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The Conclusive Presumption of Legitimacy: Jackson v. Jackson (Cal. 1967); Hess v. Whitsitt (Cal. App. 1967)

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supported on the basis of public policy. The number of people who find themselves in the employee's corner of the triangular relationship is large and growing.[39] The majority view jeopardizes the security of this large segment of the American working population who have entered into the insurance arrangement in good faith. The insurance companies, on the other hand, are not only in a position to exercise a closer control over the employer to keep mismanagement at a minimum, but they are also in a position to spread the cost of such mismanagement to the public at large. As a matter of public policy, the insurer should be made to treat such losses as a part of the cost of doing business and to include such costs in arriving at the dollar amount of premiums to be charged.[40]

David S. Murray

THE CONCLUSIVE PRESUMPTION OF LEGITIMACY: *JACKSON v. JACKSON* (CAL. 1967); *HESS v. WHITSITT* (CAL. APP. 1967)

For nearly a century California statutes have provided companion presumptions favoring the legitimacy of children born during wedlock or within a competent time thereafter.[1] The presumption is disputable in cases where the husband and wife were not cohabiting at the time of conception.[2] However, Evidence Code section 621

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39 R. EILERS AND R. CROWE, GROUP INSURANCE HANDBOOK 50-52 (1965). *See also*, LIFE INSURANCE FACT BOOK 26-28 (1961).

40 Although the supreme court reversed the trial court's finding that Fullerton was not New York Life's agent, it sent the case back to the trial court so that it might be determined whether Mr. Elfstrom, as beneficiary, partook in the misrepresentation of his daughter's eligibilty made to the insurer. Elfstrom v. New York Life Ins. Co., 67 A.C. 511, 520, 432 P.2d 731, 740, 63 Cal. Rptr. 35, 44 (1967). If it is found that he did, New York Life may avoid the policy. *See e.g.* New York Life Ins. Co. v. Zivitz, 243 Ala. 379, 10 So. 2d 276 (1942).

1 CAL. EVID. CODE §§ 621, 661 (West 1966) *formerly* CAL. CODE CIV. PROC. §§ 1962(5), 1963(31) (West 1955); CAL. CIV. CODE §§ 193-95 (West 1955) (originally enacted in 1872). In enacting Evidence Code section 621, "conclusively" was substituted for "indisputably." This was not intended to effect any substantive change. Jackson v. Jackson, 67 A.C. 241, 243 n.1, 430 P.2d 289, 290 n.1, 60 Cal. Rptr. 649, 650 n.1 (1967); Cal. Law Revision Comm'n, 7 REPORTS, RECOMMENDATIONS AND STUDIES 105 (1965). [The conclusive presumption arising out of cohabitation will be referred to herein as "the indisputable presumption."].

2 "A child of a woman who is or has been married, born during the marriage or within 300 days after the dissolution thereof, is presumed to be a legitimate child of that marriage. This presumption may be disputed . . . ." CAL. EVID. CODE § 661 (West 1966).

provides that "notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is conclusively presumed to be legitimate."[3] The latter presumption, being conclusive, is actually a rule of substantive law.[4] In two recent cases involving this latter presumption, the courts were called upon to consider the admissibility of evidence of blood tests[5] and racial characteristics[6] that tended to preclude the husband as the father of a child born to his wife during lawful wedlock.

In *Jackson v. Jackson*,[7] the husband had been ordered to pay child support and legal and medical expenses in connection with the birth of a child to the wife approximately nine months after the date of the marriage. The only cohabitation had been a four-day honeymoon in the couple's apartment after which the wife had departed; there had been no contact thereafter. In support of his motion to terminate the prior court orders, the husband offered evidence of blood tests indicating that he could not have fathered the child. On appeal to the supreme court it was held that the test results were admissible, not for the purpose of overcoming the indisputable presumption, but rather for the purpose of showing that the child was not conceived during cohabitation and that, therefore, the indisputable presumption was not applicable. The dissenting opinion concluded that the effect of the court's holding was to add an exception to the indisputable presumption, thereby subverting a longstanding public policy favoring legitimacy.[8]

In *Hess v. Whitsitt*,[9] the husband and wife were Caucasian while the wife's child was of mixed blood, evidencing both Negro and Caucasian characteristics and bearing a close physical resemblance to the defendant, a Negro. It was not disputed that the child had been conceived at a time when the husband and wife were cohabiting although the wife had had sexual relations with both the defendant and her husband during that period. In an action against the alleged father to establish paternity and obtain a child support order the district court of appeal held that the child was conclusively presumed to be the legitimate issue of the hus-

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[3] CAL. EVID. CODE § 621 (West 1966).

