

Opinion No. 76-18

June 16, 1976

BY: OPINION OF TONEY ANAYA, Attorney General Raymond Hamilton, Assistant Attorney General

TO: Mr. John P. Isaacs, Assistant District Attorney, Eighth Judicial District, Clayton, New Mexico 88415

QUESTIONS

Question

Is the municipal jail owned and operated by the Town of Clayton, constructed solely with city funds, and the only jail in Union County, a "common jail" within the meaning of Section 42-2-1, NMSA, 1953 Comp. (2nd Repl. Vol. 6), and thus subject to the control of the Union County Sheriff?

Conclusion

No.

OPINION

{*83} Analysis

Section 42-2-1, NMSA, 1953 Comp. (2nd Repl. Vol. 6) provides:

JAILS UNDER CONTROL OF SHERIFFS -- USE. -- The common jails shall be under the control of the respective sheriffs of each county, and the same shall be used as prisons in the respective counties.

The language of Section 42-2-1, **supra**, was enacted originally in Laws 1865-1866, Ch. 19, Sec. 1. The provision read:

Sec. 1. **The common jails** now standing or that may hereafter be built in the different counties of this territory, **shall be under the control of the respective sheriffs of each county, and the same shall be used as prisons, in the respective counties** for the purposes in this act provided. (Emphasis supplied.)

Compilers of the 1915 Code deleted the words "now standing or that may hereafter be built in the different counties of the territory" and the terms "for the purposes in this act provided." The language of Section 42-2-1, **supra**, remains as originally enacted.

A statute must be interpreted as the legislature understood it at the time it was enacted. **State v. Cutnose**, 87 N.M. 300, 532 P. 2d 889 (Ct. App. 1975); **Montoya v. City of Albuquerque**, 82 N.M. 90, 476 P.2d 60 (1970). Also, when interpreting a statute it should be presumed that the legislature was informed as to existing law, not only statutory law, but common law. **Bettini v. City of Las Cruces**, 82 N.M. 633, 485 P.2d 967 (1971). When enacted in 1865-1866 "common jail" was used to denote the detention facility **owned** by the county. The usage of "common jail" in earlier times is demonstrated by a 1787 Virginia case, **Commonwealth v. Posey**, 4 Call (Va.) 109, 115 2 Am. Dec. 560 (Ct. App. 1787). In **Posey**, Judge Henry opined:

And, as to the prison, the words "common gaol, and county prison," mean the house that is directed by the act of the assembly, **to be provided and kept by the county**, for the abode of those who are committed to custody by the ministers of public justice. (Emphasis supplied.)

Judge Lyons, in **Posey**, noted:

Common gaol and county prison **mean the house provided by the {84} county**, under the act of assembly, for the custody of persons committed by legal process.

The judges' conclusions affirmed the definition adduced in the lower court that "the common gaol and county prison are terms known to the law; and, as there is but one in each county, **and that belongs to the county . . .**" (Emphasis supplied.) The practice of designating the county jail as a "common jail" apparently arose in England due to the distinction made between two kinds of jails, called gaols, controlled by the sheriff; one for debtors, any house where the sheriff chose to keep them, another for persons who had offended the Crown. The latter class of offenders were kept in the "county or common gaols." Anderson's **Dictionary of Law**, p. 571 (1893).

Conclusion

The extent meaning of "common jails" when the language was enacted controls presently. **State v. Cutnose, supra**. As used, **circa** 1865-1866, "common jail" referred to the jail provided and kept by the county. **Commonwealth v. Posey, supra; Day & Whittlesey v. Brett**, 4 Johnson (N.Y.) 21 (1810). Section 42-2-1, **supra**, means, simply, that the county sheriff shall control the county's jail. The section is a codification of the common law principle that the sheriff is jailer **ex officio** and has the right to the custody and control of the common or county jail and of the prisoners confined therein. **State v. Williams**, 346 Mo. 1003, 144 S.W.2d 98 (1940); 72 C.J.S. **Prisoners** § 8 (1951).

The jail in Clayton is "owned and operated" by the Town of Clayton and "constructed solely" with city funds. Merely because Clayton's municipal jail is the only jail in Union County does not cause it to be a "common jail" within the meaning of Section 42-2-1, **supra**. Therefore, it is not subject to the control of the Union County Sheriff.