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An Analysis of Wyoming Marriage Statutes, with Some Suggestions for Reform - Part II

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This is Part II in a series of articles reviewing the Wyoming marriage statutes. Here Professor Rames continues his in depth analysis of the statutes relating to the creation of the marriage relationship. Areas of ambiguity, conflict and omission are indicated together with the suggested court resolution and the future policy to be considered in a revision of the law.

AN ANALYSIS OF WYOMING MARRIAGE STATUTES, WITH SOME SUGGESTIONS FOR REFORM -- PART II

*John O. Rames**

IN Part I of this article[49] sections 20-1 to 20-5 of the Wyoming statutes of 1957 were analyzed in depth, both as to form and substance, certain problems which they present were pointed out, and various deficiencies were noted. This process will be continued with section 20-6, which deals with the circumstances under which the county clerk shall refuse to issue a marriage license.[50]

The preceding section, 20-5, pertains to the application for and issuance of the license. As indicated in Part I, the overall objective of the application should be to elicit all information necessary to enable the county clerk to determine whether the applicants are qualified, under Wyoming law, to be married in this state; and to this end the information should negative the possibility that the marriage would be

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49. Rames, *An Analysis of Wyoming Marriage Statutes, With Some Suggestions for Reform—Part I*, 2 LAND & WATER L. REV. 182 (1967).

50. WYO. STAT. § 20-6 (1957) states:

> If, on such testimony being given, it shall appear that either of the parties is legally incompetent to enter into such contract according to the law of the state of their residence and of this state, or that there is any impediment in the way; or if either party is a minor and the consent hereinbefore mentioned shall not be given, the said clerk shall refuse to grant a license.

either void or voidable if performed in Wyoming. Assurance was given in Part I that in the proposed legislation hereinafter set out a form of application for marriage license would be included. If these responsibilities are properly discharged, the county clerk's task of determining whether the applicants are entitled to a license under Wyoming law should be comparatively easy.

It was also proposed in Part I that the clerk be relieved of the burden now imposed upon him to ascertain "whether there be any legal impediment to the parties entering into the marriage contract according to the laws of the state of their residence" if it is other than Wyoming. In the light of these changes in Section 20-5, the following section could provide simply that if, upon examination of the application and any information (such as proof of age) supplementary thereto, it shall appear to the county clerk that a marriage between the applicants would be either void or voidable if performed in Wyoming, he shall refuse to issue the license; otherwise he shall issue it, dating it on the day of issuance. In addition, Section 20-6 should allow for a situation (discussed in Part I) in which a district judge under special circumstances directs the county clerk to accept the written consent of a person other than a living father when an applicant under 21 is involved. If these suggestions are followed, Section 20-6 would not contain language imposing upon the county clerk the duty of ascertaining *whether there is a legal impediment* to the prospective marriage, but only the duty of ascertaining whether it would be either void or voidable; and other statutes would specify what sorts of marriage would be void or voidable if performed in Wyoming.

Sections 20-7 to 20-9 require applicants for marriage licenses to produce health certificates, serological tests for syphilis, and under certain circumstances additional laboratory reports concerning venereal disease. They make it unlawful for persons afflicted with venereal diseases of certain types and in cetrain stages to marry, and prescribe criminal penalties for violations. The laudable objective of these sections (as pointed out in Part I) is to insure healthy marriages and healthy offspring so far as venereal disease is concerned. If these statutes are to be retained, some rearrangement

would seem desirable. Since the certificates and reports are required at the time application is made for the license, Section 20-7[51] logically should precede rather than follow 20-6, and the wording of 20-7 which ties it in with the application could be improved upon. Section 20-8[52] could be combined with 20-7 as the opening sentence thereof. Section 20-9[53] prescribes criminal sanctions for Sections 20-7, 20-8, and 35-183, the last mentioned requiring physicians in attendance at births to administer antibiotic eye drops to newly born children. It is submitted that such portion of 20-9 as pertains to 35-183 should be combined with the latter and eliminated from the marriage statutes. As to the remainder of 20-9, the problem of criminal sanctions for violation of the marriage statutes will be considered as a whole at a later stage of this article; for the time being, therefore, disposition of Section 20-9 will be held in a state of suspended animation.

51. WYO. STAT. § 20-7 (1957) reads as follows:

> Every male and female person securing a marriage license must produce a certificate dated within thirty (30) days before the date of application for such marriage license from a physician licensed to practice in this state or any other state or in any territory of the United States, or the District of Columbia, or by a commissioned medical officer on active duty with the armed forces of the United States or with the public health service, showing applicant to be free from any venereal disease in a communicable stage. Such certificate shall include or be accompanied by a report of a standard approved serological test for syphilis from a laboratory authorized for this purpose by the Wyoming state board of health or the corresponding public health authority having jurisdiction in the area where such tests are performed. It shall further include or be accompanied by the report of a laboratory examination for other venereal disease as indicated by the physical examination.
>
> A physician, duly licensed under the laws of the State of Wyoming and engaged in practice therein, may submit to the person authorized by law to issue marriage licenses, in lieu of such certificate, a statement over such physician's signature that the female applicant for the license is near the termination of her pregnancy or the death of one or both applicants is imminent and that he has taken blood samples adequate for serological testing from such applicant or applicants, and forwarded same to the Wyoming department of health laboratory, in which case a certificate shall not be required of such applicant prior to issuance of a license.

