9/16/60

Second Supplement to Memorandum No. 83 (1960)

Subject: Uniform Rules of Evidence (privileges)

The attached memorandum was prepared by Commissioner Selvin. This memorandum has been reproduced so that it will be available for reference at the September meeting.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum from H. F. Selvin

Subject: U. R. E. - rule 25(10)

To avoid repetition, at the next meeting at which rule 25(10) is considered, of what must be, by this time, a boring discourse, I am putting my thoughts on the subject into writing for your leisurely and, I hope, favorable attention.

I start with some pretty obvious considerations. Every privilege tends to suppress material evidence. It is only when the evidence would be otherwise admissible that a privilege comes into effective or necessary operation. Yet, we retain various of the privileges in the law because, I assume, their social value is felt to outweigh the occasional or even frequent instance when justice miscarries because of the inability to have material evidence admitted. Unless that is so there is no justification for any privilege.

Consistently enough, and with only one exception, we seek to preserve this value by providing in rule 39 that no presumption or inference may be drawn from the fact that a privilege is exercised. That is a necessary and desirable corollary of recognizing a privilege at all. Without it exercise of a privilege could and in most instances would be more detrimental to the holder than would be disclosure of the information sought to be made inviolate by the privilege.

Inconsistently, however, we not only fail to erect the same safeguard around the so-called self-incrimination privilege, we go farther by making it certain that exercise of the privilege will be legally and practically detrimental to the one who exercises it. I

find no justification, either in logic or policy, for that treatment of the matter. Without meaning any disrespect to those who disagree with me, I believe that treatment to be the product of an emotional reaction to the kind of people who, in widely publicized hearings or investigations dealing with what is today a burning issue, have invoked the privilege. I believe it also to be, in part, the product of the lawyer's besetting sin of putting a tag on a concept and thereafter constructing all thinking on the subject within the area defined by the words used on the tag. The "self-incrimination" tag attached to this privilege immediately suggests that the protected information if disclosed would incriminate. Yet, the history of the struggle that brought the privilege into the law shows that it is really a privilege against testimonial compulsion; and that it was and is the device by which it was sought to prevent the continuance in England and the adoption in this country of those barbaric and even bloody practices which for so long disfigured criminal justice at the common law. It is merely a recognition of the fact that in our system no man should be compelled to give evidence of any fact, however insignificant or harmless in itself, that may be used against him as part of a chain of proof in a criminal prosecution. Resort to the privilege, therefore, is neither necessarily nor always an inferential admission of guilt, any more than, as we properly recognize, is resort to one of the other privileges an

inferential admission of an adverse fact. I shall attempt to demonstrate this in a moment.

The importance of the self-incrimination privilege in our society is shown, I should think, by the fact that it is the only one of the privileges that, in the federal system, in California, and in many other states, is created and preserved in a constitution rather than in a statute or merely in the case law. I claim for it, therefore, a standing at least equal in dignity to that of the other privileges; and I can see no reason why, having granted it by constitutional mandate, we should sap its vitality by a rule of evidence.

The incongruity of our proposed action is demonstrated, at least to my satisfaction, by a consideration of these hypothetical cases -- hypothetical in respect of the use of the privilege, but the first two of which are based on or suggested by factual situations that arose in cases with which I am familiar:

1. Attorney - client: The case is a will-contest. The contestants claim that will was forged by its proponent. The testator was an elderly, nearly blind man who died after an operation in a private hospital. The will was typed and was in excellent legal form. It bore the admittedly genuine signature of the testator. The claim of the contestants was that the testator signed a blank sheet of paper upon the representation that it was a consent to his then impending operation, and that the text was later typed in above that signature. It was felt that to conform

the length of the text to the space available over the signature, the forger must have previously prepared the text; and since the suspected forger was neither a lawyer nor particularly literate, it was quite likely that he had engaged a lawyer to prepare a form. There was no suggestion that the lawyer was a knowing accomplice. Investigation showed that the suspected forger had visited a lawyer's office a day or so before the testator signed. Now, suppose the lawyer is called as a witness and asked to divulge the communications between himself and the proponent. The objection of privilege would be made and sustained. Under rule 39 no presumption of inference adverse to the proponent could be drawn. The justification for that result would be, first, that the privilege should not be impaired by making its invocation the practical equivalent of a disclosure; and, second, that the privilege may have been invoked for various reasons supplying no logical basis for the adverse inference, e.g., (a) the communications related to other matters which the client desired, as was his right, to keep confidential; or (b) the communications related to a will but not the will in question -- a difference that a jury in the course of a long trial might not fully appreciate; or (c) the communications were harmless but the proponent's lawyer was one of those who believe in making the road as rough as possible for the opponent by invoking every objection to admissibility that is available. No doubt, the privilege could have been invoked because disclosure would have been fatal to the proponent's case -- but we do not think this sufficiently likely to permit the inference; otherwise we would not have rule 39.

2. Physician - patient: X. is on trial for manslaughter as the result of a hit-and-run collision. The police believe from the circumstances that X. was injured in the collision. They locate a doctor who was consulted by X. the day following the collision. The doctor is called as a witness and asked questions designed to produce testimony that he treated X. for an injury of the sort that could have been or that he was told by X. had been suffered in the kind of collision involved. An objection on ground of privilege would no doubt be sustained. Here, again, no adverse inference may be drawn. The justification, once more, is the necessity of not impairing the privilege, and the fact that there may have been other reasons for claiming the privilege, e.g., (a) X. was treated for a loathsome disease -- a fact he does not want disclosed; or (b) he was treated for a traumatic injury, not in fact suffered in the collision, but which the jury might infer was suffered there; or (c) he too is represented by the play-it-the-hard way lawyer.

