the Attorney General to represent the state and its agencies.<sup>94</sup> Apparently the more common view, however, is that where a statute expressly authorizes appointment or employment of other counsel by a state agency, the common law power of the Attorney General may be abrogated to that extent.<sup>95</sup> Some state courts take the view that the authority of a state agency to employ counsel other than the Attorney General must be explicitly accorded to the agency by statute and that a mere general statement to hire such other persons, professionals or consultants as the agency may require will not authorize appointment of other counsel.<sup>96</sup> On the other hand, the courts of some states have been very generous to state agencies in finding authority for those agencies to hire counsel other than the Attorney General on such bases as that the agency was not one known to the common law and that no specific legislation extends to the Attorney General the authority or duty to represent the agency,<sup>97</sup> or that the authority of the governor to appoint members of an agency and to hire other attorneys, and the authority of the agency to hire such other personnel as may be required, authorize the agency to hire its own attorney.<sup>98</sup> In states in which the courts have rejected the principle of common law powers

93. *Fergus v. Russel*, 270 Ill. 304, 342, 110 N.E. 130 (1915).

94. *Wade v. Mississippi Cooperative Extension Serv.*, 392 F. Supp. 229 (N.D. Miss. 1975); *People ex rel. Scott v. Briceland*, 65 Ill. 2d 485, 3 Ill. Dec. 739, 359 N.E.2d 149 (1976); *State ex rel. Maloney v. Wells*, 79 S.D. 389, 112 N.W.2d 601 (1961).

95. See NAAG (1977), *supra* note 30, at 48-49; NAAG, *supra* note 60, at 49-51; 7 Am. Jur. 2d *Attorney General* § 9 (1963); Morgan, *The Office of the Attorney General*, 2 N.C. CENT. L.J. 156 (1970). See generally Annot., 137 A.L.R. 818 (1942).

96. *E.g.*, *Darling Apartment Co. v. Springer*, 25 Del. Ch. 420, 22 A.2d 397, 137 A.L.R. 803 (1941); *Keenan v. Board of Chosen Freeholders*, 101 N.J. Super. 495, 244 A.2d 705 (1968), *aff'd*, 106 N.J. Super. 312, 255 A.2d 786 (App. Div. 1969).

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

98. *Woodahl v. State Highway Comm'n*, 155 Mont. 32, 465 P.2d 818 (1970). See generally Toepfer, *supra* note 30, at 209-13.

being vested in their Attorneys General or where the courts have not clearly found such powers, statutory authority for state agencies to hire counsel other than the Attorney General has readily been found.<sup>99</sup>

North Carolina has not produced significant judicial statements on the common law authority of the Attorney General to represent state agencies to the exclusion of other counsel. North Carolina General Statutes § 114-2(2) requires the Attorney General to "represent all State departments, agencies, institutions, commissions, bureaus, or other organized activities of the State which receive support in whole or in part from the State." Additionally, the state has long had statutory authority for the governor to employ other or additional counsel in his discretion.<sup>100</sup> More directly on point, the General Assembly has now provided in detail for situations in which the governor may authorize employment of counsel other than the Attorney General. North Carolina General Statutes § 147-17 reads 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 activities 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.

(c) The Governor may direct that the compensation fixed under this section for special counsel shall be paid out of appropriations or other funds credited to the appropriate department, agency, institution, commission, bureau, or other organized activity of the State or out of the Contingency and Emergency Fund.

99. *State ex rel. Frohmler v. Hendrix*, 59 Ariz. 184, 124 P.2d 768 (1942); *Padgett v. Williams*, 82 Idaho 28, 348 P.2d 944 (1960).

100. Coates, *supra* note 8, at 137. See also Morgan, *The Office of the Attorney General*, 2 N.C. CENT. L.J. 165, 169 (1970).

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Although the appellate courts of this state have not been required to interpret these provisions, it seems likely that the appellate courts would uphold the constitutionality of the statutory instructions for circumstances in which counsel other than the Attorney General may be utilized by state agencies. As previously stated, North Carolina General Statutes § 4-1 provides that the common law is in full force and effect in this state except as it may be repugnant to the state's system of government or as it may be modified or repealed by constitutional or statutory provisions. Since this statute has been upheld and the courts of this state have nowhere held that the common law may not be modified unless the modification is incorporated into the North Carolina Constitution, there seems no reason to doubt that the General Assembly can authorize appointment of counsel other than the Attorney General for state agencies. Since North Carolina General Statutes § 147-17 sets out in such detail situations and conditions upon which counsel other than the Attorney General may be employed for state agencies, one may speculate that the courts would probably construe this statute as exclusive and would not permit appointment or employment of counsel other than the Attorney General by state agencies in situations not specified by North Carolina General Statutes § 147-17.

## ADVISORY FUNCTION OF THE ATTORNEY GENERAL

The general practice of conferring upon state Attorneys General the duty to advise officials and agencies of the state and to provide them with opinions interpreting the law derives from the common law function of the English Attorney General in advising the Crown, Parliament, and other departments of government.<sup>101</sup> Opinions of the Attorney General may take the form of off-hand advice over the telephone, informal letter opinions concerning a state statute or the duties and powers of a state agency or official, or the formal opinions which go out over the Attorney General's name and are usually subjected to a formal review procedure in the office and published regularly.<sup>102</sup> While Attorney General's opinions in this country are generally published or at least a matter of public record,<sup>103</sup> the official opinions of the Attorney General of England are confidential although they may

101. HAMMONDS, *supra* note 12, at 2; 7 AM. JUR. 2d *Attorney General* § 8 (1963); Cooley, *supra* note 12, at 307; Larson, *The Importance and Value of Attorney General Opinions*, 41 IOWA L. REV. 351, 352 n.4 (1955-1956); Toepfer, *supra* note 30, at 206.

