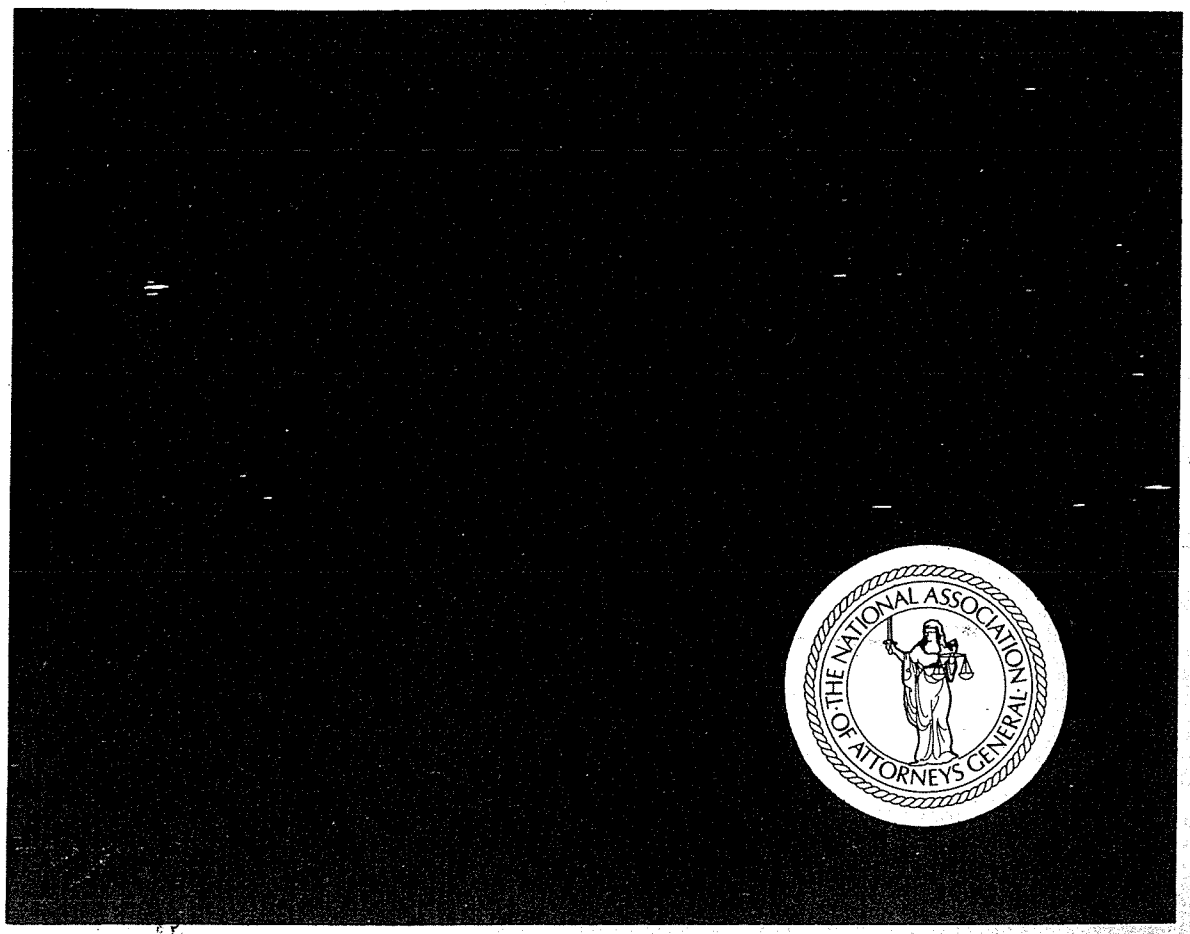
Common Law Powers of State Attorneys General

May 1980

The National Association of Attorneys General
Committee on the Office of Attorney General



The National Association of Attorneys General

Committee on the Office of Attorney General

COMMON LAW POWERS OF STATE ATTORNEYS GENERAL

Revised Edition

May 1980

This project was supported by Grant Number 79-TA-AX-0028 awarded by the Law Enforcement Assistance Administration, United States Department of Justice. The fact that LEAA is furnishing financial support does not necessarily indicate its concurrence with the statements herein.

This is a revised and updated version of reports issued in 1975 and 1977. Patton G. Galloway, COAG Executive Director, had primary responsibility for all three editions.

3901 Barrett Drive
Raleigh, North Carolina 27609
Price: $5.00

THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL

Chairman

Honorable J. D. MacFarlane
Attorney General of Colorado

Other Members

Honorable Carl R. Ajello
Attorney General of Connecticut

Honorable John D. Ashcroft
Attorney General of Missouri

Honorable Arthur K. Bolton
Attorney General of Georgia

Honorable William J. Brown
Attorney General of Ohio

Honorable Chauncey H. Browning
Attorney General of West Virginia

Honorable M. Jerome Diamond
Attorney General of Vermont

Honorable Rufus L. Edmisten
Attorney General of North Carolina

Honorable Slade Gorton
Attorney General of Washington

Honorable Michael T. Greely
Attorney General of Montana

Honorable Bronson C. La Follette
Attorney General of Wisconsin

Honorable Daniel R. McLeod
Attorney General of South Carolina

Honorable Allen I. Olson
Attorney General of North Dakota

Honorable Thomas D. Rath
Attorney General of New Hampshire

Honorable William J. Scott
Attorney General of Illinois

Honorable Theodore L. Sendak
Attorney General of Indiana

Honorable Warren R. Spannaus
Attorney General of Minnesota

Honorable Robert T. Stephan
Attorney General of Kansas

Honorable Mark White
Attorney General of Texas

Honorable Frank J. Kelley
Attorney General of Michigan

Executive Director

Patton G. Galloway
3901 Barrett Drive
Raleigh, North Carolina 27609

TABLE OF CONTENTS

1. INTRODUCTION

Attorneys General derive their powers from constitutional, statutory and common law. There is no clear division between the three sources of authority, for each complements the others. Many statutes, for example, are merely declaratory of the common law. Common law powers are the most difficult to establish; even when their existence is recognized by statute, the definition of their practical applications rests with the courts. No court has ever attempted a complete listing of the Attorney General's powers at common law.

The office of Attorney General in the American states developed as an outgrowth of the Colonial Attorney General. Legal historians agree that:

> ... little attempt was made to define or enumerate duties, for the American Attorney General became possessed of the common law powers of the English Attorney General, except as changed by constitution or statute.... The English office was assuming its modern form as the American colonies were being settled. By the seventeenth century the powers exercised by the Attorney General at common law were quite numerous.[1]

The prevailing position concerning common law powers and state Attorneys General is substantially represented in an often-quoted remark in Ruling Case Law:

> Although in a few jurisdictions the attorney-general has only such powers as are expressly conferred upon him by law, it is generally held that he is clothed and charged with all the common law powers and duties pertaining to his office, as well, except in so far as they have been limited by statute.[2]

Another frequently quoted statement relates to the codification of the Attorney General's duties:

> The office of Attorney General has existed from an early period, both in England and this country, and is vested by common law with a great variety of duties in the administration of the government. The duties are so numerous and various that it has not been the policy of the legislature of the states of this country to attempt specifically to enumerate them; and where the question has come up for consideration, it is generally held that the office is clothed, in addition to the duties expressly defined by statute, with all the powers pertaining thereto under the common law.[3]

---

1. Rita Cooley, Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies, 2 AM. J. LEGAL HIST. 304 (1958).

2. RULING CASE LAW 916.

3. CORPUS JURIS 809-810.

This report examines the specific powers that courts have attributed to the Attorney General under common law. It also describes the status of the Attorney General's common law powers in the 54 jurisdictions. The common law is different in each state, as its content depends upon definition by that state's courts; however, these definitions often cite case law of other states or other jurisdictions, and thus tend to be interrelated.

A list of cases, by state, appears at the end of this report. It provides citations to all of the cases mentioned in the text. This list was developed from periodic questionnaires to Attorneys General's offices and through research by the staff of the Committee on the Office of Attorney General. It is intended to be a complete listing of cases defining Attorneys General's common law powers.

This report updates a similarly titled report published in May, 1977. That prior report developed more fully materials that had been considered in the comprehensive study of The Office of Attorney General, published in 1971. This update incorporates recent case law and commentaries into the substance of its 1977 predecessor. Extensive revisions have not been necessary, because of the limited number of cases on this subject which have been decided during the past 3 years.

Common law powers are a matter of much more than historical interest. Courts have upheld the Attorney General's powers on the basis of the common law, without statutory authority to: intervene in a rate case as the representative of the general public; enjoin a nuisance in the form of stream pollution; appear before a grand jury; nolle prosequi a criminal case; and otherwise to function as the state's chief law officer and the representative of the public interest. These examples illustrate how common law powers can be brought to bear on contemporary problems and used to supplement or to substitute for statutory authority.

Former Attorney General Arthur Sills of New Jersey summarized the application of the common law of England to the current role of the American Attorneys General:

> As guardian of royal prerogative, the Attorney General of England possessed a broad range of powers.... Unlike after the Colonial Period when state governments were organized and recognized in this country, there was no monarch in whom the government prerogatives were vested. Since the essential power of government resided and emanated from the people, the prerogatives had to be exercised on their behalf. Just as the Attorney General safeguarded royal prerogatives at common law, similarly, the official authority, an obligation to protect public rights and enforce public duties on behalf of the general public, became vested by the states in the Attorney General. And it is this obligation inherited from the common law to represent the public interest which has shaped and colored the role which the Attorney General fulfills today.[4]

---

4. Arthur Sills, PROCEEDING OF THE CONFERENCE OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL 102 (1967).

2. THE NATURE OF THE COMMON LAW

One problem in defining a state Attorney General's common law powers is the nature of the common law itself. It is a body of rules and principles, written and unwritten, that derives its authority from prolonged use and defies a comprehensive ordering of its contents. As this chapter notes, it is largely unwritten and is not susceptible to clear definition.

Sources of the Common Law

The term "common law" is variously spoken of by American courts as including "the common jurisprudence of the people of the United States ... [which was] brought with them as colonists from England, and established here so far as it was adapted to our institutions and circumstances";[5] "unwritten law as distinguished from a written or statute law;"[6] or "a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy";[7] and as being "not confined to the ancient unwritten law of England,"[8] and "not a static but a dynamic and growing thing ... [with rules] arising from application of reason to the changing conditions of society."[9] It is "the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England."[10]

Most states hold that the working common law includes not only the lex non scripta, or unwritten law based on custom, usage, and general public consent, but also English statutes amendatory of the common law which were of a general nature and suitable to use in American institutions.[11] A few states, however, hold that the common law does not include any English statutes, except as specifically adopted.[12]

---

5. Clark v. Allaman, 8 P. 571 (Kan. 1905), citing I KENT, COMM. 342 (1826).

6. In re Davis' Estate, 35 A.2d 880 (N.J. 1944).

7. Edgerly v. Barker, 31 A. 900 (N.H. 1891).

8. Missouri-Kansas Pipe Line Co. v. Warrick, 22 A.2d 865 (Del. 1941).

9. Barnes Coal Corp. v. Retail Coal Merchants Association, 128 F.2d 645 (4th Cir., 1942).

10. Western Union Telephone Co. v. Call Pub. Co., 181 U.S. 92 (1901), citing I KENT, COMM. 492.

11. E.g., People v. One 1941 Chevrolet Coupe, 231 P.2d 832 (Cal. 1951).

12. Brooks v. Kimball County, 255 N.W. 501 (Neb. 1934).

In attempting to describe the common law, authorities always note that it is derived from many sources. Blackstone said that:

> The unwritten, or common law, is properly distinguishable into three kinds: 1) General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2) Particular customs, which for the most part affect only the inhabitants of particular districts. 3) Certain particular laws; which, by custom, are adopted and used by some particular courts, of pretty general and extensive jurisdiction.... All these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law for their support.[13]

A contemporary commentator writes that:

> The principles of common law have always eluded complete embodiment of any code or collection of writings. Judicial decisions recorded on the plea rolls of common-law courts, declaratory statutes, and learned treatises on the common law may all express the principles of the common law, but these writings never comprise its totality.[14]

Dean Roscoe Pound gives the following broad definition:

> [The common law] is essentially a mode of judicial and juristic thinking, a mode of treating definite legal problems rather than a fixed body of definite rules. [I]t succeeds everywhere in molding rules, whatever their origin, into accord with its principles and in maintaining those principles in the face of formidable attempts to overthrow or to supersede them.[15]

This diverse nature of common law sources complicates the task of the courts in attempting to define what common law rules apply in any given situation.

Constitutional and Statutory Recognition of Common Law

Many states, probably the majority, have a constitutional or statutory provision confirming the force of common law. This would appear to presume the existence of common law powers in those states. Differences arise, however, as to the effective date of such provisions and in subsequent judicial interpretations. In some states, the provision was carried over from colonial legislatures. In others, it was adopted when one state broke away from another. In still others, it was incorporated into the code when a territory achieved statehood.

---

13. I BLACKSTONE'S COMMENTARIES 45 (1769).

14. Arthur P. Hogue, ORIGINS OF THE COMMON LAW, 176 (1966).

15. Roscoe Pound, THE SPIRIT OF THE COMMON LAW (1921).

Some states specifically acknowledge by statute the Attorney General's common law powers. The primary laws defining his powers and duties, for example, often specify, as in Maine, that: "The authority given under this section shall not be construed to deny or limit the duty and authority of the Attorney General as heretofore authorized, either by statute or under the common law."[16] New Jersey statutes speak of "the powers and duties now or hereafter conferred upon or required of the Attorney General, either by the Constitution or by the common and statutory law...."[17] An Hawaiian statute, after describing certain specific duties incumbent upon the Attorney General, provides that "the Attorney General shall be charged with such other duties and have such authority as heretofore provided by common law or statute."[18]

The existence of a statute adopting the common law may affect the Attorney General's power. The Missouri Court in State ex rel. McKittrick v. Public Service Commission noted that:

> The Constitution ... provides generally that the Attorney General 'shall perform such duties as may be prescribed by law' ... we have long had a statute ... adopting the common law of England.... This section evidently has been construed as adopting not only the common law rights and remedies of litigants, but also such common law powers of public affairs as were possessed by similar officers in England.

Statutory recognition of common law powers can resolve conflicts in the case law. The Mississippi Supreme Court, for example, held that the Attorney General had common law power to prosecute an appeal in a habeas corpus action.[19] In a later case, the court held that the Attorney General had no common law powers and did not refer to its earlier opinion.[20] A statute was then enacted conferring common law powers on the Attorney General; in a third decision, the court determined that it was therefore unnecessary to decide which case had correctly described his power.[21]

The question of whether or not the Attorney General of Vermont had common law powers was resolved by the legislature, which amended the relevant statute to read as follows:

---

16. ME. REV. STAT. ANN. tit. 5, K 199.

17. N.J. REV. STAT., K 52:17A-4.

18. HAW. REV. STAT. K 26-7.

19. State v. Key, 46 So. 75 (Miss. 1908).

20. Board of Supervisors v. Bank of Meridian, 77 So. 955 (Miss. 1918).

21. Capital Stages v. State, Miss., 128 So. 759 (1930); see also Kennington-Saenger Theatres v. State ex rel. District Atttorney, 18 So.2d 483 (Miss. 1944).

The Attorney General may represent the state in all civil and criminal matters as at common law and as allowed by statute. The Attorney General shall also have the same authority throughout the state as a state's attorney.[22]

Applicable Date of Common Law

Another factor which enters into the definition of common law powers is the date of the applicable common law. In some states, only those common law rules which were in force prior to the fourth year (1607) of the reign of James I, the year that Virginia was first successfully colonized, were adopted.[23] Other states adopted the common law as developed up to the approximate time of the American Revolution,[24] while still other states adopted the common law in force prior to the adoption of the constitution.[25] Other states adopted the body of law which was in force in the state of which they were a part as of the date of separation.[26]

Since common law powers are not static, this date may be important. Kentucky, for example, specified by statute that the Attorney General:

shall exercise all common law duties and authority pertaining to the office of the Attorney-General under the common law, except when modified by statutory enactment.[27]

The Kentucky court has said, however, that:

To declare that common law and statutes enacted prior to that time should be in force was equivalent to declaring that no rule of the common law not then recognized and in force in England should be recognized and enforced here ... [W]hen it is sought to enforce in this state any rule of English common law, as such, independently of its soundness in principle, it ought to appear that it was established and recognized as the law of England prior to the latter date. [March 24, 1607][28]

The Kentucky court invoked this rule in Commonwealth ex rel. Ferguson v. Gardner and denied the Attorney General authority to intervene in a

---

22. VT. STAT. ANN. tit. 3, K 152.

23. Town of Cody v. Buffalo Bill Memorial Association, 196 P.2d 369 (Wyo. 1948).

24. Hannah v. State, 92 S.E.2d 89 (Ga. 1956).

25. Clawson v. Primrose, 4 Del. Ch. 643 (1873).

26. Howard v. State, 227 S.W. 36 (Tenn. 1921).

27. KY. REV. STAT. K 15.020.

28. Aetna Insurance Co. v. Commonwealth, 51 S.W. 624 (Ky. 1979).

will contest, because he "failed to show that there was any established and recognized law of England to that effect prior to 1607."

A Nebraska case contained an interesting interpretation of the applicable date of the common law. In Williams v. Miles, the court held that:

> The term 'common law of England', as used in one statute, refers to that general system of law which prevails in England, and in most of the United States by derivation from England.... Hence, the statute does not require adherence to the decisions of the English common law courts prior to the Revolution, in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system.

As this brief discussion indicates, determination of the status of the common law is a complex matter.

Current Application in British Law

In reviewing American case law on common law powers of Attorneys General, it may be relevant to note that these powers are still viable doctrines in British jurisprudence. Writing in 1964, Professor J. Ll. J. Edwards described the Attorney General's functions as the guardian of the public interest:

> First, there is the Attorney-General's position as the Crown's principal agent for enforcing public legal rights.... Generally referred to as relator actions, proceedings are brought in the name of the Attorney-General with the object, for example, of obtaining a declaration or an injunction (1) in cases of public nuisance, (2) with a view to restraining a corporation from exceeding the legal powers conferred upon it by statute, where the excess of power tends to injure the public, or (3) to prevent the repeated commission of a statutory offense by any person. These aspects of the Attorney-General's role as protector of public rights are of great antiquity. Quite distinct is the modern participation by successive holders of the office of Attorney-General who have deemed it their duty ... to represent the public interest before public tribunals....[29]

Recent British cases sustain this role. A 1973 case said that "it is settled in our constitutional law that in matters which concern the public at large the Attorney General is the guardian of the public interest;" further, "unless a member of the public has a private right or interest in a matter concerning the public over and above the interest of the public generally, that matter can only be brought before the court if the Attorney General gives his fiat."[30]

Another 1973 case concerned the Attorney General of England's authority to bring before the court any matter he thinks may amount to contempt. It noted that: "in doing so, he acts on behalf of the Crown as

---

29. Edwards, THE LAW OFFICERS OF THE CROWN, 286 (1964).

30. Attorneys General ex rel. McWhirter v. Independent Broadcasting Authority, 1 QB 629 (Law Reports) 1973; 2 WdR 344 (C.A. 1973).

'the fountain of justice' and not in the exercise of its executive function." The case commented further on his duty to the public: "[In] considering the matters raised an Attorney-General would with complete impartiality solely be considering the public interest of maintaining the due administration of justice in all its integrity." It concludes that:

> Where it becomes manifest ... that there is a need that the public interest should be represented in a class of proceedings before courts of justice which have hitherto been conducted by those representing private interests only, we are fortunate in having a constitution flexible enough to permit of this extension of the historic role of the Attorney General.[31]

Thus, common law authority is still subject to changing definitions under British law. The issue of the Attorney General's control over litigation was litigated and upheld in England in 1977. The case, Gouriet v. Union of Post Office Workers,[32] arose when the plaintiff sought the Attorney General's consent to a realtor action for an injunction against the postal workers, who planned to boycott certain mail deliveries. The plaintiff alleged that the boycott would constitute a criminal offense, but the Attorney General declined to consent to the suit. The plaintiff issued a writ in his own name and, after appealing an adverse ruling, was granted an injunction and given leave to add the Attorney General as defendant.

The matter then was appealed to the House of Lords, which "unanimously and unhesitatingly confirmed that public rights could only be asserted by the Attorney General."[33]

> That it is the exclusive right of the Attorney General to represent the public interest, even where individuals might be interested in a larger view of the matter is not technical, not procedural, nor fictional. It is constitutional.

The English Attorney General's control over criminal proceedings is based on both statute and common law. As one commentator has pointed out, however, "this function is to be understood against the background of the common law's traditional reliance on the private prosecutor."[34] The individual, as private prosecutor, can invoke the criminal jurisdiction of the courts, and the Attorney General has no authority to interfere with such assertion of private rights. Conversely, no individual has the authority to represent the public: "It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney General as representing the public."[35]

---

31. Attorney General v. Times Newspaper Ltd., 1973, 3 ALL E.R. 54.

32. Gouriet v. Union of Post Office Workers, 1 ALL E.R. 70 (H.L.) (1977).

33. See, Comment, 56 CAN. B. REV. 331 (1978).

34. F.M. Brookfield, The Attorney General, NEW ZEALAND L.J., 336 (1978).

35. Gouriet, supra note 32, at 80.

3. DEVELOPMENT OF THE OFFICE OF ATTORNEY GENERAL

The common law powers of Attorneys General are a result of the development of the office and its evolution throughout centuries of English jurisprudence. A brief review of that development is helpful in understanding its powers as they derive from the common law.[36]

Development in England

In the Middle Ages, the King had attorneys, serjeants and solicitors to perform some of the functions of the modern Attorney General. Prior to the 13th century, the King appointed special attorneys to prosecute criminal cases. Such counsel had only limited authority and were empowered to represent the Crown only in a specified court and for a specified period of time.[37]

The general term attornatus was used in official documents in England in the Middle Ages for anyone who appeared for another as pleader, attorney, or essoiner.[38] In Normandy, at the time of the Conquest, either of the parties in a civil case could appear before a justice and nominate someone to represent them in their absence. In England, the King or an individual authorized by a special writ could receive an attorney in the absence of the party involved if the case were in the King's Court, since it was a court of record. During the 13th and 14th centuries there are numerous records of attorneys being so assigned; however, these attorneys had to be received by the justice, or someone authorized by the King.[39]

Professor J. Ll. J. Edwards, in his authoritative study of The Law Officers of the Crown, explains the development of the King's legal representatives in medieval times as follows:

> Although the Sovereign is in theory the fountain of justice and supreme, the Year Books (official records) are replete with cases in which the King was concerned as a litigant in his own courts and, presumably, abided by the decisions reached by the royal justices. For the King to appear in person as a plaintiff or defendant in such suit was inconceivable. The

---

36. This chapter is adapted in part from the National Association of Attorneys General, Committee on the Office of Attorney General, THE OFFICE OF ATTORNEY GENERAL, Sec. 1.1 (1971) and POWERS, DUTIES AND OPERATIONS OF STATE ATTORNEYS GENERAL, ch. 2 (1977).

