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PROOF OF FACTS OF FAMILY HISTORY

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This article constitutes an effort to bring together in one place, for the practical use of the legal profession in California, the various methods known to the law for proving matters of family history, often designated rather too narrowly as pedigree. The law will be dealt with under nine headings: The pedigree exception to the hearsay rule; Community reputation; Recitals in ancient deeds; Vital statistics records; Census records; Church records; Hospital records; School records; Determination of legitimacy.

Further, by way of preface, it should be pointed out that only rarely is percipient witness testimony available as to matters of family relationship and such related matters as time and place of birth and marriage. This is especially true if the inquiry relates to some former generation. But even as to recent matters personal knowledge is very limited. Certainly one cannot know who his own father or mother or sister or brother is, much less who his grandparents are. Even a mother, where the child is born in a hospital, does not know her own child. Thus, of necessity, some kind of secondary, as distinguished from primary evidence of such facts must be used, if the determination of such issues are to be made, as indeed they needs must be, in order to settle many important controversies. This is especially true where questions of inheritance are involved. This general practical necessity led one of the early English courts to observe that family tradition is sufficient in point of pedigree. Tradition as here used is another name for hearsay—indeed often hearsay upon hearsay, upon hearsay, etc.

The Pedigree Exception to the Hearsay Rule

The inventive genius of the Common Law brought into being the pedigree exception to the hearsay rule to meet, in part, the foregoing necessities. The exception, with somewhat varying specific requirements, goes back a considerable distance in England, and is recognized throughout the American jurisdictions.

The evidence offered under the pedigree exception may take either of two forms. It may be evidence: (1) of a hearsay declaration by a specific declarant, or (2) evidence of family reputation. If it is a specific declaration, the declarant (1) must have been a member of the family; (2) must be unavailable as a witness, and (3) must have made his statement under circumstances that furnish a reasonable probability of its trustworthiness or more accurately, as the law has developed, under circumstances that do not throw too much suspicion on its credibility.

(1)
The Elements of the Pedigree Exception

A. Declaration of Specific Declarant

1. Declarant Non-Available

What constitutes legal non-availability?

Two overlapping code provisions prescribe, as follows: Code of Civil Procedure 1852—declarant deceased or out of the jurisdiction; Code of Civil Procedure 1870(4)—declarant deceased.

Comment: These provisions are unreasonably restrictive. Legal non-availability should be synonymous with factual non-availability, e.g., insanity, absence from the jurisdiction, etc., should suffice.

2. No Substantial Apparent Interest or Motive to Falsify

(a) The existence of a legal controversy at the time the statement is made, whether or not known to the declarant, automatically renders the declaration untrustworthy and thereby inadmissible. The rule, thus stated, is dictated by considerations of practical administration since it would generally be difficult to ascertain whether the declarant knew of the controversy. The formal arbitrariness of this rule has been criticized. (Wigmore, sec. 1483, footnote 6.)

This restriction, that the declaration must be excluded if made post litem motam, is not incorporated in the California code provisions, but it is a long-standing rule of the Common Law, generally, and has been added to the California law by court decision. (See Estate of Walden, 166 Cal. 446, 448, 137 Pac. 35 [the question of the declarant's knowledge is not discussed, hence this issue is not foreclosed in California].)

(b) It is not every circumstance that might produce a bias in the declarant that will justify exclusion. Neighborhood gossip questioning the legitimacy of the child has been held not sufficient to call for the rejection of a declaration of legitimacy. Berkeley Peerage Case, 4 Camp. 408; Metheny v. Bohn, 160 Ill. 263, 43 N. E. 380. In Gee v. Ward, 7 El. and Bl. 509, Lord Campbell declares that declarations of relationship "are not excluded, if made ante litem motam, even though made by a person expecting that the interest he is speaking about may ultimately vest in himself."

(c) The existence of a legal controversy does not mean that litigation has actually been instituted but only that the legal rights of members of the family have become a matter of dispute. (Wigmore, sec. 1483.)

3. Declarant Must Be a "Member of the Family" Concerning Whose Relationship He Speaks.

Contrary to most exceptions to the hearsay rule, this exception does not require the declarant to have had personal knowledge of the fact. If such
limitation were imposed it would render this exception generally useless for it seldom occurs that a member of the family has personal knowledge of the facts of family relationship even if they be of his generation and never, of course, if they reach back into former generations. The result is that we are generally using multiple hearsay in this exception, i.e., hearsay upon hearsay upon hearsay and so on.

In lieu of a showing of personal knowledge, the courts are satisfied if the declarant appears to have been a member of the family and thus in a position to be familiar with the family tradition on the matter. If therefore it is sought to prove that X and Y were brothers and the hearsay declaration of Z is offered there must be a foundation showing that Z was related either to X or Y. Hence if it appeared that he was the son of Y, his declaration that X was his father's brother would be admissible so far as this requirement goes. If, however, the declaration of Y is offered no preliminary showing of relationship is required because in the nature of things Y is in the stream of the family tradition as to who his own brother is. This distinction is sound and is fully recognized in California in an excellent opinion, In re Hartman’s Estate, 157 Cal. 206, 197 Pac. 105. In a goodly number of jurisdictions some evidence aliunde the declaration itself is required to show the relationship. Aalholm v. People, 211 N. Y. 406, 105 N. E. 647, L. R. A. 1915D 215.