[4] Kusior v. Silver, 54 Cal. 2d 603, 619, 354 P.2d 657, 668, 7 Cal. Rptr. 129, 140 (1960); MCBAINE, CALIFORNIA EVIDENCE MANUAL § 1273 (2d ed. 1960).

[5] Jackson v. Jackson, 67 A.C. 241, 430 P.2d 289, 60 Cal. Rptr. 649 (1967).

[6] Hess v. Whitsitt, 257 A.C.A. 618, 65 Cal. Rptr. 45 (1967), *hearing denied*, 68 A.C. No. 8 (1968) (minutes at 3).

[7] 67 A.C. 241, 430 P.2d 289, 60 Cal. Rptr. 649 (1967).

[8] *Id.* at 245, 430 P.2d at 291, 60 Cal. Rptr. at 651.

[9] 257 A.C.A. 618, 65 Cal. Rptr. 45 (1967), *hearing denied* 68 A.C. No. 8 (1968) (minutes at 3).

band and wife. The only exception to the presumption was that provided by the statute itself, *i.e.*, impotence. Language in earlier California cases suggesting a "racial difference" exception was held to be dicta which had never risen to the level of a rule of law.

This note examines the *Jackson* and *Hess* decisions in light of the historical background and development of Evidence Code section 621.

Background and Development

The Common Law Presumption

At early common law, the child of a married woman was conclusively presumed to be legitimate unless the husband was beyond the realm or incapable of procreation.[10] Professor Wigmore has characterized the evolution of the presumption since that time as a reduction of the instances in which it is conclusive, brought about by an expansion of the instances in which it is rebuttable.[11] The most notable examples of this pattern arose during the first half of the 19th century when the English courts handed down the landmark decisions in the *Banbury Peerage Case*[12] and *Hargrave v. Hargrave*[13] wherein the contemporary common law presumption of legitimacy was formulated.[14]

Banbury involved the legitimacy of a son born to the wife of the Earl of Banbury, the Earl an octogenarian at the time.[15] In response to questions posed by a committee of the House of Lords, the judges set forth the following rules. A child born in lawful wedlock, the husband not being proved impotent, is *prima facie* legitimate. This presumption can be overcome only by proving that the husband was impotent or that he did not engage in sexual relations[16] with his wife at a time when, according to the laws

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[10] Coke Lit. § 244a.

[11] 9 Wigmore, Evidence § 2527 (3d ed. 1940).

[12] 57 Eng. Rep. 62 (H.L. 1811).

[13] 50 Eng. Rep. 546 (Ch. 1846).

[14] J. Madden, Persons and Domestic Relations 340-41 (1931). "Any detailed consideration of the American cases is unnecessary, for they, like the subsequent English cases, in the main, look back to the Banbury Peerage Case and *Hargrave v. Hargrave* . . . in order to determine the rule of the common law . . . ." Estate of Walker, 180 Cal. 478, 490, 181 P. 792, 797 (1919).

[15] *See* Estate of Walker, 180 Cal. 478, 486, 181 P. 792, 795 (1919).

[16] The terms "access" and "opportunities for access" appear in the case but are used to indicate sexual intercourse or the opportunity for sexual intercourse: "That, after proof given of such access . . . (by which we understand proof of sexual intercourse between them) no evidence can be received . . . ." Banbury Peerage Case, 57 Eng. Rep. 62, 63 (H.L. 1811); "The non-existence of sexual intercourse is generally expressed by the words 'non-access of the husband to the wife;' and we understand

of nature, he could be the father. Where there have been opportunities for intercourse with the wife at the relevant time, such intercourse is presumed. When, by presumption or otherwise, evidence of intercourse between the husband and wife at the relevant time is offered, a finding of paternity and legitimacy can be avoided only by evidence going to disprove the occurrence of such intercourse.[17]

In *Hargrave v. Hargrave*,[18] the *Banbury* rules were formulated into what is generally referred to as Lord Langdale's rule:

> A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion; but may be wholly removed by proper and sufficient evidence, showing that the husband was: 1. Incompetent. 2. Entirely absent, so as to have no intercourse or communication of any kind with the mother. 3. Entirely absent, at the period during which the child must, in the course of nature, have been begotten; or, 4. Only present, under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this puts an end to the question, and establishes the illegitimacy of the child of a married woman.[19]

The court added that where it was shown that there had been opportunities for sexual intercourse, the husband was entitled to show the absence of such intercourse but he could not introduce evidence that any other man might have been the father of the child.[20]

Thus, *Banbury* and *Hargrave* announced that the presumption of legitimacy of a child born during wedlock was *prima facie* rather than conclusive. In a sense, however, the presumption had never really been conclusive insofar as it allowed for proof of impotence or absence of the husband beyond the "four seas." Conversely, the modern *"prima facie"* rule operated conclusively in cases where the husband failed to show nonintercourse or incompetency. For example, a husband who admitted intercourse with his wife at the relevant time was conclusively presumed to be the father notwithstanding the availability of contrary evidence. Logically, these

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those expressions as applied to the present question, as meaning the same thing." *Id.* at 64.

