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Russell J. Myhre

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THE ATTORNEY FOR THE STATE AND THE ATTORNEY FOR THE PEOPLE: THE POWERS AND DUTIES OF THE ATTORNEY GENERAL OF NORTH DAKOTA

RUSSELL J. MYHRE*

I. INTRODUCTION

Other than the Governor, the attorney general of North Dakota is the most important elected officer in state government and he enjoys a wide array of legal and administrative powers and duties. The attorney general receives much of his authority by statute, but is also vested with important powers and duties by common law. The attorney general may institute legal proceedings to enforce the laws of the state and he may bring suit on behalf of the people of the state.

North Dakota is rich in case law delineating the powers and duties of the attorney general. Although much of the case law was a result of increased political activity during the period after the turn of the century, many of the cases are more recent. Legislative enactments have also gradually increased the jurisdiction of the attorney general. However, the essential character of the office—that of chief legal officer of the state—has remained unchanged.

In addition to the attorney general's legal duties, he is responsible for the administration of several departments and divisions of state government and serves on several boards and commissions, including the Industrial Commission which oversees all state-owned industries. The attorney general also licenses several activities, such as the retail sale of alcoholic beverages, and is responsible for the enforcement of these laws.

The concept of the primary function of the attorney general has changed through the years. Attorneys general during the early part of North Dakota's history viewed their primary function as being that of a legal advisor to the state and its officers, while attorneys general during the past thirty years have viewed their primary function as being that of an administrator and executive in state government.

Nevertheless, the attorney general remains a potent force in North Dakota state government. As the head of a two-part prosecutorial system, he is the principal law enforcement officer of the state. But more importantly, he is the legal representative of the interests and liberties of the people of the state, and therefore, it may be said, that the attorney general of North Dakota is the attorney for the state and the attorney for the people.

* Staff attorney, North Dakota Legislative Council, J.D., 1974, University of North Dakota.

II. BACKGROUND

The office of attorney general is derived from the common law of England. The attorney general was the chief legal representative of the Crown and represented the Crown in all matters in which it had an interest. He also exercised various common law powers, such as the enforcement of public charities, supervision of the estates of lunatics, and the institution of equitable proceedings against public nuisances that affected or endangered the public safety.¹

It is generally held that in the exercise of the attorney general's common law powers, the attorney general may not only control and manage all litigation on behalf of the state, but he may also intervene in all suits or proceedings which are of concern to the general public.² "Attorney general" may be defined as:

[A] general attorney; one who is authorized to appear in all suits and causes, and in all courts; or in all suits at a particular circuit or for a specific period of time.³

Generally, litigation over which the attorney general has authority involves the enforcement of rights of the state, or of the people. Lacking statutory authority, he can participate in private litigation only when it has a bearing on or affects the interests of the general public.⁴

In most states, the civil and criminal business of the state which once actually, as well as theoretically, was the responsibility of the attorney general, has been divided between two offices: the local prosecuting attorney and the attorney general. Thus, the office of prosecuting attorney has been carved out of that of attorney general and virtually made an independent office. If the right to bring a certain action falls within the common law powers of the attorney general, and the power to bring such action is not specifically granted to the prosecuting attorney by statute, the latter cannot bring the action.⁵ However, in certain circumstances where a statute only authorizes a prosecuting attorney to bring an action, the attorney general may also bring the action.⁶

1. General works on the common law office of attorney general include: Bellot, *The Origin of the Attorney-General*, 25 L.Q. REV. 400 (1909); Holdsworth, *The Early History of the Attorney and Solicitor General*, 13 ILL. L. REV. 602 (1918); Morgan, *The Office of the Attorney General*, N. CENTRAL L. REV. 165 (1970).

2. These powers are exercised on the theory that the prerogatives which pertain to the Crown are vested in the people of the country. The attorney general is vested in some states with common law powers without express constitutional provisions of the office. See, e.g., *Gibson v. Kay*, 68 Ore. 589, 137 P. 864 (1914). *Contra State ex rel. Steers v. Criminal Court of Lake County*, 232 Ind. 443, 112 N.E.2d 445 (1953).

3. 7 C.J.S. *Attorney General* § 1 at 1213 n.1 (1937).

4. Annot., 163 A.L.R. 1346 (1946); 5 AM. JUR. *Attorney General* § 9, at 239 (1936).

5. 7 AM. JUR. 2d *Attorney General* § 10, at 13 (1963).

6. *State ex rel. Young v. Robinson*, 101 Minn. 277, 112 N.W. 269 (1907). In *Young* a Minnesota statute imposed a duty upon municipal and other officers to make a complaint

At the federal level the Attorney General of the United States may conduct and argue any case in the United States in which the United States is interested when he considers it in the interests of the United States.⁷

III. SCOPE OF POWERS AND DUTIES OF THE ATTORNEY GENERAL OF NORTH DAKOTA

A. THE QUESTION OF THE ATTORNEY GENERAL'S COMMON LAW POWERS

It has been said that the Attorney General of North Dakota has no common law powers and duties.⁸ This view apparently relies upon

of any known violation of the state's liquor laws. The section of the statute subjected an officer guilty of neglect or failure of that duty to be guilty of malfeasance in office, and the duty of enforcing this section was placed upon the county attorney. Subsequently when a county attorney did not bring an action against the mayor of St. Cloud, the Attorney General of Minnesota did. The Court stated at 272-73 (citations omitted):

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. 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 at the common law. From this it follows that, 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. He 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. We have no statutory restrictions in this state. The statute under consideration, imposing specific duties upon county attorneys in the matter of its enforcement is in no proper view a limitation upon, nor does it exclude, the general authority of the Attorney General. . . . The purpose of this statute was not to confer special exclusive authority upon the county attorney, but rather to require of him the performance of an existing official duty. . . . Our conclusion, therefore, is that the Attorney General is authorized by law to maintain the action to enforce the pecuniary penalty in question, notwithstanding the fact that the county attorney might also maintain proceedings to recover it.

The majority of jurisdictions hold that the attorney general has powers similar to those recognized by the common law where such duties are prescribed by law. 2 ARIZ. L. REV. 293, 294 (1960).

State *ex rel.* McKittrick v. Missouri Public Ser. Comm'n, 352 Mo. 29, 175 S.W.2d 857, 861 (1943) held that the phrase "as prescribed by law" is taken to mean that statutes in the adoption of common law rights and remedies of litigants are to be interpreted in view of common law powers and remedies similar to those in England.

The courts of at least four states (New Jersey, Oregon, Kansas, and West Virginia) although recognizing the general capacity of the Attorney General to use common law powers, have reasoned that, when the Legislature delegates duties, which would be Attorney General's function under common law, to a prosecuting attorney, the powers so delegated vest exclusively in the local prosecutor. Yet the Minnesota, New York and Pennsylvania courts have held such powers to be concurrent in like situations.

Morgan, *The Office of the Attorney General*, 2 N.C. CENTRAL L. REV. 165, 177 (1970) (footnotes omitted). The term "prescribed by law" in the state constitution indicates that the legislature cannot revoke those powers and duties.

The Attorney General is vested with many powers and duties, and these appertain to his office under the Constitution. He cannot be deprived of those common-law functions by the Legislature, but new duties may be imposed.

Fergus v. Russell, 270 Ill. 304, 349, 110 N.E. 130, 144 (1915), *citing* People v. McCullough, 254 Ill. 9, 98 N.E. 156 (1912).

7. 28 U.S.C. § 518(b) (1970).

8. 33 N.D.L. REV. 110 (1957).

In most states the Attorney General has all the powers and duties given to

Section 1-01-06 of the North Dakota Century Code, which states: "In this state there is no common law in any case where the law is declared by the Code."⁹

However, evidence of the existence of the common law of North Dakota does appear in the Code. Section 1-01-03 provides that:

The will of the sovereign power is expressed by . . . the decisions of the tribunals enforcing those rules, which, though not enacted, form what is known as customary or common law.¹⁰

And similarly:

The evidence of the common law is found in the decisions of the tribunals.¹¹

Second, it has been held by North Dakota courts that a statute will be construed as a continuation of the common law, not as excluding the common law on that part of the subject not covered by the statute.¹²

Third, the framers of the state constitution also alluded to those powers by stating that the attorney general's office "has come down from the tradition of our fathers."¹³ Thus, it may be seen that the attorney general has common law powers and duties which are recognized in North Dakota.

Another argument against the existence of common law powers of the attorney general is that, according to Article 83 of the North Dakota Constitution, the powers and duties of the attorney general and certain other officers of the state are to be prescribed by law, and therefore, these officers have no common law powers and duties. The leading case upon this question held that a similar constitutional provision in the Illinois Constitution could not deny an attorney general of such powers:

The Constitution provides, as has been noted, that the Attorney General shall perform such duties as may be prescribed by law. The common law is as much a part of the law of this state, where it has not been expressly abrogated by statute, and is included within the meaning of this phrase. . . . By our Constitution we created this office by the common-law

the officer with that title under common law unless restricted by statute. In a minority of jurisdictions, including North Dakota, the powers of the Attorney General are solely statutory.

9. N.D. CENT. CODE § 1-01-06 (1975).

10. N.D. CENT. CODE § 1-01-03(7) (1975).

11. N.D. CENT. CODE § 1-01-05 (1975).

12. *Reeves & Co. v. Russell*, 28 N.D. 265, 148 N.W. 654 (1914).

