Third Supplement to Memorandum 64-2

C.C.P. § 1963

27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact;

Class: Repeal.

This presumption has been applied but rarely in the California cases. In the instances when it has been cited, it seems to have had little if any effect on the result.

In Estate of Clark, 13 Cal. App. 786, 110 Pac. 828 (1910), the decedent died intestate and a person claiming to be her niece claimed as sole heir. The question was whether the claimant's father and the decedent were brother and sister. Part of the claimant's evidence consisted of testimony that the father had introduced the decedent as his sister, and that the decedent acquiesced in the introduction without protest. A judgment in favor of the claimant was affirmed. The court indicated that the evidence of acquiescence was admissible not only under the presumption but also under the pedigree exception to the hearsay rule, since the silent acquiescence by the decedent amounted to a hearsay statement agreeing with the declaration.

Estate of Flood, 217 Cal. 763, 21 P.2d 579 (1933), was similar. There, the claimant was claiming as a pretermitted heir. She claimed to be Flood's illegitimate daughter who had been legitimated by adoption. It was admitted that Flood had received her into his home and treated her as a daughter. In dispute were whether Flood acknowledged her as his illegitimate daughter and whether Flood's wife knew she was Flood's illegitimate daughter and, with such knowledge, consented to her reception

into the home as Flood's daughter. The trial court had directed a verdict against the claimant. Admissions by Flood of paternity were abundant. To show Mrs. Flood's knowledge and consent, evidence was introduced of Flood's admissions in Mrs. Flood's presence. The Supreme Court relied on Mrs. Flood's acquiescence, citing the presumption, and other evidence (direct admissions by Mrs. Flood and statements by members of Mrs. Flood's family) to reverse the trial court.

In New York Life Ins. Co. v. Occidental Petroleum Corp., 43 Cal. App.2d 747, 111 P.2d 707 (1941), it was held that the presumption could not be relied on where acquiesence followed from reliance on the statements of a person not adverse in interest. And in Sappa v. Crestetto, 78 Cal. App.2d 362, 177 P.2d 950 (1947), a creditor was held to be precluded from recovering for services rendered prior to the giving of a receipt because the decedent must be presumed to have acquiesced in the representation made in the receipt.

The presumption seems extremely vague. At best, it seems to be but a form of circumstantial evidence. Whether an inference or a conclusion should be permitted or compelled would seem to be dependent upon the nature of the evidence giving rise to the inference in the particular case. Accordingly, we recommend repeal.

C.C.P. § 1963

29. That persons acting as copartners have entered into a contract of partnership;

Class: Repeal.

The foregoing presumption appears to have been cited once during its 92 year history. In Asamen v. Thompson, 55 Cal. App.2d 661, 131 P.2d 841 (1942), the plaintiff entered into an agreement with the two defendants whereby the defendants agreed to sell plaintiff's carrot crop and guarantee him a specific price. The defendants took the crop, sold it, realized less than expected, and paid plaintiff less than the agreed price. He sued them as partners. They defended on the ground that a corporation was the sole interested party. Plaintiff showed that defendants had a partnership and a partnership account, that checks were drawn on that account to pay other growers, and that checks were drawn on that account to pay plaintiff. A judgment was given for plaintiff. Defendants appealed on the ground of the insufficiency of the evidence to show a partnership or an agreement with one. The appellate court affirmed, citing the evidence mentioned above, stating that it was sufficient to show a partnership (citing the presumption), and stating that a partnership once shown to exist must be presumed to continue and the burden of proof is upon him who asserts its termination.

The nature of the evidence indicating the existence of a partnership must, of course, vary from case to case. In some cases the inference of partnership will be strong, in other cases it will not. We can perceive no public policy which would require the fixed result a presumption would require in each case. The presumption seems of no significance in the cases. Hence, we recommend its repeal.

C.C.P. § 1963

30. That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage;

Class: Morgan presumption for presumption that marriage, when proven, is valid; statutory inference for presumption of marriage from cohabitation and repute.

There are two presumptions that arise in the cases under the terms of the above subdivision. One presumption is that a marriage proven to have occurred is valid, and the burden of proof is on the party attacking the validity of the marriage. Estate of Hughson, 173 Cal. 448, 160 Pac. 548 (1916); Wilcox v. Wilcox, 171 Cal. 770, 155 Pac. 95 (1916); Freeman S.S. Co. v. Pillsbury, 172 F.2d 321 (9 Cir. 1949). The cited cases indicate that the presumption is a strong one. Although the cases have not held that "clear and convincing" evidence is required, we believe the presumption reflects a strong public policy and should prevail unless the trier of fact is persuaded that the likelihood of the invalidity of the marriage is substantially greater than the likelihood of its validity.

The other presumption arising from this subdivision is the one more clearly indicated by its terms. The presumption of marriage arises from proof of cohabitation and repute. Pulos v. Pulos, 140 Cal. App.2d 913, 295 P.2d 907 (1956); White v. White, 82 Cal. 427, 23 Pac. 276 (1890) (quoting "cohabitation and repute do not make a marriage; they are merely items of evidence from which it may be inferred that a marriage had been entered into.") The presumption is raised because frequently the ceremony has taken place many years before, or in distant places, and eyewitness testimony or reliable records are lacking. Estate of Hartman, 157 Cal. 206, 209-10, 107 Pac. 105 (1910).