17 "In the Banbury case . . . inferences from circumstantial evidence were considered sufficient; and it was said that the presumption of legitimacy might be rebutted, not only by *direct* and *conclusive* evidence which negated the *possibility of sexual intercourse having taken place*, but by *circumstances* which might convince those who had to decide the question, that it did not take place." H. NICOLAS, TREATISE ON ADULTERINE BASTARDY 265 (1836).

18 50 Eng. Rep. 457 (H.L. 1846).

19 *Id.* at 458.

20 *Id.*

rules precluded the admission of evidence of divergent racial characteristics or, had such data been available at the time, negative blood test results.

The California Presumptions

As will be seen, the California statutory provisions, enacted in 1872, embraced the English rules—with one restriction. Under the English view, the presumption could be rebutted by proof of nonintercourse even in a case where the parties were cohabiting at the time of conception. In California, however, section 1962(5) of the Code of Civil Procedure raised an indisputable presumption when cohabitation was established, provided that the husband was not impotent.[21] Thus, in *Estate of Mills*,[22] the court refused to receive evidence that, although the couple had been cohabiting, the husband had always slept in a separate room and the wife had shared her bed with Mills, a boarder. After defining "cohabitation" as "the living together of a man and woman ostensibly as husband and wife,"[23] the court held that the presumption was by definition indisputable and, therefore, no evidence could be received to rebut it.[24]

After considering the nature of the indisputable presumption in *Mills*, the supreme court next examined the disputable presumption of Civil Code section 194 in *Estate of Walker*.[25] In *Walker*, the husband and wife had lived apart for four years prior to his death in 1913.[26] Five months thereafter, the widow gave birth to twin sons. The court indicated that California had codified the

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[21] Now CAL. EVID. CODE § 621.

[22] 137 Cal. 298, 70 P. 91 (1902).

[23] *Id.* at 301, 70 P. at 92.

[24] Beyond the fact that the statute precluded the admission of such evidence, it was also inadmissible under Lord Mansfield's Rule since it consisted of testimony by the wife as to non-access. *See generally* 7 WIGMORE, EVIDENCE § 2063 (3d ed. 1940). In California, this restriction applies only in cases involving the conclusive presumption. Estate of McNamara, 181 Cal. 82, 100, 183 P. 552, 559 (1919); MCBAINE, CALIFORNIA EVIDENCE MANUAL § 209 (2d ed. 1960).

The *Mills* court also suggested that the indisputable presumption was not inconsistent with the four exceptions to the modern common law presumption as enumerated in Hargrave v. Hargrave, 50 Eng. Rep. 546 (Ch. 1846). However, in *Hargrave*, Lord Langdale went on to say, "In the course of the investigation, I apprehend that evidence . . . may be adduced, for the purpose of shewing the absence of sexual intercourse . . . ." 50 Eng. Rep. at 548. The holding in *Mills* does limit this aspect of the decision in *Hargrave*. The limitation was noted in Estate of Walker, 180 Cal. 478, 181 P. 792 (1919), "The English rule would seem to go so far as to permit evidence of nonintercourse even where the parties are cohabiting, i.e., living together in the same house or apartments. Such is not the rule in this state." *Id.* at 491, 181 P. at 797 (citing CAL. CODE CIV. PROC. § 1962(5) and *Estate of Mills*).

[25] 180 Cal. 478, 181 P. 792 (1919).

[26] 176 Cal. 402, 407, 168 P. 689, 690 (1917) (first appeal).

common law rule as announced in *Banbury* and *Hargrave* by enacting the disputable presumptions of legitimacy.[27] Accordingly, the court held that there being no technical cohabitation, evidence of nonintercourse was admissible even though it was shown that there had been opportunities for intercourse and even though the wife had testified as to acts of intercourse with the husband.

