File

1/31/63
File: URE Privileges Article

Memorandum No. 63-12

Subject: Study No. 34(L) - Uniform Rules of Evidence (Rules 38, 39 and 40)

Attached to this memorandum as Exhibit I is a copy of the Minutes of the Northern Section of the Committee to consider the Uniform Rules of Evidence relating to Rules 38, 39 and 40. Because the most serious problems are involved in Rule 39, that rule will be discussed last.

RULE 38

Rule 38 is discussed at pages 144 and 145 of the Study. The Minutes of the Northern Section of the State Bar Committee do not indicate whether the Commission's revision was before them when they discussed this rule. In any event, the Northern Section has approved the original URE version of the rule. We have no Minutes of the Southern Section relating to this rule.

You will note that New Jersey's statute enacting this rule modified the rule to incorporate the idea expressed in the Commission's revision of the rule.

RULE 40

Again, the Minutes of the Northern Section do not reflect whether the Commission's action on Rule 40 was before the State Bar Committee. In any event, the State Bar Committee approved Rule 40 as proposed by the Commissioners on Uniform State Laws.

Rule 40 is discussed at pages 148 and 149 of the Study.

RULE 39

The first three subdivisions of Rule 39 have been approved. Subdivision (4) of Rule 39 has been substantially worked over by the Commission but has not been finally approved. The last time it appeared before the Commission it was a part of Rule 25. The Commission decided at that time to defer consideration of the provision until Rule 39 was considered. Both subdivisions (3) and (4) were moved to Rule 39 pursuant to a suggestion made by the Commission. The Northern Section of the State Bar has approved Rule 39 provided that it is so written as to preserve the full effect of Section 13 of Article I of the Constitution. In this regard, subdivisions (3) and (4) were written with the intent to preserve the existing California Law.

Rule 39, generally, is discussed at pages 145 to 147 of the Study. See, also, the discussion at pages 10-13 and 44-46 in connection with subdivisions (3) and (4).

Inasmuch as final action on subdivision (4) has been postponed from time to time because of disagreements over what the existing law is, it would be helpful to review that law briefly.

Article I, Section 13 of the California Constitution provides in part:

> [I]n any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury.

The principal expositions of this provision of the Constitution are found in Justice Traynor's opinions in People v. Albertso

23 Cal.2nd 550 (1944)(concurring opinion at pages 584-586) and People v. Adamson, 27 Cal.2nd 478 (1946). In the Albertson case, Justice Traynor said:

> Before the constitutional amendment it was error to comment on the defendant's failure to take the stand or to advise the jury that it could draw inferences unfavorable to him on that account. (People v. Tyler, 36 Cal. 522.) The constitutional amendment changes the rule of the Tyler case and permits such comment but does not do more. It does not relieve the prosecution of the burden of establishing guilt beyond a reasonable doubt by competent evidence. . . . If the prosecution fails to meet this burden, the jury cannot infer guilt from the failure of the defendant to take the stand. If, however, the prosecution has introduced competent evidence on every element of the crime, the jury, in weighing the evidence and drawing inferences therefrom, may consider the defendant's failure to explain evidence against him that he could reasonably be expected to explain. Under such circumstances, the jury may weigh the evidence most heavily against the accused and draw reasonable inferences that may be unfavorable to him.
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> . . . The failure of the accused to testify derives significance from the presence of evidence that he might "explain or deny by his testimony," for it may be inferred that if he had an explanation he would have given it, or that if the evidence were false he would have denied it.

In People v. Adamson, Justice Traynor said in speaking for the court:

> It is clear from the terms of the constitutional provision that the consideration and comment authorized relates, not to the defendant's failure to take the stand, but to "his failure to explain or deny by his testimony any evidence or facts in the case against him" whether he testifies or not. The constitutional provision thus makes applicable to criminal cases in which the defendant does not testify, the established rule that the failure to produce evidence that is within the power of a party to produce does not affect in some indefinite manner the ultimate issues raised by the pleadings, but relates specifically to the unproduced evidence in question by indicating that this evidence would be adverse. . . .
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> The failure of the accused to testify becomes significant because of the presence of evidence that he

might "explain or . . . deny by his testimony". . . , for it may be inferred that if he had an explanation he would have given it, or that if the evidence were false he would have denied it. . . .

It was never intended, of course, that the 1934 constitutional amendment should relieve the prosecution of the burden of establishing guilt beyond a reasonable doubt by admissible evidence supporting each element of the crime. . . . Nor can the defendant's silence be regarded as a confession. [27 Cal.2d at 488-90.]

It is clear from these expressions that no inferences are to be drawn from the claim of privilege itself. All that the claim of privilege permits the court or the jury to do is to draw unfavorable inferences from other evidence in the case that the defendant should be able to explain because of the fact that the defendant has not seen fit to explain or deny the adverse evidence.

