April 24, 1957

Memorandum No. 2

Subject: A.B. 248 - Possibility of amendment.

Attached are communications received from the State Bar relating to A.B. 248. Although the State Bar is taking no official position on this bill, I am afraid that the CAJ reports reflect the thinking of many lawyers on this subject. This apprehension is fortified by the fact that John Bohn, counsel for the Senate Judiciary Committee, has advised me that he is opposed to the abolition of the "against" privilege of the party spouse. He is concerned about the possibility that under the revisions proposed in A.B. 248 a wife about to sue for a divorce would be able to coerce a better property settlement than she could otherwise get by threatening to tell the authorities about a crime committed by the husband and to testify concerning it.

If this general attitude concerning the undesirability of tampering with the "against" privilege is shared by the members of the Senate Judiciary Committee the bill would doubtless be tabled in its present form (our experience with A.B. 247, the dead man statute bill, tends to fortify this conclusion). Should we consider proposing, if and when such a fate seems imminent, that the bill be amended to restore the "against" privilege of the party spouse in order to save what we can of the bill and thus accomplish the following limited objectives:

(1) Elimination of the "for" privilege.

(2) A general "clean-up" of the statutes relating to the privilege, including the following:

(a) As to civil actions, separation of provisions relating to privilege re communications from those relating to privilege

re testimony concerning other facts.

(b) Elimination of exceptions relating to criminal proceedings from statutes dealing with privilege in civil actions.

(c) Elimination of certain duplicating and obsolete provisions relating to exceptions to privileges.

(d) Cross-reference in C.C.P. § 1880.1 and Penal Code § 1322 to all other code sections establishing particular exceptions to privilege.

Admittedly, the amendments proposed would substantially undermine the original purpose of A.B. 248. Even so, the bill would accomplish some good, primarily of a technical nature.

Last Monday we made several technical amendments to A.B. 248 which I will explain at the meeting. To facilitate discussion of these amendments and of the further amendments proposed for your consideration herein, I enclose the following:

A. A document showing in strike-out and underline the changes made in A.B. 248 by the amendments adopted on Monday.

B. A document showing in strike-out and underline the changes which would have to be made in A.B. 248 as presently amended to return to the present law insofar as the "against" privilege is concerned.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

att.

THE STATE BAR OF CALIFORNIA

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2100 Central Tower

San Francisco 3

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March 29, 1957

VIA QUICKWAY

Thomas E. Stanton, Jr., Esq., Chairman
California Law Revision Commission
111 Sutter Street
San Francisco, California

Dear Mr. Stanton:

At its March, 1957, meeting the Board of Governors determined to take no position on S.B. 248, a proposal of the Law Revision Commission re witnesses - marital privilege, and directed that you be advised of the views of the Committee on Administration of Justice thereon. Those views are set forth in the enclosure.

Very truly yours,

Jack A. Hayes
Secretary

JAH:ob
enc.

cc: Messrs. McDonough and
Farley w/enc.

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S.B. 248 - Witnesses - Testimony

"For" or "Against" spouse.

Summary of views of Southern and Northern Sections of Committee on Administration of Justice.

1. Substitution of the "For" Rule in civil and criminal cases:

A. The Southern Section favors the principle of S.B. 248, in both civil and criminal cases, insofar as it makes the spouse a competent witness "for" the other spouse.

As to criminal cases, the amendments would prevent a scheming spouse from refusing to testify for her spouse from motives of either blackmail or vengeance. No good reason is perceived why a "witness-spouse" should be permitted to refuse to testify in such cases, if such testimony is desired by the "party-spouse."

As to civil cases, there likewise is no objection to the principle, because if the "party-spouse" does not desire the testimony of the "witness-spouse", all he or she need do is not call the other spouse as a witness.

Insofar as "incompetency" proceedings are concerned, the Southern Section advocates an express exception or amendment dealing with this subject matter.

B. The Northern Section opposes the proposed amendments, in principle.

It does not think there is any real need for the amendments.

In civil cases, it is true that there may be isolated cases in which difficulty is encountered, if the "witness-spouse" has favorable testimony. Presently, C.C.P. 1881(1) requires only the consent of the "party-spouse." If (save possibly in cases involving incompetency of the "party-spouse,") the testimony is favorable, the "party-spouse" may call the other spouse, thereby giving his consent. In many cases, spouses are co-plaintiffs, thereby waiving the "privilege". In civil matters, therefore, the problem seems solely that of the incompetent or alleged incompetent "party-spouse," a limited area. The Northern Section took no action on this special situation.

As to criminal matter, the consent of both spouses is presently required under Penal Code 1322. In such matters, the amendments might have some application, as there an estranged wife might not give her consent.

In the view of the Northern Section, however, there are dangers in the proposed amendments.