Also in accord with the common law rule was the court's determination that where actual intercourse was shown to have occurred between the husband and wife at a time when it was possible by the laws of nature that he was the father, the presumption became *conclusive* and no inquiry would be allowed as to the probability of someone else being the father.[28] Additionally, in dictum, the court expanded the *Banbury-Hargrave* rule by announcing an exception to the presumption in cases where the racial characteristics of the child precluded the possibility that the husband was the father.[29]

Having considered the indisputable presumption in isolation in *Mills*, and the disputable presumption in isolation in *Walker*, the supreme court next examined a case involving both presumptions. In *Estate of McNamara*,[30] the husband and wife had cohabited for approximately five months when she left him and went to live with McNamara. Three hundred and four days after her departure the wife gave birth to a son; there had been no opportunity for intercourse with the husband in the interim. Since the indisputable presumption arises only when conception and cohabitation concur, the court was forced to consider the likelihood of a 304-day gestation period. Assuming as a matter of law that intercourse took place on the last day of cohabitation, the court held that, although it was *possible* that the husband was the father, the indisputable presumption did not apply where the gestation period necessary to reach that result would be contrary to the *usual* operation of the laws of nature, *e.g.*, 304 days. The court distinguished the broad language in *Walker*, that once the possibility of paternity on the part of the husband was established, no inquiry would be

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[27] 180 Cal. 478, 491, 181 P. 792, 797 (1919). *See* CAL. EVID. CODE §§ 621, 661 (West 1966).

[28] "There is no doubt but that the presumption of legitimacy goes at least to this extent: that if it appear that by the laws of nature it is possible that the husband is the father (that is, if it appears that the husband had intercourse with the mother during the period of possible conception), legitimacy is conclusively presumed . . . ." 180 Cal. at 484, 181 P. at 794. *But see* Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960) (Blood test results may be conclusive against the disputable presumption.); Adoption of Stroope, 232 Cal. App. 2d 581, 43 Cal. Rptr. 40 (1965) (Sterility is substantial evidence rebutting the disputable presumption.).

[29] 180 Cal. at 491, 181 P. at 797.

[30] 181 Cal. 82, 183 P. 552 (1919).

made into the probabilities as to someone else being the father, as merely stating the rule "in a general way."[31]

By way of dictum, the court again acknowledged the existence of a "racial difference" exception.[32] Noting that the element of indeterminability normally present when either of two men could be the father is absent when a racial factor is added, the court reasoned that the same element of indeterminability is absent when only one of the men had engaged in intercourse with the mother during the *usual* period of conception.[33] After finding the indisputable presumption inapplicable, the court determined that the evidence was sufficiently "clear and satisfactory" to overcome the residual prima facie presumption of legitimacy.

Following *McNamara,* cases involving the indisputable presumption generally focused on the question of whether conception was concurrent with cohabitation. In these cases, the presumption was held inapplicable if birth occurred shortly after cohabitation began[34] or long after cohabitation terminated.[35]

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[31] *Id.* at 89, 183 P. at 555.

[32] *Id.* at 96, 183 P. at 557, 558. The acknowledgement loses some of its force upon an examination of the authorities offered in support of it. In two of the cases, the statements were dicta: Wright v. Hicks, 12 Ga. 155, 56 Am. Dec. 451 (1852); Cross v. Cross, 3 Paige 139 (N.Y. Ch. 1832). The cases directly in point were from jurisdictions where public policy considerations may have been influential: Bullock v. Knox, 96 Ala. 195, 11 So. 339 (1892); Watkins v. Carlton, 37 Va. (10 Leigh) 560 (1840).

[33] 181 Cal. at 96, 183 P. at 557, 558. It is doubtful that indeterminability is, or ever has been, the test in applying the *statutory* conclusive presumption arising out of cohabitation. In *Mills,* the evidence offered would have made it possible to determine that the husband was not the father. The evidence was rejected on the ground that it was offered to dispute a presumption made indisputable by the statute. *Cf.* Hess v. Whitsitt, 257 A.C.A. 618, 622, 65 Cal. Rptr. 45, 48 (1967), *hearing denied,* 68 A.C. No. 8 (1968) (minutes at 3).

The *McNamara* court, in considering the effect of determinability, spoke in terms of a conclusive presumption raised by actual intercourse rather than the statutory conclusive presumption raised by cohabitation: "The reason for going beyond the *prima facie* presumption and applying a conclusive presumption wherever the husband has had intercourse with the wife during the time when the child must normally have been conceived, although others as well may have had intercourse with her during the same period, is the impossibility of determining under such circumstances who is the father. . . . [In the racial] instances . . . the element of indeterminability which is the reason for the presumption in the ordinary case is absent. . . . The same element of indeterminability is lacking in the [extended gestation] cases under consideration . . . ." Estate of McNamara, 181 Cal. 82, 95-96, 183 P. 552, 557-58 (1919).