13. N.D. CONST. CONVENTION OF 1887, PROCEEDINGS AND DEBATES 274.

designation of Attorney General and thus impressed it with all of the common law-powers and duties. . . .¹⁴

In North Dakota, the attorney general has often exercised his common law powers.¹⁵ While the North Dakota Supreme Court has never addressed itself directly to the question of whether the phrase "prescribed by law" indicates constitutionally imposed common law powers, the court has mentioned that such powers and duties are prescribed by law in the process of upholding various common law powers.¹⁶

B. COMMON LAW POWERS OF THE ATTORNEY GENERAL

The powers and duties of the attorney general at common law were so numerous and varied that legislatures have not attempted specifically to enumerate them.¹⁷ These powers and duties have a broad span:

[It is] the duty of the attorney general to institute necessary proceedings in the courts to enforce or protect any right of the public that is violated, or to redress or prevent any injury done to the public that demands intervention of the courts. It is an inherent function of his office to protect the public through the courts when they are injured, and have a cause of action. Who else could institute or direct a suit for the public? Can it be said that the courts would be closed to them, and that they would have no remedy against wrong or usurpation, if there should be no expressed law directing the attorney general to act? When there is a statute directing him, giving a legal remedy, he must be guided by it, but if there be none, the public are not for that reason deprived of the right to resort to judicial proceedings for protection against wrong. In such case, the remedy will be suited to the nature of the cause of action and the relief demanded. The state cannot sue by her attorney general to redress a private wrong; that is left to the individual injured; but where the public are injured the state must sue to redress the wrong by her attorney general, whether there be a statute to that effect or not.¹⁸

The attorney general has powers to bring an action where an individual member of the public may not. He may institute an ac-

14. *Fergus v. Russell*, 270 Ill. 304, 337-42, 110 N.E. 130, 143-45 (1915).

15. *See, e.g., Bonniwell v. Flanders*, 62 N.W.2d 25 (N.D. 1954).

16. *Queen Ins. Co. v. State*, 22 S.W. 1048, 1052 (Tex. Civ. App. 1893), *rev'd on*

17. *In re Equalization of Assessment of Natural Gas Pipelines*, 123 Neb. 259, 261, 242 N.W. 609, 610 (1932).

18. *Queen Ins. Co. v. State*, 22 S.W. 1048, 1052 (Tex. Civ. App. 1893), *rev'd on other grounds*, 86 Tex. 250, 24 S.W. 397 (1893). Compare N.D. CENT. CODE §§ 42-02-01 (1968) and 51-15-07 (1974), authorizing the attorney general to bring actions to abate common nuisances and to enforce consumer fraud laws, respectively, appear to be based on this common law concept. The essential elements of the attorney general's power to institute actions where the public is involved appears to be expressed in these statutes. These statutes reinforce the common law powers and duties of the North Dakota Attorney

tion in equity to purge the registrations of voters in a county;¹⁹ file an injunction contesting the validity of a statute granting relief from payment of interest or delinquent taxes;²⁰ intervene in the contest of a will where the state has an escheat interest in the estate of an intestate decedent;²¹ bring an action to recover for sand and gravel taken from the beds of navigable streams;²² bring mandatory injunctive action to remove enclosures around public lands of the state and restrain further construction of fences as a purpresture and public nuisance;²³ and petition for review of a reduction of tax assessments by state boards.²⁴

A test to determine whether the attorney general may exercise his common law powers to enforce the rights of the public may be stated as follows: The attorney general has the power to institute necessary proceedings in the courts to enforce or protect any right, redress or prevent any wrong where an injury has been done to the public which demands intervention of the court; the attorney general cannot sue for an individual to redress a private wrong, but the individual injured may have a private cause of action.²⁵

As the chief legal representative of the state, the attorney general is a proper person to receive service of process on its behalf.²⁶ In certain circumstances, he is permitted to intervene where the constitutionality of a statute concerning the public welfare is concerned.²⁷ He

General. See also N.D. CENT. CODE §§ 42-01-03 (1968) and 51-15-09 (1974), which allow recovery by individuals who have a claim for private nuisance and consumer fraud, respectively.

19. *Pierce v. Superior Court*, 1 Cal. 2d 759, 37 P.2d 460 (1934); see N.D. CENT. CODE §§ 16-01-11 to -11.2, 16-01-15 to -16 (1971), § 16-01-17 (Supp. 1975) for relevant election laws which involve the attorney general.

20. *Wilentz v. Hendrickson*, 133 N.J. Eq. 447, 33 A.2d 366 (Ct. of Chancery 1943).

21. *State ex rel. Smith v. Rector*, 134 Kan. 685, 8 P.2d 323 (1932). Compare N.D. CENT. CODE § 59-04-02 (Supp. 1975) which allows the attorney general and the state's attorney for the county where a public or charitable trust is established to be considered persons interested in the trust for purposes of supervision of such a trust.

22. *State ex rel. Rice v. Stewart*, 184 Miss. 202, 184 So. 44 (1938). Here the state tax collector improperly obtained a decree in a suit on the same cause of action. The Court held that the cause of action was not *res judicata*. *Id.* at 221, 184 So. at 46. Regarding the contention that the State Land Commissioner had authority to bring a suit of this character the Court held that the attorney general's statutory and common law powers vested him with the authority to represent the sovereign in the enforcement of his laws and protection of public rights. *Id.* at 222, 84 So. at 46.

23. *State ex rel. Templeton v. Goodnight*, 70 Tex. 682, 11 S.W. 119 (1888).

24. *In re Equalization of Assessment of Natural Gas Pipelines*, 123 Neb. 259, 261, 242 N.W. 609, 610 (1932). The State Board of Equalization contended that the statute giving legal right to appeal only to "any person, county or municipality affected thereby" did not give the counties affected the legal capacity to sue by and through the attorney general because only the county attorney could bring suit for the counties. The Board also contended that the attorney general had no legal capacity to institute suits or to appear for parties adverse to the State Board of Equalization. Invoking the common law powers of the attorney general to make any disposition of the state's litigation which he deems in the best interest, the Court held that the attorney general could bring the action. The Court did not address the issue of which party the attorney general was to represent, since the attorney general is also legal advisor of the state and its officers. See N.D. CENT. CODE § 54-12-01 (1960); 2 ARIZ. L. REV. 293 (1960).

25. *Queen Ins. Co. v. State*, 22 S.W. 1048, 1052 (Tex. Civ. App. 1893), *rev'd on other grounds*, 86 Tex. 250, 250, 24 S.W. 397 (1893).

26. *State v. Cook*, 57 Tex. 205 (1882); *State v. Steele*, 57 Tex. 200 (1882).

27. *VanRiper v. Jenkins*, 140 N.J. Eq. 99, 45 A.2d 844 (1946); *An Attorney General's Standing Before the Supreme Court to Attack the Constitutionality of Legislation*, 26 U.

has the power to institute, conduct, and maintain all suits and proceedings which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights.²⁸

The attorney general has the right, on behalf of the state, to prevent any private corporation from exercising any power not conferred on it by law when such an exercise may be harmful to the public.²⁹ He may bring an action to remove municipal officers for misconduct in office.³⁰ It is well settled that the attorney general may bring an action for quo warranto.³¹ He may intervene, in certain circumstances, in a civil case.³² Absent any express statutes, he cannot intervene in a divorce suit, even though the state has a re-

CHI. L. REV. 624 (1959). The general rule is that a public official has no standing to attack the constitutionality of legislation with which he is charged to enforce. Note, *The Power of a State Officer to Raise a Constitutional Question*, 33 COL. L. REV. 1036 (1933). However, in certain federal cases the Supreme Court has allowed the United States Attorney General to dispute the constitutionality of federal legislation. *E.g.*, *United States v. Realty Co.*, 163 U.S. 427 (1896). Since the Court has apparently distinguished between an attorney general and other public officials, the denial of standing to public officials would seem to be on grounds other than the lack of personal interest.

Thus while, it appears rather anomalous that an attorney general, whose duty it is to enforce legislation, be allowed to attack its constitutionality, it can be seen that there are circumstances where it is not unreasonable. In the first of the two suggested categories, the attorney general was in effect seeking to uphold the validity of a statute by urging the unconstitutionality of alternative interpretations. In the second, decisions of the Supreme Court indicate quite clearly a willingness to allow an attorney general—where private persons could not—to invoke the Constitution to attack legislation which he believes seriously impairs the best interests of the government.

Comment, *An Attorney General's Standing Before the Supreme Court to Attack the Constitutionality of Legislation*, 26 U. CHI. L. REV. 624, 632-33 (1959).

N.D. CENT. CODE § 32-23-11 (1960) provides that when declaratory relief is sought, all persons who have or claim an interest which would be affected by the declaration are to be made parties. In any proceeding which involves a statute, ordinance, or franchise alleged to be unconstitutional, the attorney general is to be served with a copy of the proceeding and shall be entitled to be heard. *See generally* *Langer v. State*, 69 N.D. 128, 284 N.W. 238 (1939). It has been suggested that the attorney general is required to raise the constitutional issue. Comment, *An Attorney General's Standing Before the Supreme Court to Attack the Constitutionality of Legislation*, 26 U. CHI. L. REV. 624, 627 n.20 (1959), *citing* *State ex rel. Johnson v. Baker*, 74 N.D. 244, 21 N.W.2d 355 (1945).

28. *State ex rel. Miller v. District Court*, 19 N.D. 819, 838, 124 N.W. 417 (1910). In general, the attorney general controlled and maintained all litigation on behalf of the Crown and could both intervene and institute all actions which were of concern to the general welfare. *Capitol Stages, Inc. v. State*, 157 Miss. 576, 128 So. 759, 763 (1930).

29. *State v. Farmers' Loan & Trust Co.*, 81 Tex. 530, 17 S.W. 60 (1891). *See* N.D. CENT. CODE § 10-04-12.1 (Supp. 1975), § 10-04-16(3) (Supp. 1975), §§ 10-15-46, 10-21-18, 10-26-03 (1960), dealing with the attorney general's powers regarding supervision of issue and sale of securities, dissolution of cooperatives or associations, dissolution of business corporations, and dissolution of nonprofit corporations, respectively.

