basic requirements that the federal courts must follow under Fed. R. Crim. P. 11.

The *McCarthy* and *Boykin* decisions provided the impetus for the Iowa supreme court's decision in *Sisco*, although on two other occasions[28] it had been suggested that the Iowa courts follow the procedure in Fed. R. Crim. P. 11. It is apparent that the United States Supreme Court in *Boykin* and the Iowa supreme court in the present decision were highly concerned with the rights of the defendant, in accord with the many recent decisions safeguarding various constitutional rights.[29] However, the courts should not neglect the societal interest which must be protected also. It seems difficult to comprehend that the defendant's conviction is reversed and he is allowed to replead merely because his plea *might* have been involuntary, when in fact the defendant makes no claim that it was so. The concurring opinion in the instant case said, "It would seem axiomatic that, if defendant is to be entitled to relief because he did not understand his rights, he should first allege he was in fact ignorant of those rights. Otherwise where is the harm?"[30] This was precisely one of the issues that the State argued in its brief,[31] that the defendant should at least advise the reviewing court of which constitutional or statutory right he has been deprived.[32] The majority, however, said that the defendant's guilt or innocence was not at issue in this case. Thus, to obtain a reversal of his plea of guilty, the defendant need not claim that he was in any way prejudiced, but need only claim that the court did not follow a particular procedure.

One problem which may arise in implementing these new procedures is that the acceptance of pleas may become merely a ritual. Although the majority in *Sisco* dismissed this contention[33] rather shortly, the concurring opinion dealt with it at length:[34] "The inquiry no longer is what did the defendant *know* at the

---

516: "Presuming waiver from a silent record is impermissable. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

[28] State v. Cooper, 161 N.W.2d 728, 731 (Iowa 1968); State v. Rife, 260 Iowa 598, 602, 149 N.W.2d 846, 848 (1967).

[29] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966), which requires that a defendant in an accusatory stage be told of his rights before law enforcement officers may question him; Escobedo v. Illinois, 378 U.S. 478 (1964), which makes any statements inadmissible which were elicited by the police after defendant had requested, and been denied, consultation with counsel; Gideon v. Wainwright, 372 U.S. 335 (1963), which guarantees to defendant the right to counsel at trial; and Mapp v. Ohio, 367 U.S. 643 (1961), which makes evidence illegally seized inadmissible at defendant's trial.

[30] 169 N.W.2d 542, 553 (Iowa 1969).

[31] Brief for Appellee at 6, State v. Sisco, 169 N.W.2d 542 (Iowa 1969), wherein the State argued, "A plea of guilty should not be set aside without defendant's allegation of innocence," citing State v. Whitehead, 163 N.W.2d 899 (Iowa 1969). The majority opinion in *Sisco* distinguished *Whitehead* since it involved an application for leave to withdraw a plea of guilty after judgment and sentence, and the court again reiterated that the question of defendant's guilt or innocence was not at bar in Sisco's appeal.

[32] *See also* People v. Winegar, 380 Mich. 719, 158 N.W.2d 395 (1968). Interesting language is to the effect that since the defendant has been convicted, he no longer enjoys the presumption of innocence on appeal, and therefore has the burden of showing more than mere technical noncompliance with a rule.

[33] 169 N.W.2d 542, 548 (Iowa 1969).

[34] *Id.* at 552-53.

time he entered his plea, but what did the trial court *tell* him at that time."[35] In reviewing a case similar to the case *sub judice*, the Michigan supreme court, in *People v. Dunn*,[36] said that on review the court should be concerned more with substance than form, and that the important factor is whether "there has been a miscarriage of justice."[37] A second possible problem was avoided by the decision in *State v. Vantrump*,[38] where the Iowa supreme court held that the *Sisco* decision would not apply retroactively.

Regardless of the possible hidden misuse and undesirable side effect which might arise, the result of the *Sisco* decision is that the defendant's rights are more adequately safeguarded when a record is preserved. Since this record must show that the defendant personally entered his guilty plea voluntarily, with an understanding of the charge and with a knowledge of the consequences of his plea, the immediate result appears to be a desirable, beneficial and progressive step in aid of both the accused and the courts. Effectively used, this new procedure could establish an equitable balance between the right of the defendant to due process, and the right of the court to protect itself from procedural technicalities which result in reversal in post-conviction attacks.

