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

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This is the third of a series of articles reviewing the Wyoming marriage statutes. In this article Professor Rames analizes the Wyoming statutes that apply directly to the marriage and its annulment. There is a discussion concerning which marriages should be determined void or voidable and the consequences of these determinations. This is followed by a proposed revision of the Wyoming "Marriage Code."

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

*John O. Rames**

In Part I of this article[115] 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 identified, and various deficiencies were noted. In part II[116] this process was continued through Section 20-21. We propose in Part III to complete the analysis of the Wyoming statutes which deal directly with the subject of marriage, including those relating to annulment.

Analysis of Sections Other Than 20-1 to 20-21

Title 20, Chapter 2 of the 1957 statutes, entitled "Divorce, Annulment and Alimony," contains certain sections which directly relate to the validity of marriages.[117] We shall now approach these statutes in order as listed in footnote 117.

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115. Rames, *An Analsyis of Wyoming Marriage Statutes, With Some Suggestions for Reform—Part I*, 2 Land & Water L. Rev. 177 (1967).

116. Rames, *An Analysis of Wyoming Marriage Statutes, With Some Suggestions for Reform—Part II*, 3 Land & Water L. Rev. 129 (1968).

117. They are Sections 32, 33, 34, 35, 37, 44, 45, 46, 50, 52, 53, 57, 61, 62, 64, 68, 69 and 70.

Section 20-32 undertakes to enumerate the kinds of marriages which, if performed in Wyoming, are *void.*[118] These include bigamous, insane and consanguinous marriages. The language with which the section begins should be noted: "Marriages are void without any decree of divorce. . . ." The word "divorce" is a misnomer, since one cannot dissolve a void marriage by means of a divorce; the establishment of at least a voidable marriage is prerequisite to the granting of a divorce. [119] Accordingly, the word "divorce" should be changed to "annulment." (The legislature, in the ensuing sections of Chapter 2, seems to have used the words "divorce" and "annulment" more or less interchangeably.)

With respect to the three subdivisions of the statute, the first seems well phrased and codifies the common law with respect to bigamous marriages. The second poses a number of problems: to begin with, since idiocy is merely one form of insanity the phrase "or an idiot" could well be omitted. More important are the questions as to whether an insane marriage should be void, voidable, or both; and (this decision having been made) how the mental incompetence here involved may most accurately be expressed.

At common law the marriage of an insane person was void ,[120] and Section 20-32 (which was enacted in 1882 and remains unchanged to date) evidently adopts this view. However, Section 20-45—part of the same 1882 act—provides that "The marriage of a lunatic may also be declared void upon the application of the lunatic after the restoration of reason, but in such cases no decree of nullity shall be pronounced if it shall appear that the parties freely cohabitated as husband and wife after the lunatic was restored to a sound mind,"

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118. WYO. STAT. § 20-32 (1957) reads as follows:
> Marriages are void without any decree of divorce that may hereafter be contracted in this state:
> *First*—When either party has a husband or wife living at the time of contracting the marriage;
> *Second*—When either party is insane or an idiot at the time of contracting the marriage;
> *Third*—When the parties stand in the relation to each other of parent and children, grand-parent and grand-children, brothers and sisters, of half as well as of whole blood, uncle and niece, aunt and nephew, and first cousins, and this sub-division extends to illegitimate as well as legitimate children and relations; provided, that this prohibition shall not extend to any persons not related by consanguinity.

119. 27A C.J.S. *Divorce* § 54, at 170 (1959).

120. CLARK, LAW OF DOMESTIC RELATIONS § 2.15, at 97 (1968) [hereinafter cited as CLARK].

which is contra to the firmly established rule that a *void* marriage cannot be ratified. [121] In a state in which common law marriage is recognized such a provision would cause no difficulty, since the cohabitation would produce a new common law marriage. Wyoming case law being what it is, Section 20-45 creates a doubt as to whether the legislature intended that insane marriages should be void, voidable, or both (void for some purposes and voidable for others).

Clark tells us that

> There has been a trend, however, noticeable both in statutes and in cases, in the direction of treating the marriage of an incompetent person as being only voidable rather than void.[122]

He reminds us that if the marriage is void it can be disregarded and no decree is necessary to set it aside, and that it is open to collateral attack, even after the death of one of the parties.[123] Such vulnerability to attack makes for uncertainty of status, which is not desirable. If the marriage is voidable, it might ripen into a valid marriage and thus become invulnerable to attack. These are some of the factors to be considered in making the "void vs. voidable" decision. In addition there is the broad public policy question, "Is it desirable to make the validity of the marriage depend upon the mental condition of the parties at the exact moment of the marriage ceremony?" If mental incompetency were an unalterable, black-and-white proposition there would be more reason to say, dogmatically, that if either party is "insane" at the time of the ceremony the marriage is void. It is the writer's feelings that the reasons for making an insane marriage voidable outweigh those in favor of making it void, and this view will be adopted in the legislative proposals hereinafter submitted. The question of whether a marriage can be void for some purposes and voidable for others will be discussed at a later stage of this article.

Should the statute define "insanity" which, existing in either party at the time of the ceremony, will render the marriage voidable? Clark points out that

121. 55 C.J.S. *Marriage* § 39, at 884 (1948).
122. CLARK, *supra* note 120, § 2.15, at 97-8.
123. *Id.* at 97.

> The annulment statutes refer to the ground of mental incompetence in varying terms, such as insanity, lunacy, idiocy, feeble mindedness, imbecility, and an assortment of other phrases. Some statutes authorize annulment on the more straightforward ground of mental incapacity to consent to entering the marriage contract. With such a variety of imprecise language, these statutes have produced a good deal of litigation concerning the kind of mental incompetence sufficient to justify annulment . . . the English cases made the test of mental competence to marry turn upon 'a capacity to understand the nature of the contract, and the duties and responsibilities which it creates.' The American courts have generally adopted the same test. Some cases, however . . . have held that the only requirement is that the parties have the ability to consent to the marriage contract in general, without taking into account the particular duties and the nature of the marriage relation. Various other more or less similar tests have been adopted . . . .[124]

What Professor Clark has said seems to give us clear guidelines: the statute should use the phrase "mental incapacity to consent to entering the marriage contract," and should define this in terms of "a capacity to understand the nature of the contract, and the duties and responsibilities which it creates."

Moving on to the third subdivision of Section 20-32, we find that marriages of persons within certain blood relationships to each other are void. The language here seems quite clear, so that the only question appears to be whether the relationships enumerated are subject to any valid criticism. As to those included, the only controversial ones are uncle-niece, aunt-nephew and first cousin marriages. For the sake of brevity the term "uncle-niece marriage" will be assumed in this discussion to include the corresponding aunt-nephew relationship.

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124. *Id.* at 95-6.

Consanguinity statutes (if we may call them such) originated with the 18th Chapter of the Book of Leviticus in the Bible. In this Chapter the Lord informed Moses of the relationships within which marriage was wrongful and therefore to be forbidden. These so-called "Levitical degrees" came down to us through Roman Catholic canon law and English ecclesiastical law, and included disqualifications arising from affinity as well as consanguinity.[125] Through a series of statutes beginning at the time of Henry VIII's marital difficulties, prohibitions based on affinity have largely disappeared in England. In this and other ways, Section 20-32 represents a considerably modified version of the Levitical degrees.

From the standpoint of eugenics, inbreeding brings to light recessive (unfavorable) family characteristics,[126] and this is to some extent true of first cousin marriages.[127] Since uncle-niece marriages represent an even closer blood relationship,[128] the legislative judgment in forbidding first cousin and uncle-niece marriages seems sound. A few states go even further.[129]

Clark indicates that most statutes include persons related by the half as well as the whole blood, and illegitimates.[130] The Wyoming statute as presently worded seems to limit the half blood language to brothers and sisters, and this seems satisfactory; the concluding clause that "this prohibition

125. *Id.* § 2.8, at 72.
126. *Id.* at 71, and authorities there cited.
127. *Id. And see* MONTAGU, HUMAN HEREDITY 317 (1963) where the author illustrates as follows: "The chance that a cousin carries the same recessive gene, say for albinism, in first cousin marriage is about 1 in 8, as compared with 1 in 70 unrelated individuals; so it will be seen that first-cousin marriages are quite a hazard." On the other hand first cousin marriages "likewise tend to bring into expression beneficial genes, since the mechanism of heredity is the same in both cases." *See also* COLIN, ELEMENTS OF GENETICS 336 (1946).
128. There are various methods for reckoning degrees of blood relationship, see 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 386 *et seq.* (2d. ed. 1909). The simplest is the Roman: "In order to discover the degree of consanguinity which exists between two persons, *A* and *X*, we must count the acts of generation which divide the one from the other. . . . [S]uppose that *A* and *X* are collateral relations, then our rule is this—[c]ount the steps, the acts of generation, which lie between each of them and their nearest common ancestor, and then add together these two numbers. Father and son are in the first degree, brother and brother in the second, uncle and nephew in the third, first cousins in the fourth."
129. "In the mid-50's, 29 jurisdictions prohibited marriages between first cousins, 7 jurisdictions forbade marriage to a grandniece (grandnephew) and 6 prohibited marriage to a first cousin once removed." 14 ENCYCLOPEDIA BRITTANNICA *Law of Marriage* 955 (1964).
130. CLARK, *supra* note 120, § 2.8, at 73.

shall not extend to any persons not related by consanguinity" should take care of "step" relationships.