30. *State ex rel. Young v. Robinson*, 101 Minn. 277, 112 N.W. 269 (1907). The defendant contended that the attorney general could not bring an action under the statute providing a penalty for misconduct for the reason that the duty of enforcing the statute was placed, by that same statute, upon the county attorney. The Court held that the duties of the attorney general and the county attorney were concurrent:

We have numerous instances where particular duties are expressly imposed upon the county attorney, yet it is clear that the Attorney General has the right, in virtue of his office, to cooperate with or act independently of that official in all cases where the public interests justify it. The purpose of this statute was not to confer special exclusive authority upon the county attorney, but rather to require of him the performance of an existing official duty.

Id. at 289, 112 N.W. at 272. *See* note 6 *supra*.

31. Annot., 131 A.L.R. 1207, 1212 (1941).

32. Annot., 163 A.L.R. 1346 (1946).

cognized interest in divorce litigation.³³ It is his duty to represent the state in tax cases before the supreme court.³⁴ However, the attorney general cannot represent the state where it is only a nominal party.³⁵ In an appearance before the supreme court, the court cannot appoint another attorney in place of the attorney general.³⁶

Because the common law powers of the attorney general are far reaching and broad, the attorney general may have an interest in proposed litigation whenever the state or the people are involved. However, he may bring these cases into court only under certain circumstances:

No matter how novel or evolutionary a problem may be, if it involves the state or any of its officers or departments, if it requires any work of a lawyer, is or may be involved in litigation or can be identified in any way as "law business," its handling . . . is the exclusive prerogative of the Attorney General under his inherent common law powers.³⁷

The interest involved may include, but should not be limited to: work which involves an attorney; the possibility of litigation; or identification of a problem as one which merits legal attention. Matters involving the state, its officers, or its departments, are within the scope of the common law powers of the attorney general. However, the attorney general is not bound to represent political subdivisions.³⁸

The interests of the public which may involve legal action by the attorney general are more limited in scope. When involved in a case involving the state, the attorney general may either defend or prosecute.³⁹ However, the attorney general, according to common law, may bring an action on behalf of the public only to enforce or protect a right, or redress or prevent a wrong. A present or future injury must be shown, and the attorney general cannot bring an action on behalf of private parties for a private wrong. The remedy sought must be available to the public in general and not just to a private party. An additional distinction must be made between the wrongs inflicted upon the public generally and those inflicted upon a private party. However, an injury inflicted upon several private parties under similar circumstances by the same adverse party may be considered to be an injury to the public.⁴⁰

33. Annot., 22 A.L.R. 1112 (1923).

34. *Storey v. Murphy*, 9 N.D. 115, 81 N.W. 23 (1899).

35. *State ex rel. Dakota Hall Ass'n v. Carey*, 2 N.D. 36, 49 N.W. 164 (1891).

36. *State v. Marshall County*, 14 S.D. 149, 84 N.W. 775 (1900).

37. *Freels, Powers of the Attorney General of Illinois*, 53 CHI. BAR REC. 119, 128 (1971).

38. *See State ex rel. Dakota Hall Ass'n v. Carey*, 2 N.D. 36, 49 N.W. 164 (1891).

39. *See* N.D. CENT. CODE § 54-12-01 (1974).

40. *See, e.g., State ex rel. Johanneson v. Glenn W. Turner Enterprises*, No. 44131 (1st Dist. N.D., filed July 13, 1972) brought under the provisions of N.D. CENT. CODE § 51-15 (1974).

In deciding whether to make an inquiry, initiate an investigation, or bring an action, the attorney general has a great deal of discretion.⁴¹ This may be reviewable by the courts, and the basis for the determination may become an issue at trial.⁴²

Barring outright abuse by the official or departments involved, the attorney general has no apparent right to question the discretionary acts of state officials. But a certain conflict is inevitable because of the dual nature of the attorney general's powers. The roots of the office, lying in the concerns of the public, makes the attorney general more responsible to the people than other elected officials. Although there are times when these duties conflict, the attorney general has a duty to protect the interests of both the state and the public.

IV. SPECIFIC NORTH DAKOTA COMMON LAW POWERS OF THE ATTORNEY GENERAL

A. CODIFICATION OF COMMON LAW

The framers of the Constitution of North Dakota were aware of the common law powers of the attorney general.⁴³ At the first legislative assembly following the Constitutional Convention of 1889, the legislature defined the powers and duties of the attorney general:⁴⁴

And, in this connection, it must be remembered that many of the members of the first legislative assembly were men who had participated actively in the framing of the constitution and must have prescribed the duties of the attorney general in the light of their understanding of its provisions.⁴⁵

41. *State ex rel. Ivedson v. District Court*, 70 N.D. 17, 291 N.W. 620 (1940).

42. *State ex rel. Young v. Robinson*, 101 Minn. 277, 112 N.W. 269 (1907). It has been held that an attorney general is not liable for malicious prosecution. In such instances, the plaintiff also encounters the problem of overcoming a defense of sovereign immunity. See *Kitto v. Minot Park District*, 224 N.W.2d 795 (N.D. 1974).

43. N.D. CONST. CONVENTION OF 1889, PROCEEDINGS AND DEBATES 228, 274 (1889). Of the 75 delegates to the Convention, 25 were listed as attorneys. The author of the Constitution was James B. Thayer, a Harvard law professor. The Northern Pacific Railroad, the largest corporation in the territory—owning nearly one-quarter of what is presently North Dakota—commissioned Professor Thayer to write the Constitution. Revision of Address by Prof. Elwyn B. Robinson, 75th Anniversary Conference of the University of North Dakota, November 6, 1958 hereinafter referred to as "Robinson Address". These facts were kept from the delegates until after the convention.

You may think it singular that the authorship of the work of this importance should wait until this time for public disclosure. The fact is, that it seemed prudent that when the work was doing to conceal its authorship. Though Mr. Villard was moved only by a single-hearted desire to promote the welfare of the two new states, it is feared that the draft-constitution prepared by an Eastern college professor, under the direction of a Wall Street lawyer and at the insistence of the head of the largest corporation in the territory, might fall of adoption if its authorship were known; that the people whom it was designed to benefit might entertain a suspicion that a Constitution so prepared, however fair upon the face, conceals some sinister attack upon their property rights. The two constitutions have been in force some 15 years. Their merits have been proved in that time.

C. LOUNSBERRY, EARLY HISTORY OF NORTH DAKOTA at 398-99 (1919).

44. Ch. 21, § 4, 1899 LAWS OF N.D. 104. This section is now found practically verbatim with the original enactment in section 54-12-01 of the North Dakota Century Code (1974).

45. *State ex rel. Johnson v. Baker*, 74 N.D. 244, 258, 21 N.W.2d 355, 363 (1946).

Thus, the statutes, derived from a continuation of the intent of the common law, should be given their common law meaning.

B. CASE LAW

The Supreme Court of North Dakota has carefully delineated the common law role of the attorney general. He is the principal law officer of the state, and his authority is co-extensive with the legal affairs of the whole community. His duties are general, and his discretionary powers enable him to act in a manner which he determines is in the best interest of the state and its people.

While the attorney general is the legal advisor of the agencies, boards, departments, and officers of the state, persons who are acting in their official capacities still possess the right to defend themselves as individuals in any action which may be brought against such an agency, board, department, or officer. Moreover, although the attorney general has control over any litigation in which the state or public interest is involved, he may not waive or agree to establish a basis of liability against the state.

Two major lines of cases demonstrating common law powers of the attorney general exist in North Dakota. The first line of cases arose during the stormy political era during which the Non-Partisan League (NPL) made a lasting impact on state government. These cases generally were often politically motivated, but they also served to explain and to expand the common law. The second line of cases involved litigation of claims upon the unsatisfied judgment fund.

1. NPL Period Cases

In *McCue v. Equity Co-op Publishing Co.*,⁴⁶ a former attorney general of North Dakota sued the defendant for libel for publishing certain materials which, the plaintiff alleged, gave readers the impression that he had acted wrongfully and corruptly in his official capacity. The court discussed the powers and duties of the attorney general in the odd context of a dissent by the writer of the majority opinion.

The State now has, and since its admission into the Union has had, constitutional prohibition. The Attorney General is the principal law officer of the state; "his duties are general; his authority is co-extensive with public legal affairs of the whole community." It is his duty, among other things, "to appear for and represent the State before the Supreme Court in all cases in which the State is interested as a party." And "when in his judgment the interests of the State require it, he

46. 39 N.D. 190, 204, 167 N.W. 225, 230 (1918).

shall attend the trial of any party accused of crime and assist in the prosecution." He is specifically charged with the duty of enforcing the state prohibition law in any county of the state wherein the state's attorney fails, neglects, or refuses to do so. Under our laws any willful omission on the part of a public officer to perform any duty enjoined upon him by law is a misdemeanor.⁴⁷

Certain restrictions are placed upon the attorney general. In *State ex rel. Amerland v. Hagen*,⁴⁸ the court held that boards or officers of the state possess the right of individuals to defend themselves in the courts of the state.

Furthermore, although it is perfectly obvious under the statute that the Attorney General is the general and the legal advisor of the various departments and officers of the state government, and entitled to appear and represent them in court, this does not mean that the Attorney General, standing in the position of an attorney to a client, who happens to be an officer of the government, steps into the shoes of such client in wholly directing the defense and the legal steps to be taken in opposition or contrary to the wishes and demands of his client or the officer or department concerned.⁴⁹

The act was then found to be constitutional.

