

## Opinion No. 14-1227a

May 11, 1914

**BY:** IRA L. GRIMSHAW, Assistant Attorney General

**TO:** L. Current, Esq., Justice of the Peace, Aztec, New Mexico.

### **JUSTICE OF THE PEACE.**

As to jurisdiction of justice of the peace where the defendant was related to him.

### **OPINION**

{\*88} We have your letter of the 7th instant propounding several questions to us.

Your first question is that the justice of the peace, before whom the defendant pleaded guilty, married the sister of the defendant's mother, and the attorney for the state claims that the justice of the peace was related to the defendant within the second degree of affinity, and therefore precluded from taking jurisdiction of the case against the defendant.

Section 3320 of the Compiled Laws gives jurisdiction to the justice of the peace in criminal cases throughout the county. He is authorized and required, on view or on complaint made under oath or affirmation, to have brought before him the person charged with the commission of the offense.

The proviso in the sixth sub-section of Section 3232 of the Compiled Laws in effect provides that no justice of the peace shall sit in any criminal case where he may be related to the party against whom the offence is charged within the second degree of consanguinity or affinity.

In the case of *People v. Connor*, reported in 142 New York Reports, 130, 131-133, the defendant was convicted in the Court of Sessions, a court of limited jurisdiction, of grand larceny in the second degree. On the trial for that offence the defendant interposed a general plea of not guilty, together with the special plea of former conviction. The court, by a jury, tried the special plea of former conviction. The basis of the special plea of former conviction was that the defendant had been convicted of the offence before a court composed of a county judge and two justices of the peace. It appeared that one of the justices of the peace, in the trial of that cause, was related to the defendant within the sixth degree of consanguinity. Upon the trial of the special plea in the lower court that court ruled that the plea of former conviction was not sustained and that it, the trial court, had jurisdiction to try the charge against the defendant for criminal larceny. This contention was sustained by the superior court in the case at bar. Section 46 of the Civil Code of Procedure, in so far as is material hereto, provided that:

"A judge shall not sit as such in, or take any part in the decision of a cause or matter to which he is a party \* \* \* or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree."

{\*89} The superior court held that the court of sessions, which tried and convicted the defendant, was improperly constituted and was without jurisdiction in the case and that the result of that case was a mis-trial and the judgment of that court was no bar in the case now on review. Our statute, heretofore referred to, in our judgment and opinion absolutely prohibits a justice of the peace from taking cognizance of or sitting in the trial of a case wherein the defendant is a person related to him within the second degree of affinity.

It is for you to determine as a question of fact whether or not the justice of the peace referred to was related to the defendant within the second degree of affinity. This should be determined upon the answer to the defendant's plea of abatement. If you determine that he was so related, then the effect of your decision is that the trial and judgment of the justice of the peace in the former case are only such in form, and are and were without any legality or validity whatever, and that the proceedings had not the slightest effect upon the rights or liberty of the defendant.

It is not necessary that the transcript of record of the proceedings of the justice of the peace, in the former case, show that a similar complaint was lodged, because the statute heretofore quoted permits a person to be charged on view.

Answering your third question as to whether or not you can take jurisdiction, you are advised that the laws permit you to take jurisdiction of that case, notwithstanding the action of the other justice.

We have answered the other questions contained in your letter.