1. In criminal cases particularly, comment may be made upon the failure of an accused to call the other spouse, if the evidence otherwise shows such other spouse has knowledge of material facts. Present case law seems to be that, even under the present law, comment is sometimes made by prosecutors where the accused has failed to call the other spouse as a witness. While this is improper, it has been held not reversible error. (See People v. Klor, 32 C.2d 658 - majority; People v. Harmon, 89 C. A. 2d 55). Under fear of such comment, an accused may call his spouse in a criminal case, and on cross examination, the witness spouse may be forced to give damaging testimony.

2. Problems will be created as to the meaning of the word "for". What is the effect of cross examination that brings out testimony that is in fact adverse.

In the view of the Northern Section, the possible damage to the marital relationships outweighs the slight advantage that may be gained in unusual cases where consent is not obtainable.

It is pointed out by the Northern Section that the "for" rule is in effect in a minority of states.

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2. Proposed modification of "against" rule by making the privilege that of the "witness-spouse" alone.

The Commission Report recommends that the "against" privilege be retained, for reasons of social policy, but recommends that the "witness-spouse" alone be given the privilege.

Both the Southern and Northern Sections unite in opposition to this feature. A report states, on this phase:

"It is obvious that these sweeping proposals encompass questions of both legal and social philosophy. Should the law, in the interest of expediency, permit a wife to testify against her husband, without his consent, because her testimony in that particular case may be of substantial importance in arriving at a just result in that case (assuming that she testifies truthfully)? Or might it permit a vindictive spouse to hover close to the sometime vague boundary line between truth and perjury in order to wreak vengeance for some real or fancied wrong at the hands of her hapless spouse? "Hell hath no fury like a woman scorned." Would such a change in a philosophy of law of such long standing have a substantial tendency to diminish the confidence and harmony between husband and wife that are now considered sociologically desirable?"

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"With regard to #4 and #5 above, however, it is the feeling of the writer that this is much too drastic a change to be made in our law. One of the basic considerations for the present existence of this privilege is that it helps preserve domestic harmony and tranquility and thereby protects the family and the home. But it is argued that if the "against" privilege were taken from the party-spouse and given to the witness-spouse, the witness-spouse would be in a better position to determine whether "domesitc tranquility is already hopelessly disrupted" so that

there would be no domestic tranquility to be disturbed by testifying. However, this overlooks another objective of both social and legal philosophy, viz., the law favors reconciliation of separated spouses. It is obvious that once a spouse has testified against his wife any hope that might otherwise have existed for a reconciliation is thrown out the window. It is the opinion of the writer that on balance it were better to give the "against" privilege to the party-spouse and deny it to the witness-spouse. However, it is admitted that this is a question upon which many reasonable minds may differ."

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Both sections recommend the consent of the party spouse be restored.

3. Suggestion of Northern Section as to an action for damages for adultery.

The Northern Section raises the question whether proposed Section 1882 as in this respect would affect C.C. 43.5, enacted in 1939, which provides that no cause of action shall arise for certain offenses, including "criminal conversation."

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For information, a report by Eugene E. Sax of the Southern Section is attached. This is subject to the Northern Section views stated herein.

March 25, 1957

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1956 C.A.J. AGENDA ITEM #18

Witnesses--Privilege of Spouses. (Law Revision Commission)

November 23, 1956
EUGENE E. SAX.

This is a proposal by the Law Revision Commission to enact legislation which would narrow the present husband and wife privilege in both civil and criminal cases. The Board reference is for study and report.

The Commission does not recommend any change in the present law concerning privileged communications between husband and wife during the marriage relation. But the Commission does recommend the creation of an exception to the "against" privilege in incompetency proceedings involving a married person. This was the subject matter of 1956 C.A.J. Agenda Item #18 upon which the southern section of this committee reached the same conclusion (Southern Section Minutes February 29, 1956, Stencil 56-129, p.2, and page R-18), but in the report of this committee of May, 1956, to the Board of Governors the majority of this committee recommended against the proposal "on the ground that it raised questions of social policy in which the State Bar should not become involved." (See Stencil 56-258, p. 17 and 18).

The essence of the Commission's recommendations is as follows:

1. It applies to both civil and criminal actions.

2. It abolishes the "for" privilege of the witness-spouse now in Pe. C. 1322.

3. It abolishes the "for" privilege of the party-spouse now in Pe. C. 1322 and C.C.P. 1881(1).

4. It abolishes the "against" privilege of the party-spouse now in Pe. C. 1322 and C.C.P. 1881(1).

5. It gives the "against" privilege to the witness' spouse alone.

It is obvious that these sweeping proposals encompass questions of both legal and social philosophy. Should the law, in the interest of expediency, permit a wife to testify against her husband, without his consent, because her testimony in that particular case may be of substantial importance in arriving at a just result in that case (assuming that she testifies truthfully)? Or might it permit a vindictive spouse to hover close to the sometime vague boundary line between truth and perjury in order to wreak vengeance for some real or fancied wrong at the hands of her hapless spouse? "Hell hath no fury like a woman scorned". Would such a change in a philosophy of law of such long standing have a substantial tendency to diminish the confidence and harmony between husband and wife that are now considered sociologically desirable?

