Opinion No. 14-1162

February 21, 1914

BY: H. S. CLANCY, Assistant Attorney General

TO: Mr. J. M. Atkinson, Corona, New Mexico.

MARRIAGE.

Common law marriage legal in New Mexico.

OPINION

*{*18}* I am in receipt of your letter of the 16th inst., in which you inquire as to the legality of a ceremony performed by a person claiming to be a justice of the peace, but who, subsequent to his re-election as such justice, failed to execute a bond as required by law.

Section 1414 of the Compiled Laws of 1897 makes it lawful to all intents and purposes, "for those who may so desire" to solemnize the contract of matrimony by means of any ordained clergyman, or by means of any civil magistrate. Section 1415 of the same compilation defines marriage as a civil contract, for which the consent of the contracting parties, capable in law of contracting, is essential. From the foregoing, you will see that it is not absolutely essential that a man and woman, who desire to enter into a marriage contract, should have the same solemnized by a minister of the gospel or a justice of the peace, but "those who may so desire" can employ the services of a clergyman or civil magistrate.

The fact that the justice of the peace to whom you refer, at the time of the performance by him of a marriage ceremony, had failed to file his bond as required by law, will in no way vitiate the marriage contract or render the same void. I assume that any such marriage ceremonies performed by him were so performed by virtue of the license required by our statute, and such celebrations of marriages are now of record in the county clerk's office. In case a question should ever arise as to the legality of such a marriage, this record could be produced as evidence thereof, but even in the event that there had never been any record made, the marriage could still be proved by witnesses other than the so-called officer or by himself.

In the case of Holder vs. State, 29 S. W. 793, it was set up by Holder and proved by him, that a marriage ceremony was performed between him and one Rosa Cleveland by a person named Roberts, who was not an ordained minister of the gospel at the time he performed such marriage ceremony. This fact being established, the contention was made that the marriage was a nullity. The Supreme Court of Texas very wisely took an opposite view and in its opinion made use of the following language in referring to statutes similar to ours:

"Such statutes are merely directory. Marriage is a civil contract, and is a thing of common right, so recognized by all civilized countries in all ages, and is encouraged by public policy. A rule of construction as contended for by appellant would bastardize children whose parents believed they were legally married, and who were not conscious of violating any law, human *{*19}* or divine, and who believed they had entered into the marital relation without coming in conflict with the provisions of statutory enactments. Such a rule, we think, fraught with consequences fearful to the interest of society, would tend to flood the courts with litigation, unsettle property rights, and disturb settled rights of inheritance. We cannot agree to such a rule of construction. Our statute does not render null or prescribe penalties against marriages not entered into under terms thereof."

We have no statute in New Mexico declaring that marriages not celebrated by ordained clergymen or civil magistrates shall be void, and it is undoubtedly a fact that what are known as common law marriages are valid in this state.

The Supreme Court of the United States has passed upon this question in the case of Meister vs. Moore, 96 U.S. 76. In that case the learned Court held that it was not essential that a minister or a magistrate should be present at the time of the entering into of such a contract and further said:

"Marriage is everywhere regarded as a civil contract. Statutes in many of the states, it is true, regulate the mode of entering into the contract, but they do not confer the right. Hence they are not within the principle that, where a statute creates a right and provides a remedy for its enforcement, the remedy is exclusive. No doubt, a statute may take away a common-law right; but there is always a presumption that the legislature has no such intention, unless it be plainly expressed. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license, or publication of banns, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common-law right to form the marriage relation by words of present assent. And such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity."

The same Court in the case last cited quotes, with approval, from Greenleaf on Evidence, as follows:

"Though in most, if not all, the United States there are statutes regulating the celebration of marriage rites, and inflicting penalties on all who disobey the regulations, yet it is generally considered that, in the absence of any positive statute declaring that all marriages not celebrated in the prescribed manner shall be void, or that none but certain magistrates or ministers shall solemnize a marriage, any marriage, regularly

made according to the common law, without observing the statute regulations, would still be a valid marriage."

From the information contained in your letter, I cannot see that *{*20}* people at Corona, who have entered into a marriage contract before a person who was not a duly qualified justice of the peace, need be at all apprehensive that such marriage contracts can ever be declared illegal and void.