

Opinion No. 31-27

January 27, 1931

BY: E. K. Neumann, Attorney General

TO: Mrs. Ruth S. Nye, County Clerk, Carlsbad, New Mexico.

{*31} This will acknowledge your letter of the 22nd instant, asking if a Probate Judge has the right and authority to perform marriage ceremony in this state and whether, if he has such power, he can receive a fee therefor or should same be paid into the County funds.

Section 87-102 of the New Mexico Statutes, Annotated, 1929 Compilation provides 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."

There is therefore but one question to decide, that being is a probate judge a civil magistrate. There is no statute in this state giving any of the four courts, created by the constitution, any specific authority to perform the marriage ceremony. These courts are the supreme court, the district courts, the probate courts and justice of the peace courts. Of the judges of these courts, only one, the justice of the peace, has been declared a magistrate. Therefore are the judges of these other courts created civil magistrates?

In 2 Bouvier's Law Dict. 92 we find the following:

"In a general sense a magistrate is a public civil officer, possessing such power -- legislative, executive, or judicial as the government appointing him may ordain."

And again in Words & Phrases Vol. 5 page 4272, we find the word "magistrate" defined: "A magistrate is a public civil officer invested with some part of the legislative, executive, judicial power given by the constitution or law."

Each of our courts has been given by the Constitution or legislative enactment certain civil powers, so that the judges thereof are, in my opinion, under all definitions, civil magistrates, empowered to perform the marriage ceremony. Therefore, having determined that a probate judge has the right to perform such ceremonies, it naturally follows that you are charged with the duty of recording the marriage certificate when the marriage has been performed by such officer.

The Probate Judge can charge no fees for such service, neither for himself nor for the county, and should he do so, he would be guilty of collecting illegal fees, in my opinion, subject to prosecution therefor.

Section 1 Article X of the Constitution, providing ". . . And no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law . . ."