4. Is “Member of the Family,” as Here Used, Confined to a Declarant Who Is Related by Blood or Does It Include One Who Is Related by Marriage?

Under the English Common Law the declarant must be either a blood relative or a husband or wife of a blood relative. Vowles v. Young, 13 Ves. 147. In California the relationship may be either blood relationship or relationship by marriage even beyond that of husband or wife. Estate of Flood, 217 Cal. 763, 21 P. 2d 579 (declarations of brothers and sisters of the wife were admitted as to her husband’s relatives).

Code of Civil Procedure 1870(4) places no limit to the degree of relationship by marriage. On principle there is justification for accepting the hearsay declaration of a non-relative if he is so intimately connected or associated with the family as to justify the inference that he would be cognizant of the family tradition. A leading English case, Johnson v. Lawson, 2 Bing. 86, 1824, held inadmissible the declarations of a deceased housekeeper who had lived in the family over twenty years and who had practically raised the children. However, in the United States see to the contrary Frey v. Thomas (Iowa 1929), 207 Iowa 1229, 224 N. W. 597, which held admissible the declaration of a woman who had raised the claimant from infancy, but who had not adopted him. This is an excellent opinion. See, also, in support of the liberal rule, Wigmore, section 1487, and The American Law Institute Model Code of Evidence, Rule 524.
5. Does the Pedigree Exception Include Illegitimate Relationships?

The prevailing view in the United States is that it does. (See Champion v. McCarthy (Ill. 1907), 228 Ill. 87, 81 N. E. 808; State v. McDonald, 55 Ore. 424, 104 Pac. 967; and Estate of Flood, 217 Cal. 763, 21 P. 2d 579. Also in support of this view see Wigmore, sec. 1492.)

6. Is the Pedigree Exception Confined to Genealogical Controversies or Does It Cover Proof of Facts of Family History in Any Kind of Case in Which Such Facts May Be in Issue or Relevant to the Issue?

The leading case in England, Haines v. Guthrie (1884), 13 Q. B. D. 818, held inadmissible the declaration of a deceased father as to the date of birth of his son, the defendant, who entered a plea of infancy to a contract action, on the ground that the controversy was not a genealogical one. But in the United States a number of jurisdictions have broken away from this formal English limitation. (See Summerhill v. Darrow, 94 Tex. 71, 57 S. W. 942, admitting a declaration of a deceased mother as to the fact of her daughter’s marriage status at a certain time as bearing on the running of the statute of limitations.) Wigmore, secs. 1502-1503, approves the liberal rule.

In People v. Mayne, 118 Cal. 516, 50 Pac. 654, the age of the prosecutrix in a prosecution for statutory rape was in issue. It was held that an entry made by the mother of the prosecutrix in the family Bible was not admissible, the English case of Haines v. Guthrie, supra, being cited as the basis for the decision. This case is weakened as an authority by a critical comment upon it in the later case of Estate of Paulsen, 179 Cal. 528, 178 Pac. 143. In the Paulsen case Justice Sloss expresses himself as favoring the broader American rule and points out that the real and justifiable basis for the exclusion of the evidence in the Mayne case was that the declarant was not unavailable. This issue was not involved in the Paulsen case because the court squeezed the case into the genealogical controversy category so that People v. Mayne is not overruled by the Paulsen case. People v. Slater, 119 Cal. 620, 51 Pac. 957, is contra to People v. Mayne, but it does not refer to People v. Mayne or any other precedent for its holding, nor discuss the question on principle.

B. Family Reputation as Evidence of Matters of Family History

Code of Civil Procedure 1852 and 1870(11) and (13) have provisions which render common reputation (in the family) admissible as evidence of pedigree. Subdivision 11 of 1870 provides in general for the use of “Common reputation, previous to controversy . . . in cases of pedigree. . . .” Subdivision 13 provides that “monuments and inscriptions in public places” are admissible “as evidence of common reputation” and that “entries in
family Bibles, or other family books or charts, engravings on rings, family portraits and the like" are admissible "as evidence of pedigree."

Code of Civil Procedure 1852 is as follows:

"The declaration act, or omission of a member of a family who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where on questions of pedigree, such reputation is admissible."

These sections all stress the part that reputation, as such, plays in determining pedigree. Even if the evidence is, in terms, a declaration of a specific member of the family, or a specific notation, or inscription on a monument in the family burial plot or in the family Bible, it reaches the point to be proved only indirectly by way of reputation. This analysis is understandable because such statements do not normally represent what the particular person making the statement or entry personally knew but generally rest rather on what was reputed in the family concerning the fact of family history.