From what has been said above it appears that there can be no real quarrel with the Wyoming legislative determination concerning the relationships within which marriage should be forbidden; and there would seem to be no policy reasons why such marriages should be deemed voidable rather than void. Hence, the third subdivision of Section 20-32 should be "passed for cause."

In addition to bigamous, insane and consanguinous marriages, what other kinds of marriages should be designated void? As already observed,[131] it is logical to provide that if one or more of the mandatory requirements for a ceremonial marriage have not been met, the marriage will be void, hence a provision to this effect should be added to Section 20-32. We also suggested[132] the codification of the Wyoming Supreme court holdings that valid common law marriages cannot be created in Wyoming, which could be done by adding still another subdivision to Section 20-32.

Miscegenous marriages need not be mentioned, since they are no longer in the picture as a result of the repeal of Sections 20-18 and 20-19 by the 1965 legislature.[133]

The other types of marriages in which infirmities exist are those in which one or both parties are underage, or are impotent or otherwise physically incapacitated, marriages produced by fraud or compulsion, and those (such as marriages in jest) where for additional reasons there was no real consent by one or both parties. These may exist singly or in combination. Except for the last mentioned category (which will be discussed *infra*), none of these types of marriages would appear to be against the *strong* public policy of the state, even though the state would not want to encourage any of them. The individuals involved should therefore be permitted to ratify such marriages, or to obtain formal dissolution, as they may elect. Unless and until such action of dissolution is taken the law should regard such unions as valid,

131. Rames, *supra* note 115, at 179.
132. *Id.*
133. Act of January 27, 1965, ch. 4, § 1, [1965] Wyo. Sess. Laws 3. *And see* Loving v. Virginia, 388 U.S. 1.

and they should be subject to direct attack only. Such is the philosophy of the voidable marriage.

When we move on to Section 20-33 we enter a thicket in which the subjects of annulment and divorce are thoroughly intertwined, with major surgery as the only effective separation remedy. Sections 20-33 to 20-70 include some statutes expressly relating to the validity of marriages, some relating specifically to divorce, and some which commingle both subjects. In footnote 117 we identified those which relate to (but may not deal exclusively with) the validity of marriages as being Sections 32, 33, 34, 35, 37, 44, 45, 46, 50, 52, 53, 57, 61, 62, 64, 68, 69 and 70. The major surgery indicated is the creation of what may be called a Divorce Code and an Annulment Code, each separate and distinct from the other. Since divorce is the big brother, we suggest that the Divorce Code come first in the statute book, followed by the Annulment Code. The former is outside the purview of this article, but we shall undertake to formulate the latter as a part of the final portion of the article. Meanwhile, comments on Section 20-33 et seq. are in order because they are pertinent to the Annulment Code. First, however, let us make some general observations as to the structure of the Annulment Code:

Since one or both of the parties to a marriage may doubt its validity, without desiring an annulment, a proceeding in the nature of a declaratory judgment may be useful. Section 20-37 recognizes this need, but establishes a proceeding separate and apart from the Uniform Declaratory Judgments Act in order to accomplish the result. It is submitted that a separate proceeding is unnecessary and may only lead to confusion; and that a statute such as Section 20-37 should provide that the Declaratory Judgments Act may be utilized for this purpose.

Since void as well as voidable marriages are subject to annulment, the Annulment Code should make it clear that a marriage alleged to be void may be the subject of an annulment proceeding. We have already recommended that there be a legislative declaration as to what marriages are void when attempted within Wyoming.

The next step should be an enumeration of the kinds of marriages which, if performed in Wyoming, are voidable, followed by the statement that such marriages may be annulled in and by an annulment action as provided by law. We would then be in position to set up the procedure to be followed in an annulment action. This could be followed by specifics pertaining to each kind of voidable marriage which is subject to annulment.

At this point we can pick up the analysis of Section 20-33, and the subsequent sections through 20-70 which are pertinent to the validity of marriages:

Section 20-33[134] deals specifically with underage marriages and declares them voidable. Section 20-35[135] is so closely connected as to make it desirable to combine it with Section 20-33. In effecting this combination, references to marriages resulting from duress and fraud should be eliminated and treated separately. The language "under the age of legal consent" should be clarified: does it mean 18 and 16 for the man and woman, respectively? Or does it mean under 21 in view of the requirement of parental consent to the marriage of minors? Evidently the legislature intended the 18 and 16 meaning, as we can gather from Section 20-35. The words "if they shall separate during such non-age, and not cohabit together afterwards" could also be improved. What if a husband under 18 leaves his wife for a while, then the young couple tries a reconciliation which proves unsuccessful, with the result that the husband again leaves his wife before he arrives at the age of 18; he has "separated during such non-age" but they did "cohabit together afterwards" and before his 18th birthday; yet it seems evident that an annulment

134. This section provides that:
> In case of a marriage solemnized when either of the parties are [is] under the age of legal consent, if they shall separate during such nonage, and not cohabit together afterwards, or in case the consent of one of the parties was obtained by force or fraud, and there shall have been no subsequent voluntary cohabitation of the parties, the marriage shall be deemed voidable.

135. This section provides that:
> An action to annul a marriage on the ground that one of the parties was under the age of legal consent as defined in section 4956, Wyoming Compiled Statutes, 1920 [§ 20-2], may be exhibited by the parent or guardian entitled to the custody of such minor, but in no case shall such marriage to be annulled on the application of a party who was of the age of legal consent at the time of the marriage nor when it shall appear that the parties, after they had attained the age of consent, had freely cohabitated [cohabited] as man and wife.

should be permitted under these circumstances. Furthermore, although the context in which the word "cohabit" is used probably makes its meaning clear, the word itself "is of large and flexible signification, having several meanings, depending on the ideas which accompany its use, and the subject to which it is applied. . . ."[136] As used in Section 20-33 the word "cohabit" is evidently intended to mean "living together as husband and wife,' 'which is one of the meanings of "cohabit,"[137] and seems a more precise way to express the legislative intention.

Section 20-35 describes the underage marriage as "under the age of legal consent as defined in section 4956, Wyoming Compiled Statutes, 1920" which is both better and worse than the equivalent expression in Section 20-33; better because the section referred to can be pinpointed as what is now Section 20-2 (the 18-16 ages), but worse because references to other statutes normally constitute poor draftsmanship; what if the statute referred to is amended or repealed? We can avoid such legislation by reference by putting Section 20-2 in definition form: "The 'age of legal consent' for marriage in this state shall be the age of eighteen years or upwards for the male, and sixteen years or upwards for the female." With a few minor changes the remaining language of Section 20-35 seems adequate, and, as we have said, can be combined with Section 20-33.

However, there is an important point concerning the annulment of underage marriages which seems not to be covered by any existing Wyoming statute, and that is the question of a time limitation on the institution of such a suit. If, upon arriving at age 18 or 16 as the case may be, the individual is eligible to file an annulment suit (separated prior to 18 or 16, etc.) and has not already done so, within what time must the suit be filed? A minor has a "reasonable time" following the attainment of his majority within which to disaffirm ordinary commercial contracts; could the potential plaintiff in our hypothetical situation postpone the institution of an annulment until, say, age 22? Or is the contract of marriage different in this respect? With one exception about to be mentioned the

136. 14 C.J.S. *Cohabit*, at 1311 (1939).
137. *See* Rasgaitis v. Rasgaitis, 347 Ill. App. 477, 107 N.E.2d 273, 274 (1952).

entire subject of limitations on the institution of annulment suits seems to have been neglected by the legislature. For example, how about a limitation on the right of a parent under Section 20-35 to institute a suit to annul the underage marriage of his child? The statute is silent on the subject.

The only statute of limitation in Wyoming specifically applying to annulment suits is Section 20-46, which provides that "An action to annul a marriage on the ground of the physical incapacity of one of the parties . . . shall in all cases be brought within two years from the solemnization of the marriage."

