7/23

I N T R O D U C T I O N

This memo is a study of Rule 28 on the Marital Privilege for Confidential Communications and of Rule 37 insofar as the latter rule relates to the Marital Privilege. The text of both of these Rules is as follows:

> "Rule 28. . . .
> (1) General Rule. Subject to Rule 37 and except as otherwise provided in Paragraphs (2) and (3) of this rule, a spouse who transmitted to the other the information which constitutes the communication, has a privilege during the marital relationship which he may claim whether or not he is a party to the action, to refuse to disclose and to prevent the other from disclosing communications found by the judge to have been had or made in confidence between them while husband and wife. The other spouse, the guardian of an incompetent spouse may claim the privilege on behalf of the spouse having the privilege.
> (2) Exceptions. Neither spouse may claim such privilege (a) in an action by one spouse against the other spouse, or (b) in an action for damages for the alienation of the affections of the other, or for criminal conversation with the other, (c) in a criminal action in which one of them is charged with a crime against the person or property of the other or of a child of either, or a crime against the person or property of a third person committed in the course of committing a crime against the other, or bigamy or adultery, or desertion of the other or of a child of either, or (d) in a criminal action in which the accused offers evidence of a communication between him and his spouse, or (e) if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the communication was made, in whole or in part, to enable or aid anyone to commit or to plan to commit a crime or a tort.
> (3) Termination. A spouse who would otherwise have a privilege under this rule has no such privilege if the judge finds that he or the other spouse while the holder of the privilege testified or caused another to testify in any action to any communication between the spouses upon the same subject matter."

> "Rule 37. . . . A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has (a) contracted with anyone not to claim the privilege or, (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one."

In this memo we first consider the general rule stated in subdivision (1) of Rule 28, comparing such general rule with the California rule, namely C.C.P. § 1881 (1) and the judicial construction thereof. Next we consider the five exceptions stated in subdivision (2) of Rule 28, comparing such exceptions with the California exceptions.[1]

G E N E R A L R U L E

For convenience of discussion we regard the following as the 28 (1) general rule of marital privilege for confidential communications:

> ". . . a spouse who transmitted to the other the information which constitutes the communication, has a privilege during the marital relationship which he may claim whether or not he is a party to the action, to refuse to disclose and to prevent the other from disclosing communications found by the judge to have been had or made in confidence between them while husband and wife. The other spouse or the guardian of an incompetent spouse may claim the privilege on behalf of the spouse having the privilege."

The California general rule is in part legislative and in part decisional. The legislation is C.C.P. § 1881 (1) which states in substance as follows:

"[D]uring the marriage or afterward . . . [neither spouse can be examined] without the consent of the other, . . . as to any communication made by one to the other during the marriage . . ."

Under the ensuing italicized subtitles we compare the 28 (1) and California general rules as to the matters indicated by each subtitle.

Confidentiality.

The 28 (1) privilege applies only to "communications found by the judge to have been had or made in confidence. . . ." (Italics added.) On the other hand, the parallel expression in C.C.P. § 1881 (1) is "any communication . . ." (Italics added.) At one time, as the quotation in the appended footnote shows, this expression was construed literally and was therefore held to include non-confidential spousal communications.[2] However, this view has not prevailed. The current attitude of the courts is to regard § 1881 (1) as requiring confidentiality of communication as an element of the privilege.[3]

Preliminary finding by judge -- burden of establishing privilege.

The 28 (1) privilege is operative only when the conditions requisite for the privilege are "found by the judge". Rule 8 states how the judge should proceed in making the preliminary finding.

The California practice seems to be in accord with the Rule 8 procedure.[4] The privilege-claimant has the burden of establishing privilege.[5]

Whose Privilege?

Outside California there seem to exist two divergent views respecting the question of who possesses the marital confidence privilege. These views are: 1. The privilege belongs solely to the communicating spouse. 2. The privilege belongs to both the communicating spouse and the addressee (listening) spouse.[6]

On its face, C.C.P. § 1881 (1) seems to provide a third view: namely, the privilege belongs to the non-testifying spouse. Says the statute:

> "Nor can either . . . be, without the consent of the other, examined as to any communication made by [either] . . .". (Italics added.)

Literally this seems to mean that the only requisite for the examination is the permission of the spouse not under examination. Read thus, the statute gives to the non-testifying spouse the election whether the testimony shall be allowed and thus makes such spouse the holder of the privilege.

