

**Opinion No. 44-4470**

February 29, 1944

**BY:** EDWARD P. CHASE, Attorney General

**TO:** Honorable Livingston N. Taylor, District Judge, Clayton, New Mexico

In your letter dated February 25, 1944, you state that due to injuries you have been unable to comply with the provisions of Sections 30-108 and 30-108 (a) of the 1941 Compilation, pocket parts, and for that reason no jury commission has been named to draw a list as provided therein. You inquire whether this law is mandatory or directory and whether, at the term of court beginning the first Monday in March, you can empanel a jury from the list as it was heretofore made up.

In the case of *Baker v. Johnson*, 35 N.M. 293, the Supreme Court of this State held that the time fixed for filing a suit in the District Court for the sale of tax delinquent lands is directory only. By analogy it would seem that the court, in a proper case, would also hold that the statute fixing the time for drawing a list of jurors would be directory and not mandatory. By the great weight of authority courts in other states have consistently so held. 35 C. J. Sec. 217 and Sec. 225. See also *Midkiff v. State*, 243 P. 601, 29 Ariz. 523; *Sullivan v. State*, 125 So. 115, 155 Miss. 629; *State v. Wells*, 161 S. E. 177, 162 S. C. 509; *Mitchell v. Louisville and N. R. Co.*, 35 N. E. (2d) 81, 310 Ill. Appellate 563; *Dougherty v. State*, 2 S. E. (2d) 519, 59 Ga. App. 898. In these cases the fact is emphasized that a jury list is required to contain large numbers of persons, not for the benefit of the accused so much as to distribute the burdens of jury duty over the whole citizenship.

It has also been held that a failure to revise the jury list will not vitiate the venire, provided the record shows the reason for such failure; however, as stated in 35 C. J., Sec. 225, under "Juries", a substantial compliance with the law is necessary and there are several cases supporting this principle.

Since the names of persons in the present jury wheel are legally selected and, if the record shows valid reasons for failure to comply with the law requiring a new jury list, I am of the opinion that any error arising from the use of the present jury list would not be prejudicial. I am further of the opinion that the provisions of this law are directory only, and that a new jury list may legally be made up as soon as the Judge is able to assume his duties and appoint the commissioners.

By C. C. McCULLOH,

First Asst. Atty. General