Hastings Law Journal

Volume 19 | Issue 3 Article 13

1-1968

California's Conclusive Presumption of Legitimacy: Jackson v. Jackson and Evidence Code Section 621

Stephen M. Robertson

CALIFORNIA'S CONCLUSIVE PRESUMPTION OF LEGITIMACY: JACKSON v. JACKSON AND EVIDENCE CODE SECTION 621

*The wickedness of mankind makes it necessary for the law to suppose them better than they really are. Thus we judge that every child conceived in wedlock is legitimate, the law having confidence in the mother as if she were chastity itself.**

On August 11, 1967, the California Supreme Court delivered a four to three decision in *Jackson v. Jackson*[1] which, while arriving at a just result, perpetuated a controversial California law.[2] This controversy springs from section 621 of the Evidence Code,[3] which sets forth the conclusive presumption that issue born in wedlock are legitimate. This statute, previously controlling only in civil proceedings, was apparently made applicable to criminal proceedings also when the Evidence Code became operative January 1, 1967.[4] Presently section 621 provides:

> 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.

Contrary to most other states,[5] California has created and per-

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* Montesquieu, quoted in 3 R.C.L. *Bastards* § 6, at 726 (1914).

1 67 A.C. 241, 430 P.2d 289, 60 Cal. Rptr. 649 (1967).

2 *See generally* Schoch, *Determination of Paternity By Blood-Grouping Tests: The European Experience*, 16 S. CAL. L. REV. 177 (1943); Note, *Evidence: Presumptions of Legitimacy: Cohabitation and the Use of Blood Tests—Kusior v. Silver*, 48 CALIF. L. REV. 852 (1960); Note, *Evidence: Bastards: Infants: Parent and Child: Blood Tests As Proof of Non-Parentage*, 39 CALIF. L. REV. 277 (1951); Comment, *Legitimation Through Acts: Acknowledgment: Reception into Family*, 13 CALIF. L. REV. 68 (1924); Note, *Evidence: Disputable Presumption of Parentage in California*, 11 HASTINGS L.J. 200 (1959); Comment, *California's Conclusive Presumption of Legitimacy—Its Legal Effect and Its Questionable Constitutionality*, 35 S. CAL. L. REV. 437 (1962); Note, *Evidence—Bastards—"Exception" to the Conclusive Presumption of Legitimacy*, 28 S. CAL. L. REV. 185 (1955); Comment, *Presumptions of Legitimacy and Related Problems*, 23 S. CAL. L. REV. 538 (1950); Comment, *The California Blood Test Act v. The Presumptions of Legitimacy*, 7 STAN. L. REV. 388 (1955).

3 This section substantively repeats Cal. Code Civ. Proc. § 1962(5), first enacted in 1872, *as amended*, Cal. Stats. 1955, ch. 948, § 3, at 1835 (repealed Jan. 1, 1967).

4 Provisions in CAL. EVIDENCE CODE §§ 12, 105, make all sections of the code applicable in civil and criminal proceedings, unless specifically stated otherwise.

5 The presumption of legitimacy began as a maxim of ancient Roman law and was later adopted by the English common law which originally treated the presumption of legitimacy of the issue of a marriage as a substantive rule of law. 6 OPS. CAL. ATT'Y GEN. 282, 283 (1945); Annot., 7 A.L.R. 329 (1920). The rigidity of the ancient law was later relaxed in England and adopted in the United States. It is now generally treated as rebuttable, *e.g.*, Groulx v. Groulx, 98 N.H. 481, 103 A.2d 188 (1954); *In re* Findley, 23 N.Y. 1, 170 N.E. 471 (1930), but it remains a strong presumption, *e.g.*, Eldridge v. Eldridge, 153 Fla. 873, 16 So. 2d 163 (1944), which social policy requires

petuated a presumption that is a substantive rule of law[6] which arises when the requisite conditions, cohabitation[7] and potency,[8] are present. Once the presumption is raised, the admission of scientifically accurate blood tests or any other evidence that would prove the illegitimacy of the child is not permitted.[9] Thus California must struggle with a law, enacted on a basis of ancient public policy, which remains operative in spite of modern social and scientific advancements that cast doubt upon the results of its application.