Inscriptions on monuments, entries in the family Bible and notations in genealogical charts are not thought of as declarations of specific persons but rather as bespeaking impersonally the family reputation. As stated in People v. Ratz, 115 Cal. 132, 46 Pac. 915, where an entry in the family Bible was offered to show a date of birth, "The admissibility of the book did not depend upon proof of handwriting or authorship of entries." It depended upon proof of the fact that it was the family Bible which "derives its weight" from the fact "that being in that place, they are to be taken as assented to by those in whose custody the book has been." These are not the only ways in which to prove what the family reputation is. A witness, who is not a member of the family, may, as Mr. Wigmore states (sec. 1490), have sufficient acquaintance with the family to know what the reputation is, and thus be testimonially qualified to testify thereto. (See Neustadt v. Coline Oil Co., 141 Okla. 113, 284 Pac. 52; Eaton v. Talheradge, 24 Wis. 217; see, also, Harland v. Eastman, 107 Ill. 535, 7 N. E. 59 [rejecting the testimony of a relative by marriage on the ground that he was testifying only to what certain members of the family had said to him and which did not amount to general reputation. It was not admissible as evidence of declarations of specific members of the family because they were not shown to be deceased].)

A collateral question is whether reputation evidence as such can be resorted to unless it appears that there are no available living members of the family who know the facts. There seems to be very little explicit authority on this. Mr. Wigmore, in section 1481, says:

"Perhaps it is appropriate enough where the evidence is offered in the form of family reputation to require a showing of no available living witness, for there is in strictness no necessity for resorting to the hearsay of the
family as such until it appears that members of the family cannot be had to testify on the stand.”

This restriction would seem to have little validity when it is borne in mind that even when a member of the family is called he rarely has personal knowledge of the fact but is basing his statement rather upon family history even though he assumes to be speaking directly to the fact.

The question here involved is somewhat in doubt under the California cases. In People v. Ratz, 115 Cal. 132, 46 Pac. 915, the family Bible was admitted as evidence of the date of birth of a child despite the presence of the mother as a witness who identified the book as her family Bible and testified as to the date of birth, apparently of her own recollection. The court emphasizes the point that the admissibility of the book did not depend upon proof of handwriting or authorship, but that it was admissible rather as indicative of the family reputation.

In People v. Mayne, 118 Cal. 516, 50 Pac. 654, the trial court admitted an entry in a book identified by a mother as having been made by herself, as evidence of the date of birth of her child. This was held by the Supreme Court to be error. The opinion is open to the criticism that it apparently makes the erroneous assumption that an entry of genealogical fact in a family Bible can be treated only as a written declaration of the specific person who made the entry and thus to be governed by Code of Civil Procedure 1870(4), which provides that the declaration by a member of the family of such facts is admissible only if the declarant is deceased. It may well be that the entry in this case was offered on this theory. If so the decision as such is valid. The court also quotes Code of Civil Procedure 1870(13), which refers to entries in family Bibles, etc., as evidence of the family reputation but ignores the significance of this provision of the code. The Ratz case, supra, is entirely ignored. The Mayne case thus cannot be considered a persuasive authority for the proposition that an entry in a family Bible which comes within Code of Civil Procedure 1870(13) is inadmissible if some member of the family who happens to have personal knowledge of the same fact is available as a witness. Moreover, the Mayne case is definitely misleading as an authority governing the admissibility of entries in family Bibles. With no citation of authority and no discussion, the Supreme Court in People v. Slater, 119 Cal. 620, 623, 51 Pac. 957, held that an entry in the family Bible was admissible on an issue of age, notwithstanding the testimony of both the father and the mother as to their daughter’s age. However, People v. Bohmain, 16 Cal. App. 28, 116 Pac. 303, harks back to People v. Mayne, saying that “entries in a family Bible are but secondary evidence of the facts stated, and are not admissible as evidence of the fact when the persons having actual knowledge of the fact are alive, and can be produced in court.” No reference is made
either to People v. Ratz, supra, or to People v. Slater, supra. Moreover the quoted statement is only dictum. Such reasoning mistakes the underlying principle which classifies hearsay as secondary evidence and which as a basis for its admissibility requires that the primary evidence be unavailable. This does not mean that hearsay evidence which falls within some specific exception is to be excluded merely because there is other and direct evidence to the same fact. For example a dying declaration is not inadmissible if it appears that there are available eyewitnesses to the slaying. It means only that if a specific hearsay declaration of A is offered it is, in most hearsay exceptions, required that A be non-available. Hence, if A’s declaration happens to be a declaration as to pedigree and is offered under Code of Civil Procedure 1852 or 1870(11) it will be excluded if A is available as a witness. But entries in family Bibles fall within the family reputation exception to the hearsay rule and do not presuppose any specific declarant to be either available or non-available. Hence, the presence of some member of the family who happens to know the fact should not affect the operation of this rule.

Now if it were desired to render family reputation inadmissible if there were other and different ways of proving the same fact, for example, by some living member of the family or perhaps someone else who knew the fact, this result could readily be accomplished by expressly so providing or by following the precedent of the so-called ancient reputation exceptions which because of the antiquity of the matter assume that all percipient witnesses to the matter are deceased. Even under such exceptions the fact that some old person, who knew the fact, happened to be available does not exclude the ancient reputation. Since the California rule is based upon a code provision, Code of Civil Procedure 1870(13), and since that section includes no such limitations as the ones referred to in the Mayne case, there would seem to be no reason why the court should read them into it.