102. For general discussions of Attorney General opinions, see Abraham & Benedetti, *The State Attorney General: A Friend of the Court?*, 117 U. PA. L. REV. 795 (1969); Larson, *supra* note 101; Thompson, Gough & Wallace, *supra* note 15, at 16-18; Toepfer, *supra* note 30.

103. Abraham & Benedetti, *supra* note 102, at 800; Thompson, Gough & Wallace, *supra* note 15, at 17-18.

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be disclosed by the recipient in his discretion.<sup>104</sup> These opinions are generally held to be advisory only and cannot have the effect of rendering a statute unenforceable or protect officials charged with enforcing statutes from being held in error, absent explicit statutory provision.<sup>105</sup>

In North Carolina the Attorney General may be viewed as possessing the common law duty to render legal advice to the state and its officials.<sup>106</sup> This responsibility has now been embodied in statute as North Carolina General Statutes § 114-2 requires the Attorney General to "consult with and advise the solicitors, when requested by them, in all matters pertaining to the duties of their office"<sup>107</sup> and to "give, when required, his opinion upon all questions of law submitted to him by the General Assembly, or by either branch thereof, or by the Governor, Auditor, Treasurer, or any other State officer."<sup>108</sup> Although the statutes do not seem to require or authorize the giving of Attorney General's opinions to local officials other than solicitors, the long-standing practice of the Attorneys General of North Carolina has been to advise county and city officials generally and to render even formal opinions upon their request.<sup>109</sup> The Attorney General's office continues at present to provide legal advice and opinions to local officials other than solicitors.

North Carolina, like many states, has ruled that Attorney General's opinions are purely advisory and do not affect the legal duty or authority of the recipients in regard to the subject matter of the opinion.<sup>110</sup> Consequently, the advisory function of the Attorney General in providing general legal advice and formal opinions to state officials and agencies does not provide much scope for the expansion of the activities of the Attorney General's office or adaptation of those activities to modern situations on the basis of common law powers inherent in the office. The Attorneys General in North Carolina have apparently long viewed this responsibility as a public function and service and have expanded the duties to include local officials and agencies who may be in need of legal advice or assistance. Since the opinions are advisory only, the Attorney General cannot, as a practical matter, utilize them

104. Jones at 47; Thompson, Gough & Wallace, *supra* note 15, at 17.

105. Council 81, Am. Fed'n of State, County & Mun'l Employees v. State, 288 A.2d 453 (Del. Ch. 1972); Gershman Inv. Corp. v. Danforth, 517 S.W.2d 33 (Mo. 1974) (en banc); Hetherington v. McHale, 10 Pa. Commw. Ct. 501, 311 A.2d 162 (1973), *rev'd on other grounds*, 458 Pa. 479, 329 A.2d 250 (1974). *But see* State *ex rel.* Johnson v. Baker, 74 N.D. 244, 21 N.W.2d 355 (1945), holding that Attorney General's opinions must be followed by state officials until a judicial decision considers the question.

106. Coates, *supra* note 8, at 129.

107. N.C. GEN. STAT. § 114-2(4) (1975).

108. N.C. GEN. STAT. § 114-2(5) (1975).

109. Coates, *supra* note 8, at 130.

110. *In re Assessment of Taxes*, 248 N.C. 531, 103 S.E.2d 823 (1958); *Lawrence v. Shaw*, 210 N.C. 352, 186 S.E. 504 (1936).

for encouraging or promoting innovative approaches to activities of the state and its agencies since to do so would imperil the legal status of those agencies or officials which relied on the Attorney General's opinion or undermine the confidence of State agencies and officials in the Attorney General's advice.

### ENFORCEMENT OF CHARITABLE TRUSTS

State Attorneys General are frequently held to have common law authority to enforce charitable trusts.<sup>111</sup> "The power to institute and prosecute a suit of this nature, in order to establish and carry into effect an important branch of the public interest, is understood to be a common-law power incident to the office of attorney-general or public prosecutor for the government."<sup>112</sup> Other courts have recognized that charitable trusts were favored in common law England and were enforced by the Attorney General and that that practice is generally continued by the Attorney General of the state representing the public interests.<sup>113</sup>

Although the courts have uniformly ruled that the state Attorneys General may initiate or intervene in suits to enforce charitable trusts, they split over the question of whether the Attorney General may participate in a will contest where the validity of a will including a charitable trust is in question. One authority has stated as follows that the general view permits such participation:

There is general accord that the Attorney General, as the chief law enforcement officer of the state, shall represent the public when a will makes provision for a public charity or charitable trust. This right is predicated on the ancient English doctrine that the king as *parens patriae*, through his officer, the Attorney General, watched over the administration of charities. Since charities are matters of public interest the Attorney General is a necessary party to any matter dealing with them.<sup>114</sup>

But in 1959 the Kentucky Court of Appeals, in an often-discussed case, held that the Attorney General was not entitled by virtue of his common law authority to intervene in a will contest where the validity of a will providing for a charitable trust was in question. The court

111. See generally NAAG (1977), *supra* note 30, at 43-45; NAAG, *supra* note 30, at 48-49; Shepperd, *supra* note 30, at 13.

112. Parker v. May, 59 Mass. (5 Cush.) 336 (1850), considering the authority of the county attorney to initiate such an action at a time when the office of Attorney General had been abolished in Massachusetts.