Development of the Presumption in California

California first codified the presumption in 1872[10] as a rule of expediency, based in part on the impossibility of establishing an absolute determination of nonpaternity when parentage was disputed.[11] The legal validity of the presumption was justified on the basis of preserving the integrity of the family and the avoidance of the social and legal stigmas associated with illegitimacy;[12] the rights of the husband were subordinated because of these considerations. Since enactment of the code, public awareness of social problems has greatly increased. Tolerance has replaced ignorance in many instances. This has created a need for reevaluating past policies with new developments in light of the requirements of modern society. Changes in public attitudes have led to a modification of public policy as expressed by the courts and legislature. These modifications have

unless overcome by clear evidence, *e.g.*, Boyers v. Boyers, 283 Ky. 1, 140 S.W. 2d 646 (1940), and in some instances, by evidence beyond a reasonable doubt. *E.g.*, Holder v. Holder, 9 Utah 2d 163, 340 P.2d 761 (1959). *See also* MODEL CODE OF EVIDENCE rule 703 (1942). In the United States, the presumption that issue born in wedlock is legitimate is universally accepted. *E.g.*, Mitchell v. Mitchell, 136 Me. 406, 11 A.2d 898 (1940); Pierson v. Pierson, 124 Wash. 319, 214 P. 159 (1923). *See generally* Annot., 57 A.L.R.2d 729 (1958); 10 AM. JUR. 2d *Bastards* § 11 (1963). Only in Oregon and California, however, is this presumption made conclusive. CAL. EVIDENCE CODE § 621; ORE. REV. STAT. § 41.350 (1965). *See also* Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829, 844 n.30 (1966).

[6] For a coverage of the view that treats conclusive presumptions as substantive rules of law, see 9 J. WIGMORE, EVIDENCE § 2492, at 292 (3d ed. 1940).

[7] The definition of cohabitation is the living together of a man and a woman ostensibly as husband and wife in the same house or apartment. *See* Kusior v. Silver, 54 Cal. 2d 603, 611, 354 P.2d 657, 662, 7 Cal. Rptr. 129, 134 (1960). This reaffirmed the earlier definition found in Estate of Mills, 137 Cal. 298, 70 P. 91 (1902). Cohabitation is necessary at the time of conception, not at birth. *See* Estate of McNamara, 181 Cal. 82, 183 P. 552 (1919).

[8] Impotency is the inability to copulate, and does not include ability to reproduce. Carmichael v. Carmichael, 106 Ore. 198, 206, 211 P. 916, 918 (1923).

[9] The only judicially created exception to the conclusive presumption occurred in a 1954 court of appeal case in which sterility was allowed as an exception to the rule despite the presence of those conditions which normally result in its application. Hughes v. Hughes, 125 Cal. App. 2d 781, 271 P.2d 172 (1954).

[10] Cal. Code Civ. Proc. § 1962(5), *as amended*, Cal. Stats. 1955, ch. 948, § 3, at 1835 (repealed Jan. 1, 1967).

[11] Estate of Mills, 137 Cal. 298, 70 P. 91 (1902).

[12] Estate of McNamara, 181 Cal. 82, 183 P. 552 (1919); Estate of Walker, 176 Cal. 402, 168 P. 689 (1917); Estate of Mills, 137 Cal. 298, 70 P. 91 (1902).

wrought change in the interrelation between the law and society so that illegitimacy, while still a burden, no longer bears the tremendous sanctions connected with it in the past.[13]

Concurrent with this change in public attitudes and social awareness, a field of scientific investigation emerged and became refined to such an extent that today results of blood tests often strain the credibility of judicial decisions reached on the basis of the presumption of legitimacy. Prior to 1917, there was no evidence available which could establish nonpaternity with scientific precision. Today, blood tests can conclusively prove that a man is *not* the father of a child.[14] If innocent of the allegation of fatherhood, the average chance of blood test exclusion of paternity is 55 percent. If a rare blood type is involved, the chance of exclusion can rise as high as 82 percent.[15] In 1953, recognition of the conclusiveness of blood tests[16] by the California Legislature resulted in adoption of most of the Uniform Act on Blood Tests to Determine Paternity.[17]

