

Opinion No. 61-104

October 9, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A. Donnelly, Assistant Attorney General

TO: Mr. Richard H. Folmar, Assistant Director New Mexico Legislative Council, Room 201 /- State Capitol, Santa Fe, New Mexico

QUESTION

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"Can a Justice of the Peace, priest, or minister, legally perform a marriage ceremony under the authority of a marriage license issued in a county other than that wherein the ceremony is performed?"

CONCLUSION

See analysis.

OPINION

ANALYSIS

In considering the answer to your question posed above, reference should be made to the provisions of Sec. 57-1-10, N.M.S.A., 1953 Comp., as amended. This section sets out in full as follows:

"Hereinafter 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. The county clerk shall issue no license, for the marriage of any male, under the age of twenty-one (21) years, or any female, under the age of eighteen (18) years, without the consent of their parents or guardian. It shall be the duty of such county clerk to require the affidavit of at least two (2) reliable persons who are acquainted with the age of the applicant or applicants for license, as to the age of whom said county clerk may be in doubt; and the failure of any county clerk to perform his duty under this section shall be grounds for the removal of such county clerk from office, in the manner provided for the removal from office of county officers for misfeasance or malfeasance in office."

Three prior Attorney General's Opinions interpreting the language of the above section, have ruled that a marriage is valid even though the marriage ceremony was performed in a county of this state other than the county wherein the marriage license was obtained by the parties.

Since the date of issuance of these opinions, (No. 345, August 20, 1931; No. 320, November 23, 1931; and No. 4225, February 6, 1943), the Legislature has by legislation, repealed former Section 57-1-11, N.M.S.A., 1953 Compilation, relating to applications for marriage licenses by persons residing more than ten (10) miles from a county seat, enacted new Sections 57-1-10.1 through 57-1-10.3, N.M.S.A., 1953 Compilation requiring premarital medical examinations of applicants for a marriage license, and repealed and re-enacted a new section, Section 57-1-16, N.M.S.A., 1953 Compilation, specifying new forms for marriage license applications, licenses and certificates.

A close study of the effect of the recent legislative enactments, repeals and amendments to the marriage laws of this state indicates no specific legislative change which would alter the interpretation previously placed upon Section 57-1-10, N.M.S.A., 1953 Compilation, by our former opinions.

No Supreme Court decision has been found in New Mexico bearing directly upon the question of the legality of a marriage performed by a duly authorized individual where the parties have obtained the license in one county of the state and celebrated the marriage ceremony in another county of the state. However, the rule generally as enunciated in other jurisdictions and as set out in 61 A.L.R. 2d., Section V at Page 862, is that:

"The validity of a marriage solemnized on the authority of a marriage license procured in the wrong. . . county . . . is generally upheld providing the parties are competent to marry and the laws of the state where the marriage was celebrated do not specifically nullify marriages for noncompliance with the statutory marriage requirements."

Section 57-1-2, N.M.S.A., 1953 Compilation, provides that "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."

Section 57-1-17, N.M.S.A., 1953 Compilation, specifies in part that:

"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 willfully 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 . . ."

It should be specifically noted that the precise language of Section 57-1-10, N.M.S.A., 1953 Compilation, as amended, contemplates that all persons who desire to "enter into the marriage relation in the State of New Mexico, shall obtain a license in the county wherein they desire the marriage to occur." We interpret such language to be permissive rather than mandatory in its effect.

Section 57-1-10, N.M.S.A., 1953 Compilation, is included within the "eight preceding sections" referred to in Section 57-1-17, N.M.S.A., 1953 Compilation, above. However, it is the interpretation of this office that the act of a duly qualified justice of the peace, priest or minister in performing a marriage ceremony where the marriage license was obtained in a county of this state other than that where the marriage ceremony was celebrated, does not fall within the mandatory or prohibited provisions of such sections referred to, and the wording of Section 57-1-10, N.M.S.A., 1953 Compilation, does not expressly or by inference refer to persons performing the marriage ceremony.

Criminal statutes are generally strictly construed, and in the absence of a clear intent on the part of the Legislature to prohibit certain definite acts by statute, such acts will not be held criminal. **State v. Armijo**, 19 N.M. 345, 142 P. 1126; **State v. Diamond**, 27 N.M. 477, 202 P. 988; **State v. Couch**, 52 N.M. 127, 193 P. 2d 405; **State v. Prince**, 52 N.M. 15, 189 P. 2d 933.

It should specifically be noted, however, that under the language of Section 57-1-10, N.M.S.A., 1953 Compilation, as amended, it is contemplated that marriage licenses will be issued for the county in which the marriage is solemnized. Undoubtedly, the primary purpose of such provision is to facilitate the recording of marriage data, and for the preservation of marriage records in the county wherein the marriage was consummated. And the recommended, and better practice in such instances, even in the absence of an expressed mandatory legislative provision requiring marriages to be performed in the same county of issuance of the license, would be to have the marriage consummated in the county of this state wherein the license is issued.

Thus, it is our interpretation of our New Mexico law that a justice of the peace, priest, or minister may without violating the marriage laws of this state, or subjecting himself to criminal penalty, legally perform a marriage ceremony under the authority of a marriage license issued in a county of this state other than that wherein the ceremony is performed. And despite recent changes in such legislation relative to marriages, our opinion upholding the validity of such marriages remains the same as previously stated.