J. RICHARD BLAND

Domestic Relations—A DIVORCED WOMAN MAY MAINTAIN AN ACTION AGAINST HER FORMER HUSBAND FOR A TORT COMMITTED BY HIM PRIOR TO THEIR MARRIAGE.—*Gaston v. Pittman* (Fla. 1969).

Plaintiff brought an action seeking to recover damages for the death of her minor child, born during a prior marriage, allegedly caused by the negligence of the defendant on March 4, 1965. Thereafter the plaintiff and defendant were married. This marriage ended in divorce on January 18, 1966, and the plaintiff subsequently initiated this suit. The United States District Court for the Northern District of Florida, holding that the wife's action had been "extinguished" upon her marriage to the defendant by virtue of the common law theory of the unity of husband and wife,[1] entered final summary judgment in favor of the defendant and dismissed the complaint. Plaintiff appealed to the United States Court of Appeals for the Fifth Circuit which certified to the Florida supreme court the question of whether, under Florida law, a divorced woman could main-

[35] *Id.* at 552. *See also* United States *ex rel.* Brooks v. McMann, 408 F.2d 823 (2d Cir. 1969), discussed at note 10, *supra.*
[36] 380 Mich. 693, 158 N.W.2d 404 (1968).
[37] *Id.* at 701, 158 N.W.2d at 408.
[38] Crim. No. 53478, Iowa Supreme Court, September 5, 1969.

[1] Gaston v. Pittman, 285 F. Supp. 645 (N.D. Fla. 1968). The common law rule as recognized in Florida is laid down in Bencomo v. Bencomo, 200 So. 2d 171 (Fla. 1967).

tain an action against her former husband for a tort allegedly committed by him prior to the marriage. *Held*, in the affirmative. A divorced woman can maintain an action against her former husband for a tort committed by him prior to their marriage. *Gaston v. Pittman*, 224 So. 2d 326 (Fla. 1969).

The basis of the Florida supreme court holding in *Gaston* is that the cause of action against the tortfeasor became vested in the injured woman at the time the tort was committed. The subsequent marriage of the injured woman to the tortfeasor did not extinguish the spouse's cause of action but merely abated the woman's capacity to sue. A later divorce lifted the procedural bar and allowed the divorced woman to sue her former husband for the antenuptial tort.[2]

This decision creates a procedural means whereby under similar circumstances, the common law doctrine of spousal immunity, as applied in Florida,[3] may be circumvented. As stated at common law, a wife may not sue her husband for a personal injury occurring during coverture,[4] or prior to marriage.[5] Further, a subsequent divorce does not alter this doctrine.[6] Although seventeen states have expressly abolished the doctrine of spousal immunity by statute[7] or by judicial resort to the Married Woman's Property Acts authorizing tort actions between spouses,[8] a majority have not discarded the common law rule.[9] Nevertheless, many courts have limited the doctrine in various ways. Some have allowed the wife to recover for an antenuptial tort,[10] and others have allowed recovery after a divorce.[11] Some courts distinguish intentional torts

---

[2] Gaston v. Pittman, 224 So. 2d 326 (Fla. 1969).

[3] Bencomo v. Bencomo, 200 So. 2d 171 (Fla. 1967) (a divorced woman may not bring suit against her former husband for a tort committed during marriage); Amendola v. Amendola, 121 So. 2d 805 (Fla. App. 1960) (Florida follows the common law rule that a wife may not sue her husband for a personal tort occurring prior to the marriage); Webster v. Snyder, 103 Fla. 1131, 138 So. 755 (1932) (the common law rule is supported by implication).

[4] The leading case is Thompson v. Thompson, 218 U.S. 611 (1910). An extensive collection of cases is found in W. PROSSER, TORTS 882 (3rd ed. 1964); 41 AM. JUR. 2d *Husband & Wife* § 522 (1968); Annot., 43 A.L.R.2d 632 (1955).

