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OPINION	:	No. 84-801
of	:	OCTOBER 23, 1984
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THE HONORABLE JEFFREY G. GREEN, COUNTY COUNSEL, MARIPOSA COUNTY, has requested an opinion on the following question:

Is a federal magistrate authorized to solemnize marriages pursuant to section 4205 of the California Civil Code?

CONCLUSION

A federal magistrate is not authorized to solemnize marriages pursuant to section 4205 of the California Civil Code.

ANALYSIS

Section 4205 of the California Civil Code[1] provides:

> "*Marriage may be solemnized by any* judge or retired judge, *commissioner* or retired commissioner, or assistant commissioner *of a court of record* or justice court *in this state* or by any priest, minister, or rabbi of any religious denomination, of the age of 18 years or over or by a person authorized to do so under Section 4205.1.
>
> "A marriage may also be solemnized by a judge who has resigned from office." (Emphasis added.)[2]

Federal law provides that federal magistrates shall have "all powers and duties conferred or imposed upon United States Commissioners by law." (28 U.S.C. § 636(a)(1).) Accordingly, as federal judicial officers (28 U.S.C. § 632) who perform their duties within the jurisdiction of federal district courts, which are clearly courts of record (28 U.S.C. § 636), it is suggested that federal magistrates fall within the purview of section 4205. Stated otherwise, federal magistrates are essentially "commissioner[s] . . . of a court of record . . . in this state" under that section.

The suggestion would be persuasive but for the legislative history of section 4205. Prior to 1967 the predecessor provision to section 4205 was numbered section 70. Between 1951 and 1967 section 70 provided:

> "70. Marriage may be solemnized by either a justice of the Supreme Court, justice of the district courts of appeal, judge of the superior court, judge of the municipal court, judge of a justice court, priest or minister of the gospel of any denomination, of the age of 21 years or upwards." (Stats. 1951, ch. 1676, § 1.)

It is thus clear that until 1967 section 70 provided that only judicial officers of California courts could solemnize marriages. It did not include any federal judicial officers, even federal *judges.*

In 1967, section 70 was amended to read.

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[1] All section references are to the Civil Code unless otherwise indicated.

[2] Chapter 250, Statutes of 1984 will amend section 4205, effective January 1, 1985, to also include "commissioner of civil marriages or retired commissioner of civil marriages." That officer is the county clerk, who may also appoint deputies to that position.

> "Marriage may be solemnized by any judge of a court of record or justice court in this state or by any priest, minister or rabbi of any religious denomination, of the age of 21 years or over." (Stats. 1967, ch. 1114.)

Thus, the language of section 70 was changed from an enumeration of judicial officers of California courts to "any judge of a court of record or justice court in this state." Read literally, such language would appear to encompass judges of federal courts located in this state.

However, section 2 of the amending statute provided:

> "SEC. 2. It is the intent of the Legislature that the amendment of Section 70 of the Civil Code made by the 1967 Regular Session of the Legislature does not constitute a change in, but is declaratory of, the preexisting law."

Accordingly, the change in language with respect to those judges who could solemnize marriage did not work a change in the law. The language "any judge of a court of record or justice court in this state" was intended to mean any judge of a court within the California state judicial system. Although a legislative declaration such as was set forth in section 2 of the 1967 statute is not necessarily binding upon the Court where *preexisting* law was ambiguous (see, *e.g. California Emp. Etc. Com.* v. *Payne* (1947) 31 Cal.2d 210, 213-214; *Learner Co.* v. *County of Alameda* (1965) 234 Cal.App.2d 278, 284-285.), we do not have such a situation to invoke that rule of construction. There was no ambiguity in the pre-1967 law as to those judicial officers who were authorized to solemnize marriages.[3] In short the Legislature was not purporting to "clarify" the law on this point. It merely restated the unambiguous law in different language.[4]

Additionally, any "construction" of section 70, as amended in 1967, to include judges of federal courts in California would be improper. A statute is to be literally construed *except* where to do so would lead to absurd results *or would be contrary to the*

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[3] The only ambiguity we perceive in the pre-1967 statute was whether a rabbi was a "priest or minister of the gospel" within the meaning of section 70, since that term was added in 1967.