What *general* statutes of limitation apply to annulment suits? If we assume that an annulment suit is a civil action, which it is for some purposes at least, there may be a question whether the four-year limitation of Section 1-18 applies. This section includes "an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter eumerated" as well as "an action for relief on the ground of fraud." Perhaps annulments are within the ten-year limitation of Section 1-21: "An action for relief, not hereinbefore provided for, can only be brought within ten years after the cause of action accrues." Such a "catch-all" statute as Section 1-21 has been held inapplicable to divorce suits[138] and annulment suits.[139] Clark puts it well, in these words:

> A fair number of states have statutes of limitation dealing specifically with annulment, and imposing different periods of limitation for the different grounds on which annulment may be sought. If there is no specific statute of limitations, the question arises whether general statues of limitation apply to annulment. A leading Wisconsin case upholds that they do, and that the period begins to run upon the plaintiff's discovery of the condition constituting the ground for annulment. There are cases to the contrary, just as there are in divorce. It would seem wise in all states to enact speciifc statutes of limitation for annulment. If the

138. Kittle v. Kittle, 86 W. Va. 46, 102 S.E. 799 (1920).
139. Campbell v. Campbell, 264 N.Y. 616, 191 N.E. 592 (1934), Chittenden v. Chittenden, 68 Misc. 172, 123 N.Y.S. 629 (1910).

> general statutes do not apply, there still may be the defense of laches, based upon delay causing a prejudicial change of position to the defendant.[140]

We shall not undertake at this stage to propose a solution to the problem of limitations, but will note the existence of the problem and cover it later in the suggestions for revision of the statutes.

Section 20-34 provides in bare outline for the institution and prosecution of annulment suits—a subject to be covered in detail in the Annulment Code.

Taking leave of the annulment of underage marriages for the time being, what should the statutes provide with respect to annulment for duress and fraud? We have suggested a separate section for each.

Looking at duress first, it would seem desirable to provide that a marriage resulting from duress affecting either or both parties is voidable and may be annulled on that ground by the party or parties whose consent was procured by duress. "Duress" seems preferable to the word "force" now found in Section 20-33. The term "duress" should be defined in terms of case law, which is relatively uniform in this area. The statute should provide that the cause of action for annulment on the ground of duress shall accrue at the time the marriage is performed, since the plaintiff or plaintiffs must have been aware of it at that time.

The section on fraud should take the same general approach, but here the task is not so easy because of a certain amount of disagreement among the courts as to the type of fraud which will justify annulment. The various possibilities are (1) "Ordinary fraud," or fraud sufficient to justify the recision of a commercial contract, (2) "Gross fraud," which, like "gross negligence," is fairly self-explanatory, and (3) "Fraud going to the essentials of the marriage." Without undertaking to tabulate the jurisdictions which follow each of the above categories, it is sufficient to say that the great majority of American jurisdictions limit annulment for fraud

140. CLARK, *supra* note 120, § 3.3, at 130-1.

to that which goes to the essentials of the marriage.[141] Clark has pointed out that the essentials test seems to be undergoing a change of content;[142] courts do not always agree as to what is fraud going to the essentials of a marriage. For this reason it would seem inadvisable to attempt in the statute to define the term.

As in the case of underage marriages, there should be a limitation on the time within which a suit for annulment on the ground of fraud may be instituted following the discovery of the fraud.

So much for underage marriages and the marriages procured by duress and fraud. What other grounds for annulment are mentioned in our statutes? There are two—insanity and physical incapacity—represented by Sections 20-44, 20-45 and 20-46.[143] We have commented *supra* on the fact that Section 20-32 makes insane marriages void, whereas Section 20-45 indicates that they are voidable, and we then reserved for later discussion the question as to whether a certain type of marriage may be void for one purpose and voidable for another. We now take up that question:

As already observed, void as well as voidable marriages may be subject to annulment, and this is as it should be, since a decree annulling a void marriage may be desirable to "clear the record." For this reason the mere fact that a particular type of marriage is designated annullable does not fix its character as void or voidable. To label a certain kind of marriage void for one purpose but voidable for another would serve no useful end, and would lead to serious difficulties. These would arise from the collateral consequences of the

141. 55 C.J.S. *Marriage* § 43, at 868 (1948).
142. CLARK, *supra* note 120, § 2.17, at 105.
143. Section 20-44 provides that:
> A petition to annul a marriage on the ground of insanity or idiocy may be exhibited by any person admitted by the court to prosecute as the next friend of such idiot or lunatic.

Section 20-45 provides that:
> The marriage of a lunatic may also be declared void upon the application of the lunatic after the restoration of reason, but in such cases no decree of nullity shall be pronounced if it shall appear that the parties freely cohabited as husband and wife after the lunatic was restored to a sound mind.

Section 20-46 provides that:
> An action to annul a marriage on the ground of the physical incapacity of one of the parties shall only be maintained by the injured party against the party whose incapacity is alleged, and shall in all cases be brought within two years from the solemnization of the marriage.

label: as already noted, void marriages need no decree to render them void; they cannot be ratified; they are subject to collateral as well as direct attack; and they may be attacked after the death of the parties as well as during their lifetimes. All of these consequences are directly opposite with voidable marriages. For these reasons, then, a marriage of a type subject to an impediment should be classified as either void or voidable, but not both. We have already concluded that insane marriages should be classified as voidable, which would validate Section 20-45 but eliminate the second subdivision of Section 20-32. Section 20-44 can remain as it is, with minor changes in wording. A time limitation should be added to 20-45, and it should be made clear that the section applies only to insanity existing at the time of the marriage, since insanity developing after the marriage is a ground for divorce under Sections 20-39 to 20-43 and it is unlikely that the legislature intended Section 20-45 to apply to the latter situation.

Let us next look at "physical incapacity" as a ground for annulment, under Section 20-46. As in the case of insanity we need at the outset a legislative classification of such a marriage as void or voidable, and undoubtedly it should be the latter. We need a direct statement that the "physical incapacity" of one of the parties existing at the time of the marriage is a ground for annulment, rather than the "left-handed" way in which 20-46 puts it. And we need to mull over the meaning of the interesting phrase "physical incapacity."

Impotence of either party made a marriage voidable according to the ecclesiastical law of England.[144] Since such law never became a part of American common law, in the strictest sense, Clark concludes that most courts will not recognize impotence as a ground of annulment in the absence of statute.[145] He points out that impotence means inability to copulate, or impairment to the extent that sexual relations are imperfect, painful or unnatural.[146] Although originally the law recognized only physical impotence, modern courts grant annulments when the impotence is only psycogenic, so long as the result is physical inability to copulate.[147]

144. CLARK, *supra* note 120, § 2.12, at 87.
145. *Id.* at 88.
146. *Id.* at 88-9.
147. *Id.* at 89.

Did the Wyoming legislature mean *impotence* when it used the phrase "physical incapacity," in Section 20-46, or did it mean something more or less than this? The statute was enacted in 1882, when there was a Victorian modesty about referring to sexual matters, and "physical incapacity" may have been a delicate substitute for "impotence." If not, it is difficult if not impossible to mark out the limits of "physical incapacity" when used in this context.

Section 20-38 which sets out 11 of the 13 available grounds for divorce in Wyoming was a part of the same Act as Section 20-46. The second divorce ground enumerated in 20-38 is "When one of the parties was physically incompetent at the time of the marriage, and the same has continued to the time of the divorce." There is no apparent difference in the meaning of "physically incompetent" as compared with "physical incapacity." We can only speculate as to why the legislature did not use identical phraseology.

Incidentally, there are two instances in which the legislature has permitted a litigant to make a choice between a divorce and an annulment: (1) the divorce for physical incompetency set out in 20-38(2) and the annulment for physical incapacity set out in 20-46, and (2) the divorce for pregnancy of the intended wife by another man at the time of the marriage, unknown to the intended husband (the 11th ground), and the annulment for fraud going to the essentials of the marriage, to the degree that it includes such pregnancy. In both instances the marriage is voidable, but the legislature may permit the dissolution of a voidable marriage by divorce as well as by annulment, and research has revealed no cases holding that it must be an either-or proposition. The legislative motive in permitting a single ground to be used for either divorce or annulment is somewhat puzzling, but there seems to be no matter of principle involved. Accordingly, no change is suggested.

To return to the "physical incapacity" language in 20-46, we suggest that the word "impotence" be substituted. Its meaning in ecclesiastical law is well understood, and it was probably what the legislature meant by "physical incapacity." It should be noted that the existence of impotence in one or

both parties could (but does not necessarily) fall within the fraud category. A time limitation on a suit for annulment on the ground if impotence should be added, as presently provided by Section 20-46.

To recapitulate on the present topic, the Wyoming legislature has expressly provided in more or less satisfactory fashion that underage, insane, coerced, fraudulent, and impotent marriages are void or voidable and can be annulled. Are there other kinds of marriages, void or voidable, which should be added to list?

First let us say that the Annulment Code should provide that *all* marriages which are void or voidable if performed in Wyoming shall be subject to annulment. This would include attempted common law marriages (void), those in which one or more of the mandatory requirements for a valid ceremonial marriage were not complied with (void), and such of the directory requirements (parental consent for the marriage of a minor, for example) as would make the marriage voidable if not complied with. In addition there are the following possibilities: venereal disease, eplipsy, and all marriages to which, for any reason not already covered, there was no valid consent to marry.

Considering these in order, in Part II of this article we discussed the health certificate and serological test requirements of Sections 20-7 through 20-9, which relate to veneral disease. We concluded, largely on the basis of the opinion of the physician who was then the Director of the Wyoming Department of Public Health, that those sections should be eliminated altogether. If that is done, should the statutes nevertheless contain provisions specifically relating to venereal disease?

