#63 3/14/73

Memorandum 73-3

Subject: Study 63 - Evidence Code ("Erroneously Compelled" Disclosure of Privileged Information)

Attached are two copies of a tentative recommendation prepared by the staff to deal with an evidence problem. The problem and the nature of the revision needed are discussed in the attached draft, and we do not duplicate that discussion here.

The draft recommendation has been prepared in response to two letters (attached as Exhibit I) from Judge Herbert S. Herlands. Judge Herlands recently called me to determine what action, if any, the Commission had taken with respect to his letters. I advised him that I would work the matter into the Commission's meeting agenda as soon as possible and advise him as to the action taken by the Commission.

Also attached are the following background materials:

Exhibit II--text and official Comments to Sections 912 and 919 of the Evidence Code

Exhibit III--opinion in Markwell v. Sykes, the case discussed in the tentative recommendation and in the letters from Judge Herlands

We believe that the draft recommendation merely makes clear the meaning of the Evidence Code provisions and reflects desirable policy. Accordingly, we suggest that it be approved for distribution for comment and request that you make your suggested editorial changes on one copy to return to the staff at the Commission meeting.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 73-3

EXHIBIT I

Superior Court of the State of California
County of Orange
Santa Ana, California

Chambers of
HERBERT S. HERLANDS
Judge of Superior Court

April 19, 1972

Professor John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law-Stanford University
Stanford, California 94305

Dear Professor DeMoully:

Since you are continuously working on the Evidence Code, I should like to present a problem to the Commission that, in my opinion, needs clarification.

Evidence Code § 919 provides that "disclosure of privileged information is inadmissible against a holder of the privilege if . . . . a person authorized to claim the privilege claimed it but nevertheless disclosure erroneously was required to be made . . . . ." (underlining added).

Suppose, in an action, that a defendant is erroneously ordered, during discovery proceedings, to reveal, over his objection, relevant but privileged statements to his attorney. Suppose, further, that the defendant neither takes any steps in a higher court to challenge the erroneous order nor risks citation for contempt by refusal to obey. He discloses the privileged matter to plaintiff.

Suppose, further, that during the trial of the action, plaintiff offers to introduce such statements and defendant objects, citing Section 919. Plaintiff counters by citing Markwell v. Sykes, 173 C.A. 2d 642, 649-650 (1959), and by arguing that, since defendant did not take steps to challenge the erroneous order and since defendant disclosed the privileged matter, defendant had "waived" his objection.

Plaintiff also argues: (1) that defendant was not "required" to make disclosure within the meaning of Section 919 because defendant did not pursue his remedies in higher courts to invalidate the order; (2) that the Law Revision Commission Official Comment, original report and research study all refer to erroneous orders in a "prior" proceeding, whereas this erroneous order was issued in the same proceeding; and (3) that Section 919 purports to state existing law, makes no mention of Markwell v. Sykes, supra, and, therefore, may not be interpreted to overrule that case.

If there is a ready answer in the Code or its Comments, I would be grateful for your informing me of it. If the matter is confused, I hope the Commission will be able to eliminate the confusion.

Sincerely,

Herbert S. Herlands
Judge of the Superior Court

HSH:pas

cc: Hon. Bernard Jefferson
Los Angeles Superior Court

Superior Court of the State of California
County of Orange
Santa Ana, California

Chambers of
HERBERT S. HERLANDS
Judge of Superior Court

December 18, 1972

Professor John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law, Stanford University
Stanford, California 94305

Dear Professor DeMoully:

Please excuse the inordinate delay in answering your letter of September 29, 1972, relating to Section 919 of the Evidence Code. I have been involved in a series of urgent matters and have not had an opportunity to review the problems I had described in my letter to you of April 19, 1972.

My opinion is that Sections 912 and 919 ought to be amended and supplemented by additional language, and that the Official Comment to these Sections ought to be revised in similar fashion. The purpose of the revisions should be to eliminate the ambiguities I discussed and to explicitly overrule Markwell v. Sykes, 173 C.A. 2d 642, 649-650 (1959), since that decision seems to be inconsistent with the philosophy underlying Sections 912 and 919.

It seems quite clear to me from the Code and Comments that an erroneous judicial order to disclose the privileged matter constitutes "coercion" and "requires" disclosure; that, contrary to Markwell, such a disclosure is not "public property", is not "irrevocable" and may be "recalled." It should not make any difference whether the coerced disclosure occurs in the "same" or a "prior" proceeding.

From the vantage point of "Law of the case", as that doctrine is applied in California, a decision of one trial judge is not, in the absence of Statutes to the contrary, binding on another judge of the same court at a later hearing. For example, the law and motion judge may overrule a general demurrer to a complaint, but the trial judge may decide the complaint does not state a cause of action. What Markwell does (sub silentio) is create an exception to the foregoing general rule by making the order of the first judge binding on the litigants unless the party claiming the privilege obtains prompt appellate review of the erroneous order.

Thus, Markwell seems to be in conflict not only with the Evidence Code but with the way in which California generally handles "law of the case."

I would, therefore, revise Sections 912 and 919 and their comments as set forth in separate sheets enclosed herewith.