Despite scientific and social changes, the legislature has consistently reaffirmed the conclusive presumption. This was evidenced in 1953 when, despite recognition of blood test utility to prove nonpaternity, that part of the Uniform Act which would have been in conflict with the presumption was omitted by the legislature.[18] In an apparent effort to avoid possible misconstruction of the intention to preserve the presumption, the forerunner of section 621 was amended in 1955 by the addition of the provision that it would apply "[n]otwithstanding any other provision of law . . . ."[19] Again, in 1965, adoption of the conclusive presumption without change in the Evidence Code indicates that the California Legislature has not yet determined that the "social policy" criterion of preventing bastardization is outweighed by the resultant inequalities of the rule.[20]

Similar to the consistent legislative treatment, the California courts have continued to apply the rule of the early cases[21] uphold-

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[13] *See generally* Note, *Legitimization: The Liberal Judicial Trend in California*, 19 HASTINGS L.J. 232 (1967).

[14] About 60 years ago Landsteiner discovered that human blood possesses some definite characteristic qualities. It was not until 10 years later that it was proved that these qualities are inherited according to definite laws. *See* Wiener, *Determinations of Non-Paternity by Means of Blood Groups*, 186 AM. J. MED. SCI. 257, 258 (1933).

[15] Schatkin, *Paternity Proceedings and Blood Tests*, ABA PROCEEDINGS OF SECTION OF FAMILY LAW 14, 15 (1960).

[16] S. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS (3d ed. 1953); A. WIENER, BLOOD GROUPS AND BLOOD TRANSFUSIONS (3d ed. 1946); Comment, *The California Blood Test Act v. The Presumption of Legitimacy*, 7 STAN. L. REV. 388 (1955); Annot., 46 A.L.R.2d 1000 (1956).

[17] 9 UNIFORM LAWS ANNOT. 110-14.

[18] The California Legislature omitted section 5 of the Uniform Act which stated: "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 [blood] tests, show that the husband is not the father of the child." 9 UNIFORM LAWS ANNOT. 112.

[19] Cal. Stats. 1955, ch. 948, § 3, at 1835.

[20] Section 621 of the Evidence Code was adopted without change or direct comment by the Code Commission.

[21] Estate of McNamara, 181 Cal. 82, 183 P. 552 (1919); Estate of Walker, 176 Cal. 402, 168 P. 689 (1917); Estate of Mills, 137 Cal. 298, 70 P. 91 (1902).

ing the conclusiveness of the presumption, based on early considerations.[22] The one variable within the judicial position has been the definition of cohabitation. Defined in the early cases as the living together of a man and woman, ostensibly as husband and wife, in the same house or apartment at the time of conception,[23] an "unfortunate sentence" in a 1946 decision[24] extended this definition to encompass "conjugal access" during the period of conception.[25] This meant that if the man had potential access to his wife, despite separation of the couple, cohabitation existed. This departure from early holdings led to uncertainty in the law which resulted in 14 years of confusion in California courts whenever "cohabitation" was in question.[26] Certainty was restored in 1960 in *Kusior v. Silver*,[27] when the definition was narrowed to the original form espoused in 1902 and all inconsistent statements of the law were expressly overruled.[28]

Judicial legislation in California has created one exception to the conclusive presumption of legitimacy. In the 1954 case of *Hughes v. Hughes*,[29] the application of the presumption was rejected where a potent but sterile[30] husband was cohabiting with his wife. The court held that the husband *could* introduce evidence of his inability to father his wife's child as the result of a vasectomy[31] performed 16 years prior to conception. This was and still is the only judicially created exception to the conclusive presumption of legitimacy.[32]

Jackson v. Jackson

Into this apparently settled area of the law, the case of *Jackson v. Jackson*[33] intruded on November 30, 1964, when Garland Jackson filed an action for annulment of his marriage on November 9, 1964 to Jackie Jackson. Mrs. Jackson left the plaintiff permanently on the

22 *E.g.*, Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960).

