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7/8/68

Memorandum 68-63

Subject: Study 63 - Evidence Code (Marital Privilege Revisions)

You will recall that we approved and distributed for comment early in April 1968 a tentative recommendation revising Evidence Code Sections 971 and 973 to take care of problems identified by Mr. Edwin A. Heafey, Jr., in his CEB work, California Trial Objections.

We have revised the tentative recommendation to incorporate editorial revisions suggested by Commissioner Stanton and attach two copies. We suggest that the recommendation be approved at the July meeting for printing as a part of our next Annual Report. We attach two copies so that you can mark your editorial revisions on one copy and turn them in to the staff at the July meeting.

You will recall that the basic purpose of this recommendation was to restore the law in civil cases as it existed prior to the enactment of the Evidence Code. We received only two letters commenting on the tentative recommendation. One letter is opposed to the suggested revisions. The letter does not convince us that there is anything wrong with the recommendation. We are not aware that the "administrative problems" that existed under the former law were such that any difficulty in administering the law was experienced.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Memo 68-63

EXHIBIT I

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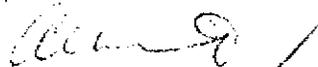
April 30, 1968

John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

Thank you for the tentative recommendations relating to Evidence Code Sections 971 and 973 and Commercial Code Section 4103. In my practice I have never been faced with the problems encompassed within those sections; but the booklets are so well written, that I feel that I understand them, and the proposed changes impress me as improvements. I think the commission is doing a fine job.

Sincerely yours,



ALBERT J. FORN

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April 23, 1968

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Gentlemen:

Thank you for forwarding your Tentative Recommendation re Evidence Code Sections 971 and 973. I have reviewed the Recommendation.

As I understand the proposed revision, Evidence Code Section 973 will apply to criminal cases only. The reason for change pertains to solving several problems referred to by Edwin A. Heafey, Jr., in his C. E. B. work California Trial Objections.

COMMENT:

Though 1965 legislation terminated the privilege of a married person to refuse to testify "for" the other spouse, Evidence Code Section 971, in effect, gave that privilege back in a different form. By refusing to be a witness, the spouse is not required to testify "for" the other spouse. In my opinion, the result of Section 971 applying to criminal cases only would be threefold, i. e. 1) the present public policy of protecting the marriage will be watered down; 2) danger of erroneous voluntary waiver will be created; and 3) the Courts will be faced with a greater volume of judicial interpretation of "against" as used in Section 970:

a) Automobile Accident: A sues B and C as to injury in a three car accident. C calls A's spouse to testify that B ran a red light. Will A's wife be required to testify under the recommended change? What if B is judgment-proof and C has \$100,000 of insurance coverage?

b) Domestic: A sues B & C for damages caused by an assault and battery. C wants B's wife to testify that C was 10 miles away at the time of the alleged assault and battery. B's spouse does not want to testify as it would humiliate her and

she fears her husband would have to file for divorce. B's spouse was with C ten miles away at the time in question. Also query: Is the testimony "against" B or just "for" C?

c) Contract: A sues B & C, individually and as partners. C calls B's wife to testify as to B's conduct on the date the contract was signed. C wants to establish B had no capacity on the date in question. (e.g. insane or under influence of narcotic or drug.) B's spouse does not want to testify.

d) Debt: A sues B in quantum meruit and notices the deposition of B's wife at once. B is in business and has had hundreds of transactions with A, to which B's wife has first hand knowledge. How is counsel for B's spouse to advise her if and when her testimony is "against" her husband?

One problem Mr. Heafey refers to in Section 40.2 has a solution which does not require legislation, i.e.,

Problem: Plaintiff sues A and is able to use B's spouse as a witness vs. Plaintiffs sues A and B and is unable to use B's spouse as a witness.

Solution: If Plaintiff can sue A only then he can sue A and B in separate actions and probably successfully resist a joinder on the basis that evidence against A would be made unavailable.

In my opinion, the other problems referred to by Mr. Heafey involve the basic determination of whether to alter public policy so as to give more weight to the "truth finding" policy of a trial and a reduction of the "marriage protection" policy. If the Commission still seeks the revision, I believe the resulting alteration of public policy and increased administrative problems should be given more focus in your considerations.