However, it is clear that the California courts will not in all cases apply § 1881 (1) in accord with its facial, literal meaning. In at least one situation there is a clear-cut departure from such meaning, i.e., the case of a defendant in a criminal action cross-examined by the prosecution as to confidential statements by defendant to defendant's spouse. In this situation, though the accused is the testifying spouse, the accused is given the privilege to refuse to make the disclosure.[7]

Here it seems to be recognized that the matter of who happens to be the witness is a fortuity unrelated to the policy and purpose of the privilege. In other situations

whether the California courts will depart from the exact terms of the statute seems to be conjectural. For example, suppose husband D is a party and is cross-examined as to Mrs. D's statement to him and he objects or suppose he examines Mrs. D as to her statement to him and she objects or suppose D's adversary examines Mrs. D as to D's statement to her or hers to him and there is no objection by D but there is objection by Mrs. D. Assuming all other privileges to be waived, this problem remains: which, if any, of these claims of the marital confidence privilege will the California courts honor despite the fact that the claim is made by the testifying spouse?

The preceding questions and remarks are intended to suggest that the notion of the non-testifying spouse as the sole privilege holder is a criterion of dubious validity and of uncertain application. As suggested at the outset of this section, there are two alternative criteria. Assuming we wish to abrogate the non-testifying-spouse test, which of the two alternative tests possesses superior merit?

The bilateral view (i.e., that both communicating and addressee spouse are holders of the privilege) might possess a special appeal in criminal cases and there is something to be said for it in all cases. Today in a criminal case to which a spouse is a party <u>both</u> spouses possess privilege to suppress <u>all</u> testimony by the non-party spouse.[8] Although

this privilege is abolished (as it would be under Rules 7 and 17), it may be urged that a vestige of it should be retained by giving both spouses the privilege to suppress evidence of a confidential inter-spousal communication. Furthermore, in all cases -- both criminal and civil -- it may be argued that spousal communication is ordinarily a two-way street, making it difficult to separate the parts, determining as to each part which spouse is communicator and which is addressee. The bilateral view of privilege would avoid the necessity of making such a difficult determination.

Against the considerations just mentioned we must weigh the Wigmore-McCormick-U.R.E. approach which favors the unilateral view. Wigmore states that since the "privilege is intended to secure freedom from apprehension in the mind of the [spouse] desiring to communicate", the privilege "belongs to the communicating [spouse]" and the "other [spouse] -- the addressee of the communication -- is therefore not entitled to object."[9] McCormick regards this argument as "convincing".[10] The Commissioners are likewise persuaded, for in 26 (1) they provide privilege only for "a spouse who transmitted to the other the information which constitutes the communication."

For the reasons stated by Wigmore, we are persuaded that this is the best of the three views. We acknowledge the difficulty of administering it--the difficulty of determining who is communicator and who is addressee in a marital exchange (especially a heated exchange). However, we believe that McCormick adequately meets this difficulty with his suggestion that

even under the unilateral view "if a conversation or an exchange of correspondence between [spouses] is offered to show the collective expressions of them both, either . . . could claim privilege as to the entire exchange."[11]

Post-coverture privilege.

The 28 (1) privilege is applicable only "during the marital relationship". On the other hand, the § 1881 (1) privilege is applicable "during the marriage or afterward". (Italics added.)

This is a significant difference in the scope of the two privileges. To illustrate: suppose the action of People v. D, in which D is charged with a crime allegedly committed while D was married to Mrs. D. At the time of the trial the D's have been divorced (or the marriage has been annulled). The DA calls the ex-Mrs. D to testify to a confidential statement made by D to her prior to the divorce or annulment. D objects.[12] Under § 1881 (1) the objection would be sustained; whereas under 26 (1) the objection would be overruled.

The respective results (i.e., under 1881 (1) D's objection sustained; under 28 (1) overruled) would be the same if the DA attempted to cross-examine D as to D's statement to the ex-Mrs. D.[13] The respective results would likewise be the same if we assume Mrs. D is dead at the time of the trial and the DA attempted to cross-examine D as to D's statement to Mrs. D.[14]

In the post-coverture situations above mentioned the results of no after-marriage privilege under 28 (1) are

diametrically opposed to the result of permanent privilege under § 1881 (1). These divergent results stem, of course, from differing notions as to how far we should go in implementing the policy of encouraging marital confidence. Should we provide maximum encouragement by guaranteeing post-marital secrecy as in § 1881 (1) or should we stop short of such maximum encouragement as in 28 (1)? In our opinion the 28 (1) view is preferable to the § 1881 (1) view. The competing policies here are, on the one hand, confidence-encouragement and, on the other hand, the desirability of disclosing all the facts relevant to the controversy. The present view (we think) gives too much weight to the first desideratum and too little to the second. Therefore in our opinion the 28 (1) view represents a better resolution of the policy conflict than does the § 1881 (1) view.