23 *Id.* at 611, 354 P.2d at 662, 7 Cal. Rptr. at 134.

24 People v. Kelly, 77 Cal. App. 2d 23, 174 P.2d 342 (1946).

25 *Id.* at 26, 174 P.2d at 344.

26 Hale, *Proof of Facts of Family History*, 2 HASTINGS L.J. 1 (1950); Comment, *The California Blood Test Act v. The Presumptions of Legitimacy*, 7 STAN. L. REV. 388 (1955).

27 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960).

28 The *Kusior* decision overruled the following cases to the extent of their definition of cohabitation: Bonsall v. Bonsall, 169 Cal. App. 2d 753, 337 P.2d 843 (1959); Waters v. Spratt, 166 Cal. App. 2d 80, 332 P.2d 754 (1958); Estate of Marshall, 120 Cal. App. 2d 747, 262 P.2d 42 (1953); Hill v. Johnson, 102 Cal. App. 2d 94, 226 P.2d 655 (1951); Williams v. Moon, 98 Cal. App. 2d 214, 219 P.2d 902 (1950); People v. Kelly, 77 Cal. App. 2d 23, 174 P.2d 342 (1946).

29 125 Cal. App. 2d 781, 271 P.2d 172.

30 "Sterility . . . means 'barrenness, incapacity to produce a child.'" *Id.* at 786, 271 P.2d at 175.

31 A vasectomy is a comparatively simple and painless operation, performed by section of the vas deferens or spermatic cord to produce sterility. BLACK'S LAW DICTIONARY 1723 (4th ed. 1951).

32 *But see* Comment, *California's Conclusive Presumption of Legitimacy—Its Legal Effect and Its Questionable Constitutionality*, 35 S. CAL. L. REV. 437 (1962).

33 67 A.C. 241, 430 P.2d 289, 60 Cal. Rptr. 649 (1967).

morning of November 13, 1964, 4 days after their marriage. She gave birth to a son approximately 9 months later. Although Garland Jackson was not impotent, blood tests positively demonstrated that he was not the father of his wife's child.

The superior court ruled that although the marriage relation endured but 4 days, cohabitation resulted, thereby bringing the case within the scope of the conclusive presumption. This necessitated a finding, on the authority of *Kusior v. Silver*,[34] that the blood tests were inadmissible as evidence to contradict the conclusive presumption. Thus, Mr. Jackson became a "father by presumption."[35] Faced with this established and apparently insurmountable state of the law, Garland Jackson abandoned hope of obtaining justice and fled the state.[36] In the court of appeal the superior court decision was affirmed, again with heavy, albeit reluctant, reliance upon the *Kusior* decision.[37]

On appeal to the California Supreme Court, the lower court decisions were reversed. The court stated that the issue involved was "whether the child could possibly have been conceived during cohabitation . . . ."[38] To demonstrate his innocence the plaintiff must account for his wife's "actions and whereabouts during the . . . days of married life,"[39] and prove that the issue "was not conceived when *he* was having sexual intercourse with his wife"[40] in order to prove conception did not occur during the brief cohabitation.[41] Concerning proof of these facts, the court held that "any competent evidence relevant to the question is admissible."[42] Following this reasoning, the decision held that the blood tests were valid as evidence to prove "conception did not occur at various times during the four day cohabitation, that is, the moments when the newlyweds were engaged in sexual intercourse."[43]

In effect, the court reaffirmed the prior judicial interpretation of the statutory prerequisite of cohabitation as cohabitation during, and only during, any time when conception might have occurred.[44] If the child could not possibly have been conceived during cohabitation the presumption will not apply. To prevent its application the husband must produce any relevant evidence to demonstrate conception did not occur during the vital period. Normally, blood tests are not relevant to show the *time* of conception, but under the particular

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[34] 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960).

[35] Brief for Appellant at 15, Jackson v. Jackson, 248 A.C.A. 35, 56 Cal. Rptr. 240, *vacated* 67 A.C. 241, 430 P.2d 289, 60 Cal. Rptr. 649 (1967).