37. Cooley, supra note 1, at 306.

38. Hugh C. Bellot, The Origin of the Attorney General, 25 LAW Q. REV. 400 (1909).

39. Id. at 402-403.

right of any person to come forward in court and to sue on behalf of the King in any matter affecting the King's interests was repeatedly recognized by the courts.... As a method of protecting the King's rights, however, this unlimited right of audience could only be regarded, at best, as somewhat unreliable.[40]

The first mention of the title of attornatus regis is in the statute 38 Henry III, but such an office had probably been in existence for some time. Hugh Bellot gives 1254 as the earliest date when Lawrence del Brok appeared for the Crown; he was designated in many cases by the phrase se-quitur pro rege and seems to be the first attorney designated by the King to act as his permanent attorney in the King's Bench.[41] Professor Edwards, however, cites studies to show that del Brok was conducting the King's business as early as 1247.[42]

Apparently, numerous attornati regis were employed at the same time. Some were appointed ad hoc to represent the Crown locally. All appear to have been appointed by a King's writ in much the same way as a "general attorney" for an individual. In addition to these individuals, there were the King's serjeants-at-law in every county to prosecute pleas in the Crown's name before the common law courts.

Authorities differ as to when the office of Attorney General actually came into being. Bellot says that finally, in 1472, William Husse was appointed Attorney General of England with the power to appoint deputies to act for him in any court of record. For the first time, the office was held singly; it has remained so since. As George W. Keeton points out:

> The fixing of dates is often an idle pursuit where the progress of historical development is concerned. This is particularly true of English History. There is no need, therefore to pronounce with certainty that so-and-so was the first Attorney-General, or that the office was instituted in such a year, even if this were possible. Historically, the office has no statutory basis. The Attorney-General and the Solicitor-General are the products of royal need. These offices emanate from the magnitude of the royal business in the Courts. For this the King, like everyone else must have his representatives to match the proctor in the ecclesiastical courts. Little by little the Law Officers are drawn into the great constitutional struggles of Tudor and Stuart times, and when these are at last ended, the Law Officers emerge, firmly attached to the King's Cabinet Council, whose development has made possible our modern Parliamentary system.[43]

---

40. Edwards, supra note 29, at 15.

41. Bellot, supra note 38, at 406.

42. Edwards, supra note 29, citing later studies of Professor Sayles.

43. George W. Keeton, The Office of Attorney General, 58 JURIS. REV. 107, 217 (1946).

The attornatus regis in the period from the reign of Edward II to the reign of Edward III were granted limited patents in respect to the courts in which they could practice, the area over which they had authority, or the business with which they were entrusted.[44] As the office evolved, the several attorneys who had limited power were replaced by a single attorney who had much wider powers and could appoint deputies. This process was complete by the end of the 15th century; as a result, the King's attorney had become, by the 16th century, the most important person in the legal department of the state and the chief representative of the Crown and the courts.[45]

During this period, the King employed several attorneys, who acted with the serjeants for the King. Gradually the King's attorney grew in significance while the other members of the King's legal staff, such as the serjeants, declined in importance.[46] By the reign of Henry VIII, the King's attorney was the individual who took the bills from the Lords to Commons and in so doing amended them and put them in workable shape. During the Tudor period, the King's attorney was the person consulted by the government on the law and the one who prepared and conducted the important state trials.

The office of Attorney General began to assume political overtones and, when it did, the role of the King's serjeants began to diminish. The King's serjeants could proceed only under specific instructions from the Crown and could appear only in the Court of Common Pleas. The King's attorney, on the other hand, could represent the Crown in all tribunals.[47]

The conflict in legal authority reflected a division which existed in English law from ancient times to the 17th century.[48] One system, the common law, had grown in uncodified form from custom and usage, statutes, judicial decisions, and other sources. The practitioners of the common law were the barristers and serjeants, who learned law in the Inns of Court. The other system was the Roman civil law, which was taught at the universities and practiced by the attorneys. The common law advocated the supremacy of the law over the sovereign; the Roman law held that Rex est les loquens: the King is the law. Those who practiced in the common law courts had a narrow educational background, but could rise through successful practice to become serjeants and, ultimately, the King's serjeants.

---

44. William S. Holdsworth, The Early History of the Attorney and Solicitor General, 13 ILL. L. REV. 602 (1919). There is detailed discussion on the matter of limitation and a number of examples are provided.

45. Id. at 606.

46. Id. at 606-607.

47. Cooley, supra note 1, at 306.

48. See, e.g., Catherine D. Bowen, FRANCIS BACON - THE TEMPER OF A MAN (1963).

The King required lawyers who were conversant with the political problems of the day. This was especially true as the contest of jurisdiction between the rival courts grew and as the constitutional differences between the King and Parliament became more bitter.[49] The King found it necessary to choose judges who would take his views on constitutional questions and legal advisers who were committed to them politically. The sergeants were unwilling to accept the King's position on many constitutional questions. They were gradually replaced by officers who were geared to a more modern concept of government and politics and the Attorney General emerged as the preeminent figure.

By 1769, Blackstone could write that the Attorney General "represents the sovereign ... and his power to prosecute all criminal offenses is unquestioned at Common law." His description of the Attorney General's powers in criminal prosecutions has been quoted in opinions of numerous courts:

> The objects of the king's own prosecutions, filed ex officio by his own attorney general, are properly such enormous misdemeanors, as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offenses so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal.... The objects of the other species of information, filed by the master of the crown-office upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the attorney general) but which, on account of their magnitude or pernicious example, deserve the most public animadversion.... There can be no doubt but that this mode of prosecution by information (or suggestion) filed on record by the king's attorney general, or by his coroner or master of the crown-office in the court of the king's bench is as ancient as the common law itself. For as the king was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever a grand jury informed him upon their oaths that there was a sufficient ground for instituting a criminal suit; so, when these his immediate officers were otherwise sufficiently assured that a man had committed a gross misdemeanor, either personally against the king or his government, or against the public peace and good order, they were at liberty, without waiting for any further intelligence, to convey that information to the court of king's bench by a suggestion on record, and to carry on the prosecution in his majesty's name. But these informations (of every kind) are confined by the constitutional law to mere misdemeanors only; for, wherever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men before the party shall be put to answer it.[50]

---

49. Holdsworth, supra note 44, at 617.

50. IV BLACKSTONE'S COMMENTARIES 304-305 (1769).

During the constitutional struggles that followed the English Revolution, the Attorney General emerged as the legal adviser for the government, not just as the single servant of the King. He appeared on behalf of the Crown in the courts, gave legal advice to all the departments of government and appeared for them in courts whenever they wished to act. He became an adviser to the government as a whole: the Attorney General for the Crown.

Colonial Period in America

Colonization of America brought with it the office of Attorney Geneneral, through executive action in some places and legislative action in others. Regardless of the manner in which the office was instituted, the colonies made little attempt to define or enumerate the duties of Attorney General in America. It was accepted generally that he possessed the common law powers of the English Attorney General except where they were changed by the constitution or statute. "He was in a sense a delegate of the Attorney General of England."[51]

In most of the colonies, the office probably existed for some time before it was mentioned in official records. Maryland, for example, was first settled in 1634, but 1658 was the first year in which a printed record referred to an Attorney General. We know something of his duties from a commission by the Lord Proprietor to the Attorney General in 1660, which said that he should act "in all Causes as well Criminall as Civill to sue poursue prosecute and Implead and in our name on Suites against vs Comenced to answere as fully and amply as any Attorney General may doe."[52]

The colonial archives reveal that he was engaged in activities ranging from preparing indictments on charges of murder, theft, mutiny, sedition and piracy, to appearing before the grand jury, and to acting against individuals for disturbing a minister in a divine service. He worked closely with the courts and made recommendations to the governing council, even suggesting the creation of new courts and appointing attorneys for the county courts.

In Massachusetts, the first Attorney General was appointed in 1680. A recent court decision noted that, when the office was established, "it became endowed with the powers and duties appertaining to it at common law."[53] Powers during the colonial period apparently rested primarily on the common law. This reliance on the common law, rather than statute, caused an Attorney General to lament, in 1701, that he "never Could know what was my duty,-- What I Should doe, ... All other officers know

---

51. Oliver W. Hammonds, The Attorney General in the American Colonies, ANGLO-AMERICAN LEGAL HISTORY, Series V. 1, no. 3 (1939).

52. Id. at 3-4.

53. Secretary of Administration and Finance v. Attorney General, 326 N.E. 2d 334 (Mass. 1975).

their power duty & dues by the law, but Relating to the King's Attorney the law is Silent."[54]

Some of the most specific instructions to come out of the colonial period are those by the Lord Proprietors to their appointees as Attorney General of South Carolina. In 1708, the duties of the Attorney General were thus specified:

> ... to Act, plead, Implead, Sue and Prosecute all and every Person & Persons whatsoever, for all Debts, Fines, Americaments, Forfeitures, Escheats Claims and Demands whatsoever which now is or may or Shall be Due and in Arrears to Us upon any Account whatsoever whither Rents, Revenues or otherwise howsoever, And to Prosecute all Matters Criminall as well as Civill Giving and hereby Granting unto You full Power and Authority and the Premises therein to Deal Doe Execute and Performe in as large and Ample manner to all Intents and Purposes as to Said officer of Attorney Generall doth in any way Appertaine & belong....[55]

In addition to these responsibilities, the Attorney General kept the proprietors informed on the general welfare of the colony, the conduct of public officials, and matters relating to disposition of land titles.

In Virginia, the first recorded appointment of an Attorney General was in 1643. Usually, the duties of the Attorney General were to prosecute criminal actions, handle bonds and disputed land claims, and to represent the Commonwealth. However, in Virginia he also seemed to exercise a substantial degree of control and supervision over the collection of public monies. The Attorney General of Virginia occasionally assisted the House of Burgesses in drafting bills, and, even though he was not a member, was given a seat in the House.[56]

These examples, taken primarily from Oliver Hammonds' study of the Attorney General in the American Colonies, show that considerable differences existed in Attorneys General's duties, methods of selection, and relationship to the rest of the government. The office was far from stable. The Crown or legislatures kept changing it, and it often had a far from satisfactory relationship with the Governor of the colony.

The Office After Statehood

A majority of the states, 34 of the 50, either continued or created the office of Attorney General in their first constitutions. Eight other states established the office by law at the time of statehood. Today, the office exists in all 50 states, either because of constitutional or statutory authority. Thus, the office is deeply embedded in American government.

---

54. Hammonds, supra note 49, at 6-7.

55. Id. at 17.

56. Id. at 2-21.

A recent decision of the Maryland Court of Appeals reviewed the historical development of the office of Attorney General in that state.[57] It provides an interesting example of how the office underwent major changes in some states, but retained its common law power. The Declaration of Rights adopted in 1776 by Maryland's first constitutional convention provided that:

> the inhabitants of Maryland are entitled to the common law of England ... and to the benefit of such of the English statutes as existed at the time of their first emigration, and which, by experience, have been found applicable to their local and other circumstances, and of such others as have been since made in England, in Great Britain, and have been introduced, used and practiced by the courts of law or equity. [article 3].

The Constitution provided for an Attorney General, but did not delineate his powers, which were those of the common law. In 1816, the Maryland constitution was amended to abrogate all provisions relating to the Attorney General and to direct the legislature to provide for performance by others of duties previously belonging to him. The 1917 legislature re-established the office of Attorney General and identified its duties by statute. Some of these duties were assigned to district attorneys. The 1821 legislature again assigned to others, by statute the common law powers of the Attorney General.

The Constitution of 1851 abruptly changed this by prohibiting the legislature from creating the office of Attorney General and established instead a state's attorney for each county, "to perform such duties ... as are now prescribed by law for the attorney general...." The common law powers of the office thus were transferred to local prosecutors. Thirteen years later, a new constitution again provided for an Attorney General, while retaining state's attorneys. This was construed with virtually the same duties prescribed in the Constitution of 1867, which is still in force.

Reviewing this history in some detail, the Maryland court concluded that:

> ... it is beyond doubt that Maryland embraced the common law. Thus, the result is that the General Assembly may not abrogate the common law powers of the Attorney General since his powers were the powers of a common law Attorney General, having been constitutionally stated as those 'prescribed by law....'

Thus, the office has retained its common law characteristics throughout numerous statutory and constitutional changes. This same situation prevails in many states, although the specific historical developments differ.

The Massachusetts court also reviewed the history of that state's Attorney General in a recent decision.[58] As noted earlier, the office was established in 1680, with its duties resting on common law. It was not

---

57. Murphy v. Yates, 348 A.2d 837 (Md. 1975).

58. Secretary of Administrative and Finance v. Attorney General, supra note 53.

until 1832 that its duties were defined by law with any specificity. In that year, a statute was enacted which prescribed in a general way the office's duties, but continued the reliance on common law powers.

Massachusetts abolished the office of Attorney General in 1843, then reestablished it in 1849 in a more limited way. The court held in Pardue v. May that, although this broke the continuous flow of the common law, and although the new statute did not mention the common law, these powers still attached to the office. The constitution was amended in 1855 to provide for popular election of the Attorney General. In 1896, legislation was enacted to provide that the Attorney General would represent the Commonwealth and department heads in all proceedings in which the Commonwealth was a party or had an interest. This made it possible for him to set a unified and consistent legal policy, and greatly strengthened the office.

The Pennsylvania court has recognized that Attorney General's common law powers despite the complex legal origins of that office and the lack of continuity in its history. A recent article on its history points out that, "Throughout the early years of development, the Attorney General's office--like the law itself-- made various accomodations with the statutory laws of Sweden and the Netherlands, Roman Law, Delaware Indian law, colonial and proprietary laws, the laws of the Duke of York, the radical equalitarian 'law' of Penn's Quakers, as well as with the conflict of devine-right and natural law advocates."[59] The origin of the office of Attorney General in that state is traced to the Swedish "Schout," who had extensive prosecutorial powers. The first person to be titled Attorney General was appointed in 1683, after Pennsylvania became a proprietorship under English law. Under proprietary Attorneys General, the office changed substantially from the English office:

> Although they saw the Attorney General as chief prosecutor for, advisor to, and appointee of the Governor, they admitted no bondsman relationship to the governor. Rather, they opposed the governor on numerous occasions in behalf of the citizenry; their advice to the appointed governor and the king's agent tended not to find ways to grant them privileges or powers, but rather to restrict their powers and confine them to wishes of the people's elected representatives. They designed the office of Attorney General to be a legal defender of public interest rather than royal or executive interest, which it had represented in the European models.[60]

There were few statutes defining the office's powers and duties, so these derived primarily from common law.

Pennsylvania's first constitution, adopted in 1776, authorized the appointment of an Attorney General. It was not mentioned in the Constitution of 1790, but the Governor continued to appoint such an officer. There were very few statutes concerning the Attorney General during the

---

59. Edward B. Golla, A History of the Attorney General in Pennsylvania, Pennsylvania Department of Justice.

60. Id.

early years of statehood, so his authority continued to be defined by the common law. In 1850, legislation was enacted which provided for the election of district attorneys, who replaced the Attorney General's deputies. In a series of cases described elsewhere in this report, Pennsylvania's highest court recognized the Attorney General's common law powers, including that of conducting grand jury investigations. In 1938, the legislature codified this power. A year later, it repealed the statute. Subsequently, in Appeal of Margiotti, the court recognized the continued existence of this power, even though a dissenting opinion argued that repeal of the statute abolished the power it codified.

These examples indicate that discontinuing the office of Attorney General for a period does not necessarily deprive it of its common law powers, although these powers derive from the office's origins in English history. Eight states apparently did not have Attorneys General at the time they became states. Some other states abolished the office for some period after statehood; Vermont was actually without an Attorney General for more than a century. The courts have generally held that these disruptions in the office's history do not affect its authority. This is not always true, however. In Indiana, the state's first constitution did not provide for an Attorney General, and the office was established by the legislature 5 years later. Indiana's highest court has held that this lack of a constitutional basis deprives the office of any claim to common law powers.[61]

---

61. State ex rel. Bingham v. Home Brewing Co., 105 N.E. 909 (Ind. 1914).

4. BASIS OF THE ATTORNEY GENERAL'S COMMON LAW POWERS

Two questions are involved in considering Attorneys General's common law powers: the definition of those powers and the extent to which they are retained by the Attorney General. Neither question is susceptible of a uniform answer. This chapter gives a summary of judicial holdings on these issues. Chapter 6 examines particular powers in more detail.

Judicial Definition of Power

Because these common law powers were customary, there is no single delineation of all of them. One authority, Earl DeLong, noted:

> Although many courts in the United States have agreed that the Attorney General of the contemporary American state is endowed with the common law powers of his English forbearer ... the application from one jurisdiction to another of this seemingly simple principle has produced an astonishing array of mutations which make it altogether impossible to reach any sweeping generalization on the matter.[62]

It should also be noted that "the rules of common law which are court made rules can be changed by the court when it becomes convinced that the policies upon which they are based have lost their validity or were mistakenly conceived."[63] The force of common law precedent can be tempered by "tests of unsuitability, legislative abrogation or unconstitutionality."[64]

The first American court to rule on the Attorney General's common law powers was the Supreme Judicial Court of Massachusetts. In the 1850 case of Parker v. May it held that the Attorney General might exercise powers that had belonged to the English Attorney General under common law.

The most frequently-cited listing of the Attorney General's common law powers is found in People v. Miner, a New York case decided more than a century ago. The court found that:

> The attorney-general had the power, and it was his duty:
> 1st. To prosecute all actions, necessary for the protection and defense of the properties and revenues of the crown.

---

62. Earl DeLong, Powers and Duties of the State Attorneys General in Criminal Prosecution, 25 J. CRIM. L. 392 (1934).

63. Pendexter v. Pendexter, 363 A.2d 743 (1976).

64. Note, Maine's Reception of the Common Law, 30 ME. L. REV. 274 (1979).

2nd. By information, to bring certain classes of persons accused of crimes and misdemeanors to trial.

3rd. 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. (3 Black. Com. 2567, 260266; id., 427 and 428; 4 id., 308, 312.)

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. (Mitford's P., 2430, Adams' Equity, 3012.)

The court noted, however, that "this enumeration, probably does not embrace all the powers of the attorney-general at common law...." Although some of the language used is archaic, this early decision established basic powers in criminal prosecutions, ouster actions, protection of trusts, and certain other actions.[65]

A 1953 decision by the Pennsylvania court in Commonwealth ex rel. Minerd v. Margiotti enumerated additional powers:

The Attorney General of Pennsylvania is clothed with the powers and attributes which envelop Attorneys General at common law, including the right to investigate criminal acts, to institute proceedings in the several counties of the Commonwealth, to sign indictments, to appear before the grand jury and submit testimony, to appear in court and to try criminal cases on the Commonwealth's behalf, and, in any and all of these activities to supersede and set aside the district attorney when in the Attorney General's judgment such action may be necessary.

---

65. The holding of the case is less often cited: the Attorney General could not restrain town commissioners from issuing bonds, even if certain requisite preliminary steps had not been taken. The Judge commented that:

> I am utterly opposed to the adoption of a rule that will permit a State officer to intermeddle in the affairs of every corporation in the State. It can only lead to abuse, and to relieving persons directly in interest in them, from the duty and responsibility of seeing that abuses are corrected by those immediately concerned.

Michigan's highest court, in Mundy v. McDonald, acknowledged the office's common law authority:

We must recognize the fact that the office of Attorney General is ancient in its origin and history, and it is generally held by the states of the Union that the Attorney General has a wide range of powers at common law. These are in addition to his statutory powers.

Many courts have relied on the description of the Attorney General's powers given in Ruling Case Law:

Although in a few jurisdictions the attorney general has only such powers as are expressly conferred upon him by law, it is generally held that he is clothed and charged with all the common law powers and duties pertaining to his office, as well, except insofar as they have been limited by statute. The latter view is favored by the great weight of authority, for the duties of the office are so numerous and varied that it has not been the policy of the State Legislatures to attempt specifically to enumerate them; it cannot be presumed, therefore, in the absence of an express inhibition, that the attorney-general has not such authority as pertained to his office at common law. Accordingly, as the chief law officer of the state, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time require; and may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights.[66]

The Maine Supreme Judicial Court incorporated this quotation into its decision in Withers v. Lane & Libby Fisheries Co., and used substantially the same language in a 1973 decision, Lund ex rel. Wilbur v. Pratt. A Nebraska decision, State ex rel. Sorenson v. State Board of Equalization, used part of this language:

By the great weight of authority, it is now held that the Attorney General is clothed and charged with all the common law powers and duties except in so far as they have been limited by statute. The duties of his office are so numerous and varied that it has not been the policy of different state legislatures to enumerate them.

A Minnesota court, in the 1960 case of Slezak v. Ousdigian, said:

The Attorney General is the chief law officer of the state. His powers are not limited to those granted by statute, but include extensive common law powers inherent in his office. He may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights.

---

66. RULING CASE LAW 916, Para. 5.

The United States Court of Appeals for the Fifth Circuit, in Florida ex rel. Shevin v. Exxon Corporation, et al., pointed out that the Attorney General's duties necessarily involved a great deal of discretion:

> As chief legal representative of the king, the common law attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion. The volume and variety of legal matters involving the crown and the public interest made such limited independence a practical necessity. Transportation of the institution to this country, where governmental initiative was diffused among the officers of the executive branch and the many individuals comprising the legislative branch, could only broaden this area of the attorney general's discretion.

Thus, the powers of the Attorney General were not closely defined by either statute or common law.

Representation of the People

It has been held that the Attorney General's common law powers derive from his role as representative of the people. In Commonwealth ex rel. v. Paxton, et al., the Kentucky Court of Appeals denied that Attorney General's duties to represent the "Commonwealth" referred exclusively to the hierarchy of officers, departments and agencies heading the executive branch of government. The court said that:

> It is true that at common law the duty of the Attorney General was to represent the King, he being the embodiment of the state. But under the democratic form of government now prevailing the people are the King, so the Attorney General's duties are to that sovereign rather than to the machinery of government. [citation omitted]

A similar issue was raised in a California case, D'Amico v. Board of Medical Examiners, where plaintiffs contended that the Attorney General's representation of a licensing board conflicted with his representation of the public interest. The court ruled that, though this duty to represent the public interest was paramount where it conflicted with a duty to represent a state agency, it would be presumed that the Attorney General's representation of a state agency was consistent with the public interest. Illinois courts have held consistently, most recently in Environmental Protection Agency v. Pollution Control Board, that the Attorney General is "the law officer of the people."

A 1975 Massachusetts case, Secretary of Administration and Finance v. Attorney General, upheld the Attorney General's decision not to appeal a superior court decision to the supreme judicial court. The Secretary of Administration and Finance had challenged this refusal to appeal. The court said that:

> The Attorney General represents the Commonwealth as well as the Secretary ... who requests his appearance. He also has a common law duty to represent the public interest. Thus, when an agency head recommends a course of action, the Attorney General must consider the ramification of that action on the interests of the Commonwealth and the public generally.

An earlier Massachusetts case, Attorney General v. Trustees of Boston Elevated Railroad, held that "The Attorney General represents the public interest."

New Hampshire's highest court has taken a similar position, most recently in Buck v. Town of Yarmouth, where it said that "As has long been recognized, the Attorney General may, in his discretion, institute a court proceeding to remedy an alleged violation of a public right."

In Hyland v. Kirkman, a New Jersey court upheld the Attorney General's common law power to protect the property recordation system of the state. It quoted the reasoning in O'Reagan v. Schermerhorn that the statute pertaining to the Attorney General "does not restrict but rather affirms the common law authority of this official to attend to all legal matters in which the people of the state are involved." Moreover, the Attorney General is invested with a broad discretion in determining what matters may be of interest to the public generally."

