

Opinion No. 16-1783

April 18, 1916

BY: FRANK W. CLANCY, Attorney General

TO: Mr. J. B. Arellano, Sr., Justice of the Peace, Springer, New Mexico.

Duty of justice of the peace in receiving and forwarding an application for a marriage license to the county clerk.

OPINION

{*354} Your letter of the 14th instant reached this office yesterday, but I could find no time to answer until this morning.

{*355} You ask me about an application for a marriage license by a lady who has heard nothing of her husband since he abandoned her in May, 1905, nearly eleven years ago, who informs you that a lawyer has told her that she is free by law, since her husband has been gone over ten years. You further say that you have tried to find that law, but cannot find it, and therefore, have not sent the application to the County Clerk.

I do not think that you are called upon to pass upon the validity of the application, or the qualification of the applicants to be married. If you will refer to Chapter 31 of the Laws of 1915, you will see that your duty is only to interrogate the parties, as required by the statute, which begins with Section 3435 of the Codification, and certify the result to the county clerk in writing, without expense to the applicants. The county clerk is to pass upon the question of whether satisfactory proof is produced that the parties are legally qualified to marry, and you need not consider that question at all. You should send the application to the County Clerk and let him settle that.

You say that you cannot find any law to show that the lady is free, on account of her husband's absence. There is no statute, I believe, on this subject in New Mexico, but it is a general rule of law, which was a part of the common law of England, that absence of a person for seven years, without any information or knowledge that he still lives, raises a presumption that he is dead. This presumption may be rebutted by evidence, but in the absence of any evidence that the person is still living, the law presumes that he is dead.

You also ask me whether Section 1346 of the Compiled Laws of 1897 is now in force. You will find it in the Codification as Section 1736, so that it must be held still to be in force, having been re-enacted by the legislature in the Codification.