However, in other cases the attorney general retained a great deal of discretion. For example, in *State ex rel. Byerley v. State Board of Canvassers*,⁵⁰ an application for a common law prerogative writ was made upon the supreme court by private individuals without first securing the consent of the attorney general or his refusal to maintain an action on behalf of the state or its interests. The court held that where a matter only affects the state, its interests, and the liberties of its people, and where no right of a relator or any citizens of the state is being threatened, the supreme court will refuse jurisdiction.⁵¹ The refusal of the attorney general to approve or act on an application, however, must be reasonable.⁵²

In the *Byerley* case, the attorney general, by refusing to act, prevented relators from bringing an action. This case upheld the attorney general's privilege to act in a manner which he determines is in the best interest of the state and the people, limited, of course, where the attorney general clearly abuses his discretion.

47. *Id.* at 230 (citations omitted).

48. 44 N.D. 306, 175 N.W. 372 (1919).

49. *Id.* at 311, 175 N.W. at 372.

50. 44 N.D. 126, 172 N.W. 80 (1919).

51. *Id.*

52. *State ex rel. Lofthus v. Langer*, 46 N.D. 462, 177 N.W. 408 (1919). In this case, the State Bank Examiner sought to prohibit the attorney general and the State Banking Board, of which the attorney general was a member, from usurping the powers and duties of the examiner and from continuing their appointee as a receiver of a certain bank.

In *State ex rel. Lofthus v. Langer*,⁵³ it was held that where the attorney general is a defendant in an action to restrain and prohibit alleged wrongful acts, the supreme court may exercise original jurisdiction independent of any application to, or the consent of, the attorney general.⁵⁴

It is true that ordinarily the consent or refusal of the Attorney General should be secured in initiating the exercise of the original jurisdiction of this Court for the reason that ordinarily the Attorney General is the legal representative of the interests of the state, its sovereignty, franchises, and liberties of the people. However, the contention is absurd that an application should be made to that officer in an action in which he is in fact one of the parties defendant, and which concerns his alleged wrongful acts and seeks to restrain them.⁵⁵

The *Langer* case recognizes the dual nature of the responsibilities of the attorney general to both the state and the people of the state. Moreover, this case indicates that interests of the people may include sovereignty, franchises, and liberties.

Under most circumstances assistant attorneys general have the authority to perform duties which the attorney general may personally perform, including the institution of appropriate actions on behalf of the state or the issuance of opinions on behalf of the attorney general.⁵⁶ In *State v. Heidt*,⁵⁷ the defendant contended that the attorney general was:

without legal authority to appoint an assistant for the purpose of instituting and prosecuting injunctive proceedings and proceedings to punish as for contempt violations of injunctive orders restraining and enjoining the maintenance of liquor nuisances under the so-called prohibition statute.⁵⁸

The court dismissed this argument as devoid of merit, stating that duties similar to those of the attorney general "may be imposed upon his assistants" constitutionally by the legislature and that in this case such a delegation had been properly made.⁵⁹ The court went on to explain:

The attorney general is a constitutional officer elected by the people, and, as before stated, is the head of the legal de-

53. 46 N.D. 462, 177 N.W. 408 (1919).

54. *Id.* at 473, 177 N.W. at 413.

55. *Id.*

56. *Id.*

57. 20 N.D. 357, 126 N.W. 72 (1910).

58. *Id.* at 366, 127 N.W. at 76.

59. *Id.*

partment of the state, and he occupies a widely different position with reference to the enforcement of criminal statutes than a mere appointive officer would occupy. Any duties which he may perform personally may, of course, be performed by his regularly authorized assistants.⁶⁰

The authority of assistant attorneys general was further discussed in *Walker v. Weilenman*.⁶¹ The plaintiffs in *Walker* contended that an opinion of an assistant attorney general was not an official opinion unless the attorney general personally endorsed it. The court, however, stated that:

This clearly is not the law in North Dakota. Our Constitution provides that the powers and duties of the Attorney General shall be prescribed by law. By law, the Legislature has authorized the Attorney General to appoint certain assistants. The Attorney General and his assistants are further authorized to institute actions whenever "in their judgement" it is in the best interests of the State to do so. The Attorney General may also "personally or through his assistants" make investigations of any matter properly referred to him. The Attorney General is not required to act personally in every matter or to approve all acts of his assistants. The opinion of the first Assistant Attorney General is, in our opinion, the opinion of the Attorney General even though such opinion is not personally signed or initiated by the Attorney General himself.⁶²

2. Unsatisfied Judgment Fund Cases

A great deal of common law is built up around the Unsatisfied Judgment Fund Act,⁶³ perhaps because of the interests individual claimants have in the outcome of the litigation. In actions involving uninsured motorists where certain conditions precedent have been alleged and proved,⁶⁴ a claimant may recover up to \$10,000.00 for bodily injury.⁶⁵ The Act has been found to be constitutional; specifically, it is not violative of equal protection simply because only res-

60. *Id.* at 367, 127 N.W. at 76.

61. 143 N.W.2d 639 (N.D. 1966).

62. *Id.* at 697 (citations omitted).

63. N.D. CENT. CODE ch. 39-17 (1972).

64. N.D. CENT. CODE § 39-17-03 (1972). The claimant must be a resident of the state, have a judgment exceeding \$300 in an action for damages for bodily injury or death, and must make his claim from an incident arising out of ownership, maintenance, operations, or use of a motor vehicle which occurred in this state.

The claimant, or judgment creditor, must give notice to the attorney general and must make application to the judge of the District Court. The judgment creditor must prove that he has obtained a judgment under the provisions of the Act, stating the total amount due and the amount owing. He must have caused an execution to have been issued and that either (1) the sheriff has made a return showing no property; or (2) there is insufficient property to satisfy judgment. He must show he has unsuccessfully examined the judgment debtor for automobile insurance, and he must also show that he has looked for and learned of no property of the judgment debtor's which would satisfy the judgment.

65. N.D. CENT. CODE § 39-17-07 (1972).

idents of North Dakota may recover under its provisions.⁶⁶ Also, it has been held to be prospective only in application.⁶⁷

A claimant under the Act is:

obliged to meet rigid requirements before he becomes entitled to the order and the attorney general, or special counsel representing the Fund, may appear in resistance. The burden of proof is upon the judgment creditor making application. . . . The judgment is not subject to compulsory assignment.⁶⁸

It has been held under Section 54-12-01 of the North Dakota Century Code that it is not necessary for the state to be named as a party to an action to be considered an interested party in a Fund case. Thus, the attorney general may make an appearance even though there was a failure to name the state as a party.⁶⁹

However, the provision in the Act for the appearance of the attorney general is only for the protection of the fund, and he has no authority to appear for any other purpose.⁷⁰ Neither the attorney general nor the highway commissioner can effectively waive the 30-day notice requirement after entry of a default judgment.⁷¹ The importance of the series of cases involving the unsatisfied judgment fund is that they constitute a continuation of the common law relating to the powers and duties of the attorney general.

The most important of the unsatisfied judgment fund cases is *Bonniwell v. Flanders*.⁷² In this case, the plaintiff failed to give the proper notice to the attorney general and the highway commissioner required by the Act, but had obtained a waiver signed by the two state officers. The court quickly held that the highway commissioner could not waive the notice requirement because he was a mere administrative officer.⁷³ The court then addressed itself to the issue of whether the attorney general could waive the required notice. It pointed out that the attorney general is "the chief law enforcement

66. *Benson v. Schneider*, 68 N.W.2d 665 (N.D. 1955). In the *Benson* case, the Court pointed out that plaintiff was neither a resident nor a motor vehicle registrant and that he was not seeking access to a natural right or privilege. No other right was restricted, and the "only privilege denied him was to have his uncollectible judgment paid out of the special fund created and administered for the benefit of residents of the State." *Id.*, at 670. See also *Geller v. Sather*, 147 N.W.2d 661 (N.D. 1967).

67. *Monson v. Nelson*, 145 N.W.2d 895 (N.D. 1966).

68. *Pearson v. State Unsatisfied Judgment Fund*, 114 N.W.2d 257, 260 (N.D. 1962) (citations omitted).

69. *Farmers Ins. Exch. v. Nagle*, 190 N.W.2d 758, 761-62 (N.D. 1971).

70. *King v. Menz*, 75 N.W.2d 516 (N.D. 1956). In this case, service was not made upon the nonresident defendant, but service was admitted by the attorney general on behalf of the defendant. The court held that, while the attorney general, acting purely in his official capacity, could make an appeal in this case, there was still a lack of jurisdiction over the defendant which the attorney general could not remedy by admitting service to confer such jurisdiction.

71. *Bonniwell v. Flanders*, 62 N.W.2d 25 (N.D. 1953).

72. 62 N.W.2d 25 (N.D. 1953).

73. *Id.* at 28.

officer of the State" and that "he may institute legal proceedings necessary to protect the interests of the state and defend all actions affecting public interest."⁷⁴ The general rule is that the attorney general has control of litigation in which the state is involved and of the procedure by which it is conducted.⁷⁵ But the court held that the attorney general may not, without special statutory authorization, waive or agree to establish a basis of liability against the state in an action where the state is not a party.⁷⁶

C. INTERPRETATION OF NORTH DAKOTA STATUTES

*State ex rel. Miller v. District Court*⁷⁷ offers the fullest explanation of the common law powers of the attorney general. In that case, the attorney general sought to appear before the grand jury in a matter involving prohibition. The lower court entered into the record the following order: "I will hold, General, that you have no right to go before the Grand Jury."⁷⁸ No claim was made by the attorney general that the state's attorney refused or neglected to perform any of the duties of his office. Section 9829 of the Revised Code of 1905 provided that only the state's attorney could be present during the sessions of a grand jury, but Section 9372, which prescribed the duties of the attorney general in enforcing the prohibition law, provided that the attorney general was to enforce laws relating to prohibition.