Sincerely,

Herbert S. Herlands
Judge of the Superior Court

HSH:hbs
Encls.
cc: Hon. Bernard Jefferson
Judge of the Superior Court
County of Los Angeles
111 North Hill Street
Los Angeles, California

PROPOSED REVISION TO SUBDIVISION (a) OF SECTION 912

The last sentence of Suvdivision (a) of Section 912 should be changed by converting the period that ends that sentence into a comma and adding the following language:

"except that the failure to seek review of an order rejecting the claim of privilege by the holder and directing disclosure shall not indicate consent to disclosure."

PROPOSED ADDITION TO OFFICIAL COMMENT TO SUBDIVISION (a) OF SECTION 912

The following language should be added to the end of that comment:

"Subdivision (a) expressly states that, once the holder of the privilege claims it without success, however, and is erroneously ordered to make disclosure, his failure to reassert the privilege by seeking review of the order does not indicate any consent to the disclosure and leaves the disclosure as one made under coercion. This portion of Subdivision (a) is probably in conflict with Markwell v. Sykes 173 Cal. App. 2d 642, 649-650 (1959)."

NEW SUB-PARAGRAPH (a) OF SECTION 919

§ 919. ADMISSIBILITY WHERE DISCLOSURE ERRONEOUSLY COMPELLED.

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(a) A person authorized to claim the privilege claimed it ~~but nevertheless disclosure erroneously was required to be made~~, or in the same or a prior proceeding, was erroneously ordered by the Court or presiding officer before whom the privilege was claimed to make the disclosure, and made the disclosure without seeking review, by a higher tribunal, of the order directing disclosure.

REVISION OF OFFICIAL COMMENT TO SECTION 919

The last paragraph of the Official Comment should be revised as follows:

Section 919 probably states existing law/ in part. See People v. Abair, 102 Cal. App. 2d 765, 228 P. 2d 336 (1951) (prior disclosure by an attorney held inadmissible in a later proceeding where the holder of the privilege had first opportunity to object to attorney's testifying). See also People v. Kor, 129 Cal. App. 2d 436, 277 P.2d 94 (1954). ~~However, there is little case authority upon the proposition.~~ Although Markwell v. Sykes, 173 Cal. App. 2d 642, 649-50 (1959) indicates that, after disclosure has been erroneously required to be made by order of a trial court, the failure to seek review of the erroneous order results in the admissibility of the information disclosed. Sections 919 and 912 resolve the question by expressly eliminating such review as a condition of inadmissibility and treat such disclosure as coerced.

§ 912. Waiver of privilege. (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), or 1034 (privilege of clergyman) is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating his consent to the disclosure, including his failure to claim the privilege in any proceeding in which he has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), or 1014 (psychotherapist-patient privilege), a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

(c) A disclosure that is itself privileged is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), or 1014 (psychotherapist-patient privilege), when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, or psychotherapist was consulted, is not a waiver of the privilege. (Stats. 1965, c. 299, § 912.)

Comment—Senate Committee on Judiciary

This section covers in some detail the matter of waiver of those privileges that protect confidential communications.

Subdivision (a). Subdivision (a) states the general rule with respect to the manner in which a privilege is waived. Failure to claim the privilege where the holder of the privilege has the legal standing and the opportunity to claim the privilege constitutes a waiver. This seems to be the existing law. See City & County of San Francisco v. Superior Court, 37 Cal.2d 227, 233, 231 P.2d 26, 29 (1951); Lissak v. Crocker Estate Co., 119 Cal. 442, 51 P. 688 (1897). There is, however,

at least one case that is out of harmony with this rule. People v. Kor, 129 Cal.App.2d 436, 277 P.2d 94 (1954) (defendant's failure to claim privilege to prevent a witness from testifying to a communication between the defendant and his attorney held not to waive the privilege to prevent the attorney from similarly testifying).

Subdivision (b). A waiver of the privilege by a joint holder of the privilege does not operate to waive the privilege for any of the other joint holders of the privilege. This codifies existing law. See People v. Kor, 129 Cal.App.2d 436, 277 P.2d 94 (1954); People v. Abair, 102 Cal. App.2d 765, 228 P.2d 336 (1951).

Subdivision (c). A privilege is not waived when a revelation of the privileged matter takes place in another privileged communication. Thus, for example, a person does not waive his lawyer-client privilege by telling his wife in confidence what it was that he told his attorney. Nor does a person waive the marital communication privilege by telling his attorney in confidence in the course of the attorney-client relationship what it was that he told his wife. And a person does not waive the lawyer-client privilege as to a communication by relating it to another attorney in the course of a separate relationship. A privileged communication should not cease to be privileged merely because it has been related in the course of another privileged communication. The theory underlying the concept of waiver is that the holder of the privilege has abandoned the secrecy to which he is entitled under the privilege. Where the revelation of the privileged matter takes place in another privileged communication, there has not been such an abandonment. Of course, this rule does not apply unless the revelation was within the scope of the relationship in which it was made; a client consulting his lawyer on a contract matter who blurts out that he told his doctor that he had a venereal disease has waived the privilege, even though he intended the revelation to be confidential, because the revelation was not necessary to the contract business at hand.