52. WYO. STAT. § 20-8 (1957) indicates:

> It shall be unlawful for any person having syphilis, gonococcus infection or chancroid in an infectious stage, or having syphilis in a stage of said disease whereby the same could be transmitted to the issue of said infected person, to contract marriage or enter the marriage relationship within this state.

53. WYO. STAT. § 20-9 (1957) provides:

> Any person who shall violate any of the provisions of sections 14 [§ 35-183], 15 [§ 20-8] and 16 [§ 20-7], or shall wilfully or knowingly make any misstatements or false certificates as to any facts required by the provisions of sections 14, 15 and 16, shall, upon conviction, be punished by a fine of not to exceed one thousand dollars or imprisonment not to exceed one year, or by both such fine and imprisonment.

The three statutes, 20-7 to 20-9, were first enacted in 1921. Section 20-7 was later amended in 1943 and 1955. As originally enacted 20-7 was limited to male persons, and required a physician's certificate of freedom "from any venereal disease in a communicable stage" before a marriage license could be issued, only Wyoming physicians could give the certificate, and it could be dated not earlier than 10 days before the application for the license. In 1943 the legislature expanded Section 20-7 to include females, extended the permissible date of the certificate to 30 days before the license application, and required the report of a standard serological test for syphilis and the report of a laboratory examination for any other venereal disease indicated by the physical examination. In 1955 the section was further expanded in minor particulars to its present form.

It will be noted that, as in the case of the requirement of parental consent for marriage of a minor,[54] there is no language in Sections 20-7 to 20-9 indicating what may be the effect upon the validity of the marriage if for some reason the physician's certificate and reports of tests are not supplied at the time the license is applied for. Section 20-8 does provide that "it shall be unlawful" for any person having certain venereal diseases in certain stages to contract marriage, but it still stops short of branding such a marriage void. As indicated in Part I of this article there are no decisions of the Supreme Court of Wyoming on this point, and on the basis of case authority from other jurisdictions we concluded that the marriage would be valid, or at worst voidable.[55] Adopting the reasoning of the Supreme Court of Nebraska in the *Christensen* case,[56] we recommended that such a marriage be classified as voidable, and that this should be expressly stated in a statute.[57]

But, despite their praiseworthy objective, there is some question as to whether Sections 20-7 to 20-9 should be retained at all. The Director of the Wyoming Department of Public Health, Dr. Robert Alberts, has recently expressed the opinion

54. WYO. STAT. § 20-3 (1957).
55. Rames, *supra* note 49, at 187.
56. Christensen v. Christensen, 144 Neb. 763, 14 N.W.2d 613 (1944).
57. Rames, *supra* note 49, at 188.

that these statutes are of little value.[58] Dr. Alberts pointed out that syphilis is the only one of the various venereal diseases which at present can be detected by means of a serological test, and that it is often difficult to diagnose the other venereal diseases (especially in women) by physical examination. Consequently, in Wyoming—as elsewhere—physicians rely basically on the results of the laboratory serological test for syphilis in executing the certificate of freedom "from any venereal disease in a communicable stage" required by Section 20-7. No charge is made for the standard serological test when conducted by the Wyoming state laboratory; the specimens, however, are obtained by private physicians who may make a charge for their services. Dr. Alberts recalled that in the State of Washington, where similar procedures were in force, a study during the early sixties disclosed that the cost of identifying communicable syphilis by this means was approximately $4,000 per case; thus it cannot be justified solely as a convenient method of detecting syphilis in the population. Other epidemiological methods have proved to be more successful and much less expensive. Discussing the matter of a general physical examination of a marriage license applicant being mandatory, and made available in the interests of protection to the other prospective marriage partner, Dr. Alberts questioned the validity of the basic assumption that the state has a duty to protect the parties to a prospective marriage from each other: the requirement smacks more of the type of officious interference in personal relations characteristic of a police state. On the other hand, if the primary object of the statutes is to prevent the transmission of venereal disease to offspring, a more effective control could be found, in Dr. Alberts' opinion, by prenatal examinations of all prospective mothers, followed by remedial measures when venereal disease is detected or suspected. And finally, Dr. Alberts considers Sections 20-8 and 20-9 to be of very limited value, if any, as deterrents.

On the basis of this thoughtful analysis of Sections 20-7 to 20-9 by the Director of the Department of Public Health

58. Personal interview with the writer, September 19, 1967.

of Wyoming, it is fair to conclude that these sections should be eliminated altogether.

We move next to Section 20-10[59] which relates to the performance of a marriage ceremony by an authorized celebrant. In Part I of this article we concluded that this section should make it clear (although it does not now do so) that the requirement of a ceremony is mandatory,[60] and that the classes of celebrants named in the section are exclusive except as may be modified by Section 20-20, which provides that marriages performed according to the rites and customs of "any religious society" shall be valid.[61] There is little variation from state to state with respect to the classes of persons authorized to perform marriage ceremonies,[62] and our statute is typical of inland states. The description seems clear: e.g., "every judge" would include a municipal judge and a supreme court justice. If the inferior court system of Wyoming should be changed (as may soon come about) and the title "justice of the peace" be changed to something else, such as "magistrate", an amendment would be necessary; but probably we should not cross such a bridge before we come to it. It is interesting to note that at least one court has held that a Jehovah's Witness is a "minister" within the meaning of a statute similar to section 20-10.[63]