[5] Taylor v. Vezzani, 109 Ga. App. 167, 135 S.E.2d 522 (1964); Patenaude v. Patenaude, 195 Minn. 523, 263 N.W. 546 (1935); Taibi v. DeGennaro, 65 N.J. Super. 294, 167 A.2d 667 (1961); Meisel v. Little, 407 Pa. 546, 180 A.2d 772 (1962).

[6] Cimijotti v. Paulsen, 230 F. Supp. 39 (N.D. Iowa 1964) (subsequent divorce does not alter the common law rule); Lynn v. Gaskins, 212 F. Supp. 951 (N.D. Ind. 1963); Wallach v. Wallach, 94 Ga. App. 576, 95 S.E.2d 750 (1956); Callow v. Thomas, 322 Mass. 550, 78 N.E.2d 637 (1948); Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898); Nickerson v. Nickerson, 65 Tex. 281 (1886).

[7] For a comprehensive list of statutes throughout the states, *see* 3 C. VERNIER, AMERICAN FAMILY LAWS 167, 179 (1935).

[8] The leading cases which support the abolition of the immunity doctrine are Self v. Self, 58 Cal. 2d 683, 376 P.2d 65 (1962) (an intentional tort); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70 (1962) (negligence); *see, e.g.*, Annot., 43 A.L.R.2d 632, 643 (1955).

[9] The leading case is Thompson v. Thompson, 218 U.S. 611 (1910). An extensive collection of cases is found in W. PROSSER, TORTS 882 (3rd ed. 1964); 41 AM. JUR. 2d *Husband and Wife* § 522 (1968); Annot., 43 A.L.R.2d 632 (1955).

[10] O'Grady v. Potts, 193 Kan. 644, 396 P.2d 285 (1964) (states that the wife's tort claim at the time of the marriage was her personal property); Mosier v. Carney, 376 Mich. 532, 138 N.W.2d 343 (1965); Hamilton v. Fulkerson, 285 S.W.2d 642 (Mo. 1955).

[11] Sanchez v. Olivarez, 94 N.J. Super. 61, 226 A.2d 752 (1967); Goode v. Martinis, 58 Wash. 2d 229, 361 P.2d 941 (1961). *Contra*, Annot., 43 A.L.R.2d 632, 645 (1955).

from negligent torts, allowing the former as grounds for suits between spouses.[12]

The reasons advanced for upholding the doctrine of spousal immunity are varied. The most recent are those based on public policy. It is argued that such actions would disrupt the harmony of the marital relations,[13] lead to excessive trivial litigation,[14] and encourage fraud and collusion between those spouses covered by insurance.[15] It is also felt that the criminal, equity, and divorce courts provide an adequate remedy for the wrongs committed by one spouse against the other.[16] One of the most prevalent reasons upon which courts have upheld the common law rule is the concept of the unity of husband and wife.[17] By marriage the husband and wife become, in law, one person. In effect, the unity doctrine suspends the legal existence of the woman during the marriage.[18]

In light of the unique facts in *Gaston*, the Florida supreme court found that, "all these reasons fail in an action for an antenuptial tort by a divorced wife."[19] Because the tort was committed prior to marriage, and the action was commenced after the divorce of the parties, there appeared to be neither a disruption of the marital relationship nor collusion between husband and wife. In such a situation the woman has her own legal identity at the time the tort was committed (prior to marriage)[20] as well as at the time of the commencement of the action (after her divorce).[21] Following this reasoning it would seem that the unity doctrine would also be inapplicable.[22]

The Florida supreme court in *Gaston* felt that when the reason for a rule of law is no longer applicable, that rule should be discarded.[23] This is a classic application of the maxim *cessanti ratione legis, cessat et ipsa lex*, meaning that when the reason for the law ceases, the law itself also ceases.[24] This doctrine has previously been used to overrule the common law which was found to be inconsistent with the Florida constitution.[25] In *Gaston*, the Florida supreme

---

12 W. PROSSER, TORTS 884 (3rd ed. 1964). *Contra*, Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952) (since husband and wife were one person at common law neither could maintain an action regardless of whether it was an intentional tort).

