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found that the defendant had used due care to provide a safe place for the plaintiff to work and was entirely free from negligence. Since the evidence on this point was in conflict, a definite determination cannot be made as to the basis for the jury's finding. However, the possibility exists that the jury did base its decision on an erroneous classification of the plaintiff's conduct.

Most cases which go to trial under the FELA involve questionable conduct on the plaintiff's part. It is submitted that the trial judge should instruct the jury on the issue of assumption of risk, and its distinction from contributory negligence and non-negligence, to avoid any misclassification of the plaintiff's conduct by the jury.

ROBERT T. MITCHELL, JR.

THE MANSFIELD RULE OF NONACCESS

The question of legitimacy comes up in many different types of cases.[1] Among these, none are so anomalous as those in which a married woman or her hubsand is attempting to prove that a child born or conceived during marriage was sired by a stranger to the marriage.

The recent West Virginia case of *State ex rel. Worley v. Lavender*[2] involved a filiation or bastardy proceeding in which the defendant was charged with having fathered the child of the prosecutrix.[3] Under objection by the defendant, both the prosecutrix and her husband testified that they had been separated for thirteen months prior to the birth of the child, and that they had no sexual relations during that time. Further testimony indicated that the prosecutrix had sexual intercourse only with the defendant during the period in which the child was conceived. Upon this evidence, the defendant was convicted of bastardy and appealed.

On appeal, the Supreme Court of West Virginia reversed the con-

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[1]Ejectment: Goodright v. Moss, 2 Cowp. 591, 98 Eng. Rep. 1257 (1777); Adoption: In re Adoption of a Minor, 29 Wash. 2d 759, 189 P.2d 458 (1948); Petition by bastard for papers of administration for the estate of his alleged father: In re Kessler's Estate, 76 S.D. 158, 74 N.W.2d 599 (1956); Contributing dependency proceeding; Vasquez v. Esquibel, 141 Colo. 5, 346 P.2d 293 (1959); Divorce: Bariuan v. Bariuan, 186 Kan. 605, 352 P.2d 29 (1960); Married woman's paternity proceeding: Peters v. District of Columbia, 84 A.2d 115 (D.C. 1951).

[2]131 S.E.2d 752 (W. Va. 1963).

[3]W. Va. Code ch. 48, art. 7, § 1 (1961). The court in State ex rel. Crouser v. Mercer, 141 W. Va. 691, 92 S.E.2d 745, 754 (1956), held that: "The bastardy proceeding provided for by the statute, though criminal in form, is a civil, not a criminal action."

viction, holding that, in the absence of a statute, neither a married woman who institutes a bastardy proceeding, nor her husband should be permitted to testify to the fact of nonaccess. One judge dissented, criticising the rule as an anachronism, in view of the trend toward abolishing disqualifications of witnesses, and as a rule promoting the suppression of truth.

It has often been stated that the presumption of legitimacy is one of the strongest known to our law.[4] At early common law this presumption was conclusive,[5] except when the husband was proved to be impotent or "beyond the seas."[6] Both the husband and wife were disqualified from testifying as to nonaccess in filiation proceedings because of their interest in discharging the husband from his duty to support the child.[7] But, as early as 1734, it appeared that the law was developing in the direction of removing the historic disqualification. *The King v. Reading*[8] held that the wife could testify as to nonaccess when her testimony was corroborated. However, in 1777, Lord Mansfield made his "onerous pronouncement" in the case of *Goodright v. Moss*:[9]

> "[T]hat the declaration of a father or mother, cannot be admitted to bastardize the issue born after marriage... [is]... a rule founded in decency, morality, and policy that they shall not be permitted to say after marriage, that they have had no connection, and therefore that the off-spring is spurious; more especially the mother, who is the offending party."[10]

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[4]1 Jones on Evidence, § 101, at 176 (5th ed. 1958); Morrison v. Nicks, 211 Ark. 261, 200 S.W.2d 100 (1947); Bariuan v. Bariuan, 186 Kan. 605, 352 P.2d 29 (1960); Cameron v. Roland, 208 La. 663, 23 So. 2d 283 (1945); Smith v. Smith, 71 S.D. 305, 24 N.W.2d 8 (1946).