What is the impact of Section 20-20 upon Section 20-10, and what should be their relative positions in the statute book? If the former is intended to modify the latter, it would be logical to combine the two in Section 20-10, adding 20-20 as a proviso following what is now 20-10. There is currently quite a problem in determining what is a "reli-

59. WYO. STAT. § 20-10 (1957) provides that: "Every judge, and every court commissioner of any district court of this state, every justice of the peace, and every licensed or ordained minister of the gospel, may perform the ceremony of marriage in this state."
60. Rames, *supra* note 49, at 189.
61. *Id.* This section reads as follows:
> It shall be lawful for any religious society or religious assembly to perform the ceremony of marriage in this state according to the rites and customs of such society or religious assembly and the clerk or keeper of the minutes, proceedings, or other book of the religious society or religious assembly wherein such marriage shall be had, or if there be no such clerk or keeper of the minutes, then the moderator or person presiding in such society or religious assembly, shall make out and trasmit to the county clerk of the county, a certificate of the marriage, and the same shall be recorded in like manner as hereinbefore provided.
62. 55 C.J.S. *Marriage* § 29, at 862 (1948).
63. State *ex rel.* Hayes v. O'Brien, 160 Ohio St. 170, 114 N.E.2d 729 (1953).

gion"[64] and it would no doubt be helpful if we could come up with language in 20-20 more specific than "any religious society", but it is doubtful that we can without creating more problems than we would solve. It has been suggested that the county clerks be surveyed with respect to various problems presented by the marriage statutes, and as part of the survey they could be asked whether they have encountered any difficulties connected with 20-20.

Section 20-11[65] must also be taken into account in connection with 20-20. We must ask here, as we did with 20-10, whether it was intended that 20-20 should modify 20-11; or, to put it the other way, whether it was intended that ceremonies by which religious societies unite people in marriage shall meet the minimum specifications of 20-11: a declaration of the parties, made in the presence of the celebrant and at least two witnesses, that they take each other as husband and wife. The problem of statutory construction which is involved is complex, but need not be solved: what *is* necessary is to decide whether we want the marriage ceremonies of religious societies comprehended by 20-20 to meet the minimum specifications of 20-11 and to conform to 20-10 as far as celebrants are concerned, then to phrase the three sections so that they will clearly implement such decisions. The fact that the legislature amended and re-enacted 20-20 in 1967[66] without reference to 20-10 or 20-11 seems to indicate a legislative intent that 20-20 shall not be limited by 20-10 and 20-11, and that view of the matter will be adopted by the revision hereinafter proposed. What is now 20-20 will be added to 20-10 as a proviso, and 20-11 will except from its requirements ceremonies performed according to the rites of religious societies.

Parenthetically, it may be said that contemporary developements suggest interesting questions pertaining to Section

64. *Cf.* Weiss, *Privilege, Posture and Protection—"Religion" in the Law*, 73 YALE L.J. 593, 604 (1964); Fellowship of Humanity v. Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (1957); Lefkowitz v. Burden, 252 N.Y.S.2d 715 (1964).

65. This section provides that: "In the solemnization of marriage, no particular form shall be required, except that the parties shall solemnly declare in the presence of the person performing the ceremony, and the attending witnesses, that they take each other as husband and wife, and in any case there shall be at least two witnesses."

66. Ch. 108, [1967] WYO. SESS. LAWS 126.

20-20; for example, would a "Hippie" marriage ceremony performed in Wyoming constitute a valid marriage?

With further reference to Section 20-11, we concluded in Part I of this article that the observance of the minimum ceremonial requirements of this section should be mandatory (except as modified by Section 20-20).[67] This should be more clearly indicated than appears from the existing language of 20-11.

But the most interesting question presented by this section is whether, in view of its present wording, there could be a valid marriage if one or both parties are not physically present before the celebrant. Putting it in another way, are proxy marriages and marriages by telephone or radio valid in Wyoming?

The dynamics of living in today's world have led to ever increasing pressures to legalize proxy, telephone and radio marriages. Swift communication, personal situations which change drastically overnight, and the presence of many young men in the armed forces are factors which make such pressures understandable. Typically, at least one of the parties to the prospective marriage would be physically present in Wyoming, and under our existing statutes could lawfully obtain a marriage license without the actual presence of the other. It would be a rare case in which *both* parties would be absent from the place of the celebrant's physical presence in Wyoming and yet would request him to perform a ceremony by proxies, telephone or radio. It seems to us that if "absentee marriages" are to be permitted at all, there should be a requirement that one of the parties must be in Wyoming in the physical presence of the celebrant when the ceremony is performed; there ought to be this much nexus between the State of Wyoming and the creation of a marriage status by virtue of the laws of this state.

In a proxy marriage the changes of fraud are minimal. In the negotiation and consummation of commercial contracts it is commonplace that one and sometimes both parties are represented by agents. Contractually speaking, a proxy marriage is nothing more nor less than the formation of a con-

67. Rames, *supra* note 49, at 190.

tract through an agent. Normally the proxy holds a written power of attorney, so that the assent of the absent party and the identity of the agent present no peculiar problems.