113. E.g., Halladay v. Verschoor, 381 F.2d 100 (8th Cir. 1976); Dickey v. Volker, 321 Mo. 235, 11 S.W.2d 278, 62 A.L.R. 858 (1928), *cert. denied*, 279 U.S. 839, 49 S. Ct. 252, 73 L. Ed. 986 (1929); Attorney General by Anderson v. Rochester Trust Co., 115 N.H. 74, 333 A.2d 718 (1975). See also Annot., 62 A.L.R. 881 (1929).

114. Martin, *The Attorney General and the Charitable Trust Act—Wills, Contest and Construction*, 14 CLEV.-MAR. L. REV. 194 (1965) (footnotes omitted).



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reached its result on the theory that until the validity of the will was determined, there was no trust created and no devise or bequest to go to the potential charitable recipients. It also suggested that the Attorney General, as representative of the state, would place himself in an inconsistent position urging the validity of the will and the resulting charitable trust. Determination that the will was valid and that certain property should go to charity would cause a loss of tax revenue to the state.<sup>115</sup> On the other hand, it has been held that if "there is any question of the validity of a purported charitable trust in a will, it would seem that there is an *a fortiori* reason for the Attorney General's participation, since it is only he who, representing the public which benefits by a charitable trust, will or can act as advocate in support of a charitable provision."<sup>116</sup>

North Carolina follows the general rule of entrusting the Attorney General of the state with the duty of protecting and enforcing charitable trusts in the public interest. The Attorney General exercises extensive statutory powers in the area of enforcement of charitable trusts.<sup>117</sup> In the area of charitable trusts, however, the Supreme Court of North Carolina has expressly endorsed the common law powers of the Attorney General. In *Sternberger v. Tannenbaum*,<sup>118</sup> the court held that the Attorney General could intervene in a suit to approve a settlement entered into by interested parties to avoid a contest over a will which included certain gifts to charity. The Court did not consider it necessary to determine whether Chapter 36 of the North Carolina General Statutes vested the Attorney General with the power to intervene in this suit since it was possible to resort to common law principles to resolve the question.

It seems that the State as *parens patriae*, through its Attorney General, has the common law right and power to protect the beneficiaries of charitable trusts and the property to which they are or may be entitled. Tudor, Charitable Trusts at 323; *Cook v. Duckenfield*, 2 Atk. 562, 26 Eng. Rep. 737 (1943).

This is said in 15 Am. Jur. 2d, Charities, § 119:

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

115. *Commonwealth ex rel. Ferguson v. Gardner*, 327 S.W.2d 947, 74 A.L.R.2d 1059 (Ky. App. 1959). See also Annot., 74 A.L.R.2d 1066 (1960).

116. *In re Estate of Ventura*, 217 Cal. App. 2d 50, 31 Cal. Rptr. 490 (1963); cf. *Sternberger v. Tannenbaum*, 273 N.C. 658, 161 S.E.2d 116 (1968).

117. N.C. GEN. STAT. §§ 36A-48, -52(c), -53(a), (b), -54(b), -74(a) (Supp. 1977). For relevant statutes before the 1977 revision of provisions governing trusts generally, see N.C. GEN. STAT. §§ 36-20, -23.1(c), -23.2(a), -35(b) (1976).

118. 273 N.C. 658, 161 S.E.2d 116 (1968).

to institute and maintain proceedings for the enforcement of such a gift or trust.

If the Attorney General is not a necessary party, he surely is a proper party.<sup>119</sup>

Although *Sternberger v. Tannenbaum* did not, strictly speaking, concern a will contest, one may speculate that the Supreme Court of North Carolina would follow the courts which have decided that the Attorney General may intervene in a will contest instituted to determine the validity of a will containing a charitable trust provision. In a proceeding for the approval of a settlement entered into by the interested parties to avoid a will contest, the validity of the settlement must be determined. Until the courts rule on the question, the existence or amount of any gift to charity is not resolved and there is as yet no gift to charity to enforce. Certainly, a court which refused to permit a state Attorney General to intervene in a will contest might also bar the Attorney General from participating in a proceeding to determine the validity of a settlement among the potential parties to a will contest. In this area it seems that the North Carolina Supreme Court has not only recognized the common law powers of the Attorney General, but construed them rather broadly. In a subsequent case brought by a charitable organization to determine the extent of its rights in regard to certain property, the Attorney General was a party defendant and, as such, urged the existence of a charitable trust and argued that the doctrine of *cy pres* should be applied. The North Carolina Supreme Court apparently relied on common law doctrines as well as statutory provisions in endorsing the right of the Attorney General to act on behalf of charitable trusts in cases of this type. "The State, through its Attorney General, may institute proceedings for the enforcement of charitable trusts or gifts. *Sternberger v. Tannenbaum*, 273 N.C. 658, 161 S.E.2d 116; G.S. 36-20; G.S. 55A-50."<sup>120</sup> In these cases, the Supreme Court of North Carolina has upheld the common law authority of the Attorney General of North Carolina in regard to enforcement of charitable trusts even where statutory provisions might be sufficient to authorize the Attorney General's participation. The approach taken in these two cases may suggest that the Court is willing to find common law powers of the North Carolina Attorney General despite extensive statutory provisions which might arguably be considered implicitly repealing the common law powers in that area. Hopefully, the results in these two cases bode well for interpretations by the court as to the existence and extent of common law powers of the Attorney General in other areas of law.

119. *Id.* at 678-79.

120. *YWCA v. Morgan*, 281 N.C. 485, 494, 189 S.E.2d 169 (1972).