Community Reputation to Prove Marriage and Other Facts of Family History

A. Marriage. “It has been universally conceded,” says Mr. Wigmore, section 1602, “that reputation in the community is always admissible to evidence the fact of marriage: there does not seem to have been any time when this was disputed.” In California one of the disputable presumptions (Code Civ. Proc. 1963(30)) is, “That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.”

B. Reputation of other facts of family history. In section 1605 of his treatise, Mr. Wigmore inquires: “May not neighborhood reputation be often sufficiently trustworthy to be received in evidence of certain other facts of
family history likely to be notoriously canvassed and hence to become known with a sufficient degree of accuracy?" His answer reveals that on this question there is much conflict. In California, only family reputation can be used generally on questions of pedigree. (Heaton's Estate, 135 Cal. 385, 67 Pac. 321.) This case interprets Code of Civil Procedure 1870(11) to mean reputation in the family, not neighborhood. Wigmore's full citation of authorities on the state of the law need not be here repeated.

**Recitals in Ancient Deeds as Evidence of Pedigree**

An exception to the hearsay rule which has received some, but a relatively small amount of, recognition is that a recital of fact in an ancient deed is admissible to prove the truth of the fact asserted. Ancient means 30 or more years old. This gives rise to the presumption that the declarant is deceased. The circumstantial probability of the truthfulness of such statements arises from the fact they were accepted as true by the grantee plus the additional fact either that they were of record and unquestioned for at least 30 years or, often, the further fact that possession was taken and held thereunder. While not limited to pedigree the recitals sometimes relate to such matters. If offered under this exception no specific showing that the declarant is unavailable or that he was a member of the family is required. (See Wilson v. Snow, 228 U. S. 217, 57 L. Ed. 807 [a recital that the grantor was the duly appointed executrix of the deceased title holder]; Rollins v. Atlantic City Railroad Co., 73 N. J. L. 64, 62 Atl. 929; an article by Professor J. A. Wickes in 8 Texas Law Review 453; and Wigmore, sec. 1573.)

**Vital Statistics Records**

These records are, of course, a rich source of information concerning matters of pedigree. Provision is made for such records for the purpose of compiling and preserving reasonably authentic, though needless to say not infallible, information as to births, deaths and marriages. Since they are kept under authority of law they fall in the category of official records. Though the only real officials are those in the offices in which the records, as such, are kept, yet the private persons who are required by law to report such facts to the officials are often referred to as ad hoc officials.

California makes full provision by statute for the use in evidence of the facts contained in such records. Health and Safety Code, section 10200, covers the subject of records of births; section 10375 records of deaths; and section 10526 records of marriages. The details to be reported are prescribed by the statute. They include a number of facts of family history other than the
mere fact of birth, death, or marriage of the individual. The Health and Safety Code, section 10551, renders these records *prima facie* evidence of all of the facts reported and recorded pursuant to the requirements of the law. There is in substance a brief general duplication of these more elaborate provisions of the Health and Safety Code in Code of Civil Procedure 1920, which refers generally to records kept pursuant to law.

An examination of the matters required to be reported by the physician or by a person performing the marriage ceremony will disclose that a report on facts, not within the personal knowledge of the reporter, is required. Since the statute expressly provides that the record is *prima facie* evidence of all the facts thus reported, it will be observed that use may be made of hearsay upon hearsay. For example a birth certificate states such facts as the full maiden name and age of the mother, the number of her children, whether born alive and then living, the name, age and residence of the father. The California cases give full effect to section 10551 of the Health and Safety Code. But in Robinson v. Western States Ins. Co., 184 Cal. 401, 405, 194 Pac. 39, the California Supreme Court in upholding the admission of a death certificate as to the cause of death, not based upon the personal knowledge of the physician, remarked that since it was based upon hearsay it was not entitled to much credence. In contrast with the California law there is substantial authority in other states restricting the use of such certificates to the matters within the personal knowledge of the reporter. (See Howard v. Bank, 189 Ill. 568, 59 N. E. 1106; Gilchrist v. Mystic Workers, 188 Mich. 466, 154 N. W. 575.) However, there is also authority elsewhere in accord with the liberal California rule. (See Murray v. Supreme Lodge, etc., 74 Conn. 715, 52 Atl. 722; State v. McDonald, 55 Ore. 419, 446, 103 Pac. 512; for a further discussion of this phase of the problem see Wigmore, sec. 1646.)