Venereal disease in an infectious stage, or of a character such as can be transmitted to offspring, may if misrepresented or concealed constitute fraud going to the essentials of the marriage and render the marriage voidable.[148] All other diseases (such as pulmonary tuberculosis) that would seriously endanger the health of the marriage partner or of the issue of the marriage fall into the same category. Accordingly, if

148. 55 C.J.S. *Marriage*, § 34, at 872 (1948).

only the possibility of fraud involving venereal disease had to be considered, it would be unnecessary to refer to it specifically in the statutes. However, one may have various kinds of venereal disease in a transmissible or communicable form without realizing it at the time of the application for the marriage license, thus eliminating the fraud element.[149] The only way to detect these venereal diseases would be by means of a thorough physical examination together with laboratory procedures. It is Dr. Henry's feeling that unless and until we are ready to require all applicants for marriage licenses to undergo such procedures for the purpose of detecting not only venereal disease but all other diseases which might threaten a healthy marriage and healthy offspring, there would be no justification for requiring such procedures with reference to venereal disease alone. Moreover, he concurs with Dr. Robert Alberts, former Director of the Wyoming Department of Public Health, in the view that requirements of this kind constitute unjustified invasions of the privacy of individuals by official state action. Adequate procedures would be expensve. Individuals would balk at such expense. Why should the state incur it? If Jill is unwilling to marry Jack until she is satisfied he is in fine mental and physical health, her assurance on this score is a matter to be privately arranged between them.

Dr. Lawrence J. Cohen, Director of the Division of Health and Medical Services of the State of Wyoming, is inclined to dissent from the views of Drs. Alberts and Henry on the question of whether Sections 20-7 through 20-9 should be retained.[150] He considers the requirements of these sections "a reasonable preventive medicine type of approach to a medical problem," and, recognizing the high cost of case identification which results, he believes it to be justified when compared to the cost of actively treating the severe complications of diseases subsequently identified at later stages by other methods. He points out that prenatal testing, which would lead to identification of venereal diseases in the prospective mother, may not always be done: the patient may not wish it, and a reasonable percentage of women do not seek prenatal care.

149. Personal interview with Dr. Victer G. Henry, Jr., Director of the Student Health Service of the University of Wyoming, in Laramie, Aug, 19, 1969.
150. Letter from Dr. Lawrence J. Cohen to the writer, Sept, 25, 1969.

On the basis of these opinions or respected medical experts there seems to be a considerable question as to whether Sections 20-7 through 20-9 should be included or excluded. Dr. Henry believes that if they are to be retained, the present procedures should be tightened up to insure greater validity. Recognizing full well that our decision is by no means final, we shall stay with our election to eliminate the sections in the draft of Legislation hereinafter offered. If and when it is considered by the legislature, the matter can receive further attention.

Dr. Henry proposes that applicants for a marriage license be required to answer questions pertaining to such aspects of their physical and mental health as are vital to the success of the contemplated marriage from a health standpoint, and that if the answers reveal serious threats to a healthy marriage, procedures to resolve these ought to be devised. We shall return to this subject after discussing the epilipsy problem, since the same solution will be recommended as in the case of venereal disease.

The picture regarding epilepsy is somewhat different. One afflicted with epilepsy of the petit mal type may not realize that he has the disease, but it is not regarded by the courts as serious enough to constitute fraud going to the essentials if misrepresented or concealed. On the other hand, one can hardly have grand mal epilepsy without knowing it, according to Dr. Henry. Thus, misrepresentation or concealment of grand mal epilepsy at the time of marriage would necessarily be fraudulent. But the courts are not in agreement as to whether it is fraud going to the essentials,[151] therefore it would be desirable to cover the matter specifically in a statute if it is the legislative judgment that epilepsy fraud should make the marriage voidable.

Dr. Cohen does not consider epilepsy as a disease per se, but rather a descriptive diagnostic term inferring a convulsive state. He points out that there are numerous types of convulsive disease, and that these are related to numerous types of pathology as well as no demonstrable pathology at all. He concludes that it would be medically unsound to restrict the

151. 55 C.J.S. *Marriage, supra* note 148.

marriage of a person with a history of convulsive disease "without a profound background as to the cause of the seizures and an equally profound investigation to determine whether or not the disease has a hereditary influence." These observations carry two implications: (1) that as a matter of terminology the statute should use a phrase such as "history of convulsive seizures" rather than the term "epilepsy," and (2) that, a history of such seizures having come to light in some way, further procedures would be essential in order to provide a basis upon which an intelligent decision could be made respecting the desirability *vel non* of the marriage of a person thus afflicted.

Laying aside for the moment the matter of terminology, and for the sake of convenience continuing to speak of "epilepsy," we venture to suggest a solution based on an informative opinion of a Pennsylvania trial court.[152] The opinion writer pointed out that all forms of epilepsy usually respond to modern medication, that epilepsy is not communicable, and that there is no positive answer as to whether it is transmissible. He concluded that:

> It would seem that certain epileptics should not be permitted to marry, viz., those who show mental deterioration, those whom medicine is unable to control, and those whose family history is studded with epileptics. Others should probably be granted a marriage license, especially where the applicant has 'acquired' epilepsy, where the seizures are controlled by medication, and where there is no family history of epilepsy. In between is the great borderline group. Each such case depends upon its own facts as to whether 'it is for the best interest of such applicant and the general public to issue the license."[153]

The final phrase last above quoted was a portion of the Pennsylvania statute regarding the issuance of marriage licenses to epileptics, to which we shall advert in a moment. The Pennsylvania judge suggested in his opinion that in addition

152. E. P. Marriage License, 8 Pa. D. & C.2d 598 (Orphans' Ct. 1957).
153. *Id.* at 602-3.

to factors already mentioned, the court consider in borderline cases the probable effect of marriage on the epileptic, the physical and emotional condition of the other applicant, and the likelihood of the other applicant's being able to adjust to married life with the epileptic.

All this suggests the wisdom of attempting to control the marriage of epileptics at the license-issuing stage rather than "locking the stable after the horse has been stolen" in an annulment suit. The Pennsylvania statute above referred to provided that no marriage license shall be issued

> if either of the applicants is an epileptic, or is or has been, within five years preceding the time of the application, an inmate of an institution for epileptics, weakminded, insane, or persons of unsound mind, unless a judge of the orphans' court shall decide that it is for the best interest of such applicant and the general public to issue the license, and shall authorize the clerk of the ophans' court to issue the license.[154]

It will be noted that the statute includes mental incompetents as well as epileptics. If this approach is taken, applicants who admit a history of venereal disease could well be included, since they may or may not be entitled to a license depending upon the type and stage of the disease. This would be especially desirable if Sections 20-7 to 20-9 are eliminated. The Judge of the District Court would in Wyoming assume the role of the judge of the orphans' court in Pennsylvania, with the county clerk as the license-issuing official.

A statute of this sort would not solve our problem, however, if the epileptic applicant failed to disclose his affliction in his application for a marriage license. We must face up to the queston of whether an "epileptic marriage" is to be valid, voidable or void—a question upon which the courts (as we have said) are not agreed. According to Clark,

> As medical knowledge of epilepsy has grown, and perhaps as a result of the criticisms made by Mr. Barrow and Dr. Fabing, the statutes forbidding the marriage of epi-

154. PA. STAT. tit. 48, § 1-5(e) (1954).

> leptics have largely been repealed. Today there seem to be only about six states which retain such statutes.[155]

His footnote cites statutes from five states only: Delaware, Nebraska, North Carolina, Virginia and West Virginia. He tells us that there were at one time 19 states in this category. The English Matrimonial Causes Act of 1950[156] makes epilepsy a ground for annulment.

Inasmuch as there is a question as to whether concealment of grand mal epilepsy is fraud going to the essentials, and since the victim of such fraud *may* find the marriage relationship intolerable after discovery, it seems to us that epileptic marriages should be classified as voidable and subject to annulment. The same should be done with respect to venereal disease in a communicable stage and/or of a transmissible type. This seems preferable to making such marriages absolutely valid or absolutely void.

The final category of marriages which might be annullable would consist of those to which, for reasons other than already specified, there was no valid consent to marry. Here the emphasis is upon the contractual character of marriage. Since this would be a catch-all provision it would be unwise to attempt an enumeration therein; however, there are two kinds of marriages in particular which come to mind here: marriages in jest, and marriages for a limited purpose.

