

7/10/67

Memorandum 67-52

Subject: Study 63 - Evidence Code

At the June meeting the Commission discussed Memorandum 67-30 which reported the "bugs" discovered in the Evidence Code by Edwin A. Heafey of Oakland who is preparing the CEB book on California trial objections. The Commission only briefly discussed and made no decision concerning whether any changes are needed in Evidence Code Sections 970-973. The portion of Memorandum 67-30 which related to these sections is attached as Exhibit I (pink). The text of the sections and the official comments to the sections are set out as Exhibit II (yellow).

Upon reviewing the memorandum, the staff suggests the following disposition of the matters raised:

Section 971

Section 971 should be revised 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.

This revision limits the application of the section to criminal proceedings. It would preclude the prosecution or a codefendant from calling the spouse of a defendant. Mr. Harvey suggested repeal of Section 971, but we believe that the revision set out above eliminates the problems that concerned him and, at the same time, retains the section in the type of case that we primarily had in mind when we drafted the section. See the official comment to Section 971.

Section 973

Subdivision (a) of this section should be revised to read:

(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.

We believe that subdivision (b) should not be revised. Any problems that exist with respect to that subdivision should be left to the courts for resolution in the light of the facts of the particular case.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Extract from Memorandum 67-30

The privileges of a spouse not to be called as a witness by a party adverse to the other spouse and not to testify against the other spouse were apparently drafted with only two-party litigation in mind. As a result, the application of these privileges provisions is somewhat complex, and perhaps irrational, in multi-party litigation. Forgetting for the moment the privilege not to be called as a witness, the privilege not to testify against the other spouse apparently is intended to prevent the elicitation of testimony from the witness-spouse that is intended to be used against the party-spouse. The privilege does not prevent the witness spouse from being forced to testify against another party in the action. However, if the witness spouse testifies at all, the witness spouse has waived all privileges against testifying in the action. It does not matter that the testimony related to issues between other parties; under Section 973 the privilege is gone when the spouse testifies at all in a proceeding to which the other spouse is a party. Moreover, 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 not to be called and has no privilege to refuse to testify. Yet, after the witness spouse has testified, all marital testimonial privileges are waived for the remainder of the proceeding. Thus, the code literally provides that a witness spouse can be compelled to waive the privilege.

Part of the problem seems to stem from the breadth of the waiver provision in Section 973(a). Perhaps some modification along the following lines would eliminate part of the problem:

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

The privilege not to be called as a witness raises some further complications in multi-party litigation or in litigation involving the interests of both spouses. Apparently the privilege may be asserted in multi-party litigation even though the privilege could not be asserted if the dispute between each pair of adverse parties was litigated separately. The privilege apparently authorizes the non-party spouse to refuse to give testimony 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. 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, apparently neither party can be called as an adverse witness under Evidence Code Section 776 even for testimony solely relating to that spouse's individual case. Moreover, Mr. Heafey takes the position that the adverse party cannot even notice or take the deposition of either of the spouses, for the noticing of a deposition is a violation of the privilege. There could be no adverse consequences imposed upon the spouses for failure to make discovery in this fashion because discovery reaches only unprivileged information. Of course, 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. It has been pointed out above that the privilege not to be called does not protect the witness spouse from being called by a party who is not adverse to the party spouse.

I have some question as to whether we ever intended the privilege not to be called to be applicable except when the testimony to be elicited was intended to be used against the other spouse. Yet where multiple

parties are involved, this cannot be determined at times until the questions are asked. The privilege not to be called is violated when the witness is called. The error occurs at that time and not when the judge overrules the claim of privilege (although that would be an error too).

It seems to me that the difficulties with this privilege could be eliminated by the elimination of the privilege not to be called. We included this privilege because the case of People v. Ward, 50 Cal.2d 702, 328 P.2d 777 (1958), held that it was an error 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. Our change in the nature of the testimonial privilege prevents this situation from again arising. The privilege is no longer that of the party spouse. The privilege is that of the witness spouse. Perhaps there may be some prejudice to a party spouse when the other spouse declines to testify against him at the request of an adverse party, but the witness' reliance on a privilege does not create the impression that the defendant is concealing evidence in the same way that the defendant's exercise of the former privilege did. Moreover, I have some doubt as to whether the exercise of this privilege by the witness spouse is that damaging to the party spouse. Mr. Heafey also points out in several places in his draft that the flagrant and repeated forcing of a person to invoke a privilege that counsel knows will be invoked may be misconduct regardless of the privilege involved. It seems to me that the seriousness of the misconduct and its effect upon the trial ought to be evaluated by the judge in each particular context. If an attorney represents a party whose spouse may be called as a witness, he can make sure that the opposing counsel and the judge are well aware of

the fact that the witness spouse's privilege will be invoked. The judge, thus, prior to trial may take such action as may be necessary to prevent any serious misconduct in front of the jury.