[5]Today it is generally held to be rebuttable. In Kowalski v. Wojtkowski, 19 N.J. 247, 116 A.2d 617 (1955), the dissenting judge cites 38 jurisdictions so holding. As to the type of proof necessary to rebut the presumption, see McCormick, Evidence § 309 at 646-47 (1954). See also In re Findlay, 253 N.Y. 1, 170 N.E. 471, 473 (1930), where Cardozo, J. after reviewing the various formulas concluded: "What is meant by these pronouncements, however differently phrased, is this, and nothing more, that the presumption will not fail unless common sense and reason are outraged by holding that it abides."

[6]In re Findlay, 253 N.Y. 1, 170 N.E. 471 (1930); 1 Blackstone Commentaries t. *457.

[7]Wigmore, Evidence § 2063, at 361 (3d ed. 1940).

[8]Cas. t. Hard. 79, 95 Eng. Rep. 49 (K.B. 1734).

[9]2 Cowp. 591, 98 Eng. Rep. 1257 (1777).

[10]Ibid.; Upon what policy Mansfield established the rule is unclear. Courts have tried to supply an answer, for example Tioga County v. South Creek Township, 75 Pa. 433, 437 (1874): "Many reasons have been given for this rule. Prominent among them is the idea that the admission of such testimony would be unseemly and scandalous, and this not so much from the fact, that it reveals immoral conduct upon the part of the parents, as because of the effect it may have upon the child,

Although this pronouncement was not based on authority, on the strength of Mansfield's reputation it soon became the universally accepected doctrine. The rule of *The King v. Reading* which was based on disqualification because of interest applied solely to the wife, and only in filiation proceedings; the Mansfield Rule, based on broad grounds of policy, applied to both spouses, and in all cases involving legitimacy.[11]

The Mansfield Rule was accepted generally in a majority of American jurisdictions.[12] However, this rule, which is considered by many courts to be "too deeply planted to be uprooted,"[13] has been the focus of criticism since Dean Wigmore, in his treatise on evidence, launched his attack on it.[14]

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who is in no fault, but who must nevertheless be the chief sufferer thereby. That the parents should be permitted to bastardize the child is a proposition which shocks our sense of right and decency."

[11]Wigmore, Evidence § 2063, at 360 (3d ed. 1940).

[12]Franks v. State, 26 Ala. App. 430, 161 So. 549 (1935); Shatford v. Shatford, 214 Ark. 612, 217 S.W.2d 917 (1949); McNamara v. McNamara, 181 Cal. 82, 183 Pac. 552 (1919); Morris v. Morris, 40 Del. 480, 13 A.2d 603 (Super Ct. 1940); Evans v. State, 165 Ind. 369, 74 N.E. 244, 75 N.E. 651 (1905); Craven v. Selway, 216 Iowa 515, 246 N.W. 821 (1933); Martin v. Stillie, 129 Kan. 19, 281 Pac. 925 (1929); Dudley's Adm'r v. Fidelity & Deposit Co., 240 S.W.2d 76 (Ky. 1951); Hubert v. Cloutier, 135 Me. 230, 194 Atl. 303 (1937); Sayles v. Sayles, 323 Mass. 66, 80 N.E.2d 21 (1848); In re Wright's Estate, 237 Mich. 375, 211 N.W. 746 (1927); Zutavern v. Zutavern, 155 Neb. 395, 52 N.W.2d 254 (1952); State v. Sargent, 100 N.H. 29, 118 A.2d 596 (1955); Salas v. Olmos, 47 N.M. 408, 143 P.2d 871 (1943); In re Anonymous, 12 Misc. 2d 781, 177 N.Y.S.2d 784 (1958); State v. Campo, 233 N.C. 79, 62 S.E.2d 500 (1950); In re Rowe's Estate, 172 Ore. 293, 141 P.2d 832 (1943); Commonwealth v. Carrasquilla, 191 Pa. Super. 14, 155 A.2d 473 (1959); Peoples Nat'l Bank of Greenville v. Manos Brothers, 266 S.C. 257, 84 S.E.2d 857 (1954); Longoria v. Longoria, 324 S.W.2d 244 (Tex. Civ. App. 1959); State v. Kellner, 247 Wis. 425, 20 N.W.2d 106 (1945).

[13]Wigmore, Evidence § 2063, at 367 (3d ed. 1940); Harward v. Harward, 173 Md. 339, 196 Atl. 318, 325 (Ct. App. 1938).

