

In answering your inquiry it is first important to note the provisions of Section 5712, Revised Codes of Montana, 1935, which provides:

"Where either party is a minor no license shall be granted without the written consent of the father, if living; if not, then of the mother of such minor or of the guardian, or person under whose care and government such minor may be, which written consent shall be proved by the testimony of at least one competent witness."

Section 5673, Revised Codes of Montana, 1935, defines minors as males under twenty-one and females under eighteen, and Section 5696, Revised Codes of Montana, 1935, provides that the age of consent to marriage is eighteen years or upwards for males and sixteen years or upwards for females.

In the case of *Cross v. Cross*, 110 Mont. 300, 102 Pac. (2nd) 829, referred to in your letter, the court was concerned with the question of annulment of the marriage of a minor under the age of consent to marriage. The court noted a conflict between the provisions of Section 5712 and Section 5729, but held that Section 5729 was applicable under the facts before the court because the question of annulment was involved.

In this connection, it is well to note that Section 5729 requires two conditions precedent to an annulment, i. e., first, the party seeking the annulment was under the age of consent, and, second, such marriage was contracted without the consent of his or her parents, etc. In the *Cross* case it is held the mother consented, so the second condition precedent was lacking.

The court held in regard to an Idaho statute similar to our Section 5712 that:

"The requirement of written and acknowledged consent, as required by Section 31-202 of the Idaho Laws, supra, has been held in cases considering similar statutes to be applicable only to the issuance of the license, and simply directory to the clerk who issues the license, and the lack of such written and acknowledged consent does not affect the validity of the marriage."

In *Johnson v. Alexander*, 39 Cal. App. 177, 178, Pac. 297, the California court held that Section 69 of the Cali-

#### Opinion No. 85.

##### Marriage—Licenses—Minors—Clerks of Court—Offices and Officers.

Held: A clerk of the court is not authorized to issue a marriage license where either party is under the age of legal consent as defined by Section 5696, Revised Codes of Montana, 1935, which is 18 years for males and 16 years for females, regardless of the written consent of the parents. Such written consent of the parents does not enlarge the authority of the clerk where either party is under the age of consent.

July 6, 1943.

Mr. M. L. Parcels  
County Attorney  
Stillwater County  
Columbus, Montana

Dear Mr. Parcels:

You have requested my opinion concerning the minimum age of applicants for marriage licenses when accompanied by consent of parent. You ask in particular what authority the clerk of the court has in the matter, and you make reference to Section 5673, 5696 and 5712, Revised Codes of Montana, 1935, and also the case of *Cross v. Cross*, 110 Mont. 300, 102 Pac. (2nd) 829.

ifornia Civil Code, which is similar to Section 2712 of our Code, defined the duties of the clerk in issuing marriage licenses, and recognized the distinction between the application of Section 69 as directory to the clerk issuing the license and the fact that if the clerk fails to follow the section, "such marriage is not void or voidable because of the failure of the clerk to perform his duty as prescribed."

The decision of *Cross v. Cross*, *supra*, in no way alters the interpretation of Sections 5673, 5696 and 5712, Revised Codes of Montana, 1935, as pronounced by this office in the past. (Volume 10, Report and Official Opinions of the Attorney General, 195.)

It is my opinion that a clerk of the court is not authorized to issue a marriage license where either party is under the age of legal consent as defined by Section 5696, Revised Codes of Montana, 1935, which is eighteen years for males and sixteen years for females, regardless of the written consent of the parents. Such written consent of the parents does not enlarge the authority of the clerk where either party is under the age of consent.

Sincerely yours,  
R. V. BOTTOMLY  
Attorney General