Mr. Heafey also raises a question concerning interpretation of Section 973(b). That subdivision provides that there is no marital testimonial privilege in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse. He points out that the prior case law is somewhat uncertain concerning the scope of this exception as it existed prior to the Evidence Code. There is at least one case--Stein v. Superior Court, 174 Cal. App.2d 21, 344 P.2d 406 (1959)--that held that there was no waiver of the privilege merely because the spouses were involuntarily joined as defendants. The spouses had to seek affirmative relief to make the privilege inapplicable. Under this view, if a wife is sued for injuries arising out of an automobile accident involving a vehicle owned by the husband and driven by the wife, the wife can refuse to testify on deposition or under Section 776 on the ground that her testimony will necessarily be against her husband as the owner of the vehicle. I have some doubt that as a policy matter a married person should have a privilege not to testify under Section 776 whenever the litigation affects the liability of his spouse as well as himself. On the other hand, I have some doubt that the privilege should be waived whenever the party spouse's liability, if any, is a liability that may be satisfied out of the community property. If the involvement of the community property worked a waiver of the privilege, there would be virtually no privilege left in civil litigation involving monetary liability. Perhaps Section 973(b) should

be modified to indicate that the term "immediate benefit" in Section 973(b) refers to the situation where affirmative relief is sought for the benefit of both spouses (including the community property) or the liability of the other spouse is necessarily dependent upon the liability of the party spouse as in the vehicle owner-permissive driver situation. Perhaps the distinction that I am searching for is one depending on whether the community property subject to the control of the other spouse is involved in the action. If a party spouse is defending the action for the immediate benefit of the community property subject to the control of the other spouse, then neither should have a privilege not to testify under Section 776. Whether or not these are the proper principles, I suggest that you consider specifically whether some clarification should be attempted or whether the matter should be left to the courts.

The foregoing are somewhat minor defects or ambiguities in the code. I call them to your attention here merely to preserve a record of them so that in your continuing oversight of the Evidence Code you may specifically consider these particular matters.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

EXHIBIT II

EVIDENCE CODE §§ 970-973
WITH OFFICIAL COMMENTS

§ 970. Privilege not to testify against spouse

970. Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding.

Comment. Under this article, a married person has two privileges: (1) a privilege not to testify against his spouse in any proceeding (Section 970) and (2) a privilege not to be called as a witness in any proceeding to which his spouse is a party (Section 971).

The privileges under this article are not as broad as the privilege provided by existing law. Under existing law, a married person has a privilege to prevent his spouse from testifying against him, but only the witness spouse has a privilege under this article. Under the existing law, a married person may refuse to testify for the other spouse, but no such privilege exists under this article. For a discussion of the reasons for these changes in existing law, see the Law Revision Commission's *Comment* to Code of Civil Procedure Section 1881 (superseded by the Evidence Code).

The rationale of the privilege provided by Section 970 not to testify against one's spouse is that such testimony would seriously disturb or disrupt the marital relationship. Society stands to lose more from such disruption than it stands to gain from the testimony which would be available if the privilege did not exist. The privilege is based in part on a previous recommendation and study of the California Law Revision Commission. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to the Marital "For and Against" Testimonial Privilege* at F-1 (1957).

[Law Revision Commission Comment (Recommendation, January 1965)]

§ 971. Privilege not to be called as a witness against spouse

971. Except as otherwise provided by statute, a married person whose spouse is a party to a 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. The privilege of a married person not to be called as a witness against his spouse is somewhat similar to the privilege given the defendant in a criminal case not to be called as a witness (Section 930). This privilege is necessary to avoid the prejudicial effect, for example, of the prosecution's calling the defendant's wife as a witness, thus forcing her to object before the jury. The privilege not to be called as a witness does not apply, however, in a proceeding where the other spouse is not a party. Thus, a married person may be called as a witness in a grand jury proceeding because his spouse is not a party to that proceeding, but the witness in the grand jury proceeding may claim the privilege under Section 970 to refuse to answer a question that would compel him to testify against his spouse.

[Law Revision Commission Comment (Recommendation, January 1965)]

§ 972. When privilege not applicable

972. A married person does not have a privilege under this article in:

(a) A proceeding brought by or on behalf of one spouse against the other spouse.