## QUO WARRANTO PROCEEDINGS

At common law the Attorney General of England prosecuted all actions to determine the right of an individual to a privilege or franchise from the Crown. This action in *quo warranto* was utilized to determine the right to a public office or the right to exercise the privilege of operating as a corporation.<sup>121</sup>

The Writ of Quo Warranto is of ancient origin and was used at common law to oust a usurper from a franchise or privilege belonging to the Crown. Because of its limited nature and cumbersome procedure, however, it gradually came to be supplanted by an Information in the nature of a Writ of Quo Warranto which, while differing in form from the ancient Writ, nevertheless was available only to try the right to an office or franchise, public in nature. Hence it followed that the action could be instituted solely in the name of the Sovereign upon the relation of the Attorney General. High, *Extraordinary Remedies*, §600; Ferris on *Extraordinary Legal Remedies*, §121; Bailey on *Habeas Corpus* 1271.

In England, however, following enactment of the Statute of Anne (9 Anne, Ch. 20) an Information in the nature of a Writ of Quo Warranto was permitted to be used by private parties seeking to test the title of persons claiming to occupy public office, or exercise a public franchise. The Statute of Anne authorized the filing of the Information, with leave of court, upon the relation of any person. Upon a relation by a private person the court, in the exercise of its discretion, took into consideration the policy of allowing the proceeding and the motive of the relator. High's *Extraordinary Legal Remedies*, §605.

The Statute of Anne, however, was never the law of Delaware. The remedy by Information in the nature of a Writ of Quo Warranto in this State is the common law remedy as it existed prior to the enactment of the Statute of Anne. *Brooks v. State*, *supra* [*Brooks v. State ex rel. Robert H. Richards, Attorney General*, 3 Boyce 1, 79 A. 790, 51 L.R.A., N.S., 1126]. . . .

It is thus clear that Informations in the nature of Writs of Quo Warranto may be filed solely in the name of the State upon the relation of the Attorney General. Not only is this true with respect to public offices in which the people and the State have a fundamental interest, but as well to corporate offices which in a sense are of interest to private parties only. . . .

The right to institute the action accordingly lies solely with State acting through the Attorney General, in the absence of a statute, of which this State has none, delegating the right of institution to private citizens. 44 Am. Jur., Quo Warranto, §66; 74 CJS Quo Warranto, §18.<sup>122</sup>

121. NAAG (1977), *supra* note 30, at 39-41; NAAG, *supra* note 30, at 45-47; Cooley, *supra* note 12, at 309. See also *Saunders v. Gatling*, 81 N.C. 298, 300 (1879); *State v. Hardie*, 23 N.C. 42, 47 (1840).

122. *Cleaver v. Roberts*, 57 Del. 538, 203 A.2d 63 (1964).

In most states, the Attorney General is the proper party to bring an action in the nature of *quo warranto* although some states also permit an action by an individual upon certain conditions. In considering cases involving actions in the nature of *quo warranto*, state courts have repeatedly resorted to the common law control of the Attorney General over *quo warranto* proceedings and have held that he retains the authority to control such litigation by refusing to institute an action, withdrawing his consent after the action is instituted so that dismissal is required, or intervening to dismiss the action himself.<sup>123</sup>

North Carolina has long recognized actions in the nature of *quo warranto*. Early cases of the North Carolina Supreme Court recognized and discussed the common law writ of *quo warranto* and the extent to which the statutory provisions in North Carolina embody the common law method of challenging possession of public offices or corporate charters.<sup>124</sup> North Carolina currently has extensive statutory provisions which carry forth the right of the Attorney General to initiate actions similar to the *quo warranto* proceedings of common law<sup>125</sup> and, in fact, has had such statutory provisions since the early days of the state's existence.<sup>126</sup> Numerous North Carolina cases, involving both corporations<sup>127</sup> and the right to hold public offices,<sup>128</sup> have dealt with actions in the nature of *quo warranto* brought by the Attorney General.

In at least one case, the North Carolina Supreme Court implied that the Attorney General did not possess any common law powers to bring actions in the nature of *quo warranto*.<sup>129</sup> There, the plaintiff contended that the Attorney General had power to bring such an action on the basis of his common law as well as statutory powers. The court ruled that the Attorney General was not authorized to bring the particular action in question because of the specific provisions of the statutes relating to such actions.

123. *E.g.*, *People ex rel. Conway v. San Quentin Prison Officials*, 217 Cal. App. 2d 182, 31 Cal. Rptr. 649 (1963); *State ex rel. Cage v. Petroleum Rectifying Co.*, 21 Cal. App. 2d 289, 68 P.2d 984 (1937); *Cleaver v. Roberts*, 57 Del. 538, 203 A.2d 63 (1964); *State ex rel. Foster v. Kansas City*, 186 Kan. 190, 350 P.2d 37, *cert. denied*, 363 U.S. 831, 80 S. Ct. 1598, 4 L. Ed.2d 525 (1960). *But see State ex rel. Handlan v. Wilkie Land Co.*, 349 Mo. 666, 162 S.W.2d 846 (1942).

124. *Saunders v. Gatling*, 81 N.C. 298, 300-01 (1879); *State v. Hardie*, 23 N.C. 42, 47-49 (1840).

125. *E.g.*, N.C. GEN. STAT. §§ 1-514 *et seq.* (1969); 55-114, -122, -123, 55A-50, -51, 55B-13 (1975).

126. Compare N.C. GEN. STAT. § 1-515 (1969) to the statute quoted in *Saunders v. Gatling*, 81 N.C. 298, 300 (1879).

127. *E.g.*, *Attorney-General v. Railroad*, 134 N.C. 481, 46 S.E. 959 (1904); *Attorney-General v. Simonton*, 78 N.C. 57 (1878); *Attorney-General v. Petersburg & Roanoke R.R.*, 28 N.C. 456 (1846). *See also State ex rel. Attorney-General v. Scott*, 182 N.C. 865, 109 S.E. 789 (1921).