Whenever the state's attorney shall be unable, or shall neglect or refuse to enforce . . . or for any reason whatever, the provisions of this chapter shall not be enforced in any county, it shall be the duty of the Attorney General to enforce the same in such county, and for that purpose he may . . . perform any act that the state's attorney might lawfully do or perform.⁷⁹

The court noted that the attorney general is in the same category as the state's attorney, but he has a larger jurisdiction and is in a sense a superior and supervising officer.⁸⁰

The court could have rested its decision upon the discretion granted the attorney general by the prohibition law, but it went further and discussed the authority of the attorney general to appear before the grand jury in any county whenever or wherever there is

74. *Id.* See also *Giese v. Engelhardt*, 175 N.W.2d 578 (N.D. 1970); *State ex rel. Johnson v. Baker*, 74 N.D. 244, 21 N.W.2d 355 (1945).

75. 62 N.W.2d at 24.

76. *Id.* at 28.

77. 19 N.D. 819, 124 N.W. 417 (1970).

78. *Id.* at 821, 124 N.W. at 418.

79. *Id.*

80. *Id.* at 825, 124 N.W. at 419, citing *State v. Becker*, 3 S.D. 29, 5 N.W. 1018 (1892).

a grand jury in session in the state.⁸¹ Relying upon statutes which still exist,⁸² and upon the intent of the legislature in requiring state's attorneys to do certain acts,⁸³ the court held:

We are of the opinion that the Attorney General is the proper party to decide when he shall attend the trial of any party accused of crime and assist in the prosecution, and that the Attorney General or his assistants are the proper parties to decide when it is to the best interests of the state to institute and prosecute any case.⁸⁴

The court further noted that "the Attorney General is given broad discretionary powers and is placed in a supervisory position over the state's attorneys."⁸⁵ However, a vigorous dissent pointed out that there was no express authority for the attorney general to draw indictments or appear before grand juries.⁸⁶

This case gives the strongest argument to interpret the statutory powers of the attorney general in a broad, inclusive manner. The attorney general can do all acts necessary to institute and prosecute a case in which the state is an interested party, not just those which are set out by statute. The attorney general has a supervisory capacity over state's attorneys, and is given the right of determining what are the best interests of the state in relation to the institution and prosecution of cases affecting the interests of the state.

In citing statutory law in the *Miller* case, the court referred to Section 2494 of the Revised Code of 1905, now Section 11-16-01 of the

81. *Id.* at 827, 124 N.W. at 420.

82. *See, e.g.*, N.D. CENT. CODE §§ 54-12-01(4), (5), 54-12-02 (1974).

In *State v. Heldt*, 20 N.D. 357, 127 N.W. 72 (1910), the court discussed the decision in *Miller*. They said that the *Miller* case expressly recognized the power of the Legislature to confer upon the assistant attorney general the powers of the attorney general for certain purposes:

It was there conceded that the Legislature had the constitutional power to confer upon the Attorney General the right in his discretion to supplant the state's attorneys, or to assist them in the institution and prosecution of criminal cases. The question on which the Court divided was whether the Legislature had either expressly or impliedly conferred such right in the particular instances with reference to the particular duties there in question.

Id. at 367, 127 N.W. at 76.

See State ex rel. Ilvedson v. District Ct., 70 N.D. 17, 291 N.W. 620 (1940). In this case it was held that the state's attorney is a constitutional officer, and that as such, the legislature cannot strip from the state's attorney his important duties and transfer them to an officer appointed by a central authority. *See also Ex parte Corliss*, 16 N.D. 470, 114 N.W. 962 (1907).

83. *See State ex rel. Miller v. District Ct.*, 19 N.D. at 827, 124 N.W. at 420. The provision requiring the state's attorney to make monthly reports to the attorney general was repealed by ch. 161, § 1, [1945] LAWS OF N.D. 224. It should be noted that this is only one of several statutes upon which the court determined the case. The discretion of the attorney general "to institute and prosecute" any case in which the State is party whenever he determines it to be in the best interests of the state is the foundation of the Court's argument, and as pointed out in the discussion of the attorney general's common law powers, this statute is based upon common law. *See* N.D. CENT. CODE § 54-12-02 (1974).

84. *State ex rel. Miller v. District Court*, 19 N.D. at 828, 124 N.W. at 421.

85. *Id.* at 830-33, 124 N.W. at 422-23.

86. *Id.* at 836, 124 N.W. at 424.

North Dakota Century Code.⁸⁷ Subsection 9 of § 2494 of the Revised Code declared the intent of the legislature in creating the position of state's attorney.

It is the intention of this article to make the attorney general, his assistants, and the state's attorney the only public prosecutors in all cases civil and criminal, wherein the state or county, is a party to the action, and that they only shall be authorized and empowered to perform the duties herein set forth, except as hereinafter provided. The attorney general or his assistants are authorized to institute and prosecute any cases in which the state is a party, whenever in their judgment it would be to the best interests of the state so to do.⁸⁸

The state's attorney must enforce the law or he will be substituted by the attorney general or his assistants. This makes the attorney general a supervisor of state's attorneys and creates a two-part system of prosecution: the attorney general and the state's attorneys.

The attorney general is the chief prosecuting officer of the state, and has the same legal powers as state's attorneys. Examination of the relevant statutes does not reveal this provision in Section 11-16-01, but the 1944 Code Revisor stated that omission of this section was "for clarity only, without change in meaning."⁸⁹ Voluminous research reveals no subsequent change in legislative intent, and therefore, the original intent would appear to continue.

It is difficult to assess the impact of the omission of this provision. Many people have been under the impression that the attorney general could not exercise statutory powers over state's attorneys except in a limited fashion, and they have been unaware that the common law powers of the attorney general have existed for many years.⁹⁰

87. N.D. REVISED CODE § 2494(9) (1905). See *State v. Stepp*, 45 N.D. 516, 178 N.W. 951 (1920), wherein the court states that "the Attorney General, his assistants, and the state's attorneys are denominated the only public prosecutors in all cases, civil and criminal, wherein the State is a party of the action." *Id.* at 521, 178 N.W. at 953.

88. *State ex rel. Miller v. District Court*, 19 N.D. 819, 837, 124 N.W. 417, 424-25 (1910).

89. N.D. CODE REVISOR'S REPORT § 11-16-01 (1944):

In this revision, C.L. 1913, S. 3376, Subs. 9, has been divided into three independent sections. This section is composed of C.L. 1913, s. 3376, subs. 1, 2, 3, 4, 5, 6, 7, 8, 10, 11. C.L. 1913, S. 3376, subss. 12, 13 have been omitted from this section and placed in separate sections in this chapter. The section is revised for clarity only without change in meaning.

Quite clearly the Code Revisor exceeded his authority in eliminating this section "for clarity only" and he demonstrated a lack of understanding for the dual nature of the North Dakota prosecutorial system. One may only wonder at how much of the law was thus changed arbitrarily by stroke of the pen rather than by legislative enactment.

A search of authorities reveals the 1960 Code Revision made no comment on this section and there is no indication that this code revision destroyed the original intent of Section 9.

The repeal of Section 11 in 1945, shortly following the revision in 1944, seems to indicate that this section was particularly vexatious and appeared to serve no useful purpose. Ch. 161 § 1, [1945] LAWS OF N.D. 224.

90. See COMBINED LAW ENFORCEMENT COUNCIL, REPORT ON INTERAGENCY COMMUNICATION PROBLEMS, at 41-7 (1972).

D. SUMMARY

The attorney general of North Dakota is vested with broad common law powers which may be traced to the common law office under the English Crown. He may control and manage all litigation in all suits in behalf of the state, and he may intervene in all suits and proceedings in which the state or the people of the state are concerned. However, boards, agencies, and state officers may also retain counsel in addition to the attorney general.

The criminal powers of the attorney general have been divided into two offices, the prosecuting attorney and the attorney general, which are somewhat independent of each other; however, the North Dakota Legislature has created a two-part system of prosecution in which the attorney general has all the powers of the state's attorney, and he may exercise his discretion at any time and enter into any county to the end that the laws of the state are enforced.⁹¹ Moreover, it is doubtful whether these overlapping powers may be taken away from the attorney general on a constitutional basis.⁹²

It would be impossible to enumerate all of the common law powers of the attorney general. However, there are many specific holdings which indicate the extent of the attorney general's powers. The attorney general may exercise these common law powers at his discretion. Thus, the attorney general cannot be forced by court action to exercise his prerogative power.

The attorney general may not only exercise his powers where the state, its officers, or agencies are an interested party, but he may also exercise his powers where the rights of citizens are involved and where no right of action exists for any citizen individually. Much of the common law has been codified in North Dakota, and common law interpretations have been given to these statutes. The attorney general may appear before a grand jury in a criminal case and perform all other necessary functions in a criminal prosecution.

The attorney general has been described as the chief law enforcement officer of the state. "[H]is authority is co-extensive with the public legal affairs of the whole community."⁹³ He has a great deal of discretion at all stages of litigation, but there are certain limitations which courts have imposed.

The exercise of common law powers by the attorney general in North Dakota could have a major impact upon the state and its environment. Problems which the citizens of North Dakota will be facing in the immediate future, such as problems relating to the envi-

91. State *ex rel.* Johnson v. Baker, 74 N.D. 244, 21 N.W.2d 355, 363 (1946).

92. Fergus v. Russell, 270 Ill. 304, 110 N.E. 130 (1915). Compare N.D. CONST. §§ 82, 83.

93. State *ex rel.* Miller v. District Court, 19 N.D. 819, 831, 124 N.W. 417, 422 (1910).

ronment or energy development, are logical areas in which the attorney general may choose to exercise his discretionary powers.