The effects of this doctrine were summarized as follows by one commentator:

> The common law doctrine that the state's chief legal officer has independent authority to speak on behalf of the public interest has important implications in American government. When he appears before a public agency, he may present a viewpoint that might otherwise be unarticulated, and when he contests governmental action, he brings to bear judicial sanctions against the abuse of governmental powers. In either event, by exercising his power, the Attorney General may enhance the responsiveness of government to the public interest.[67]

Arizona is one of the few jurisdictions to deny the Attorney General authority to act in the public interest, saying, in Arizona State Land Development v. McFate that: "... the initiation of litigation by the attorney general in furtherance of interests of the public generally, as distinguished from policies or practices of a particular department, is not a concomitant function of this rule." As a law journal article pointed out: "[T]he attorney general in Arizona is thus greatly restricted in his ability to institute actions which he may deem to be in the public interest.... The decision to oppose the official determination of a state agency would, then, rest only in the Governor."[68]

Effect of Statutory Enumeration of Powers

In all jurisdictions, at least some duties and powers of the Attorney General are prescribed by statute. Many constitutions merely specify that

---

67. Note, The Solicitor General and Intragovernmental Conflict, 76 MICH. L. REV. 326 (1978).

68. Note, State Officers - Attorneys General's Right to Institute Action Against a State Agency, 2 ARIZ. L. REV. 293 (1960).

his powers shall be "prescribed by law." An article on the constitutional authority of Ohio's Attorney General argued that the fact that state's constitution did not expressly assign any powers or duties to that office indicated they intended to sustain his common law powers. The authors, both of whom were Assistant Attorneys General, said that:

Either of two conclusions is inferable from the vacuity of the language employed in the 1851 constitution to create the office of the attorney general: the framers either believed the bare term "Attorney General" to be sufficiently descriptive to render superfluous any further elaboration of the character of the officer given that designation or, quite the contrary, they wished that the attorney general constitute a lifeless shell until his position was legislatively infused with substantive content.[69]

Reviewing Ohio's political and constitutional history, they conclude that "only the former inference may be acceptably drawn."

Courts in many jurisdictions have considered the relation of those powers enumerated by statute to those existing under common law. Most courts follow the rationale expressed by the New York court in People v. Miner:

As powers of the attorney-general were not conferred by statute, a grant by statute of the same or other powers would not operate to deprive him of those belonging to the office at common law, unless the statute, either expressly, or by reasonable intendment, forbade the exercise of powers not thus expressly conferred.

The Mississippi Supreme Court, in Wade v. Mississippi Co-Op Extension Service, noted that it had "consistently ruled that the constitutional creation of the office even without further statutory enactment vested in the Attorney General all powers which that office possessed at common law."

Florida's court, in State ex rel. Landis v. S. H. Kress & Co., upheld the contention from Ruling Case Law, that:

... the duties of such an office are so numerous and varied that it has not been the policy of the Legislatures of the states to specifically enumerate them; that a grant to the office of some powers by statute does not deprive the Attorney General of those belonging to the office under the common law.

In State ex rel. Barrett v. Boeckeler Lumber Co., the Missouri court concurred with this reasoning, saying that:

A grant by statute of the same or other powers does not operate to deprive him [the Attorney General] of those belonging to the office under the common law, unless the statute, either expressly or by reasonable intendment, forbids the exercise of powers not thus expressly conferred. (6 C.J. 816.) This view has been tacitly accepted, and acted upon, in this state for many years.

---

69. C.J. Miller and T.M. Miller, The Constitutional Charter of Ohio's Attorney General, 37 OHIO ST. L.J. 807 (1976).

Some courts have stated, however, that common law authority is subject to statute law, where the two are in conflict. Ryan v. District Court, a recent Nevada case, for example, said that: "[when] an exercise of powers would be repugnant to the statutory law of this state ... the Attorney General may not look to the common law to justify his action."

In states which recognize common law powers, codification does not affect such powers unless the statutes expressly state so. Some states have enacted provisions specifically declaring that the authority conferred upon the Attorney General by statute shall not be construed to limit his authority or duty under common law.

At least one state court has said that an Attorney General's authority may be extended by statute beyond those powers recognized by common law. In the Missouri case State ex rel. Barrett v. Boeckeler Lumber Company, the question of the Attorney General's power to serve as the enforcing officer for the state's antitrust laws came before the court. The statute which made the Attorney General responsible for enforcing the antitrust laws was challenged on the ground that the Attorney General was not the proper officer to enforce such a statute, since it was not a part of his authority at common law. In responding to this, the court said:

...[T]he Attorney General of this state is therefore invested with all the powers and duties pertaining to his office at common law.... If the power and duty which the anti-trust statute purports to confer on the Attorney General are not identical with powers and duties which he already possesses at common law, they are at least of the same general character, and therefore fall within the scope of the services which 'may be prescribed by law.'

Despite the diversity of these court rulings, their underlying premise is that, while statutes enumerate some powers of the Attorney General, they are by no means coextensive with his common law powers. As the New Hampshire court said in State v. Swift, "The powers of the Attorney General are broad and numerous. Some grow out of the common law and many are specified by statute."

5. STATUS OF THE ATTORNEY GENERAL'S POWERS

The office of Attorney General is established by constitution in forty-four states, as is the office of Secretary of Justice in Puerto Rico. Most of these constitutions say that his duties shall be prescribed by law. A Kentucky case, Johnson v. Commonwealth ex rel. Meredith, noted three prevailing views in courts' construction of such provisions:

> (1) the legislature may not only add duties but may lessen or limit common law duties ...
>
> (2) the term 'as prescribed by law' has been held ... in effect, to negate the existence of any common law duties, so that the Attorney General has none, and the legislature may deal with the office at will ...
>
> (3) the term has been construed ... to mean that the legislatures may add to the common law duties of the office, but they are inviolable and cannot be diminished ...

The court in that instance adopted the first view.

Most courts have recognized the Attorney General's common law powers, but have also recognized the legislature's power to amend or restrict them. Courts in a few states have denied the Attorney General any common law powers. Only one state's high court, Illinois, has held that the Attorney General's common law power is beyond the reach of legislative revision.

Tabular Summaries

The following table shows which jurisdictions recognize the Attorney General's common law powers, which do not, and which have not settled the question. This table is generally based on Attorneys General's offices' responses to COAG questionnaires. Replies to the 1979 questionnaire were received from all but five Attorneys General's offices (Connecticut, Nebraska, New York, Oklahoma and Tennessee). The classification for these states is based primarily on responses to previous questionnaires. Replies were also received from the three territorial Attorneys General's offices (Guam, Samoa and the Virgin Islands) and from the Commonwealth of Puerto Rico.

For a few offices, the questionnaire answers were indefinite, and the tabular classification was based on a review of relevant cases. In a few others, court decisions have avoided ruling on common law power issues, relying instead upon statutory enactments affecting the controversy at bar. This judicial preference for statute law has resulted in a reluctance within some Attorneys General's offices to claim common law powers. In addition, "the extensive statutory powers to represent both the state and the public interest granted to the Attorney General" have been cited as a reason for the failure by Attorneys General's offices to rely specifically on common law powers.

The table indicates that the great majority of jurisdictions recognize the Attorney General's common law powers. The table shows that Attorneys General of 35 states have common law powers, those of 8 do not, while the status of the other 8 is not decided. From this table, it appears that the trend toward increased recognition of common law powers, which has been apparent in recent years, has halted; in 1977, 37 Attorneys General's offices reported that they had common law powers.

COMMON LAW POWERS OF THE ATTORNEY GENERAL

	Has Such Powers	Not Decided	No Such Powers	Comments
Alabama	X			Where not limited by statute or constitution
Alaska	X			Where not limited by statute or constitution
Arizona			X	Case law denies powers
Arkansas	X			Where not limited by statute
California	X			Most powers now defined by statute
Colorado		X		Case law divided
Connecticut	X			Where not limited by statute, constitution, or court
Delaware	X			Case law does not specify powers
Florida	X			Where not limited by statute
Georgia		X		Insufficient case law
Guam		X		From Spanish civil law
Hawaii	X			Statutes give Attorney General common law power
Idaho	X			Has power to institute certain actions
Illinois	X			Has extensive powers, through case law
Indiana			X	Courts limit Attorney General to statutory power
Iowa			X	Case law not completely clear
Kansas	X			By case law
Kentucky	X			Where not limited or modified by statute
Louisiana			X	Common law not recognized in state
Maine	X			By statute and case law
Maryland		X		By case law
Massachusetts	X			Wide range of powers, through case law
Michigan	X			Wide range of powers, through case law
Minnesota	X			By case law, not statute
Mississippi	X			By case law
Missouri	X			By case law, not statute
Montana	X			By case law, where not limited by statute
Nebraska	X			Where not limited by statute
Nevada		X		By case law,

COMMON LAW POWERS OF THE ATTORNEY GENERAL (cont'd)

	Has Such Powers	Not Decided	No Such Powers	
New Hampshire	X			Case law
New Jersey	X			Reaffirmed by statute and constitution
New Mexico			X	Courts deny Attorney General
New York	X			By case law
North Carolina	X			Implied from statute and case law
North Dakota		X		Insufficient case law
Ohio	X			By case law
Oklahoma	X			By case law
Oregon	X			Except where limited by statute
Pennsylvania	X			Extensive case law
Puerto Rico			X	No reported cases
Rhode Island	X			By case law
Samoa	X			By statute
South Carolina	X			Certain powers exercised
South Dakota			X	Courts limit Attorney General to statutory power
Tennessee		X		No statutes or case law
Texas		X		No statutory basis; case law divided
Utah	X			By case law
Vermont	X			By statute
Virgin Islands		X		No reported cases
Virginia	X			Has powers, by virtue of constitutional status
Washington	X			Where not limited by statute
West Virginia	X			By case law
Wisconsin			X	Dicta only in recent cases
Wyoming		X		Insufficient case law

Status Subject To Change

The status of the Attorney General's common law powers is not static, but is subject to continuing judicial revision. In almost all states, the highest court has ruled on the Attorney General's common law powers. A list of these cases is appended. No relevant cases have been identified for Guam, Puerto Rico, Samoa, Tennessee, or the Virgin Islands. It is interesting that the first Alaska decision defining the Attorney General's common law status was in 1975, and the first Connecticut case in 1978.

In some jurisdictions, the relevant case law may consist only of dicta. In others, common law powers may be inferred from the court's recognition of a specific power. The North Carolina court, for example, has never expressly ruled on the Attorney General's common law power. However, Sternberger v. Tannenbaum, the court suggested that the Attorney General may retain common law power by saying 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." In the 1976 case of Matter of Southern Bell Telephone and Telegraph, the court said that the Attorney General "is not only the state's chief law enforcement officer but a steward of our liberties," without specifying the basis for this characterization. As a 1978 article by the Attorney General of that state concluded, "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."[70]

Another example of changing case law is New York, where the court recognized broad common law powers in People v. Miner and other early cases, but have restricted this power somewhat in more recent decisions. The Oregon Supreme Court had, in various cases, indicated that the Attorney General had common law powers. State v. Lord held that the Attorney General could bring suit to protect the state's interest in land; Gibson v. Kay recognized his common law authority to bring mandamus proceedings; Wemme v. First Church of Christ, Scientist declared that he had a common law duty to oversee charitable trusts; and other cases further defined his common law powers. In a 1959 case, State ex rel. Thornton v. Williams, the court restricted such powers, saying that the common law power to initiate criminal proceedings reposed in the district attorney, not the Attorney General. It should be noted that federal courts are generally reluctant to interpret a state official's common law powers. A similar situation occurred in Arkansas. In State ex rel. Williams v. Karston, the court indicated that the Attorney General has extensive common law powers. Eight years later, the court said in Parker v. Murray, without referring to Karston, that the duties of the Attorney General are purely statutory.

The federal district court for Alabama in Baxley v. Rutland, summarized the situation in most states:

> [The] extent of the powers conferred on the Attorney General by the state constitution and statutes can be adjusted with final authority only by the Supreme Court of Alabama. That court has indicated that the Attorney General's powers are as broad as the common law unless restricted or modified by statute.

Powers Not Determined

As indicated in the preceding table, the status of the Attorney General's common law power is not determined in seven states. Georgia, for example, reported as follows in response to COAG's 1979 questionnaire: "we are still assuming that common law powers obtain notwithstanding the fact that our appellate courts still tend to rest any approval of the Attorney General's action upon statute or constitutional provision ... It is thus fair to say that the issue as to whether or not the Attorney General possesses common law power is not yet clearly decided in the Georgia courts." In some jurisdictions, the Attorney General has considered his written powers to be adequate, and recourse to the common law has not been sought.

---

70. Rufus L. Edmisten, The Common Law Powers of the Attorney General of North Carolina, IX N.C. CENTRAL L.J. 35 (1978).

In some jurisdictions, a considerable body of case law on the question has developed, but there is still not a clear determination of powers. Texas, for example, has a number of cases relating to the Attorney General's common law powers, but case law is divided. A 1955 study by John Ben Shepperd, then Attorney General, reviewed Texas decisions and concluded that:

> ... it would appear that the Attorney General of Texas does have extra-statutory powers derived from the common law. Just which of the powers the courts of Texas are willing to recognize is largely a matter for speculation.... A survey of the opinions from other jurisdictions may be partially enlightening on this matter, but the number and diversity of enacted statutes on the subject in this State, when coupled with the unique features of our Constitution and heritage, render the future trend of the Texas law extremely difficult to predict.[71]

The Attorney General asserted his common law powers in two cases that were decided in 1978 by the Texas Court of Civil Appeals, Hill v. Texas Water Quality Control Board and Hill v. Lower Colorado River Authority. The court, however, specifically declined to rule on the common law question in the first case, because both the parties agreed that the Attorney General's common law power could be circumscribed by statute and constitution, and the court relied on those authorities to define the Attorney General's duties in the case. In the second case, the Attorney General contended that the constitutional directive that he "perform such other duties as may be required by law" should be construed to include both statutory and common law. He cited cases to show recognition by Texas courts of his common law powers. The appeals court, however, noted that none of the cases cited involved a similar fact situation, and found three Texas Supreme Court cases which did not recognize these common law powers to be controlling.

In Nevada there is some uncertainty regarding the extent to which the Attorney General can exercise common law powers. A 1922 case, State ex rel. Fowler v. Moore, appears to confirm that common law powers exist by holding that "we are in accord with his contention that the office of Attorney General in this state has all the powers belonging to it at common law." However, another case decided the same year, Ryan v. District Court, strongly suggests that the common law powers of the Attorney General are quite limited, if they exist at all. In the latter decision, the court emphasized arguments for a solely legislative definition of Attorney General powers. Two 1976 Colorado decisions, People ex rel. Tooley v. District Court and People v. District Court, said the Attorney General's powers are limited to those granted by the General Assembly. The court said that:

> the Attorney General submits that he retains powers and duties based upon the common law and holds a position analogous to the Attorney General of the United States. Since the Attorney General of the U.S. is the chief law enforcement officer of the nation, the Attorney General asserts that he is

---

71. John Ben Shepperd, Common Law Powers and Duties of the Attorney General, 8 BAYLOR L. REV. 17 (1955).

the chief law enforcement officer of the state. Colorado, however, has neither identified nor required the Attorney General to serve as the "people's elected chief law officer," as some states have.

A questionnaire response from the Colorado Attorney General's office, however, indicates that the question is undecided.

No Common Law Powers

A few jurisdictions have denied the Attorney General any common law powers. In a few other jurisdictions, the common law is not recognized.

A 1929 New Mexico case, State v. Davidson, held that "the doctrine of common-law power in the Attorney General appears to have originated in New York, and to have grown out of the peculiar conditions surrounding the formation of the governments of the original thirteen colonies." The court briefly reviewed the doctrine of common law powers, then said that:

> We are not concerned here with the correctness of this doctrine, for it is clearly inapplicable in this jurisdiction. It is a doctrine of presumptions, and constitutes a departure from the general rule of expressio unius exclusio alterius. It is based entirely upon the initial premise that the Attorney General was recognized as being vested with common-law powers before any attempt was made to enumerate or define his powers by statute. In New Mexico, the converse of this condition exists. The powers and duties of the Attorney General were enumerated by the very statute which created that office.

The court quoted an earlier decision, State ex rel. Clancy v. Hall, which said that the state constitution does not prescribe the duties of the Attorney General, and that "the legislature, unless limited by some direct constitutional provision, has the power to direct how, when, and where the state shall be represented in all matters." A 1967 case, State v. Reese, upheld this position, despite the Attorney General's contention that the "case stands alone in this country in its conclusion that common law powers and duties are not vested in the office." A 1973 case, State ex rel. Norvell v. Credit Bureau, Inc., confirmed that the New Mexico Attorney General does not have common law powers.

The Arizona court, in Arizona State Land Department v. McFate, a 1960 case, said that "the Attorney General has no common law powers." A 1939 decision, Shute v. Frohmiller, had previously said that "The attorney general is not a common-law officer ... but is one whose powers and duties may be ascertained only by resort to the statutes."

Wisconsin, in State v. Snyder, held that the constitutional provision that the duties of the office were to be prescribed by law meant that they could only be derived from statute. A 1974 decision, In re Sharp's Estate, reiterated that the constitutional provision removed any common law powers from the office. South Dakota reports that "since the 1961 decision in State ex rel. Maloney v. Wells any questions of the Attorney General's common law powers has been dissipated"; as in Wisconsin, the constitutional provision is interpreted to mean that his powers derive only from statutory law.

The Indiana court held in State ex rel. Bingham v. Home Brewing Co. that the Attorney General did not have the common law powers which attached to the office in those jurisdictions where he was a constitutional officer, since the office was created by statute in Indiana. This distinction is not universally accepted. Courts in other states where the Attorney General is not a constitutional officer, such as Connecticut and Oregon, have recognized at least some common law powers.

In a 1977 decision, Motor Club of Iowa v. Department of Transportation, the Iowa Supreme Court declared that "in this state the duties and powers of the attorney general are defined by statute. He is clothed with common law power only to the extent codified in the statute." The same court had held in four cases prior to Motor Club that the Attorney General had no common law power; two of these cases gave no reasoning for this position, but merely cited the two earlier cases for authority."[72]

North Dakota statutes say that "there is no common law in any case where the law is declared by the Code."[73] The court, however, upheld the Attorney General's authority to go before a grand jury, even without statutory authorization, in the 1910 case of State ex rel. Miller v. District Court. A 1946 decision, State v. Baker, noted that although the Attorney General is a constitutional officer, his powers and duties are prescribed by legislative enactment. A recent law journal article, however, argues that the Attorney General has common law powers, because he has often exercised them. The author says that the North Dakota Supreme Court has never directly addressed the question of whether the phrase "prescribed by law" indicates constitutionally imposed common law powers, rather than merely statute law. The author discusses the State v. District Court case and contends that it "gives the strongest argument to interpert the statutory powers of the attorney general in a broad, inclusive manner."[74]

Louisiana has never adopted the common law, due to its predominately French-Spanish origin. The Louisiana Supreme Court, in Saint v. Allen, rejected the Attorney General's attempt to exercise common law powers, saying they do not exist in that state.

The status of the Attorney General's common law powers in the Commonwealth of Puerto Rico and the territories of Guam, American Samoa and the Virgin Islands is unclear. There is no relevant case law in these jurisdictions. American Samoa reported in response to a 1979 COAG questionnaire that the Attorney General had common law powers, Puerto Rico that he did not, and Guam that such powers were undecided. The Attorney General is appointed by the Governor in the territories; the Governor, in turn, is federally appointed.

---

72. Note. The Litigation Function of the Iowa Attorney General, 63 IOWA L. REV. 1264 (1978).

73. N.D. CENT. CODE K 1-0106, NDRC-43.

74. Russell J. 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 (1975).

As the United States Government retains no common law powers, it might be difficult to establish their applicability to territories, particularly when the territories were not English in origin. An 1889 Hawaii case, The King v. Robertson, noted that: "... The common law is not in force in this Kingdom. This is not an English colony which has brought out the law of England to be in force here...." Hawaii resolved such problems by enacting a statute conferring common law powers on the Attorney General. A study of Guam and American Samoa, however, notes that "American precepts of common law, modified as necessary to accomodate the various cultures, are applied ... through an appointed judiciary."[75]

Powers Cannot Be Limited

Illinois' Constitution provides for an Attorney General who "shall perform such duties as may be prescribed by law."[76] The Illinois Supreme Court has interpreted this constitutional provision to mean that not only does the Attorney General have common law power, but that such power cannot be limited. As the court noted in Environmental Protection Agency v. Pollution Control Board, "[i]t is noteworthy that neither the legislature nor the judiciary may deprive the Attorney General of his common law powers under the Constitution." This position has been sustained in a series of cases. In People v. Finnegan, the court held that:

> In this State the constitution, by creating the office of Attorney General under its well-known common law designation and providing that he shall perform such duties as may be prescribed by the law, ingrafted upon the office all the powers and duties of an Attorney General as known at the common law and gave the General Assembly power to confer additional powers and impose additional duties upon him. The legislature cannot, however, strip him of any of his common law powers and duties as the legal representative of the State.

Fergus v. Russel is among the Illinois cases which affirmed that "under the common law the Attorney-General had well-known and well-defined powers, and it was incumbent upon him to perform well-known and clearly prescribed duties." The court has not attempted to enumerate these powers; it did note, in Hunt v. Chicago Horse and Dummy Railroad Co., that "the attorney general was the law officer of the crown, and its only legal representative in the courts." In People ex rel. Elliot v. Covelli, the court concluded that:

> ... on those occasions when the Illinois courts have had an opportunity to examine into the matter of the rights and prerogatives of the Attorney General of the state, they have quite generally determined that such officer, in addition to those powers and duties conferred by statute, enjoys all the inherent powers and duties of the Attorney General of England under the common law, and that under no circumstances could those powers be denied him.

---

75. N. Meller, American Pacific Outposts, STATE GOV'T. 210 (1968).

76. ILL. CONST. art. V, § 1 (1870).

Has Powers Except as Modified by Statute

The majority of jurisdictions recognize the Attorney General's common law powers, but consider them subject to constitutional or statutory modification. The existence of common law power is thus recognized, but it must be considered in the context of that jurisdiction's statute law. Where statute law and common law conflict, the legislative act will prevail in most cases. Where the statutes are silent, the Attorney General's power at common law will be acknowledged.

Most states hold that the term "prescribed by law" includes the common law, or hold that the institution of the office of Attorney General brought with it common law powers that cannot be abrogated. Supporting cases are too numerous to be listed, but a few examples are cited here.

The Montana court said in State ex rel. Ford v. Young that:

... the office of attorney general, as it existed in England, was adopted as a part of the governmental machinery, and that in the absence of express restrictions, the common law duties attach themselves to the office so far as they are applicable and in harmony with our system of government.

The Supreme Court of Kansas cited that case in State v. Finch, wherein it ruled that "the Attorney General's powers are as broad as the common law unless restricted or modified by statute."

Mississippi, in State ex rel. Patterson v. Warren, likewise held that "the attorney general is clothed with all the common law powers of the office, except insofar as they have been expressly restricted or modified...." A New Jersey court said in 1976, in Evans v. Newark, that "The functions and authority of the Attorney General are derived from the common law of England, subject to enlargement or abridgement by legislative action." The Maine court reached a similar conclusion in In re Maine Central Railroad:

The Attorney General represents the whole body politic, or all the citizens and every member of the state. Only a few of the duties of the Attorney General are specified by this and the following section [referring to the statute] ... The Attorney General is however, clothed with common law powers. It is for him to protect and defend the interests of the public.

An Illinois case, Hunt v. Chicago Horse & Dummy Railway Co., is frequently quoted to show that statutes merely specify a few duties, and the rest are authorized by common law:

In England, the office of attorney general has existed from a very early period, and has been vested by the common law with a great variety of duties in the administration of the government.... Upon the organization of governments in this country, most, if not all, of the commonwealths which derive their system of jurisprudence from England adopted the office of attorney general as it existed in England as a part of the machinery of their respective governments. The prerogatives which pertain to the crown of England are here vested in the people, and the necessity for the existence of a public officer charged with the protection of public rights and

the enforcement of public duties, by proper proceedings in the courts of justice, is just as imperative here as there. The duties of such an office are so numerous and varied that it has not been the policy of legislatures to attempt the difficult task of enumerating them exhaustively, but they have ordinarily been content, after expressly defining such as they have deemed the most important, to leave the residue as they exist at common law, so far as applicable to our jurisprudence and system of government.