128. *E.g.*, *State ex rel. Attorney-General v. Knight*, 169 N.C. 333, 85 S.E. 418 (1915); *People ex rel. Attorney-General v. Heaton*, 77 N.C. 18 (1877); *cf. Saunders v. Gatling*, 81 N.C. 298 (1879); *Loftin v. Sowers*, 65 N.C. 251 (1871).

129. *Attorney-General v. Railroad*, 134 N.C. 481, 46 S.E. 959 (1904).

The whole subject of this controversy is now of legislative authority, for section 603 of the Code declares that "The writ of *scire facias*, the writ of *quo warranto* and proceedings by information in the nature of *quo warranto* are abolished, and the remedies obtainable in those forms may be obtained by civil actions under this subchapter." . . . Then, too, if the Attorney-General has the right to institute proceedings in the nature of *quo warranto* against corporations in cases where the charters were obtained and granted through fraudulent representations or suggestions under section 2788, then why should it be thought necessary by the General Assembly that that body should provide for such a proceeding by special enactment, section 604 of the Code? And further, the Attorney-General cannot bring an action in the nature of *quo warranto* for the purpose of vacating the charters of corporations in the cases mentioned in section 605 of the Code, unless and until he gets the leave of the Supreme Court or one of the justices for that purpose. The clear meaning of section 604, before the amendment of 1889, chapter 533, was that whenever the General Assembly had chartered a corporation that charter should not be annulled or vacated on the Attorney-General's own motion on the alleged ground that the charter had been procured by fraud.<sup>130</sup>

The court seemed to base its decision partly on the fact that the General Assembly had specifically provided that, as to corporations chartered by the General Assembly, the Attorney General must obtain leave of the Supreme Court to initiate an action to vacate the corporate charter in certain instances. However, the Court also relied on the fact that the General Assembly had thought it necessary to enact provisions allowing the Attorney General to bring *quo warranto* actions as an indication that, without the statute, the Attorney General did not have the authority. This reasoning seems flawed since it is the courts, not the General Assembly, which should determine whether the general provision continuing the common law in this state would authorize the Attorney General to bring such an action without statutory enactment. The Supreme Court may possibly have relied on the fact that the first provision dealing with these actions specified that the writ of *quo warranto* was abolished and may have construed that provision as an indication that the entire common law basis for such action had been repealed or abrogated. Presumably, the Supreme Court would not now hold that the Attorney General lacked common powers in an area simply because there was significant statutory provision for actions similar to those within the Attorney General's common law authority. Otherwise, the Court would not have been able to find common law powers of the Attorney General in the area of enforcement of charitable trusts. However, the Attorney General's responsibility in the area of actions in the nature of *quo warranto* may well be limited not only by

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130. *Id.* at 484-85.

the extensive statutory enactments on the subject, but also by the specific provision that the writ of *quo warranto* has been abolished. One may well conclude that the Attorney General of North Carolina has been stripped of his common law powers to bring actions against corporations and against persons holding public office to determine the right of those persons to hold such office. Nevertheless, the common law heritage may supply a means of interpreting or construing statutory provisions for actions in the nature of *quo warranto* in the future.

### ACTIONS TO ABATE PUBLIC NUISANCES

The right of the Attorney General to institute actions to abate public nuisances has been recognized by both commentators<sup>131</sup> and courts<sup>132</sup> alike as a common law prerogative of the Attorney General. Recently commentators have suggested that this power may be utilized by a state Attorney General as a tool in the Attorney General's efforts to take an active role in the areas of consumer and environmental protection.<sup>133</sup> State Attorneys General have relied on their common law powers to abate public nuisances in recent years in actions for injunctions against such diverse practices as exceeding permissible weight limits in using public highways<sup>134</sup> and the practice of optometry unlawfully by certain opticians.<sup>135</sup> Clearly, their common law powers to institute actions to abate public nuisances offer a viable means for state Attorneys General to enhance their roles as advocates of consumer and environmental protection interests. North Carolina apparently does not have any general statutory provision governing actions to abate public nuisances although the General Assembly has enacted particular procedures for actions to abate nuisances which are offensive against public morals.<sup>136</sup> The Attorney General, along with a district attorney or any private citizen of the appropriate county, is expressly empowered to institute an action to abate a nuisance against the public morals.<sup>137</sup> Nevertheless,

131. NAAG (1977), *supra* note 30, at 41-42; NAAG, *supra* note 30, at 47-48; W. THOMPSON & B. SMITH, *supra* note 55, at 29; 7 AM. JUR. 2d *Attorney General* § 19 (1963); Shepperd, *supra* note 30, at 12-13; Note, *The Role of the Michigan Attorney General in Consumer and Environmental Protection*, 72 MICH. L. REV. 1030, 1040 (1974).

132. *Hancock v. Terry Elkhorn Mining Co.*, 503 S.W.2d 710 (Ky. App. 1973); *Attorney General ex rel. Michigan Bd. of Optometry v. Peterson*, 381 Mich. 445, 164 N.W.2d 43 (1969); *State ex rel. McLean v. Townsend*, 227 N.C. 642, 44 S.E.2d 36 (1947) (holding a solicitor cannot bring such an action).

133. W. THOMPSON & B. SMITH, *supra* note 55, at 29-30; Note, *The Role of the Michigan Attorney General in Consumer and Environmental Protection*, 72 MICH. L. REV. 1030, 1040-42, 1045-55 (1974).