**Census Records**

Facts pertaining to pedigree and other matters of family history are included in census records. May such records be introduced in evidence as to such facts? The law is in conflict. Their admissibility, if allowed, must be predicated upon the official entries exception to the hearsay rule. They ostensibly come within the general framework of this rule because the law provides for the ascertainment and recording of such data. In line with the principle which bases the admissibility of official entries, it can be assumed that the census takers have correctly recorded and reported the data which they are required to gather. However, against the use of the census records to prove the truth of individual specific matters of fact, Mr. Wigmore points out in section 1671(7) that the purpose of the census "is to report general
classes of facts; the details as to individual persons, factories, farms and
the like, are noted only as a necessary basis for the general anonymous
summaries.” He then concludes that “the census reports are not receivable
to show the age of a particular person, or the product of a particular factory,
or the area of a particular farm.” The implication here seems to be that
sufficient dependence cannot be placed upon the accuracy of such records in
matters of such detail. It cannot be overlooked, of course, that the facts
concerning the family are not within the personal knowledge of the census
taker. His reliance is placed entirely upon what is stated to him by some one
who happens to be at the house, who in turn may not personally know the
detailed facts reported. It is thus an attenuated form of hearsay. Even so
it may be noted that this circumstance does not carry us beyond the scope
of the operation of the rule applied to the use of vital statistics. Hence there
is some room for an argument in support of a rule of admissibility. A North
Carolina case (Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201) quotes
from and approves the views expressed by Mr. Wigmore in excluding a
census record in the county clerk’s office to prove one Margaret Lenora Wood
was not living at the time a deed was executed. The court expressly voiced
its concern over the source of the information. On the other side of the
picture is Priddy v. Boice, 201 Mo. 309, 99 S. W. 1055, 9 L. R. A., N. S.
718, in which the trial court was affirmed in admitting a census report to
show that the grantor in a deed was a minor at the time the deed was executed.
The court said, “these are public official records, required by the law to be
made and kept, by sworn public officials of the law, and by law required to
contain the name, age, sex, color, occupation, etc., of each inhabitant.” In
Jefferson v. State, 85 Tex. Crim. Rep. 614, 214 S. W. 981, it was held that a
school census report was properly admitted to prove the age of the defendant
in spite of the fact that the census taker testified that he was unable to identify
the person whose name was signed to the report, or to state, of his own
knowledge, that she was the mother or guardian of the accused. The decision
is criticized in a note in 33 Harvard Law Review 865.

In California, in this connection, notice should be taken of Code of
Civil Procedure, section 1920, which seems to be, in terms, broad enough to
include all of the detailed facts included in the census records. It provides,
“Entries in public or other official books or records, made in the performance
of his duty by a public officer of this state, or by another person in the
performance of a duty specially enjoined by law, are prima facie evidence
of the facts stated therein.”

10551), this section does not confine the facts to those the truth of which are
within the personal knowledge of the one required by law to make the report.
Church Records

Data bearing on matters of pedigree are frequently found in church records. Insofar as they are facts within the personal knowledge of an official or functionary of the church in the regular course of his duty and recorded reasonably contemporaneously with the event they are admissible generally under the traditional exception to the hearsay rule, designated as Regular Entries in the Course of Business. In California this rule, with some specific modifications and clarifications, was incorporated in the code under the title "Uniform Business Records as Evidence Act." (Code Civ. Proc., sec. 1953e, f, g, h, enacted in 1941.) But more specifically the use of church records to prove the facts recorded therein is expressly provided for in Code of Civil Procedure section 1919a and section 1919f. This statute was enacted in 1931 and provides broadly, as does the Vital Statistics Act, supra, that such records "kept in accordance with law or in accordance with the rules, regulations and/or requirements of a religious denomination, society or church shall be competent evidence of the facts recited therein." (Italics ours.) Section 1919b provides for the proof of the contents of such records by a copy certified by the clergyman or other person having custody of the original.

Hospital Records

Occasionally items relative to pedigree may be found tucked away in hospital records. The use of such records in evidence today is fairly common under the Business Entries exception to the hearsay rule, insofar as the matters recorded relate to the treatment of a person as a patient as perceived by the members of the hospital staff. Records of births would come in such category. But as I have pointed out elsewhere (see Hale, "Hospital Records as Evidence, 14 Southern California Law Review 99, 106):

"Within the traditional hearsay framework little basis can be found for the inclusion of data which lies outside the personal knowledge of the doctor and others who are employed by, and acting on behalf of, the hospital."

Hence, anything that the patient might say concerning his ancestry would come naturally under this ban. In Ghelin v. Johnson (1932), 186 Minn. 405, 243 N. W. 444, this limitation led to the exclusion of a record on a matter of pedigree.

School Records

School records, whether private or public, may be thought to be a source of possible legally available information pertaining to facts of family history. They are systematically and regularly kept in the conduct of the school. They clearly fall within the definition of business records as given
in the Uniform Business Records as Evidence Act. (Code Civ. Proc., sec. 1953, e to h.) Section (e) defines "business" as used in the act as follows:

"The term 'business' as used in this article shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not."

But a point of difficulty in applying this act to the matters of family history recorded in school records would be that such facts would not be within the personal knowledge of the school authorities or employees. A similar act, drafted by the Commonwealth Fund Committee and adopted in New York and a number of other states, has been construed by the leading case of *Johnson v. Lutz* (1930), 253 N. Y. 124, 170 N. E. 517, to render business records admissible only to prove facts within the knowledge of the employees of the business. The American Law Institute Model Code provision, relative to Business Entries (Rule 514), is carefully worded to keep its operation within the area marked out by the New York case in its construction of the New York act.