[36] *Id.* at 1. Jackson's attorney carried on his appeal alone through the court of appeal and supreme court.

[37] "The case of Kusior v. Silver . . . is conclusive against the appellant. Whether we like it or not, we are bound to hold in accordance with the law as established by the Supreme Court in that case." 248 A.C.A. at 36, 56 Cal. Rptr. at 241.

[38] 67 A.C. at 245, 430 P.2d at 291, 60 Cal. Rptr. at 651.

[39] *Id.* at 244, 430 P.2d at 291, 60 Cal. Rptr. at 651.

[40] *Id.*

[41] *Id.*

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

[43] *Id.*

[44] *See* text accompanying notes 22-28 *supra*.

facts of the *Jackson* case, the tests become relevant if the plaintiff can prove that his wife had not engaged in sexual intercourse with any other person during their 4 days of married life together. If no one else had the opportunity to become the father during that short period, and blood tests negate any possibility of the husband's paternity, the only possible conclusion would be a finding that conception did not occur during cohabitation. Thus, by holding the blood tests inadmissible, the trial court had denied the plaintiff a full opportunity to demonstrate that his case did not come within the coverage of the conclusive presumption, and for this reason the lower court decisions were reversed.[45]

It is clear that the *Jackson* decision does not change the general California rule that blood tests are not admissible to prove nonpaternity of issue born in wedlock. In almost all situations involving the conclusive presumption, the reasoning of *Jackson* will not be available. Very rarely will a husband be able to sufficiently account for his wife's whereabouts to establish the impossibility of extramarital relations during cohabitation at the time when conception might possibly have occurred.[46] However, this decision allowing the admission of blood test evidence in apparent contradiction of the legislative intent, demonstrated a preference by the supreme court to limit the application of the conclusive presumption as far as possible when blood tests indisputably show that the presumption's effect will be to equate justice with scientific impossibility.

Despite this apparent judicial disapproval of the inadmissibility of blood tests, the supreme court did not consider it necessary to review again the constitutional arguments raised in the past[47] and by the appellant,[48] for the reason that section 621 does not appear to be unconstitutional as judicially interpreted in civil actions.[49] As the

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[45] The *Kusior* case was expressly approved and the constitutional issues pressed by appellant's attorney were ignored. The dissent strongly advocated that the conclusive presumption should have been applied as it had been in the lower court. 67 A.C. 241, 430 P.2d 289, 60 Cal. Rptr. 649.

[46] This situation is further complicated by the fact that the husband and wife must cease living together about the time of possible conception.

[47] *E.g.*, Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960); Comment, *California's Conclusive Presumption of Legitimacy—Its Legal Effect and Its Questionable Constitutionality*, 35 S. CAL. L. REV. 437 (1962).

[48] Petitioner's Brief for Hearing at 4, Jackson v. Jackson, 67 A.C. 241, 430 P.2d 289, 60 Cal. Rptr. 649 (1967).

[49] In *Kusior v. Silver*, the constitutional validity of section 1962(5) of the Code of Civil Procedure was questioned and upheld by the California Supreme Court. The court said: "[A]ppellant does not suggest that the legislature has no interest in or power to determine, as a matter of overriding social policy, that given a certain relationship between husband and wife, the husband is to be held responsible for the child. There are significant reasons why the integrity of the family when husband and wife are living together as such should not be impugned. A conclusive presumption is in actuality a substantive rule of law and cannot be said to be unconstitutional unless it transcends such a power of the Legislature." 54 Cal. 2d at 619, 354 P.2d at 667-68, 7 Cal. Rptr. at 140.

This language of the California court is supported by language of the United States Supreme Court as follows: "The equal protection clause of the

controlling case authority, *Kusior* had held in essence that a conclusive presumption is in actuality a substantive rule of law which is not unconstitutional unless the legislature has transcended its power to determine as a matter of overriding social policy that, in the marital relation, "the husband is to be held responsible for the child."[50] It is thus apparent that until legislative action is undertaken either to remove the conclusive character of the presumption codified in section 621, or to allow blood tests as an exception to its conclusiveness, the courts may continue to struggle with a rule that forces them to render decisions contrary to nature unless the circumstances are such that the court can find, as it did in *Jackson*, a means of avoiding the presumption's application.