V. STATUTORY POWERS

Shortly after the adoption of the North Dakota Constitution, the members of the first legislature, many of whom were men who actively participated in the framing of the constitution and must have prescribed the duties of the attorney general in the light of their understanding of its provisions,⁹⁴ enacted Section 4 of Chapter 21 of the Session Laws of 1889-1890, defining the powers and duties of the attorney general, now found practically word for word in Chapter 54-12 of the North Dakota Century Code. These provisions are based upon the common law powers and duties of the attorney general and are to be construed as a continuation of the common law.⁹⁵

The attorney general is a constitutional officer whose powers and duties are prescribed by legislative enactment.⁹⁶ Section 54-12-01 makes the attorney general the legal advisor of both the legislature and state officers. He is to give written opinions to the legislature upon legal questions, consult with and advise the Governor, other state officials, and various municipal officials, and when requested give opinions, not only on all legal questions, but also on all constitutional questions regarding the duties of such state officials. These opinions must be recorded in a book which must be delivered to the successors in office.

It should be noted that statutes do not require that the attorney general of North Dakota be an attorney at law, but case law indicates that he is an officer required to be learned in the law.⁹⁷ The attorney general is required, however, to perform certain functions which necessarily require an attorney. For example he may "institute and prosecute all cases in which the state is a party,"⁹⁸ appear and defend in all actions and proceedings against any state official in any state or federal court, and where both parties to an action are state officers, he may determine which party he shall represent.⁹⁹

94. *State ex rel. Johnson v. Baker*, 74 N.D. 244, 258, 21 N.W.2d 355, 364 (1946).

95. *State ex rel. Miller v. District Court*, 19 N.D. 819, 124 N.W. 417 (1910). In discussing the general duties of the attorney general, the court stated:

We cannot believe that the Legislature of this state imposed so many duties upon the attorney general and then deprived him of the means of performing those duties.

Id. at 833, 124 N.W. at 423.

96. N.D. CONST. § 83.

97. *Id.* at 277, 21 N.W.2d at 372, citing *Enge v. Cass*, 28 N.D. 219, 148 N.W. 607 (1914). See *Petition of Teigen*, 221 N.W.2d 94 (N.D. 1974), which held that the phrase "learned in the law" contained in N.D. CONST. § 94, relating to qualifications of Supreme Court justices, means admission to practice before the bar.

98. N.D. CENT. CODE § 54-12-02 (1974).

99. N.D. CENT. CODE § 54-12-01(3) (1974). However, when a suit or proceeding is commenced against an officer of the militia for an act done in his official capacity or against any person acting under the authority of an officer of the militia, the attorney general, an

The enforcement powers of the attorney general are broad and comprehensive. He is the superior prosecuting attorney and may oversee criminal prosecutions and civil matters which involve the state.

The attorney general is to attend the trial of any person when the interests of the state require such assistance.¹⁰⁰ He may also institute and prosecute all cases in which the state is an interested party.¹⁰¹ Statutory provisions authorize the attorney general to investigate and prosecute complaints in any county of the state. He may investigate any matter in any county for the purpose of enforcing the laws of North Dakota in that county when:

1. He deems it necessary for the successful enforcement of the laws of the state in such county;
2. Requested by a majority of the members of the board of county commissioners of the county; and
3. Petitioned by twenty-five taxpaying citizens of the county.¹⁰²

The attorney general is required to investigate and prosecute any criminal matter or complaint upon the written demand of any judge

assistant attorney general, or a judge advocate officer must provide the defendant with free legal representation. If the action is dismissed or if a verdict or judgment is rendered against the plaintiff, the defendant is to recover treble costs. N.D. CENT. CODE § 37-01-12 (Supp. 1975).

100. N.D. CENT. CODE § 54-12-01(5) (1974).

101. N.D. CENT. CODE § 54-12-02 (1974).

102. N.D. CENT. CODE § 54-12-03 (1974). The wording of this section has had an interesting history. The original enactment stated that the attorney general had the discretion to institute an investigation or prosecution when any one of the three prerequisites had been satisfied, e.g. the attorney general deemed it necessary for the successful enforcement of the laws of the state, the Board of County Commissioners requested the attorney general to investigate or prosecute in the county, or 25 taxpaying citizens of the county petitioned the attorney general.

INVESTIGATION BY ATTORNEY GENERAL. The Attorney General, whenever he deems it necessary for the successful enforcement of the laws of the State in any County, or when requested by a majority of the Board of County Commissioners of any County, or when petitioned by twenty-five tax-paying citizens of any County, may make an investigation in any such County to the end that the laws of the State shall be enforced therein and all violators thereof brought to trial.

Ch. 68, § 1, [1919] LAWS OF N.D. 79.

In 1943, the statutes were revised, and the Code Revisor reworded section 54-12-03, inserted the numerals, and omitted the conjunctive "or" between each of the prerequisites. However, the intended meaning of the section apparently remained unchanged because the section had "been combined to unite subject matter and to eliminate surplusage. Revised in form only without change in meaning." N.D. CODE REVISOR'S NOTES, § 54-12-03 (1943).

When the statutes were again revised in 1960, there was no mention in the revisor's notes regarding the legislative intent in reenacting section 54-12-03 using language which was identical to that which appeared in the 1943 revision. Subsequently, when the publisher replaced the volume in which section 54-12-03 appeared, an "and" was placed between the last two subsections.

It would appear that a proper interpretation of section 54-12-03 would allow the attorney general, in his discretion, to make an investigation or to commence prosecution in any county of North Dakota when any one subsection has been satisfied rather than requiring that all three subsections be satisfied. Extensive research has indicated that the intended meaning of this section has remained unaltered by language changes subsequent to its original adoption in 1919.

of a district court, and under such circumstances it is not necessary to obtain the consent of the state's attorney.¹⁰³

The attorney general is required to make a biennial report to the Governor and the Department of Accounts and Purchases, and in this report he is to direct attention to any defect in the practical operation of all laws relating to criminal offenses and revenue and to suggest necessary amendments and changes to serve the public interest.¹⁰⁴ He may also prosecute corporations for failure or refusal to make any reports required by law.¹⁰⁵

The attorney general may enforce any state environmental statute, rule, or regulation under authority of the North Dakota Environmental Enforcement Act of 1975.¹⁰⁶ He may maintain an action for abatement of a public nuisance,¹⁰⁷ and institute injunctive proceedings for the protection of children in a day care center or a family day care home.¹⁰⁸ He may also prosecute fraudulent charitable solicitations¹⁰⁹ and investigate alleged violations of lobbying laws.¹¹⁰

VI. EXECUTIVE AND ADMINISTRATIVE FUNCTIONS OF THE ATTORNEY GENERAL

The attorney general of North Dakota performs official functions in several categories: advisory, executive, and administrative.¹¹¹ The exercise of these functions is essential for the effective discharge of state governmental operations.

The administrative and executive functions of the attorney general may be divided into four general areas:

103. N.D. CENT. CODE § 54-12-04 (1974).

104. N.D. CENT. CODE § 54-12-05 (Supp. 1975):

The Attorney General shall make a biennial report to the governor and the department of accounts and purchases as prescribed by section 54-06-04. In addition to any requirements established pursuant to section 54-06-04, the report shall state:

1. The number, character, condition, and result of the actions prosecuted or defended by him in behalf of the state;
2. The cost of prosecuting or defending each action; and
3. The amount of fines and penalties collected.

He also shall direct attention to any defect in the practical operations of the law relating to revenue and criminal offenses, and shall suggest such amendments and changes as in his judgment are necessary to subserve the public interest.

105. N.D. CENT. CODE § 54-12-01(10) (1974).

106. N.D. CENT. CODE § 32-40-05 (Supp. 1975). The North Dakota Environmental Law Enforcement Act of 1975 provides that all remedies provided by the act are cumulative and are not to replace statutory or common law remedies. The attorney general is given the authority to enforce any state statute, rule, or regulation which relates to the environment. A state agency which seeks to bring an action under the provisions of the act must have the approval of the attorney general to bring such an action. Notice of all actions brought under the act must be given to the attorney general except any emergency proceedings necessary to protect the health, safety, or welfare of any person. See generally N.D. CENT.

107. N.D. CENT. CODE § 42-02-01 (Supp. 1975).

108. N.D. CENT. CODE § 50-11.1-12 (Supp. 1975).

109. N.D. CENT. CODE § 50-22-05 (Supp. 1975).

110. N.D. CENT. CODE § 54-05.1-04 (Supp. 1975).

111. [1946-48] REP. OF ATT'Y GEN. OF N.D. 5, 7 [FOREWORD BY ATT'Y GEN.] CODE ch. 32-40 (Supp. 1975).

1. Membership upon state boards, councils, and committees;
2. Licensing;
3. Administration of bureaus and divisions of government; and
4. General legal supervision.

Thus, in addition to being the legal officer of the state, the attorney general performs major administrative tasks which affect the operation of state government.

A. MEMBERSHIP UPON STATE BOARDS, COUNCILS, AND COMMITTEES

The attorney general has long complained that his membership upon various boards, councils, and committees is too time-consuming, and several attorneys general have urged his removal from these boards, councils, and committees.

The Attorney General is, at the present time, a member of about a dozen state boards. Attendance upon meetings of these boards consumes a great deal of time and the theory of the law is that being the legal advisor of the state he will be able to render opinions as legal questions arise at those meetings. This is wholly unsound. As a practical matter, it is very seldom that the Attorney General is in a position to render an opinion off hand upon complicated questions of law that may arise at such meetings. Furthermore, he is required to render opinions in writing in any event so that a permanent record may be made thereof. I would, therefore, suggest that the Attorney General be removed from the various boards of which he is now a member, except the State Pardon Board, so that he may devote his time and energy to the legal duties of his office and to the preparation of legal opinions for the numerous departments and boards for which he is responsible. The duties performed by these various boards are, in most cases, purely administrative. Strictly speaking, the Attorney General is not an administrative officer; his duties are rather of a judicial nature. He is required to give legal counsel to all the departments of state and prepare lawsuits of great importance for trial. He can contribute nothing to the routine of the transaction of business at the meetings of these administrative boards which any other state official or deputy cannot equally well contribute.¹¹²

The attorney general is a member of the Board of Pardons¹¹³ and the Board of University and School Lands¹¹⁴ by constitutional

112. [1921-22] REP. OF ATT'Y GEN. OF N.D. 13 [REC. ATT'Y GEN.].

