of this writer that Georgia should refuse to employ the method of judicial legislation seen in the principal case, leaving such policy decisions with regard to Sunday contracts to the legislature.

JEFFREY B. TALLEY

EVIDENCE—BASTARDS—RACIAL DIFFERENCE EXCEPTION DISALLOWED

In this case[1] the California Court of Appeal for the Second District ruled that no racial difference exception is contained in the statute providing that issue born while a wife is cohabiting with her husband is presumed legitimate.[2]

The court found as fact that the child's mother and her husband were Caucasian, that the defendant was a Negro, and that the child was of mixed blood "evidencing both Negro and Caucasian characteristics, and bearing a close physical resemblance to the defendant."[3] Testimony was to the effect that the child's mother had engaged in sexual intercourse with the Negro defendant repeatedly from July, 1960, through late August or early September of that year. The child was born on May 25, 1961.[4]

Citing the statute,[5] the court held that the only exception allowed to rebut the presumption of legitimacy was impotency of the husband.

The court reasoned that as the California legislature had refused to adopt that portion of the Uniform Act on Blood Test[6] which would allow blood testing to determine paternity, and therefore the legislative intent was clear to the effect that the presumption of legitimacy was conclusive except in cases of impotency of the husband.

The holding in this case seems to be contrary to the rule in Georgia. Justice Lumpkin in an 1852 Georgia case[7] held that the common law presumption of legitimacy was rebuttable. In a well-documented opinion he traced the development of the presumption through the common law and expressed his opinion as follows:

> It is hard to believe, at the middle of the nineteenth century, that there ever existed, in any enlightened country, a law so diametrically opposed to every principle of reason and common sense, as, that the children of a married woman should in all cases, be

1. Hess v. Whitsitt, 257 Cal. App.2d 618, 65 Cal. Rptr. 45 (1967).
2. CAL. CODE OF CIVIL PROCED. §1962 (West 1955) provides the following: "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."
5. CAL. CODE OF CIVIL PROCED. §1962 (West 1955).
4. *Id.* at ___, 65 Cal. Rptr. at 46.
5. CAL. CODE OF CIVIL PROCED. §1962 (West 1955).
6. For a discussion of the Uniform Act on Blood Test see Comment, *Blood Will Tell!*, 1 MERCER L. REV. 266 (1950).
7. Wright v. Hicks, 12 Ga. 155 (1852).

> deemed legitimate, provided the husband . . . was endowed with generating potency.[8]

Justice Lumpkin illustrated the ridiculous lengths to which the presumption of legitimacy could be carried by giving an example similar to the factual situation in the case here under discussion:

> For instance—suppose that an adulterous connexion was shown to have existed between the wife and a Negro, at or about the time when the child should have been begotten, and the color and other physiological developments of the offspring, demonstrated its African paternity, might not it be bastardized?[9]

In the opinion of this writer the Georgia Court in 1852 demonstrated more wisdom than the California Court did in the case at hand. It is hard for the author to believe that there should be any presumption of law, certainly of the type here in question, that cannot be overcome by clear and convincing evidence.

One can only imagine what Justice Lumpkin's comment would be if he were alive today—

It is hard to believe, at the middle of the twentieth century . . . .

H. NORWOOD PEARCE

EVIDENCE—IMPLIED AGENCY—CIRCUMSTANTIAL EVIDENCE SUFFICIENT TO SEND TO JURY

The plaintiff, a passenger, brought an action for injuries sustained in an automobile collision against a corporation which engaged in the rental of automobiles. The car was rented from a local Hertz-Rent-A-Car station in Nassau. The collision, which seriously injured the plaintiff, occurred during the course of the car rental; the rental agency did not have sufficient insurance to cover the damages sustained in the collision. The Hertz Corporation had long held itself out by advertisement that it offered a rental service worldwide, and that this service included the highest standard of insurance coverage.

After the injuries occurred, the plaintiff discovered that the Hertz Corporation doing business in Nassau was not the same corporation as the one doing business in the continental United States. Hertz service outside the United States is provided by Hertz American Express International, Ltd., a subsidiary jointly owned by the Hertz Corporation (51%) and by the American Express Company, Inc. (49%). The question presented in *Crowe v. Hertz Corporation*[1] was whether or not the Nassau company

8. *Id.* at 159.
9. *Id.* at 161.
1. 283 F.2d 681 (5th Cir. 1967).