[14]Wigmore, Evidence § 2064, at 368-71 contains the following analysis and criticism of the rule: "(1) There is an *indecency,* we are told. And yet, in nine cases out of ten, the sole question that the wife is asked is (for example) whether her husband was in St. Louis from 1929 to 1933 during the time that she was in New York. Is this indecent? Moreover, the very next question may be whether during that time she lived with alleged adulterer; and this (by general concession) is indubitably allowable. In every sort of action whatever, a wife may testify to adultery or a single woman to illicit intercourse; yet the one fact singled out as 'indecent' is the fact of non-access on the part of a husband. Such an inconsistency is obviously untenable.

"(2) There is an *immorality* and a scandal, we are told, in allowing married parents to bastardize their children. And yet they may lawfully commit this same immorality by any sort of testimony whatever, except to the fact of non-access. They may testify that there was no marriage-ceremony, or that the child was born before marriage, or that the one party was already married to a third person, or their hearsay declarations (after death) to illigitimacy in general may be used.

Kansas was the first to reject the Mansfield Rule.[15] In 1926, the Supreme Court of Kansas held that, in the interest of truth and the child's welfare, the mother was competent to testify as to nonaccess, because her's was the best evidence.[16] At the same time, in another case, the court decided that where there was other evidence of nonaccess the wife should be allowed to testify.[17] However, within three years, the court reversed itself in the case of *Martin v. Stillie*,[18] and readopted the Mansfield Rule. In a recent case[19] the Kansas court, in dictum, suggested that perhaps the mother might be able to testify, but that the father could not. No definitive statement, then, can be made as to what position the Kansas court would take if directly presented with the issue.

New Jersey in *Loudon v. Loudon*[20] was the first American jurisdiction to take a firm position in direct opposition to the rule. Relying heavily on Wigmore, the court said:

> "[T]he fact that the rule is based on a foundation that is unsound and leads to the suppression of the truth and the defeat of justice takes from it the customary traditional and precedental justification urging its adoption."[21]

But, the weight of this decision as a judicial precedent was weakened

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In all these other ways they may lawfully do the mean act of helping to bastardize their own children. Where is the consistency here? Of what value is this conjuring phrase about 'bastardizing the issue,' if it will not do the trick more than once in a dozen times? Moreover, what shall be said of a system of law which, while thus rebuking parents who come to prove their children bastards, at the same time by its own inhuman prohibition (unique among civilized peoples) had refused absolutely to allow those parents, by any means whatever, to remove afterwards (by legitimation) the consequences of their original error and to give to their innocent children the sanction of lawful birth,—a refusal which is still maintained in some of our jurisdictions? That the same law which harshly fixes the stain of bastardy as perpetually indelible should censure parents for the abomination of testifying to the bastardy is preposterous.

"The truth is that these highsounding 'decencies' and 'moralities' are mere Pharisaical afterthoughts, invented to explain a rule otherwise incomprehensible, and lacking support in the established facts and policies of our law. There never was any true precedent for the rule; and there is just as little reason of policy to maintain it."

[15]Stillie v. Stillie, 121 Kan. 591, 249 Pac. 672 (1926); Lynch v. Rosenberger, 121 Kan. 601, 249 Pac. 682 (1926).

[16]Stillie v. Stillie, 121 Kan. 591, 249 Pac. 672 (1926).

[17]Lynch v. Rosenberger, 121 Kan. 601, 249 Pac. 682 (1926).

[18]129 Kan. 19, 281 Pac. 925 (1929).

[19]Bariuan v. Bariuan, 186 Kan. 605, 352 P.2d 29 (1960). See also 11 Kan. L. Rev. 269 (1962).

[20]114 N.J. Eq. 242, 168 Atl. 840 (Ct. Err. & App. 1933).

[21]Id. at 841.

by the fact that New Jersey had a statute making spouses competent witnesses in all court actions.[22]

Mississippi was the first state to reject *Goodright v. Moss* outright, doing so in *Moore v. Smith*,[23] by holding that, in a filiation proceeding, testimony of nonaccess is admissible to rebut the presumption of legitimacy. Pointing out that the presumption is based on policy and is essentially truth defeating, the court concluded that in modern circumstances the policy for ascertaining the truth is stronger than those policies enunciated by Mansfield.