[34] Anderson v. Anderson, 214 Cal. 414, 5 P.2d 881 (1931) (105 days after marriage; however, premarital intercourse was alleged and thus a 200 day period was at issue.); Smith v. Heilman, 171 Cal. App. 2d 424, 340 P.2d 752 (1952) (198 days); Murr v. Murr, 87 Cal. App. 2d 511, 197 P.2d 369 (1948) (190 days). *Compare* Dazey v. Dazey, 50 Cal. App. 2d 15, 122 P.2d 308 (1942) (250 days considered usual and normal; therefore indisputable presumption applied.).

[35] Whitney v. Whitney, 169 Cal. App. 2d 209, 337 P.2d 219 (1959) (297 days); McKee v. McKee, 156 Cal. App. 2d 764, 320 P.2d 510 (1958) (304 days).

The 1954 case of *Hughes v. Hughes*[36] involved the applicability of the indisputable presumption in a unique situation. There cohabitation was established but the husband, though not impotent, was found to be sterile. The court stated exceptions to the presumption where the husband was incompetent or if it was impossible by the laws of nature for him to be the father. Finding that sterility fell within both of the announced exceptions, the court held that the indisputable presumption was not applicable.

If the cases after *Mills* had established a trend away from the rule that no evidence could be received to rebut the indisputable presumption, that trend was reversed in *Kusior v. Silver*.[37] In that action to establish paternity and provide support, the mother offered blood test evidence indicating that her husband was not within the class of persons who could be the father. The central issue was the court's instruction as to cohabitation but the primary impact of the decision was felt in its holding that blood test results were admissible to rebut the disputable presumption but not the indisputable presumption.

The court attached special significance to the legislature's 1953 enactment of a *modified* version of the Uniform Act on Blood Tests to Establish Paternity.[38] The court reasoned that the adoption of section four of the Uniform Act[39] was a legislative determination that blood tests were to be conclusive in every case where they were admissible[40] provided that all the experts concurred in the results. However, the court further reasoned that the legislature's omission of section five of the Uniform Act[41] relating to the presumption of legitimacy of a child born during wedlock, indicated its intention that such tests should not be admissible to overcome the indisputable presumption.[42]

Legislative inaction since *Kusior* suggests that the supreme court correctly interpreted the legislative intent in omitting section

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36 125 Cal. App. 2d 781, 271 P.2d 172 (1954), *noted in* 28 S. CAL. L. REV. 185 (1955).

37 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960), *noted in* 48 CALIF. L. REV. 852 (1960) *and* 34 S. CAL. L. REV. 104 (1960).

38 CAL. EVID. CODE §§ 890-97 (West 1966), *formerly* CAL. CODE CIV. PROC. §§ 1980.1-.7 (West 1955) [hereinafter cited as the UNIFORM ACT].

39 CAL. EVID. CODE § 895 (West 1966), *formerly* CAL. CODE CIV. PROC. § 1980.6 (West 1955).

40 54 Cal. 2d at 619-20, 354 P.2d at 668, 7 Cal. Rptr. at 140.

41 "The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, show that the husband is not the father of the child." UNIFORM ACT § 5.

42 54 Cal. 2d at 618, 354 P.2d at 667, 7 Cal. Rptr. at 139.

five of the Uniform Act.[43] This revitalization of the statutory conclusive presumption is further reflected in the recent *Jackson*[44] and *Hess*[45] decisions, and calls for a reexamination of the doctrine of "impossibility" as a defense to the presumptions of legitimacy.

TRACING THE DOCTRINE OF "IMPOSSIBILITY"

Much of the confusion that has surrounded the conclusive presumption of Evidence Code section 621 can be traced to language in *Walker* and *McNamara* suggesting that where it is *impossible* for the husband to have been the father, no conclusive presumption applies. In retrospect, it appears that the suggestion was partly correct and partly incorrect.

As already noted, even at early common law, the "conclusive" presumption of legitimacy could be overcome by a showing that the husband was impotent or beyond the realm at the time of conception.[46] Proof of these facts demonstrated the impossibility of his being the father. *Banbury* and *Hargrave* announced that the presumption of legitimacy was *prima facie* but, at the same time, limited the types of evidence by which it might be rebutted. As before, proof of impotence or absence during the time when conception must have occurred would prove illegitimacy. Additionally, even though there were opportunities for intercourse (giving rise to a presumption that it had occurred), the modern rule allowed proof that the husband had not had such intercourse at a *time* when, according to the laws of nature, he could be the father.[47] Thus, in effect, legitimacy was conclusively presumed in every case where the husband could not show, either by proof of impotence or nonintercourse at the time of possible conception, that it was *impossible* for him to have been the father.