It is submitted that the above questions may be difficult to answer not only for this committee but for the legislature as well.

I believe #2 above is a salutary proposal. It could prevent a scheming spouse from refusing to testify for her spouse in a criminal case from motives of either blackmail or vengeance. I can perceive no good reason why a witness-spouse should be permitted to refuse to testify if such testimony is desired by the party-spouse.

There is likewise no objection to #3 above because if the party-spouse does not desire the testimony of the witness-spouse, all he need do is not call that spouse as a witness.

With regard to #4 and #5 above, however, it is the feeling of the writer that this is much too drastic a change to be made in our law. One of the basic considerations for the present existence of this privilege is that it helps preserve domestic harmony and tranquility and thereby protects the family and the home. But it is argued that if the "against" privilege were taken from the party-spouse and given to the witness-spouse, the witness-spouse would be in a better position to determine whether "domestic tranquility is already hopelessly disrupted" so that there would be no domestic tranquility to be disturbed by testifying. However, this overlooks another objective of both social and legal philosophy, viz., the law favors reconciliation of separated spouses. It is obvious that once a spouse has testified against his wife any hope that might otherwise have existed for a reconciliation is thrown out the window. It is the opinion of the writer that on balance it were better to give the "against" privilege to the party-spouse and deny it to the witness-spouse. However, it is admitted that this is a question upon which many reasonable minds may differ.

It is believed that an exception to the "against" privilege in incompetency proceedings should be created, it is suggested that this had better be done by express statutory amendments to such effect, perhaps substantially in the form as recommended in the report of the writer, attached to Southern Section Minutes of February 29, 1956, Stencil 56-129, page R-18.

RECOMMENDATIONS

1. That the "for" privilege of the witness-spouse in criminal actions be abolished.

2. That the "for" privilege of the party-spouse in both civil and criminal actions be abolished.

3. That the "against" privilege of the witness-spouse in criminal actions be retained.

4. That the "against" privilege of the party-spouse in both civil and criminal actions be retained.

5. That Section 1881 of the Code of Civil Procedure, Subdivision 1, be amended to exclude therefrom only the provisions relating to criminal actions or proceedings upon the ground that such matters are already covered by Section 1322 of the Penal Code.

6. That an express exception be created for incompetency proceedings substantially in the form as suggested in the Southern Section Minutes, dated February 29, 1956, Stencil 56-129, page R-18.

A.

Code of Civil Procedure Section 1882. A married person may not be compelled to testify against his spouse in any civil action or proceeding except ~~in an action for damages against another person for adultery committed by either husband or wife with such person or~~ in an incompetency proceeding involving the spouse or in a proceeding brought under Title 10a of Part 3 of this code or Title 3 of Part 3 of Division 1 of the Civil Code.

Penal Code Section 1322. A married person may not be compelled to testify against his spouse in a criminal action or proceeding against the spouse except an action or proceeding for:

(a) A crime committed by one spouse against the person or property of the other, whether before or after marriage;

(b) A crime of violence committed by one spouse upon the child or children of either spouse;

(c) Bigamy or adultery;

(d) A crime defined by Sections 266g, 266h, 266i, 270 and 270a of this code or by the "Juvenile Court Law;"

(e) A crime committed against another person by one spouse while engaged in committing and connected with the commission of a crime against the other spouse.

Code of Civil Procedure Section 1882. A married person may not be compelled to testify against his spouse without the consent of the spouse in any civil action or proceeding except; ~~in~~

(a) A civil action or proceeding by one spouse against the other;

(b) ~~an incompetency proceeding involving~~ A hearing to determine the mental competency or condition of the spouse; ~~or in a~~

(c) A proceeding brought under Title 10a of Part 3 of this code or Title 3 of Part 3 of Division 1 of the Civil Code.

Penal Code Section 1322. A married person may not be compelled to testify against his spouse in a criminal action or proceeding against the spouse without the consent of both except an action or proceeding for:

(a) A crime committed by one spouse against the person or property of the other, whether before or after marriage;

(b) A crime of violence committed by one spouse upon the child or children of either spouse;

(c) Bigamy or adultery;

(d) A crime defined by Sections 266g, 266h, 266i, 270 and 270a of this code or by the "Juvenile Court Law;"

(e) A crime committed against another person by one spouse while engaged in committing and connected with the commission of a crime against the other spouse.