#63 4/1/68

Memorandum 68-39

Subject: Study 63 - Evidence Code (Privilege Against Self-Incrimination)

Attached as Exhibit I (pink) is a letter from Robert E. Hinerfeld, a Los Angeles attorney, expressing the view that counsel ought to be able to comment on the defendant's claim of the privilege against compulsory self-incrimination in a civil case. Mr. Hinerfeld was involved in a case in which a divorced wife was claiming that her husband had fraudulently concealed community property at the time of the divorce. When the defendant was served with interrogatories he declined to answer them on the grounds that the answers might tend to incriminate him. (The husband was under investigation by the Internal Revenue Service for possible violations of the tax laws.) As a result of the ruling in favor of the privilege in the trial court, the husband is able to conceal property in which the wife has an interest by claiming the privilege against self-incrimination despite the fact that the case concerns information peculiarly within the knowledge of the defendant.

Despite the seemingly harsh result of the rule of Section 913(a) in Mr. Hinerfeld's case, the staff recommends that no change be made in the rule stated in Section 913(a). Because privileges operate to withhold relevant information, they necessarily handicap the court or jury in its effort to reach a just result. Nevertheless, courts and legislatures have determined from time to time that it is so important to keep certain information confidential that the needs of justice should be sacrificed to that end. When it is necessary to grant a privilege, the privilege granted must be broad enough to accomplish its

purpose--it must not be subject to limitations that strike at the very interest the privilege is created to protect. If comment could be made on the exercise of a privilege and adverse inferences drawn therefrom, a litigant would be under great pressure to forgo his claim of privilege and the protection sought to be afforded by the privilege would be largely negated. Moreover, the inferences which might be drawn would, in many instances, be quite unwarranted.

In the recent criminal case of People v. Bernal, 254 A.C.A. 316 (1967), the court made a detailed statement of policy which indicates that the rule against comment should be retained in civil cases. The text of that opinion is attached as Exhibit II (yellow) and should be read by the Commission before the meeting.

Respectfully submitted,

Gordon E. McClintock
Junior Counsel

Memorandum 68-39

EXHIBIT I

LAW OFFICES

SIMON, SHERIDAN, MURPHY, THORNTON & MEDVENE

623 SOUTH KINGSLEY DRIVE

LOS ANGELES, CALIFORNIA 90005

TELEPHONE
DUNKIRK 6-3500

WILLIAM G. SIMON
THOMAS R. SHERIDAN
RICHARD A. MURPHY
TIMOTHY M. THORNTON
EDWARD M. MEDVENE
ROBERT E. HINERFELD

February 28, 1968

Mr. John H. De Moully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California

Dear Mr. De Moully:

In a recent civil action undertaken by this firm an interesting problem, apparently of first impression, was presented under the new California Evidence Code. The action was one for extrinsic fraud brought by a divorced wife against her former husband in which she claimed that in the settlement of their divorce case he had concealed from her the existence of certain community property in which she had an interest. On behalf of the plaintiff ex-wife, we served a set of 83 interrogatories on counsel for the husband. The husband's reply was to answer the first and second questions (his name and address) and to decline to answer the remaining 81 questions on the grounds that the answers to the questions might tend to incriminate him. The questions concerned his property holdings during and after the marriage.

We brought on a motion to compel answers to the interrogatories, contending that a bare refusal to answer them on the grounds of the privilege against compulsory self-incrimination was insufficient, especially without a detailed attempt by the questioned party to explain, question by question, how an answer to each question might tend to incriminate him. In response to our motion, the husband's counsel filed his declaration in support of the refusal to answer, stating in substance that his client was then under investigation by the Intelligence Division of the Internal Revenue Service for possible criminal violations of the Internal Revenue laws. We rejoined with the contention that the husband had waived his Fifth Amendment privilege by filing a verified answer to our complaint and alleging in the answer by various items of affirmative matter, including certain allegations responsive to the allegations in the complaint, to the effect that he had recovered a tax refund on account of tax years during the period of the marriage and had failed to divide that refund with the plaintiff.