Extension of the Conclusive Presumption

A new facet of the conclusive presumption has resulted from its inclusion in the Evidence Code in the same form it had as section 1962(5) in the Code of Civil Procedure. The difference arises in the area of effectiveness of the two codes. As a section of the Code of Civil Procedure, the presumption was applicable only in civil proceedings. However, its inclusion in the Evidence Code extended its coverage to both civil and criminal proceedings.[51] This broadened application results from the Evidence Code provisions that all sections in that code are applicable to criminal as well as civil proceedings,[52] unless specifically stated otherwise.[53] Since there is no limiting clause for section 621, it is apparently intended to be applicable in criminal prosecutions brought under section 270 of the Penal Code—the criminal nonsupport statute. Under prior law, blood tests were admissible to prove nonpaternity in actions under section 270.[54] Thus the conclusive presumption's criminal application is a major departure from established principles. This extension, whether intentional or the result of an oversight,[55] is in all probability unconstitutional under the due process clause of the fourteenth amendment.

Fourteenth Amendment admits of a wide exercise of discretion and only avoids a classification which is purely arbitrary being without reasonable basis; nor does a classification having some reasonable basis offend because not made with mathematical nicety or resulting in some inequality." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

[50] 54 Cal. 2d at 619, 354 P.2d at 667-68, 7 Cal. Rptr. at 139-40 (1960).

[51] A search has disclosed no reported cases brought under the criminal nonsupport statute, CAL. PEN. CODE § 270, in which the conclusive presumption was applied.

[52] CAL. EVIDENCE CODE § 12(a) states in part: "This code shall become operative on January 1, 1967, and shall govern proceedings in actions brought on or after that date . . . ." CAL. EVIDENCE CODE § 105 states: " 'Action' includes a civil action and a criminal action."

[53] CAL. EVIDENCE CODE § 100 states: "Unless the provision or context otherwise requires, these definitions govern the construction of this code."

[54] People v. Crawford, 205 Cal. App. 2d 858, 32 Cal. Rptr. 569 (1962); People v. Bynon, 146 Cal. App. 2d 7, 303 P.2d 75 (1956).

[55] The only relevant statement made by the Law Revision Commission with respect to the adoption of CAL. EVIDENCE CODE §§ 620-24 was: "Conclusive presumptions are not evidentiary rules so much as they are rules of substantive law. Hence, the Commission has not recommended any substantive revision of the conclusive presumptions contained in this article." 7 CAL.

In prosecutions under section 270, it has been firmly established that a civil finding of paternity is not res judicata in the criminal action.[56] Paternity is an essential element of the offense under section 270;[57] to obtain a conviction, it must be established beyond a reasonable doubt that the defendant is the father of the child and has failed to support him.[58] Establishment of paternity in a civil action is admissible as evidence in the criminal case, but only as a rebuttable presumption as to whether or not paternity exists.[59] Section 270e of the Penal Code, amended in 1965 to facilitate operation in conjunction with the Evidence Code and operative on the same date,[60] provides in part that "[i]n any prosecution under Section 270, it shall be competent for the people to prove nonaccess of husband to wife *or any other fact establishing nonpaternity* of a husband."[61] This language seems to indicate that the legislature contemplated the use of blood tests in the criminal proceedings, and that the conclusive presumption's extension may have been an oversight.[62]

Nevertheless, section 621 of the Evidence Code, preventing admission of blood tests "[n]otwithstanding any other provision of law," would appear to override the general admissibility provision of 270e in any action brought under section 270 of the Penal Code when the conclusive presumption applies. Under these circumstances, the defendant would be denied an opportunity not only to "raise a reasonable doubt" as to his paternity, but also to establish conclusively nonpaternity through blood tests or any other evidence.

