

Board of County Commissioners, Authority to Employ Special Counsel.

It is not within the province of the Board of County Commissioners to employ special counsel at the expense of the county for the prosecution of criminal cases. However, there can be no legal objection to the employment by them at county expense of special counsel for the prosecution of a civil case to which the county is a party, but it is not within the province, nor has the Board of County Commissioners, authority to employ, at the expense of the county, special counsel to prosecute cases, either civil or criminal, in the supreme court on appeal generally, as such duty is by law placed upon the attorney general.

Helena, Montana, Sept. 9, 1905.

Hon. James E. Healy, County Attorney, Butte, Montana.

Dear Sir:—I am in receipt of your letter of the 6th instant, submitting for opinion certain matters, which, for convenience, may be grouped as follows:

1. Has the board of county commissioners authority to employ, at the expense of the county, additional or special counsel for the prosecution of criminal cases?
2. Has said board the authority to employ, at the expense of the county, special counsel for the prosecution of civil cases to which the county is a party?
3. Has said board the authority to employ, at the expense of the county, special counsel to prosecute cases, either civil or criminal, in the supreme court on appeal, where the attorney general is qualified and acting?

These questions will be considered in their order.

I.

The provisions of Section 4450, Political Code, and laws of 1899, p. 76, make it the duty of the county attorney "to attend the district court

and conduct on behalf of the state all prosecutions for public offenses * * * within the limits of his county." No direct authority is vested in the board of county commissioners to employ a special prosecutor in a criminal case. Section 4230, Political Code, which enumerates the general and permanent powers of the board, contains no such provision. Subdivision 15 of said section cannot apply, for the county is not in any sense a party to a criminal action. (*Modoc County v. Spencer*, 103 Cal. 498, 37 Pac. 483.)

Section 2108, Penal Code, provides "If the county attorney fails to attend at the trial, the court must appoint some attorney at law to perform the duties of the county attorney before the grand jury or otherwise."

Similar statutory provisions have been construed by courts of last resort to other jurisdictions. In *Modoc County v. Spencer*, above, the supreme court of California held that the board of county commissioners did not have the authority to employ counsel in a criminal case, but that such authority was vested exclusively in the court. To the same effect are the decisions in *Brome v. Cuming County*, 31 Neb. 362; *Board Co. Commrs. of Grant Co. v. Bradford*, 72 Ind. 455; *Tull, Treasurer v. State*, 99 Ind. 238.

And in *Williams v. Commissioners*, 28 Mont. 360, the court, in construing the authority of the board, said: "If it has power to employ counsel under this statute (Sec. 4230, Political Code), which we do not decide, it has none whatsoever to do so in a case to which the county is not a party."

Inasmuch as the county is not a party to a criminal case, it is apparent that the board of county commissioners has no power or authority to employ counsel in such a case. This question was not presented nor decided in *State v. Whitworth*, 26 Mont. 107.

II.

The power of the board with reference to civil cases is more clearly defined by the statute. Subdivision 15, Section 4230, confers upon the board the authority "To direct and control the prosecution and defense of all suits to which the county is a party." And subdivision 22, of said section, further provides that the board has power "to represent the county and have the care of county property, and the management of the business and concerns of the county in all cases where no other provision is made by law." And subdivision 25, of the same section, gives to the board authority "to perform all other acts and things required by law not in this title enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government."

Under these statutory provisions, and the general power vested in boards of county commissioners to guard and protect the interests of the county, such boards have the authority to employ counsel in civil cases, to which the county is a party, when the public interests demand the same. (*Jordan & McCallum v. Osceola Co.* 59 Iowa, 388; *Hornblower v. Duden*, 35 Cal. 664; *Lassen Co. v. Shinn*, (Cal.) 26 Pac. 365.)

It must, however, be kept in mind that the people of each county elect

a county attorney on whom is enjoined the duty of looking after the interests of the county in all matters of litigation, and he is the legal adviser of all county officers, and he is paid a salary for the discharge of these duties. This power of the board to employ a special county attorney can be exercised rightfully only when the public interests of the county demand it. for an arbitrary exercise of this authority would have the effect of nullifying the provisions of the statute which enjoin these duties upon the county attorney, and would, in effect, set at naught the action of the people in designating, by election, the attorney who should act as the legal representative of the county.