The legal problem presented by the Evidence Code arises under §913(a), which prohibits comment on, and adverse inference being drawn from, the exercise of any privilege covered by Division 8 of the Code, and § 940, which incorporates into the Code the privilege against compulsory self-incrimination under the Constitution of the United States and the law of the State of California. We pointed out to the trial court that if it sustained the husband's claim of the privilege, §913(a) of the Evidence Code might have the effect of preventing any sanctions from being imposed against the defendant husband despite the sanction procedures authorized by Code of Civil Procedure § 2034. The court indicated that it recognized the problem and that no ultimate solution was available in the face of the existing statutes. The court's resolution of the problem is reflected in the enclosed copy of a minute order on the motion. The order amounts to a compromise of interests which is probably not a solution of the problem but may be the most that is permitted under the existing law.

The ruling is less than satisfactory to the plaintiff because it does not prohibit the defendant ex-husband from offering evidence other than his own testimony in support of his verified answer. In addition, the ruling does not in any way prohibit the husband, who is the manager of the community property owing fiduciary obligations to his wife, from freely concealing property in which the wife has an interest, thereby preventing her from obtaining any evidence which would tend to establish her property rights in a divorce action.

Indeed, if a subsequent motion, under Code of Civil Procedure § 2034, to strike the entirety of the defendant ex-husband's answer, were granted, the plaintiff ex-wife might be deprived of any opportunity to produce affirmative evidence in support of her complaint, which evidence may be exclusively within the knowledge of the defendant.

If the wife, or former wife, is barred by the Fifth Amendment privilege against compulsory self-incrimination from cross-examining the manager, or former manager, of the marital community, §912(a) of the Evidence Code may have the effect of substantially expropriating an innocent wife.

With the facts of this case in mind, it is our belief that the Law Revision Commission should consider the desirability of amending Evidence Code §913(a) to exclude from its scope in a civil action or proceeding the privilege against compulsory

self-incrimination under Evidence Code §940. Otherwise, in certain civil proceedings such as the instant one, the privilege against compulsory self-incrimination can be utilized by a malefactor as a sword rather than simply as a shield. Where information is peculiarly within the knowledge of one party to a civil action and pretrial discovery is effectively barred to the opposing party by reason of the Fifth Amendment, Evidence Code §913(a) in its present form can well have the unintended result of utterly destroying a plaintiff's cause of action.

Sincerely,

SIMON, SHERIDAN, MURPHY,
THORNTON & MEDVENE

By: Robert E. Hinerfeld
ROBERT E. HINERFELD

Enclosure

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NATURE OF PROCEEDINGS

Motion of plaintiff for order to require defendant to further answer certain interrogatories

and

for reasonable expenses including reasonable attorney's fees (third call)

SUBMITTED.

LATER: MOTION TO COMPEL FURTHER RESPONSE IS GRANTED AS TO INTERROGATORY 23 AND DENIED AS TO ALL OTHERS ON THE BASIS OF DEFENDANT'S CLAIM OF PRIVILEGE AGAINST SELF INCRIMINATION. THE COURT RECOGNIZES THAT IN THE EVENT THAT DEFENDANT SHOULD ELECT TO WAIVE HIS PRIVILEGE BY TESTIFYING AT THE TIME OF TRIAL PLAINTIFF SHOULD THEN BE ENTITLED TO A CONTINUANCE TO PURSUE DISCOVERY. THE COURT THEREFORE, IN THE INTEREST OF CONTROL OF ITS CALENDAR, AND OF THE DISCOVERY PROCESS OF THIS LITIGATION, ORDERS THAT DEFENDANT SHALL NOT BE PERMITTED TO TESTIFY AT THE TIME OF TRIAL AS TO ANY MATTER OR ITEM WHICH THE PRIVILEGE OF SELF INCRIMINATION HAS BEEN CLAIMED IN RESISTANCE TO THIS MOTION UNLESS AT LEAST 60 DAYS PRIOR TO RETRIAL HEARING OR 90 DAYS PRIOR TO TRIAL IF ONE IS SCHEDULED DEFENDANT SHALL HAVE SERVED AND FILED FULL AND COMPLETE ANSWERS TO THE INTERROGATORIES WHICH ARE THE SUBJECT OF THIS MOTION WITHOUT FURTHER OBJECTION.