113. N.D. CONST. § 76.

114. N.D. CONST. § 156.

provision, and he is a member of the Central Personnel Election Committee,¹¹⁵ the Combined Law Enforcement Council,¹¹⁶ the Industrial Commission,¹¹⁷ the Judicial Council,¹¹⁸ the Securities Board of Review,¹¹⁹ and the State Laboratories Commission¹²⁰ by statutory provision. Since 1960 he has been removed from ten boards, councils, and commissions, either by repeal or amendment,¹²¹ and he has been added to two.¹²²

B. APPROVAL OF ARTICLES OF INCORPORATION

The attorney general must approve the articles of incorporation for accident and sickness insurance companies,¹²³ benevolent societies,¹²⁴ county mutual insurance companies,¹²⁵ fraternal societies,¹²⁶ mutual insurance companies,¹²⁷ and mutual reinsurance companies.¹²⁸ However, the statutes which authorize the attorney general to perform these functions are not parallel and provide for differing responsibilities, depending upon the type of insurance organization involved.

C. APPROVAL OF BOND

The attorney general is to approve the bond of administrative bank receivers,¹²⁹ housing authorities,¹³⁰ revenue-producing buildings at institutions of higher education,¹³¹ and school textbook sellers.¹³²

115. N.D. CENT. CODE § 54-44.3-05 (Supp. 1975).

116. N.D. CENT. CODE § 12-61-01 (Supp. 1975).

117. N.D. CENT. CODE § 54-17-02 (1974).

118. N.D. CENT. CODE § 27-15-01 (Supp. 1975). *See also* Comment, *The Judicial Council Act*, 1 N.D.L. REV. 43 (1927).

119. N.D. CENT. CODE § 10-04-12.1 (Supp. 1975).

120. N.D. CENT. CODE § 19-01-02 (1971).

121. The attorney general was removed from the following boards and commissions by amendment or repeal:

Board to Control Distribution of Laws (1961)

Budget Board (1965)

Civil Defense Council (1973)

Commission to Hear Petitions for Consolidation of Insurance Companies (1961)

State Auditing Board (1973)

State Board of Canvassers (1961)

State Board of Public School Instruction (1963)

State Bonding Fund Board (1971)

State Safety Committee (1971)

Traffic Advisory Committee (1971)

122. The attorney general was named a member of the Combined Law Enforcement Council by ch. 117, § 1, [1967] LAWS OF N.D. 194 (codified at N.D. CENT. CODE § 12-61-01 (Supp. 1975)) and a member of the Central Personnel Election Committee by ch. 487, § 5, [1975] LAWS OF N.D. 1349 (codified at N.D. CENT. CODE § 54-44.3-05 (Supp. 1975)).

123. N.D. CENT. CODE § 26-13-03 (1970).

124. N.D. CENT. CODE § 26-25-07 (1970).

125. N.D. CENT. CODE § 26-15-03 (1970).

126. N.D. CENT. CODE § 26-12-07 (1970).

127. N.D. CENT. CODE § 26-14-03 (1970).

128. N.D. CENT. CODE § 26-15-26 (1970).

129. N.D. CENT. CODE § 6-07-13 (1975).

130. N.D. CENT. CODE § 23-11-25 (1970).

131. N.D. CENT. CODE § 15-55-07 (1971).

132. N.D. CENT. CODE § 15-43-02 (1971).

D. LICENSING

The attorney general of North Dakota is responsible for licensing retail alcoholic beverage dealers,¹³³ amusement games and devices,¹³⁴ amusement places,¹³⁵ detectives,¹³⁶ lie detector experts,¹³⁷ and persons to fit and sell hearing aids in the State of North Dakota.¹³⁸

E. BUREAUS AND DIVISIONS UNDER THE ADMINISTRATION OF THE ATTORNEY GENERAL

1. *Bureau of Criminal Investigation*

The attorney general is responsible for the administration of the Bureau of Criminal Investigation.¹³⁹ He appoints the chief of the bureau and is to fix his salary, and he is to appoint other agents and employees necessary to carry out the responsibilities of the bureau.¹⁴⁰ He must also furnish the necessary equipment to carry out the functions of the office.¹⁴¹

The bureau is directed to cooperate with and assist federal and state organizations in establishing and carrying on a system of criminal identification.¹⁴² It is also to cooperate and assist state law enforcement officers of any state or the federal government.¹⁴³ It is to establish a system for the apprehension of criminals and the detection of crime,¹⁴⁴ and is to keep a fingerprint record of convicts and criminal suspects.¹⁴⁵

When called upon by certain officers of the state, the bureau is to assist and aid in the investigation, apprehension, arrest, detention, and conviction of all persons believed to be guilty of committing a felony within North Dakota.¹⁴⁶ Special statutory authority is given to the bureau to provide training schools for police officers,¹⁴⁷ to maintain a file for the identification of persons convicted of issuing false and fraudulent checks,¹⁴⁸ to perform the inspection and enforcement duties for the attorney general's licensing department,¹⁴⁹ and to detect and apprehend persons illegally possessing or disposing of

133. N.D. CENT. CODE § 5-02-01 (1975).

134. N.D. CENT. CODE § 53-04-01 (1974).

135. N.D. CENT. CODE § 53-06-02 (1974).

136. N.D. CENT. CODE § 43-30-04 (Supp. 1975).

137. N.D. CENT. CODE § 43-31-04 (Supp. 1975).

138. N.D. CENT. CODE § 43-33-02 (Supp. 1975).

139. *See generally* N.D. CENT. CODE ch. 12-60 (Supp. 1975).

140. N.D. CENT. CODE § 12-60-05 (Supp. 1975).

141. N.D. CENT. CODE § 12-60-06 (Supp. 1975).

142. N.D. CENT. CODE § 12-60-07(1) (Supp. 1975).

143. N.D. CENT. CODE § 12-60-07(2) (Supp. 1975).

144. N.D. CENT. CODE § 12-60-07(4) (Supp. 1975).

145. N.D. CENT. CODE § 12-60-07(3) (Supp. 1975).

146. N.D. CENT. CODE § 12-60-07(5) (Supp. 1975).

147. N.D. CENT. CODE § 12-60-07(7) (Supp. 1975).

148. N.D. CENT. CODE § 12-60-07(8) (Supp. 1975).

149. N.D. CENT. CODE § 12-60-07(9) (Supp. 1975).

drugs.¹⁵⁰ The bureau is also to perform other duties assigned by the attorney general in the performance of his duties.¹⁵¹ The investigators for the bureau have all the powers conferred by law upon any peace officer of the state.¹⁵²

The attorney general must authorize all investigations made by or through the bureau of any state agency or state office.¹⁵³ The attorney general also has the authority to establish a scientific laboratory as a part of the Bureau of Criminal Investigation, and he is to specify the functions and duties of such a laboratory.¹⁵⁴ When requested to do so, the attorney general may make available to the state officials requesting such information the results of the laboratory facilities and personnel.¹⁵⁵

2. Consumer Fraud Division

Chapter 51-15 of the North Dakota Century Code, incorporating Chapter 51-13, the Retail Installment Sales Act, and Chapter 51-14, the Revolving Charge Accounts Act, constitute the major North Dakota consumer fraud provisions. Section 51-15-02 provides that:

The act, use, or employment by any person of any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice.¹⁵⁶

If the attorney general believes that any person has violated, is violating, or is about to violate the provisions of Chapter 51-15, he may use several of the powers granted to him to investigate the alleged fraud. After a complaint is received and a determination is made that it is well founded and that it is within his jurisdiction, the attorney general may take the following actions:

1. Require that the person being investigated make a full statement or report, under oath, of all the facts and circumstances surrounding the alleged defective acts or practice;
2. Examine under oath any person who is connected with the sale or advertisement of any merchandise;
3. Examine any merchandise, sample record, book, document, account, or paper;

150. N.D. CENT. CODE § 12-60-07(10) (Supp. 1975).

151. N.D. CENT. CODE § 12-60-07(6) (Supp. 1975).

152. N.D. CENT. CODE § 11-60-08 (Supp. 1975).

153. N.D. CENT. CODE § 12-60-09 (Supp. 1975).

154. N.D. CENT. CODE § 12-60-21 (Supp. 1975).

155. N.D. CENT. CODE § 12-60-22 (Supp. 1975).

156. N.D. CENT. CODE § 51-15-02 (1974).

4. Impound any record, book, document, account, paper, or sample of merchandise material to the alleged deceptive act or practice, but only by order of District Court;
5. Issue subpoenas to any person;
6. Administer an oath;
7. Conduct hearings to aid investigation or inquiry;
8. Prescribe rules and regulations on consumer affairs which will have the force of law.¹⁵⁷

These broad powers, as utilized by the attorney general, give him a decisive and positive role in consumer affairs in North Dakota. Through the effective use of his powers to promulgate rules and regulations on consumer affairs, the attorney general has a potentially strong provision to use and provide for quality standards for merchandise sold in North Dakota, to set up sales standards, and to regulate sales practices.¹⁵⁸

If a person fails or refuses to supply requested information or to obey a subpoena, the attorney general must apply to the district court, after giving notice, to request an order granting injunctive relief. The effect of the injunctive relief is the restraint of the sale or advertisement of any merchandise of any such person by the vacating, admitting, remitting, or suspending the corporate charter of a North Dakota corporation; revocation or suspension of a foreign corporation's certificate of authority to do business; the revoking or suspending of any other licenses, permits, or certificates used to further the allegedly unlawful practice; and granting such other relief as may be required.¹⁵⁹ These measures may be applied only until the person files a statement or obeys the subpoena. Such power is a serious economic lever which may serve to force compliance with Chapter 51-15.