If the constitutional provision had been applied literally, it would have been held applicable in criminal proceedings only. But the California Supreme Court has indicated that it is also applicable in civil proceedings. In Fross v. Wotton, 3 Cal.2nd 384 (1935) the defendants who were accused of transferring property from one to the other to defraud creditors, were called to testify under Code of Civil Procedure Section 2055 and invoked the privilege of self-incrimination. There was considerable evidence of suspicious circumstances in the case. The transfer had been made while the transferor was virtually bankrupt and a voluntary petition in bankruptcy was thereafter filed. The transfer was made after he had been served with a notice of default on a note secured by a trust deed on another piece of property

and, therefore, had reason to anticipate a suit for deficiency judgment. The transferee knew nothing of the property, required no accounting of its operation and supervision by the transferor who retained dominion over the property after the transfer. Despite this evidence the trial court granted a nonsuit. In reversing the Supreme Court said that it was proper to infer from this evidence that the transfer was not bona fide. The court said, inter alia, "the inference of fraud from the irregularities of the instant transaction is reasonable, particularly in view of the refusal of all parties thereto to testify upon the ground that their answers would tend to incriminate them." (At page 393.) Although this case has sometimes been cited for the proposition that inferences may be drawn from the exercise of the privilege against self-incrimination, the foregoing brief review should indicate that the holding in the case is no different from the holdings in such criminal cases as People v. Adamson. It merely held that the refusal of the defendants to testify and explain or deny the evidence against them permitted the trier of fact to draw adverse inferences from that evidence.

The foregoing cases, of course, dealt only with the exercise of the privilege at the trial of the case. Other cases, however, held that exercise of the privilege in different proceedings might be admissible in a proceeding where the person who exercised the privilege was testifying

either for the purpose of impeachment or for some other purpose. In People v. Kynette, 15 Cal.2d 731 (1940), the defendant who was convicted of attempted murder had asserted the privilege before the grand jury but testified in an exculpatory fashion at the trial. Evidence of his assertion of the privilege was introduced as bearing on credibility. In Nelson v. Southern Pacific Company, 8 Cal.2d 648 (1937), the court was concerned with a wreck between an automobile and a train. In the trial court judgment was given for the defendant. The trial court had sustained an objection to a question whether the engineer had invoked the self-incrimination privilege at the coroner's inquest. The Supreme Court held the trial court's ruling in error because, "such a question was proper for impeachment purposes since the claim of privilege gives rise to an inference bearing on the credibility of his statement of lack of negligence upon his part."

In People v. Snyder, 50 Cal.2d 190 (1958), the Kynette case was overruled. That case involved a conviction for conspiracy and perjury. In the trial court the defendant's claim of privilege when he appeared as a witness in a previous trial was admitted on the ground that it showed a consciousness of guilt. The Attorney General contended that the evidence was admissible either on that ground or as an admission by failure to deny an accusatory statement. The Supreme Court, however, rejected these contentions by saying that, "no implication of guilt can be drawn from a defendant's relying

on the constitutional guarantees" relating to self-incrimination. "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 set forth above." People v. Calhoun, 50 Cal.2d 137 (1958) is to the same effect. In People v. Talle, 111 Cal. App.2d 650 (1952), the prosecution forced the defendant to claim the privilege at the inception of the trial by calling him as a witness. The prosecution then commented on the exercise of the privilege. The District Court of Appeal in reversing the conviction emphasized the words in the constitutional amendment which say "in the case against him" and went on to say that "by express constitutional and statutory limitation comment is allowed only when the prosecution has first made out a case that the accused can or should deny.. . . Until that has been done, it is improper to even comment on his silence."

It seems clear from these cases, that at least in the criminal cases Article 1, Section 13 merely means that adverse inferences may be drawn from the evidence in the case if the defendant refuses to deny or explain such evidence by relying on the privilege against self-incrimination. Comment to this effect is permitted by counsel and the court. Subdivision (3) in Rule 39 permits this by referring to the constitutional provision.

What the law is in regard to civil cases is arguable. There would seem to be little doubt that Fross v. Wotton still declares the law, for it declares no more than what the court held to be the law insofar as criminal cases are concerned in People v. Calhoun, People v. Snyder, and People v. Adamson. Nelson v. Southern Pacific Company, which held a prior invocation of the privilege may be used for impeachment purposes, has not been overruled although People v. Kynette which declared the same rule so far as criminal cases are concerned has been overruled. Certainly, the validity of the Nelson case is in doubt because of the Calhoun and the Snyder cases.

The language of subdivison (4) seems unduly broad, for it expressly permits the trier of fact to draw inferences from an exercise of the privilege. The latter part of the subdivision expresses a rule which is at least in doubt as a result of the Calhoun and Snyder cases.

To resolve the impasse which the Commission has reached each time it has considered this subdivision it would seem that the proper way to proceed would be to take the problems raised in subdivision (4) one at a time. The narrowest construction of California law should be considered first and if approved as a policy matter the next matter should be considered. Accordingly, it is suggested that the Commission consider the following questions:

1. In a civil case should counsel and judge be permitted to comment on a party's exercise of the privilege and should the trier of fact be permitted to draw adverse inferences from the evidence against the party because of the fact that he failed to explain or deny such evidence by exercising the privilege?

2. Should evidence of a prior exercise of a privilege by a party to a civil action be admissible for any purpose?

3. Should comment upon the exercise of the privilege by a witness at a civil action or proceeding be permitted and should any inferences be drawn from the evidence in the case as a result of such exercise?

4. Should prior exercise of the privilege by a witness at a civil case be admitted for any purpose?

Respectfully submitted,

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