Thus both on principle and authority one would doubtless have trouble in making use of school records to prove facts pertaining to pedigree. One possible escape from this limitation is to use the business entries rule to get the school record in evidence to prove what the registrant or his parent stated to the school official and then to use the pedigree exception to render admissible the latter hearsay statement. It is theoretically sound to admit hearsay upon hearsay, if each link in the chain is forged by some recognized exception to the hearsay. The use of multiple hearsay is not unknown to the law. There is a general provision for its use in the American Law Institute Model Code, Rule 530.

**The Determination of the Issue of Legitimacy**

On considerations of public policy, the common law placed barriers in the way of bastardizing a child begotten during wedlock.

In California the rule of the common law, with some modifications, which need not be noted, has been set out in the Code of Civil Procedure and the Civil Code.

**A. A CONCLUSIVE PRESUMPTION OF LEGITIMACY, WHEN.**

Code of Civil Procedure section 1962(5) raises a conclusive presumption that the issue of a wife cohabiting with her husband, who is not impotent, is legitimate. There are some five cases that amplify the provisions of this code section. This section has been supplemented by another code section (Code Civ. Proc., sec. 1963(31)) which sets up a disputable presumption. This will be discussed later (see *infra*).
1. **Cohabiting.**

What does "cohabiting" mean, as used in Code of Civil Procedure, section 1962(5)? Black's dictionary defines it as "living together; living together as husband and wife; sexual intercourse." Thus the term is ambiguous. Does the code mean that the conclusive presumption will obtain only where there has been intercourse between the husband and wife within the gestation period or when they were living together as husband and wife during that period, thus creating a special opportunity for and reasonable likelihood of intercourse. One can readily understand why a conclusive presumption should obtain, when the spouses not only lived together but actually had sexual intercourse. As stated by Justice Olney in *Estate of McNamara*, 181 Cal. 82, 95, 183 Pac. 552:

"The reason for . . . 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."

(Does this reasoning lose some of its force since the development of blood tests to show non-paternity?)

If the mere opportunity for intercourse, which exists when the spouses are living together, is to be accepted as in itself a sufficient basis for the conclusive presumption of parentage, the further implicit specific conclusive presumption is indulged that the spouses had intercourse, if Justice Olney's reasoning is accepted as the basis for the rule.

In *Estate of Mills*, 137 Cal. 298, 301, 70 Pac. 91, "cohabiting" is defined as "the living together of a man and woman ostensibly as husband and wife." This case was brought within the operation of the conclusive presumption by proof that the husband and wife had a home together for many years, even up to the time of the husband's death, had their meals together, and gave the three children begotten during that period, the husband's name. It was held that evidence that the wife had ceased to sleep in the same room with the husband, but, without exception, slept in an adjoining room with Mills was inadmissible to show that the two latter children begotten during that period were the illegitimate children of herself and Mills. The conclusive presumption of legitimacy was applied. Ample support for the predication of the conclusive presumption upon opportunity for intercourse alone can be found in the early English Common Law in which the conclusive presumption was indulged if the husband was within the four seas. Even that much of an opportunity for intercourse was deemed sufficient to raise the conclusive presumption of legitimacy.

In a recent extensive comment on the presumption of legitimacy in
23 Southern California Law Review 538, the writer, Mr. James J. Brown, concludes as to the present question:

“What is ‘cohabiting’ today? It would seem that the courts have by and large adhered to the original definition in the Mills case. A mere living together still suffices, although a tendency to avoid such a finding is discernible.” (Italics ours.) Prior thereto on page 552, he states: “Two of the following cases . . . show the possibility that we have sub silentio changed the construction to include sexual intercourse” viz., Nelson v. Nelson, 7 Cal. 2d 449, 60 P. 2d 982, and People v. Kelly, 77 Cal. App. 2d 23, 174 P. 2d 342. I cannot find in these cases, or any other California cases, anything to indicate any departure from the definition laid down in the Mills case. Mr. Brown attaches significance to the fact that the court, in the two cases referred to, uses the words “access” in one and “conjugal access” in the other. But “access” is also an ambiguous word. Black’s Dictionary defines it as “sometimes importing the occurrence of sexual intercourse, otherwise as importing the opportunity for intercourse.” But it should be noted that the court in the same connection uses the word “cohabiting,” apparently interchangeably with “access,” saying the final decree of divorce found that the parties had theretofore “lived and cohabited together as husband and wife . . .” The court then quotes the code section referring to “The issue of a wife cohabiting” etc. (Code Civ. Proc., sec. 1962(5).) There is nothing to indicate that there was any proof of actual intercourse. It would seem that as the law stood at the time the court would have said “intercourse” if that was what was meant, and especially if it was intended to change the plain definitional language of the Mills case. In the Kelly case, supra, there is nothing to indicate that by “conjugal access” the court meant anything other than the fact that the husband and wife were living together, albeit perhaps only for a few days, occupied the same room, and therefore had “opportunity” for intercourse.

Another reason for finding that “cohabiting” as used in the code means special opportunity for and not actual intercourse, is the further provision that the conclusive presumption does not exist if the husband is impotent. The commonly accepted definition of “impotent” is “physically unable to have intercourse.” The inclusion of this exception would be surplusage if “cohabiting” implied actual intercourse.

We prefer to conclude therefore on all counts that the law of California in this respect remains exactly where the Mills case put it.