Subdivision (d). Subdivision (d) is designed to maintain the confidentiality of communications in certain situations where the communications are disclosed to others in the course of accomplishing the purpose for which the lawyer, physician, or psychotherapist was consulted. For example, where a confidential communication from a client is related by his attorney to a physician, appraiser, or other expert in order to obtain that person's assistance so that the attorney will better be able to advise his client, the disclosure is not a waiver of the privilege, even though the disclosure is made with the client's knowledge and consent. Nor would a physician's or psychotherapist's keeping of confidential records necessary to diagnose or treat a patient, such as confidential hospital records, be a waiver of the privilege, even though other authorized persons have access to the records. Similarly, the patient's presentation of a physician's prescription to a registered pharmacist would not constitute a waiver of the physician-patient privilege because such disclosure is reasonably necessary for the accomplishment of the purpose for which the physician is consulted. See also Evidence Code

§ 992. Communications such as these, when made in confidence, should not operate to destroy the privilege even when they are made with the consent of the client or patient. Here, again, the privilege holder has not evidenced any abandonment of secrecy. Hence, he should be entitled to maintain the confidential nature of his communications to his attorney or physician despite the necessary further disclosure.

Subdivision (d) may change California law. Green v. Superior Court, 220 Cal.App.2d 121, 33 Cal. Rptr. 604 (1963) (hearing denied), held that the physician-patient privilege did not provide protection against disclosure by a pharmacist of information concerning the nature of drugs dispensed upon prescription. See also Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949) (applying the California law of privileges and holding that a lawyer's revelation to an accountant of a client's communication to the lawyer waived the client's privilege if such revelation was authorized by the client).

§ 919. Admissibility where disclosure erroneously compelled. Evidence of a statement or other disclosure of privileged information is inadmissible against a holder of the privilege if:

(a) A person authorized to claim the privilege claimed it but nevertheless disclosure erroneously was required to be made; or

(b) The presiding officer did not exclude the privileged information as required by Section 916. (Stats.1965, c. 299, § 919.)

Comment—Law Revision Commission

Section 919 protects a holder of a privilege from the detriment he would otherwise suffer in a later proceeding when, in a prior proceeding, the presiding officer erroneously overruled a claim of privilege and compelled revelation of the privileged information. Although Section 912 provides that such a coerced disclosure does not waive a privilege, it does not provide specifically that evidence of the prior disclosure is inadmissible; Section 919 assures the inadmissibility of such evidence in the subsequent proceeding.

Section 919 probably states existing law. See People v. Abair, 102 Cal.App.2d 765, 228 P.2d 336 (1951) (prior disclosure by an attorney held inadmissible in a later proceeding where the holder of the privilege had first opportunity to object to attorney's testifying). See also People v. Kor, 129 Cal.App.2d 436, 277 P.2d 94 (1954). However, there is little case authority upon the proposition.

Memo 73-3

EXHIBIT III

[Civ. No. 23655. Second Dist., Div. Two. Sept. 14, 1959.]

MARGARET MARKWELL, Appellant, v. RUBY SYKES, Respondent.

[1a, 1b] Witnesses—Privileged Communications—Public Officers.—In a slander action in which plaintiff's principal witness, at the time of the occurrence sued on, was employed as a social worker for a county public welfare commission, it was error to hold that her testimony was privileged under Code Civ. Proc., § 1881, subd. 5, on objection by defendant, and to grant a nonsuit, where, at a proceeding to take such witness' deposition, the county's objection that the testimony was privileged was overruled by a judge other than the trial judge and the witness had then testified fully as to the claimed privileged matter, since defendant had no privilege she could claim pertaining to the allegedly privileged information and the commission had waived its privilege by failing to insist on it after

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[1] Privilege of communication made to public officers, notes, 9 **A.L.R.** 1099; 59 **A.L.R.** 1555. See also **Cal.Jur.**, Witnesses, § 31; **Am.Jur.**, Witnesses, §§ 535, 536.

McK. Dig References: [1, 2, 4] Witnesses, § 60; [3, 5, 7] Witnesses, § 62; [6] Motions and Orders, § 13; [8, 9] Appeal and Error, § 188.

its objection was overruled and by allowing the witness to testify.

[2] **Id. — Privileged Communications — Public Officers.** — A public officer's privilege with respect to communications made to him in official confidence is for the benefit of the state or its agencies, and the cloak of testimonial immunity is thrown only around such public officials.

[3] **Id.—Privileged Communications—Waiver.**—When the right of waiver of a public officer's privilege with respect to communications made to him in official confidence exists, it cannot be exercised by a subordinate employee in the exercise of his own discretion.

[4] **Id.—Privileged Communications—Public Officers.**—Whether a privilege of nondisclosure of communications made to a public officer in his official confidence exists is a question for the court, not for the head of a department, to determine.

[5] **Id.—Privileged Communications—Waiver.**—Where a public officer, during the taking of his deposition, refuses to answer questions under a claim of privilege, is then directed by a judge to answer all allegedly privileged questions, and neither he nor his superiors pursue any of the expeditious remedies open to them to challenge the court's order, and do not renew their objections on resumption of the deposition or renew any claim of privilege at the trial of the matter, disclosure by the public officer of the matter claimed to be privileged as a result of the court's order is an irrevocable thing and results in waiver of the privilege.