In *Mills,* the California Supreme Court acknowledged the

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[43] "[E]fforts to enact legislation permitting blood tests to negate paternity despite the provisions of Code of Civil Procedure Section 1962(5) failed enactment in the legislative sessions of 1961 and 1963." Final Report of the *Assembly Interim Committee on Judiciary Relating to Domestic Relations*, 23 ASSEMBLY INTERIM COMM. REP. 1963-1965, No. 6, at 135 (1965). In 1965, the legislature reenacted Code of Civil Procedure section 1962(5) into Evidence Code section 621. The only change at that time was the substitution of "conclusively" for "indisputably." This, however, was not intended to effect any substantive change. Jackson v. Jackson, 67 A.C. 241, 243 n.1, 430 P.2d 289, 290 n.1, 60 Cal. Rptr. 649, 650 n.1 (1967); Cal. Law Revision Comm'n, 7 REPORTS, RECOMMENDATIONS AND STUDIES 105 (1965).

[44] 67 A.C. 241, 430 P.2d 289, 60 Cal. Rptr. 649 (1967).

[45] 257 A.C.A. 618, 65 Cal. Rptr. 45 (1967), *hearing denied*, 68 A.C. No. 8 (1968) (minutes at 3).

[46] *See* note 10 *supra* and accompanying text.

[47] In *Banbury*, the phrase "according to the laws of nature" referred to the gestation period; that is, evidence was offered to show nonintercourse at the time of possible conception rather than, for example, divergent physical characteristics.

Hargrave rules but announced that *no* evidence could be introduced to rebut the indisputable presumption of section 1962(5).[48] Evidence of the impossibility of his paternity could be admitted only to avoid the operation of the presumption. That is, it was admissible to establish impotence or to disprove cohabitation at the relevant time. If those elements of the presumption were established, the rule announced in *Mills* precluded consideration of further evidence tending to prove the impossibility of the husband's paternity. In *Walker,* the evidence did in fact show that there was no cohabitation and, therefore, only the disputable presumption found in Civil Code section 194[49] was under consideration. The court found that this section embodied the common law rules and held that the husband was entitled to show that he had not taken advantage of opportunities for intercourse with his wife during the period of possible conception. That is, by proof of nonintercourse, he could show the *impossibility* of his paternity. However, the court added that if there was intercourse at a time when it was possible that he was the father, legitimacy was conclusively presumed unless, by the laws of nature, it was manifestly *impossible* for the child to be his, for example where the husband and wife were white and the child a mulatto.[50]

Thus, after *Mills* and *Walker,* the defense of impossibility went at least this far: (1) as against the indisputable presumption, the husband could show that it was impossible that the child was conceived during the period of cohabitation[51] or, because of impotence, it was impossible for him to be the father; (2) as against the disputable presumptions, he could show that because of impotence, or nonintercourse during the period of possible conception, it was impossible for him to be the father, and further, assuming that intercourse had been established, that according to the laws of nature, it was manifestly impossible that he was the person who had fathered the child.

McNamara restricted the operation of these rules to cases where the length of the gestation period that would have to be assumed in order to invoke them, was in accordance with the *usual* operation of the laws of nature. The complication in *McNamara* lies not in the rule established, but rather in the rationale announced. The court said that the reason for applying a conclusive presumption in the first place was the indeterminability of paternity in a

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48 CAL. CODE CIV. PROC. § 1962(5) (now CAL. EVID. CODE § 621 (West 1966)).

49 CAL. CIV. CODE § 194 (now CAL. EVID. CODE § 661 (West 1966)).

50 180 Cal. at 491, 181 P. at 797.

51 That is, the husband could show that cohabitation and conception did not concur and thus prevent the presumption from arising.

case where both the husband and another may have had intercourse with the wife at a time when, according to the laws of nature, either could be the father.[52] Although this was consistent with the court's statement in *Walker* that the husband was conclusively presumed to be the father if there was actual intercourse during the period of possible conception, it was equally clear from the holding in *Mills*, that indeterminability played no part in the *statutory* conclusive presumption arising upon proof of cohabitation. As noted above, the *Mills* court rejected evidence that the husband had not had intercourse with his wife but that Mills had. If believed, such evidence would clearly have eliminated any indeterminability as between the husband and Mills.[53]