2. Spousal Incompetency to Testify

The rule of exclusion in the Mills case was based upon the ground that the wife was incompetent as a witness to testify to absence of intercourse with her husband during the period of their cohabitation. It was reasoned that
the rule of the common law, on policy considerations of decency and morality, deemed a husband and wife incompetent to testify to non-intercourse—at least while they lived together—and that this rule was not abrogated by Code of Civil Procedure, section 1879. This reasoning seems quite invalid and has been essentially repudiated in Estate of McNamara, 181 Cal. 82 at page 99, 183 Pac. 552, where the court says that, "this statement (in the Mills case) was not necessary to the decision, which could have been rested solely on the ground that the evidence there presented was inadmissible, because material only to dispute an indisputable presumption." The reasoning of the court in the Mills case is unfortunate in that it might well carry the implication that a witness other than the spouse could testify to such facts. This of course could not be true in the face of the indisputable presumption. Also it tends to keep alive a rule of witness-incompetency of the common law which was full of incongruities and the historical soundness and illogic of which have been vigorously pointed out by Mr. Wigmore, section 2063, and which would seem clearly to have been abrogated in California by Code of Civil Procedure, section 1879.

3. Cohabiting at What Time?

Under the statute the question arises, "Cohabiting at what time?" The answer, in general terms, should be, of course, "At the time when the child was begotten." But how is that time to be fixed? On this question there are two very important cases, Estate of McNamara, supra, and Murr v. Murr, infra.

In Estate of McNamara, supra, it appeared that the child was born 304 days after the wife had left her husband. The wife had occupied the same apartment with her husband up to and through the night of December 23, 1913, and the following morning went with him to the town of San Jose and, "there left him about noon to go immediately with McNamara" with whom she lived practically continuously thereafter until his death. The wife testified not only to these facts but to the further facts that in December, 1913, and both in January and February, 1914, she had her regular menstrual periods. The question was squarely raised as to whether the conclusive presumption raised by the code rendered this evidence irrelevant. It was held that it did not but that the case would be governed by a rule only of a prima facie presumption of legitimacy which could be and was rebutted by competent evidence. Justice Olney, who wrote the opinion (Justice Melvin, dissenting), gives a thorough discussion of the problem. It was urged in opposition to Judge Olney's view that the conclusive presumption operates when the child was begotten within a period of possible gestation and that, as Judge Olney himself concedes, there is medical authority that cases of 304 days of gestation are not unknown and that possibly, and therefore as a
matter of law conclusively, the husband and not McNamara must be deemed the father of the child. Judge Olney points out that 280 days is the normal time and that one published study of 30,500 cases revealed only 31 (or less than one-tenth of one per cent) where it was reasonably certain that the elapsed period was 302 days or more. He further discloses that there are instances in which as many as 330 days have elapsed and thus that the rule of absolute presumption must either go the limit of "possibility," which he considers quite unreasonable, or stay within the normal period of gestation. This rule would be within another legal presumption in California that, "things have happened according to the ordinary course of nature." The dissenting justice retorts, "Does this mean that the conclusive presumption is out if 281 days or even 280 days and one minute have elapsed since the husband and wife have ceased to live together?"

In *Murr v. Murr* (1948), 87 Cal. App. 2d 511, 197 P. 2d 369, the question turned on the minimum period of gestation, as affecting the rule of conclusive presumption. In this case the plaintiff was seeking a divorce on the ground of his wife's infidelity. His evidence was that he returned from service in the Navy and remained with his wife "from the 15th or 17th of July, 1943, to the 22nd of July, 1943," when he left, and was absent until November 1944. In the meantime the wife had given birth to a mature child on January 21, 1944, which date was 190 days after July 15 or 188 days after July 17 of the previous year. The court follows the reasoning of Judge Olney in the McNamara case, *supra*, in holding that this was less than the normal period of gestation and hence that the rule of conclusive presumption would not be applied—"Under the circumstances here, the presumption as to legitimacy should be regarded as disputable."

It remains to be seen what the courts will accept as a normal period of gestation for the purpose of determining whether the rule of conclusive presumption is to prevail. All that can be said definitely is that on the upper side 304 days (the McNamara case) and on the lower side 188 to 190 days (the Murr case) are such abnormal periods as to take the case out of the conclusive presumption category. What would the courts do if the time were 290 days or 210 days?

In *Dazey v. Dazey*, 50 Cal. App. 2d 15 at page 20, 122 P. 2d 308, medical experts are quoted to the effect that members of the medical profession count 280 days from the last menstrual period but that if the period is computed from fruitful coition to birth the time varies from 220 days to 330 days.

In the McNamara case reference is made to a Michigan case, *People v. Case*, 171 Mich. 282, 137 N. W. 55, in which it was held that a child born 253 days after the husband's liberation from jail and a renewal of marital
relations must be conclusively presumed to be legitimate. In the McNamara case, Judge Olney states, page 95:

"It is apparent also from what has already been said that the facts with which the law has to deal in this regard are that while the average period of gestation is 280 days, there are exceptional and rare instances where it exceeds 320 days and it is probable that there are instances where it exceeds 330 days."