3. Priest-penitent: A defendant in a criminal case is known to be a communicant of a church whose practice includes the confessional. The priest of the parish in which the defendant resides is called and asked questions designed to produce testimony that the defendant confessed the crime of which he is accused. The privilege is claimed and upheld. Rule 39 precludes drawing of an adverse inference, even though, if the facts were known, it would appear that the claim of privilege was motivated by the

fact that just such a confession had been made. On the other hand, the inducing cause may have been (a) a desire to prevent disclosure that, not the crime in question, but some other sin (perhaps not even amounting to a crime) had been confessed; or (b) a conscientious belief that the confessional is sacred and should remain inviolate in all circumstances.

The case of the self-incrimination privilege is not different in principle from these examples. The claim of privilege may have been made for any of a number of reasons supplying no logical basis for the adverse inference, e.g., (a) to prevent disclosure of the commission of some offense other than the one with which the holder is charged; or (b) to prevent disclosure of a fact, harmless and innocent in itself, which together with evidence of other facts (the nature and extent of which the holder may not fully know) will fashion a circumstantial case against the holder; or (c) a conscientious belief that constitutional rights are and should be inviolable; or (d) a belief that the prosecution should make out a case independently of the testimony or testimonial conduct of the defendant.

As the Supreme Court has said: [Grunewald v. U.S., 353 U.S. 391, 421]

> "...Recent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect innocent men. Griswold, The Fifth Amendment Today, 9-30, 53-82. 'Too many, even those

who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege.' Ullmann v. United States, 350 US 422, 426, 100 L ed 511, 518, 76 S Ct 497, 53 ALR2d 1008. See also Slochower v Board of Higher Education, 350 US 551, 100 L ed 692, 76 S Ct 637, when, at the same Term, this Court said at pp. 557, 558: 'The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.'"

If, notwithstanding all this, the inference is permitted to be drawn the defendant would be entitled to dispel it by showing his real reason for claiming the privilege. That, however, is of little, if any, benefit to him; for such a showing would almost always result in the direct or at least indirect disclosure of the information sought to be protected by the privilege.

The current decisional trend is against rule 25(10). The latest California cases of which I am aware are People v. Calhoun, 50 Cal.2d 137 and People v. Snyder, 50 Cal.2d 190. In Calhoun the prosecution introduced evidence, as part of its case-in-chief, that the defendant when called before the grand jury and queried about matters related to the subject-matter of the indictment against him claimed the self-incrimination privilege 47 times. The admission of that evidence was held prejudicially erroneous because "no implication of guilt can be drawn from a defendant's relying on the constitutional guarantees of article I, section 13,

of the Constitution of the Sate of California . . ."

In Snyder, it was held prejudicially erroneous to admit evidence that the defendant, as a witness in the Calhoun trial, had refused to testify on the ground of self-incrimination. It was also held to be error to instruct the jury that the refusal to testify, along with all other facts, could be considered in determining the guilt or innocence of the defendant. Contrary cases -- People v. Kynette, 15 Cal.2d 731, and People v. Wayne, 41 Cal.2d 814, among others -- were overruled.

I realize that neither Calhoun nor Snyder directly settles the question whether such evidence and the adverse inference to be drawn therefrom would be admissible to impeach a defendant who had testified at his trial; or the question whether in a civil proceeding the evidence and inference would be admissible. To my mind, however, they clearly foreshadow a result against admissibility when those two questions do arise; because, as the Court said in Snyder, the "use of evidence of the assertion of the privilege against self-incrimination as an indication of guilt and as support for a verdict is directly contrary to the intent of the constitutional provisions . . ." (Emphasis mine) That intent is just as effective and controlling in a civil case as in a criminal case, and in respect of impeachment as well as in respect of affirmative evidence.

In Calhoun our court approvingly cited Grunewald v. U. S., 353 U. S. 391. There, the defendant testified at his trial to facts consistent with innocence. He was cross-examined about having claimed the self-incrimination privilege before the grand jury when asked

questions directed to those facts. The trial jury was instructed that his claim of privilege could be taken "only as reflecting on his credibility, and that no inference as to guilt or innocence could be drawn therefrom . . ." The court as a whole agreed that no implication of guilt could be drawn from the claim. A majority of the Court held that permitting the cross-examination for purposes of impeachment was error because in the special circumstances of the case the defendant's "claim of the Fifth Amendment privilege before the Brooklyn grand jury in response to questions which he answered at the trial was wholly consistent with innocence . . . . For example, had he stated to the grand jury that he knew Grunewald, the admission would have constituted a link between him and a criminal conspiracy, and this would be true even though he was entirely innocent and even though his friendship with Grunewald was above reproach . . . ." The Chief Justice, and Mr. Justices Black, Douglas and Brennan agreed with the majority in the above, but added that they did not rest their concurrence on the special circumstances of the case. Their view was:

> ". . . I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them.
>
> "It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation

of a privilege deemed worthy of enshrinement in the Constitution . . . ."

These cases fairly represent the present trend. So far as the earlier cases are concerned I should say, as the Supreme Court has said, that "the authority of an older case may be as effectively dissipated by a later trend of decision as by a statement expressly overruling it . . . ." [Sei Fujii v. California, 38 Cal.2d 718, 728.]