It was reasonable for the *McNamara* court to hold that, when considering unusual gestation periods, the case should not be determined "by *any* conclusive presumption of legitimacy."[54] However, it is submitted that, insofar as *McNamara* suggests that it is *always* proper for the husband to show the impossibility of his paternity by proof that tends to eliminate an indeterminability as between himself and another, it should be taken to apply *only* to cases involving the disputable presumption. That is, a husband who is not impotent may rebut the disputable presumption by showing either nonintercourse or biological disparities tending to preclude him as the father. However, in cases involving the indisputable presumption, his only defense is that by the *usual* operation of the laws of nature, it is not possible that the child was conceived at a *time* when he was cohabiting with his wife. This construction is consistent not only with the holding in *Mills*, but also with the results in the ensuing cases[55] with the possible exception of the district court decision in *Hughes v. Hughes*.[56]

As mentioned previously, the court in *Hughes* found that the "incompetency" exception to the common law presumption[57] had been adopted as an exception to the indisputable presumption of

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[52] *But see* note 33 *supra*.

[53] On the particular facts in *Mills* the evidence could not have been received even if the court had accepted the "indeterminability" theory since it consisted of testimony by the wife as to non-access. *See* note 23 *supra*. However, the *Mills* court clearly based its rejection on the fact that the evidence was offered to dispute an indisputable presumption. 137 Cal. at 301, 70 P. at 92.

[54] 181 Cal. at 97, 183 P. at 558 (emphasis added).

[55] *See* cases cited in notes 34 and 35 *supra* considering what is a *usual* period of gestation. For the purposes of the conclusive presumption, the question in each case was whether the child was conceived while the husband and wife were cohabiting.

[56] 125 Cal. App. 2d 781, 271 P.2d 172 (1954). *Compare* Benes v. Young, 187 Cal. App. 2d 270, 9 Cal. Rptr. 500 (1960). *See also* Krog v. Krog, 32 Cal. 2d 812, 198 P.2d 510 (1948); Adoption of Stroope, 232 Cal. App. 2d 581, 43 Cal. Rptr. 40 (1965).

[57] *See* note 19 *supra* and accompanying text.

Code of Civil Procedure section 1962(5).[58] The statute, however, acknowledges only one exception—impotence. While, as the court held, sterility may constitute incompetency, it does not constitute impotence.[59] Additionally, the court adopted the *McNamara* reasoning that the husband was entitled to eliminate the element of indeterminability by showing that it was impossible for him to be the father. But, the *Mills*, *Kusior* and *Hess* cases, inferentially, and the *Jackson* decision expressly indicate that with regard to the indisputable presumption, "impossibility" is relevant only insofar as it relates to impotence or the husband's showing that it was impossible for the child to have been conceived at a time when the parties were cohabiting. Thus, any exception based on sterility is questionable.

This increasingly literal construction of the statute is perhaps best exemplified in *Kusior*.[60] There the court acknowledged that by allowing blood test results to be conclusive against the disputable presumption of legitimacy,[61] the legislature recognized their efficacy in establishing biological impossibility of paternity. By precluding such evidence in cases involving the indisputable presumption, the legislature indicated an overriding public policy favoring the legitimacy of children born to married couples cohabiting at the time of conception.[62] Although the wisdom of this policy has been questioned,[63] the policy itself persists, as evidenced by *Jackson v. Jackson*[64] and *Hess v. Whitsitt*.[65]

Jackson AND *Hess*

In *Jackson*, the four days of cohabitation clearly fell within the period of possible conception. The question was whether conception occurred during the brief cohabitation; if it did, the conclusive presumption was applicable. Under the circumstances, there was

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58 125 Cal. App. 2d at 785, 271 P.2d at 174.

59 *Sterility*: Barrenness; unfruitfulness; incapacity to germinate or reproduce. *Impotence*: Inability to copulate. BLACK'S LAW DICTIONARY 889, 1584 (4th ed. 1951); *Cf.* 10 AM. JUR. 2d *Bastards* § 22 (1963). But the terms have been used interchangeably. See, *e.g.*, Benes v. Young, 187 Cal. App. 2d 270, 9 Cal. Rptr. 500 (1960). *But see* Tosh v. Tosh, 214 Cal. App. 2d 483, 485, 29 Cal. Rptr. 613, 615 (1963).

60 Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d, 657, 7 Cal. Rptr. 129 (1960).

61 CAL. EVID. CODE § 895 (West 1966).

62 54 Cal. 2d at 619, 354 P.2d at 667-68, 7 Cal. Rptr. at 139-40.

63 48 CALIF. L. REV. 852, 856 (1960); 34 S. CAL. L. REV. 104, 107-09 (1960). "Though it may shock the legal mind to speak of an 'exception' to a conclusive presumption, it is surely no less absurd to presume the impossible." 28 S. CAL. L. REV. 185, 188 (1955).