13 Thompson v. Thompson, 218 U.S. 611 (1910).

14 Goode v. Martinis, 58 Wash. 2d 229, 361 P.2d 941 (1961).

15 Lyons v. Lyons, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965).

16 Goode v. Martinis, 58 Wash. 2d 229, 361 P.2d 941 (1961).

17 Thompson v. Thompson, 218 U.S. 611 (1910).

18 *Id.*

19 Gaston v. Pittman, 224 So. 2d 326, 328 (Fla. 1969).

20 Carver v. Ferguson, 115 Cal. App. 2d 641, 254 P.2d 44 (1953); O'Grady v. Potts, 193 Kan. 644, 396 P.2d 285 (1964) (a tort claim at the time of marriage was held to be the woman's personal property); Benevides v. Kelley, 90 R.I. 310, 157 A.2d 821 (1960) (the cause of action was the wife's separate property yet the wife was not entitled to sue).

21 *See* 27A C.J.S. *Divorce* § 1 (1957).

22 Thompson v. Thompson, 218 U.S. 611 (1910).

23 Gaston v. Pittman, 224 So. 2d 326, 327 (Fla. 1969).

24 "The reason of the law ceasing, the law itself also ceases." BLACK'S LAW DICTIONARY 288 (4th ed. 1968).

25 *See also* Waller v. First Sav. & Trust Co., 103 Fla. 1025, 1038, 138 So. 780, 784 (1931) (the common law was held not applicable because it was contrary to the customs, institutions and intendments of our statutes); Abraham v. Baldwin, 52 Fla. 151,

court concluded that to perpetuate the common law rule in this particular situation would be contrary to the due process clause of the Declaration of Rights of the Florida constitution[26] and the due process and equal protection clauses of the fourteenth amendment of the Constitution of the United States.[27]

In the instant case, the Florida supreme court utilized the distinction between *cause of action* and *right of action* to create a procedural method by which the divorced woman could maintain an action against her former husband for an antenuptial tort. In an earlier decision, *Webster v. Snyder*,[28] the Florida supreme court held that where the plaintiff sustained injuries as a result of the negligence of the defendant's servant or agent, the subsequent marriage to the servant or agent abates the "right of action" against him but affects neither her "cause of action" nor "right of action" against the employer. In such a differentiation the *cause of action* is the substantive fact creating the right to maintain an action,[29] while the *right of action* is the procedural capacity to bring the action.[30] Thus *Amendola v. Amendola*,[31] the District Court of Appeal of Florida, in an action to recover for injuries sustained prior to marriage, held that while the wife's cause of action was not *cancelled* or *purged* by the marriage, her right of action was *abated* or *suspended*.

The court in *Gaston* found that the cause of action, which accrued to the plaintiff prior to her marriage, became her separate property and was vested in her, and remained her separate property even after the marriage was dissolved.[32] This enlightening interpretation emanated from decisions in several other jurisdictons.[33] Similar reasoning was used by the California Court of Appeals in allowing a wife to sue for an antenuptial tort.[34] California statutes provide that all property of a wife owned before her marriage is her separate property,[35] and that a cause of action for a premarital tort constitutes

---

42 So. 591 (1906) (the court applied the doctrine to overrule the common law that is inconsistent with the constitution).

[26] FLA. STAT. ANN. Declaration of Rights § 4 (1944).

[27] U.S. CONST. amend. XIV.

[28] 103 Fla. 1131, 138 So. 755 (1932).

[29] "Cause of Action is based on the substantive law of legal liability." Landry v. Acme Flour Mills Co., 202 Okla. 170, 172, 211 P.2d 512, 515 (1949); A "cause of action" is the fact or combination of facts which give rise to a suit. State v. District Court, 44 Wyo. 437, 447, 13 P.2d 568, 570 (1932). *See also* McMahan v. United States, 186 F.2d 227, 230 (3d Cir. 1950); Bacon v. Wahrhaftig, 95 Cal. App. 2d 599, 218 P.2d 144 (1950).

