

ATTORNEY-GENERAL: The Attorney-General is to furnish legal assistance to the prosecuting attorneys and circuit attorneys in preliminary examinations in criminal cases when so ordered and directed by the Governor.

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Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Dear Governor Donnell:

Your letter of May 9, 1942 directed to the Attorney-General, requesting an opinion, has been referred to me. This request is as follows:

"Attached hereto is copy of letter of May 8, 1942 from Honorable Michael W. O'Hern, Prosecuting Attorney of Jackson County, Missouri to myself. You will observe that in said letter, Mr. O'Hern requests your presence at the preliminary hearing of defendant George W. Welsh, Jr., before Justice Dougherty. Following said request Mr. O'Hern makes of me the following inquiry:

"Would you be kind enough to direct General McKittrick to come to Kansas City and assist in the preparation and trial of this preliminary hearing?"

"Section 12898 of the Revised Statutes of Missouri of 1939 reads as follows:

"When directed by the governor, the attorney-general, or one of his assistants, shall aid any prosecuting or circuit attorney in the discharge of their respective duties in the trial courts and in examinations before grand juries, and when so directed

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by the trial court, he may sign indictments in lieu of the prosecuting attorney.' (My emphasis.)

"I request of you your official opinion on the following question:

"If the governor shall issue to the attorney-general a direction that the attorney-general, or one of his assistants, shall aid the prosecuting attorney of Jackson County in the discharge of his respective duties in the preliminary hearing before Justice Dougherty of a person charged with murder, is there by such direction created a duty on the part of the attorney-general to, or to cause one of his assistants to, aid said prosecuting attorney in the discharge of his respective duties in the court of the said Justice Dougherty in the preliminary hearing of said person?"

We will first cite Section 12898 R. S. Mo., 1939, which reads as follows:

"When directed by the governor, the attorney-general, or one of his assistants, shall aid any prosecuting or circuit attorney in the discharge of their respective duties in the trial courts and in examinations before grand juries, and when so directed by the trial court, he may sign indictments in lieu of the prosecuting attorney."

As has been seen, the above statute specifically sets out "trial court". In the case of Ex Parte Bedard 106 Mo. 616, the court held that a preliminary examination is a criminal proceeding.

However, in the case of State v. Ancell 62 S.W. (2d) 443, the court held that a Justice of the Peace sitting in a preliminary hearing does not "act in the capacity of a court." Therefore, it would probably be construed, and we so think, that a preliminary examination is not a proceeding in a "trial court." This conclusion is reached by the two decisions cited above; also by the fact that in a preliminary examination before a Justice of the Peace, a defendant is not placed in jeopardy. However, the statute cited above, specifically sets out as one of the duties of the attorney-general, the furnishing of assistance and aid to prosecuting attorneys and circuit attorneys in examination before a grand jury. An examination before a grand jury reaches the same result as a preliminary examination before a Justice of the Peace. It is a hearing to decide whether or not a person accused of crime should be held for trial in a trial court. If an accused is bound over in a preliminary hearing, an information is then signed and filed in the circuit court or trial court. If a true bill is found by a grand jury, the indictment is then signed by the foreman and is filed in the circuit court or trial court. Consequently the same result is reached in either case and we feel that this statute should be construed so that it will apply to preliminary examination as well as "examinations before grand juries." We also feel that the common law powers of the attorney-general would give him the authority to furnish legal assistance in a preliminary examination if directed to do so by the governor.

In support of this view, we will cite the following, 6 C.J. 809 par. 13:

"The office of attorney-general has existed from an early period, both in England and in this country, and is vested by the common law with a great variety of duties in the administration of the government. The duties are so numerous and varied that it has not been the policy of the legislatures 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 power pertaining thereto under

the common law. A grant by statute of the same or other powers does not operate to deprive him 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. As the chief law officer of the state, the attorney-general 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. Any duties which he may perform personally may of course be performed by his regularly authorized assistants.* * *"

Again, at 7 C. J. 1213, we find the following:

"An attorney general is the chief law officer of a state government or of the federal government, as the case may be. His office as well as his designation or title is one which is derived from the common law of England where from an early date the attorney general has been the chief legal representative of the sovereign whose duty it is to represent the crown in civil and criminal matters in the courts. * * *"

Again, at page 1222 in the same volume, we find the following:

"The powers and duties of attorneys general are primarily executive and administrative and consist in those expressly or impliedly conferred by constitutional or statutory provisions together with, in the absence of express exclusion thereof, the powers attached to the office at common law.

Also, at page 1226 in the same volume, the authority of the attorney-general is stated thus:

"The attorney general, as the chief legal representative of the state, may institute all legal proceedings necessary to protect the interests of the state, and may defend all actions affecting the public interest.