[6] **Motions and Orders — Intermediate Orders — Operation and Effect.**—The principle that an intermediate order is subject to review and reversal in the trial court is not absolute. Since such an order, like a judgment, is binding only so long as it has not been performed, when one judge undertakes to reverse it he cannot undo what has been done pursuant to it.

[7] **Witnesses — Privileged Communications — Waiver.** — A trial judge's ruling that he was not bound by another judge's ruling directing a public officer to answer questions pertaining to allegedly privileged matter did not and could not erase the fact that the officer's department, through her, had spread the entire privileged matter on the record after the other judge's direction to answer the disputed questions and had thus effectually waived any further objection it might have had thereto.

[8] **Appeal—Objections—Nonsuit.**—On appeal from a judgment of nonsuit in a slander action, the nonsuit could not be justified on the grounds of absence of proof of falsity, malice, damage or excuse for delaying the suit for more than one year where the only objection made by defendant as a basis for the nonsuit related to the subject of privilege and the ground stated

was "an insufficiency of evidence to prove the allegations contained in the complaint" which could not have been corrected by further proof because of the court's sustaining the objection relating to privilege as to plaintiff's principal witness.

[9] Id.—Objections—Nonsuit.—Grounds not specified in a motion for a nonsuit will be considered by an appellate court only if it is clear that the defect is one that could not have been remedied had it been called to plaintiff's attention by the motion. This rule is complementary to the requirement that a party specify the grounds on which his motion for nonsuit is based.

APPEAL from a judgment of the Superior Court of Los Angeles County. Jerold E. Weil, Judge. Reversed.

Action for damages for slander. Judgment of nonsuit reversed.

Brock, Fleishman & Rykoff and Robert L. Brock for Appellant.

Robert A. Cushman, Melvin B. Grover and Henry E. Kappler for Respondent.

ASHBURN, J.—Appeal from judgment of nonsuit in plaintiff's slander action. The amended complaint alleged that plaintiff conducted a rest home for aged persons in Los Angeles pursuant to license issued by the Department of Social Welfare of the County of Los Angeles; that defendant knew that said department received complaints and ordered inspections of the operation of rest homes. That on July 28, 1954, defendant, acting under an assumed name, verbally stated to Marjorie Skinner, one of the deputies in said department: "That, 'plaintiff used hypodermic needles and injected narcotics into the bodies of her patients to keep them quiet so that she could conduct drinking parties and gambling in her home.' That, 'plaintiff locked her patients in bedrooms of her home after administering to them a narcotic shot to keep them quiet, so that she could conduct drinking parties and gambling in her home.' That, 'plaintiff had insane patients locked in her bedrooms to keep them quiet while she conducted wild parties for drinking and gambling in her home.' That, 'plaintiff permitted her patients to participate in gambling on her premises and afterwards administered to them a shot (implying a narcotic shot), locked them up in

her bedrooms, so that she would not be bothered with them any more.' That, 'plaintiff operated and conducted gambling in her garage on her premises.'" It was also alleged that said statements were false and malicious, known to be false, made with malice and ill will toward plaintiff and with intent to injure her in her business etc.; concealment of the cause of action was also charged and damages were alleged.

[1a] Appellant's opening brief appropriately says: "The nonsuit was the result of a ruling by the trial court that the principal witness for appellant was incompetent to testify with respect to material and relevant facts in support of appellant's causes of action solely because of the provisions of section 1881, subdivision 5 of the Code of Civil Procedure which, in the view of the trial court, barred the witness' testimony as privileged communications. Whether the construction and application of the aforesaid statute by the Court below, in the light of the particular record herein, was correct is the fundamental question presented on this appeal." Said section 1881 says: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person can not be examined as a witness in the following cases: . . . 5. [Public officers.] A public officer can not be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."

Prior to trial defendant initiated proceedings for the taking of the deposition of said Marjorie Skinner, who testified that she was then a retired social worker of the Public Welfare Commission of Los Angeles County and immediately claimed that communications made to her as an employee of that commission, and any records of same, were confidential, that she had consulted the county counsel and been so advised; she further refused to answer any questions as to any complaint concerning the home operated by plaintiff or as to any records of same. The matter was then presented to the court (a judge other than the trial judge) for a ruling upon the question of privilege, all such objections were overruled and the witness was ordered to answer the questions. In due course she appeared and testified fully upon the subject.