But opportunities for fraud are obviously present in marriage by radio or telephone. Here, the identity of the absent party depends upon recognition of a voice. Except rarely the celebrant would not be thoroughly enough acquainted with such party to recognize his voice, and would necessarily be forced to depend upon the assurance of the other party physically present, who might be deceived by an imposter who was a good mimic. In addition there is the possibility of mechanical difficulty—static, a poor telephone connection, and the like. Although it takes time to arrange proxies, it is difficult to visualize a situation where there would be so much urgency about the marriage that proxies would be impractical. If the foregoing premises are correct, we reject the suggestion that our statute legalize marriages by telephone and radio, and we would state the proxy marriage issue as follows: Is it desirable to permit proxy marriages to be performed by celebrants located in Wyoming, one prospective spouse being in the physical presence of the celebrant, and provided that there has been full compliance with all other statutory requisites for a valid ceremonial marriage?

At the outset it should be said that on the basis of *case* authority it is probable that under existing statutes a proxy marriage performed in Wyoming would be voidable, assuming compliance with all other statutory requisites for ceremonial marriage.[68] In states which recognize common law marriages a proxy marriage can often be sustained as a common law marriage, depending upon what must be proved in each particular state to establish such a marriage; for example, some states require cohabitation and reputation and others do not. None of the cases cited in footnote 68 dealt with jurisdictions which recognize common law marriage; in other words, the proxy marriage had to be sustained as a ceremonial marriage or not at all.

68. Barrons v. United States., 191 F.2d 92 (9th Cir. 1951); Respole v. Respole, 34 Ohio Ops. 1, 70 N.E.2d 465 (1946); State v. Anderson, 239 Ore. 200, 396 P.2d 558 (1964).

A New York decision held that proxy marriages performed in the District of Columbia are entirely valid.[69] (The court sustained the marriage as a common law marriage as well, such marriages being recognized in the District.)

Barrons v. United States[70] is the leading case. It involved the validity of a proxy marriage performed in Nevada in 1944, at which time common law marriages were invalid there. Both parties were members of the armed forces. The woman, who was domiciled in Texas but physically present in Reno during the ceremony, was pregnant by the man, who was stationed in Africa and domiciled in California. She informed him of her pregnancy and they agreed to be married. He was represented at the ceremony by a member of the Red Cross, who had been given a written power of attorney for him for this purpose. With the exception of the proxy feature, all statutory requirements for a ceremonial marriage were complied with. The ceremony was performed on July 20, 1944, and the husband (*H*) was killed in action one week later. The wife (*W*) claimed the proceeds of a National Service Life Insurance policy on *H's* life, and she was opposed by *H's* father, who contended that the proxy marriage was void and that he was entitled to the policy as *H's* next of kin. The action, in the nature of interpleader, was instituted by the federal government in a U.S. District Court in California.

The District Court held in favor of *W*[71] and the Court of Appeals for the Ninth Circuit affirmed. In the latter opinion the reasoning was as follows: If the marriage was not invalid in Nevada, both Texas and California would recognize it unless proxy marriages were in conflict with their strong public policy. There were, said the court, no Texas or California decisions on the subject, but "All states which have passed on this question have recognized the validity of proxy marriages validly performed elsewhere."[72] In support the court cited a number of references to text-

69. Ferraro v. Ferraro, 77 N.Y.S.2d 246 (1948), *aff'd sub nom.* Fernandes v. Fernandes, 87 N.Y.S.2d 707 (1949).

70. Barrons v. United States, *supra* note 68.

71. United States v. Barrons, 91 F. Supp. 319 (D.C.N.D. Cal. 1950).

72. Barrons v. United States, *supra* note 68, at 95.

books, law review articles, and Section 124 of the Restatement of Conflict of Laws.

There were no Nevada decisions on the validity of proxy marriages performed there. The heart of the problem, according to the opinion, was the interpretation of Section 122.-110 of the Nevada Revised Statutes. This statute is substantially identical to Section 20-11 of the existing Wyoming statutes. The pertinent provisions as the court saw them were that ". . . the *parties shall declare,* in the presence of the judge, minister, or magistrate, and the attending witnesses, that they take each other as husband and wife."[73] People can "declare" through an agent as well as in person, in the court's opinion, although it agreed that "Superficially, the statute could be construed to require that the declaration be made by the parties personally . . . ."[74] The court found support for its interpretation in the additional language of Section 122.110 of the Nevada statute that "In the solemnization of marriage no particular form shall be required." As supporting its conclusion the opinion cited the *Respole*[75] and *Fernandes*[76] cases, adding that these were the only two decisions on the validity of proxy marriages disclosed by research, but observing that in neither of the jurisdictions concerned (West Virginia in *Respole* and the District of Columbia in *Fernandes*) was there a statute establishing minimum essentials for a ceremonial marriage. And finally, the court in the *Barrons* case noted that in Nevada only one party to the prospective marriage was required to apply for the license. With respect to the status of the Nevada proxy marriage, the court said, "The most that could be said of it is that it rendered the marriage voidable."[77] There was no explanation of why the marriage was characterized as voidable rather than valid. The ultimate decision was that since it was voidable, and since one party to it (*H*) was dead, his father had no standing to attack its validity.

The Ninth Circuit decision in *Barrons* harmonized with the U.S. District Court decision in the case[78] but the latter

73. *Id.* at 96 (Emphasis supplied by the court).
74. *Id.*
75. Respole v. Respole, *supra* note 68.
76. Fernandes v. Fernandes, *supra* note 69.
77. Barrons v. United States, *supra* note 68, at 99.
78. United States v. Barrons, *supra* note 71.

relied in addition upon Section 122.090, which is substantially identical to Wyoming Section 20-16.

