

destruction of a marriage license and certificate prior to their return to his office by the solemnizing authority—issue a duplicate and secure the necessary signatures of the solemnizing authority and witnesses for the purpose of recording it. Section 5720, Revised Codes of Montana, 1935, requires the record to be made from the original certificate; and a duplicate executed later than the initial, true writing is not an "original."

August 6, 1946.

Mr. Paul J. Murphy
County Attorney
Judith Basin County
Stanford, Montana

Dear Mr. Murphy:

You have stated this problem:

"Our clerk of the court recently issued a marriage license to a couple who were shortly thereafter married by our local Justice of the Peace. The marriage certificate was duly executed by the Justice and two witnesses.

"Some time later the husband obtained the marriage license through artifice from the Justice and burnt the same.

"Our clerk would like to know whether or not she can issue a duplicate and have the Justice of the Peace and the witnesses sign the same so that it can be returned and recorded in her office . . ."

Sections 5716 and 5720, Revised Codes of Montana, 1935, provide:

"5716. Duty of person solemnizing—return of certificate. No person authorized to solemnize marriages shall perform such ceremony until the parties have given him the license issued by the clerk of the district court for their marriage; and when he has completed any such ceremony he shall enter upon such license a certificate of such marriage, showing when and where it occurred, and such certificate shall be attested by two witnesses to such ceremony; he shall, within thirty days after such marriage has been solemnized, return said license and certificate to the clerk of the district court, who shall

Opinion No. 188.

**Marriage—Clerks of Court—Original
Writing—Licenses, Marriage—
Certificate, Marriage.**

**Held: A clerk of court may not—upon
receiving notice of the wilfull**

record the certificate in the same book where the said marriage license is recorded." (Emphasis mine.)

"5720. Certificate and copy prima facie evidence. The original certificate of marriage, made as prescribed in this chapter, and the record thereof by the clerk of the district court, or a copy of such record duly certified by the clerk of the district court, shall be received by all courts in all places as presumptive evidence of such marriage."

Section 5720 specifically provides the original certificate of marriage and the record thereof by the clerk of the district court, or a certified copy of such record, shall be presumptive evidence of a marriage. In other words, the "original" certificate's existence is the basis of the evidence, for from it the clerk makes his record.

Webster defines the adjective "original" to mean: "Not copied, imitated, reproduced or translated; underived; not dependent or secondary; new, first-hand . . ." (Webster's New International Dictionary, Second Edition, 1941.

Carbon impressions of a typewritten paper, made by the same stroke of the keys as the companion impression which first receives the stroke of the letter from the typewriter, have been held to be "originals." (See Volume 30, Words and Phrases, Titles "Original" and "Original Writing.") Like reasoning would apply to carbon impressions of a hand written document; but nowhere have I found the word "original" extended to the degree of applying to a document which, while executed by the same persons who subscribed the initial writing, is not created simultaneously with the initial one.

Our statutes are silent on the subject of restoration of lost, mutilated or destroyed public records.

In the case of Guillot v. State Highway Commission, et al. (1936) 102 Mont. 149, 153, 56 Pac. (2d) 1072, our court made this general statement:

"Under our political system the entire source of governmental authority is found in the people themselves. Either directly or through their chosen representatives, they create such offices and agencies as they deem desirable for the administration of the public functions, and declare in what manner and by what

persons they shall be exercised; prescribe the quantum of power to be attached to each department and the conditions upon which its continuation depends. Their will, in these respects, finds its expression in their Constitutions and laws. (Machem's Public Offices and Officers, 329.) But the powers which an officer, commission or department may exercise are not confined to those expressly granted by the Constitution or statutes of the state. 'In addition to powers expressly conferred upon him by law, an officer has by implication such powers as are necessary for the due and efficient exercise of those expressly granted, or such as may be fairly implied therefrom. But no power will be implied other than those which are necessary for the effective exercise and discharge of the powers and duties expressly conferred.' (46 C. J. 1032.)"

I have examined carefully the statutes relating to the powers of the clerk of the district court; and I do not find the power here in question specifically granted. Nor can I see or feel the power is one necessary for the due and efficient exercise of those expressly conferred by the law—and therefore, under our court's interpretation, it cannot be implied.

Hence, it is my opinion a clerk of court may not—upon receiving notice of the wilful destruction of a marriage license and certificate prior to their return to his office by the solemnizing authority—issue a duplicate and secure the necessary signatures of the solemnizing authority and witnesses for the purpose of recording it. Section 5720, Revised Codes of Montana, 1935, requires the record to be made from the original certificate; and a duplicate executed later than the initial, true writing is not an original."

Sincerely yours,
R. V. BOTTOMLY,
Attorney General