Where the duly elected county attorney is, by reason of physical inability, self-interest, absence, or pressure of official business, unable to attend to the particular case or discharge the particular duty, there is no question but what the board may engage special counsel; but to attempt any enumeration beyond this, in which the board may engage special counsel, would be mere speculation or the expression of an individual opinion which could be of no assistance, and the general rule can only be stated that the board of county commissioners may engage special counsel, in civil matters to which the county is a party, where the business interests of the county demand it.

III.

It seems well settled that the board of county commissioners cannot employ special counsel to prosecute criminal cases or civil cases to which the county is not a party. See *Williams v. Comms.*, 28 Mont. 360; *Ind. Pub. Co. v. Lewis and Clark Co.* 30 Mont. 83, and also, authorities and statutes above cited in subdivision No. 1 hereof.

Under the provisions of subdivisions 1, 4 and 5, Section 460, Political Code, it is the duty of the attorney general to attend the supreme court and prosecute or defend all cases to which any county may be a party unless the interests of the county is adverse to the state or some officer thereof acting in his official capacity; also, to keep a register of all cases in which he is required to appear, which must be open to the inspection of the public, and which shall show the county, district and court in which the case was instituted and tried and the nature of the case. He is also given authority to exercise supervisory powers over county attorneys in all matters pertaining to the duties of their offices.

Except in cases where the interests of the state, or some officer thereof acting in his official capacity, is adverse, it is made the duty of the attorney general, by express command of positive statutory provisions, to represent the county in all actions pending in the supreme court. The attorney general takes his oath of office and gives a bond for the faithful discharge of this duty, and it is idle to say he may be subordinated in its discharge to the judgment of special counsel employed by a board of county commissioners, or be entirely superseded by such counsel, and thus be prevented, by reason of a contract entered into by the board of commissioners with a third party from discharging a duty which the law says he must perform, and the performance of which he is not vested with authority to waive. This would be giving to the board the power

to nullify, or at least modify, a statute. If the attorney general may exercise supervisory powers over the duly elected county attorney (and this he may do, subdiv. 5, Sec. 460, Pol. Code) he certainly has like authority over a specially appointed counsel, for such special counsel cannot be vested with greater power than is possessed by the regular county attorney. The duty of prosecuting these cases in the supreme court is one of the specially enumerated duties of the attorney general, and if such cases are presented by special counsel, such counsel is, to that extent, discharging the duties of the attorney general, and is, in effect, an assistant to the attorney general, for he cannot supersede him. Nowhere is the board of county commissioners given the authority to employ an assistant for a state official. As well might it be contended that the board could employ an assistant secretary of state or an assistant clerk of the supreme court.

It appears that so long as the case remains in the trial court the board may exercise a certain control over it, but when it is taken by appeal to the tribunal of last resort it passes entirely beyond the board's jurisdiction, and the duty of presenting it is vested in a state official, to-wit, the attorney general, and the board of county commissioners does not have the authority to relieve the attorney general from the discharge of this duty nor to employ an assistant attorney general to discharge the duties for him.

It is true that county attorneys may assist in the preparation of briefs or aid the attorney general by advice, but this is a matter of courtesy. It is likewise true that a county attorney may appear and aid in the oral argument, but this is likewise a matter of courtesy, and we are here considering only the abstract right and legal authority.

No adjudicated case has been found directly in point, but our supreme court has frequently decided that all briefs and transcripts in such cases must be served on the attorney general. (Murray v. Livingston, 29 Mont. 567; McIntosh Hardware Co. v. Flathead Co. 80 Pac. 239.)

The cases and statutes heretofore cited, as well as the following cases, I believe sustain the conclusion here reached, to-wit, that the board of county commissioners do not have the authority or power to employ special counsel for the prosecution of any case to which the county is a party in the supreme court, where such case has been removed by appeal to such court, and the attorney general is qualified and acting. (People v. Pacheco. 29 Cal. 211; County of Sacramento v. R. R. Co. 61, Cal. 250; State v. District Court, 22 Mont. 25.)

Respectfully submitted.

ALBERT J. GALEN,
Attorney General.