The most recent case on the validity of proxy marriages appears to be *State v. Anderson,*[79] a 4-3 decision of the Supreme Court of Oregon in 1964. The majority, relying heavily on *Barrons,* held that a proxy marriage performed in Oregon was voidable. All other statutory requirements for a ceremonial marriage had been fulfilled.

In Oregon, as in Nevada, common law marriages were invalid, the statutes permitted the application for the marriage license to be made by one of the parties only, and the statute or the form of ceremony was substantially the same as Wyoming Section 20-11; Ore. Rev. Stats. Section 106.150 provided in part that "the parties thereto shall assent or declare in the presence of the minister . . . solemnizing the marriage . . . that they take each other to be husband and wife."

The *Anderson* opinion is a comprehensive one. Here, as in *Barrons,* the merits and demerits of proxy marriages are discussed. (In this article such discussion will be reserved for that part in which legislative changes in our marriage statutes are proposed; at the moment, the point we are making is that on the basis of case authority a proxy marriage performed in Wyoming would not be void.)

Pointing out that the Oregon statute was silent as to whether the assent or declaration of the parties could be made by agent, that proxy marriages were valid at common law, and that there is nothing about a proxy marriage which offends public policy, the *Anderson* majority held that such marriages performed in Oregon are voidable and cannot be attacked by a third person. Assuming but not deciding (said the court) that the marriage was not entirely valid, because the act of a proxy will not satisfy the statutory requirement that the parties shall assent or declare in the presence of the celebrant, the defect did not render it void.[80] This mode of reasoning seems peculiar.

The dissenters concentrated on the phrase "in the pre-

79. State v. Anderson, *supra* note 68.
80. *Id.* at 560.

sence of" in Section 106.150, arguing that these words required personal presence, and that such requirement was mandatory. The dissenting judges charged that the majority had added to the list of voidable marriages one of a type not so designated by the legislature, and thus were guilty of judicial legislation. They concluded that proxy marriages are void.

The value of the *Respole*[81] and *Fernandes*[82] cases is weakened by the fact that in neither jurisdiction involved (West Virginia and the District of Columbia, respectively) was there a statute like Wyoming Section 20-11 specifying minimum requirements for a marriage ceremony; there was no statute containing the "in the presence of" phraseology.

The few cases which hold that proxy marriages are void construe statutes in which there is language explicitly requiring both parties to be in the physical presence of the celebrant.[83]

As already indicated, discussion of the pros and cons of proxy marriages (as well as text and law review material) will be reserved for later discussion. The subject is of considerable importance since, as one authority observed, "during World War II several thousand proxy marriages occurred . . ."[84] and the primary reason—many young men overseas in miltary service—still exists. For the moment, suffice it to say that the wording of Section 20-11 of the Wyoming marriage statutes should be altered at least to the extent necessary to clarify the status of proxy, telephone and radio marriages performed in this state.

Research has not disclosed any reported cases involving the validity of marirages by telephone, radio or similar means of communication. Newspaper reports of such marriages appear from time to time, and the indications are that for the most part such marriages fall in the category of "stunts".[85] We have already taken the position that such

81. Respole v. Respole, *supra* note 68.
82. Fernandes v. Fernandes, *supra* note 69.
83. *See* Annot., 170 A.L.R. 947 (1947).
84. *Id.*
85. Howery, *Marriage by Proxy and other Informal Marriages*, 13 U.K.C.L. REV. 48 (1944).

marriages should not receive the blessing of Wyoming law, and Section 20-11 should make this clear.

One could hardly be "in the presence of" the celebrant if only his voice were present. This conclusion is supported by an opinion of the Attorney General of Wyoming rendered under date of November 12, 1953.[86] The Attorney General considered that what is now Section 20-11 was determinative of the question, and that a man in Germany who proposed to marry a woman in Wyoming by telephone could not be "in the presence" of the celebrant under those circumstances. He added that he believed that express legislative authorization of such marriages "would be in the public interest".

A further suggestion: As a matter of practice, the marriage license is delivered to the celebrant by the parties desiring to be married (it being his authority for performing the ceremony), but the opening sentence of Section 20-11 should specifically require this.

Under existing law a marirage license once obtained is valid for an indefinite time. Perhaps a limitation should be imposed, especially if the requirements for health certificates, serological tests, etc. are retained, since the protection provided thereby would obviously decrease with the passage of time. If the parties abandoned their plans to marry the absence of a time limit might encourage the fraudulent use of the license by imposters who lack legal capacity to marry. The opinions of county clerks, ministers and other interested persons as to a reasonable time limitation could be sampled. The limitation appropriately could be expressed in Section 20-11.

The analysis of Section 20-11 having been completed, let us go on to Section 20-12[87] which deals with the preparation and delivery of the marriage certificate to the parties. Several minor changes would improve this statute. Since it

86. 1953 OP. WYO. ATT'Y. GEN. 71.