[4] The question naturally arises as to why the Legislature changed the language in this respect. We can only speculate. However, we note that Chapter 17 of the Statutes of 1967 would have amended section 70 to change the words "justice of the district courts of appeal" to "justice of the courts of appeal" to reflect the change in name of those courts.

Perhaps the Legislature felt that the language in chapter 1114 of Statutes of 1967 would preclude the need for such language changes in the future by substituting "court of record" for a specific enumeration of such courts.

manifest intention of the Legislature. (See, *Atlantic Richfield Co.* v. *Workers' Comp. Appeals Bd.* (1982) 31 Cal.3d 715, 726-727.) If section 70, as amended, were literally read to include federal courts in California, that construction would defeat the legislative intent.

Furthermore, section 70, as amended in 1967 is arguably ambiguous. It could be construed as meaning (1) only California courts or (2) any courts in California, including federal courts. Then, as stated by our Supreme Court recently in *Sand* v. *Superior Court* (1983) 34 Cal.3d 567, 570:

> ". . . This ambiguity invites statutory construction: 'Where the language [of a statute] is susceptible of more than one meaning, *it is the duty of the courts to accept that intended by the framers of the legislation*, *so far as its intention can be ascertained*.' (*Stillwell* v. *State Bar* (1946) 29 Cal.2d 119, 124 [173 P.2d 313].) (4) In *Select Base Materials, Inc.* v. *Board of Equal.* (1959) 51 Cal.2d 640, 645 [335 P.2d 672], this court reiterated that 'The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' . . ." (Emphasis added.)

The legislative declaration in section 2 of the statute, therefore, must be accepted. Thus in 1967, only state court judges were included within the purview of section 70 as amended.

In our view, subsequent events have not changed this basic conclusion. Section 70 was renumbered section 4205 in 1969 without change. (See Stats., 1969, ch. 1608, § 8, pp. 3316-3317.) This repeal and reenactment in the same form did not change the law. (See, e.g., *In re Dapper* (1969) 71 Cal.2d 184, 189.) Subsequently, the only amendments material to our consideration herein have been the addition after the words "any judge" in paragraph one of section 4205 of the words "or retired judge, commissioner or retired commissioner, or assistant commissioner."

Clearly, these amendments have merely added to the list of those entitled to solemnize marriage. Added are retired judges and other subordinate judicial officers *of the same courts* previously encompassed by section 4205, that is, *California courts.* These additions in no way expanded the courts described by the words "court of record or justice court in this state". "'[F]ailure to make changes in a given statute in a particular respect when the subject is before the Legislature, and changes are made in other respects, is indicative of an intention to leave the law unchanged in that respect.'" (*Williams* v. *Industrial Acc. Com.* (1966) 64 Cal.2d 618, 620.) "Parts of an amended statute not affected by the amendment will be given the same construction that they received before the amendment" (*Brailsford* v. *Blue* (1962) 57 Cal.2d 335, 339.) "[A] clause in a statute will be given no different meaning after an amendment than it had before, if the amendment

relates to other matters, and was obviously not designed to affect its meaning." (*Barber* v. *Palo Verde Etc. Co.* (1926) 198 Cal. 649, 651-652.)

If the Legislature had wished to expand the statute to include federal judicial officers, it would seem that it would have added the words "of this state or the United States" or words of similar import after the words "court of record" in section 4205 when the section was before it a number of times between 1969 and the present.

Accordingly, we conclude that section 4205 does not include within its scope any federal judicial officers. From that conclusion it follows that a federal magistrate is not authorized to solemnize marriages pursuant to that section.[5]

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[5] We note that such conclusion applies to federal judges in their capacity as federal judges. It is to be recalled that section 4205 permits retired state court judges and state court judges who have resigned from office to solemnize marriages. Some federal judges and magistrates may still qualify to perform or have performed marriages by virtue of such prior status as state court judges.