

**Criminal Law—Sunday—Justice of the Peace.**

Where a Justice of the Peace arraigned a defendant, accepted his plea of guilty, and sentenced him upon Sunday, such sentence and judgment were void, but the defendant was not discharged thereby but held under the warrant of arrest and could be brought before the Justice for re-sentence.

R. V. Bottomly, Esq.,  
County Attorney,  
Chinook, Montana.

My dear Mr. Bottomly:

The following statement of facts has been submitted to this office: That on Sunday, June 10, 1923, a Deputy Game Warden brought before a Justice of the Peace a person charged with fishing without a license. This party waived time for plea and pled guilty to the charge and asked to be sentenced. Whereupon a fine of \$25.00 was imposed on the defendant. On account of the defendant having no money, the sentence was suspended for 30 days, in order to give the defendant an opportunity to pay the same. The defendant failed to pay the fine within 30 days, and based thereon you have submitted the following questions, upon which you have requested my opinion:

"1st. Was the Justice of the Peace acting within his powers when he allowed this defendant to enter his plea and impose sentence on Sunday?

"2nd. Did he have authority, as Justice of the Peace, to suspend the sentence for 30 days?

"3rd. Is there a method whereby the Justice of the Peace may compel the defendant to come into court and pay the fine, or be committed to jail?"

Section 22 of Article VIII of the Constitution provides:

"Justices' courts shall always be open for the transaction of business, except on legal holidays and non-judicial days." Section 8850, Revised Codes of 1921, provides in part as follows:

"No court must be open, nor must any judicial business be transacted, on Sunday, \* \* \* except for the following purposes: \* \* \*

"3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature;" \* \* \*

This provision of our statute evidently was borrowed from California, and was construed by the Supreme Court of that state in the case of *Ex parte Smith*, 93 Pac. 191. In that case the prisoner was convicted of the crime of burglary, was arraigned for sentence on the 29th day of November, which day had been by the Governor of

the State of California designated a legal holiday. It was objected that the court was without jurisdiction to perform any judicial act on that day, except those acts enumerated in Section 134 of the Code of Civil Procedure which corresponds with our Section 8850. It was contended that inasmuch as the judgment and commitment were void, the prisoner must be discharged. After reviewing the authorities cited in behalf of this contention, the Court said:

“Without further reference to the cases cited by counsel for petitioner, it is sufficient to say that there is no decision of this court which stands opposed to the plain and common-sense proposition that, if the sentence pronounced by Judge Cook on the 29th day of November was void for the reason that he was forbidden by the Constitution or statute to perform that judicial act on that day it is void for all purposes, and the prisoner is lawfully held today, as he was held prior to that time, under the bench warrant issued on the filing of the information, and subject to be again arraigned for judgment at any time when the court is competent to act.”

Section 11619, Revised Codes of 1921, defines who are magistrates as follows:

- “1. The Justices of the Supreme Court.
- “2. The Judges of the District Court.
- “3. Justices of the Peace.
- “4. Police Magistrates in towns or cities.”

This provision of our statute also corresponds to Section 808 of the California penal code, from which state it was apparently borrowed by this state. The California court, therefore, held under a statute identical with our own that a superior court had no power to pronounce sentence on a legal holiday, and that, while a sentence so pronounced was void, this did not discharge the prisoner who is still held under the bench warrant and that he could be again arraigned for sentence. While the case of *Ex parte Smith* was decided after the adoption of Section 8850, yet it is believed that the courts of this state would follow the California court in construing this section.

It would follow that the fine imposed on Sunday being void, the prisoner could still be held under the warrant of arrest and could be again brought before you for re-sentence.

The answer to this question disposes of your questions numbered 2 and 3.

Very truly yours,

WELLINGTON D. RANKIN,  
Attorney General.