87. This section provides:

> When a marriage shall have been solemnized pursuant to the provisions of this chapter [§§ 20-1 to 20-6, 20-10 to 20-17, 20-20, 20-21], the person performing the ceremony, shall give each of the parties, on request, a certificate under his hand, specifying the names, ages, and place of residence of the parties married, the names and residence of at least two witnesses who were present at such marriage, and the time and place thereof.

seems to be invariable practice for celebrants to make out and deliver marriage certificates to the parties and to the county clerk, the words "on request" should be deleted. Every one who is married should be given a marriage certificate—whether he chooses to retain it or to dispose of it is for him to decide. This section should require the celebrant to prepare and sign three originals of the marriage certificate, and to deliver or mail one to each of the parties and the third to the county clerk of the county of issuance, within ten days following the performance of the ceremony. Furthermore, the opinions of the county clerks should be sought as to whether the information presently required to be entered on the certificate is adequate. If additional information is desirable, the statute relating to the application for the license should be amplified accordingly, so that the celebrant will have the necessary information before him when he prepares the marriage certificate. If proxy marriages are to be permitted, provision should be made in Section 20-12 to include that fact and the name of the proxy. Language making allowance for the performance of ceremonies by religious societies should also be included.

Sections 35-70 to 35-72,[88] which appear in Title 35 (Public Health and Safety) tie in with Section 20-12 although there is no mention of this in the latter statute. Sections 35-70 to 35-72 seem out of place in Title 35. They do not direct the State Registrar of Vital Statistics to do anything; their directions are confined to celebrants of marriages and to county clerks. They could well be omitted from Title 35. Moreover, in view of what we have already proposed as to 20-12, 35-70 and 35-71 can be eliminated entirely. The substance of 35-72 can be incorporated into Section 20-13, which provides that "The county clerk of each county in the state

88. WYO. STAT. § 35-70 (1957) provides:
Every officiant of a marriage ceremony performed in this state shall prepare and sign a certificate of marriage in duplicate, one copy of which shall be given to the parties so married, and the other copy to be filed in accordance with section 24 of this act [§ 35-71].
WYO. STAT. § 35-71 (1957) provides:
Every person who performs a marriage ceremony in this state shall file, within ten (10) days after the ceremony, one copy of the certificate of marriage with the officer who issued the marriage license.
WYO. STAT. § 35-72 (1957) provides:
Every officer authorized to issue marriage licenses shall forward on or before the fifteenth day of each calendar month the certificates of marriage which were filed with him during the preceding calendar month, to the state registrar.

shall record all such returns of such marriages in a book to be kept for that purpose, within one month after receiving the same." This one month time period should be synchronized with the time specified in 35-72, since there could be a conflict as matters now stand. It is suggested that the latter be changed to read "within 15 days after he (the couny clerk) records the marriage certificate". In Title 35, in substitution for 35-70 to 35-72, there should be a statute directing the Registrar of Vital Statistics to file and make a record of marriage certificates received from county clerks. ("Make a record of" is included with a view to the compilation of statistics.) Former Section 35-73 was repealed by the legislature,[89] since the recording fee is covered elsewhere.

In line with our suggestions as to Section 20-12, the words "all marriage certificates received by him from persons or religious societies authorized to perform marriage ceremonies" should be substituted for "all such returns of such marriages" in Section 20-13.[90]

The next section, 20-14,[91] could also be improved in minor particulars. It is confusing to speak of an original certificate *and record* of marriage made by a celebrant. The *record* of the marriage would appear to be the entry made in the marriage book by the county clerk. Thus the section might well be rephrased to read, "Any one of the original certificates of marriage prepared and signed by a person or representative of a religious society authorized by this chapter to perform marriage ceremonies, and any record of the marriage appearing in the office of the county clerk, or a copy of such record duly certified by the county clerk, shall be received in all courts and places as presumptive evidence of the fact of such marriage." Since people frequently record their marriage certificates, the words "any record of the marriage appearing in the office of the county clerk"

89. Ch. 106, § 4, [1965] WYO. SESS. LAWS 130.
90. This section provides: "The county clerk of each county in the state shall record all such returns of such marriages in a book to be kept for that purpose, within one month after receiving the same."
91. WYO. STAT. § 20-14 (1957) reads as follows:
> The original certificate and record of marriage made by the minister, officer or person, as prescribed in this chapter [§§ 20-1 to 20-6, 20-10 to 20-17, 20-20, 20-21], and the record thereof made as prescribed, or a copy of such record duly certified by such officer, shall be received in all courts and places as presumptive evidence of the fact of such marriage.

were chosen because they would include both the record in the marriage book and a recorded marriage certificate.

The problem of sanctions to be imposed for violation of the marriage statutes will be considered as a whole at the conclusion of this analysis—consequently we shall at present omit discussion of Section 20-15.

Logic suggests that what is now Section 20-16[92] should follow the combination of 20-10 and 20-20 which we discussed hereinabove. Section 20-16 tells us in effect that the validity of a marriage performed by justices of the peace or ministers shall not be affected by a "flaw in the title" of such justice or minister, if at least one of the persons so married entertains a "full belief" that the marriage was valid. This is a desirable curative statute, but minor changes would be in order. Why not include judges and court commissioners as well as justices and ministers, and celebrants representing a religious society or assembly under 20-20? The section should cover all celebrants. "Want of jurisdiction or authority" would seem to be broad enough to cover all defects which the statute seeks to reach, including a situation such as occurred in the well known case of *Travers v. Reinhardt*[93] where the husband, without the wife's knowledge, arranged for the ceremony to be performed by a friend of his, who was not a minister but who masqueraded as such. Out of an abundance of caution, perhaps the phrase should read "want of qualification, jurisdictions or authority".