The Supreme Court of New Hampshire, in Fletcher v. Merrimack County, held that the Attorney General had all of the powers of common law in criminal actions. A 1975 decision by the same court, Attorney General by Anderson v. Rochester Trust Co., said that "The common law powers of the Attorney General are broad, and not restricted by specific statutory duties." In Michigan, the court declared in Mundy v. McDonald that the Attorney General has a wide range of common law powers in addition to his statutory powers. The Minnesota Supreme Court said in State ex rel. Young v. Robinson and Dunn v. Schmid, that the Attorney General "is possessed of extensive common law powers which are inherent in his office."

The legislature's authority to restrict common law powers by statutes is generally acknowledged. In State ex rel. Carmichael v. Jones the Alabama court affirmed "that the attorney general's powers are as broad as the common law unless restricted or modified by statute." Similar language was used in a Delaware case, Darling Apartment Co. v. Springer, which cited "the accepted principle that, in the absence of express legislative restrictions, the Attorney General, as the chief law officer of the State, may exercise all of the powers and authority incident to the office at common law." A 1975 Alaska decision, Public Defender Agency v. Supreme Court, said that "an Attorney General has those powers which existed at common law except where they are limited by statute or conferred upon some other state official."

A Nevada case, Ryan v. District Court, held that: "[when] an exercise of powers would be repugnant to the statutory law of the state ... the Attorney General may not look to the common law to justify his action." In a 1978 decision, State v. Jiminez, the Utah Supreme Court implied that common law powers could be limited by case law as well as by statute. The court said that the Attorney General's authority "is ... supported by the common law which Utah has adopted where it is not inconsistent with our own legislation or judicial pronouncements."

The legislature's right to modify common law powers is not absolute, at least in those jurisdictions where the Attorney General is a constitutional officer. As Kentucky's Court of Appeals said in Johnson v. Commonwealth ex rel. Meredith:

... The office may not be stripped of all duties and rights so as to leave it an empty shell, for obviously, as the legislature cannot abolish the office entirely, it cannot do so indirectly by depriving the incumbent of all his substantial prerogatives or by practically preventing him from discharging the substantial things appertaining to the office.

A more recent decision by the same court, Hancock v. Terry Elkhorn Mining Company, Inc., reaffirmed that "presently the Attorney General is vested with those powers he had under the common law...." Maryland's highest court in the 1975 case of Murphy v. Yates said that "the General Assembly may not abrogate the common law powers of the Attorney General...."

Missouri's highest court, in State ex rel. McKittrick v. Missouri Public Service Commission defined the relationship of common law to state statutes and constitution. The state's constitution provides that the Attorney General shall perform such duties as may be provided by law. The state, by statute, has adopted such common law as is not repugnant to its constitution and statutes. The court concluded, therefore, that "There can be no doubt that the Constitution does not prohibit the General Assembly from limiting the common law powers of the Attorney General."

In those states where the Attorney General's common law power is recognized, the court may reject a particular power as not belonging to the office at common law. For example, the Nevada court held in State ex rel. Fowler v. Moore that, although the office of Attorney General had "all the powers belonging to it at common law," these did not include the power to set aside a divorce decree.

In other states, a judicial ruling that common law powers exist may be weakened by a subsequent decision. Thus, a 1902 Washington case, State ex rel. Attorney General v. Seattle Gas and Electric Company, held that the Attorney General retains those powers which were ordinarily exercised by him under common law except where the legislature has seen fit to confer such powers upon another officer. In a 1974 case, State v. O'Connell, the court said that the powers of the Attorney General are created not by the common law, but by the legislature or the constitution. However, the latter rule was stated briefly as one point of a lengthy and complex case, which involved many issues. The fact that it was a six to three decision, with two other justices not participating, and that the court stressed its reluctance to overturn the jury verdict, are considered to mitigate the case's importance in defining common law powers.

Iowa's highest court, in a 1975 decision, said that the duties and powers of the Attorney General in that state are defined by statute. The case, State v. Blyth, noted that "he is clothed with common law powers only to the extent codified in the statute." Most courts, however, have not taken so restrictive a definition of common law powers. As the preceding discussion has shown, the courts of most states recognize that the Attorney General has some common law powers in addition to those powers that are specifically defined by statute.

6. SPECIFIC COMMON LAW POWERS

The following pages classify by topic cases concerning the Attorney General's common law powers. Any such classification must be somewhat arbitrary both in the subjects selected and in the assignment of cases to a category. No attempt has been made to include every case relating to the Attorney General's common law powers in this discussion. Some cases, on the other hand, are discussed under more than one heading. Citations to the cases are given in an appendix to this report.

Institution/Intervention in Civil Suits

Courts have held that the Attorney General has broad power to act to protect the public interest. Howard v. Cook, an Idaho case, held that:

> It is virtually conceded that the attorney general is empowered to institute civil actions for and on behalf of the state for the protection of the state's rights and interests, as was apparently the universal rule at common law; that is, at common law, the attorney general had the right to institute civil suits on his own initiative and at his own discretion for such purpose.

California's court upheld the Attorney General's action to purge fraudulent voter registration lists on similar grounds in Pierce v. Superior Court in and for Los Angeles County:

> The right of the state to proceed by an action in equity ... to purge [voting registers] ... may not seriously be questioned .... If, as we hold, the state may maintain such an action, the right of the Attorney General to institute it may not be attacked. The Attorney General, as the chief law officer of the state, has broad powers derived from the common law, and in the absence of any legislative restriction, has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interests.

Another California case, Hart v. County of Los Angeles, indirectly acknowledged this power when it said that a county was not immune from suit by the Attorney General to enforce a trust, any more than it would have been at common law.

Many actions by the Attorney General have been upheld on the basis of his common law duty to protect the public. In an 1887 Illinois case, Hunt v. Chicago Horse & Dummy Railway Co., the court allowed the Attorney General to restrain the defendant from constructing a railroad without undertaking certain procedures. The court quoted the lower court reference to:

... the principles of the common law, which make the attorney general the proper representative of the people of the state in all courts of justice, and charge him with the official duty of interposing for the protection and preservation of the rights of the public, whenever those rights are invaded and there is no other adequate or available means of redress.

The Michigan court, in Mundy v. McDonald, said that "a broad discretion is vested in this office in determining what matters may, or may not be, of interest to the people generally." An early Pennsylvania case, Commonwealth v. Burrell, held that "The Office of the Attorney General is a public trust, which involves, on the discharge of it, the exercise of an almost boundless discretion by an officer who stands as impartial as a judge...."

In a Texas case, State v. Goodnight, the Attorney General petitioned for an injunction to restrain fencing in of public lands. The Texas Supreme Court held that these enclosures injured the public as an aggregate body, and, therefore, it was the Attorney General's duty to proceed to remove them. The decision did not specifically mention common law powers; however, this apparently was the authority involved, as no statutory or constitutional provisions were cited. Similarly, a California district court in Don Wilson Builders v. Superior Court ruled that the Attorney General had standing to sue to enjoin violations of the state civil rights act. As the act does not provide for enforcement by the Attorney General, his standing presumably derives from the common law.

The Kentucky Court of Appeals, in Hancock v. Terry Elkhorn Mining Co., overruled a lower court decision which denied the Attorney General's right to intervene in a suit concerning special overweight truck permits. The court said that "the Attorney General is not attempting to intervene as counsel but rather in his capacity as an official of the Commonwealth and as its chief law officer." It pointed out that he has a vital interest in this litigation because of such public issues as protection of the public interest, the travelling public, school busses, and the existence of the roads.

In State ex rel. Shevin v. Yarborough, a 1972 case, the Florida Supreme Court said that "Generally speaking, the Attorney General is Chief Counsel for the state which in the final analysis is the people.... In the final analysis, the citizens constitute the State and the State the people." Justice Ervin, in a special concurring opinion, commented further that:

The Attorney General is elected by the people; he is entrusted by them with the common law power to legally represent them or some of them in matters deemed by him to affect the public interest. He has a discretionary duty under the common law rarely modified by statute to protect the public interests of any of the people who elected him. It is his discretionary duty to choose those legal matters in the area of public litigation or quasi-judicial administration in which he believes it is his official duty to intervene, except in those instances when it is mandated by the legislature for him to intervene or to refrain from intervening. If he is mistaken in his legal advocacy, the courts and quasi-judicial tribunals always retain the power to rule against him and often do on the merits but this power does not affect his standing to become a party of interest in the cause or proceeding.

A federal circuit court, quoting Florida cases, concluded that "the Attorney General's power to institute litigation on his own initiative is not limited to quo warranto proceedings in Florida or elsewhere; it is as broad as the 'protection and defense of the property and revenue of the state' and, indeed, the public interest requires." This case, Florida v. Exxon, involved a suit under federal law, without specific authorization of the individual government entities which allegedly had sustained injuries. The decision also noted that the fact that various statutes delegate specific portions of the state's litigation power to local prosecutors "in no way indicates an abrogation of the Attorney General's common law powers as to other types of litigation."

The Wyoming Attorney General brought an action to enjoin defendant from filing mining certifications in Zweifel v. Wyoming ex rel. Brimmer. Defendant moved to dismiss, contending the state had no standing to sue with respect to any lands other than its own. The court rejected this contention and upheld the Attorney General's standing: "We do not think that the attorney general of this state must sit idly by while those mining laws are ignored in such wholesale fashion." The court cited statutory authority giving the Attorney General power to prosecute any proceeding which is in the best interest of the state; it also quoted Pierce v. Superior Court, which held the Attorney General has broad common law powers to act in the prosecution of public rights and interests.

Gandy v. Reserve Life Insurance Co., a Mississippi case, concerned an action by the Attorney General and the Commissioner of Insurance to enjoin an insurance company from making unlawful increases in premium rates. The court held that "since the nature of the present bill is to maintain and preserve the lawfully enacted statutes of the state relating to insurance by restraining violations thereof, we conclude that the Attorney General is vested with the authority and, indeed, has the duty to do so." This conclusion derived from the status of the Attorney General, "possessed of all the power and authority inherited from the common law as well as that specifically conferred upon him by statute."

A Massachusetts decision, Attorney General v. Kenco Optics, concerned an action filed by the Attorney General on the question of whether opticians could fit contact lenses. Defendants argued that the action should be dismissed because the Attorney General sought an injunction against conduct subject to criminal statutes. The court said that the Attorney General was an "appropriate officer to seek ... clarification" through the courts in such a controversy.

Some courts have recognized the Attorney General's authority to bring suits under the public trust doctrine. Pennsylvania's Commonwealth Court, in Commonwealth v. National Gettysburg Battlefield T., Inc., said that "the Attorney General is plainly the proper officer to assert the public trust." Ohio's Supreme Court said in State v. City of Bowling Green that the doctrine had been consistently recognized by common law in the state. It said, citing cases, that "where the state is deemed to be the trustee of property for the benefit of the public it has the obligation to bring suit not only to protect the corpus of the trust property but also to recoup the public's loss occasioned by the negligent acts of those who damage the property." In a 1976 Illinois case, People ex rel. Scott v.

Chicago Park District, the Attorney General successfully brought action alleging that a law authorizing the sale of certain public lands was void because it violated the public trust doctrine.

A New Jersey case, Evans v. Newark, recognized the Attorney General's right to initiate litigation in which he would actually take no part. The private plaintiff was barred by the doctrine of sovereign immunity from filing tort action against a public authority. The Attorney General, however, had statutory authority to bring such suits in his own discretion or on behalf of other persons. The Attorney General filed suit but announced he would take no part in the action. The court said that the Attorney General had common law power, and, "[A]t common law, a private individual having some private interest to subserve in connection with the rights of the ... sovereign could, as a matter of right, bring an action as a realtor through the attorney general to set in motion the machinery of the court." The court also noted that the Attorney General is "vested with the duty of interpreting the statutes," so his interpretation in this instance would be strongly persuasive.

A Michigan decision, Anchor Bay Concerned Citizens v. People ex rel. Kelley, noted that "once the Attorney General has intervened his rights are no greater than those of any other party to the lawsuit." In the matter under consideration, his failure to file a brief was held to constitute a waiver of his right to appeal.

The Iowa court has restricted such authority to bring action. The Attorney General brought an action to enjoin the State Highway Commission and the Director of Highways from removing "permanent resident engineers' 'offices'" from their present locations. The Attorney General asserted such removal would be in violation of the laws. The district court held that the Attorney General had standing to bring this suit. However, the Iowa Supreme Court reversed that decision by holding that neither statutory nor common law powers gave the Attorney General authority to institute such an action. The court cited Cosson v. Bradshaw and State ex rel. Fletcher v. Executive Council of the State of Iowa, which had held that, generally, "the duties and powers of the Attorney General are defined by statute." These cases had also stated that the Attorney General cannot maintain an action if such maintenance puts him in a position which is repugnant to his other official duties.

Two 1978 decisions by the Texas Court of Civil Appeals denied the Attorney General standing to sue a state agency. Hill v. Lower Colorado River Authority concerned an action by the Attorney General against a state agency pursuant to his constitutional, statutory and common law powers. The Attorney General cited cases upholding his common law powers, but the court relied on other cases, which did not recognize these powers. It said that:

> [We] find in reviewing the cases decided by the Courts of Texas consistent adherence to the principle that the attorney general derives his power and authority in office from the constitution and the laws of the State enacted by the Legislature.... nowhere do these grants of power arm the attorney general with authority to sue the State or any of its arms or agencies.

The other case, Hill v. Texas Water Quality Board, concerned a suit brought by the Attorney General against the Board. The Attorney General asserted his common law role as guardian of the public interest as a basis for the suit; the court again denied standing, although it did not comment on the Attorney General's common law authority.

The Indiana Court of Appeals has held that the Attorney General has no common law powers. It has also held that the Attorney General has no authority, common law or otherwise, to initiate an action to recover damages for the destruction of state university property in connection with a student demonstration. In State of Indiana v. Rankin, the court said that "the necessary triggering device, the condition precedent to set the legal machinery in action is the client's oral or written instruction to his attorney," which was the university trustees in this case; without such instruction, the Attorney General could not act.

Challenges to the Constitutionality of Legislative or Administrative Actions

The Attorney General's standing to attack the constitutionality of state legislation has been recognized as a common law power. In Wilentz v. Hendrickson and Van Riper v. Jenkins, the New Jersey court allowed the Attorney General to intervene in private suits challenging the constitutionality of legislation. A Utah case, Hansen v. Barlow, said that the Attorney General had the right and the duty to clarify the constitutionality of legislation. A study of the Attorney General's standing before the Supreme Court to attack legislation which he thought unconstitutional pointed out that:

> ... the basic constitutional principle that the judiciary is to serve as a check on the legislature would be avoided unless the attorney general is granted standing to present the constitutional question concerning legislation which seriously jeopardizes the interests of the government as a whole.[77]

In People ex rel. Scott v. Chicago Park District, the Attorney General of Illinois sought a declaratory judgment that an act of the General Assembly providing for the sale of certain lands was void. The court held that the law was void because it violated the public trust doctrine. The Kentucky court, in Commonwealth ex rel. Hancock v. Paxton, determined that there could be no question of the Attorney General's right to appear in a suit involving the constitutionality of a statute; the right was founded in common law, as well as in the constitutional and statutory authority for the Attorney General's office.

Courts have also recognized the Attorney General's standing to challenge action by administrative agencies which he considers injurious to the public interest. In State ex rel. Sorensen v. State Board of Equalization,

---

77. Note, Attorney General's Standing before the Supreme Court to Attack the Constitutionality of Legislation, 26 U. CHI. L. REV. 631 (1959).

the Nebraska court upheld the Attorney General's common law authority to petition for a writ of error from a decision of the State Board of Equalization, which had reduced tax assessments. The court said:

> In equity, as in the law court, the attorney general has the right, in cases where the property of the sovereign or the interest of the public are directly concerned, to institute suit, by what may be called civil information, for their protection. The state is not left without redress in its own courts because no private citizen chooses to encounter the difficulty of defending it, but has appointed this high public officer, on whom it has cast the responsibility and to whom, therefore, it has given the right of appearing in its behalf and invoking the judgment of the courts on such questions of public moment....

A subsequent Nebraska case, State ex rel. Meyer v. Peters, cited Sorensen and held that it was proper for the Attorney General, pursuant to common law, statute and constitution, to challenge the constitutionality of legislation. The court also cited a Florida case, State ex rel. Landis v. S. Kress and Co., which held that the rule that a person not affected by a statute cannot challenge its constitutionality did not apply to the Attorney General who was acting in the public interest.

A 1974 Pennsylvania case, Hetherington v. McHale, recognized the Attorney General's common law duty to initiate judicial proceedings if he considers a law unconstitutional, or to propose legislation to correct the suspected constitutional infirmity. The court concluded, however, that the direction by the Attorney General to ignore a statute would amount to a "suspension" of that statute in direct contravention of the Pennsylvania Constitution.[78] The court recognized an exception to this statement in cases where the United States Supreme Court has declared a statute to be unconstitutional and Pennsylvania has a statute which is similar in all important aspects. If the Supreme Court decision is controlling, then the Attorney General may implement it by issuing an opinion.

In Gershman Investment Corporation v. Danforth, a banker sought a declaratory judgment that opinions of the Missouri Attorney General which held a statute unconstitutional were erroneous opinions. The court said that the Attorney General's opinions "are entitled to no more weight than that given the opinion of any other competent attorney," and said unequivicolly that "he has no judicial power and may not declare the law."

Suits Under Federal Law

A state Attorney General's right to bring suit on behalf of the people under federal law was upheld in State of California ex rel. Younger v.

---

78. Gerald Gornish, The Attorney General's Authority to Advocate and Advise the Constitutional Invalidity of Statutes, 82 DICK. L. REV. 639 (1978).

Butz, in which the Attorney General sought an injunction against defendants who failed to prepare an impact statement as required by the National Environmental Policy Act. In its conclusions of law, the court held that the Attorney General has standing to represent the people and to seek compliance with the Act. In Florida v. Exxon, the United States Court of Appeals for the Fifth Circuit held that a state Attorney General's powers extended to the institution of suit under federal law, even without specific authorization of the individual government entities which allegedly had sustained the legal injuries asserted.

Several recent decisions by federal district courts in Alabama have concerned the Attorney General's authority to bring suit in federal court challenging the constitutionality of state statutes. In Baxley v. Rutland the court dismissed a suit in which the Attorney General alleged that a state statute violated the U. S. Constitution. The court said that, although state courts had indicated that the Attorney General had broad common law powers,

> If his powers and responsibilities are so extensive as to permit him in his own name and in the name of the state to seek declaratory and injunctive relief from a federal district court as to any statute of the State of Alabama, the balance of power between the three departments of state government may be seriously disturbed. The Attorney General sues in his official capacity as Attorney General and as relator in the name of the state (as parens patriae). May the state attack in federal court its own statutes as violative of the Constitution of the United States? That seems incongruous.
>
> This case is instituted solely upon the authority of the Attorney General. The opinion of the Attorney General without any other personal stake in the outcome is too weak a base to support the concept of standing and the jurisdictional requirement of a case or controversy.

In another case, Suitts v. the Alabama Legislative Commission to Preserve the Peace, the Attorney General's authority to intervene in a similar case was upheld. The court said that the Attorney General is required by his oath of office to support and defend the U. S. Constitution, and "when and if there is a conflict between the state law and the federal law in areas where the federal law is applicable, the Supremacy Clause of the Constitution of the United States controls." In the third case, Delchamps, Inc. v. Alabama State Milk Control Board, the court granted the Attorney General's motion to be realigned as a party plaintiff, rather than defend what he considered to be an unconstitutional state statute. The court said that, if the Attorney General is of the opinion that certain state laws are "clearly violative" of the U. S. Constitution, he is not under a duty to defend them.

Intervention in Rate Cases

New Jersey's court upheld the Attorney General's power to intervene before a regulatory commission in a public utility rate case, saying in Petition of Public Services Coordinated Transport that:

The Attorney General has traditionally been recognized as the defender of the public interest. This power is an attribute of his office, bestowed by the common law, which has not been taken away by legislative enactment.

The Attorney General's role in rate cases was examined by the Montana court in State ex rel. Olsen v. Public Service Commission. It held that "the action taken by the attorney general questioning the reasonableness and lawfulness of the [telephone] rates is a proceeding affecting public interests and properly maintainable by him." This was identified as a common law power: "public interest being affected, the state is a party in interest and the attorney general under broad powers given him by the common law may represent the state in the litigation." Earlier cases had clearly established the Attorney General's authority to take action questioning a public service commission's decision, even though he served as the Commission's attorney.[79]

The Attorney General's common law power to intervene concerning electricity rates was upheld in Alexander v. New Jersey Power and Light Company, a New Jersey case, and in State ex rel. Shevin v. Yarborough, a Florida case.

The Missouri court, however, said in State ex rel. McKittrick v. Missouri Public Service Commission that, although the Attorney General had common law powers, he had no right to intervene in a public service commission proceeding, or to apply for a rehearing or writ of review and appeal. The court said that the statutes provided that the Governor shall appoint counsel for the commission, so the Attorney General had no power to "represent, control or impede the Commission in its functioning." Therefore, "he cannot do the same thing indirectly by intervention."[80]

Maine's highest court said "there may be common law power authorizing the participation of the Attorney General in [Public Utilities] Commission proceedings in particular limited instances," although it found it unnecessary to assert the nature and scope of such powers in the particular case. The Attorney General's appeal to the court in Central Maine Power v. Public Utilities Commission raised only the issue of the residential rate structure. The court said that residential rates were not germane to his interests as representing the state as a ratepayer, nor to the interest of the public at large, so dismissed his appeal. The Attorney General has statutory authority to appear for the state in court proceedings where the state is a party or has an interest, but is authorized by statute to appear in proceedings before other tribunals only when requested by the Governor or legislature.

---

79. See State v. State Board of Equalization, 185 P. 708 (Mont. 1919).

80. See National Association of Attorneys General, Committee on the Office of Attorney General, ATTORNEY GENERAL'S INTERVENTION BEFORE REGULATORY AGENCIES (1975).

Parens Patriae

The common law doctrine of parens patriae has been used in defining the Attorney General's power. This doctrine has been applied in such diverse areas as charitable trusts and antitrust enforcement. Its acceptance by the courts has not been uniform.

In general, the doctrine provided that the King, through his Attorney General, could represent all persons non sui juris. It has been noted that:

> The nature and scope of parens patriae has greatly expanded in this country beyond its original common law confines. This expansion is reflected in a line of cases developed in the nineteen-hundreds.... The nexus in all these cases is that a large number of state's citizens were injured-- or threatened with injury-- and the injured mass of citizens was unable to protect its own interests because of the magnitude of the problem. Such suits were permitted even though the persons represented were technically non sui juris, and even though there was no direct injury to any proprietary interest of the state.[81]

The United States Supreme Court at one time acknowledged a state's right to bring antitrust suits parens patriae.[82] State courts have also accepted the doctrine. In People of the State of Oregon v. Debt Reducers, Inc., that state's court of appeals said that "the doctrine of parens patriae is usually applied for the benefit of people who are non sui juris. However, it is not invariably so limited in its applications."

Two recent federal cases have impaired the utility of parens patriae as a tool for Attorneys General. In 1972, the United States Supreme Court decided Hawaii v. Standard Oil Co. of California,[83] in which the state sought treble damages for injury to its economy under the Clayton Act. The Court denied the state standing and emphasized that recovery for injury to the quasi-sovereign interests of a state would have to be founded on statutory language which was not found in the Clayton Act. The Court did not expressly foreclose future use of the parens patriae doctrine, but intimated that a state's parens patriae claim in the nature of a class action on behalf of its citizen-consumers might be permissible.