In a bastardy proceeding Ohio refused to follow Mansfield,[24] saying that:

> "[T]o impose upon the plaintiff the burden of proving beyond a reasonable doubt the impossibility of access at the time of the conception of the child and then to disqualify both her and her former husband as witnesses to that fact, is to set up an insuperable barrier to the establishment of the truth."[25]

Many jurisdictions have passed statutes which make husbands and wives competent to testify where they were not so at common law. These, and statutes giving a married woman the right to accuse a man other than her husband of being the father of her child, have, in many instances, been held to abrogate the Mansfield Rule. However, some courts construe these strictly and continue to uphold the Mansfield doctrine.

In *Kennedy v. State*,[26] under a statute that made a mother competent "in all cases of bastardy," Arkansas held that she could testify as to any fact tending to prove illegitimacy except as to the nonaccess of her husband. The court would require an express provision making the wife competent to testify as to that evidence. And in *People ex rel. Cullison v. Dile*,[27] where an Illinois statute expressly made the wife competent to testify in bastardy proceedings, it was held that the wife could testify, but, in the absence of an express provision, the husband could not. In *Hubert v. Cloutier*,[28] the Supreme Judicial Court of Maine, recognizing Wigmore's criticism, but feeling that the Mansfield Rule embodied the better policy, said:

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[22]The effect of statutes on the rule will be dealt with infra.
[23]178 Miss. 383, 172 So. 317 (1937).
[24]Yerian v. Brinker, 35 N.E.2d 878 (Ohio Ct. App. 1941).
[25]Id. at 881.
[26]117 Ark. 113, 173 S.W. 842 (1915).
[27]347 Ill. 23, 179 N.E. 93 (1931).
[28]135 Me. 230, 194 Atl. 303 (1937).

> "Statutes removing the bar against parties testifying or even those specifically authorizing the mother to testify in bastardy proceedings do not change the Mansfield rule. The effect of such enactments is merely to make a witness competent, not to let down the bars as to the evidence which may be properly admitted."[29]

The trend, however, seems to be developing in the direction of holding that such statutes do remove the disqualification. So, under a statute making the spouses competent in all actions, testimony as to nonaccess has been held to be admissible.[30] And, a statute making all persons of sufficient understanding, including the parties, competent to testify has been held to abrogate the common law rule.[31] A statute making libellant and libellee competent in divorce actions qualifies the husband to testify.[32] And, where "illegitimacy can be proved like any other fact," the Mansfield Rule does not apply.[33] In a divorce action on the ground of adultry, the wife's admissions to a probation officer were allowed, there being a statute which made the spouses competent in non-support and illegitimacy proceedings, but which did not cover divorce actions. Although the court said that it was not deciding whether the wife's testimony as a witness would be admissible, it implied that it would be.[34] In England the Mansfield Rule was abolished by statute in 1949.[35]

Two recent District of Columbia cases construing the same type of statute as is involved in the principal case, which gives a cause of action to a woman who is not living or cohabiting with her husband at the time of conception, held that the wife is competent to testify.[36] In *Peters v. District of Columbia* the court said that giving the wife a remedy implied the right to testify as to nonaccess.[37]

It is submitted that the majority of the court in the principal case reached the wrong result. The statute gave the mother a right, but the court, in effect, denied her a remedy by refusing to allow her to

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[29]194 Atl. at 304.

[30]In re McNamara's Estate, 181 Cal. 82, 183 Pac. 552 (1919); Vasquez v. Esquibel, 141 Colo. 5, 346 P.2d 293 (1959).

[31]State v. Soyka, 181 Minn. 533, 233 N.W. 300 (1930); In re Adoption of a Minor, 29 Wash. 759, 189 P.2d 458 (1948).

[32]Adams v. Adams, 102 Vt. 318, 148 Atl. 287 (1930).

[33]In re Wray's Estate, 33 Mont. 525, 19 P.2d 1051 (1933), In re Findlay, 253 N.Y. 1, 170 N.E. 471 (1930); State v. Coliton, 17 N.W.2d 546 (N.D. 1945); In re Kessler's Estate, 76 S.D. 158, 74 N.W.2d 599 (1956).

[34]Sayles v. Sayles, 323 Mass. 66, 80 N.E.2d 21 (1948).

[35]McCormick, Evidence 146 n.5 (1954).

[36]Peters v. District of Columbia, 84 A.2d 115 (D.C. 1951); Murphy v. District of Columbia, 85 A.2d 805 (D.C. 1952).

[37]84 A.2d 119 (D.C. 1951).