

Opinion No. 61-56

June 29, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Norman S Thayer, Assistant Attorney General

TO: Mr. Philip T. Manly, Attorney, State Judicial System Study Committee, 201 State Capitol, Santa Fe, New Mexico

QUESTION

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Attorney General's Opinion No. 61-5, January 9, 1961 advised "that judicial proceedings other than purely formal acts are void if performed on Sunday."

1. Are the following acts "judicial" or "ministerial"?
 - a. Accepting the filing of a criminal complaint?
 - b. Issuing a warrant in a criminal case?
 - c. Setting and accepting an appearance bond in a felony case?
 - d. Setting and accepting an appearance bond in a misdemeanor case?
 - e. Handling any part of a civil case?
 - f. Issuing a writ of habeas corpus or other writ?
2. If the acts mentioned in question 1 (a) through (d) above are "judicial" acts, must a person charged on Sunday with commission of a crime be incarcerated until Monday morning when the court is able to set bail or hear:
 - a. Felony charges alleged by a law enforcement officer?
 - b. Misdemeanor charges alleged by a law enforcement officer?
 - c. Criminal charges alleged by a citizen?
3. May a justice of the peace or municipal magistrate designate some other person or agency as his clerk, deputy, or agent to accept or to set and accept appearance bonds in criminal cases?

CONCLUSIONS

1. See analysis.
2. See analysis.
3. See analysis.

OPINION

ANALYSIS

The reason for your question, as we understand it, is to determine whether the acts listed may be performed on Sunday. Some helpful general rules are stated in **83 C.J.S.**, 'Sunday', Sections 45 and 48.

Section 45 provides, in part:

". . . at common law and also commonly under the Sunday statutes, warrants may issue and arrests or other appropriate execution be made on Sunday."

Section 48 provides, in part:

"A bail bond or recognizance entered into on Sunday, for the purpose of securing the release of a person in custody and his appearance for trial, is valid, the entering into such bond being a ministerial, rather than judicial act, and hence not void at common law . . ."

Following these general rules, it is our opinion that warrants in criminal cases may issue on Sunday, and that setting and accepting appearance bonds are ministerial acts that may be performed on Sunday, in felony cases as well as misdemeanor cases. Our conclusion is supported when we notice that warrants of arrest may be issued by the Clerk of the Court under Section 41-1-4, N.M.S.A., 1953 Compilation, and appearance bonds may be accepted by nonjudicial officers under Section 41-4-9, N.M.S.A., 1953 Compilation, thus indicating that these are ministerial, rather than judicial acts.

We feel no hesitation in advising that the acceptance of the filing of a criminal complaint is a purely formal act that may be performed on Sunday. Although the judge receiving the complaint is required by Section 41-1-1, N.M.S.A., 1953 Compilation, to examine the complainant and any witnesses introduced to him to determine whether it appears that a crime has been committed, and to issue a warrant for the arrest of the accused if it does so appear, it is obvious that these acts have nothing to do with the merits of the case, or with the guilt or innocence of the accused. This proceeding can only lead to issuance of a warrant of arrest, which, as we have seen, is valid even when performed on Sunday. It would be contradictory for us to say that a warrant could be issued on Sunday, but that the conditions precedent to its issuance could not be performed on Sunday.

In our opinion the entire procedure from the filing of the complaint, through issuance of the warrant and arrest of the accused, through the setting and acceptance of an appearance bond, may validly be performed on Sunday.

Civil cases present different problems. They fall within the common law prohibition of judicial proceedings on Sunday, unless expressly sanctioned by statute.

It seems clear that the filing of a civil complaint is a mere ministerial act that can be performed on Sunday. Such a filing ordinarily requires nothing beyond docketing the complaint and receiving the filing fee.

As to civil process that may issue or be served on Sunday, we refer to Section 21-1-1 (4) (6), N.M.S.A., 1953 Compilation:

"No civil process shall be issued or served on Sunday, except in case of *capias*, attachment or *replevin*, when the plaintiff, or his agent, shall make oath that he is in danger of being subjected to loss, or serious inconvenience, unless process shall be issued or served on said day. In all other cases, any civil process issued, or the service thereof, on said day, shall be void."

Clearly, only the writs mentioned in this statute may be issued and served on Sunday. Summons, writs of garnishment, writs of execution and other forms of process are void when issued or served on Sunday. This effectively restricts the handling of civil cases. We think it obvious that the trial of a civil case (or a criminal case, for that matter), including the examination of witnesses or the determination of the merits of the case is a judicial proceeding that may not be performed on Sunday.

We add that Section 21-1-1 (4) (6), *supra*, by authorizing issuance of writs of *capias*, attachment, and *replevin* on Sunday, also authorizes by necessary implication, the setting and receiving of the bonds required for the issuance of such writs.

Section 21-1-1 (4) (6), *supra*, clearly prohibits the issuance or service on Sunday of writs of habeas corpus, or any other writ not specifically permitted in the statute. That habeas corpus is a civil, and not a criminal, proceeding was settled in ***In re Borrego***, 8 N.M. 655.

It is unnecessary to answer your second question, since we have advised that the acts on which it is predicated may be performed on Sunday.

Turning to your third question, Section 41-4-1, N.M.S.A., 1953 Compilation, requires the court or officer issuing a warrant of arrest to make an order to admit the defendant to bail, and to endorse on the warrant the amount of the bail. Except in cases of indictment, when the clerk of the district court may issue a warrant of arrest, the judge of the court is the only officer who may issue a warrant of arrest and hence, is the officer required by law to **set the amount** of the bail. Thus, we conclude that justices of the peace and municipal magistrates must themselves set bail for appearances in criminal

cases in their respective courts. And, under Sections 41-3-13 and 41-3-15, N.M.S.A., 1953 Compilation, it is clear that the justice of the peace must himself set bail for appearance in the district court if the defendant is bound over following preliminary hearing.

As for **accepting the bail**, we refer to Sections 41-4-9, 41-4-10, and 41-4-12, N.M.S.A., 1953 Compilation.

41-4-9. "Any officer authorized to execute a warrant in in a criminal action may take a recognizance and approve bail; he may administer the oath and examine the bail as to its sufficiency."

41-4-10. The defendant may, in the place of giving bail, deposit with the clerk of the court to which the defendant is held to answer, the sum of money mentioned in the order . . ."

41-4-12, "When any person is committed for want of bail, and the amount of the bail is specified in the warrant of commitment, the sheriff may take the recognizance and approve the bail."

These statutes clearly authorize officers executing warrant of arrest to accept a recognizance, (and authorize sheriffs to accept a recognizance from prisoners, where the amount of the bail is specified in the comitment.) The clerk of the court in which the defendant is to appear is authorized to receive the amount of money specified on bail.

Our opinion, therefore, is that justice of the peace and municipal magistrates may appoint clerks to receive the amount of money specified as bail, and may authorize the sheriff or the officer executing the warrant of arrest to accept the recognizance bond and approve the bail.