In making the above remarks we have been thinking of the situation in which a marital communication is offered <u>against</u> a spouse after the marriage tie has been severed. In such situation, it is not to be denied that § 1881 (1) gives to such spouse something which 28 (1) would take away. There is, however, possibly an opposite side to the coin. It may be that the 28 (1) view gives a spouse something not available today. In this connection we have in mind the situation of a marital communication which is favorable to a widow or widower spouse who offers it in evidence. Returning to the case stated above (i.e., criminal action of People v. Mr. D), let us inquire what the situation

would be if Mrs. D were now deceased and D were seeking to testify to Mrs. D's communication to him? Here, it seems, the holding is that D's attempt to give such testimony fails because of the 1881 (1) privilege. Apparently the rationale is that of the holdings on posthumous physician-patient privilege, namely the privilege survives Mrs. D's death and no one can waive the privilege on her behalf.[15] Under 28 (1) there would, however, be no privilege and D would be in the clear so far as privilege is concerned -- a better result, we submit, than the present holdings under § 1881 (1).

E X C E P T I O N S

28 (2) states five exceptions to the general rule propounded in 28 (1).

Below we note the terms of each of these exceptions and the extent to which it prevails in California today.

28 (2) (a).

Under this exception the privilege is inapplicable "in an action by one spouse against the other spouse". C.C.P. § 1881 (1) likewise provides that the "[privilege] does not apply to a civil action or proceeding by one [spouse] against the other."[16]

28 (2) (b).

This exception is that the privilege is inapplicable "in an action for damages for the alienation of the affections of the other, or for criminal conversation with the other, . . ."

Civil Code § 43.5 provides in part as follows: "No cause of action arises for: (a) Alienation of affection; (b) Criminal conversation."

In view of this provision, 28 (2) (b) would be a moot exception in this State and, as such, it should be stricken.

28 (2) (c).

This exception makes the privilege inapplicable "in a criminal action in which one [spouse] is charged with a crime against the person or property of the other or of a child of either, or a crime against the person or property of a third person committed in the course of committing a crime against the other, or bigamy or adultery, or desertion of the other or of a child of either".

The California analogue is the 1881 (1) provision that the privilege does not apply "to a criminal action or proceeding for a crime committed by one against the other, or for a crime committed against another person by a husband or wife while engaged in committing and connected with the commission of a crime by one against the other."[17]

The coverage of 28 (2) (c) is broader than its 1881 (1) counterpart because 28 (2) (c) includes criminal charges against a spouse for bigamy, adultery, or desertion. We prefer the broader provision. Today the P.C. § 1322 privilege of the spouses to refuse to permit all spouse testimony in a criminal action is inapplicable in "criminal action or proceedings for bigamy, or adultery . . ." It would seem that our exceptions to the marital confidence rule ought to

be at least as broad as our present exceptions to the P.C. § 1322 privilege.

28 (2) (d).

This exception makes the privilege inapplicable "in a criminal action in which the accused offers evidence of a communication between him and his spouse."

If the accused is offering evidence of his communication to the other spouse, there is no need for this exception. As to such communication the accused is under 28 (1) the sole privilege-holder, and, as such, he may elect to waive the privilege. However, if the accused is offering the other spouse to testify to the communication of the other spouse to the accused or is offering himself so to testify, then the other is privilege-holder and (but for this exception) the other could deprive the accused of the evidence.

The purpose of (d) is stated as follows by the A.L.I.:

> "The provision in Clause (d) is made to prevent the striking injustice which has been done in a few criminal cases where defendant spouse was not allowed to testify to a communication from the other spouse, although the mental effect produced by it might well have reduced the grade of the offense."[18]

Exception 28 (2) (d) seems to us a very limited and merciful concession to a defendant charged with crime. We do not find any recognition of this exception in California but we recommend it.

Exception 28 (2) (e).

This exception makes the privilege inapplicable "if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the communication was made, in whole or in part, to enable or aid anyone to commit or to plan to commit a crime or a tort."

This is included by analogy to 26 (2) (a) on lawyer-client privilege and to 27 (6) on physician-patient privilege.