[30] A "right of action" is the right to pursue a judicial remedy, and "a cause of action" is the entire state of facts that give rise to an enforceable claim. Adams v. Albany, 80 F. Supp. 876, 881 (S.D. Cal. 1948). A "right of action" is remedial while a "cause of action" is substantive. Douglas v. Daniels Bros. Coal Co., 135 Ohio St. 641, 22 N.E.2d 195 (1939); *see also* Whalen v. Strong, 230 App. Div. 617, 246 N.Y.S. 40 (1930).

[31] 121 So. 2d 805 (Fla. App. 1960).

[32] Gaston v. Pittman, 224 So. 2d 326 (Fla. 1969).

[33] Carver v. Ferguson, 115 Cal. App. 2d 641, 254 P.2d 44 (1953); O'Grady v. Potts, 193 Kan. 644, 396 P.2d 285 (1964) (a tort claim at the time of marriage was held to be the woman's personal property); Benevide v. Kelley, 90 R.I. 310, 157 A.2d 821 (1960) (the cause of action was the wife's separate property yet the wife was not entitled to sue).

[34] Carver v. Ferguson, 115 Cal. App. 2d 641, 254 P.2d 44 (1953); Foote v. Foote, 170 Cal. App. 2d 435, 339 P.2d 188 (1959) (affirmed the rule as applied in Carver v. Ferguson).

[35] CAL. CIV. CODE § 162 (1954).

property[36] which is retained by the injured woman as separate property after her marriage.[37]

Even though the cause of action became vested in the woman, the Florida supreme court, prior to *Gaston*, followed the common law principle that the "right of action" was abated by the marriage.[38] By "abated" the courts that apply the common law rule mean *extinguished*.[39] Thus even if the subsequent marriage did not destroy the cause of action it still remained that the right of action was abated and extinguished. Hence, divorce could not revive it, for—being extinguished—there was nothing to revive.[40] This definition is modified in *Gaston* by the holding that the right of action was only temporarily suspended and could be revived by a subsequent divorce.[41]

Even though the action was brought within the two year period,[42] the application of the Florida supreme court decision necessarily leads to a consideration of the effect of the statute of limitations upon the spouse's suspended right of action. It is generally held that in order for the statute of limitations to be tolled in a particular situation there must be a clear and unequivocal statutory provision to that effect.[43] The statute of limitations may be tolled, for example, when a party is imprisoned,[44] serving in the armed forces,[45] or absent from the state.[46] Usually the provision which tolls the statute will be strictly construed.[47] It would logically follow, therefore, that in the absence of an express tolling statute the statute of limitations will generally run. Therefore it would appear that if the action was not commenced within the prescribed period it would be barred,[48] notwithstanding the abatement of the right of action.

---

[36] CAL. CIV. PRO. CODE §§ 17(1), (3) (1954).

[37] CAL. CIV. CODE § 162 (1954). The leading case that upholds the majority opinion that the Married Woman's Emancipation Acts do not abrogate the doctrine of spousal immunity is Thompson v. Thompson, 218 U.S. 611 (1910). An extensive collection of cases is found in W. PROSSER, TORTS 882 (3rd ed. 1964); 41 AM. JUR. 2d *Husband & Wife* § 522 (1968); Annot., 43 A.L.R.2d 632 (1955).

[38] Hudson v. Hudson, 226 Md. 521, 174 A.2d 339 (1961) (states that the cause of action was extinguished by the marriage); Scales v. Scales, 168 Miss. 439, 151 So. 551 (1934) (the right of action is extinguished by the marriage); Koplik v. C.P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958) (marriage during the pendency of the action extinguishes the right of the injured wife to prosecute the action). For the Florida law in this area *see*, Bencomo v. Bencomo, 200 So. 2d 171 (Fla. 1967); Webster v. Snyder, 103 Fla. 1131, 138 So. 755 (1932); Amendola v. Amendola, 121 So. 2d 805 (Fla. App. 1960).