MOTION FOR SANCTIONS IS DENIED.

PLAINTIFF MAY FILE AND SERVE FURTHER INTERROGATORIES CONSISTENT WITH THIS ORDER.

Date Mar 29,1967(3) Dept 63

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EXHIBIT III

§ 913. Comment on, and inferences from, exercise of privilege. (a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

(b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding. (Stats. 1965, c. 299, § 913.)

Comment—Assembly Committee on Judiciary

Section 913 prohibits any comment on the exercise of a privilege and provides that the trier of fact may not draw any inference therefrom. Except as noted below, this probably states existing law. See People v. Wilkes, 44 Cal.2d 679, 284 P.2d 481 (1955). In addition, the court is required, upon request of a party who may be adversely affected, to instruct the jury that no presumption arises and that no inference is to be drawn from the exercise of a privilege. If comment could be made on the exercise of a privilege and adverse inferences drawn therefrom, a litigant would be under great pressure to forgo his claim of privilege and the protection sought to be afforded by the privilege would be largely negated. Moreover, the inferences which might be drawn would, in many instances, be quite unwarranted.

It should be noted that Section 913 deals only with comment upon, and the drawing of adverse inferences from, the exercise of a privilege. Section 913 does not purport to deal with the inferences that may be drawn from, or the comment that may be made upon, the evidence in the case.

Section 13 of Article I of the California Constitution provides that, in a criminal case, the failure of the defendant to explain or to deny by his testimony the evidence in the case against him may be commented upon. The courts, in reliance on this provision, have held that the failure of a party in either a civil or criminal case to explain or to deny the evidence against him may be considered in determining what inferences should be drawn from that evidence. People v. Adamson, 27 Cal.2d 478, 165 P.2d 3 (1946); Fross v. Wotton, 3 Cal.2d 384, 44 P.2d 350 (1935). However, the cases have emphasized that this right of comment and consideration does not extend in criminal cases to the drawing of inferences from the claim of privilege itself. Inferences may be drawn only from the evidence in the case and the defendant's failure to explain or deny such evidence. People v. Ashley, 42 Cal.2d 246, 267 P.2d 271 (1954); People v. Adamson, supra, 27 Cal.2d 478, 165 P.2d 3 (1946). Section 413 of the Evidence Code expresses the principle underlying this constitutional provision; nothing in Section 913 affects the application of Section 413 in either criminal or civil cases. See the Comment to Evidence Code § 413.

Thus, for example, it is perfectly proper under the Evidence Code for counsel to point out that the evidence against the other party is uncontradicted.

Section 913 may modify existing California law as it applies in civil cases. In Nelson v. Southern Pacific Co., 8 Cal.2d 648, 67 P.2d 682 (1937), the Supreme Court held that evidence of a person's exercise of the privilege against self-incrimination in a prior proceeding may be shown for impeachment purposes if he testifies in a self-exculpatory manner in a subsequent proceeding. The Supreme Court within recent years has overruled statements in certain criminal cases declaring a similar rule. People v. Snyder, 50 Cal.2d 190, 197, 324 P.2d 1, 6 (1958) (overruling or disapproving several cases there cited). See also People v. Sharer, 61 Cal.2d 869, 40 Cal.Rptr. 851, 395 P.2d 899 (1964). Section 913 will, in effect, overrule the holding in the Nelson case, for it declares that no inference may be drawn from an exercise of a privilege either on the issue of credibility or on any other issue, whether the privilege was exercised in the instant proceeding or on a prior occasion. The status of the rule in the Nelson case has been in doubt because of the recent holdings in criminal cases; Section 913 eliminates any remaining basis for applying a different rule in civil cases.

There is some language in Fross v. Wotton, 3 Cal.2d 384, 44 P.2d 350 (1935), that indicates that unfavorable inferences may be drawn in a civil case from a party's claim of the privilege against self-incrimination during the case itself. Such language was unnecessary to that decision; but, if it does indicate California law, that law is changed by Evidence Code Sections 413 and 913. Under these sections, it is clear that, in civil cases as well as criminal cases, inferences may be drawn only from the evidence in the case, not from the claim of privilege.