

OPINION
47-91

August 4, 1947 (OPINION)

MARRIAGE

RE: License - Serological Test - Section 14-0312

Re: Authorization of County Judge to Issue Marriage License If One or

both Parties to a Contemplated Marriage Contract Are Afflicted with Syphilis in Communicable Form

This will acknowledge the receipt of your letter of July 31, 1947, with reference to the issuance of marriage licenses in certain cases. In your letter you say:

* * * The question comes up every now and then in issuing marriage licenses. In fact there is a man twenty-nine years who has made application in this court for a license to marry a woman who is forty-six years of age. There is no question that he is feeble minded, a common drunkard, and he is probably afflicted with venereal disease as he is that type of man. He can get no health certificate from any physician. Now the question is if this couple is entitled to be married under the laws of our state."

You direct our attention to the provisions of chapter 207, laws 1913, embodied in the Compiled Laws of 1913 as sections 4373, 4374, and 4375, particularly section 1 of chapter 207, laws 1913, included in the Compiled Laws of that year under section 4373. The provisions of section 1 of chapter 207, laws 1913, were embodied in the Revised Code of 1943 as section 14-0307. It reads as follows:

Marriage by a woman under the age of forty-five years or by a man of any age, unless he marries a woman over the age of forty-five years, is prohibited if such a man or woman is a common drunkard, an habitual criminal, an epileptic, an imbecile, a feeble-minded person, an idiot, an insane person, a person who has been afflicted with hereditary insanity, or a person afflicted with pulmonary tuberculosis in its advanced stages or with any contagious venereal disease."

I am somewhat familiar with the history or origin of chapter 207 of the Session Laws of 1913. If my memory serves me correctly, Dr. Gillette, Professor of Sociology in our State University, was largely instrumental in inducing Senator Overson, now District Judge Overson of Williston, North Dakota, to sponsor the introduction of Senate Bill No. 45 in the legislative session of 1913, enacted into law as chapter 207 of the Session Laws of that year. The purpose of the law was, of course, to prevent the procreation of children by epileptics, imbeciles, feeble-minded persons, etc. It was assumed that a woman past the age of forty-five years is incapable of conception. And I suppose that, generally, that assumption is sound, although there may be exceptional cases.

As stated in your letter, the legislature of 1939 enacted chapter 162 of the Session Laws, providing for a serological test for syphilis. Section 2 of chapter 162, embodied in the 1943 Revised Code as section 14-0312, provides:

Before any county judge shall accept an application for a marriage license, each applicant must file with him a certificate from a duly licensed physician and surgeon stating that the applicant has been given a standard serological test and such other examination as may be necessary for the discovery of syphilis, and that in the opinion of the physician and surgeon the applicant is not infected with syphilis or that if so infected such disease is not in such a stage of development that it is or may become communicable to the marital partner. Such examination shall have been made not more than thirty days prior to the date of the application. No license shall be granted if either party is affected with syphilis in communicable form, and no person who is so afflicted is entitled to marry."

Chapter 162 of the Session Laws of 1939 was undoubtedly enacted at the instance and request of the State Health Department or the State Medical Association or both. Prior to 1939, Dr. Bundeson, Director of the Health Department of Chicago, after an investigation in the prevalence of syphilis in that city, inaugurated a campaign there for the prevention and eradication of the disease. The Chicago Tribune took up the campaign and for several months featured articles dealing frankly with the prevention and treatment of syphilis. The campaign thus started in Chicago spread to other cities. The United States Health Department took notice of it and became actively interested. The interest of the various state health departments, including our own, and of the national and state medical associations, in the treatment and prevention of the disease, was solicited. House Bill 267, enacted into law as chapter 162 of the 1939 Session Laws and embodied in the 1943 Revised Code as sections 14-0312 to 14-0316, was the result of the national campaign for the cure and prevention of syphilis.

It is my opinion that section 14-0312 of the 1943 Revised Code modifies section 14-0307 thereof to the extent that a marriage license may not be issued, if a serological test shows that either the man or woman, whatever his or her age, is afflicted with syphilis in communicable form. Such was clearly the intention of the legislature in enacting chapter 162 of the Session Laws of 1939, and that intention remained when the legislature adopted the 1943 Revised Code. Section 1-0225 of the Revised Code provides:

The provisions of this code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments."

Section 14-0315 of the 1943 Revised Code provides that in cases of emergency, the judge of the district court "may make an order, on joint application of both parties, dispensing with the requirement for filing with the county judge the physician's certificate and the laboratory statement, * * *." This exception to the statutory requirement of a serological test was undoubtedly intended to

safeguard the legitimacy of children who might otherwise be born out of "lawful wedlock".

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