California v. Frito Lay, Inc.,[84] involved a different interpretation of parens patriae. The Attorney General sued manufacturers concerning

---

81. Former California Attorney General Evelle Younger Before House Judiciary Subcommittee on Monopolies and Commercial Law, March 25, 1974.

82. Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945).

83. Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972).

84. California v. Frito Lay Inc., 474 F.2d 774 (9th Cir., 1973), cert. denied, 412 U.S. 908 (1973).

an alleged conspiracy to fix prices in violation of the Sherman Act. The state sought to recover for injury to its citizen-consumers, not for injury to its general economy. The Court of Appeals for the Ninth Circuit held that "The authority of the state to act here as representative of its citizens cannot be founded on its common law capacity as parens patriae." The court, however, made it clear that the doctrine could be restored by legislation.

The Hart-Scott-Rodino Antitrust Improvement Act of 1976[85] granted Attorneys General the power to sue for damages incurred by natural persons residing in a state because of Sherman Act violations by firms. In Illinois Brick v. Illinois,[86] however, the Supreme Court held that, with certain exceptions, indirect purchasers are not entitled to recover damages suffered as a result of antitrust law violations. Since persons who could be represented by a parens patriae antitrust action are often indirect purchasers, the decision has limited the use of this approach.

A state case limiting the Attorney General's authority to bring an action on behalf of the consuming public as parens patriae was People v. Superior Court. The California Court of Appeals limited the Attorney General's power to institute suit to instances where the state's interest was "direct," "primary and direct," or "present, direct and immediate." The court found no such direct interest where restitution of moneys paid encyclopedia salesmen by individual consumers was requested. The court held specifically: "In light of the foregoing, we hold that the People do not have an action in common law restitution for wrongs alleged to have been committed upon members of the public. There is no doctrine of parens patriae that is yet so broad as to vest in the People the rights and interests which are prerequisites in this type of action."

Proceedings Against Public Officers

The courts of several states have ruled on the Attorney General's power to institute quo warranto actions to recover public offices from wrongful occupants thereof. This is one of the common law powers enumerated in People v. Miner.

The origins of Attorney General's standing to bring quo warranto proceedings to remove public officials from office of malfeasance was discussed by the Illinois court in People v. Fullenwider:

> At common law the writ of quo warranto was a prerogative writ used only for the purpose of correcting the public wrongs of usurpation of office or wrongful exercise of franchises or liberties granted by the crown. It was never used as a remedy for private citizens. It was purely civil remedy, and it gradually fell into disuse and was succeeded by the prosecution by information filed in the court of King's bench by the Attorney General in

---

85. P.L. 94-435 (1976).

86. 431 U.S. 720 (1977).

the nature of quo warranto, which was a common law remedy and a criminal method of prosecution in which a judgment against the defendant involved not only ouster from office but also a fine for usurpation of the franchise, which was regarded as a crime. A private citizen could no more prosecute such a proceeding than he could prosecute in his own name for any other crime. The Attorney General had the arbitrary discretion to determine whether he would institute the proceeding or not, and his discretion could not be controlled and was not subject to review.

The court concluded that "the Attorney General is vested with the same discretion originally exercised by the Attorney General as common law when the writ of quo warranto was solely a prerogative remedy of the crown."

A 1944 Kentucky decision, Commonwealth ex rel. Attorney General v. Howard, held that the Attorney General did not retain power to bring quo warranto proceedings, but most states' courts have taken a contrary position. In State ex rel. Young v. Robinson, the Minnesota Attorney General was allowed to bring quo warranto proceedings against a city official who had failed to report violations of liquor laws. The Attorney General's authority was attributed to his common law powers and he was further allowed to sue for a penalty. State ex rel. Glenn v. Stein recognized the Nebraska Attorney General's common law power to bring quo warranto proceedings to oust a county treasurer for malfeasance. The Kansas court sustained the Attorney General's standing to institute quo warranto proceedings to test the validity of a city annexation ordinance in State v. City of Kansas City.

The decision to bring such actions has been held to be within the discretion of the Attorney General. Over a century ago, Pennsylvania's Supreme Court, in Commonwealth v. Burrell, declined to allow an individual to bring a quo warranto action even when the Attorney General failed to act. The court said that the Attorney General was deemed to be a person of integrity and to conclude otherwise "would deprive the Attorney General of his official discretion and compel him to act against the dictates of his judgment...." Lamb v. Webb, a California case, held that it is within the discretion of the Attorney General to bring a quo warranto proceeding in a contested election case.

The Attorney General may also proceed through mandamus or injunction against public officers. A Massachusetts case, Attorney General v. Trustees of Boston Elevated Railroad, held that:

The Attorney General represents the public interest, and as an incident to his office he has the power to proceed against public officers to require them to perform the duties that they owe to the public in general, to have set aside such action as shall be determined to be in excess of their authority, and to have them compelled to execute their authority in accordance with law.

A Texas court restated the common law power of the Attorney General to bring mandamus proceedings in a case denying that right to a private citizen. In Yett v. Cook the court denied to the private litigant the right to file a mandamus to require city officers to call an election for councilmen, saying that:

... under the ancient and modern rules of the common law, the state has the power and duty to supervise the conduct of municipalities.... Since the state can bring a mandamus suit similar in purpose to the one before us, it is elementary that the Attorney General has the power to institute such action.

An Alaska court recognized in a 1975 decision, Public Defender Agency v. Superior Court, that "both federal and state courts have ... held that the Attorney General cannot be controlled in either his decision of whether to proceed, or in his disposition of the proceedings." In holding that a superior court judge could not order the Attorney General to prosecute a child support order, the state supreme court said that "under the common law, an Attorney General is empowered to bring any action which he thinks is necessary to protect the public interest." The Washington Supreme Court upheld the Attorney General's discretion to decline to bring suit to recover state funds in two 1977 decisions, Berge v. Gorton and Boe v. Gorton. Neither decision referred to common law powers, but they held that the statutes providing that the Attorney General should institute proceedings for the state "only impose upon the Attorney General the 'duty' to exercise discretion."

The Mississippi court said in State ex rel. Patterson v. Warren that the Attorney General was the proper officer to sue county officials for discrepancies in their financial records, as part of his common law duties. A New York court had held in an 1872 case, People v. Tweed, that the Attorney General had common law authority to seek to recover money that city officers had raised unlawfully and had converted to their own use. A 1963 Massachusetts decision, Jacobsen v. Parks and Recreation Commission of Boston, said that the Attorney General was the proper officer to enjoin the commission from selling certain public lands.

The Maine Supreme Judicial Court, in Lund ex rel. Wilbur v. Pratt, stated that:

Under his common law powers, the Attorney General, on his own motion or at the relation of any person, but on his official responsibility, can initiate in his discretion proceedings the purpose of which is to inquire by what authority one claiming or unsurping a public office can support his claim to the office or sustain his right thereto ... the Attorney General is an essential party to the institution and maintenance of such common law process which, no matter what the nature or extent of the interest the relators might have therein, remains subject to his absolute control.

Maine has abolished certain extraordinary writs, including quo warranto; the court noted, however, that the same substantive relief that was obtainable at common law could be sought by an appropriate complaint.

A 1979 Maine decision, Buck v. Town of Yarmouth, cited Lund's holding that the Attorney General has common law power. In the latter case, the court upheld a lower court's dismissal of plaintiffs' action for a court order directing compliance by municipal officers with a petition submitted to them. The appellate decision said that a citizen had no standing to seek mandamus against allegedly illegal action by officials, unless the citizen had a private or particular interest in the matter. The

court reasoned that interjecting the Attorney General between dissatisfied citizens and the municipality assures that the municipality will not be subjected to a multiplicity of suits.

The same rationale for restricting citizens' standing to sue public officials was given by the Illinois court in Fuchs v. Bidwell. The court said that plaintiff, a private citizen, lacked standing to bring suit against legislators, despite the fact that he had made written demand on the Attorney General to bring suit and the Attorney General had refused to do so. The court explained that "the public interest will not be served in permitting persons, without limitations, to institute actions of this nature against public officials when the Attorney General has declined to act." This case was cited the following year in People ex rel. Lee v. Kenroy, where the court upheld the dismissal of a taxpayer action on the grounds that the Attorney General's inaction in not bringing suit did not excuse the failure of the taxpayer to obtain the Attorney General's consent.

A 1904 Georgia case cited authorities to confirm the Attorney General's authority to bring an equitable action in the name of the state, by the common law proceeding of "information of intrusion" to recover land to which the state has title. State v. Paxson and Cannon upheld his authority to obtain an injunction, in aid of such action, to restrain a trespass upon the land, without reference to whether the alleged trespasser is insolvent, or whether the damages resulting from the trespass are irreparable.

> At common law the King could not bring an action of ejectment, or trespass to try title, against an occupant of crown lands; these actions being founded upon disseisin, and it not being possible, theoretically, to oust the King. The remedy of the King was by information, called an 'information of intrusion.' See 8 Bacon's Abr. pp. 101,96; 2 Bl. 261. This information was exhibited in the name of the King's Attorney General. Attorney General v. Allgood, Parker, 1; 2 Story's Eq. Jur. (13th Ed.) § 922. This rule of common law has been followed by South Carolina (State v. Arledge, 1 Bailey, 551; State v. Stork, 3 Brev. 101), and recognized in New York and Massachusetts.

Abatement of Nuisance

One of the common law powers enumerated in the New York case People v. Miner, which is the most often-quoted enumeration of the Attorney General's common law power, is the power to prevent or abate public nuisances. Five years before the Miner case, in 1862, the New York Supreme Court had recognized the authority of the Attorney General to bring an action to enjoin a public nuisance in the case People v. Vanderbilt. The court did not specify the source of this authority, but it might be assumed that it was the common law.

The Attorney General's common law power to abate public nuisances has been reaffirmed in New York by several recent cases. People v. Town of Huntington involved an action by the Attorney General to restrain the town from its method of operating incinerators and refuse disposal

sites. The court held that the Attorney General's power to abate a nuisance by bringing an injunction proceeding in behalf of the people is beyond dispute. In People v. Port of New York Authority, the Attorney General was held to have standing to obtain injunctive relief against a contractor who installed inadequate sewage systems which released untreated effluent into a lake. In a 1977 case, State v. Waterloo Stock Car Raceway, the Attorney General brought a parens patriae action before the state supreme court, County of Seneca, and obtained an injunction against operation of a stock car racetrack on the grounds of nuisance.

In an 1884 case, People v. Gold Run Ditch and Mining Co., the California court upheld the Attorney General's authority to abate a public nuisance. A mining company was discharging debris into a stream which then polluted and impaired navigation on a river. The court held that the Attorney General was the proper party to bring an action to abate this nuisance. A few years later, in People v. Truckee Lumber Company, the court recognized the Attorney General's authority to enjoin a lumber company from dumping waste and refuse in a river. The court observed that at common law the Crown had the duty to protect the public from nuisances and that pollution was such a nuisance.

In State v. Excelsior Powder Manufacturing Corporation, the Missouri court recognized the power of the Attorney General to act for the public in abating a nuisance created by a powder manufacturing concern. A recent Missouri case, State ex rel. Dresser Industries, Inc. v. Ruddy, confirmed that power where the rupture of an industrial settling basin polluted surrounding waterways. The court declared that the relevant statutes, providing that "the Attorney General shall institute, in the name and on behalf of the state, all suits ... requisite or necessary to protect the rights and interests of the state," "merely re-enforces the accepted law." The court quoted with approval Commonwealth ex rel. Schumaker v. New York and Pennsylvania Co., a Pennsylvania case which found similar statutory provisions "but declaratory of the common law relating to nuisances. For corruption of waterways has long been recognized as both a public and private nuisance." The Schumaker decision held that the district attorney could not appoint counsel to handle a pollution case, since this was a matter exclusively within the common law power of the Attorney General. The Maine Attorney General's common law power to abate a nuisance consisting of offensive odors was recognized in Withee v. Lane and Libby Fisheries Company. Idaho's court, in Howard v. Cook, held that the Attorney General had authority to sue to protect water rights of the state, on his own initiative.

There are scores of state cases concerning nuisance actions, including many brought by Attorneys General. Analysis of such cases is beyond the scope of this report; however, some representative cases are noted below which sustain his common law power to bring such actions. A former Deputy Attorney General of Wisconsin has commented on the potential uses of this authority to abate nuisances:

> It requires only a little imagination to see the potential use an Attorney General might make of his broad authority to seek abatement of public nuisances. Any person acting under an improperly granted license or in excess of his authority as a licensee is probably engaging in activity

constituting a public nuisance. Any public utility operating in violation of the laws or regulations governing the utility may be conducting a public nuisance. Open, continuous, and intentional violation of the criminal law is also a public nuisance. This might include not only bawdy-houses and gambling dens, but loan sharking, extortion, and other patterns of illegal activity as well. The potential for dealing with some of the activities of organized crime is apparent.[87]

Another law journal article reviewed the use of nuisance and other common law doctrines in California environmental cases. It commented that, although such powers are infrequently used because of the availability of broad statutory powers, "The continued retention of common-law powers provides the Attorney General with the capacity to file practically any action necessary to protect the environment although such action is not necessarily authorized by statute."[88]

Among recent cases upholding the Attorney General's right to proceed to enjoin a public nuisance was a 1973 Kentucky case, Hancock v. Terry Elkhorn Mining Company. This case involved the operation of overweight coal trucks on highways. Another recent case, State of Maryland v. Amerada Hess Corp.,[89] involved an action by Maryland based on pollution of waters occurring upon rupture of an oil transfer line between a vessel of defendant's tanker corporation and the plant of a co-defendant. The court held that, even though Maryland had not enacted legislation in this area at the time of the oil discharge, the state had a common law right of action against the offenders to abate the nuisance.

The Michigan courts had recognized that the Attorney General is the proper party to bring an action to abate a nuisance, in Attorney General v. City of Howell and Attorney General ex rel. Township of Wyoming v. City of Grand Rapids. In Attorney General ex rel. Optometry Board of Examiners v. Peterson, the Michigan Supreme Court said that the Attorney General had authority to sue to enjoin the violation of a statute if that violation resulted in a public nuisance:

[a]t common law, acts in violation of the law constitute a public nuisance. Harm to the public is presumed to flow from the violation of a valid statute enacted to preserve public health, safety and welfare. The attorney general, acting on behalf of the people, is a proper party to bring an action to abate a public nuisance or restrain unlawful acts which constitute a public nuisance. The existence of a criminal or other penalty ...

---

87. Arlen C. Christenson, The State Attorney General, 1970 WIS. L. REV. 319.

88. James P. Wagoner, Environmental Protection in California: Court Action Powers of State and Local Government Attorneys, 14 SANTA CLARA LAWYER 314 (1974).

89. State of Maryland v. Ameranda Hess Corp., 350 F. Supp. 1060 (D.C. Md. 1972).

will not oust equity from jurisdiction.[90]

The power to abate nuisances has also been used to abate offenses against morality. The Montana court in State ex rel. Ford v. Young recognized the common law authority of the Attorney General to abate a nuisance in the form of a bawdy house, even though the controlling statute vested that authority in the county attorney. The statute did not supplant the Attorney General as a proper party plaintiff but, instead, served to extend that authority to additional parties.

The 1909 Kentucky case, Respass v. Commonwealth ex rel. Attorney General, recognized the Attorney General's authority to seek to enjoin the operation of a pool hall as a public nuisance.

> The office of Attorney General comes to us with the common law. The Attorney General at common law, as the chief law officer of the state, was allowed to institute proceedings of this sort where the interest of the state demanded it .... It cannot be presumed that, in creating the state government and in creating the law department, it was contemplated that the head of the law department should not have such authority as exercised by the Attorney General at common law.

The Missouri Supreme Court also has held that provision of statutory remedies does not limit the availability of nuisance actions. In State ex rel. Dresser v. Ruddy, the defendant argued that enactment of the 1975 Missouri Clean Water Law had preempted the field of "public nuisance in water pollution cases. The court, however, said that the new law "envisions a comprehensive remedial approach to water pollution problems, but preservation of common law remedies is consistent therewith - simply because preservation thereof strengthens and makes cumulative the powers of those charged with taking corrective measures."

The Supreme Court of Arkansas, in State ex rel. Williams v. Karston, determined that the state constitution gave the legislature the right to define the powers and duties of the Attorney General. The court relied upon legislation which provided that "nothing in this Act shall relieve the Attorney General of discharging any and all duties now required of him under the common law" to hold that the Attorney General had common law power to file injunctive proceedings to abate the operation of a "bookmaking place."

In a West Virginia case, State v. Erlich, the defendant was a gambler who claimed that the district attorney's action to enjoin his activities was improper, because such action would properly be part of the Attorney General's common law powers. The court dismissed the injunction on the ground that no injury had been caused.

---

90. See discussion in The Role of the Michigan Attorney General in Consumer and Environmental Protection, 72 MICH. L. REV., at 1040-2.

Enforcement of Charitable Trusts

In the first case to discuss the Attorney General's common law power, Parker v. May, the Massachusetts court held that he had common law authority to file an information to establish and effectuate a charitable donation. In so doing, the court said: "The power to institute and prosecute a suit of the 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." People v. Miner, a 1868 New York case, pointed out that the statutes conferred no power to enforce charitable trusts on the Attorney General, but it surely was not the legislature's intention to place such trusts beyond the law, so the Attorney General must retain common law power to proceed against them. The holdings of these early cases have been sustained by courts in subsequent decisions.

The New Hampshire Attorney General brought suit in equity to require trustees to distribute certain income of a charitable trust. The trial court dismissed, relying on a 1942 case, Souhegan National Bank v. Kenniston, which had recognized the duty of his office to enforce charitable trusts, but had limited its responsibility to supervise them, primarily on the pragmatic grounds that it was not equipped to do so. In Attorney General by Anderson v. Rochester Trust Co., the state supreme court held for the Attorney General, because a director of charitable trusts had been established in his office, thus removing the reason for the earlier decision. The court noted that "at common law it was the duty of the Attorney General to see that the rights of the public in the charitable trust area were protected" and that this duty was not limited by statute.

In an early Illinois case, Newberry v. Blanchford, the power of the Attorney General to interpose to prevent misappropriation of a fund held in trust for charity was recognized. The court said that:

> It must be admitted that there is no statute imposing upon the attorney general the duty of instituting or becoming a party to any legal proceedings for the protection or preservation of funds held in trust for a public charity. Whence, then, arises such duty? Manifestly from the principles of the common law, which makes the attorney general the proper representative of the people of the state in all courts of justice, and charge him with the official duty of interposing for the protection and preservation of the rights of the public whenever those rights are invaded, and there is no other adequate or available means of redress.

This statement was reaffirmed a decade later in Attorney General v. Newberry Library, when the court concluded that: "where the public is interested in the execution of a trust, the Attorney General is the proper party, either plaintiff or defendant, as the representative of the public.[91]

---

91. See "Common Law Powers of the Attorney General as Applied to Charitable Trusts," unpublished paper prepared by the Attorney General of Illinois' Charitable Trusts and Solicitations Division (1977).

The common law power of the Attorney General to protect charitable trusts was recognized by the Oregon court in Wemme v. First Church of Christ, Scientist. The court said that the Attorney General was responsible for protecting the public interest in such trusts, although he could not accept a separate fee for such action. A Wyoming case, Town of Cody v. Buffalo Bill Memorial Association, recognized that the Attorney General was an indispensable party in a proceeding to terminate a charitable trust. This is especially significant, since no Wyoming case has explicitly held that the Attorney General possesses any common law powers; but this requirement for participation seems to imply such powers.

A 1961 Washington case, State v. Taylor involved an action by the Attorney General for an accounting of a charitable trust in the absence of allegations of mismanagement. The court held that at common law a court of equity could compel an accounting by the trustees of a private trust, so the Attorney General could compel an accounting as representative of the beneficiaries of a charitable trust. The court, however, dismissed his demand for information to which the beneficiaries of a private trust would not have been entitled.

An early California case involving the Attorney General's common law power to enforce charitable trusts is People v. Cogswell, where the court accredits the Attorney General's power to enforce charitable trusts to the broader common law power to act as parens patriae. The court states that the Attorney General has not only a right, but a duty to maintain such suits:

> This action is based upon averments of a public trust. It is brought to remedy abuses in the management of this trust. It is not only the right, but the duty of the attorney general to prosecute such action. The state, as parens patriae, superintends the management of all public charities of trusts, and, in these matters, acts through her attorney general. Generally speaking, such an action will not be entered at all unless the attorney general is a party to it. Such was the rule at common law, and it has not been changed in this state.

The common law power of the Attorney General to enforce charitable trusts was upheld, in juxtaposition with a pertinent statute, by a later California court in Brown v. Memorial National Home Foundation. The defendants contended that a statute superseded the Attorney General's common law powers, and that the statute imposed a condition precedent to a suit by the Attorney General; specifically, a finding by him that there had been a failure to comply with the trust terms. The court rejected this argument and held that the statute did not abridge the Attorney General's common law power to bring suit, even without meeting the exact specifications of the statute. The court concluded that the effect of the statute was the imposition upon the Attorney General of an additional obligation, above a mere discretion, to institute suit when he has concluded after investigation that there has been a breach of trust. The court also stated that the Attorney General enjoys privileges not shared by all plaintiffs:

> ... the proper administration of a benevolent trust, especially the prevention of departures from its legitimate objects and the redressing of breaches and repudiations of the trust, are matters of large public in-

terest which preclude application of the doctrine of laches and estoppel and particularly so in an action brought by the attorney general. No length of diversion from the plain provisions of a charitable trust will prevent restoration to its true purposes.

The court in Brown stated that the Attorney General alone has common law standing to maintain such an action. A Missouri case, Dicky v. Volker, ruled that the Attorney General has the sole right, as representative of the public, to sue concerning the mismanagement of funds of a public charitable trust.

The Maine Supreme Court, in the 1978 case of Fitzgerald v. Baxter said that:

> In other jurisdictions it is an oft-repeated precept that only the Attorney General has the authority to enforce such charitable trusts ... Although no pertinent Maine authority has been found, the implication of § 194 [which directs the Attorney General to enforce charitable trusts] combined with the desirability of protecting charities from a harassing multiplicity of suits might appropriately lead us, without deciding the general issue, to use that precept as a starting point for discussing the plaintiffs' standing here.

The court held that, in this particular case, the Attorney General's role as a member of the Authority created by statute to administer the trust precluded his opposing the Authority in litigation.

The North Carolina court, in Sternberger v. Tannenbaum, in considering the right of the Attorney General to intervene in a settlement proceeding where a charitable trust is the main beneficiary, said that:

> [T]he 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.

A later North Carolina case, YMCA v. Morgan, cited Tannenbaum as authority for holding that the state, through the Attorney General, may institute proceedings for the enforcement of charitable trusts or gifts.

The Wisconsin court, which has denied the Attorney General common law powers, held in In re Sharp's Estate that he lacks common law authority to intervene in an estate proceeding relating to a charitable trust. The preponderance of case law, however, supports such authority.

Intervention in Will Contests

In State v. Rector, the Kansas court held that the Attorney General had the common law power and duty, as well as the statutory authority, to intervene in an action contesting the existence of a valid will, because the property would escheat to the state if the decedent died intestate. In Estate of Ventura, a California case, decedent's will had been offered for probate, giving the residue of his estate "to a deserving home for orphans." An heir at law contested this will and offered an earlier will for

probate. The Attorney General filed an answer contending he had a right and duty to participate in the proceeding to protect the gift to charity, and was acting as parens patriae for the state. The Court of Appeals upheld the Attorney General's position, stating:

> ... where 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 the validity of the charitable provision.