(b) A proceeding to commit or otherwise place his spouse or his spouse's property, or both, under the control of another because of the spouse's alleged mental or physical condition.

(c) A proceeding brought by or on behalf of a spouse to establish his competence.

(d) A proceeding under the Juvenile Court Law, Chapter 2 (commencing with Section 500) of Part 1 of Division 2 of the Welfare and Institutions Code.

(e) A criminal proceeding in which one spouse is charged with:

(1) A crime against the person or property of the other spouse or of a child of either, whether committed before or during marriage.

(2) A crime against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse, whether committed before or during marriage.

(3) Bigamy or adultery.

(4) A crime defined by Section 270 or 270a of the Penal Code.

Comment. The exceptions to the privileges under this article are similar to those contained in Code of Civil Procedure Section 1881(1) and Penal Code Section 1322, both of which are superseded by the Evidence Code. However, the exceptions in this section have been drafted so that they are consistent with those provided in Article 5 (commencing with Section 980) of this chapter (the privilege for confidential marital communications).

A discussion of comparable exceptions may be found in the *Comments* to the sections in Article 5 of this chapter.

[Law Revision Commission Comment (Recommendation, January 1965)]

§ 973. Waiver of privilege

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 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. Section 973 contains special waiver provisions for the privileges provided by this article.

Subdivision (a). Under subdivision (a), a married person who testifies in a proceeding to which his spouse is a party waives both privileges provided for in this article. Thus, for example, a married person cannot call his spouse as a witness to give favorable testimony and have that spouse invoke the privilege provided in Section 970 to keep from testifying on cross-examination to unfavorable matters; nor can a married person testify for an adverse party as to particular matters and then invoke the privilege not to testify against his spouse as to other matters.

In any proceeding where a married person's spouse is *not a party*, the privilege not to be called as a witness is not available, and a married person may testify like any other witness without waiving the privilege provided under Section 970 so long as he does not testify against his spouse. However, under subdivision (a), the privilege not to testify against his spouse in that proceeding is waived as to all matters if he testifies against his spouse as to any matter.

The word "proceeding" is defined in Section 901 to include any action, civil or criminal. Hence, the privilege is waived for all purposes in an action if the spouse entitled to claim the privilege testifies at any time during the action. For example, if a civil action involves issues being separately tried, a wife whose husband is a party to the litigation may not testify for her husband at one trial and invoke the privilege in order to avoid testifying against him at a separate trial of a different issue. Nor may a wife testify against her husband at a preliminary hearing of a criminal action and refuse to testify against him at the trial.

Subdivision (b). This subdivision precludes married persons from taking unfair advantage of their marital status to escape their duty to give testimony under Section 776, which supersedes Code of Civil Procedure Section 2055. It recognizes a doctrine of waiver that has been developed in the California cases. Thus, for example, when suit is brought to set aside a conveyance from husband to wife allegedly in fraud of the husband's creditors, both spouses being named as defendants, it has been held that setting up the conveyance in the answer as a defense waives the privilege. *Tobias v. Adams*, 201 Cal. 689, 258 Pac. 588 (1927); *Schwartz v. Brandon*, 97 Cal. App. 30, 275 Pac. 448 (1929). But cf. *Marple v. Jackson*, 184 Cal. 411, 193 Pac. 940 (1926). Also, when husband and wife are joined as defendants in a quiet title action and assert a claim to the property, they have been held to have waived the privilege. *Hagen v. Silva*, 139 Cal. App.2d 199, 293 P.2d 143 (1956). And when both spouses joined as plaintiffs in an action to recover damages to one of them, each was held to have waived the privilege as to the testimony of the other. *In re Strand*, 123 Cal. App. 170, 11 P.2d 89 (1932). (It should be noted that, with respect to damages for personal injuries, Civil Code Section 163.5 (added by Cal. Stats. 1957, Ch. 2334, § 1, p. 4066) provides that all damages awarded to a married person in a civil action for personal injuries are the separate property of such married person.) This principle of waiver has seemingly been developed by the case law to prevent a spouse from refusing to testify as to matters which affect his own interest on the ground that such testimony would also be "against" his spouse. It has been held, however, that a spouse does not waive the privilege by making the other spouse his agent, even as to transactions involving the agency. *Ayres v. Wright*, 103 Cal. App. 610, 284 Pac. 1077 (1930). (Legislative Committee Comment (Assembly J., Apr. 6, 1965) 1