We do not find it presently in California, but we recommend it.

28 (3).

This provides as follows:

> "(3) Termination. A spouse who would otherwise have a privilege under this rule has no such privilege if the judge finds that he or the other spouse while the holder of the privilege testified or caused another to testify in any action to any communication between the spouses upon the same subject matter."

Let us suppose husband (H) tells wife (W) in confidence that H hit P without provocation. Later H states to W in the presence and hearing of divers persons that H hit P but did so only in self-defense. Suppose further that in the action of P v. H, H proves his public statement to W. The thought underlying 28 (3) seems to be that since H has given evidence of his public statement to W, H has lost his privilege as to his private, confidential statement to W. The A.L.I. Commentary states as follows as to the comparable A.L.I. Rule:

> "In so far as the Rule makes testimony to another communication upon the same subject a waiver of the privilege, it goes beyond existing decisions. The theory of the Rule

> is that a spouse ought not to be able to select for disclosure from among the communications upon a given subject those which he deems favorable, and to suppress the rest."[19]

This seems to us reasonable and is recommended.

However, we are perplexed by the following features of 28, subdivision (3). The subdivision deals with a "spouse who would otherwise have a privilege under this rule." Considering 28, subdivision (1), we find that under this subdivision the only spouse who has a privilege is the "spouse who transmitted to the other the information which constitutes the communication." Hence under subdivision (1) it would seem that only the communicating spouse could be "a spouse who would otherwise have a privilege" in the 28 (3) sense - that is such spouse, and such spouse only, could be holder of the privilege. Nevertheless subdivision (3) seems to envision the possibility that the other (i.e., non-communicating spouse) may be holder of the privilege, for the reference in subdivision (3) is "he [i.e., communicator] or the other spouse while the holder of the privilege".

We believe there is a contradiction here, namely, a recognition in subdivision (3) of someone (communicatee) as possible holder of privilege who under subdivision (1) could not possibly be such holder.

In the belief that this is an inadvertence, we recommend striking the following language from subdivision (3):

or the other spouse.

Eavesdroppers.

The privilege of the communicating spouse stated in 28 (1) is the privilege "to refuse to disclose and to prevent the other from disclosing" the communication. Note that the privilege does not extend to preventing eavesdroppers and interceptors from making the disclosure. In thus refusing to bring eavesdroppers within the ambit of the privilege [20] [21] 28 (1) adopts the traditional and the present California view.

Out-of-court disclosure by addressee spouse.

Under Rule 26 (1) (c) (iii) a client may prevent any witness from disclosing a confidential communication to his attorney if the communication came to the knowledge of the witness "as a result of a breach of the lawyer-client relationship". Under 27 (2) (iii) a like result obtains with reference to physician-patient privilege. However, Rule 28 contains no provision whereby the communicating spouse may prevent disclosure by a witness to whom the addressee spouse has revealed the confidence. This is an intentional omission. As Morgan stated in the A.L.I. Proceedings in explaining A.L.I. Rule 215 (on which U.R.E. Rule 28 is based):

> "I want you to notice . . .
> that we do not give the same protection to the communicating spouse that we give to the client. If the other spouse to whom the communication is made by a breach of confidence discloses the communication, the communication will be admitted so far as the marital privilege is concerned. Suppose that a man writes a letter to his wife in confidence and she gives the letter to the County Attorney--a kind of case that

has happened--can that letter be used as an admission against him? This Rule allows it to be. There are some cases to the contrary. The cases on that are in conflict." (XIX, A.L.I. Proceedings, pp. 168-169.)

Possibly the present California rule is in accord with the Morgan-A.L.I.-U.R.E. view. We say this on the basis of People v. Swaile, 12 C.A. 192 (1909), in which defendant husband sent a letter to his wife by a police officer. After the wife read the letter and upon the officer's request she returned it to the officer. The letter was held to be admissible because "there was no examination of the wife as to a privileged communication". To be sure the opinion is not at all a thorough examination of the question. However, assuming it represents the present law, that law would be unchanged by adoption of Rule 28.

Other Exceptions.

§ 1881 (1) makes the privilege inapplicable "in a hearing held to determine the mental competency or condition of either husband or wife."

This exception is not included in 28 (2). We recommend amending 28 to include it.

R U L E 37

Subdivision (b).

(N.B. We treat the subdivisions in inverse order.)

This subdivision provides:

> "Rule 37. . . . A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he or any other person while the holder of the privilege has . . . (b) without coercion and with knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one."

