

Opinion No. 17-2010

June 27, 1917

BY: HARRY L. PATTON, Attorney General

TO: Hon. C. C. Fielder, Probate Judge, Deming, New Mexico.

Probate Judges May Solemnize Marriages

OPINION

I received your letter some time since, in which you ask for an opinion from this office as to whether or not, under our statutes, Probate Judges are authorized to solemnize marriages.

Section 3426, Codification of 1915, reads as follows:

"It shall be lawful, valid and binding, to all intents and purposes for those who may so desire, to solemnize the contract of matrimony by means of any ordained clergyman whatsoever, without regard to the sect to which he may belong, or by means of any civil magistrate."

If authority is granted by this section of the statute, to a Probate Judge to perform a marriage ceremony, it must come under the classification of "civil magistrate." I have been unable to find any definition of the term "civil magistrate," but there are numerous instances wherein the word "magistrate" is defined. In a narrow sense, the term magistrate includes inferior judicial officers, such as Justices of the peace.

Section 3167, Codification of 1915, provides that "all Justices of the Peace of this State are hereby declared to be magistrates."

Another common definition of magistrate is an officer having authority or power to issue a warrant. Again, the courts have held that a magistrate is a public civil officer, invested with some part of the legislative, executive, or judicial power given by the Constitution or the law. It has been held that the President of the United States is Chief Magistrate of the nation, and that the Governors are the Chief Magistrates of their respective States.

Our statute does not declare a Probate Judge to be a magistrate, as it does a Justice of the Peace. My attention has not been called to instances wherein the Probate Judge was authorized to issue warrants. It follows that if a Probate Judge has authority to solemnize marriages, it must be because he is included in the term magistrate in its broadest sense, such as relates to a public civil officer. Owing to the fact that so many marriage ceremonies have been performed in this State by Probate Judges, I hesitate to say that they are not authorized to officiate in such capacity. I shall incline toward the

more lenient view that they are included in the broader classification of officers, and that they are authorized to perform marriage ceremonies.

I am not expressing my views as to the legality of common law marriages, because I do not feel that the question presented calls for an opinion as to such character of marriages.