Very truly yours,


LLOYD TUNIK

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Revised July 2, 1968

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

RECOMMENDATION

relating to

EVIDENCE CODE SECTIONS 971 AND 973

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

RECOMMENDATION OF THE
CALIFORNIA LAW REVISION COMMISSION

relating to
EVIDENCE CODE SECTIONS 971 AND 973

The Evidence Code was enacted in 1965 upon recommendation of the Law Revision Commission. Resolution Chapter 130 of the Statutes of 1965 directs the Commission to continue its study of the Evidence Code. Pursuant to this directive, the Commission has undertaken a continuing study of the new code to determine whether any substantive, technical, or clarifying changes are needed. In this connection, the Commission is continuously reviewing texts, law review articles, and communications from judges, lawyers, and others.¹ The Commission has reviewed HEAFEY, CALIFORNIA TRIAL OBJECTIONS (Cal. Cont. Ed. Bar 1967) and has concluded that Sections 971 and 973 require revision to eliminate problems identified by Mr. Heafey. Accordingly, the Commission makes the following recommendations.

¹ For further discussion, see 8 CAL. LAW REVISION COMM.'N REPORTS ..
1314 (1967)

Section 971

Evidence Code Section 971 provides that a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by any adverse party to that proceeding without the prior consent of the witness spouse, unless the party calling the spouse does so in good faith without knowledge of the marital relationship. A violation of the privilege occurs as soon as the married person is called as a witness and before any claim of privilege or objection is made. This privilege is in addition to the privilege of a married person not to testify against his spouse (Evidence Code Section 970).

A multiplicity of parties in an action may lead to complications in the operation of the privilege of a spouse not to be called as a witness and the privilege of a spouse not to testify against his spouse. The privilege not to be called apparently authorizes the non-party spouse to refuse to take the stand for any party adverse to the party spouse even though the testimony sought would relate to a part of the case totally unconnected with the party spouse. As worded, the privilege is unconditional; it is violated by calling the spouse as a witness regardless of whether or not the testimony will be "against" the party spouse.

Edwin A Heafey, Jr., has stated the problem as follows:

For example, if a plaintiff has causes of action against A and B but sues A alone, neither privilege can prevent the plaintiff from calling Mrs. B as a witness and obtaining her testimony on matters that are relevant to the cause of action against A and do not adversely affect B. However, if plaintiff joins A and B in the same action and wants to call Mrs. B for the same testimony, he presumably can be prevented from calling her by her privilege not to be called as a witness by a party

adverse to her spouse . . . and from questioning her by her
privilege not to testify against her spouse. . . .²

Where an action is defended or prosecuted by one spouse for the immediate benefit of the other spouse, either spouse may be called to testify against the other. EVIDENCE CODE SECTION 973(b). However, if the spouses are co-plaintiffs or are co-defendants and the action of each is not considered to be "for the immediate benefit" of the other spouse under Evidence Code Section 973(b), apparently neither spouse can be called as an adverse witness under Evidence Code Section 776 even for testimony solely relating to that spouse's individual case. Moreover, the adverse party apparently cannot even notice or take the deposition of either of the spouses, for the noticing of a deposition might be a violation of the privilege.³

"Allowing a party spouse to use the privilege to avoid giving testimony that would affect only his separate rights and liabilities seems to extend the privilege beyond its underlying purpose of protecting the marital relationship."⁴

If the privilege of a spouse not to be called as a witness were limited to criminal cases, the major part of the problem identified by Mr. Heafey would be avoided without defeating the basic purpose of the privilege. A witness in a civil case could still claim the privilege not to testify against his spouse. An adverse party, however, would then be able to call the spouse of a party to the action to obtain testimony that is not "against"

² HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 315 (Cal. Cont. Ed. Bar 1967).

³ See HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.10 at 317 (Cal. Cont. Ed. Bar 1967).

