Opinion No. 24-3748

January 16, 1924

BY: JOHN W. ARMSTRONG, Assistant Attorney General

TO: Requested by: Dr. Janet Reid, Director Bureau Child Welfare, Santa Fe, New Mexico.

Marriage of Infants Not Valid as a Matter of Law.

OPINION

*{*115}* We quote your letter as follows:

"I would like to have your written opinion regarding the present status of the law relating to the marriage of minors, particularly Sec. 2, Chap. 100 of the 1923 amendment.

"I took the trouble to investigate the progress of the amended law referred to above, during its progress in the last Legislature. I find that there is a difference of opinion as to whether or not the omissions and changes in the law render it possible to declare marriages of males under the age of eighteen years and females under the age of sixteen years void. There is also a difference of opinion as to whether or not magistrates who celebrate marriages of such minors, or clerks who issue licenses can by any application of this law be punished.

"Also I would like to know your opinion as to whether Sec. 1454 and Sec. 1455 of the 1915 Code under "Punishment of felonies" could be applied in the cases of officiating magistrates and clerks who issued licenses in these cases.

"Also if under civil procedure of "How an infant may sue" Sec. 4080 of the 1915 Code "the next friend" could possibly permit me or any member of my staff, or any member of The Board of Public Welfare to act in the capacity of next friend and bring suit for annulment of the marriage of males under eighteen years and females under sixteen years of age.

"I would also like to know if a marriage of such minors under the conditions as the following, girl fourteen years who claimed she was raped by a boy seventeen years old and who was afterward persuaded by and *{*116}* permitted by her parents to marry the man, would prevent the girl from testifying against her husband.

"Also I would like to have your opinion as to whether or not the parties who were instrumental in bringing about the marriage could be cited for contempt of court on the grounds of interfering with a State's witness."

We think there is no doubt but what such marriages may be annulled because of the immature age of the principals and the unlawful proceedings of persons procuring the marriage. The marriage, however, is not void as a matter of law, but merely voidable, and would require a regular proceeding in court to annul same. This was the rule at Common Law and our statutes seem to have made no change except as to raising the age of consent.

"That Section 3427 of the New Mexico Statutes Annotated, Codification of 1915, be and the same is hereby amended to read as follows:

"'Sec. 3427. No person being a male, under twenty-one years of age, and no person being a female, under eighteen years of age, can marry, unless he or she obtain the consent of his or her parents, guardian or of the person under whose charge he or she is, and for that purpose the presence of those parties, or of a certificate in writing, authenticated before competent authority, is required.'" -- Sec. 1, Chap. 100, S. L. 1923.

"That section 3431 of the New Mexico Statutes, Annotated, be and the same hereby is, amended to read as follows:

"'No person authorized by the laws of this State to celebrate marriages shall knowingly unite in marriage (1) any male under the age of twenty-one years, or female under the age of eighteen years, without the consent of their parents or guardians, nor (2) any male under the age of eighteen years or female under the age of sixteen years with or without the consent of their parents or guardians.'" -- Sec. 2, Chap. 100, S. L. 1923.

"No marriage between * * * infants under the prohibited ages shall be declared void, except by a decree of the District Court upon proper proceedings being had therein; and in cases of minors, no person who may be over a prohibited age shall be allowed to apply for or obtain a decree of the court declaring such marriage void; but such minor may do so, and in the case of a female, the court may in its discretion grant alimony until she becomes of age or remarries; and all children of marriages so declared void as aforesaid, shall be deemed and held as legitimate within the right of inheritance from both parents; and also in case of minors, if the parties should live together until they arrive at the age under which marriage is prohibited by the statute, then and in that case, such marriage shall be deemed legal and binding.'" -- Sec. 3434, Code 1915.

Persons who perform marriage ceremonies and clerks who issue marriage licenses are put on notice as to what the law is in such cases and are amenable to the criminal provisions of the statute applicable thereto.

*{*117}* "That hereafter all persons desiring to enter into the marriage relation in the State of New Mexico, shall obtain a license from the county clerk in the county wherein they desire the marriage to occur." -- Sec. 3435, Code 1915.

"All persons authorized to solemnize marriage shall require the parties contemplating marriage to produce a license signed and sealed by the county clerk authorizing said

marriage. Nothing in this chapter shall excuse any person from exercising the same care in satisfying himself as to the legal qualifications of any parties desiring him to perform the marriage ceremony, now required of him by law, in addition to the authority conferred by the license aforesaid." -- Sec. 3437, Code 1915.

"Any county clerk, or person authorized by law to perform the marriage ceremony, who shall neglect or fail to comply with the provisions of the eight preceding sections, and any person who shall wilfully violate the law by deceiving or attempting to deceive or mislead any officer or person authorized to perform the marriage ceremony in order to obtain a marriage license or to be married, contrary to law, shall be deemed guilty of a misdemeanor and upon conviction be fined in any sum not less than fifty dollars nor more than one hundred dollars, or by imprisonment in the county jail for not less than ten days nor more than sixty days, or by both fine and imprisonment, in the discretion of the court." -- Sec. 3443, Code 1915.

One of the eight sections referred to in the next preceding quotation is Sec. 1, Chap. 31, S. L. 1915 which reads as follows:

"That Section 2 of the Session Laws of 1905, Chapter 65, be amended so as to read as follows:

"'Whenever said parties reside more than ten miles from the county seat of any county they may if they desire, make application for such license to any person authorized to perform marriages or to administer oaths under the laws of the state, who shall interrogate them in the manner prescribed by this act and the laws of the state, certifying the result thereof to the county clerk in writing, without expense to the applicant. Upon satisfactory proof being produced that the parties are legally qualified to marry, the county clerk shall thereupon issue a license under the seal of the probate court authorizing said parties to contract marriage."

It will be observed that the law contemplates that before any license shall issue or any marriage ceremony shall be performed the parties presenting themselves must be legally qualified to marry. Any county clerk who shall neglect or fail to require the production of satisfactory proof that the parties are legally qualified to marry and may issue license without such proof, is guilty of a misdemeanor and may be punished under the provisions of said Sec. 3443. Likewise, any person who may solemnize a marriage is charged with notice of the law and notwithstanding parties may present a license, it is incumbent upon such person before solemnizing any marriage to satisfy himself as to the legal qualifications of parties desiring him to perform the marriage *{*118}* ceremony. If he should fail to demand and act upon proper proofs, he likewise is guilty of a misdemeanor and is punishable under the provisions of said Sec. 3443.

As to your next question, we think you or any member of your board, under the provisions of Sec. 1, Chap. 34, S. L. 1921, may bring proceedings to annul such a marriage brought about under the conditions described.

Your next question involves the power of the court to compel a wife to testify against the husband under the circumstances explained. In this instance, the offense was committed against the wife and we do not believe that she would be disqualified in testifying against him under such circumstances. This would be unquestionably true unless the wife should refuse her consent to testify. Sec. 2167, Code 1915 reads as follows:

"Hereafter the husband or wife of any defendant in any trial on a prosecution for crime before any court or officer authorized to hear or try said prosecution, shall be a competent witness to testify in favor, but not against, such defendant: Provided, That such husband or wife shall be a competent witness to testify against any such defendant where the prosecution is for any unlawful assault or violence forcibly committed by the defendant on the person of such witness.

Your last question involves a matter which would be entirely at the discretion of the court in considering any particular case where such a condition might arise. Any court would doubtless take cognizance of a complaint involving that question and would deal with it according to the showing made.

Koonce v. Wallace, 52 N. C., 216.

Goodwin v. Thompson, 2 Iowa, 332.