"As the chief law officer of the state, the attorney general 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. He may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws, the preservation of order, and the protection of public rights. He is also generally charged by law with the duty of representing the people of the state in all cases in which the State is a party or is interested, or in which the wrong or injury complained of affects the public generally. He may maintain an action in such case, even though he is not required to do so unless other officers whose duty it is to sue have not done so. * * * * *

In the case of Barrett v. Boeckler Lumber Co., 302 Mo. 1.c. 205, 206, the court said:

"* * * It is generally held in this country that the office of Attorney-General is clothed, in addition to the duties expressly defined by statute, with all the powers pertaining thereto under the common law. 'A grant by statute of the same or other powers does not operate to deprive him 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. 810). This view has been tacitly accepted, and acted upon, in this State

for many years. (St. Louis v. McAllister, 281 Mo. 26; State v. Saline County Court, 51 Mo. 350; State v. Hays, 23 Mo. 287; State ex rel. v. Vandalia, 119 Mo. App. 506). The Attorney-General of this State is therefore invested with all the powers and duties pertaining to his office at common law, except such of them as have been expressly conferred upon the circuit and prosecuting attorneys; the latter offices have, so to speak, been carved out of that of Attorney-General. (State v. Ehrlick, 65 W. Va. 700.) The duties of the Attorney-General at common law were so varied and numerous that they have perhaps never been specifically enumerated. There can be no question, however, but that the Attorney-General had the power, and it was his duty; (1) By information to bring certain classes of persons accused of crimes and misdemeanors to trial; and (2) by writ of quo warranto to vacate the charter to annul the existence of a corporation for violation of its charter. (People v. Miner, 2 Lans. (N.Y.) 396.) * * *

As a final citation on this matter, we will cite the case of Darling Apartment Company v. Springer, 137 A. L. R. 803, which was a Delaware case decided in October 1941. In that case the court took up the matter of the common law powers of the attorneys general and stated as follows:

"In England the office is of ancient origin. It was vested by the common law with a great variety of duties. The Attorney General was the law officer of the Crown, and its only legal representative in the courts. 2 Thornton, Attorneys at Law, 1131; 5 Am. Jur. 234; 11 Ill. Law Rev. 394; Rex v. Austin, 9 Price 142; Attorney General v. Brown, 1 Swanst 294; Rex v. Wilkes, 4 Burrows 2570. We derive our system of jurisprudence from England, and we adopted the office of Attorney General as it existed in England as a part of the governmental machinery necessary for the protection of public rights and the enforcement of public duties by proper proceedings in courts of justice.

The powers and duties of the office of Attorney General are so numerous and varied that neither the framers of our several constitutions nor the legislatures have ever undertaken exhaustively to enumerate them, and where not defined by statute those powers and duties must be sought for in the common law. *State v. Valent*, 3 W. W. Harr. 399, 138 A 640. The authorities substantially agree that, in addition to those conferred on it by statute, the office is clothed with all of the powers and duties pertaining thereto at common law; and, as the chief law officer of the State, the Attorney General, in the absence of express legislative restriction to the contrary, may exercise all such power and authority as the public interests may from time to time require. In short, the Attorney General's powers are as broad as the common law unless restricted or modified by statute. 7 CJS, Attorney General, Sec. 8, p. 1226; 5 Am. Jur. 235; 2 Thornton, Attorneys at Law, 1149; *Withee v. Lane & Libby Fisheries Co.* 120 Me. 121, 113 A. 22; *State v. Finch*, 128 Kan. 665, 280 P. 910, 66 ALR 1369; *Hunt v. Chicago, etc., Ry. Co.* 121 Ill. 638, 13 NE 176; *State ex rel. Ford v. Young*, 54 Mont. 401, 170 P. 947; *People v. Miner*, 2 Lans., NY, 396, 399."

We do not feel that the intention of the legislature at the time of the enactment of Section 12898, R. S. Mo., 1939, cited above, was to exclude preliminary examinations in view of the fact that in the procedure before a grand jury the results are ultimately the same. Also, in view of the decisions with reference to the common law powers of the attorney-general, cited above, we believe that it is within the power of the attorney-general to furnish legal assistance to the various prosecuting attorneys and circuit attorneys in the conduct of preliminary examinations throughout the State when directed to do so by the governor.

As to the power of the governor to direct the attorney-general to furnish such legal assistance, we will cite Section 4 of Article 5 of the Constitution of Missouri, which is as follows:

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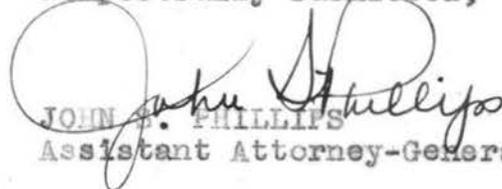
"The supreme executive power shall be vested in a chief magistrate, who shall be styled 'The Governor of the State of Missouri.'"

Also, the Governor receives the power to do this by Section 12898, R. S. Mo. 1939, cited above.

CONCLUSION

It is, therefore, the opinion of this Department, that if the Governor of the State of Missouri, directs the attorney-general or one of his assistants to aid the prosecuting attorney of any county, in the discharge of his respective duties in a preliminary hearing before a Justice of the Peace, it is the duty of the attorney-general to furnish such assistance.

Respectfully submitted,


JOHN S. PHILLIPS
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

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