So far as the relationship of 37 to 28 is concerned, the reference in 37 to the "person who would otherwise have . . . privilege" means the communicating spouse of Rule 28; the "specified matter" referred to in 37 is the communication of the communicating spouse mentioned in Rule 28. Thus under 37 a communicating spouse waives the privilege by voluntary, knowledgeable in-court or out-of-court revelation of the communication or by consent to such revelation by the addressee spouse.

As pointed out above,[22] the whose-privilege question in California is in doubt. We cannot be certain, therefore, that the results just stated are or are not current California law.

A further difficulty is presented by a group of California cases which develop a doctrine of waiver that may not be literally embraced by Rule 37. The doctrine is that the spouses as litigants may lose the privilege merely by virtue of the theory they adopt in prosecuting or defending the law suit.[23] As the appended footnote suggests, the scope of this doctrine is somewhat imprecise. A full exposition would probably not be germane to the purpose of this memo. It is germane, however, to suggest that since the doctrine has been

developed in terms of the general dogma that the spouses may waive their privilege, adoption of Rule 37 would probably have no affect on the doctrine as developed thus far or upon its development in the future. We say this because Rule 37 (b) is intended as and would probably be construed as a statement of the general principle of waiver presently prevailing.[24]

Subdivision (a).

Let us suppose a communicating spouse possessed of privilege applies for insurance, agreeing with the insurer that the insurer may require the addressee spouse to disclose any confidential communications of the communicator. The insurance is issued. Later the action of People v. the communicating spouse is brought. Under 37 (a) the DA may, it seems, require the addressee spouse to testify to the communication.

For reasons stated in our previous memos on the privileges, we endorse and recommend 37 (a).

S U M M A R Y

Adoption of Rule 28 in this state would have the following effects:

1. The marital confidence privilege would be vested solely in the communicating spouse. Presently the question of who possesses the privilege is in doubt. (See pp. 4 - 7, supra.)

2. There would be no post-coverture privilege. Presently there is such privilege. (See pp. 7 - 9, supra.)

3. The present exception to the privilege respecting "family crimes" would be broadened. (See pp. 10 - 11, supra.)

4. A new exception would become operative in re accused's evidence of communications to accused by spouse of accused. (See p. 11, supra.)

5. A new exception would become operative in re communications in aid of crime or tort. (See p. 12, supra.)

6. A spouse would waive privilege as to private spousal communications on a matter by giving evidence of public spousal communication on such matter. (See pp. 12 - 13, supra.)

7. The matter of waiver of privilege would be clarified by adopting the view of the communicating spouse as sole privilege-holder. (See pp. 16 - 17 and point 1, supra.)

R E C O M M E N D A T I O N S

The following recommendations are made:

1. That Rule 28 be amended as advised above on the following pages: 10, 13, and 15.

2. That Rule 28, as so amended, be approved.

At this time no recommendation respecting Rule 37 is made.

Respectfully submitted,

James H. Chadbourn

FOOTNOTES

1. In this memo we are not concerned with the rules which may prevent a spouse from giving any testimony in an action; viz, C.C.P. § 1881 (1), first part ("A husband can not be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent . . ."") and P.C. § 1332, first part ("Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both . . ."). These rules of privilege whereby one spouse may prohibit the other from giving any testimony whatsoever should be distinguished from the rule which is our present concern and which relates only to a particular and limited kind of testimony, viz, testimony as to confidential communications. As is pointed out in In re DeNeff, 42 C.A.2d 691, 693 (1941): ". . . two distinct privileges are granted by [C.C.P. § 1881 (1)] - (a) the privilege making husband or wife incompetent as a witness in an action for or against the other; (b) the privilege against testifying to communications between husband and wife. The distinction is an important one." Thus if one spouse is offered to testify against the other respecting a communication which may come within the second privilege, the testimony may be excluded on the basis of the first privilege and it then becomes immaterial whether or not the second privilege is likewise

applicable, as in Marple v. Jackson, 184 C. 411, 414 (1920). Moreover, in a given situation, though the first privilege is inapplicable, the second may still be applicable, as in In re DeNeff, 42 C.A.2d 691 (1941) (action by wife as beneficiary of husband's life insurance policy; second privilege applicable to husband's statements to wife in re his physical condition). See also People v. Godines, 17 C.A.2d 721 (1936). Furthermore, the first privilege, though applicable when a spouse is offered to be sworn, may be waived at that point and the second privilege be claimed at some later point in the spouses' testimony non constat the waiver of the first privilege. E.g., Personal injury action of P v. D. P calls Mrs. D. D does not object and Mrs. D testifies to circumstances of the injury. P then inquires of Mrs. D as to D's confidential statements to her. D's objection sustained. D waived the first privilege, but not the second. As is said in Wolfle v. U.S., 291 U.S. 7 (1934): ". . . the privilege with respect to communications extends to the testimony of husband or wife even though the different privilege, excluding the testimony of one against the other, is not involved."