64 67 A.C. 241, 430 P.2d 289, 60 Cal. Rptr. 649 (1967).

65 257 A.C.A. 618, 65 Cal. Rptr. 45 (1967), *hearing denied*, 68 A.C. No. 8 (1968) (minutes at 3).

almost no possibility that anyone other than the husband had an opportunity for intercourse with the wife during the four days. Blood test results precluding him as the father were strong evidence that the child must have been conceived at some other time. He was entitled to introduce such additional evidence as might be necessary to prove that such was the case.

"When the issue is whether the child could possibly have been conceived during cohabitation . . . any competent evidence relevant to the question is admissible."[66] This would include, for example, evidence of divergent racial characteristics in a case where blood tests were inadequate. In every case, however, the husband must prove that neither he *nor anyone else* caused conception during the period of cohabitation. Thus, the *Jackson* rule will probably be applicable only in cases where there was such brief cohabitation as to enable the husband to account for all of his wife's time. If he can do so, and the blood test results exclude him, he will have avoided application of the conclusive presumption and overcome the disputable presumption as well.[67]

If, however, he cannot account for substantial portions of his wife's time, the conclusive presumption may be applied notwithstanding the blood test results.

> It makes no difference whether the husband is the biological father, for the basis of the inquiry is whether he is the legal father of the child; he must be given a chance to prove that he is not the legal father by demonstrating the impossibility that the child was conceived during cohabitation with his wife.[68]

The possibility suggested in *Jackson,* that a man could be the legal father despite a finding that he was not the biological father, actually materialized in *Hess v. Whitsitt.*[69] In that case, the pertinent findings of fact were:

> 1. Ruby Hess is the natural mother of the child. 2. The defendant is the natural father of the child. 3. At the time of the conception of the child, Ruby Hess was married to Wesley O. Hess and was cohabiting with him. 4. At the time of such conception Mr. Hess was not impotent. 5. Mr. and Mrs. Hess are Caucasians. 6. Mr. Whitsitt, the defendant, is a Negro. 7. The child "is of mixed blood, evidencing both Negro and Caucasian characteristics, and bears a close physical resemblance to defendant."[70]

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[66] Jackson v. Jackson, 67 A.C. 241, 245, 430 P.2d 289, 291, 60 Cal. Rptr. 649, 651 (1967).

[67] CAL. EVID. CODE § 895 (West 1966).

[68] 67 A.C. at 245, 430 P.2d at 291, 60 Cal. Rptr. at 651.

[69] 257 A.C.A. 618, 65 Cal. Rptr. 45 (1967), *hearing denied,* 68 A.C. No. 8 (1968) (minutes at 3).

[70] *Id.* at 618-19, 65 Cal. Rptr. at 45-46.

The court noted that once cohabitation was proved, the statute was subject to only one exception, that of impotence of the husband. While dicta in *Walker* and *McNamara* had announced a judicial exception in a case involving divergent racial characteristics, no such case had been decided in California prior to *Hess*.[71] Moreover, in the meantime, the supreme court had decided *Kusior v. Silver*. The blood test evidence rejected there admittedly had as much probative value as evidence of divergent racial characteristics. The argument that such evidence justified an exception to the presumption because it eliminated interdeterminability as between the husband and others was not accepted in *Kusior* and was likewise rejected in *Hess*.

> The reasonable conclusion to be drawn is that the legislative intent was that there should be no encroachment upon the conclusive presumption by means of such tests even though the use thereof would serve the purpose of substantially lessening or overcoming "the element of indeterminability" (the phrase found in *McNamara*).
>
> It cannot be said that evidence of the nature of that to which reference is made in the *McNamara* dictum is of greater probative value than that furnished by resort to blood tests.[72]

Taken together, *Jackson* and *Hess* clearly indicate that the conclusive presumption of Evidence Code section 621 is applicable in every case where the husband is not impotent and the child was conceived during cohabitation. The only relaxation of this rule is where it is *possible* that the child was conceived during cohabitation but the period of gestation necessarily assumed to establish that possibility is unusual and contrary to the normal operation of the laws of nature. Such a construction casts doubt on the sterility exception announced in *Hughes*. That exception is only sustainable if sterility is included within the definition of impotence. Whether the supreme court will find that such is the legislative intent remains to be seen.

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[71] *See* Estate of Marshall, 120 Cal. App. 2d 747, 262 P.2d 42 (1953) (dictum conceding the racial difference exception to be the law).

[72] 257 A.C.A. at 622, 65 Cal. Rptr. at 48.