The evidence relied on to give rise to the presumption is sometimes strong and sometimes weak. Sometimes the courts hold that no presumption arises because the evidence is insufficient, and in other cases they hold the presumption does arise. Estate of Baldwin, 162 Cal. 471, 123 Pac. 267 (1912)(evidence insufficient to warrant presumption); Cacioppo v. Triangle Co., 120 Cal. App.2d 281, 260 P.2d 985 (1953)(evidence insufficient); White v. White, 82 Cal. 427, 23 Pac. 276 (1890)(evidence sufficient). Because of the variety of facts which can be relied on to invoke the presumption, some pointing strongly toward marriage, others not, we do not believe that a fixed conclusion should be required in all cases. Whether the conclusion of marriage is required in a particular case should depend on the strength of the evidence. Hence, we recommend that this presumption be classified as a statutory inference.

C.C.P. § 1963

31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate;

Class: Morgan presumption, rebuttable by showing that the likelihood of illegitimacy is substantially greater than the likelihood of legitimacy.

This subdivision is but one of several dealing with the presumption of legitimacy. Other relevant statutes are:

> Civil Code § 193: All children born in wedlock are presumed to be legitimate.
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> Civil Code § 194: All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate children of that marriage.
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> Civil Code § 195: The presumption of legitimacy can be disputed only by the people of the State of California in a criminal action brought under the provisions of Section 270 of the Penal Code, or the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact.
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> Code of Civil Procedure § 1962: The following presumptions, and no others, are deemed conclusive:
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> * * * * *
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> 5. Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate. . . .

Thus, the rebuttable presumption can be attacked only by the persons listed in Civil Code Section 195, and then only when the conclusive presumption does not apply. Estate of McMurray, 114 Cal. App. 439, 300 Pac. 72 (1931)(collateral heirs of presumed father may not dispute presumption); Estate of McNamara, 181 Cal. 82, 183 Pac. 552 (1919)(disputable presumption applies when conclusive presumption does not).

To understand the nature of the disputable presumption, therefore, it is necessary to determine when the conclusive presumption applies. The

conclusive presumption of legitimacy arises upon proof that the child was conceived while the husband and wife were living together as husband and wife, and in such a case no evidence will be permitted that they did not engage in intercourse or that the husband could not possibly have been the father. Estate of Mills, 137 Cal. 298, 70 Pac. 91 (1902); see discussion in Kusior v. Silver, 54 Cal.2d 603, 608-19, 7 Cal. Rptr. 129, 354 P.2d 657 (1960). Where the husband and wife were not actually living together, ostensibly as husband and wife, the conclusive presumption is not applicable and evidence may be considered on the question whether the husband is in fact the father. Kusior v. Silver, 54 Cal.2d 603, 7 Cal. Rptr. 129, 354 P.2d 657 (1960). The rebuttable presumption remains applicable, however, and may be overcome by "clear and satisfactory" evidence that the husband was impotent, or did not have intercourse at or about the time of the conception, or could not have been the father (as in a case where the child has a blood type or is of a race such that the husband could not possibly be the father). Kusior v. Silver, 54 Cal.2d 603, 7 Cal. Rptr. 129, 354 P.2d 657 (1960).

Since the application of the conclusive presumption depends on cohabitation at or about the time of conception, a number of cases have arisen over the determination of the time of conception. From these cases the following principles have emerged: If the last cohabitation was at least 297 days from the date of birth, the gestation period necessary to apply the conclusive presumption is so unusually long that the conclusive presumption will not be applied; however, the rebuttable presumption remains applicable. Estate of McNamara, 181 Cal. 82, 183 Pac.552 (1919) (304 days; rebuttable presumption held overcome by evidence); McKee v.

McKee, 156 Cal. App.2d 764, 320 P.2d 510 (1958)(304 days; rebuttable presumption not overcome); Whitney v. Whitney, 169 Cal. App.2d 209, 337 P.2d 219 (1959)(297 days; rebuttable presumption overcome for purposes of interim order denying motion for temporary support pending trial).

At the other end of the gestation period, the conclusive presumption has been held applicable where cohabitation began 225 days prior to birth. Dazey v. Dazey, 50 Cal. App.2d 15, 122 P.2d 308 (1942). The rebuttable presumption was applied in Anderson v. Anderson, 214 Cal. 414, 5 P.2d 881 (1931), where the birth followed the marriage by 3 1/2 months; and the presumption was held to be overcome as a matter of law by proof that child was born within 200 days from earliest intercourse between the parties. Apparently in conflict with the Anderson case, Murr v. Murr, 87 Cal. App.2d 511, 197 P.2d 369 (1948), held the disputable presumption applicable where earliest intercourse was 190 days prior to birth (the case was reversed for errors in excluding evidence and misconduct of the trial judge), and Smith v. Heilman, 171 Cal. App.2d 424, 340 P.2d 752 (1959), held the disputable presumption not overcome when the birth was 198 days after the husband returned from sea duty. In People v. Roberts, 82 Cal. App.2d 654, 187 P.2d 27 (1947), the disputable presumption was applied and not overcome when birth followed marriage by 138 days. In Blake v. Blake, 135 Cal. App.2d 218, 286 P.2d 948 (1955), the disputable presumption was applied when birth followed marriage by 167 days and was not overcome by evidence that birth followed last intercourse by 306 days (it was a shotgun type marriage).

The presumption serves a strong public policy in favor of legitimacy. To continue that policy, we recommend that the presumption be classified as a Morgan presumption that may be overcome only by "clear and convincing" proof.

Respectfully submitted,

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