The rights of the parties are controlled by the presumption and evidence contrary to the fact presumed, including blood tests, is inadmissible as immaterial despite any actual relevancy it might have. The constitutional validity of a conclusive presumption does not depend as much on a rational connection between the facts proved and those presumed, as it does on the constitutional limitations upon the power of the legislature to enact the fact presumed as a reasonable means of attaining a social goal.[63] While the courts should constantly be alert not to construe the meaning of statutes in light of their own conceptions of public policy, rather than those of the legislature, they nevertheless must be ready to preserve and protect the rights of the individual when a legislative enactment has clearly violated any of the basic constitutional guarantees. No reported case

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LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 105 (1965). Such cursory treatment indicates that the Commission may not have considered the ramifications of an extension of the conclusive presumption of legitimacy into criminal proceedings.

[56] Patterson v. Municipal Court, 232 Cal. App. 2d 289, 42 Cal. Rptr. 769 (1965).

[57] People v. Cagigas, 69 Cal. App. 2d 301, 158 P.2d 971 (1945); People v. Kovacevich, 19 Cal. App. 2d 335, 65 P.2d 807 (1937).

[58] Patterson v. Municipal Court, 232 Cal. App. 2d 289, 42 Cal. Rptr. 769 (1965).

[59] *Id.*

[60] Cal. Stats. 1965, ch. 299, § 138, at 1367.

[61] CAL. PEN. CODE § 270e (emphasis added).

[62] *See* note 55 *supra.*

[63] Morgan, *Federal Constitutional Limitations Upon Presumptions Created by State Legislation*, in HOWARD LEGAL ESSAYS 323, 329 (1934).

has yet been decided in which the conclusive presumption was applied to section 270 of the Penal Code. If and when this occurs, the apparent legislative oversight or conception of public policy should not be given the force of law.[64] While it may be constitutionally valid to require that a husband support the issue of his wife on the basis of public policy in civil cases, this basis is insufficient to justify denial of the right to enter conclusive evidence of his innocence in a trial where he faces possible incarceration for 2 years.[65] In *Heiner v. Donnan*,[66] the United States Supreme Court made the following pertinent statement:

> This Court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment . . . . [Furthermore,] [i]f a legislative body is without power to enact as a rule of evidence a statute denying litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law.[67]

This language, despite origin in a federal tax case, would appear to be determinative in a constitutional consideration of the validity of section 621 with respect to its criminal application.

Conclusion

California law establishing and perpetuating a conclusive presumption of legitimacy is contrary to modern social attitudes and technical advancements. The injustice of the past has not been cured by either the legislative or judicial activity in the last 3 years. In fact, recent legislation has apparently reaffirmed the early law and potentially extended its influence. Judicial results often required by the conclusive presumption have not met the approval of the courts. Respect for and support of the law is not encouraged by judicial decisions which are forced to ignore positive truth and justice to the individual. As one judge has indicated, "[t]his brand of so-called justice is not substantial in any sense because it is grounded on hypocrisy and untruths."[68] The good to be attained by the prevention of bastardization must be balanced against the injustice to the innocent father by presumption, and the disrespect for our judicial system that decisions not equated with truth will elicit. As a result of blood tests, the conclusive presumption of legitimacy has become in many cases a demonstrable fiction and an obvious bar to truth.[69]

The full answer to this problem should come from the California

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[64] "Certainly . . . the binding effect, in respect of particular situations, of the ancient rule precluding proof of facts to the end of avoiding supposed injurious results thought to be of greater consequence than the predominance of truth over error, still remains a proper subject of judicial inquiry to be made and resolved in the light of such further experience and knowledge." United States v. Provident Trust Co., 291 U.S. 272, 282 (1934).

[65] "The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever." Hoeper v. Tax Commission, 284 U.S. 206, 217 (1931).

[66] 285 U.S. 312 (1932).

[67] *Id.* at 329.

[68] Wareham v. Wareham, 195 Cal. App. 2d 64, 83, 15 Cal. Rptr. 465, 478 (1961) (separate opinion).

[69] J. McBAINE, CALIFORNIA EVIDENCE MANUAL § 1273 (2d ed. 1960).

