

63

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Memorandum 68-16

Subject: Study 63--Evidence Code (Sections 971 and 973)

The California Continuing Education of the Bar recently published California Trial Objections by Edwin A. Heafey, Jr. The Commission previously considered problems in the Evidence Code which are pointed out in the book.

At the September meeting, the Commission determined that Sections 971 and 973 should be amended. The attached draft of a tentative recommendation has been prepared by the staff. The changes made in Sections 971 and 973 were previously approved by the Commission.

Respectfully submitted,

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#63

February 14, 1968

STATE OF CALIFORNIA

CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

EVIDENCE CODE SECTIONS 971 AND 973

March 1968

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

TENTATIVE 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 to determine whether any substantive, technical, or clarifying changes are needed in the Evidence Code. In this connection, the Commission is continuously reviewing texts, law review articles, and communications from judges, lawyers, and others concerning the Evidence Code.¹ The Commission has reviewed HEAFEY, CALIFORNIA TRIAL OBJECTIONS (Cal. Cont. Ed. Bar 1967) and has concluded that Evidence Code Sections 971 and 973 require revision to eliminate problems identified by Mr. Heafey. Accordingly, the Commission makes the following recommendations concerning revision of these sections.

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 privilege not to be called 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). Section 971 should be amended to eliminate the privilege not to be called as a witness in civil cases.

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 despite the fact that it has not been ascertained whether or not the testimony will be "against" the party spouse. Edwin A. Heafey, Jr., has characterized 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 spouse²

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

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).

"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

The difficulties with the privilege of a spouse not to be called as a witness can be cured by eliminating the privilege in civil cases. There was no similar privilege 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

⁴ Id. § 49.9 at p. 317.

necessary in criminal cases to avoid the prejudicial effect of the prosecution calling the spouse as a witness and thereby forcing him to assert the privilege in front of the jury. However, the privilege is not necessary in a civil proceeding. A spouse may still assert the privilege not to testify against his spouse in any proceeding. The elimination of the privilege not to be called in civil cases will allow an adverse party in litigation involving multiple parties to show that the testimony is not "against" the party spouse but pertains to other facets of the case.

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 Sections 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.

The privilege not to testify against the other spouse does not prevent the witness spouse from being forced to testify against another party to 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 to refuse to testify; yet after the witness spouse has testified, all marital testimonial privileges are waived for the remainder of the proceeding 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.⁵ 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. No such privilege existed in civil cases prior to the adoption of the Evidence Code. (See former Penal Code Section 1322, repealed Cal. Stats. 1965, Ch. 299, p. 1369, § 145; former Code of Civil Procedure Section 1881(1), repealed Cal. Stats. 1965, Ch. 299, p. 1361, § 64). 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 would 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 does not relate to 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 cure a defect which existed under the former wording of the section with regard to 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 not to be called and no privilege to refuse to testify. Yet, under the prior wording of the section, after the witness spouse has testified in the proceeding, all marital testimonial privileges are waived for the remainder of the proceeding. Thus, Section 973 literally provided that the witness spouse could be compelled to waive the privilege. The section is amended to provide for waiver only when the witness spouse testifies "for or against" the party spouse.