Here for the first time we encounter in our marriage statutes the phrase "provided, the marriage be consummated ...." When we speak of the "consummation" of a marriage any one of three different meanings may be intended: (1) the mere completion of the marriage ceremony,[94] or (2) a ceremony followed by sexual intercourse,[95] or (3) the mutual

92. This section provides that:
> No marriage solemnized before any person professing to be a justice of the peace or a minister of the gospel, shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected, on account of any want of jurisdiction or authority in such supposed justice or minister; provided, the marriage be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.

93. Travers v. Reinhardt, 205 U.S. 423 (1906).
94. Lefkoff v. Sicro, 189 Ga. 554, 6 S.E.2d 687, 695 (1939).
95. Caruso v. Caruso, 104 N.J. Eq. 588, 146 A. 649, 651 (1929).

assumption of marital rights, duties and obligations, not necessarily limited to (1) or (2).[96] Any of the three meanings could have been intended by the legislature in Section 20-16. The first meaning seems the most sensible in this case, and the language of 20-16 should be clarified so as to reflect it.

One final suggestion in connection with this section: "bona fide belief" on the part of the persons so married, or either of them, would be preferable to "full belief".

The next section, 20-17,[97] forbids the *solemnization* of marriages which are declared void "by the divorce law of this state". The reference would seem to be to Section 20-32 which appears in the chapter on "Divorce, Annulment and Alimony" and which enumerates void marriages. Since the reference is somewhat uncertain, and is unnecessary in any event, it should be deleted. At first blush the statute seems to be directed primarily at people who are authorized to perform marriage ceremonies, but the underlying purpose is undoubtedly to lay the basis for imposing sanctions upon everyone who in any way participates in unlawful marriages: the parties, the county clerk, the celebrant—even the physician who supplies an untrue certificate of freedom from venereal disease. If this analysis is sound, then voidable as well as void marriages should be included (since both are unlawful) and the requirement of scienter should be added. A celebrant should not be punished for innocently solemnizing an unlawful marriage, nor a county clerk for innocently issuing a marriage license in ignorance of a legal impediment to a valid marriage, and so on. We have already recommended that our statutes expressly identify and define void and voidable marriages. The substance of Section 20-17 could be set out as the opening sentence of the statute or statutes which provide sanctions for the knowing violation of the marriage code—probably at the end of the code.

Sections 20-18 and 20-19 were repealed by the 1965 legislature.[98] So-called miscegenation statutes of this kind were recently declared by the U.S. supreme court to violate

96. Sharon v. Sharon, 79 Cal. 633, 22 P.26, 37 (1889).
97. The statute provides that: "Marriages that are declared void by the divorce law of this state shall in no case be solemnized."
98. Ch. 4, § 1, [1965] WYO. SESS. LAWS 3.

the equal protection clause of the 14th Amendment,[99] so it is unnecessary to give any thought to their possible reinstatement.

We have already worked over Section 20-20. This brings us, then, to the final statute in the article on the creation of the marriage relationship—section 20-21.[100] This statute deals very briefly with the conditions under which the State of Wyoming will recognize the validity of marriages performed or created outside the state. At first blush, the use of the word "country" would lead us to believe that the section does not apply to sister-state marriages. Nevertheless, an identical California statute was construed as including sister-state marriages.[101] The wording should be amended in order to make clear the legislative intent that the statute is to apply to all marriages contracted outside the state. Secondly, the term "marriage contracts without this state" could be improved upon.

We may observe that the statute is limited to marriages valid where performed, which would not include voidable marriages. Is this desirable? I think it is; why should we recognize as *valid* here a marriage which was merely *voidable* where performed? In order to make it clear that validity is to be judged as of the time the marriage is contracted, it would be well to use the words "were valid" rather than "would be valid".

These minor matters out of the way, we should next consider whether the statute is an adequate statement of the specific conflict of laws rule which it adopts, and whether this rule is the best of the various conflict of laws rules available for legislative selection. Section 20-21 is an expression of what may be called "the orthodox conflict of laws rule", stated as follows by the writer in C.J.S.:[102]

> "The general rule is that the validity of a marriage is determined by the law of the place where it was contracted; if valid there it will be held valid everywhere, and, conversely, if invalid by the lex

99. Loving v. Virginia, 87 S. Ct. 1817 (1967).
100. "All marriage contracts without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state." WYO. STAT. § 20-21 (1957).
101. McDonald v. McDonald, 6 Cal. 2d 457, 58 P.2d 163 (1936).
102. 55 C.J.S. *Marriage* § 4, at 811 (1948).

> loci contractus, it will be held invalid wherever the question may arise."

This rule was adopted by the Restatement of Conflict of Laws[103] and is in force in the majority of jurisdictions.

Universally an exception to this rule exists. It is variously stated, but the following from an A.L.R. annotation[104] puts it very well:

> While there are to be found some dicta in the American decisions, and possibly some actual English decisions, seemingly favoring the rule that the capacity of the parties, as contradistinguished from the formal or ceremonial requirements of the marriage, is to be tested according to the law of the domicil, no matter where the marriage is celebrated, the decisions, in the American cases at least, refusing to recognize foreign marriages on grounds other than lack of ceremonial or formal requisites are generally predicable on the fundamental public policy against the celebration of such a marriage, of the forum (whether of the domicil or of some third state) in which the validity of the marriage has come in question.

This is a more accurate way to put it than the more usual statement that "an exception thereto exists where the marriage is repugnant to the public policy of the domicile of the parties . . ."[105] the domicile of the parties ordinarily (but not necessarily) being the forum. The question left open by this latter form of statement is, "Domicile of the parties at the time of the marriage, or domicile when the law suit is begun?" The last mentioned is almost always the forum state, while the former could be any place.