134. *Hancock v. Terry Elkhorn Mining Co.*, 503 S.W.2d 710 (Ky. App. 1973).

135. *Attorney General ex rel. Michigan Bd. of Optometry v. Peterson*, 381 Mich. 445, 164 N.W.2d 43 (1969).

136. N.C. GEN. STAT. §§ 19-1 to -3, -5, -6, -8.1 to -8.3 (Supp. 1977), §§ 19-4, -7 (1975).

137. N.C. GEN. STAT. § 19-2.1 (Supp. 1977).

many actions to abate public nuisances other than those against public morals have been instituted in this state by the Attorney General.<sup>138</sup>

The North Carolina Supreme Court has expressly recognized that the "State is the proper party to complain of wrongs done to its citizens by a public nuisance" although private citizens who are injured in a way different from the public in general may have standing to bring such an action.<sup>139</sup> An individual who has not suffered special damage as a result of the public nuisance may not bring an action to abate a public nuisance in the absence of express statutory provision. As noted before, the court has recognized that the state acts for its citizens in complaining of public nuisances. "And we are of the opinion that this must be done, as heretofore, on the relation of its Attorney-General. 39 Am. Jur., p. 376, Sec. 123, 22."<sup>140</sup>

Since the North Carolina Supreme Court, without relying on express statutory authority, has ruled that the Attorney General is the proper party ordinarily to bring an action to abate a public nuisance, a strong inference may be drawn that the Attorney General of North Carolina does retain common law powers to abate public nuisances. Because of the relatively small amount of statutory provisions concerning actions to abate public nuisances, it should be a comparatively easy task for the appellate courts to uphold common law powers of the Attorney General to initiate actions to abate public nuisances. This power may be utilized, as discussed above, in the fields of consumer and environmental protection. In fact, in a 1977 case in the Superior Court of Gaston County, this office did rely strongly on common law powers of the Attorney General concerning public nuisances,<sup>141</sup> the only case reported in response to a memorandum distributed throughout the Attorney General's office in preparation for this article requesting information as to any cases relying on the Attorney General's common law powers.

### POWER OVER CRIMINAL PROSECUTIONS

The Attorney General had broad powers to institute and prosecute criminal offenses at common law.<sup>142</sup> These extensive powers in criminal law enforcement have been recognized in numerous decisions of

138. *E.g.*, Attorney-General *ex rel.* Bradsher v. Lea, 38 N.C. 301 (1844); Bell v. Blount, 11 N.C. 384 (1826); Attorney-General *ex rel.* Citizens of Raleigh v. Hunter, 16 N.C. 12 (1826).

139. Pedrick v. Railroad, 143 N.C. 485, 55 S.E. 877 (1906).

140. State *ex rel.* McLean v. Townsend, 227 N.C. 642, 643, 44 S.E.2d 36 (1947).

141. State *ex rel.* Edmisten v. C.A. Hughes, Inc., 77 CVS 1383 (Sup. Ct. Gaston County Sep. 19, 1975).

142. See generally NAAG (1977), *supra* note 30, at 51-56; NAAG, *supra* note 30, at 51-55; 7 AM. JUR. 2d Attorney General § 23 (1963); DeLong, *Powers and Duties of the State Attorney-General in Criminal Prosecution*, 25 J. CRIM. L. & CRIMINOLOGY 358 (1935); Montague, *The Office of Attorney General in Kentucky* 49 KY. L.J.194, 201-10 (1960-1961); Note, *The Common Law Power of State Attorneys-General to Supersede Local Prosecutors*, 60 YALE L.J.559 (1951); Note, *Attorney General—Common Law*

various states.<sup>143</sup> Despite the existence of local prosecutors, the Attorney General has been held in several instances to have the authority to initiate criminal prosecutions or to supersede the local prosecutor in deciding whether to initiate or to refrain from bringing or dismiss a criminal prosecution.<sup>144</sup> On the other hand, some courts have held that regardless of whether the Attorney General has common law powers, statutory and constitutional provisions creating and specifying the duties of local prosecutors have abrogated the powers of the Attorney General to prosecute criminal cases in those states.<sup>145</sup> The Maryland Court of Appeals held that constitutional and statutory provisions establishing the office and duties of the local prosecutor had incorporated the Attorney General's common law powers regarding criminal prosecutions into the office of the local prosecutor, and consequently a statutory provision for a State Prosecutor within the office of the Attorney General was unconstitutional.<sup>146</sup> The conflicting decisions in this area apparently stem primarily from the fact that the states have almost uniformly adopted a system of local prosecutors alien to the common law and in effect have carved out the positions of local prosecutors from the office of Attorney General.<sup>147</sup>

If a state Attorney General does have common law powers over criminal prosecutions, or where he possesses limited statutory power over certain criminal prosecutions, he is generally held entitled to exercise his authority in much the same manner as the Attorney General at common law did in regards to criminal prosecutions. Just as he has broad control over the initiation, conduct, and maintenance of civil litigation, he also exercises broad control over the initiation, conduct, and maintenance of criminal prosecutions. Thus, the Attorney General has clear authority to enter a *nolle prosequi*.<sup>148</sup> In fact, the power to

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*Powers over Criminal Prosecutions and Civil Litigation of the State*, 16 N.C. L. REV. 282 (1937-1938).

143. *E.g.*, *State v. Finch*, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369 (1929); *Murphy v. Yates*, 276 Md. 475, 348 A.2d 837 (1975); *People v. Karalla*, 35 Mich. App. 541, 192 N.W.2d 676 (1971); *State ex rel. Woodahl v. Dist. Court*, 159 Mont. 112, 495 P.2d 182 (1972); *Eames v. Rudman*, 115 N.H. 91, 333 A.2d 157 (1975).