These cases are contra to the holding in Commonwealth ex rel. Ferguson v. Gardner, where Kentucky court said that the Attorney General had neither statutory nor common law authority to intervene in will contests, even if charitable trusts might be involved.

Revocation of Corporate Charters

The common law also gives the Attorney General the power to bring quo warranto proceedings against corporations and other association which hold state charters or franchises to challenge their right to operate. An information in the nature of quo warranto may also be filed by the Attorney General to test the claim to office of an officer of a corporation organized for private gain, since the corporation is exercising a public franchise, and the title to its offices is a matter of public concern. The Attorney General may not, however, seek a remedy for the redress of mere private grievances, unaccompanied by an injury to the public.

A Florida case, State ex rel. Landis v. S. H. Kress & Co., is frequently cited. The 1930's witnessed rapid growth by large chain-stores, one of which obtained a license to operate in Florida. Protests were received by the Attorney General from small stores and, as a result, he filed a writ of quo warranto to revoke the company's license. The court upheld the Attorney General's authority to file the writ, but held that the question of the social desirability of certain types of business was one for the legislature not the courts to determine.

Michigan's Supreme Court, in Attorney General v. Contract Purchase Corporation, upheld the Attorney General's use of quo warranto to remedy the "abuse, misuse or non-use of franchise or powers by an existing corporation." In Kavanagh, Attorney General v. Capitol Service, Inc., it was alleged that Capitol was selling educational materials, although it was not incorporated as an educational corporation. The court entered a judgment ousting the corporation from those privileges and franchises not conferred on it by its articles of incorporation. A Massachusetts case, Attorney General v. Sullivan, held that the Attorney General could institute quo warranto proceedings without consent of the court, whereas a district attorney might need such consent.

Some state courts have rejected the Attorney General's common law power to bring quo warranto actions. In State ex rel. Bingham v. Home Brewing Co., a quo warranto action was brought to revoke the charter of the defendant company. The Indiana Supreme Court decided that, even

though the common law was adopted by statute, the statutes had since vested quo warranto powers in the local prosecutor and only he could file such a proceeding. A Washington case, State ex rel. Attorney General v. Seattle Gas & Electric Co., is similar in its significant features. The Attorney General tried, on his own motion, to enjoin the acts of the defendant as a public utility, through a quo warranto proceeding. He was denied the right to do this on the theory that this power was vested by statute in the local prosecutor and thereby removed from the Attorney General. The Oklahoma court, in State ex rel. Haskell v. Huston, refused to allow the Attorney General to act on his own motion to vacate a corporate charter, because such power had been given to local prosecutors.

Representation of State Agencies

At common law the Attorney General had the exclusive power and duty to render legal counsel to the government. Following this common law practice, courts of some states have held that agencies of state government may not hire private counsel, but must rely on the Attorney General's office for legal services.

The question arose in Illinois when the state insurance superintendent, with appropriations provided for legal services, employed an attorney. The Attorney General challenged such employment on the ground that he was the legal representative for the state and charged with rendering such services. The state supreme court in Fergus v. Russel declared that the appropriation to the superintendent was invalid:

> By our Constitution we created this office by the common-law designation 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 empowered to represent the people in any suit or proceeding in which the state is the real party in interest, except the Constitution or a constitutional statute may provide otherwise. With this exception, only he is the sole official adviser 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.

This position was reiterated recently in Department of Mental Health v. Coty.

A 1976 Illinois case, Scott v. Briceland, held unconstitutional that portion of a law which authorized the state environmental protection agency to institute and prosecute enforcement proceedings before the pollution control board. This decision was cited in a case the following year, Environmental Protection Agency v. Pollution Control Board, where the Illinois Supreme Court refused to allow a state agency to hire outside counsel, holding that the Attorney General is "the law officer of the people, as represented in the State Government, and its only legal representative in the courts." As noted earlier in this report, Illinois is the only state where the courts have held that the Legislature cannot restrict the Attorney General's common law powers.

An Oregon corporation commissioner hired an attorney to assist him, and the State Treasurer refused to pay counsel's salary on the ground that the hiring was unauthorized. The court, in Gibson v. Kay, stated that the Attorney General and the district attorneys share those duties which at common law were exclusively the Attorney General's, including the power of providing counsel for state agencies. The court said:

So far as the appointment involved counsel and legal advice to the commissioner, it may be said that, if that officer was not well enough versed in the law governing his position to perform its requirements, he cannot expect the state to incur the expense of educating him thereto further than may be implied from the functions of its regular law officers. If he desires independent legal advice, he may, at his own cost, secure it. He cannot supersede the regular law officers of the state.

In Darling Apartment Co. v. Springer, the Delaware court sought to determine whether a statute granting the State Liquor Commission the right to "... engage the services of experts and persons engaged in the practice of a profession" allowed the Commission to appoint its own counsel. The court said it did not, ruling that the language of the act must be read with reference to the office of Attorney General as it existed at common law:

In the absence of express legislative restricting, the Attorney General, as the chief law officer of the State, may exercise all of the powers and authority incident to the office at common law, it is manifest that there is nothing in the Act as a whole, nor in the particular language relied on, which, either expressly or by any reasonable intendment, indicates the legislative purpose to impower the Commission to appoint its own law officer to conduct litigation in supersession of the Attorney General, and to charge the public with the incidental expense, must rest on a plain and unambiguous grant of authority. It necessarily follows that the Attorney General has the power, and it is his duty, to represent the Commission in all judicial proceedings.

A 1975 Mississippi case, Wade v. Mississippi Cooperative Extension Service, also noted that the Attorney General's authority to serve as sole representative of state agencies was derived from the common law although, as in this case, it might also be set forth by statute. The court upheld the Attorney General's "plenary authority, as the state's chief legal officer, to defend [the state agency] in this lawsuit of undoubted statewide significance, irrespective of the [agency's] wishes to proceed through counsel of its own choice." The relevant statute provides that the Attorney General has "the power of the Attorney General at common law and the sole power to bring or defend a lawsuit on behalf of a state agency, the subject matter of which is of statewide interest."[92] The court noted that this statute "is simply a statutory grant of common law power held, and added nothing to the inherent power of the Attorney General."

---

92. MISS. CODE ANN. § 5-1.

This is, however, one area in which the common law duties have been substantially changed in many states. Statutes of many states have been utilized to allow agencies to retain counsel and have been upheld by courts. For instance, Board of Public Utilities Commissioners v. Lehigh Valley Railway Co. concerned the New Jersey Board of Public Utilities Commissioners' appointment of an attorney, who sued a railroad company at the Board's request. Upon protest by the Attorney General, the New Jersey court pointed to the statute allowing the Board to appoint its own counsel, noting:

> The important question is that of control of the litigation, whether by the board and its counsel as state agents, or by the Attorney General as the usual accredited legal adviser of the state itself. On this branch of the case we conclude that the powers and privileges of the Attorney General as they existed at common law, and particularly as conferred by statute, are subject to change and modification by legislative enactment; and that in the matter of the board of public utilities the Legislature has conferred upon that board, and upon counsel appointed by it pursuant to the statute, the power of commencing and conducting litigation in which the board in exercise of the power vested in it, is seeking to enforce its mandates.

The court upheld the legislative modification of the Attorney General's powers.

The Colorado court, in State Board of Pharmacy v. Hallett, followed the same reasoning, holding that the legislature had the authority to authorize an agency to retain counsel, even though this was a common law power of the Attorney General. The New Mexico case which denied the Attorney General any common law power, State v. Davidson, involved employment of counsel by a state agency; the court rejected the Attorney General's claim that only he could represent agencies. The Kentucky court also upheld the legislature's right to assign the Attorney General's common law powers to agency counsel in Johnson v. Commonwealth ex rel. Meredith. In Padgett v. Williams, the Idaho Supreme Court upheld payment of an attorney for the Board of Highway Directors. The court found that the statutes gave the Highway Department control over its employees, and that its statutory duties implied the need for counsel. By implication, the department was entitled to employ counsel.

A different issue arose in the Montana case of State ex rel. Pew v. Porter. The legislature had established a commission to investigate the financial policies of the state. The commission hired an attorney to conduct investigations, but the state auditor refused to pay him on the ground he was performing duties required of the Attorney General. The court compelled the auditor to pay, saying that the attorney's duties were investigative and not part of the Attorney General's duties:

> The duties of the attorney general are defined by the Constitution, by the statutes, and by the common law in so far as it is in force in this state, but nowhere, either by express declaration or by fair intendment, is the attorney general required to perform services of the character indicated. The duties defined by the Constitution attach themselves to the attorney general only by virtue of his membership on particular boards.

A 1970 Montana case, Woodahl v. State Highway Commission, upheld the highway commission's action in hiring attorneys of its own and refusing to employ counsel designated by the Attorney General. The court said that "however broad the power of the attorney general, it is not exclusive." Whether the Attorney General can hire, fire and direct all legal representation of state agencies depends on whether the legislature has authorized others to have counsel; the court found that the commission had such authority, although it was not specifically empowered to hire counsel.

The issue of conflicts in the Attorney General's representation of state agencies arose in the 1974 California case D'Amico v. Board of Medical Examiners. Graduates of osteopathic medical schools sought to compel the Board of Examiners to grant them licenses to practice, alleging equal protection violations. During discovery, the Board, represented by the Attorney General, admitted facts which prompted a successful motion by plaintiffs for summary judgment. The appeal argued that the determination of a "constitutional fact" on the basis of a party's concessions, rather than by the court on the basis of actual evidence produced before it, subjugated the public interest in those important facts to party trial tactics. The court ruled that the Attorney General had adequately served the public interest. The court elaborated by saying that the Attorney General:

> ... has the duty to defend all cases in which the state or one of its officers is a party. In the course of discharging this duty he is often called upon to make legal determinations both in his capacity as representative of the public interest and as statutory counsel for the state or one of its agencies or officers. In the great majority of such cases no conflict will result because in representing the interest of his "client" the Attorney General will take a position consistent with what he deems to be in the public interest. In the exceptional case the Attorney General, recognizing that his paramount duty to represent the public interest cannot be discharged without conflict, may consent to the employment of special counsel by a state agency or officer. However, unless the Attorney General asserts the existence of such a conflict, it must be concluded that the actions and determinations of the Attorney General in such a law suit are made both as a representative of the public interest and as counsel for the state agency or officer.

The court concluded that in the absence of a declaration "by the Attorney General that there was some conflict between his duty as counsel to his "client" agency and his paramount duty to represent the public interest, ... any concessions made by that officer were made in his dual capacity and with knowledge of the true facts."

People ex rel. Scott v. Illinois Racing Board recognized the Attorney General's authority to appear in opposition to a state agency if the Attorney General determines in his discretion that the public interests so require. The court held that the Attorney General had standing and authority in the public interest to challenge an order of the Racing Board through court proceedings, although one of his representatives had participated in hearings held by the Racing Board and had advised it. The court based its holding on the Attorney General's common law powers and on the public interest in requiring strict observance of statutes by public officials and agencies.

The Massachusetts Attorney General refused a request by a state agency to appeal a decision taken against it. The court, in Secretary of Administration and Finance v. Attorney General, upheld this refusal on the basis of the common law:

> The Attorney General represents the Commonwealth as well as the Secretary, agency or department head who requests his appearance. He also has a common law duty to represent the public interest. 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 the official himself and his agency. To fail to do so would be an abdication of official responsibility.

This reasoning was similarly applied in a subsequent case, Feeney v. Commonwealth, where the court held that the Attorney General had the authority to prosecute an appeal, in furtherance of the interests of the Commonwealth and the public he represents, over the express objection of state officers party to the appealed decision.

Iowa's Supreme Court reached a different conclusion when presented with similar facts in Motor Club of Iowa v. Department of Transportation. The Department of Transportation (DOT) appealed a trial court decision which held invalid a rule it had promulgated. Following a change in its membership, DOT sought to have the appeal dismissed. The Attorney General, who represented DOT, wanted to appeal, despite the wishes of the agency. He stated that he deemed such action to be in the best interests of the state and that he had a duty to protect the public interest. The court disagreed, saying that "to accord the Attorney General the power he claims would leave all branches and agencies of government deprived of access to the court except by his grace and with his consent."

These cases indicate that there is a trend toward reasserting the Attorney General's role as representative of the sovereign, rather than the government, in defining his relationship to state agencies. This subject is discussed at length in two research reports published by the Committee on the Office of Attorney General in 1979: Representation of State Agencies and the Structure of State Legal Services.

Relationship to Local Prosecutors

While the office of Attorney General existed at common law, the office of local prosecutor did not. As the Kansas Supreme Court said in State v. Finch:

> The office of prosecuting attorney has been carved out of that of attorney-general and virtually made an independent office. In the exercise of his common-law powers the attorney-general undoubtedly may advise the prosecuting attorney as he does other officers, since he is regarded as the chief law officer of the state; but in practically all jurisdictions, either the constitution or laws of the state make the two offices separate and distinct, and vest in the prosecuting attorney certain powers, and impose upon him certain duties, which can be neither increased nor decreased by the attorney-general. The sense in which the local officer is

subordinate to the general one seems to be that they are engaged in the same branch or department of the public business, which of course makes the relation theoretical rather than practical.... Where the attorney-general is empowered, either generally or specifically, to conduct a criminal prosecution, he may do any act which the prosecuting attorney might do in the premises; that is, he can do each and every thing essential to prosecute in accordance with the law of the land, and this includes appearing in proceedings before the grand jury.

A 1975 Maryland case, Murphy v. Yates, extended to local prosecutors the protection the common law gives to the Attorney General:

... it is beyond doubt that Maryland embraced the common law. Thus, the result is 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." And, since the office of State's Attorney in Maryland, by the Constitution, has been vested with a portion of the common law powers of the Attorney General, the General Assembly is equally powerless to abrogate the State's Attorneys' powers and duties.

There is a considerable body of case law defining the Attorney General's powers in prosecutions in those jurisdictions which have created an office of local prosecutor or district attorney. The different bases for this office, and the differences in its relationship to the office of Attorney General, obviously affect courts' rulings as to its powers. Earl H. DeLong reached the following conclusions in his study of the powers of Attorneys General in criminal prosecutions:

(1) It is difficult to determine with certainty what were the powers of the attorney general at common law but it seems probable that they included the power to conduct any criminal prosecution properly instituted by information, indictment, or otherwise as prescribed by law.
(2) The language of constitutional provisions seems to have had little bearing on the decisions of the courts upon the common law powers of the attorney general.
(3) There is wide disagreement among the courts as to the extent of the common law powers except such as have been granted by statute to the prosecuting attorneys. In a few it is held that under the common law, without any reference to statutory or criminal provisions, the attorney general has full power to prosecute any criminal proceeding....
(4) Only in Illinois is there any indication that the legislature cannot deprive the attorney general of common law powers.
(5) There is no indication that the existence of this power in any state has led to any substantial participation by the attorney general in the process of criminal prosecution.[93]

Some courts have said that legislative delegation of a power to a local prosecutor deprives the Attorney General of that power. A Washington case, State ex rel. Attorney General v. Seattle Gas & Electric Co., for example, held that the Attorney General could not file an action to enjoin a

---

93. DeLong, supra note 62.

public utility, where this had been made the duty of the prosecuting attorney.

> ... in this class of cases the attorney general has no common-law powers, because the legislature has seen fit to confer the power or duty ordinarily exercised at common law by the attorney general upon the prosecuting attorney of the county where the wrong is alleged to have been committed.

Oklahoma reached a similar conclusion in State v. Huston, as did Indiana in State ex rel. Bingham v. Home Brewing Co. The West Virginia case of State v. Ehrlick discussed in detail the relationship of the two offices and said that the Attorney General "has neither power of removal nor control over [the prosecutor] within his own province, so far as it is defined by statute."

A 1972 Montana decision, State ex rel. Woodahl v. District Court, denied the Attorney General power to initiate a criminal felony prosecution in the district court independent of the county attorney. The court agreed that the Attorney General had such power under common law, but stated that it was superseded by statute. A Nevada case decided the same year, Ryan v. District Court, held that the statute allowing the district attorney to file an information did not invest the Attorney General with such power. The court said that the statute referred only to the district attorney and rejected the contention that the Attorney General could exercise such authority because of his common law powers, even if he had such authority under the common law.

The New Mexico court, which has denied the Attorney General common law power, has said in the recent case of State v. Reese that:

> There is nothing in our laws making the attorney general the superior of the district attorneys. To the contrary, the two offices are separate and, except as the legislature had directed joint authority as it has done in a limited number of situations, there is no duplication of duties.

A 1976 Colorado case, People v. District Court, said that the fact that the office of district attorney was created by constitution, and assigned specific duties by the legislature, tended to refute the Attorney General's claim to common law powers in this area.

Other courts have taken a contrary position and said that the Attorney General retains common law powers, even if the legislature has assigned them to another officer. The Montana court, in State ex rel. Ford v. Young, upheld the Attorney General's authority to enjoin a nuisance, although the statutes gave the county attorney such power. The court said that the Attorney General's power came from common law, and the only change made by statute was to add additional parties.

Mississippi, in Kennington-Soenger Theaters, Inc. v. State, noted that, when the framers of the Constitution of Mississippi created the office of district attorney, it was manifestly not their intention "that such powers should be conferred by the legislature upon this officer as would enable him to usurp the common-law duties and functions of the Attorney General." The court noted that the district attorney's functions were confined to one locality, while the Attorney General's were statewide.

In State v. Jiminez, a 1978 Utah case, the court examined statutory provisions directing the county attorney to "conduct on behalf of the state all prosecutions for public offenses committed within his county" and directing the Attorney General to "exercise supervisory powers over the district and county attorneys of the state in all matters pertaining to the duties of their offices" and found them to be "reasonably reconcilable." In holding that the Attorney General has extensive common law power to initiate criminal prosecutions the court said:

> At common law the top legal adviser was invested with criminal prosecution authority, and such authority is deemed to be that of the Attorney General in the common law states of this country.... We conclude that any conflicts as may exist in the applicable legislative provisions are reasonably reconciliable. To conclude otherwise would provoke the anomalous and somewhat novel situation where the highest legal officer of the state, for all practical purposes, would be subservient to those over whom he otherwise has the power of supervision.

A 1971 Michigan case, People v. Karalla, concluded that "the Attorney General possesses all the powers of a prosecuting attorney unless that power has been specifically withdrawn by the legislature." Another Michigan case, In re Lewis' Estate, held that a statute authorizing a prosecuting attorney to institute proceedings for reimbursement for costs of a mental hospital patient did not exclude action by the Attorney General. The court cited cases holding that the Attorney General has common law powers in addition to his statutory duties.

A 1900 New York case, People v. Kramer, held that:

> The district attorney had no common-law powers.... His office is derived from that of the attorney general, and at its inception he was designated as his assistant.... The district attorney, by statute and by a long-continued practice, has succeeded to some of the powers of the attorney general within the respective counties, but he has not supplanted him.

The Texas court, which has not consistently upheld the Attorney General's common law powers, offered an unusual rationale for holding that he retains some power in local prosecutions. The court asked in Brady v. Brooks:

> ... Is it reasonable to suppose that it was the purpose to intrust absolutely the important function of representing the state as an attorney in all cases in which the state should be a party to the numerous county [or district] attorneys.... We cannot lose sight of the fact that the voters, especially in restricted localities, not infrequently are influenced by some improper motive, some sympathy for the candidate or some popular caprice which leads them to put incompetent men into office; a result by no means so probable in the case of an important office like that of Attorney General, in whose election all the voters of the state have a right to participate.

In a 1979 Georgia case, Meredith v. State, a challenge was made to the authority of the Attorney General to conduct a prosecution in place of the district attorney of the judicial circuit in which the alleged offense

occurred. In his brief, the Attorney General contended, among other things, that power was incidental to his office. While the court did not discuss common law powers in its opinion, it sustained the Attorney General's authority.

A New Hampshire case, Eames v. Rudman, upheld the Attorney General's right to suspend a local prosecutor until criminal charges against him were disposed of. The court cited three relevant statutes, and said that these, together with the common law, authorized such action.

Some states have, by statute, given the Attorney General authority to intervene in proceedings initiated by the local prosecutor or, in certain circumstances, to supersede him entirely. A few cases have upheld the Attorney General's right to intervene or supersede as a common law power.

In a 1978 decision, Commonwealth v. Schab, the Pennsylvania Supreme Court held that the Attorney General did not have common law power to supersede local prosecutors. This was the latest in a series of Pennsylvania cases that have examined at length the Attorney General's relationship to local prosecutors. Most of these decisions have upheld his power to supersede. These cases have been cited by many other jurisdictions, and have been the subject of considerable scholarly attention.[94]

The office of district attorney was created by statute in Pennsylvania in 1850. Commonwealth v. Lehman held in 1932 that, despite the statute, the Attorney General retained supervisory powers over district attorneys. In the 1936 case of Commonwealth ex rel. Minerd v. Margiotti the court upheld the earlier decision. Two state policemen had been charged with murder; the judge determined that the district attorney might be implicated and requested the Attorney General to appoint counsel for the case. The statute authorizing such a request authorized the Attorney General to retain a special attorney upon request of the judge; such attorney then "shall supersede the district attorney ... and shall investigate, prepare, and bring to trial the case or cases to which he may be assigned."[95] The Attorney General appointed himself special attorney, appeared before the grand jury, and proceeded to prosecute the case.

The defendants appealed on the ground that the Attorney General had no legal authority to supersede the district attorney. The court denied the appeal, holding:

---

94. See: Note: Appointed Attorney General Powers to Supersede an Elected District Attorney, 33 TEMP. L.Q. 78 (1959); Attorney General versus District Attorney, 99 U. PA. L. REV. 826 (1951); Note, Common Law Power of State Attorney General to Supersede Local Prosecutors, 60 YALE L.J. 559 (1951); Common Law Right of Attorney General to Supersede District Attorney, 85 U. PA. L. REV. 538 (1957); Note, Power of the Attorney General to Supersede a District Attorney, 24 TEMP. L.Q. 445 (1951).

95. Act of April 9, 1929 P.L. No. 177; art. IX, Sec. 907 D.S. Section 297.

We conclude from the review of decided cases and historical and other authorities that the attorney general of Pennsylvania is clothed with the powers and attributes which enveloped attorneys general at common law, including the right to investigate criminal acts, to institute proceedings in the several counties of the Commonwealth, to sign indictments, to appear before the grand jury and submit testimony, to appear in court and to try criminal cases on the Commonwealth's behalf, and, in any and all of these activities to supersede and set aside the district attorney when in the attorney general's judgment such action may be necessary.

The Pennsylvania Supreme Court held in 1938 that the Attorney General could supersede a district attorney in a case involving alleged irregularities in his office, in Dauphin County Grand Jury Investigation. In a separate proceeding the same year,[96] the court held that the Attorney General did not abuse his discretion by such supersession. The same year, the legislature enacted a law giving the Attorney General "absolute discretion" to supersede. In re Shelley held that the court could review such actions for abuse, despite the statute. The statute was repealed the following year but the question remained as to whether such action revoked the common law power, as well as that power conferred by statute.

In the 1950 case, Appeal of Margiotti, the court held that the Minerd case was still controlling and that the Attorney General could supersede on the basis of his common law powers. The court held, however, that this was not an absolute right, but was a discretionary power dependent upon the circumstances in each case. Acts of supersession could be reviewed to determine if they had been exercised arbitrarily or unreasonably. A later case, Commonwealth v. Fudeman, held that it was the Attorney General's duty to supersede "if he believes the government is to be hindered in the lawful conduct of its affairs to the detriment of the security, peace and good order of the state." A 1975 decision, Gwinn v. Kane, upheld the Attorney General's appointment of a special prosecutor, but said that there was adequate statutory basis for such appointment, so the court need not decide whether the Attorney General's common law power would also sustain such action.