[39] *See* authority cited note 38 *supra*. *See also* BLACK'S LAW DICTIONARY 15 (4th ed. 1968); 1 C.J.S. *Abandonment* 19 (1936) (synonymous with terminated and brought to an end).

[40] Gaston v. Pittman, 285 F. Supp. 645, 648 (N.D. Fla. 1968); *accord*, Henneger v. Lomas, 145 Ind. 287, 44 N.E. 462 (1896).

[41] Gaston v. Pittman, 224 So. 2d 326, 329 (Fla. 1969).

[42] In Florida, the statute of limitations for a wrongful death action is two years. FLA. STAT. ANN. § 95.11 (1960). Hence the statute of limitations was not an issue in the *Gaston* case.

[43] Annot., 24 A.L.R.2d 618 (1952) (discusses imprisonment as tolling the statute of limitations).

[44] *Id.*

[45] Annot., 26 A.L.R.2d 84 (1952) (suspension of the statute of limitations during the period of military service under the Soldiers' and Sailors' Civil Relief Act of 1940).

[46] FLA. STAT. ANN. § 95.07 (1960).

[47] *See* authority, Annot., 24 A.L.R.2d 618 (1951).

[48] Where one person may rightfully sue another, a cause of action has accrued and

The Iowa supreme court adheres to the doctrine of interspousal immunity.[49] Nevertheless, as early as 1871, the court recognized that a woman's cause of action is a property right.[50] With such a basis it may be feasible for a divorced woman to recover against her former husband for an antenuptial tort in Iowa by utilizing the reasoning of the *Gaston* decision.

Although not completely abrogating the common law rule,[51] the Florida supreme court has contrived a procedural method to circumvent the doctrine of spousal immunity in certain factual situations. The Iowa supreme court, in accord with the majority of jurisdictions which uphold the common law rule, has declared that the abrogation of that rule, even if desirable, is a matter calling for legislative action and lying without the sphere of proper judicial action.[52] Until that time one must look to progressive decisions such as *Gaston* to provide insight into the doctrine of spousal immunity, and to provide a means of relief for the married woman whose action is otherwise barred at common law.

BERT J. FORTUNA, JR.

Evidence—POST-DIVORCE TESTIMONY CONCERNING ACCESS OR NONACCESS OF HUSBAND TO WIFE AND THIRD-PARTY TESTIMONY OF THE WIFE'S STATEMENT IDENTIFYING THE FATHER ARE INADMISSIBLE TO DETERMINE THE LEGITIMACY OF A CHILD CONCEIVED BEFORE DIVORCE BUT BORN SUBSEQUENT THERETO.—*Maxwell v. Maxwell* (Mich. Ct. App. 1969).

Defendant-wife sought a supplemental judgment of divorce ordering support from plaintiff-husband for a full-term baby born to her fifteen months after the parties separated, eleven months after the plaintiff filed his complaint for divorce, and seven months after judgment of divorce was entered. The plaintiff contested the action and denied the defendant's testimony alleging sexual intercourse with him after the complaint for divorce was filed. Witnesses

---

the statute of limitations begins to run. United States Fidelity and Guar. Co. v. Fidelity Trust Co., 49 Okla. 398, 153 P. 195 (1915). For the Florida statute of limitations *see*, FLA. STAT. ANN. § 95.07 (1960). In Iowa the statute of limitations is two years. IOWA CODE § 614.1 (1966). *See also*, IOWA CODE §§ 614.24,-.27 (1966). The provisions of sections 614.24 to 614.27, inclusive, or the filing of a claim or claims hereunder shall not revive or permit an action to be brought or maintained upon any claim or cause of action which is barred by any other statute.

[49] For a review of the Iowa decisions in this area *see*, 13 DRAKE L. REV. 160 (1965) (spousal immunity); 18 DRAKE L. REV. 142 (1968) (family immunity).

[50] Musselman v. Gallagher, 32 Iowa 383 (1871); *see* IOWA CODE § 597.3 (1966) (Iowa Married Woman's Emancipation Acts).