The whole trial revolved around the question of privilege. When the court had indicated that it was about to sustain that objection counsel for plaintiff made this offer of proof: "MR. BROCK: We would prove by this witness's [Mrs. Skinner's] testimony—and I might say that this would be the only

testimony we would have relative to the publication of the slander—the following: That the defendant, Ruby Sykes, stated to this witness that at a party given by the plaintiff, the plaintiff had said that she had given the aged ladies—referring to the ladies whom she had in her home for the aged—shots of narcotics to put them to sleep; further, that the defendant stated to this witness that there was and had been both at the party and other occasions gambling conducted in the garage at the home of the plaintiff; and further, that the defendant said on several occasions that she wanted this witness to go out right away and get the plaintiff's license, that the plaintiff was not a fit person to operate a home for the aged; and that resulting from that conversation the Department, the Bureau of Public Welfare did conduct an investigation. That would be our proof on this point." The objection having been sustained, counsel for defendant made a motion for nonsuit. "MR. GROVER: So on the basis of that, your Honor, at this time the defendant, Ruby Sykes, moves the Court for a nonsuit. THE COURT: Do you want to state for the record the grounds for your motion? MR. GROVER? The ground being, your Honor, that there is an insufficiency of evidence to prove the allegations contained in the complaint. MR. BROCK: I take it that relates to the allegations as to the utterance of the slander? That is the only issue we are concerned with. MR. GROVER: As to the liability; that does not go to the question of damages. THE COURT: Well, the Court feels that the motion must be granted and is granted. And I should like to state so there is no misunderstanding as to the Court's rulings made which precluded the evidence, which otherwise, of course, would have meant that the Court would not have granted the nonsuit had it been received, but the Court's view is that the agency involved here is a public agency and it has a responsibility, a public responsibility with respect to homes of this type for the aged. Apparently it has licensing authority."

Arguments presented by respondent in the lower court and here proceed from time to time upon the assumption that somehow defendant has a valid claim of privilege with respect to the words alleged to be slanderous. But the respondent's brief concedes the contrary. "Appellant asserts that the defendant Sykes, during the taking of her deposition, made no claim of 'privilege.' Obviously, this is accurate, since *no such privilege could be asserted* by the defendant. . . . It is apparent that respondent cannot be charged with any waiver.

Counsel for respondent did not represent the witness and *could not instruct her not to answer.*" Manifestly this is true. **[2]** The privilege is for the benefit of the state (58 Am.Jur. § 534, p. 300) or its agencies and the cloak of testimonial immunity is thrown only around such public officials. (Witkin on California Evidence, p. 487, § 436b.) **[3]** Whether there can be any waiver is often a difficult question (Fricke on Cal. Crim. Evidence (3d ed.), p. 314); when the right of waiver exists it cannot be exercised by a subordinate employee in the exercise of his own discretion. (97 C.J.S. § 307, p. 852; *Gilbertson* v. *State*, 205 Wis. 168 [236 N.W. 539, 540-541].) **[4]** In any event the existence of a privilege in the state presents a question for the court (*People* v. *Curry*, 97 Cal. App.2d 537, 548 [218 P.2d 153]; *Crosby* v. *Pacific S.S. Lines* (9 C.C.A.), 133 F.2d 470, 475; 8 Wigmore on Evidence (3d ed.), § 2379, p. 799; *Duelly* v. *McReynolds*, 6 Cal.2d 128, 131 [56 P.2d 1232]); not for the head of the department, to determine (97 C.J.S. § 305, p. 848); on a parity with that question is the further one whether the public interest would suffer by a disclosure. (See annotations at p. 451 of vol. 95 Lawyers Edition of U. S. Supreme Court Reports, and at p. 740 of 97 L.Ed.; also *Holm* v. *Superior Court*, 42 Cal.2d 500, 507 [267 P.2d 1025, 268 P.2d 722].)

State ex rel. *Douglas* v. *Tune*, 199 Mo.App. 404 [203 S.W. 465], discusses the question of privilege in a libel suit upon a complaint similar to the one at bar. At page 467 [203 S.W.] it is said: "The creation of the board, in itself and in a measure, invites complaints from citizens of their officers and of public employes. If every citizen who knows of the unfitness of an officer or employe, or of facts he thinks require an investigation, believes it his duty to lodge information before the board, he will hesitate a long while before doing so if he knows his complaint is to be made public and become of the public records, so that any one may have access to it and he subjected to action for a possible libel. It is not to be expected, if that is so, that very many will come forward and lodge a complaint. We think that if it was understood that the complaints lodged by citizens against these employes were to become public property, without the consent of the party filing them, that the very object for which this board is created would be defeated. It may be that in sealing the records, so far as relates to these complaints, from public inspection, some individual will be hurt, but the right of that individual must yield to the right and to the benefit of the

public at large. In our opinion these communications by citizens to the complaint board, covering the conduct of public officers and employes, are to be considered as highly confidential, and as records to which public policy would forbid the confidence to be violated." To the same effect see *Runyon* v. *Board etc. of Calif.*, 26 Cal.App.2d 183, 184 [79 P.2d 101].

The Manual for Boarding Homes for Aged and Children, adopted and used by the Department of Social Welfare, declares that "Boarding home records shall be confidential." It then enumerates a number of permissible exceptions and concludes as follows: "In the subpoena of records and witnesses by a court when the action does not concern the licensing program, the attention of the court shall be called to the confidential nature of the records." This procedure was pursued at bar and an adverse ruling by the court was followed by the witness who spread a full disclosure upon the court record through her further testimony.

