

Opinion No. 14-1409

December 31, 1914

BY: FRANK W. CLANCY, Attorney General

TO: Mr. W. F. Wall, Nara Visa, New Mexico.

ARRESTS.

Constables and justices of the peace must see an offense committed to authorize an arrest without warrant.

OPINION

{*270} I have before me your letter of the 26th instant to which I will make answer as briefly as possible.

You have a letter from this office written August 31, 1914, explicitly stating that constables and justices of the peace are conservators of the peace and have the right to arrest without warrant any person guilty of a breach of the peace, or other violation of the criminal laws, in their presence. That means that they must distinctly see the offense committed, or have such visible evidence of it, close to the time, as to be convincing that the offense has been committed. If not so arrested the offender cannot be lawfully taken into custody except upon a complaint charging the commission of the crime in positive terms, and not upon information and belief. Authorities have no right to arrest any person except upon a warrant based upon such a complaint. This is distinctly guaranteed by Section 10 of Article II of the Constitution of New Mexico which, among other things, provides that no warrant to seize a person shall issue without a written showing of probable cause, supported by oath or affirmation. A justice of the peace has no authority to call in people who saw a crime committed to have them testify until a prosecution has been regularly instituted by means of such complaint as above indicated.

You ask whether an indictment by a grand jury can be carried above a district court. The form of your question may not indicate exactly what you have in mind. If an indictment is held to be defective or invalid by the district court, the district attorney may take an appeal from that decision to the supreme court and if a man is convicted under an indictment he may appeal to the supreme court. I know of no other way any such indictment can be taken up to the appellate court.

You also ask whether a drug store which bootlegs can be closed by an injunction. At least two district judges in New Mexico in the past, by injunction, closed up unlawful places where liquor was sold at retail, and if any public spirited citizen would bring a suit to enjoin such a drug store as you speak of, I am of opinion that the court would have jurisdiction to act.

You further ask what jurisdiction a justice of the peace has in bootlegging cases and whether he must wait for a complaint when he knows of a violation of the law. The justice of the peace is a judicial officer and cannot act unless someone sets the judicial machinery {271} in operation by a proper complaint. The fact that he, as an individual, knows of some violation of the law, does not furnish sufficient foundation for his judicial action any more than the same knowledge in the mind of any other citizen. To hold otherwise would put it in the power of unscrupulous or vindictive men, elected as justices of the peace, to prosecute and annoy those against whom they have a feeling of enmity, and without any chance of effective redress.