The 1978 decision, Commonwealth v. Schab, found the reasoning in this line of cases to be erroneous, saying "it would be incongruous to place the district attorney in the position of being responsible to the electorate for the performance of his duties while actual control over his performance was, in effect, in the Attorney General." A dissenting opinion in the case argued that the majority view was "unfortunate," because "where statutory interpretation affecting so fundamental a doctrine as supersession is involved, stare decisis deserves greater respect. ... Absent compelling circumstances, this Court should adhere to Minerd and the many decisions which build upon it."

---

96. Dauphin Co. Grand Jury Investigation (No. 1), 2 A.2d 783 (Pa. 1938); Dauphin Co. Grand Jury Proceedings (No. 3), 2 A.2d 809 (Pa. 1938).

Appearance Before a Grand Jury

There has been extensive litigation concerning the Attorney General's power to appear before a grand jury. A series of New York cases shows how one state's courts have ruled on both sides of this question.

In People v. Tru-Sport Publishing Co., a New York court upheld the Attorney General's common law power to appear before a grand jury, although this power was assigned by statute to the district attorney. The court said that:

> [T]he Attorney General at common law could appear ... in any matter or proceeding, civil or criminal, wherein the sovereign was interested. Thus he could and did attend the sittings of the grand jury and assist in the presentment of criminal charges.... [These powers are retained by the Attorney General and still exist except where] ... expressly abrogated by statutory enactment or by a reasonable intendment so to do necessarily implied from such enactment.... No express shearing away of any of his ancient powers can be found.

This 1936 holding was consistent with earlier rulings of New York courts. People v. Kramer, for example, had upheld the right of the Attorney General or his deputy to appear before the grand jury or to attend its sessions. However, in 1941 the Queens County Court ruled that a 1925 constitutional amendment eliminated common law powers of the Attorney General by establishing a system of state departments, including a law department. This case, People v. Dorsey, held that the Attorney General had no common law power to appear before a grand jury and present evidence since this power was vested by statute in the local prosecutor. In 1944, the Court of General Sessions of New York County reached the same conclusion in People v. Hopkins. In 1954, the Supreme Court of King's County reiterated this rule, but found statutory authority for the Attorney General to appear before a grand jury.[97]

This line of cases continued with the 1979 decision, People v. Buffalo Confectionary Co.. That case did not deal explicitly with the Attorney General's common law powers but, by denying him power to prosecute revenue cases before the grand jury in the absence of statutory authority, implied that he lacked statutory authority so to act. The court distinguished a 1978 case, People v. Massarella, which had held that the Attorney General may properly initiate and prosecute an action where the state's attorney has expressed no objection, given the Attorney General's statutory duty to consult with states attorneys and to assist them in prosecution. In Massarella, a court had granted the Attorney General authority to conduct grand jury proceedings; this was not the case in Buffalo.

---

97. Spiegel v. King's Co. Ct., 129 N.Y.S. 2d 109 (1954).

One summary of case law concludes that:

> Since a grand jury investigation is deemed to be part of a criminal proceeding as much as an actual trial, ... the Attorney General has power to supersede the district attorney in a grand jury investigation when his reason for so doing is well founded.[98]

North Dakota, in State ex rel. Miller v. District Court recognized the Attorney General's power to go before the grand jury at any time and present any matter, irrespective of statutes vesting such authority in another officer. The Massachusetts court reached a similar conclusion in Commonwealth v. Kozlowsky. Pennsylvania upheld the Attorney General's power to appear before the grand jury in Commonwealth ex rel. Minerd v. Margiotti, discussed in the preceding section. Iowa, on the other hand, ruled in Cosson v. Bradshaw that the Attorney General lacked power under common law to appear before a grand jury, although he was found to have such power by statute.

A 1976 New York case, Application of Scotti, concerned the release of grand jury minutes. The Attorney General sought authority to release grand jury minutes concerning the Attica Prison riot to certain state officials so that disciplinary action could be taken against these employees. The court upheld this request, without specific statutory authority, saying that "historically the ... Attorney General ... has represented the public interest when in his judgment there is evidence which bears upon the propriety of conduct of a public employee...." For this reason, the court concluded that "[it] is only right and proper for him to act in the public interest and request the court to consider his request that the information be transmitted to the agency."

Subpoena and Investigative Powers

No cases have been identified which specifically hold subpoena power to be a common law power. A recent Illinois case, People v. Crawford Distributing Company, concerned a challenge to the legislature's power to vest in the Attorney General the power to issue subpoenas aside from judicial proceedings, on the grounds that this infringed on the judicial prerogative. The court dismissed this argument as being without merit, citing the Attorney General's constitutional and statutory powers. It did not, however, specify that there was a common law power to issue subpoenas.

At least one court holds to the contrary. The Pennsylvania court, in Commonwealth ex rel. Margiotti, held that: "Neither an Attorney General, nor a district attorney who he supersedes, has any common law power of subpoena.... The power of subpoena, except by a court, is purely statutory." As one comment points out, however:

---

98. Note, Attorney General Exercise of Discretion to Supersede Local District Attorney in Grand Jury Investigation Held Reasonable, 37 VA. L. REV. 131 (1951).

The Attorney General may still obtain any necessary information by presenting the matter to a grand jury, thus acquiring the necessary subpoena power [citing cases].... In grand jury proceedings proper safeguards are imposed for the protection of the accused ... the investigation by the Attorney General, on the other hand, is not surrounded by the same safeguards.[99]

The New Hampshire case Wyman v. Danais recognized the common law power of the Attorney General to compel, through mandamus, a county attorney to turn over to him files of an investigation relating to a prosecution which the Attorney General had taken over. The court noted that the narrow issue was the Attorney General's power to compel the county attorney to turn over these papers, but that the broader issue was the respective duties of an Attorney General and the county attorney in criminal prosecutions. The court stated that the Attorney General is the chief law officer of the state, with the power to direct and supervise the county attorney when he deemed it in the public interest to do so, and was entitled to these papers. The court said that the common law supported this conclusion.

Control of Litigation

The courts have recognized the Attorney General's authority to dispose of litigation instituted by him or, in some cases, by another officer. In People ex rel. Stead v. Spring Lake Drainage and Levee District, the Illinois Attorney General had moved to dismiss a local prosecutor's action to enjoin a company from building embankments. The court ruled that the Attorney General, as the state's chief law officer, had common law power to dispose of a case in whatever manner he thought would best serve the state's interest.

In State ex rel. Carmichael v. Jones, the Attorney General of Alabama's power to enter into a good faith settlement was upheld, despite a constitutional provision forbidding compromise or release of an obligation owed the state. The court held that:

The attorney general is a constitutional officer, the chief law officer of the state, and on him are conferred various authorities and duties in connection with instituting and prosecuting, in the name of the state, suits and other proceedings at law and in equity for the preservation and protection of the rights and interests of the state .... If section 139 were to so abridge his general authority over lawsuits instituted by him by subjecting his decisions in such matters to another executive head, not necessarily learned in the law, we think it should have said so by more specific language.... The stronger current of opinion affirms that the attorney general's powers are as broad as the common law unless restricted or modified by statute.

---

99. Note, Supoena Power - No Statutory Authority to Compel Witnesses to Testify at Investigation, 100 U. PA. L. REV. 567 (1952).

Citing 5 Am. Jur. 240, the court noted that:

ordinarily the attorney general, both under the common law and by statute, 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.... Therefore, the attorney general has authority to direct the dismissal of proceedings instituted in behalf of the state.

In Cooley v. S. C. Tax Commission, a South Carolina court held that the Attorney General, as attorney for the tax commission, had the power to make a compromise agreement with the executor of the dededent's estate for payment of less than the full amount due the state. In the absence of any statutory sanction, this can be construed as an implied recognition of common law power.

State ex rel. Derryberry v. Kerr-McGee Corporation, a 1973 Oklahoma case, involved the issue of whether there was consideration for the dismissal with prejudice filed in this case. Appellant argued that there was no consideration and that it was, therefore, not within the lawful authority of the Attorney General to dismiss the suit. The court held that the Attorney General does have power to compromise and dismiss suits.

In the absence of express statutory or constitutional restrictions, the common law duties and powers attach themselves to the office [of Attorney General] as far as they are applicable and in harmony with our system of government.... At common law the duties of the Attorney General, as chief law officer of the realm were numerous.... He alone, could discontinue a criminal prosecution by entering a nolle prosequi therein ... the Attorney General's powers are as broad as the common law unless restricted or modified by statute, and that his authority to dismiss, settle or compromise the litigation in question, in the absence of fraud or collusion, is undisputed.

The Michigan court, in Mundy v. McDonald, held that the Attorney General had a wide range of common law powers, including a broad discretion as to his official conduct. The Attorney General supplied to a state judge certain facts which ultimately were used by the judge in a manner that was alleged to constitute libel against an individual. When this individual sued the judge for libel, the Attorney General was allowed to act as defense attorney for the judge, although he had provided the information in question. In Public Defender Service v. Supreme Court, the Supreme Court of Alaska held that the courts do not have the power to compel the Attorney General to prosecute nonsupport cases. They recognized that the Attorney General's "discretionary control over the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases." The court specifically recognized this to be a common law power.

State v. Swift concerned the Attorney General of New Hampshire's defense of a state trooper who had apprehended a party for speeding and was then, in turn, charged by the said party with speeding. The Attorney General elected not to nolle prosequi the case against the trooper; rather, he had the case brought to trial and represented the officer in

court. The court upheld this exercise of discretion by the Attorney General, stating:

> Where the Attorney General has concluded in his discretion that exoneration of an official by public trial rather than by entry of nolle prosequi is in the public interest there can be no reason to question his authority to appear for the official.

A more recent case, State ex rel. Bokowsky v. Rudman cited Swift to uphold the Attorney General's discretion to nolle prosequi a case.

A 1964 Rhode Island case, Suitor v. Nugent, dismissed an action in trespass for malicious use of process against the Attorney General. The court said:

> With the office [of Attorney General] came the common law powers and duties thereof to the extent that they were not abridged by constitutional provision ... among these common-law powers was the control of and participation in criminal prosecutions .... It is clear then that in the instant circumstances the attorney general may exercise validly such powers as were possessed by the occupant of that office at the time of the adoption of the constitution. It is clear also that most of these powers involved in the administration of the criminal law required an exercise of discretion on the part of the attorney general and therefore were in the nature of a judicial act.

The Pennsylvania courts have held in In re Shelley that the discretionary powers of the Attorney General are subject to abuse. In re Margiotti's Appeal added that any finding of an abuse of his discretionary powers by the Attorney General is a judgment to be made only by a court, since the Attorney General is a quasi-judicial officer. An Illinois court went even further, saying in People ex rel. Elliott v. Covelli that the Attorney General's discretionary authority is absolute, except for the continuous, repetitive use of the nolle prosequi to excess. Nor can the Attorney General be compelled by mandamus to proceed with an action such as quo warranto, since his common law powers include quasi-judicial discretion in these matters, according to the Illinois court in People v. Healy.

Courts in a number of states recognize the Attorney General's power to enter a nolle prosequi. A New York case, People v. McLeod, held in 1841 that at common law only the Attorney General had such power. The court said, however, that the power probably had been passed on by statute to the district attorney, as the Attorney General's representative. A Rhode Island case, Rogers v. Hill, recognized the Attorney General's common law authority to discontinue an action at any time before a verdict was reached. This case was cited favorably in the 1964 Rhode Island case of Suitor v. Nugent.

The Kansas court held in State v. Finch that "at common law the attorney general ... alone could discontinue a criminal prosecution by entering a nolle prosequi therein," and upheld his power to do so, despite objections of the local prosecutor. The Illinois court supported this view in People ex rel. Castle v. Daniels, where the Attorney General intervened in a case at the request of the local prosecutor, then asked the trial court

to vacate its order denying a motion of nolle prosequi. Another Illinois case, People ex rel. Elliott v. Corelli, also concluded that the Attorney General may enter a nolle prosequi and specified that this is a result of his being clothed with those powers that existed under common law.

A West Virginia case, Denham v. Robinson, denied the power of the Attorney General to nolle prosequi without consent of the court, holding that, where the Attorney General exercises the prosecutor's powers and duties, he is bound by the same rules that control the prosecutor.[100] The Attorney General's common law power to enter a nolle prosequi was recognized by North Carolina in State v. Thompson and by Wyoming in State ex rel. Wilson v. Young.

Conclusion

This report has reviewed the major decisions of state courts concerning Attorney General's common law powers. It has also reviewed the statutory, constitutional and historical basis of such powers. Such review makes it apparent that the office of Attorney General has, throughout the centuries of its development, exercised broad common law authority. In most states, the modern-day office retains this authority, as well as such authority as may be specifically assigned by statutes. Extensive case law has helped define common law powers. While these decisions are not always consistent, there is a substantial body of case law supporting many specific powers that have been attributed to Attorneys General. While the doctrines involved may be very ancient, most of them are relevant to Attorneys General's current activities.

The sources of the Attorney General's authority-- constitution, statutes, and common law-- are not entirely independent. The common law power may be subject to express statutory or constitutional limitations. However, where the constitution or statutes are silent the common law may provide a basis for affirmative action by the state Attorney General. The diversity and viability of these powers have been emphasized in this report. They may properly be viewed as a source of authority which does not depend on legislative enactments. The common law, if not expressly limited by statute or judicial decision, provides an historical grant of power which is relevant to the Attorneys General's present duties as protector of the public interest.

---

100. See Note, Common Law Powers - Powers to Nolle Prosequi Criminal Proceedings, 33 N.D. L. REV. 110 (1957).

APPENDIX

CASES CONCERNING THE COMMON LAW POWERS OF THE ATTORNEY GENERAL

ALABAMA

Baxley v. Rutland, 409 F. Supp. 1249 (M.D. Ala. 1976).
Delchamps, Inc. v. Alabama State Milk Control Board, 324 F. Supp. 117 (M.D. Ala. 1971).
State ex rel. Carmichael v. Jones, 41 So.2d 280 (Ala. 1949).

ALASKA

Public Defender Agency v. Supreme Court, 534 P.2d 947 (Alaska 1975).

ARIZONA

Arizona State Land Department v. McFate, 348 P.2d 912 (Ariz. 1960).
Shute v. Frohmiller, 90 P.2d 998 (Ariz. 1939).
Smith v. Superior Court, 422 P.2d 123 (Ariz. 1967).
State ex rel. Frohmiller v. Hendrix, 124 P.2d 768 (Ariz. 1967).
State ex rel. Morrison v. Thomas, 297 P.2d 624 (Ariz. 1956).

ARKANSAS

Morley v. Berg, 226 S.W.2d 559 (Ark. 1950).
Parker v. Murry, 254 S.W.2d 468 (Ark. 1953).
State ex rel. Williams v. Karston, 187 S.W.2d 327 (Ark. 1945).

CALIFORNIA

Brown v. Memorial Nat. Home Foundation, 329 P.2d. 118 (Cal. 1958).
California Securities Co. v. State, 295 P. 583 (Cal. 1951).
D'Amico v. Board of Medical Examiners, 520 P.2d 10 (Cal. 1974).
Desert Water, Oil & Irrigation. Co. v. State, 202 F. 498 (1913).
Don Wilson Builders v. Superior Court, 33 Cal. Rptr. 621 (1963).
In re Estate of Ventura, 31 Cal. Rptr. 490 (1963).
Evans v. Superior Court, 96 P.2d 107 (Cal. 1939).
Harpending v. Haight, 39 Cal. 189 (1870).
Hart v. County of Los Angeles, 67 Cal. Rptr. 242 (1968).
Lamb v. Webb, 91 P. 102 (Cal. 1907).
People v. Beaudry, 27 P. 610 (Cal. 1891).
People v. Birch Securities Co., 196 P.2d 143 (Cal. 1948).
People v. Centr-O-Mart, 214 P.2d 378 (Cal. 1950).
People v. City of Los Angeles, 218 P. 63 (Cal. 1923).
People v. Cogswell, 113 Cal. 129 (1896).
People v. Gold Run Ditch and Mining Co., 4 P. 1152 (Cal. 1884).
People v. Hi-Lond Enterprises, 155 Cal. Rptr. 880 (1979).
People v. Holladay, 9 P. 655 (Cal. 1886).
People v. New Penn Mines, Inc., 28 Cal. Rptr. 337 (1963).
People v. Oakland Water Front Co., 50 P. 305 (Cal. 1897).
People v. Pacheco, 29 Cal. 210 (1865).
People v. San Francisco, 36 Cal. 595 (1869).

People v. Stratton, 26 Cal. 242 (1864).
People v. Superior Court, 100 Cal. Rptr. 38 (1972).
People v. Truckee Lumber Co., 48 P. 374 (Cal. 1897).
People's Home Savings Bank v. Superior Court, 36 P. 1015 (Cal. 1894).
Pierce v.Superior Court, 37 P.2d 460 (Cal. 1934).
State Investment & Insurance Co. v. Superior Court, 35 P. 549 (Cal. 1894).
State of California ex rel. Younger v. Butz, Civ. No. C-73-1263-SAW, Order Granting Preliminary Injunction Pursuant to Stipulation (N.D. Cal. 1973).
Warner v. Kenny, 165 P.2d 889 (Cal. 1946).

COLORADO

Gillies v. Schmidt, 556 P.2d 82 (Colo. 1976).
Ireland v. Jacobs, 163 P.2d 203 (Colo. 1945).
People v. Casias, 216 P. 513 (Colo. 1923).
People ex rel. Tooley v. District Court, 549 P.2d 774 (Colo. 1976).
People ex rel. Witcher v. District Court, 549 P.2d 778 (Colo. 1976).
State Board of Pharmacy v. Hallett, 296 P. 540 (Colo. 1931).

CONNECTICUT

Connecticut Commission on Special Revenue v. Connecticut Freedom of Information Commission, 387 A.2d 533 (Conn. 1978).

DELAWARE

Brooks v. State, 79 A. 790 (Del. 1911).
Cleaver v. Roberts, 203 A.2d 63 (Del. 1964).
Darling Apartment Co. v. Springer, 22 A.2d 397 (Del. 1941).

FLORIDA

Holland v. Watson, 14 So.2d 200 (Fla. 1943).
State ex rel. Attorney General v. Gleason, 12 Fla. 190 (Fla. 1869).
State ex rel. Davis v. Love, 126 So. 374 (Fla. 1930).
State ex rel. Landis v. S. H. Kress & Co., 155 So. 823 (Fla. 1934).
State ex rel. Moodie v. Bryan, 39 So. 929 (Fla. 1905).
State ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976).
State ex rel. Shevin v. Yarborough, 257 So. 2d 891 (Fla. 1972).
State ex rel. Smith v. Anderson, 251, 8 So. 1 (Fla. 1890).
State ex rel. Watson v. Dade County Roofing, 22 So.2d 793 (Fla. 1945).
Watson v. Caldwell, 27 So.2d 524 (Fla. 1946).

GEORGIA

Hart v. Atlanta Terminal Co., 58 S.E. 452 (Ga. 1907).
Meredith v. State, 253 S.E.2d 220 (1979).
State v. Golia, 22 S.E.2d 27 (1976).
State v. Paxson & Cannon, 46 S.E. 872 (Ga. 1904).
Walker v. Georgia Railway & Power Co., 92 S.E. 57 (Ga. 1917).

GUAM

None

HAWAII

Hawaii v. Standard Oil Company of California, 405 U.S. 251 (1972).
The King v. Robertson, 6 Haw. 718 (1889).

IDAHO

Howard v. Cook, 83 P.2d 208 (Idaho 1938).
Padgett v. Williams, 348 P.2d 944 (Idaho 1960).

ILLINOIS

Attorney General v. Chicago & Evanston Railroad Co., 112 Ill. 520 (1884).
Attorney General v. Newberry Library, 37 N.E. 236 (1893).
Department of Mental Health v. Coty, 232N.E.2d 686 (Ill. 1967).
Environmental Protection Agency v. Pollution Control Board, 372 N.E. 2d 50 (Ill. 1977).
Fergus v. Russel, 110 N.E. 130 (Ill. 1915).
Fuchs v. Bidwell, 359 N.E.2d 158 (Ill. 1976).
Hunt v. Chicago Horse & Dummy Railway Co., 13 N.E. 176 (Ill. 1887).
Newborg-Krug-Brighton v. Illinois State Toll Highway Authority, 380 N.E.2d 1029 (Ill. 1978).
People v. Buffalo Confectionery Co., 385 N.E.2d 407 (Ill. 1979).
People v. Continental Beneficial Association, 204 Ill. App. 501 (1917).
People v. Crawford Distributing Co., 291 N.E.2d 648 (Ill. 1972).
People v. Illinois State Toll Highway Commission, 120 N.E.2d 35 (Ill. 1954).
People v. Massarella, 382 N.E.2d 262 (Ill. 1978).
People ex rel. Barrett v. Finnegan, 38 N.E.2d 715 (Ill. 1941).
People ex rel. Castle v. Daniels, 132 N.E.2d 507 (Ill. 1956).
People ex rel. Elliott v. Covelli, 112 N.E.2d 156 (Ill. 1953).
People ex rel. Gullett v. McCullough, 98 N.E. 156 (Ill. 1912).
People ex rel. Lee v. Kenroy Inc., 370 N.E.2d 78 (Ill. 1977).
People ex rel. Lowe v. Marquette National Fire Insurance Co., 184 N.E. 800 (Ill. 1933).
People ex rel. Miller v. Fullenwider, 160 N.E. 175 (Ill. 1928).
People ex rel. Raster v. Healy, 82 N.E. 599 (Ill. 1907).
People ex rel. Scott v. Briceland, 359 N.E.2d 149 (Ill. 1976).
People ex rel. Scott v. Chicago Park District, 360 N.E.2d 773 (Ill. 1976).
People ex rel. Scott v. Illinois Racing Board, 301 N.E.2d 285 (Ill. 1973).
People ex rel. Stead v. Spring Lake Drainage and Levee District, 97 N.E. 1042 (Ill. 1912).
Saxly v. Sonneman, 318 Ill. 600, 142 N.E. 526 (Ill. 1925).
State v. Associated Milk Producers, Inc., 351 F. Supp. 436 (1972).
State v. Bristol Myers Co., 470 F.2d 1276 (1972).
State ex rel. Board of Trustees of University of Illinois v. Barrett, 46 N.E.2d 951 (1943).
Strawbridge v. State Department of Law Enforcement, 388 N.E. 2d 203 (Ill. 1979).

INDIANA

Brune v. Marshall, 350 N.E.2d 661 (Ind. 1976).
Davis v. Pelly, 102 N.E.2d 910 (Ind. 1952).

Julian v. State, 23 N.E. 690 (Ind. 1890).
State ex rel. Bingham v. Home Brewing Co., 75, 105 N.E. 909 (Ind. 1914).
State ex rel. Neeriemer v. Daviess Circuit Court of Daviess County, 142 N.E. 2d 626 (Ind. 1957).
State ex rel. Powers v. Vigo Circuit Court, 140 N.E.2d 497 (Ind. 1957).
State ex rel. Public Service Commission v. Johnson Circuit Court, 112 N.E.2d 429 (Ind. 1953).
State ex rel. Sendak v. Marion Co. Sup. Ct., 373 N.E.2d 145 (Ind. 1978).
State ex rel. Steers v. Criminal Court of Lake County, 112 N.E.2d 445 (1953).
State ex rel. Steers v. Holovachka, 142 N.E.2d 593 (Ind. 1957).
State ex rel. Young v. Niblack, 99 N.E.2d 839 (Ind. 1951).
State of Indiana v. Rankin, 282 N.E.2d 851 (Ind. 1972).