In Anderson v. Anderson, 214 Cal. 414, 5 P. 2d 881, it was held that a three and one-half months' period of gestation would be too short to be normal. In Dazey v. Dazey, supra, a child was conclusively presumed to be the child of the husband of a second marriage which was born 225 days after the date of the second marriage.

Perhaps it would be well, for obvious practical reasons, to settle this matter by statute. Again, I quote Judge Olney in the McNamara case, supra (p. 92):

"The legislature might well deem it wise to provide that a child born within (as long as) ten or eleven or even twelve months after separation of the husband and wife, as was actually done in Pennsylvania, should be presumed legitimate, in the absence of any other evidence, (i. e., apply a prima facie presumption) when it would be wholly unwilling to make such presumption apply contrary to all other evidence (i. e., make such presumption conclusive)."

B. AREAS NOT COVERED BY CONCLUSIVE PRESUMPTION

We thus find that there are two fully recognized areas which by the terms of the code are not governed by the conclusive presumption rule: (1) Where the parties were not cohabiting at the time of the pregnancy, and (2), where the husband is impotent. Because of some statements in the California cases, it may be well to raise the question whether the conclusive presumption of legitimacy can be avoided by proof of any other facts. Referring again to the McNamara case, supra, we find Judge Olney saying (p. 96):

"There is one class of cases where it is recognized in this country at least, that the husband is not to be taken as the father of the child, even though he had intercourse with the wife during the normal period of conception. That instance is where the husband and wife are of the same race, as for instance, white, and it appears that the wife has had intercourse with a man of another race, as, for instance, a Negro, and the child is of mixed blood. The reason why the conclusive presumption is not applied in such instances is that the element of determinability which is the reason for the presumption in the ordinary case is absent. It is clear that the husband is not the father. The actual fact, in other words, is capable of definite determination, and for this reason the conclusive presumption which is a substitute for such determination is not properly applicable."

This statement is both challenging and certainly challengeable, if it has
reference to what may be held under the California code provision (Code Civ. Proc., sec. 1962(5)). If the spouses are cohabiting, the code makes provision for only one exception to the rule of conclusive presumption of legitimacy, viz., the impotence of the husband. Under the well-established rules of statutory construction, expressio unius, etc., there can be no basis for reading into it another exception, such as would be necessary under the rule enunciated in this dictum, notwithstanding the reasonableness, on principle, of the suggested rule.

1. Prima Facie or Disputable Presumption of Legitimacy

Code of Civil Procedure, section 1963(31) (There is a disputable presumption) “that a child born in lawful wedlock, there being no divorce from bed and board, is legitimate.” The area in which this presumption operates is scaled down, first, by the area occupied by the conclusive presumption (supra). Thus, we exclude the case where the husband and wife were cohabiting. Secondly, as a matter of construction, the question is not whether the birth was during wedlock but whether the child was begotten during wedlock and not during the time of cohabitation. Here again, as in the case of the conclusive presumption, we are concerned with the gestation period. Using the test set up in the McNamara case, supra, if the elapsed time between cohabitation and birth is normal (see discussion, supra) the presumption is conclusive. If the time is other than “normal” the presumption is disputable. For example, it was held in the McNamara case, supra, that the lapse of 304 days between the time of cohabitation and birth threw the case into the disputable presumption category.

A question which may be raised, and which has not been settled specifically, is whether the period of time may be so abnormal as to eliminate even a prima facie presumption. Suppose, for example, two years had elapsed since the parties had ceased cohabiting, either by reason of death or other separation, or that the birth occurred one month after marriage, should even a prima facie presumption of legitimacy be indulged? The court in the McNamara case, supra, did not put its teeth in this problem. It apparently held, as a matter of course, that the conclusive presumption being out, the prima facie presumption would be operative. And in Estate of Lee, 200 Cal. 310, 253 Pac. 145, the court assumed the operation of a prima facie presumption of legitimacy, the marriage having taken place on May 16, 1895, and the birth on July 5, 1895, i.e., less than two months after the marriage. The California Civil Code, section 194, would seem to shed some light on this question. It provides: “All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be the legitimate children of the marriage.” This section carries the implication that after ten months have elapsed no presumption would obtain.
Under ten months, the presumption would be either conclusive, or rebuttable, depending on how much less, as the cases have developed the law under the Code of Civil Procedure provisions. Perhaps, the rule should be that if the elapsed time is greater (or less, as the case may be) than a “possible” time of gestation, no presumption should obtain.

2. *Who May Question Legitimacy?*

The California Civil Code, section 195, provides that, “the presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them.” There has been no controversy over the interpretation of this code section. It means just what it says. A leading case under this section is *In re Madelina*, 174 Cal. 693, 164 Pac. 348, 1 A. L. R. 1629, in which the state was denied the right to contest the legitimacy of the child. In a more recent case, *Gonzales v. Pacific Greyhound Lines* (1950), 34 A. C. 829, 214 Pac. 2d 809, the defendant was precluded from contesting the legitimacy of the claimant in an action for wrongful death. (For a fuller discussion of this section see 23 Southern California Law Review 538, 561-569.)