The overwhelming weight of authority is to the effect that when both parties intended nothing more than a joke, the marriage may be annulled at the suit of either party.[157] This in itself does not tell us whether such a marriage is void or voidable. The A.L.R. annotator regards them as void.[158] Logically this view is sound, since neither party intended to enter into a *marriage,* even for a limited purpose, although they may have complied with all the formalities of a ceremonial marriage. We have a clear case of lack of mutual consent to marry. If subsequent to the ceremony the parties engage in sexual intercourse, the courts refuse annulment,[159] not on

155. CLARK, *supra* note 120, § 2.11, at 87.
156. 14 Geo. 6, c. 25, § 8(1)(b).
157. CLARK, *supra* note 120, § 2.14, at 94.
158. Annot., 14 A.L.R.2D 624, 629 (1950).
159. CLARK, *supra* note 120, § 2.14, at 95.

the theory that there has been a ratification of a voidable marriage, but that because of the intercourse there is an absence of proof that the marriage was in jest. In all the decisions *both* parties were jesting, but the result should not be different if one party acted in jest while the other seriously intended marriage: "It takes two to make a bargain." Thus we should add marriages in jest to the statute which enumerates void marriages.

The courts are badly split on the validity of marriages entered into for a limited purpose. A recurrent state of facts, perhaps the most typical one, is presented by the case of *Schibi v. Schibi*.[160] The plaintiff man (*H*) sued the defendant woman (*W*) in a Connecticut court for annulment of a marriage on the ground of lack of mutual consent. The trial court gave judgment for *W* and the court of last resort of Connecticut affirmed, both courts holding that the marriage was valid. *H* and *W* met during the fall of 1946, and not long thereafter she became pregnant by him. The parties then agreed that they would go through a marriage ceremony in New York, after complying with all formal requirements, in order to "give a name" to the unborn child, and that *W* would apply for an annulment six weeks later. *H* did not intend that they would live together as husband and wife or assume such relationship in any other way (nor did they), and *W* knew these intentions. The opinion does not inform us what *W's* intent was at the time of the ceremony, but at all events she refused to carry out her agreement to institute the annulment suit. She may have intended a "real marriage." Since she failed to bring the annulment suit, *H* brought the suit in Connecticut where she was living. In holding that the marriage was valid the court found that *H*

> was contemplating the creation of the status of marriage for at least the limited period and purpose stated. He must be held charged with the legal implications arising from the statute. . . . In principle, it would make no difference whether the status so created by the terms of the agreement was to continue for six weeks or six years. It is of even greater significance that the parties

160. 136 Conn. 106, 69 A.2d 831 (1949).

> married 'to give the child a name,' that is, to give it the status incident to a legitimate birth. To annul the marriage would render it void ab initio and so defeat this very purpose.[161]

And so, for the obvious purpose of protecting the legitimacy of the child, the court flew in the teeth of the basic principle that the parties are not competent to define "marriage" on their own terms, contrary to the state's definition of marriage —and placed the judicial imprimatur of validity on a relationship which never was and never could be a "marriage" in any real sense of the word. Connecticut had no statute saving the legitimacy of the issue of an annulled marriage. It may be added that in Wyoming also, under the circumstances of the *Schibi* case, an annulment would have made the child illegitimate.

There are several alternate solutions to the problem of the *Schibi* case: (1) A holding that the marriage was void, or voidable, because of lack of mutual consent to a "marriage" as the law defines it, with an annulment granted. (2) Complete abolition of the concept of illegitimacy, or at least limiting its effect to the inheritance of property. (3) A statute empowering the court to deny annulments, in its discretion, even when grounds for annulment have been technically established. Let us explore these various possibilities.

(1) A holding that the marriage was void, or voidable, because of lack of mutual consent to a "marriage" as the law defines it, with an annulment granted. This view has been taken by almost as many courts as have followed the doctrine of the *Schibi* case. [162] These dissenting courts often find it unnecessary to determine whether such a marriage is void or only voidable, since an annulment will be granted in either case, but the reasoning in some of the opinions leads to the conclusion that they are void: lack of mutual consent to a *mar-*

161. *Id.*, 69 A.2d at 833.

162. CLARK, *supra* note 120, § 2.18, at 115-118 lists the following jurisdictions as holding that marriages for a limited purpose are valid: Connecticut, the District of Columbia, Illinois, Massachusetts, New York (lower courts), Pennsylvania (lower courts), South Carolina, Tennessee, and Wisconsin. This rule is also followed in England. Holding that such marriages are not valid are two lower federal courts, Colorado, Florida, New York (lower courts), Ohio (lower court), Pennsylvania (lower court), and West Virginia. Canon law followed this rule. Clark concludes that "it is by no means clear that the law of New York validates limited purpose marriages . . . New York's position is doubtful." The same can be said of Pennsylvania.

riage, therefore no contract. Here, as in the case of marriages in jest, if cohabitation follows it is evidence that the parties did *not* intend a limited purpose marriage.

Before reaching a decision as to whether Wyoming should regard limited purpose marriages as void or only voidable, let us consider the problem of the legitimacy of children born of the union as bearing importantly on such a decision. As already noted, this seemed to be the determining factor in the *Schibi* case. The same can be said of the District of Columbia decision[163] and others. Clark comments as follows:

> If the local statute preserves the legitimacy of children of annulled marriages, the annulment can be granted and the child's interests protected at the same time. A court in such a state would be more likely to hold the marriage invalid therefore than a court in a state in which the legitimacy of children of annulled marriages is not preserved.[164]

Wyoming's statutes on the legitimacy of children following both divorce and annulment seem to be a crazy quilt. We have no statute expressly preserving complete legitimacy in a situation which would at common law result in illegitimacy. The nearest approach to such a statute is Section 20-67,[165] which relates to divorce. We do have statutes which make certain children "half legitimate" following the dissolution of marriages.[166] When these statutes speak of the "dissolu-

163. Davis v. Davis, 191 A.2d 138 (D.C. Ct. App. 1963).
164. CLARK, *supra* note 120, § 2.18, at 115.
165. This section provides that:
> A divorce for the cause of adultery committed by the wife, shall not affect the legitimacy of the issue of the marriage, but the legitimacy of such children if questioned may be determined by the court upon proofs in the case, and in every case the legitimacy of all children begotten before the commencement of the action, shall be presumed until the contrary is shown.

166. Section 20-68 provides that:
> Upon the dissolution of a marriage on account of the non-age, insanity or idiocy of either party, the issue of the marriage shall be deemed to be in all respects, the legitimate issue of the parent, who at the time of the marriage was capable of contracting, or if neither parent be of age, then of the oldest parent.

Section 20-70 provides that:
> When a marriage is dissolved on account of a prior marriage of either, and it shall appear that the second marriage was contracted in good faith and with the full belief of the parties that the former wife or husband was dead, or that one of the parties was ignorant of the fact that the other had a wife or husband living, the fact shall be stated in the decree of divorce or nullity, and the issue of such second marriage born or begotten before the commencement of the action shall be deemed to be the legitimate issue of the parent who at the time of the marriage was capable of contracting.

tion of a marriage" we can assume that the term would include both divorce and annulment, and one case has so held.[167] Section 20-69, which provides that "Upon the dissolution by decree of nullity of any marriage that is prohibited on account of consanguinity between the parties, the issue of the marriage shall be deemed to be illegitimate" merely codifies the common law. As Clark puts it,

> The obvious logical consequence of the conventional characterization of annulment is that children of a void marriage are illegitimate. . . . Even if the marriage is only voidable, the retroactive nature of the annulment decree would, in the absence of statute, bastardize any child born of the marriage. This in fact was the common law position.[168]

For reasons which will be discussed in detail *infra,* we recommend that the concept of illegitimacy be completely abolished, or at least limited to the inheritance of property. If this is done, the primary motivation for the rule that marriages for a limited purpose are valid will have been taken away. In turn this would lead to a proposal that—as in the case of marriages in jest—marriages for a limited purpose be considered void if attempted in Wyoming, with a provision to that effect included in the Wyoming Annulment Code.

In justification of this position let us consider the argument pro and con on the validity of limited purpose marriages. There are really only two arguments in favor of validity: (a) a contrary ruling would bastardize children in the absence of a saving statute; and (b) the parties intended a marriage in the ceremonial sense, therefor all prenuptial agreements inconsistent with marriage as the law defines it should be held void as against public policy. On the other side it has been argued that (a) the parties never consented to a *marriage* as the law defines the term; (b) such marriages are not viable: they provide no real home for the child if there is a child, and the parties do not live together as husband and wife in a normal marital relationship; (c) in the immigration cases the court is unwilling to approve what is essentially a fraud on the government, which takes place when an American citizen "marries"

167. Deihl v. Jones, 94 S.W.2d 47 (Tenn. 1936).
168. CLARK, *supra* note 120, § 3.4, at 132.

a foreign subject for the purpose of permitting the latter to gain entrance into the U.S. under the immigration laws; and (d) denying annulments is sometimes motivated by a desire to punish the parties, which should have no place here.