⁴ Id. § 49.9 at 317.

the party spouse. Accordingly the Commission recommends that Section 971 be amended to limit the privilege provided in that section to criminal cases.⁵

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Apparently this privilege was not recognized in civil cases prior to the adoption of the Evidence Code. Under former Penal Code Section 1322 (repealed Cal. Stats. 1965, Ch. 299, p. 1369, § 145), neither a husband nor a wife was competent to testify against the other in a criminal action except with the consent of both. However, this section was construed by the courts as a waivable privilege rather than an absolute bar; the witness spouse was often forced to take the stand before asserting the privilege. People v. Carmelo, 94 Cal. App 2d 301, 210 P.2d 538 (1949); People v. Moore, 111 Cal. App. 632, 295 Pac. 1039 (1931). Although it was said to be improper for a district attorney to call a defendant's wife in order to force the defendant to invoke the testimonial privilege in front of the jury, such conduct was normally held to be harmless error. See People v. Ward, 50 Cal. 2d 702, 328 P.2d 777 (1958). In one case the court held that it was not prejudicial to force the wife to testify where she originally attempted to assert the spousal privilege. People v. Wade, 53 Cal. 2d 322, 1 Cal. Rptr. 683, 348 P.2d 116 (1959). Thus, the privilege is necessary in criminal cases to avoid the prejudicial effect of the prosecution's calling the spouse as a witness and thereby forcing him to assert the privilege in front of the jury.

Section 973

Section 973(a) provides that a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a spousal privilege under Section 970 or 971 in the proceeding in which the testimony is given. This section should be amended to clarify the rule in litigation involving multiple parties.

In multi-party litigation, a non-party spouse may be called as a witness by a party who is not adverse to the party spouse. In this situation the witness spouse has no privilege to refuse to testify unless the testimony is "against" the party spouse; yet after the witness spouse has testified, all marital testimonial privileges--including the privilege not to testify against the party spouse--are waived, despite the fact that the waiver could not occur if the claim against the party spouse were litigated in a separate action. Thus, the Evidence Code literally provides that the witness spouse can be compelled to waive the privilege.⁶ The problem stems from the breadth of the waiver provision in Section 973(a). The section should be amended to provide for waiver only when the witness spouse testifies for or against the party spouse.

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See HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 314 (Cal. Cont. Ed. Bar 1967).

The Commission's recommendations would be effectuated by the enactment of the following measure:

An act to amend Sections 971 and 973 of the Evidence Code, relating to evidence.

The people of the State of California do enact as follows:

Evidence Code Section 971 (amended)

Section 1. Section 971 of the Evidence Code is amended to read:

971. Except as otherwise provided by statute, a married person whose spouse is a ~~party-to-a~~ defendant in a criminal proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section unless the party calling the spouse does so in good faith without knowledge of the marital relationship.

Comment. Section 971 is amended in order to preclude the assertion by a non-party spouse of a privilege not to be called in a civil proceeding. The former wording of Section 971 apparently authorized a non-party spouse to refuse to take the stand for any party adverse to the party spouse even in multi-party litigation where the testimony sought would relate to a part of the case wholly unconnected with the party spouse. HEAFEY, CALIFORNIA TRIAL OBJECTIONS § 40.2 at 414 (Cal. Cont. Ed. Bar 1967). Apparently the adverse party could not even notice or take depositions from the non-party spouse, for the noticing of a deposition might be held to be a violation of the privilege. Id § 40.10, at 317.

The elimination of the privilege not to be called in a civil proceeding does not necessarily mean that a non-party spouse must testify at the proceeding. The privilege not to testify against one's spouse in any proceeding (Section 970), and the privilege for confidential marital communications (Section 980) both remain in the Evidence Code. The only change is that an adverse party may call a non-party spouse to the stand in a civil case and may demonstrate that the testimony sought to be elicited is not testimony "against" the party spouse. In such a case the testimony should be admitted. If the testimony would be "against" the party spouse, the witness spouse may still claim the privilege not to testify given by Section 970.

Evidence Code Section 973 (amended)

SEC. 2. Section 973 of the Evidence Code is amended to read:

973. (a) Unless erroneously compelled to do so, a married person who ~~testifies-in-a-proceeding-to-which-his spouse-is-a-party,-or-who~~ testifies for or against his spouse in any proceeding, does not have a privilege under this article in the proceeding in which such testimony is given.

(b) There is no privilege under this article in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse.

Comment. Subdivision (a) of Section 973 has been amended to eliminate a problem that existed in litigation involving multiple parties. In multi-party civil litigation, if a non-party spouse is called as a witness by a party other than the party spouse, the witness spouse has no privilege not to be called and has no privilege to refuse to testify unless the testimony is "against" the party spouse. Yet, under the prior wording of the section, after the witness spouse testified in the proceeding, all marital testimonial privileges--including the privilege not to testify against the party spouse--were waived. The section is amended to provide for waiver only when the witness spouse testifies "for" or "against" the party spouse.