Legislature, since it is basically a policy decision. As a minimum, a blood test exception to the conclusiveness of section 621 should be enacted. Such an exception would place the burden of proving nonpaternity upon the husband.[70] If adopted, this provision should adequately protect the interests of the child and society in preventing bastardization while preventing both injustice to the husband and possible disrespect for the law.[71]

Legislative action at this time, however, does not seem probable considering the 1965 presumptive legislative reconsideration of this law in light of prior judicial decisions.[72] If in fact the legislature does not act, there is a possibility that the courts may create a blood test exception in spite of the statute and prior interpretations of it. Such action would be devoid of legal justification. Judicial legislation, particularly that which directly opposes established law and the clear intention of the legislature, should be avoided. Nevertheless, the court may decide that further decisions twisting the application of the presumption, as in *Jackson*, resulting in confusion and further injustice, are not preferable to a direct confrontation of the statute.[73] Unlike the *Hughes*[74] case, where the court was able to work around the statute by interpretation, judicial creation of an exception to allow admission of blood test evidence to prove nonpaternity would require an explicit statement to that effect in order to avoid any confusion due to the strength of prior judicial interpretation.[75]

The statutory extension of the conclusive presumption into the criminal law does not present the same difficulties of modification as those discussed with respect to its civil application. It is probable

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[70] Blood test evidence of nonpaternity is sufficiently conclusive to satisfy this burden of proof. Authorities cited note 16 *supra.*

[71] Possibly a better alternative would be the enactment of a comprehensive body of modern legislation encompassing support, legitimacy, blood test admissions and other related issues. This would afford the legislature an opportunity to provide full protection for the interests of illegitimate children while avoiding the harshness of the conclusive presumption. A groundwork for such a body of law has already been prepared and proposed on a national basis by Professor Krause of the University of Illinois. *See* Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829 (1966).

[72] California courts must consider legislative action in view of the fact that the legislature is presumed to have considered legislation in light of prior judicial action. Kusior v. Silver, 54 Cal. 2d 603, 618, 354 P.2d 657, 667, 7 Cal. Rptr. 129, 139 (1960); *see* 45 CAL. JUR. 2d *Statutes* § 101 (1958).

[73] For examples of confusion resulting from decisions straining the meaning of statutes, *see* text accompanying notes 25-28 *supra.*

[74] *See* text accompanying notes 29-32 *supra.*

[75] Confusion with respect to the *Jackson* decision itself has already occurred as demonstrated by this language in the dissenting opinion: "However, the effect of today's ruling is to add another exception, based on blood test evidence, to the conclusive presumption of legitimacy set forth in section 621 of the Evidence Code, and this despite the most convincing proof— recognized and spelled out in *Kusior*—that the Legislature considered and rejected such an exception." Jackson v. Jackson, 67 A.C. 241, 245, 430 P.2d 289, 291, 60 Cal. Rptr. 649, 651 (1967). A careful reading of the majority opinion does not disclose the creation of a blood test exception as stated in the dissent.

that the extension was the result of a legislative oversight which will be corrected when recognized. If the extension was intentional, it appears that judicial scrutiny of its criminal application would rightly culminate in a finding that it is in violation of the due process clause of the fourteenth amendment.[76]

*Stephen M. Robertson**

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[76] After completion of this note, the conclusive presumption expressed in section 621 was upheld in the case of *Hess v. Whitsitt*, 257 A.C.A. 618, 65 Cal. Rptr. 45 (1967), demonstrating that the presumption has *not* been rendered rebuttable by *Jackson v. Jackson* as feared by the dissenting opinion in *Jackson*. The *Hess* case held that no evidence of nonpaternity was admissible when the facts were within the purview of section 621 (*see* notes 7-9 and accompanying text *supra*). The court further indicated that there is no sound basis for a judicial alteration of the clear words of a statute and its legislative history. Thus, a child with "chocolate-colored skin [and] features characteristic of the Negro race" was conclusively presumed to be the child of a fair-skinned Caucasian couple, even though the wife admitted that she had sexual intercourse with the Negro defendant during the period when conception occurred.

* Member, Second Year Class.