We concur in Clark's thoughtful appraisal:

> what sort of consent does marriage require? As should now be clear, the cases are in such disagreement that they cannot furnish a single definite answer to the question. But on principle the correct answer is that a valid marriage ought to be based upon consent to be husband and wife as that phrase is usually construed in our society .... In the absence of such agreement, the ceremony should result in no marriage. This not only does not frustrate legitimate policies, but it helps to effectuate them. . . . One hopes this point of view may gradually come to prevail, thereby eliminating the admittedly extensive authority holding limited purpose marriages valid and ending the uncertainty and confusion.[169]

This completes our discussion of the first alternative solution to the problem of the *Schibi* case, namely, a holding that the marriage was void or voidable because of lack of mutual consent to a marriage as the law defines it, with an annulment granted.

(2) The second alternative was complete abolition of the concept of illegitimacy, or at least limiting its effect to the inheritance of property. We think this is desirable and will recommend it, but will postpone discussion of the point until we arrive at the analysis of Section 20-67 in due course. Abolition of illegitimacy would militate against the validity of limited purpose marriages.

(3) The third and final alternative solution to the problem of the *Schibi* case would be a statute such as would empower the court, in its discretion, to deny annulments even when grounds for annulment have been clearly established. Under such a statute the court could deny an annulment when

169. *Id.*, § 2.18, at 118.

the effect of granting it would be to bastardize children. The wording of the Wyoming statute[170] indicates that upon establishment of one or more grounds for annulment the court could not refuse a decree, since the clause "upon due proof thereof it shall be declared void by a decree of nullity" appears to be mandatory. Whether there should be a change here is "a hard nut to crack." Traditionally, annulment has been regarded as an equitable proceeding, and in such proceedings the Chancellor has discretion to grant or withhold relief. The writer in American Jurisprudence is quite positive about the matter:

> Where a court takes jurisdiction of an action to annul a marriage, it is proceeding as a court of equity, and, as a general rule, may grant or withhold relief in accordance with the demands of justice, except, of course, in cases where the statute expressly requires the court to grant the relief demanded. Many courts regard annulment as a matter for the sound discretion of the court even though the marriage may be void, and have refused to decree an annulment if it seems inequitable to do so.[171]

(This emphasis on the equitable nature of annulment reappears later in connection with the question as to whether the woman may recieve alimony or a division of property upon annulment.) On the one hand it seems unfair to permit a plaintiff who has proved his grounds nevertheless to be denied a decree because (for example) the judge entertains certain religious or sociological views against annulment. On the other hand, annulment proceedings can involve questions of public policy and the rights and status of persons other than the immediate parties to the case. All in all, it seems preferable to change the wording of the statute so as to empower the court in its sound discretion to deny annulments even when grounds have been clearly established. A statute so worded would, among other things, make it possible for the judge to deny the annulment in order to save the legitimacy of a child—although we would hope that this would not be accepted as a satisfactory solution to the problem of illegitimacy.

170. WYO. STAT. § 20-34 (1957).
171. 4 AM. JR. 2D *Annulment of Marriage* § 92, at 505 (1962).

This completes the long and sometimes rambling discussion of the kinds of marriages which, if performed in Wyoming, should be denominated by statute as either void or voidable and thus subject to annulment.

The next major subject which should be covered in a Wyoming Annulment Code would be the procedure governing annulment suits. This leads us back to Section 20-34. In addition, Sections 20-50, 20-51, 20-52, 20-53, 20-57, 20-61, and 20-62 relate in some measure to procedure in annulment cases, and these are more or less intertwined with divorce procedure. It is interesting to note that almost all of Chapter 2 of Title 20 of the statutes, entitled "Divorce, Annulment and Alimony," originated in the Session Laws of 1882, and that this 1882 Act jumped from divorce to annulment and back again with the greatest of ease. Such intermingling of divorce and annulment in 1882 is not surprising when we recall that annulment developed historically as the divorce *a vinculo matrimonii.*[172] Clark tells us that "During the Nineteenth century, perhaps with the spread of statutes governing annulment, the action [of annulment] came to be distinguished from divorce."[173] The Wyoming Act of 1882 was probably enacted during the transitional period. Present attitudes being what they are, it seems desirable from the legislative point of view not to confound annulment with divorce, although (to quote Clark once more) "We seem to be on the way back to the medieval position, according to which annulment was merely a way of ending a marriage, and was called divorce."[174] To what extent do the existing Wyoming statutes provide that the procedure in both divorce and annulment shall be the same? To what extent *should* the procedure be identical?

The indications are that the Wyoming Legislature intended the procedure in annulment cases to be the same as in divorce.[175] The key language of Section 20-34 is that the an-

172. CLARK, *supra* note 120, § 3.1, at 119.
173. *Id.* at 120.
174. *Id.*
175. Section 20-34 provides that:

> When a marriage is supposed to be void, or the validity thereof is doubted for any of the causes mentioned in the two preceding sections [§§ 20-32, 20-33], either party, excepting in the cases where a contrary provision is hereinafter made, may file a petition in the district court of the county where the parties or one of them reside, for annulling the same, and such shall be filed, and proceedings shall be had thereon, as

nulment petition (now the complaint) "shall be filed, and proceedings shall be had thereon, as in the case of a petition filed in said court for divorce" and Section 20-50 makes this even clearer. Since the Wyoming Supreme Court has held that divorce actions are governed by the Wyoming Rules of Civil Procedure, [176] Sections 20-34 and 20-50 would evidently produce the same result for annulment suits. We must remember that the Rules govern procedure but do not change substantive rights, or the jurisdiction of a court,[177] and for these reasons the Annulment Code should expressly provide for these two areas.

The remaining statutes pertaining to annulment procedure, identified *supra,* do not seem to present major problems. Since Rule 4 of the W.R.C.P. does not expressly state that process issued in one Wyoming county may be served anywhere in the state, Section 20-52 which contains such provision should be retained. Sections 20-61 and 20-62 deal primarily with substantive rights and will be discussed hereinafter. In the Annulment Code the procedural matters covered by Sections 20-50, 20-51, 20-52, 20-53, 20-57, 20-61 and 20-62 should be stated separately from divorce to the extent that they pertain to annulment.

The fact that annulment suits are governed by the W.R.C.P. settles a problem with which a number of courts have struggled: may the defendant be served by publication, or is an annulment suit an action *in personam* so that personal service within the state, or appearance in the case, is necessary? The concept that a divore action is *quasi in rem,* with the marriage status constituting the *res,* does not exactly fit annulment, because in the latter the plaintiff is contending that there never was a valid marriage. Under those circumstances according to one view, there is no *res,*[178] therefore annulment is *in personam* and service by publication is not permissible.

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in the case of a petition filed in said court for divorce, and upon due proof thereof it shall be declared void by a decree of nullity.

Section 20-50 provides that:

Actions to annul or affirm a marriage, or for a divorce, shall be conducted in the same manner as civil actions, and the court shall have the power to award issues, to decree costs, and enforce its decree as in other cases.

176. Strahan v. Strahan, 400 P.2d 542, 544 (Wyo. 1965).
177. State *ex rel* Frederick v. District Court of Fifth Judicial Dist., 399 P.2d 583, 584 (Wyo. 1965).
178. CLARK, *supra* note 120, § 3.2, at 125-128.

Clark indicates that there is no constitutional problem involved in permitting service by publication.

We shall move on, then, to consider jurisdiction and substantive rights. The brief statements relative to jurisdiction which appear in Sections 20-34 and 20-49[179] should be amplified. The former does settle a point which has vexed a number of American courts: do the courts of the state in which the marriage was performed have jurisdiction over a suit to annul that marriage, regardless of the domicile of *H* and *W* at the time the suit is instituted? Or, as in divorce, does jurisdiction depend upon domicile of one or both parties in the forum state? Section 20-34 tells us that the complaint for annulment may be filed "in the district court of the county where the parties or one of them reside." This language is identical with the jurisdictional provisions of Section 20-38, the principal statute relating to the grounds for divorce in Wyoming; however, we must read this statute together with Sections 20-48[180] and 24-49 in order to get the complete picture. Then we see that the mere fact of the *defendant's* residence in Wyoming is not sufficient in itself to confer jurisdiction upon a Wyoming court; the *plaintiff* must have resided somewhere in the state, either for 60 days prior to the filing of the complaint, or, if the marriage was solemnized in the state, from the time of the marriage until the complaint is filed, which may be less than 60 days. The plaintiff can then file in the county where he lives, or, if the defendant also lives in Wyoming, in the county where she lives. Section 20-49 permits a married woman to establish a residence in Wyoming separate and apart from that of her husband. As we know, the term "residence" as used in divorce statutes and such as ours is normally interpreted to mean "domicile."[181] If we are going to continue to require domicile rather than mere residence, the word "domicile" should be substituted for "residence" in the di-

179. WYO. STAT. § 20-49 (1957) provides:
> If any married woman at the time of exhibiting a petition against her husband, under the provisions of this act [§§ 20-32 to 20-38, 20-44 to 20-46, 20-48 to 20-70], shall reside in this state, she shall be deemed a resident thereof, although her husband may reside elsewhere.

180. This section provides that:
> No divorce shall be granted unless the plaintiff shall have resided in this state for sixty days immediately preceding the time of filing the petition, or unless the marriage was solemnized in this state, and the applicant shall have resided therein from the time of the marriage until the filing of the petition.