[1b] The assertedly privileged material having been incorporated in the Skinner deposition, defendant is driven to the extreme of asserting that she herself had a privilege of exclusion when the matter was offered at the trial or that it was necessary for the county to renew its claim of privilege at the trial. Obviously the defendant has no privilege pertaining to said public information at any time or place. So far as the county is concerned, it is well settled that once the privilege is waived it is gone for good. (*Deacon* v. *Bryans*, 212 Cal. 87, 93 [298 P. 30]; *Agnew* v. *Superior Court*, 156 Cal.App.2d 838, 840-841 [320 P.2d 158].)

Moreover, 8 Wigmore on Evidence (3d ed.), section 2374, pages 753-754, speaking of the "informer privilege" says: "(1) The privilege applies only to the *identity* of the informant, not to the contents of his statement as such, for, by hypothesis, the contents of the communication are to be used and published in the course of prosecution. Much less does the privilege apply to prevent merely the proof of contents which have already been 'de facto' disclosed,—as in an action against the informant for libel. To deny production in such a case is in effect to declare that the libel is privileged from liability. If that is indeed the judicial belief and the law, it should be frankly declared; if not, the action should not be defeated by an evasion which pretends to keep secret that which is not secret." The United States Supreme Court, in *Roviaro* v. *United States*, 353 U. S. 53, 59 [77 S.Ct. 623, 1 L.Ed.2d 639, 644]: "What is usually referred to as the informer's privilege

is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. . . . The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable." See also *Pihl* v. *Morris* (Mass.), 66 N.E.2d 804, 806. The principle of these cases is applicable here. After Skinner's deposition testimony disclosing the entire privileged picture, given without further objection and under order of court, the privilege had been effectively waived by departmental action, positive or negative.

[5] When Mrs. Skinner was directed by Judge McCoy (upon appropriate proceedings to that end) to answer all the allegedly privileged questions, she or her superiors had open to them a challenge of the order upon certiorari, habeas corpus, contempt or other special writ. They pursued none of these expeditious remedies and did not renew their objections upon resumption of the deposition. Nor did they renew any claim of privilege at the trial or voice any renewed objections based thereon. Disclosure of matter claimed to be privileged, when made pursuant to an unchallenged court order, is an irrevocable thing; the situation then falls within the quotations from 8 Wigmore, pages 753-754, and 1 L.Ed.2d 639, 644, *supra*. New York courts seem to hold that there is no voluntary disclosure (see nisi prius decision *In re Topliffe*, 77 N.Y.S.2d 716, 717) but the Sixth Circuit Court of Appeals ruled to the contrary in *Fraser* v. *United States*, 145 F.2d 139. Dealing with a husband-wife privilege the court said, at page 144: "It will be observed that Mrs. Fraser answered readily without objection, and disclosed not only possession of the money and securities, but their source. Fraser, on the other hand, claimed the privilege, but when directed to answer, complied without further protest. Had he persisted in his refusal to answer, it would, of course, have been at the hazard of being cited and punished for contempt, but in the event of punishment he would not have been without remedy and might have challenged the action of the court by petition for writ of habeas corpus, or by an appeal from the contempt order. He declined the hazard. May it thus not be said that though first invoking the privilege he ended by waiving it?

We think this is a logical conclusion. If it be urged that the vindication of the privilege does not require one to subject himself to punishment for contumacy, nevertheless a similar surrender results when a defendant, subject to a civil or criminal judgment which he believes to be erroneous, fails to appeal." At page 145: "Assuming the order of the court compelling disclosure to have been erroneous as an invasion of privacy in communications between husband and wife, the disclosure, once made, is irrevocable. It is public property, and may not be recalled."

[6] While it is generally true that an intermediate order is subject to review and reversal in the trial court, this principle is not absolute. An intermediate order, like a judgment, is binding only so long as it has not been performed. (*Cf.* 3 Witkin, California Procedure, p. 2188, § 40.) When one judge undertakes to reverse it he cannot undo what has been done pursuant to it. [7] Specifically, the trial judge's ruling that he was not bound by the order of another judge directing Mrs. Skinner to answer the disputed questions, did not and could not erase the fact that the Department of Social Welfare, through her, had spread the entire story (claimed to be privileged) upon the record and had effectually waived any further objection it might have had thereto.

[8] Defendant now seeks to justify the nonsuit upon the grounds of absence of proof of falsity, malice, damage or any excuse for delaying suit for more than one year. She is not in position to capitalize those defects in the proof. After the trial had proceeded as a battle over the subject of privilege and the court had sustained defendant's objections based thereon, the court indulged plaintiff's counsel in another attempt to prove the conversation between Mrs. Skinner and defendant Sykes (the alleged slander); counsel for defendant renewed the objection of privilege under section 1881, subdivision 5, Code of Civil Procedure; plaintiff's attorney made his offer of proof upon the matter of the publication and contents of the alleged libel and proceeded with an attempt to show malice. Objection being made, the court said: "I assume that it is agreeable with counsel that it be deemed that counsel's statement that what he expected to elicit from this witness is in the nature of an offer of proof and it may be deemed by the Court to be such and there is an objection to that point? MR. GROVER: That is correct. THE COURT: The objection is sustained and the offer is rejected." After further discussion the following colloquy occurred: "MR. GROVER:

Well, I would move for a nonsuit at this time, your Honor, on the issue of liability. . . . So on the basis of that, your Honor, at this time the defendant, Ruby Sykes, moves the Court for a nonsuit. THE COURT: Do you want to state for the record the grounds for your motion? MR. GROVER: The ground being, your Honor, that there is an insufficiency of evidence to prove the allegations contained in the complaint. MR. BROCK: I take it that relates to the allegations as to the utterance of the slander? That is the only issue we are concerned with. MR. GROVER: As to the liability; that does not go to the question of damages. THE COURT: Well, the Court feels that the motion must be granted and is granted." Here follows the judge's explanation of his ruling which is above quoted.