144. *State v. Finch*, 128 Kan. 665, 280 P. 910, 66 A.L.R. 1369 (1929); *People v. Karalla*, 35 Mich. App. 541, 192 N.W.2d 676 (1971); *Eames v. Rudman*, 115 N.H. 91, 333 A.2d 157 (1975).

145. *See, e.g.*, *State ex rel. Woodahl v. District Court*, 159 Mont. 112, 495 P.2d 182 (1972); *State v. Longo*, 136 N.J.L. 589, 54 A.2d 788 (1947); *State ex rel. Thornton v. Williams*, 215 Ore. 639, 336 P.2d 68 (1959).

146. *Murphy v. Yates*, 276 Md. 475, 348 A.2d 837 (1975).

147. DeLong, *supra* note 142, at 366-67; Van Alstyne & Roberts, *supra* note 19, at 727-28; Note, *The Common Law Power of State Attorneys-General to Supersede Local Prosecutors*, 60 YALE L.J. 559, 561-62 (1951).

148. *E.g.*, *State ex rel. Bokowsky v. Rudman*, 111 N.H. 57, 274 A.2d 785 (1971) (per curiam); *State v. Swift*, 101 N.H. 340, 143 A.2d 114 (1958) (per curiam); *State v. Thompson*, 10 N.C. 613 (1825); *Suitor v. Nugent*, 98 R.I. 56, 199 A.2d 722 (1964); Annot., 81 A.L.R. 124, 132-33 (1932). *See also* *State v. Sokol*, 208 So.2d 156 (Fla. App. 1968) (per curiam).



enter a *nolle prosequi* may continue to exist in states which no longer permit the Attorney General generally to initiate criminal prosecutions.<sup>149</sup> An Attorney General who does have authority in the criminal prosecution area is entitled to obtain material referred to in a grand jury report<sup>150</sup> and entitled to judicial immunity in his actions in administration of the criminal law.<sup>151</sup>

North Carolina may be among those states which view constitutional and statutory provisions as having entrusted the authority to prosecute cases generally to the local prosecutor and thus having stripped the Attorney General of his common law powers in the area of criminal prosecutions. The North Carolina Constitution expressly creates the office of District Attorney or Solicitor and imposes upon him the duty of prosecuting all criminal actions in the superior courts in his district.<sup>152</sup> Statutory provisions then set out the duties of the District Attorney or Solicitor.<sup>153</sup> Not only do the statutes reinforce the constitutional obligation of the local prosecutor to prosecute all criminal charges in the superior courts in his district, but they also require him to prosecute all criminal cases in the district courts of his district.<sup>154</sup>

By contrast, the Attorney General does not have the same kind of detailed and explicit responsibility for criminal prosecution at the trial level. North Carolina General Statutes §114-2(1) imposes upon the Attorney General the duty to "defend all actions in the appellate division in which the State shall be interested, or a party, and 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." It should be noted that before 1973, the Attorney General's duty "to appear for the State in any other court or tribunal in any cause or matter, civil or criminal in which a State may be a party or interested" was only upon request of the Governor or either branch of the General Assembly. Consequently, one might argue that this amendment has extensively enlarged the powers of the Attorney General concerning criminal prosecutions. However, North Carolina General Statutes §114-2(4) still imposes upon the Attorney General the duty to "consult with and advise the solicitors, when requested by them, in all matters pertaining to the duties of their office." This provision, as well as the express constitutional duty of the district attorneys or solicitors to prosecute criminal cases at the trial level, has been significantly relied on by the Supreme Court in rejecting the authority of the Attorney General to initiate

149. DeLong, *supra* note 142, at 370-71.

150. *Matthews v. Pound*, 403 S.W.2d 7 (Ky. App. 1966).

151. *Suitor v. Nugent*, 98 R.I. 56, 199 A.2d 722 (1964).

152. N.C. CONST. art. IV, § 18(l).

153. N.C. GEN. STAT. §§ 7A-60, -61, -66.1 (Supp. 1977).

154. N.C. GEN. STAT. § 7A-61 (Supp. 1977).

criminal prosecutions in the absence of an express statutory provision authorizing him to do so in the enforcement of a particular statute.<sup>155</sup> It seems that there is still an argument for the existence of common law powers of the Attorney General of North Carolina to prosecute criminal cases. Certainly, the Attorney General apparently has such power initially.

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

Does this provision operate as a limitation on the General Assembly's power ‘to prescribe by law’ the duties of the Attorney General? Did it give the superior court solicitors an *exclusive* power to ‘prosecute on behalf of the State, in all criminal actions’ through which they could refuse to allow the Attorney General, special counsel, or inferior court solicitor to appear with them in criminal cases in their respective districts, even when the General Assembly authorized them to appear? If so, what becomes of the legislation authorizing the Governor to send the Attorney General into the superior courts? Or either branch of the General Assembly to send him? Or himself to go on his own initiative in specific types of cases? If not so, what is to prevent the General Assembly from authorizing him to appear on his own initiative in all criminal actions? And does this power to appear carry with it the power to supersede or supplant?<sup>156</sup>

Before the 1973 amendment to North Carolina General Statutes §114-2(1), these questions appeared to have been answered. The Supreme Court had construed the respective constitutional and statutory provisions concerning the solicitors and Attorney General to abrogate any general common law power of the Attorney General over criminal prosecutions. Now one might construe the amended version of North Carolina Statute §114-2(1) to authorize the Attorney General to appear on his own initiative in criminal cases, either because of the express statutory authorization or because in effect he has regained his common law powers in this area. The constitutional and statutory prerogatives of the solicitors to prosecute criminal cases generally apparently did not prevent the General Assembly from vesting the Attorney

155. *NAACP v. Eure*, 245 N.C. 331, 95 S.E.2d 893 (1957); *State v. Loesch*, 237 N.C. 611, 75 S.E.2d 654 (1953).