181. CLARK, *supra* note 120, § 11.2, at 286 and § 13.3, at 384.

vorce and annulment statutes. Since jurisdiction is not a part of procedure, the jurisdiction of Wyoming courts to entertain annulment suits should be spelled out in the statutes. Clarification is called for rather than changes in policy, so far as our existing statutes are concerned.

Having settled the matter of jurisdiction, and having noted that the procedure in annulment cases is the same as in divorce cases, we arrive at the question as to what the Annulment Code should provide with respect to the substantive rights of the parties and children in annulment cases.

Excluding for the moment statutes relating to legitimacy, the existing statutes re substantive rights (some of which also involve procedure) are Secions 20-57, 20-61, 20-62, 20-64, and possibly 20-66. The first of these provides that after an annulment suit has been commenced the court may at any time, on the petition of the wife, "prohibit the husband from imposing any restraint upon her personal liberty" during the pendency of the cause. This seems desirable, and no doubt the husband would usually be the offender, but since the wife might also in various ways try to impose restraints upon the personal liberty of the husband it would seem only fair to word this section so that it would apply to both spouses.

Section 20-61[182] is important from the standpoint of children of the union. It seems well phrased, with a desirable breadth of language, but it does no help the children during the pendency of the action. Section 20-62[183] should be dropped. The rather obvious legislative motive behind this enactment is to punish the party guilty of force or fraud by imposing on that party the financial responsibility for the maintenance and education of the children. The trouble is that such a restriction may be adverse to the interests of the children, be-

182. This section provides that:
The court, in granting a divorce, and also upon pronouncing a decree of nullity of a marriage, may make such disposition of, and provision for, the children as shall appear most expedient under all the circumstances, and most for the present comfort and future well-being of such children; and the court may from time to time afterward on the petition of either of the parents, revise and alter such decree concerning the care, custody and maintenance of such children, as the circumstances of the parents and the benefit of the children shall require.

183. This section provides that:
If there shall be any issue of a marriage annulled on the ground of force or fraud, the court shall decree their custody to the innocent person, and may also decree a provision for their education and maintenance, out of the estate and property of the guilty party.

cause the innocent party may be much better able than the guilty party to provide for the children. The breadth of Section 20-61 should not be narrowed by Section 20-62. No doubt a judge, in making an order under the former, would take into account the relative guilt or innocence of the parties to the marriage.

Section 20-64[184] seems reasonable, and since it does not compel the judge to give back to the wife *all* of the property she may have brought to the marriage it appears to have the flexibility desirable in this subject matter. Real property as well as personal estate should be included.

It is possible that Section 20-66 is limited to divorce cases. In the original Act it followed what is now Section 20-65,[185] which in terms is limited to divorce. The trustee device of Section 20-65 could certainly be as useful and desirable in annulment cases as in divorces. We suggest that this section be included in the Annulment Code as well as in the Divorce Code. Section 20-66[186] could then be included in the Annulment Code, deleting the references to alimony and such other portions as are duplications of what has already been said in Section 20-61.

In addition to the rather meager provisions for substantive rights of the wife and/or children contained in the statutes just summarized, what additional provisions would be

184. This section provides:
Whenever the nullity of a marriage or divorce from the bonds of matrimony for any cause, except that of adultery committed by the wife, shall be decreed, the wife shall be entitled to the whole or such part as to the court shall seem just and reasonable, of the personal estate that shall have come to the husband by reason of the marriage, or the court may award her the value thereof, to be paid by her husband in money.

185. This section provides that:
Upon every divorce when provision is made for the children, the court may order any amount set apart for them, instead of being delivered to the wife or husband to be paid into the hands of a trustee or trustees, to be appointed by the court, upon trust to invest the same, and to apply the income thereof to the support of such children or any of them, in such manner as the court shall direct.

186. This section provides that:
After a decree for alimony or other allowance for the wife and children, or either of them, and also after a decree for the appointment of trustees to receive and hold any property for the use of the wife or children, the court may, from time to time, on the petition of either of the parties, revise and alter such decree respecting the amount of such alimony or allowance, or payment thereof and respecting the appropriation and payment of the principal and income of the property so held in trust and may make any decree respecting any of said matters which such court might have made in the original action.

desirable? We suggest that Section 20-56, now limited to divorce, be extended to annulment suits as well. This section empowers the court to issue restraining orders against either party *pendente lite* to prevent such party from doing acts which "would defeat or render less effectual any order which the court might ultimately make concerning property or pecuniary interests," plus the issuance of process to enforce such orders. Excluding for the moment the matter of legitimacy, there are two other possibilities, both of them controversial: (1) Should the Annulment Code make provision for "support money," attorneys fees and suit costs for the wife and children *pendente lite?* (2) Should it make provision for alimony and/or division of property as a part of the final decree? Existing statutes make both such provisions in divorce cases[187] and support them with enforcement devices.[188] Discussing these problems in order:

(1) A few courts take the position that in the absence of statutory authority, the court has no power to order the husband to pay support money, attorney's fees and court costs —but the general rule is that where H sues W for annulment, and W in good faith contests his allegations of invalidity of the marriage, she may in the discretion of the court be allowed temporary support, counsel fees and suit money, in reasonable amounts.[189] Courts following the general rule analogize the situation to a divorce suit under these circumstances. Some states expressly confer this right by statute,[190] and it would seem desirable in the interests of certainty that the Wyoming Annulment Code include such a provision. Where there is no bona fide dispute as to the validity of the marriage the courts are not willing to make such allowances to the wife, which is logically sound, because these allowances are based upon the husband's obligation to support his wife so long as she remains such.[191]

Provision should be made for the support of the children

187. Section 20-58 provides for support money, etc., for the wife and children during the pendency of a divorce action, and 20-63 authorizes alimony and division of property in the divorce decree.
188. Section 20-59 permits the examination of the husband under oath concerning his property, etc., and the enforcement of orders and decrees concerning alimony and property.
189. 4 AM. JUR.2d *Annulment of Marriage* § 97, at 509 (1962).
190. *Id.* at 510.
191. *Id.*

pendente lite, as in divorce. This, and the allowances to the wife for temporary support, attorney's fees and court costs, could be set up in the Annulment Code by adapting Section 20-58[192] (now limited to divorce) to annulment suits, within the limits just discussed.

(2) There is much difference of opinion as to whether the "wife," as we shall call her, should be entitled to permanent alimony and/or a division of property upon a decree of annulment. We have already voiced approval of Section 20-64, which permits the court to award the wife "the whole or such part as to the court shall seem just and reasonable, of the personal estate that shall have come to the husband by reason of the marriage," or the value thereof, an approval conditioned upon including real as well as personal estate. But Section 20-63, which permits permanent alimony and a property division in the final decree, is at present limited to divorce.

In the absence of statute the general rule is that the wife is not entitled in the annulment decree to permanent alimony or property division.[193] In using the term "alimony" in this connection we mean to confine it to continuing allotments of sums payable at regular intervals in the future for the support of the wife. We recognize that the word is sometimes used in a broader sense which includes division of property. We understand that most Wyoming District Judges avoid alimony orders in divorce cases whenever possible, because experience has demonstrated that they generate future litigation which can be avoided if the equities between the parties can be settled by a division of property at the time of the final divorce decree. Nevertheless, there will be cases in which the husband and wife have little or no property and the court will feel that justice can be done to the wife only through a provision for alimony in the final divorce or annulment de-

192. This section provides that:
> In every action brought for a divorce, the court may, in its discretion, require the husband to pay any sum necessary to enable the wife to carry on, or defend the action, and for her support, and the support of the children of the parties during its pendency, and it may decree costs against either party, and award execution for the same, or it may direct such costs to be paid out of any property sequestered or in the power of the court, or in the hands of a receiver, and the court may also direct the payment to the wife for such purpose of any sum or sums that may be due and owing to the husband from any party, person or corporation.

193. CLARK, *supra* note 120, § 3.5, at 136.

cree; therefore if this mater is to be handled by statute, permanent alimony as well as division of property should be expressly mentioned.

Clark states and explains the general rule regarding alimony as follows:

> Where the permanent alimony is sought as an incident to a decree annulling a marriage, the great majority of cases have held that it cannot be granted without statutory authority. The reason usually given is the nature of annulment and its dissimilarity to divorce. It would be inconsistent, the courts say, to hold that no marriage ever existed, due to some antecedent incapacity or lack of consent, and then impose on the husband a duty which can only rest upon a valid marriage.[194]

He then notes that "the results of this ineluctable logic" have sometimes been harsh, and that some courts have used various devices for compensating the wife when there has been a substantial period of cohabitation, and especially where the wife was innocent of the invalidity of the marriage, or where the invalidity could not be ascribed to her actions, or where her efforts have substantially contributed to the "marital estate." Under circumstances of this sort common justice would seem to dictate that the wife should receive the same benefits in the annulment decree as if we were dealing with a divorce case.