[9] The governing nonsuit rule is declared in *Lawless* v. *Calaway*, 24 Cal.2d 81, 92 [147 P.2d 604]: "There is a conflict of authority in this state regarding the practice to be followed by appellate courts in reviewing an order granting a nonsuit. It has been held in a long line of cases that on appeal from an order granting a nonsuit, the court will ordinarily consider only the grounds specified in the motion at the trial. [Citations.] On the other hand, almost an equal number of cases support the rule that a judgment of nonsuit will be upheld on appeal if it can be justified on any ground, whether made a ground of the motion or not. [Citations.]

"In resolving this conflict we should bear in mind that ordinarily the reviewing court will uphold the judgment or order of the trial court if it is right, although the reasons relied upon or assigned by the court are wrong. The doctrine is sound and salutary in most situations since it prevents a reversal on technical grounds where the cause was correctly decided on the merits. But this is not true as applied to nonsuits, for such a doctrine would frequently undermine the requirement that a party specify the ground upon which his motion for nonsuit is based in order to afford the opposing party an opportunity to remedy defects in proof. It seems obvious that the doctrine intended solely to uphold judgments correct on the merits should not be permitted to produce the opposite result. The correct rule is that grounds not specified in a motion for nonsuit will be considered by an appellate court only if it is clear that the defect is one which could not have been remedied had it been called to the attention of plaintiff by the motion. This rule is complementary to the requirement that a party specify the grounds upon which his motion for nonsuit is based. The decisions and dicta in

cases which support a contrary rule are hereby overruled and disapproved.

"The defendant having withdrawn as a ground for nonsuit the contention that plaintiff failed to establish her right to maintain the action, which claimed defect might have been corrected by further proof, the ground is not available to defendant here." To same effect see 2 Witkin, California Procedure, pages 1861-1862, sections 129-130.

In the circumstances shown by this record it would be unfair to assume that plaintiff, if permitted to prove the slander itself, would be unable to make a prima facie showing of the other elements of her alleged cause of action or of its active concealment by defendant; it is not clear "that the defect is one which could not have been remedied had it been called to the attention of plaintiff by motion."

The judgment of nonsuit is reversed.

Fox, P. J., and Herndon, J., concurred.

A petition for a rehearing was denied October 9, 1959, and respondent's petition for a hearing by the Supreme Court was denied November 10, 1959. Peters, J., was of the opinion that the petition should be granted.

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TENTATIVE

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

ERRONEOUSLY ORDERED DISCLOSURE OF PRIVILEGED INFORMATION

Section 912 of the Evidence Code provides that the right to claim certain privileges[1] is waived "if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone." (Emphasis added.) Evidence Code Section 919 provides that evidence of a statement or other disclosure of privileged information is inadmissible against a holder of the privilege if a "person authorized to claim the privilege claimed it but nevertheless disclosure erroneously was required to be made . . . ." (Emphasis added.)

It seems fairly clear from the quoted language that the privilege is not waived by disclosure of privileged information where the privilege is properly claimed but disclosure is erroneously ordered; the privilege holder is not required to refuse to disclose and seek review of the erroneous order in order to preserve his privilege.[2] Never-

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1. This portion of Section 912 applies to the lawyer-client privilege, the privilege for confidential marital communications, the physician-patient privilege, the psychotherapist-patient privilege, the privilege of penitent, and the privilege of clergyman.

2. See Letter from Judge Herbert S. Herlands, dated December 18, 1972, on file in the office of the Law Revision Commission, reaching the same conclusion:

> It seems quite clear to me from the Code and Comments that an erroneous judicial order to disclose the privileged matter constitutes "coercion" and "requires" disclosure; that, contrary to Markwell, such a disclosure is not "public property", is not "irrevocable" and may be "recalled." It should not make any

theless, a pre-Evidence Code case, Markwell v. Sykes,[3] contains language indicating that the privilege is waived unless the holder of the privilege refuses to comply with the erroneous order and seeks review of the order. The official comments to the Evidence Code do not make any reference to the language found in the Markwell case. To avoid the possibility that this inadvertent omission might be construed to preserve the rule of the Markwell case,[4] the Commission recommends that a new section be added

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difference whether the coerced disclosure occurs in the "same" or a "prior" proceeding.