As indicated in the A.L.R. quotation *supra* there is another conflict of laws rule which seems to be followed in England and possibly some of the American states: that lex loci contractus is applied to determine the validity of the marriage so far as its ceremonial or formal requisites are concerned, whereas capacity of the parties to marry is to be determined by the law of their domiciles at the time the

103. RESTATEMENT OF CONFLICT OF LAWS § 121 (1934).
104. Annot., 127 A.L.R. 437 (1940); *see* also, 11 OKLA. L. R. 305 (1958).
105. 55 C.J.S. *Marriage* § 4, at 813 (1948).

marriage is contracted.[106] The leading English case exemplifying what may be called the "domicile rule" is *Brook v. Brook.*[107]

A third possibility is the adoption of a "marriage evasion policy" by statute or court decision. In brief, this rule is that if parties domiciled in State A go to State B and are married, with the intent to evade the marriage laws of State A and the intent to return to State A, the marriage being valid in State B but void if performed in State A, the result is a void marriage. In 1912 the National Conference of Commissioners on Uniform State Laws promulgated the "Uniform Marriage Evasion Act" expressing this policy. Only a few states adopted it (five as of 1961) and for this reason the Conference withdrew the Act in 1943.[108] A few states may have adopted marriage evasion statutes other than the Uniform Act, and a few court decisions may be interpreted as adopting a marriage evasion policy without the aid of statute,[109] but the movement seems to have gained only slight momentum. As already noted, there are no Wyoming statutes which can be interpreted as adopting a marriage evasion policy, and when confronted with a case which presented a perfect opportunity for judicial adoption of such a policy, the Supreme Court of Wyoming declined the invitation.[110]

From this brief review there seems no reason to question the soundness of the judgment of the Wyoming legislature in selecting the orthodox conflict of laws rule to govern the validity in Wyoming of marriages performed outside the state. No extended discussion of the merits of the three rules will be undertaken.

However, if we are to stay with the orthodox rule, Section 20-21 should be fleshed out in the interests of clarity. We suggest that the period at the end of the section as it now stands be changed to a comma, and the following words added:

> unless any such marriage be deemed contrary to the strong public policy of Wyoming, in which event it

106. Cases pro and con are cited in 35 AM. JUR. *Marriage* § 169, at 285 (1941).
107. Brook v. Brook, 9 H.L.C. 193 (1861).
108. JACOBS & J. GOEBEL, DOMESTIC RELATIONS 72 (4th ed. 1961).
109. *Id.*
110. Hoagland v. Hoagland, 27 Wyo. 178, 193 P. 843, 32 A.L.R. 1104 (1920).

> shall be void in this state. Without intending this reference to be exclusive, all marriages designated as void by the statutes of this state if performed in Wyoming shall be deemed contrary to the strong public policy of Wyoming. All marriages contracted outside this state which would be either void or voidable by the laws of the state or country where contracted shall be void in all courts and places in this state.

The words "strong public policy" were chosen rather than "public policy" alone so as to exclude a category of marriages (e.g., underage marriages) which may not be completely valid if performed in Wyoming, hence are *against the public policy of Wyoming* in one sense of the term, and yet are not so offensive to our public policy as to be entirely repugnant thereto. The "strong public policy" language gives the court desirable leeway in considering the validity of out-of-state marriages which were valid where performed but would encounter at least some disapproval if attempted in Wyoming.

The next-to-last sentence is the suggested addition to Section 20-21 is designed to take care of such situations as are exemplified by the case of *Garcia v. Garcia.*[111] South Dakota statutes provided that marriages between first cousins would be incestuous and void if performed within the state, and that the parties to incestuous marriages would be guilty of adulty, a felony punishable by a maximum of 10 years in the penitentiary. (First cousin marriages performed in Wyoming are also void.)[112] The Garcias, who were first cousins, were married in California, where such marriages are valid, and later moved to South Dakota. The wife brought suit to annul the marriage. The Supreme Court of South Dakota held the marriage *valid* in that state, on the ground that the marriage was valid where performed and did not offend the strong public policy of South Dakota because it was not incestuous "according to the accepted opinion of Christendom".[113] (Incestuous marriages as set forth in the Book of Leviticus do not include first cousin marriages.) It is difficult to imagine a clearer expression of strong

111. Garcia v. Garcia, 25 S.D. 645, 127 N.W. 586 (1910).
112. WYO. STAT. § 20-32 (1956).
113. Garcia v. Garcia, *supra* note 111, at 589.

public policy than the designation of a certain kind of marriage as *void,* plus a *ten year prison sentence* for those who participate therein! If the legislature of Wyoming has seen fit to designate certain kinds of marriages as *void* when performed here, it seems to us that the strong public policy of Wyoming on that subject has been expressed—and for this reason we have suggested the addition to Section 20-21 of the provision that "marriages designated as void by the statutes of this state if performed in Wyoming shall be deemed contrary to the strong public policy of Wyoming." Not all states would follow this philosophy, as the *Garcia* case[114] so well demonstrates.

In Part III of this article there will be an analysis of such Wyoming statutes other than Sections 20-1 to 20-21 as apply directly to marriage. This will be followed by a proposed revision of the Wyoming "Marriage Code".

114. *Id.*