[51] Gaston v. Pittman, 224 So. 2d 326, 328 (Fla. 1969) (the court hints at its willingness to uphold the woman's rights).

[52] Abolition of the immunity doctrine must come from the legislature, not the courts. Flogel v. Flogel, 257 Iowa 547, 133 N.W.2d 907 (1965). For an extensive list of cases *see*, Annot., 43 A.L.R.2d 632, 662 (1955).

testified that the defendant was living with a boyfriend at the time of probable conception, and that she had stated that her boyfriend was the child's father. The trial court declared the plaintiff to be the father of the child, and the plaintiff appealed to the Michigan Court of Appeals. *Held*, affirmed. Post-divorce testimony concerning access[1] or nonaccess of husband to wife and third-party testimony regarding the wife's statements identifying another as the father are inadmissible to determine the legitimacy of a child conceived before divorce but born subsequent thereto. *Maxwell v. Maxwell*, 15 Mich. App. 607, 167 N.W.2d 114 (1969).

The law presumes every child born or conceived within lawful wedlock to be legitimate, and the burden of proving illegitimacy is upon the person so alleging.[2] The presumption of legitimacy is founded upon principles of "decency, morality, and public policy"[3] and is not weakened by divorce of the parents subsequent to conception of the child.[4]

Although early English law regarded the presumption of legitimacy as conclusive whenever the husband was not impotent and had been within the jurisdiction of the King of England at any time during his wife's pregnancy,[5] the rigidity of this view has since yielded to reason,[6] and most courts now hold that the presumption, though strong, may be rebutted by proper proof.[7] Illustrative of the current attitude toward the presumption is the case of *Craven v. Selway*,[8] where the Iowa supreme court defined both the nature and the quantum of proof required to rebut it. The court stated:

> Such presumption of legitimacy may be rebutted by showing: First, that the husband is impotent; second, that the husband was entirely absent so as to have no access to the mother; third, that the husband was entirely absent at the period during which the child, in the course of nature, must have been begotten; and, fourth, that the husband was present only under circumstances which afford clear and satisfactory proof that there was no sexual relationship between him and his wife. These propositions must be established by clear, satisfactory, convincing, and competent evidence.[9]

---

[1] The word "access" is sometimes used to denote sexual intercourse, but is here used to mean the presence together of husband and wife under conditions which afford an opportunity for coition. Jackson v. Jackson, 182 Okla. 74, 76 P.2d 1062 (1938).

[2] Bowers v. Bailey, 237 Iowa 295, 21 N.W.2d 773 (1946).

[3] *Id.* at 298, 21 N.W.2d at 775.

[4] Kuhns v. Olson, 258 Iowa 1274, 141 N.W.2d 925 (1966).

[5] 9 J. WIGMORE, EVIDENCE § 2527 (3d ed. 1940).

[6] As stated by Judge Cardozo: "The presumption does not consecrate as truth the extravagantly improbable . . . ." *In re* Estate of Findlay, 253 N.Y. 1, 8, 170 N.E. 471, 473 (1930).

[7] Craven v. Selway, 216 Iowa 505, 246 N.W. 821 (1933). Although the *Craven* case cites for support *In re* Estate of Henry, 167 Iowa 557, 149 N.W. 605 (1914) and Gilbert v. Ruggles, 189 Iowa 206, 178 N.W. 340 (1920), the latter two cases state that the paternity and legitimacy of one begotten while husband and wife were living together in lawful wedlock are *conclusively* presumed.

[8] 216 Iowa 505, 246 N.W. 821 (1933).

[9] *Id.* at 509, 246 N.W. at 823. It would seem that capably-performed blood tests which exclude the husband from any possibility of paternity should thereby rebut the presumption of legitimacy as a matter of law. However, this view apparently has not been adopted in Iowa; *cf. Dale v. Buckingham*, 241 Iowa 40, 40 N.W.2d 45 (1949); Annot., 46 A.L.R.2d 1000 (1956); 35 IOWA L. REV. 714 (1950).