The attorney general has three basic remedies available to him. These are injunction, prohibition, and restitution.¹⁶⁰ In addition to this, when it appears to the attorney general that a person has engaged in or is engaging in a practice declared unlawful by Chapters 51-13, 51-14, or 51-15, and that such person is about to (1) conceal his assets; (2) conceal his person; or (3) leave the state, the attorney general may apply to the district court *ex parte* for an order appointing a receiver to take charge of the assets of such a person. Requirements for receivership under Chapter 51-15 may be established by affidavit or by other evidence.¹⁶¹

157. N.D. CENT. CODE §§ 51-15-04 to -05 (1974).

158. Note, *Consumer Protection in North Dakota*, 49 N.D.L. REV. 643, 645 (1972).

159. N.D. CENT. CODE § 51-05-06 (1974).

160. N.D. CENT. CODE § 51-15-07 (1974).

161. *Id.*

F. GENERAL LEGAL SUPERVISION

The attorney general is to serve as the Superintendent of Criminal Identification and perform all duties incident to the proper and efficient conduct of that office.¹⁶² He is to appoint the State Fire Marshall and supervise the operation of the State Fire Marshall Department.¹⁶³ He is to administer the Interstate Agreement on Detainers Act.¹⁶⁴ The attorney general is also the attorney for the Unsatisfied Judgment Fund.¹⁶⁵

VII. THE POWERS AND DUTIES OF THE ATTORNEY GENERAL: A CHANGING CONCEPT

Despite any contentions to the contrary, the common law and statutory powers and duties of the attorney general have not been diminished in North Dakota. However, those who have held the office of attorney general have manifested a change in attitude regarding the apparent powers and duties of the attorney general which has caused a gradual reduction in the legal effectiveness of the office. Increased concern for administrative and executive functions has caused the attorney general to increase his policy-making role at the expense of reducing his effectiveness in enforcing the legal rights and remedies of the state and its citizens.

A. THE CONCEPT OF THE OFFICE: THE ATTORNEY GENERAL'S VIEW

The Report of the Attorney General of North Dakota reveals a part of North Dakota history from the viewpoint of previous attorneys general. Since the beginning of its publication, the Report has been used as a soapbox as well as a report in which attorneys general have leveled political pot shots, submitted model legislation, analyzed the role of the attorney general in state government, and almost incidentally fulfilled the statutory requirements of filing a biennial report.

The Report has been published regularly every two years from 1910 to the present. However, in 1916 Attorney General Henry J. Linde failed to make a report and died shortly thereafter. The 1915-1916 Report was eventually submitted in 1918 by Linde's successor, William Lempke. In 1930 when the State Capitol at Bismarck burned, the Report was also not made.

William Lempke was the only attorney general of North Dakota

162. N.D. CENT. CODE § 54-12-01(4) (1974).

163. N.D. CENT. CODE § 54-12-01(6) (1974).

164. N.D. CENT. CODE § 29-30-07 (1974).

165. N.D. CENT. CODE § 39-17-04 (1972). The attorney general is also to administer the Political Subdivisions Liability Fund, which operates in a manner somewhat similar to that of the Unsatisfied Judgment Fund. Ch. 295, §§ 5-9 [1975] LAWS OF N.D. 861. However, the Act expires June 30, 1977.

to be recalled while in office. In 1921 Lempke, Governor Lynn J. Frazier, and Commissioner of Agriculture and Labor John Hagen, were recalled at election and Lempke was succeeded by Sveinborn Johnson.

All the defeated incumbents were members of the NPL, the controversial party which reached the height of its powers between 1916 and 1920 and which continued to influence state politics well beyond this time into the turbulent 1930's. In the same election, however, efforts to refer NPL policies which had been enacted by the Legislature failed, which resulted in the removal of NPL members from certain state offices but did not interrupt NPL programs.

Evidence of the high emotional tenor of the times can be found in the 1921-1922 report by Sveinborn Johnson. He blamed the Industrial Workers of the World, also called the I.W.W. or "Wobblies," of trying to force a "socialistic state" which "they have actually practiced in North Dakota."¹⁶⁶ The political climate affected many aspects of state government:

At the Special Session of 1919, a law was passed giving the Governor the power to appoint Special Assistant Attorneys General. It is well known that this legislation was the outgrowth of a political feud between the Attorney General then in office and the rest of the administration. Aside from the doubt as to the constitutionality of this legislation, the theory of the law is absurd and unsound and I recommend that this legislation be repealed and the power to appoint his own assistants to be restored to the Attorney General.¹⁶⁷

The reports evidence the emerging concept of the office of attorney general by those who held it. The earlier reports show a concern for criminal matters.

The Attorney General and his assistants have also assisted and conducted prosecutions in a great number of important criminal cases in the District Courts of the State, and in the Supreme Court where appeals have been taken.¹⁶⁸

In 1940, Attorney General Alvin Strutz, later Chief Justice of the North Dakota Supreme Court, said that his licensing inspectors and investigators had confiscated and destroyed more than 200 gambling devices, slot machines, pinball machines, and similar devices, and the money contained was turned over to the State School Fund. He also said the Licensing Department was "active in the enforcement

166. [1921-22] REP. OF ATT'Y GEN. OF N.D. 16 [REC. ATT'Y GEN.].

167. *Id.*

168. [1936-38] REP. OF ATT'Y GEN. OF N.D. 5, 6 [FOREWORD BY ATT'Y GEN.].

of anti-gambling laws prohibiting the sale and exhibition of obscene books, literature, pictures, and printing."¹⁶⁹

Originally, the attorney general was considered an active law enforcement officer, both in prosecution and enforcement of state laws. He was impatient with anything that took him away from strictly legal matters.¹⁷⁰

But over the years, the concept changed. By 1938, Attorney General Strutz would call the office a "clearinghouse" for legal disputes.¹⁷¹ Nevertheless, Strutz recommended that the law should be amended "to relieve the attorney general from membership upon these commissions except those upon which he is a member by constitutional provision."¹⁷²

The next change in the concept of the office was rapid and drastic. In 1948, Attorney General Nels G. Johnson no longer disdained the "purely administrative" matter of the attorney general's power, but recognized that the attorney general could be a powerful decision-maker in state government.¹⁷³

Today the attorney general is chiefly considered to be an administrator. Because the essential powers and duties of the attorney general have not changed significantly since their original enactment, it seems surprising that the concept of the office has changed from one which emphasized his functions as a legal advisor to one which emphasizes his administrative duties.

VIII. CONCLUSIONS

The office of attorney general of North Dakota may be traced back to the English common law office of attorney general. The attorney general has two sources of power: statutory and common law powers. Under his common law powers and duties, he may control and manage all litigation in behalf of the state and the people, and may intervene in suits or proceedings which are of concern to the public.

The attorney general is the head of a two-part prosecutorial system and is in a supervisory position over the state's attorneys. He may bring all actions which may be brought by the state's attorney, and he may appear before a grand jury and perform all acts necessary to institute and prosecute a case wherein the state is an interested party.

The attorney general is responsible to both the state and the people of the state in the exercise of his powers. The exercise of

169. [1948-50] REP. OF ATT'Y GEN. OF N.D. [OP. ATT'Y GEN.].

170. [1921-22] REP. OF ATT'Y GEN. OF N.D. 13 [REC. ATT'Y GEN.].

171. [1936-38] REP. OF ATT'Y GEN. OF N.D. 5, 7 [FOREWORD BY ATT'Y GEN.].

172. *Id.*

173. [1946-48] REP. OF ATT'Y GEN. OF N.D. 5, 7 [FOREWORD BY ATT'Y GEN.].

his discretionary powers is reviewable by a court, and the attorney general cannot waive the rights of the state in an action against the state. He is the principal law enforcement officer of the state, and his authority is co-extensive with the public legal affairs of the whole community. He is the legal representative of the interests of the state, its sovereignties, franchises, and liberties of its people. The state may be made a party to any action where the interests of the state or its people are involved. In an action involving the interests of the state or its people, the attorney general may determine what constitutes the best interests of the state, but such a determination must be reasonable.

The common law powers of the attorney general are too numerous and varied to be specifically enacted by the Legislature, but North Dakota statutes relating to the powers and duties of the attorney general have been enacted with a view toward these common law powers. It appears that revocation of these common law powers may only be accomplished by constitutional amendment. These common law powers have mainly been exercised during the NPL era in North Dakota politics and following the enactment of the Unsatisfied Judgment Fund.

Assistant attorneys general may perform any duties which the attorney general may personally perform unless it is specifically required statutorily or is a constitutional duty. Assistant attorneys general may issue official opinions in the name of the attorney general.

A state official acts at his peril if he does not adhere to the holding in an attorney general's opinion. Although the attorney general is authorized to represent state officers and agencies acting in their official capacity in any legal proceeding, state officers, and agencies may retain private counsel in such proceedings to protect their individual rights.

The attorney general performs legal, executive, and administrative functions in state government. He is a member of several boards, councils, and committees which broaden his powers and enable him to make policy decisions affecting the state, and he is a member of the Industrial Commission, which operates all state enterprises and businesses. He is responsible for the licensing of certain types of businesses affecting the public interest, and he administers several divisions and departments of state government.

The exercise of these powers carries with it a broad responsibility to secure the interests of the state and its people for the benefit of North Dakota and its citizens. Alvin Strutz, once attorney general of North Dakota and later its Chief Justice of the Supreme Court, summarized those attributes which the attorney general should possess to fulfill his duties:

The Attorney General, the head of the Department of Justice, should have three of the four attributes of divinity. In other words, he should be omnipotent, omniscient and omnipresent.¹⁷⁴

174. *Id.* at 9.