156. *Coates*, *supra* note 8, at 141.

General with the power to prosecute criminal cases since there have long been a number of statutes charging the Attorney General with the duty to enforce particular criminal statutes<sup>157</sup> and, as noted, the Attorney General has long been authorized to prosecute criminal cases on the instructions of the Governor or General Assembly. No case has been found by this writer or apparently by previous writers<sup>158</sup> which question the constitutionality of statutes authorizing the Attorney General to prosecute in particular instances. And where the Attorney General does have authority to initiate criminal prosecutions, it appears that he retains the general common law powers concerning his duties and discretion in regard to those criminal prosecutions. An early North Carolina case held, with little discussion, that the Attorney General "has a discretionary power to enter a *nolle prosequi*, for the proper exercise of which he is responsible."<sup>159</sup>

A definitive answer to the question of the extent of the Attorney General's power with relation to criminal prosecution must await a judicial determination of the effect of the 1973 amendment under North Carolina General Statutes §114-2(1). However, one may doubt that the appellate courts of North Carolina would construe this provision as empowering the Attorney General to supplant or supersede the District Attorney at his will since the North Carolina Constitution and statutes enacted pursuant to it have provided extensively for the control of criminal prosecutions in their respective districts by the solicitors or District Attorneys. However, this amendment must have some meaning, and surely the Attorney General now has greater power to participate in criminal prosecutions even in cases where no specific statutory authorization exists. The Attorney General's office might well choose

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157. *E.g.*, N.C. GEN. STAT. §§ 58-9(5) (1975) (prosecution of violations of insurance laws for Commissioner of Insurance, 75-13 (1975) (prosecution of violations of North Carolina General Statutes Chapter 75, concerning restraint of trade, unfair methods of competition, and unfair and deceptive acts and practices in business), 106-266.14 (1975) (prosecution of violations of milk production and distribution laws).

In addition to express statutory obligations to prosecute particular criminal offenses, the Attorney General, by virtue of his duty to prosecute and defend suits to which the State may be a party or interested, and to represent state agencies, may prosecute particular offenses for state agencies and officials charged with the enforcement of specific statutes. See N.C. GEN. STAT. § 114-2(1), (2) (1975); Morgan, *The Office of the Attorney General*, 2 N.C. CENT. L.J. 165, 175 & n.67 (1970).

The Attorney General's office includes a "Special Prosecution Division" charged with the responsibility of prosecuting criminal cases upon request by the District Attorney and with the Attorney General's approval. N.C. GEN. STAT. § 114-11.6 (1975).

158. No case questioning the constitutionality of statutes authorizing the Attorney General to prosecute criminal cases in specific situations has been found by this writer or mentioned by previous writers discussing this office. See Coates, *supra* note 8; Morgan, *The Office of the Attorney General*, 2 N.C. CENT. L.J. 165 (1970); Note, *Attorney General—Common Law Powers over Criminal Prosecutions and Civil Litigation of the State*, 16 N.C. L. REV. 282 (1937-1938); 8 N.C. L. REV. 344 (1929-1930).

159. *State v. Thompson*, 10 N.C. 613 (1825).

to test the extent to which his powers have been increased by attempts to prosecute or intervene in prosecutions in specific instances consistent with the Attorney General's general responsibility to protect the public interest.

### CONCLUSION

The North Carolina Attorney General has numerous and varied duties and powers established by the General Statutes. At first glance, it seems as if this wide range of statutory provisions provides all the powers that the Attorney General's office could use and all the duties and responsibilities that it could handle. However, there remains the possibility that common law powers and duties are attached to the Attorney General's office by virtue of the constitutional establishment of the office and statutory provision that the common law remains in force and effect except as it may be repugnant to our system of government or modified, repealed, or abrogated by statute. The North Carolina courts have not clearly determined the question of the Attorney General's potential possession of common law powers and duties, but has suggested that they may exist in some situations. Until they do, the question remains debatable. But is there any need for determination that the Attorney General does possess such powers and responsibilities?

State Attorneys General have in recent years assumed increasingly active roles in such varied fields as consumer protection, environmental protection, and enforcement of the standards of integrity and adherence to legal requirements expected of state officials and agencies. Many state Attorneys General have found that statutory provisions governing their offices, often as diverse as the North Carolina laws concerning the Attorney General, leave gaps in the mechanisms available to them for assumption of the role of protector of public rights, promoter of public interests, and enforcer of the laws. Common law principles have often been invoked to fill in some of these gaps. Like Attorneys General of other states, North Carolina's Attorneys General have increasingly assumed the role of advocate for consumer and environmental protection interests and watch-dog over the standards of integrity and adherence to legality expected of state and local officials and agencies. Consequently, the office of Attorney General in North Carolina could be enabled to function much more effectively in this role if determinations by appellate courts should establish the continuing validity of the Attorney General's common law powers and responsibilities. If the appellate courts of North Carolina do not construe

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statutory provisions as repealing, modifying, or entrusting to other agencies and officials powers and duties inherent in the Attorney General at common law, the Attorney General of North Carolina should be able to rely on his common law powers and duties as a valuable tool in performing effectively his role as the people's attorney.