IOWA

Cosson v. Bradshaw, 141 N.W. 1062 (Iowa 1913).
In re Owens Estate, 57 N.W.2d 193 (Iowa 1953).
Motor Club of Iowa v. Department of Transportation, 251 N.W.2d 510 (Iowa 1977).
State v. Blythe, 226 N.W.2d 250 (Iowa 1975).
State ex rel. Fletcher v. Executive Council of the State of Iowa, 223 N.W. 737 (Iowa 1929).
State ex rel. Turner v. State Highway Commission, 186 N.W.2d 141 (Iowa 1971).

KANSAS

State v. City of Kansas City, 352 P.2d 37 (Iowa 1960); cert. denied 363 U.S. 831 (1960).
State v. Finch, 280 P. 910 (Kan. 1929).
State ex rel. Smith v. Rector, 8 P.2d 323 (Kan. 1932).

KENTUCKY

Commonwealth ex rel. Attorney General v. Howard, 180 S.W.2d 415 (Ky. 1944).
Commonwealth ex rel. Breckingridge v. Monroe Co., 378 S.W.2d 809 (Ky. 1964).
Commonwealth ex rel. Ferguson v. Gardner, 327 S.W.2d 947 (1959).
Commonwealth ex rel. Hancock v. Paxton, 516 S.W.2d 865 (Ky. 1974).
Hancock v. Terry Elkhorn Mining Co., Inc., 503 S.W.2d 710 (Ky. 1973).
Johnson v. Commonwealth ex rel. Meredith, 165 S.W.2d 820 (Ky. 1942).
Matthews v. Pound, 403 S.W.2d 7 (1966).
McClendon v. Hamilton, 127 S.W.2d 605 (Ky. 1939).
Respass v. Commonwealth ex rel. Attorney General, 115 S.W. 1131 (Ky. 1909).

LOUISIANA

Noel Bros. v. Texas & Pacific Railway Co., 133 So. 830 (La. 1931).
Saint v. Allen, 134 So. 246 (La. 1931).

MAINE

Burkett ex rel. Leach v. Ulmer, 15 A.2d 858 (Me. 1940).
Buck v. Town of Yarmouth, 402 A.2d 860 (Me. 1979).
Central Maine Power v. Public Utilities Commission, 382 A.2d 860 (Me. 1979).

Fitzgerald v. Baxter State Park Authority, 385 A.2d 189 (Me. 1978).
In re Maine Central Railroad, 183 A. 844 (Me. 1936).
Lund ex rel. Wilbur v. Pratt, 308 A.2d 554 (Me. 1973).
von Tiling v. City of Portland, 268 A.2d 888 (Me. 1970).
Watts Detective Agency v. Sagadahoc, 18 A.2d 308 (Me. 1941).
Withee v. Lane and Libby Fisheries Co., 113 A. 22 (Me. 1921).

MARYLAND

Murphy v. Yates, 348 A.2d 837 (Md. 1975).

MASSACHUSETTS

Attorney General v. Keno Optics, 340 N.E.2d 868 (Mass. 1976).
Attorney General v. Old Colony Railroad Co., 35 N.E. 252 (Mass. 1893).
Attorney General v. Parker, 126 Mass. 216 (1879).
Attorney General v. Suffolk County Apportionment Commissioners, 113 N.E. 581 (Mass. 1916).
Attorney General v. Sullivan, 40 N.E. 843 (Mass. 1895).
Attorney General v. Trustees of Boston Elevated Railroad Co., 67 N.E.2d 676 (Mass. 1946).
Commonwealth v. Allen, 128 Mass. 308 (1880).
Commonwealth v. Kozlowsky, 131 N.E. 207 (Mass. 1921).
Feeney v. Commonwealth, 366 N.E.2d 1262 (Mass. 1977).
Goddard v. Smithett, 69 Mass. 116 (1854).
Jacobson v. Parks and Recreation Commission of Boston, 189 N.E.2d 199 (Mass. 1963).
Parker v. May, 59 Mass. (Cush.) 336 (1850).
Secretary of Administration and Finance v. Attorney General 326 N.E.2d 334 (Mass. 1975).

MICHIGAN

Anchor Bay Concerned Citizens v. People ex rel. Kelley, 223 N.W.2d 3 (Mich. 1974).
Attorney General v. Board of Auditors, 40 N.W. 852 (Mich. 1888).
Attorney General v. City of Howell, 204 N.W. 91 (Mich. 1925).
Attorney General v. Contract Purchase Corporation, 327 Mich. 636 (1950).
Attorney General v. Detroit, 26 Mich. 263 (Mich. 1872).
Attorney General ex rel. Michigan Board of Optometry v. Peterson, 164 N.W. 2d 43 (Mich. 1969).
Attorney General ex rel. Township of Wyoming v. City of Grand Rapids, 141 N.W. 890 (Mich. 1913).
In re Lewis' Estate, 283 N.W. 21 (Mich. 1938).
Kavanagh, Attorney General v. Capitol Service, Inc., 94 N.W.2d 814 (Mich. 1959).
Mundy v. McDonald, 185 N.W. 877 (Mich. 1921).
People v. Karalla, 192 N.W.2d 676 (Mich. 1971).
People v. Rich, 212 N.W. 105 (Mich. 1973).

MINNESOTA

Dunn v. Schmid, 60 N.W.2d 14 (Minn. 1953).
Head v. Special School District No. 1, 182 N.W.2d 887 (Minn. 1970).

In re Quinlan's Estate, 45 N.W.2d 807 (Minn. 1951).
Schaeffer v. Newberry, 35 N.W.2d 287 (Minn. 1948).
Slezak v. Ousdigian, 110 N.W.2d 1 (Minn. 1961).
State ex rel. Peacock v. Village Council of Osakis, 128 N.W. 295 (Minn. 1910).
State ex rel. Peterson v. City of Fraser, 254 N.W. 776 (Minn. 1934).
State ex rel. Young v. Robinson, 112 N.W. 269 (Minn. 1907).

MISSISSIPPI

Capital Stages v. State, 128 So. 759 (Miss. 1930).
Gandy v. Reserve Life Insurance Co., 279 So.2d 648 (Miss. 1973).
Kennington-Saenger Theatres v. State ex rel. District Attorney, 18 So.2d 483 (Miss. 1944).
State ex rel. Patterson v. Warren, 180 So.2d 293 (Miss. 1965).
State ex rel. Rice v. Stewart, 184 So. 44 (Miss. 1938).
Wade v. Mississippi Cooperative Extension Service, 382 F. Supp. 229 (Miss. 1975).

MISSOURI

Dicky v. Volker, 11 S.W.2d 278 (Mo. 1928).
Gershman Investment Corp. v. Danforth, 517 S.W.2d 33 (Mo. 1974).
State v. Excelsior Powder Manufacturing Corp., 169 S.W. 267 (Mo. 1914).
State ex rel. Barrett v. Boeckeler Lumber Co., 257 S.W. 453 (Mo. 1924).
State ex rel. Dresser Industries v. Ruddy, 592 S.W.2d 789 (1979).
State ex rel. McKittrick v. Missouri Public Service Commission, 175 S.W.2d 857 (Mo. 1944).
State ex rel. Taylor v. Wade, 231 S.W.2d 179 (Mo. Mo. 1950).

MONTANA

State ex rel. Ford v. Young, 170 P. 947 (Mont. 1918).
State ex rel. Nolan v. District Court, 55 P. 916 (Mont. 1899).
State ex rel. Olsen v. Public Service Commission, 283 P.2d 594 (Mont. 1955).
State ex rel. Pew v. Porter, 189 P. 618 (Mont. 1920).
State ex rel. Woodahl v. District Court, 495 P.2d 182 (Mont. 1972).
Woodahl v. Montana Board of Natural Resources and Conservation, 516 P.2d 383 (Mont. 1973).
Woodahl v. State Highway Commission, 465 P.2d 818 (Mont. 1970).

NEBRASKA

State v. Pacific Express Co., 115 N.W. 619 (Neb. 1908).
State ex rel. Glenn v. Stein, 14 N.W. 481 (Neb. 1882).
State ex rel. Meyer v. Peters, 199 N.W.2d 738 (Neb. 1972).
State ex rel. Sorensen v. State Board of Equalization, 242 N.W. 609 (Neb. 1932).
Williams v. Miles, 94 N.W. 705 (Neb. 1903).

NEVADA

Ryan v. District Court, 503 P.2d 842 (Nev. 1972).
State ex rel. Fowler v. Moore, 207 P. 75 (Nev. 1922).

NEW HAMPSHIRE

Attorney General by Anderson v. Rochester Trust Co., 333 A.2d 718 (N.H. 1975).
Eames v. Rudman, 333 A.2d 157 (N.H. 1975).
Fletcher v. Merrimack County, 51 A. 271 (N.H. 1901).
Souhegan National Bank v. Kenniston, 26 A.2d 26 (N.H. 1942).
State v. Coolidge, 260 A.2d 563 (N.H. 1969).
State v. Knowlton, 152 A.2d 624 (N.H. 1959).
State v. Rudman, 274 A.2d 785 (N.H. 1971).
State v. Swift, 143 A.2d 114 (N.H. 1958).
Wyman v. Danais, 147 A.2d 116 (N.H. 1958).

NEW JERSEY

Alexander v. New Jersey Power and Light Co., 122 A.2d 339 (N.J. 1956).
Board of Public Utilities Commissioners v. Lehigh Valley Railway Co., 149 A. 263 (N.J. 1930).
Evans-Aristocrat Industries, Inc. v. City of Newark, 356 A.2d 23 (N.J. 1976).
O'Regan v. Schermerhorn, 50 A.2d 10 (N.J. 1946).
Petition of Public Services Coordinated Transportation, 74 A.2d 580 (N.J. 1950).
Trustees of Princeton University v. Wilson, 78 A. 393 (1910).
Van Riper v. Jenkins, 45 A.2d 844 (N.J. 1946).
Wilentz v. Hendrickson, 33 A.2d 366 (N.J. 1943).

NEW MEXICO

State v. Davidson, 275 P. 373 (N.M. 1929).
State v. Reese, 430 P.2d 399 (N.M. 1967).
State ex rel. Norvell v. Credit Bureau, Inc., 514 P.2d 40 (N.M. 1973).

NEW YORK

Application of Scotti, 385 N.Y.S.2d 659 (1976).
People v. Brennan, 127 N.Y.S. 958 (1910).
People v. Dorsey, 29 N.Y.S.2d 637 (1941).
People v. Finch, Pruyn Co., 202 N.Y.S. 582 (1923).
People v. Hopkins, 47 N.Y.S.2d 222 (1944).
People v. Kramer, 68 N.Y.S. 383 (1900).
People v. McLeod, 25 Wend. 483 (1841).
People v. Olsen, Ltd., 317 N.Y.S.2d 538 (1971).
People v. Port of New York Authority, 315 N.Y.S.2d 9 (1970).
People v. Town of Huntington, 325 N.Y.S.2d 674 (1971).
People v. Tru-Sport Publishing Co., 291 N.Y.S. 449 (1936).
People v. Tweed, 13 Abb. Pr. (n.s.) 25 (1872).
People v. Vanderbilt, 24 N.Y. 301 (1862).

NORTH CAROLINA

Matter of Southern Bell Telephone and Telegraph, 227 S.E.2d 645 (N.C. 1976).
State v. Thompson, 10 N.C. (3 Hawks) 613 (1825).
Sternberger v. Tannenbaum, 161 S.E.2d 116 (N.C. 1968).
YWCA v. Morgan, 189 S.E.2d 169 (N.C. 1972).

NORTH DAKOTA

State v. Baker, 21 N.W.2d 355 (N.D. 1946).
State ex rel. Miller v. District Court, 124 N.W. 417 (N.D. 1910).

OHIO

Brown v. Concerned Citizens for Sickle Cell, 382 N.E.2d 1155 (Ohio 1978).
State v. City of Bowling Green, 313 N.E.2d 409 (Ohio 1974).
State ex rel. Brown v. Newport Concrete Co., 44 Ohio App. 2d 121, (1975).
State of Ohio v. BASF Wyandotte Corp., 67 Ohio Op.2d 239 (1974).

OKLAHOMA

Sarkeys v. Independent School District, 592 P.2d 529 (Okla. 1979).
State ex rel. Derryberry v. Kerr-McGee Corp., 516 P.2d 813 (Okla. 1973).
State ex rel. Haskell v. Huston, 97 P. 982 (Okla. 1908).
Trapp v. Cook Construction Co., 105 P. 667 (Okla. 1909).

OREGON

Baskin v. Marion County, 141 P. 1014 (Or. 1914).
Gleason et al. v. Thornton, 313 P.2d 776 (Or. 1957).
Gibson v. Kay, 137 Pac. 864 (Ore. 1914).
Oregon Liquor Commission v. Coe, 99 P.2d 19 (Or. 1940).
People of the State of Oregon v. Debt Reducers, Inc., 484 P.2d 869 (Or. 1971).
P.G.E. v. Judd, 198 P.2d 605 (Or. 1948).
Putnam v. Norblad, 293 Pac. 940 (Or. 1930).
State v. Duniway, 128 P. 853 (Or. 1912).
State v. Guglielmo, 80 P. 103 (Or. 1905).
State v. Lord, 43 Pac. 471 (Or. 1896).
State v. Metscham, 46 Pac. 791 (Or. 1896).
State ex rel. Carson v. Kozer, 270 P. 513 (Or. 1928).
State ex rel. Johnson v. Bauman, 492 P.2d 284 (Or. 1971).
State ex rel. Johnson v. Farrell, 151 P.2d 636 (Or. 1944).
State ex rel. Moltzner v. Mort, 97 P.2d 950 (Or. 1940).
State ex rel. Moore v. Farnham, 234 P. 804 (Or. 1925).
State ex rel. Stevens, 44 P. 898 (Or. 1896).
State ex rel. Thornton v. Williams, 336 P.2d 68 (Or. 1959).
Watts v. Gorking, 228 P. 135 (Or. 1924).
Wemme v. First Church of Christ, Scientist, 223 Pac. 250 (Or. 1924).
Wemme v. First Church of Christ, Scientist, 237 P. 674 (Or. 1925).

PENNSYLVANIA

Appeal of Margiotti, 75 A.2d 465 (Pa. 1950).
Commonwealth v. Bardascino, 232 A.2d 236 (Pa. 1967).
Commonwealth v. Burrell, 7 Pa. 34 (1847).
Commonwealth v. Fudeman, 152 A.2d 428 (Pa. 1959).
Commonwealth v. Lehman, 164 A. 526 (Pa. 1932).
Commonwealth v. National Gettysburg Battlefield T. Inc., 302 A.2d 886 (Pa. 1973).
Commonwealth v. Ryan, 188 A. 764 (Pa. 1936).
Commonwealth v. Schab, 383 A.2d 819 (Pa. 1978).

Commonwealth v. The Barnes Foundation, 159 A.2d 500 (Pa. 1960).
Commonwealth v. Wilson, 44 A.2d 520 (Pa. 1945).
Commonwealth ex rel. Minerd v. Margiotti, 188 A. 524 (Pa. 1936).
Commonwealth ex rel. Shumaker v. New York & Pennsylvania Railway Co., Pa. 106 A.2d 239 (Pa. 1954).
Gwinn v. Kane, 348 A.2d 900 (Pa. 1976).
Hetherington v. McHale, 311 A.2d 162 (Pa. 1973).
In re Shelley, 2 A.2d 809 (Pa. 1938).
Matson v. Margiotti, 88 A.2d 892 (Pa. 1952).

PUERTO RICO

None

RHODE ISLAND

In re Police Commissioners, 49 A. 36 (R.I. 1901).
McCarthy v. McAloon, 83 A.2d 75 (R.I. 1951).
Rogers v. Hill, 48 A. 670 (R.I. 1901).
Suitor v. Nugent, 199 A.2d 722 (R.I. 1964).
Tate v. Howard, 296 A.2d 19 (R.I. 1972).

SAMOA

None

SOUTH CAROLINA

Cooley v. S.C. Tax Commission, 28 S.E.2d 445 (S.C. 1943).
State v. Southern Railway Co., 62 S.E. 1116 (S.C. 1908).
State ex rel. Daniel v. Broad River Power Co., 153 S.E. 537 (S.C. 1929).

SOUTH DAKOTA

Johnson v. Jones, 207 N.W. 550 (S.C. 1926).
State ex rel. Maloney v. Wells, 112 N.W.2d 601 (S.D. 1961).

TENNESSEE

None

TEXAS

Brady v. Brooks, 89 S.W. 1052 (Tex. 1905).
Charles Scribner's Sons v. Marrs, 262 S.W. 722 (Tex. 1924).
Garcia v. Laughlin, 285 S.W.2d 191 (Tex. 1956).
Hill v. Lower Colorado River Authority, 568 S.W.2d 473 (Tex. 1978).
Hill v. Water Quality Control Board, 568 S.W.2d 738 (Tex. 1978).
Queens Insurance Co. v. State ex rel. Attorney General, 22 S.W. 1048 (Tex. 1892), rev. 24 S.W. 397 (Tex. 1893).
State v. Farmers Loan & Trust Co., Tex. 17 S.W. 60 (Tex. 1891).
State v. Goodnight, 11 S.W. 119 (Tex. 1888).
State v. Harney, 164 S.W.2d 55 (Tex. 1942).
State v. Reagen County Purchasing Co., 186 S.W.2d 128 (Tex. 1944).
Yett v. Cook, 281 S.W. 837 (Tex. 1926).

UTAH

Hansen v. Barlow, 456 P.2d 177 (Utah 1969). Hansen v. Legal Services Committee of Utah State Legislature, 429 P.2d 979 (Utah 1967). State v. Jiminez, 588 P.2d 707 (Utah 1978).

VERMONT

None

VIRGIN ISLANDS

None

VIRGINIA

Blair v. Mayre, 80 Va. 485 (1885). James v. Almond, 170 F. Supp. 331 (1959).

WASHINGTON

Berge v. Gorton, 567 P.2d 187 (1977).
Boe v. Gorton, 187 (1977) 567 P.2d 197 (1977).
State v. O'Connell, 523 P.2d 872 (1974). State ex rel. Attorney General v. Seattle Gas & Electric Co., 68 P. 946 (1902).

WEST VIRGINIA

Denham v. Robinson, 77 S.E. 970 (W. Va. 1913). State v. Ehrlick, 64 S.E. 935 (W. Va. 1909). State ex rel. Matko v. Ziegler, 179 S.E.2d 735 (W. Va. 1971).

WISCONSIN

Attorney General v. Chicago & Milwaukee Railway, 35 Wis. 425 (1874).
In re Sharp's Estate, 217 N.W.2d 258 (Wis. 1974).
State v. Milwaukee Electric R. & Light Co., 116 N.W. 900 (Wis. 1908).
State v. Industrial Commission, 179 N.W. 579 (Wis. 1920).
State ex rel. Jackson v. Coffey, 118 N.W.2d 939 (Wis. 1963).
State ex rel. Reynolds v. Smith, 120 N.W.2d 664 (Wis. 1963).

WYOMING

Bentley v. Whitney Benefits, 281 P. 188 (Wyo. 1929).
Town of Cody v. Buffalo Bill Memorial Association, 196 P.2d 369 (Wyo. 1948).
Zweifel v. State ex rel. Brimmer, 517 P.2d 493 (Wyo. 1974).

BIBLIOGRAPHY

Abraham, Henry J. and Benedetti, Robert R. The State Attorney General: A Friend of the Court?, 117 U. PA. L. REV. 795 (1969).

Baxley, William J. The State's Attorney, 25 ALA. L. REV. 20 (1972).

Bellot, Hugh C. The Origin of the Attorney General, 25 LAW Q. REV. 400 (1909).

Brookfield, The Attorney General, NEW ZEALAND L.J. 336 (1978).

Christenson, Arlen C. The State Attorney General, 1970 WIS. L. REV. 298.

Cooley, Rita W. Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies, 2 AM. J. LEGAL HIST. 304 (1958).

DeLong, Earl, Powers and Duties of the State Attorney General in Criminal Prosecutions, 25 J. CRIM. L. 392 (1934).

Dickson, Jr., James G. The Office of Attorney General in Texas, XVII PUB. AFF. COM. 5 (1971).

Edmisten, Rufus, The Common Law Powers of the Attorney General of North Carolina, J.Ll. J. 9 N.C. CENT L.J. 1 (1978).

Edwards, J. Ll. J. THE LAW OFFICERS OF THE CROWN (1964).

Gornish, Gerald, The Attorney General's Authority to Advocate and Advise The Constitutional Invalidity of Statutes, 82 DICK. L. REV. 639 (1978).

Hammonds, Oliver W., The Attorney General in the American Colonies, ANGLO-AMERICAN LEGAL HISTORY, Senes VI, No. 3 (1939)

Holdsworth, William S., The Early History of the Attorney and Solicitor General, 13 ILL. L. REV. 602 (1918-19).

Jones, Sir Elwyn, The Office of Attorney General, 27 CAMB. L.J. 48 (1969).

Kazanjian, John H. Consumer Protection by State Attorneys General: A Time for Renewal, 49 NOTRE DAME L. REV. 416 (1973).

Keeton, George W., The Office of Attorney General, 58 JURIS. REV. 107 (1946).

Kentucky Department of Law, The Office of Attorney General in Kentucky, 51 Ky. L.J. (Special Issue, 1963).

Larson, Robert, The Importance and value of Attorney General Opinions, 41 IOWA L. REV. 351 (1956).

McGreevey, Robert M. The Illinois Attorney General's Representation of Opposing State Agencies - Conflicts of Interest, Policy and Practice, 66 ILL. B. J. 308 (1978).

Miller, C.J. and Miller, T. M., The Constitutional Charter of Ohio's Attorney General, 37 OHIO ST. L.J. 807 (1976).

Montague, Robert L. The Office of Attorney General in Kentucky, 49 KY L.J. 194 (1960-61).

Morgan, Robert, The Office of the Attorney General, 2 N.C. CENT. L.J. 165 (1970).

Morgan, Robert, 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).

Myhre, Russell J. 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 (1975-76).

Note, Attorney General - Common Law Powers over Criminal Prosecutions and Civil Litigation of the State, 16 N.C.L. REV. 282 (1937-38).

Note, Maine's Reception of the Common Law, 30 ME. L. REV. 274 (1979).

Note, People ex rel. Scott v. Briceland: Power of the Attorney General Revisited, 11 J. MAR. J. PRAC. & PROC. 441 (1978).

Note, The Common Law Power of State Attorneys General to Supersede Local Prosecutors, 60 YALE L.J. 559 (1951).

Note, The Litigation Function of the Iowa Attorney General, 63 IOWA L. REV. 1264 (1978).

Note, The Role of the Michigan Attorney General in Consumer and Environmental Protection, 72 MICH. L. REV. 1030 (1974).

Note, The Solicitor General and Intragovernmental Conflict, 76 MICH. L. REV. 324 (1978).

Raney, Common Law v. Statutory Pollution Abatement: The Texas Attorney General's Dilemma, 18 S. TEX. L.J. 557 (1976).

Scott, William, The Role of Attorney General's Opinions in Illinois, 67 NW. U. L. REV. 643 (1972).

Sheppard, John B. Common Law Powers and Duties of the Attorney General, 7 BAYLOR L. REV. 1 (1955).

Toepfer, Robert, Some Legal Aspects of the Duty of the Attorney General to Advise, 19 U. CIN. L. REV. 201 (1950).

Van Alstyne and Roberts, The Power of the Attorney General in Wisconsin, 1974 WIS L. REV. 721 (1974).