From the vantage point of "Law of the case", as that doctrine is applied in California, a decision of one trial judge is not, in the absence of Statutes to the contrary, binding on another judge of the same court at a later hearing. For example, the law and motion judge may overrule a general demurrer to a complaint, but the trial judge may decide the complaint does not state a cause of action. What Markwell does (sub silentio) is create an exception to the foregoing general rule by making the order of the first judge binding on the litigants unless the party claiming the privilege obtains prompt appellate review of the erroneous order. Thus, Markwell seems to be in conflict not only with the Evidence Code but with the way in which California generally handles "law of the case."

3. 173 Cal. App.2d 642, 649-650, 343 P.2d 769, (1959).

4. This type of omission was of great significance to the California Supreme Court in Kaplan v. Superior Court, 6 Cal.3d 150, 158-159, 491 P.2d 1, , 98 Cal. Rptr. 649, (1971):

Each comment summarizes the effect of the section, advises whether it restates existing law or changes it, and cites the relevant statutes or judicial decisions in either event. In particular, in every instance in which a significant change in the law would be achieved by the code, the commission's comment spells out that effect in detail and cites the precise authorities which it repeals. [Footnote omitted.]

In sharp contrast, neither the commission's background study nor its comment to any section of the Evidence Code discloses an intent to alter or abolish the Martin rule. Indeed, the commission nowhere even mentions, let alone "carefully weighs," that rule. In view of the commission's painstaking analysis of many evidentiary rules that are of far less importance and notoriety than Martin, its deafening silence on this point cannot be deemed the product of oversight. It can only mean the commission did not intend--and the code therefore does not accomplish--a change in the Martin rule. [Footnote omitted.]

to the Evidence Code to provide in substance that, if an authorized person claimed the privilege (whether in the same or a prior proceeding) but nevertheless the trial judge or other presiding officer erroneously ordered that the privileged information be disclosed, neither the failure to refuse to disclose the information nor the failure to seek review of the erroneous order indicates consent to the disclosure or constitutes a waiver of the privilege, and, under these circumstances, the disclosure is one made under coercion.[5]

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5. This clarification represents sound public policy:

> Confidentiality, once destroyed, is not susceptible of restoration, yet some measure of repair may be accomplished by preventing use of the evidence against the holder of the privilege. The remedy of exclusion is therefore made available when the earlier disclosure was compelled erroneously or without opportunity to claim the privilege.
>
> With respect to erroneously compelled disclosure, the argument may be made that the holder should be required in the first instance to assert the privilege, stand his ground, refuse to answer, perhaps incur a judgment of contempt, and exhaust all legal recourse, in order to sustain his privilege. [Citations omitted.] However, this exacts of the holder greater fortitude in the face of authority than ordinary individuals are likely to possess, and assumes unrealistically that a judicial remedy is always available. In self-incrimination cases, the writers agree that erroneously compelled disclosures are inadmissible in a subsequent criminal prosecution of the holder, Maguire, Evidence of Guilt 66 (1959); McCormick § 127; 8 Wigmore § 2270 (McNaughton Rev. 1961), and the principle is equally sound when applied to other privileges. The modest departure from usual principles of res judicata which occurs when the compulsion is judicial is justified by the advantage of having one simple rule, assuring at least one opportunity for judicial supervision in every case. [Advisory Committee's Note to Rule 512 of the Federal Rules of Evidence.]

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 919 of the Evidence Code, relating to privileges.

The people of the State of California do enact as follows:

Section 1. Section 919 of the Evidence Code is amended to read:

919. (a) Evidence of a statement or other disclosure of privileged information is inadmissible against a holder of the privilege if:

~~(a)~~ (1) A person authorized to claim the privilege claimed it but nevertheless disclosure erroneously was required to be made; or

~~(b)~~ (2) The presiding officer did not exclude the privileged information as required by Section 916.

(b) If a person authorized to claim the privilege claimed it, whether in the same or a prior proceeding, but nevertheless disclosure erroneously

was required by the presiding officer to be made, neither the failure to refuse to disclose nor the failure to seek review of the order of the presiding officer requiring disclosure indicates consent to the disclosure or constitutes a waiver and, under these circumstances, the disclosure is one made under coercion.

Comment. Subdivision (b) has been added to Section 919 to make clear that, after disclosure of privileged information has been erroneously required to be made by order of a trial court or other presiding officer, neither the failure to refuse to disclose nor the failure to challenge the order (by, for example, a petition for a writ of habeas corpus or other special writ or by an appeal from a contempt order) amounts to a waiver and the disclosure is one made under coercion for the purposes of Sections 912(a) and 919(a)(1). The addition of subdivision (b) will preclude any possibility of a contrary interpretation of Sections 912 and 919 based on the language found in Markwell v. Sykes, 173 Cal. App.2d 642, 649-650, 343 P.2d 769, (1959). The phrase "whether in the same or a prior proceeding" has been included in subdivision (b) to avoid any implication that might be drawn from the original Law Revision Commission Comment to Section 919 and from language found in Markwell v. Sykes, supra, that subdivision (a)(1) applies only where the privilege was claimed in a prior proceeding. The protection afforded by Section 919, of course, also applies where a claim of privilege is made at an earlier stage in the same proceeding and the presiding officer erroneously overruled the claim and ordered disclosure of the privileged information to be made.