Some of the devices which courts sympathetic to the wife have used under circumstances of this sort are to allow the wife fair compensation for the services she performed while they were living together, on the theory of quasi-contract; another is to divide the property of the parties as if he annulment suit were a divorce case; and in states following the civil law tradition the doctrine of putative marriage will sometimes help the wife.[195] There has been such frequent resort to these devices that the American Jurisprudence writer makes this statement:

> The general rule is that when a woman in good faith enters into a marriage with a man

194. *Id.*
195. *Id.*

> who is incapable of contracting marriage because of some impediment, or when both of the parties enter into a void marriage in good faith, and after the marriage ceremony, live together in good faith as husband and wife, the woman, upon annulment of the marriage, is entitled to a division of the property accumulated by the joint efforts of the parties during the marriage relationship, or to an allowance for the value of the services rendered on the assumption of the validity of the marriage.[196]

The writer in American Jurisprudence indicates that the courts have taken a different attitude toward allowance of permanent alimony than toward division of property, saying

> In the absence of statutory authority for the allowance of permanent alimony to the wife in connection with a decree of annulment of her marriage, the general rule is that alimony cannot be awarded to the woman when judgment is pronounced annulling her marriage.[197]

Both Clark and the American Jurisprudence writer note the fact that by statute in some jurisdictions the division of property and/or permanent alimony is permitted, always in the discretion of the court.[198]

The Wyoming Legislature seems to have given limited and indirect approval to the allowance of permanent alimony and division of property in an annulment decree by including in the grounds for divorce in Wyoming, two grounds which are normally grounds for annulment, both contained in Section 20-38: Physical incompetency at the time of the marriage (Second), and pregnancy of the intended wife at the time of marriage by another than her intended husband, and without his knowledge (Eleventh). Indeed, Clark believes this to be the motive of the legislatures in including grounds for annulment in the divorce statutes.[199]

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196. 4 AM. JUR.2D *Annulment of Marriage* § 95, at 507-8 (1962).
197. *Id.* at 513.
198. CLARK, *supra* note 120, § 3.5, at 137, 4 AM. JUR.2D, *Annulment of Marriage* §§ 102 at 513 and 95, at 508.
199. CLARK, *supra* note 120, § 3.5, at 136.

We recommend that the Wyoming Annulment Code expressly permit the final decree in annulment to provide for division of property and/or permanent alimony, in the discretion of the court, and within the limitations brought out above in the discussion of this matter. We realize that if this is done, one more distinction between divorce and annulment will have been wiped out, bringing us closer to Clark's view that "We seem to be on the way back to the medieval position, according to which annulment was merely a way of ending a marriage, and was called divorce."[200]

There is another possibility. We *could* take the position that if marriage is *void* the wife should not be entitled to division of property or permanent alimony, whereas if it is only *voidable,* she should be. Superficially this has merit, although the decision in the cases do not turn on such a distinction. This position would emphasize the philosophy that if a marriage is void, it is so offenisve to public policy that it should not give rise to any equities. The wife could be said to contract marriage at her peril, so that if it turns out to be void, she has only herself to blame; *caveat emptor.* On the other hand, it could be said that the voidable marriage is one which for some reason is imperfect; not entirely invalid, but not so reprehensible that the face of the law is set completely against it; valid until annulled, etc., so that it *can* give rise to equities which the law should recognize and enforce.

We reject this position as being artificial and legalistic. Suppose a wife who believes herself validly married, cohabits for years with her husband, bears him children, and is directly or indirectly responsible for the accumulation of marital property. Her husband tires of her, ascertains that a Nevada divorce which she obtained prior to her (second) marriage was invalid—although she in good faith believed it to be valid. Clever fellow that he is, he brings an annulment suit: void marriage, wife would therefore be turned out into the cold, financially speaking. The fair and just answer is to give the court discretion to award alimony and/or division of property, regardless of whether the marriage was void or only voidable.

And so we are brought to the final question of substantive rights in annulment suits: when, if ever, should the children

200. CLARK, *supra* note 174.

of annulled marriages be rendered illegitimate? We firmly believe that the answer should be: never. At common law the children of an annulled marriage were bastardized as a result of the annulment,[201] because the annulment rendered the marriage void *ab initio*. Granting that contemporary society takes a more liberal view of such matters than in the days of Queen Victoria, the brand of illegitimacy still burns deep. Under the common law rule, the sins of the fathers (and mothers) are indeed visited upon the children. If the motive behind this rule was one of punishment, then B is being punished for A's wrong. If its motive is deterrence it is highly questionable whether *H* and *W* will be deterred from entering into a void or voidable marriage by the knowledge (even if they possess it) that in the event the marriage is later annulled, any of the children of the union will be bastardized. At all events, the children are the innocent victims. So we have a rule which produces a cruel result, justified only by age and a sterile logic. Let us rid ourselves of it completely, as several other states have done!

In doing so we can leave for another day the question of whether the entire concept of illegitimacy should be swept away; for present purposes the statute need only provide that children of all marriages are legitimate, be the marriage valid, voidable or void, and that annulment of a marriage shall have no legal effect upon the legitimacy of such children. Clark points out the great variety of statutes on the subject which exist in the various states,[202] and we have already made the comment in an earlier portion of this article that the Wyoming statutes on the legitimacy of children of annulled marriages form a crazy quilt.[203]

Superficially it might seem that there would be little difficulty in drafting a satisfactory "abolition statute," if we may call it such. There are, however, a number of problems which lie below the surface. As Clark observes,

> Fortunately for the fate of many children, the common law has been extensively altered by statute in nearly all states. It is less fortunate, however, that

201. CLARK, *supra* note 168.
202. CLARK, *supra* note 120, § 3.4, at 132.
203. By way of review these statutes are §§ 20-68, 20-69, and 20-70.

> the statutes even today do not give children of defective marriages anything like complete protection. Many such children are still considered to be illegitimate, and the status of others is placed in doubt by the drafting of some statutes, which is so inept as to create difficult questions of construction.[204]

Clark identifies three major types of abolition statutes which now exist: the first provides that the issue of annulled marriages are legitimate; the second, that the children of void or voidable marriages or of marriages deemed null in law are legitimate; and the third provides that every child is the legitimate child of his natural parents. He favors the third type of statute, saying of it,

> It is only by this form of statute that all the troublesome issuer of construction raised by more limited statutes . . . can be eliminated. And it is only by this form of statute that ordinary justice can be achieved for all children regardless of the accident of their birth.[205]

He lists two states, Alaska and Arizona, as having statutes of this type.[206] The Arizona statute was originally enacted in 1921, and the statute of Alaska in 1949.

Granting the desirability of coming ultimately to the Alaska-Arizona type of abolition statute, a moment's reflection will demonstrate that its enactment would profoundly affect other areas of Wyoming statuory law relating to illegitimacy. In order to avoid tilting at such a large windmill, we propose the adoption of one of the other two types of abolition statute, modified so as to avoid as many troublesome issues of construction as possible, and yet to "get the job done."

The first type of statute, which provides that the issue of annulled marriages are legitimate, does not help to determine the status of children of defective marriages where no suit to annul is brought—a major defect in coverage. The second type offers more promise: the children of void or voidable marriages, or of marriages deemed null in law, are legitimate. We have already proposed that the Annulment Code specifically define and classify the kinds of marriages which are void

204. CLARK, *supra* note 120, § 3.4, at 132.
205. *Id.* at 135.
206. ARIZ. REV. STAT. ANN. § 14-206 (1956); ALASKA STAT. § 25.20.050 (1962).

or voidable if performed or attempted in Wyoming. There are two major concerns about a statute of the second type: first, would it include children of relationships which can be called "de facto marriages" but which cannot qualify under the definitions of void or voidable marriages? An example would be a relationship which *looked* like a common law marriage to the outside world, but which could not be one because the parties never agreed in fact to be husband and wife. There are two possible solutions for a court interpreting such a statute: one, to hold that since the relationship did not meet the definition of either a void or voidable marriage, the children are illegitimate; two, to hold that the statute legitimizes the the children of all de facto marriages, and of all relationships which look like marriages and in which the parties behave as husband and wife.[207] Since our objective is to help the children, we could codify into the statute the holding of the *Santill* case.

The second major concern is whether the second type of abolition statute would include children born before their parents contract the void or voidable marriage as well as those born after. This problem could be solved simply by including words to that effect in the statute. We shall, then, propose an abolition statutes of the second type containing the modifications indicated above.

The discussion involving the legitimacy of children relates to Sections 20-67 to 20-70 of the existing Wyoming statutes. (Actually, Section 20-67 is in language limited to divorce.) This concludes our analysis of the existing statutes of Wyoming which deal directly with the subject of marriage, including those relating to annulment. Part IV of this study will consist of a draft of legislation proposed as a result of the study.

207. As held in Santill v. Rossetti, 18 Ohio Op. 2d 109, 178 N.E.2d 633 (C.C.P. 1961).