For a good general survey of the two privileges, see Hines, Privileged Testimony of Husband and Wife in California, 19 Calif. L. Rev. 390 (1931).

Under the U.R.E. the first privilege is abolished. See Rules 7 and 17.

2. "The provisions of our codes on the subject of privileged communications between husband and wife are little more than a declaration of the common-law rule upon the subject, except in this respect: the privilege at common law did not extend to communications which were not in their nature confidential; and although such communications were generally held to be confidential, yet some very difficult questions did occasionally arise as to the character of the communications; but our code sweeps away that embarrassing distinction by extending the privilege to 'any communication made by one to the other during the marriage.' (Code Civ. Proc., sec. 1881.)"

People v. Mullings, 83 C. 138, 140 (1890). See to the same effect Humphrey v. Pope, 1 C.A. 374, 378 (1905).

3. Johnson v. St. Sure, 50 C.A. 735, 737 (1920); Tanzola v. DeRita, 45 C.2d 1, 6 (1955); Leemhuis v. Leemhuis, 137 C.A.2d 117, 124 (1955).

As to what has been held confidential and not confidential, see Poulson v. Stanley, 122 C. 655 (1898) (delivery of a deed); People v. Loper, 159 C. 6 (1910) (mental condition); Estate of Pusey, 180 C. 368 (1919) (act of communicating v. subject matter of the communication); Tanzola v. DeRita, 45 C.2d 1 (1955) (non-communicative act); First Nat. Bank v. De Moulin, 56 C.A. 313 (1922) (statement to a third party); People v. Morhar, 78 C.A. 380 (1926) (presence of a third party).

4. People v. Anderson, 26 C. 129 (1864); People v. Glab, 13 C.A.2d 528 (1936); People v. Thornton, 106 C.A.2d 514 (1951).

These are cases involving determination by the judge of the question of marriage vel non for the purpose of

deciding whether the alleged spouse could testify at all. It seems that the procedure would be the same when the question arises for purposes of determining whether the parties to a communication were married.

5. Tanzola v. DeRita, 45 C.2d 1 (1955); Leemhuis v. Leemhuis, 137 C.A.2d 117 (1955).

6. Wigmore § 2340; McCormick § 87.

7. People v. Mullings, 83 C. 138 (1890); People v. Warner, 117 C. 637 (1897).

8. P.C. § 1332. This would not be true under the U.R.E. See note 1, supra.

9. Wigmore § 2340, citing, however, cases contra.

10. McCormick, p. 176.

11. Ibid.

Under the U.R.E. view it seems clear that if (for example) the confidential communication is by husband to wife the husband (being the privilege-holder) may prevent his wife from revealing the confidence and may himself refuse to do so. On the other hand, if the husband elects to make the revelation he may do so through the medium of his own testimony or that of his wife and in either event she (not being privilege-holder) can do nothing to preclude the disclosure. It follows, too, that if the wife is party to an action and desires herself to testify to the

communication or to require her husband to do so, her desires go for nought so long as the husband as privilege-holder, objects to having her testify to his communication or objects to giving his own testimony as to the communication.

12. People v. Mullings, 83 C. 138 (1890) (divorce); Perkins v. Maiden, 41 C.A.2d 243 (1940) (same); People v. Godines, 17 C.A.2d 721 (1936) (annulment). Here D was permitted to refuse to testify to his communication. By analogy he could, of course, prevent the ex-Mrs. D from so testifying.

13. See note 12.

14. Emmons v. Barton, 109 C. 662, 670 (1895).

15. In Nicoll v. Nicoll, 22 C.A. 268, 270 (1913), (plaintiff widow attempts to testify to husband's declaration to her; held properly excluded under 1881 (1)); McIntosh v. Hunt, 29 C.A. 779 (1916) (similar holding where defendant widower attempted to testify to wife's declaration to him).

Emmons v. Barton, 109 C. 662, 670 (1895) suggests that the holding respecting physician-patient privilege in Estate of Flint, 100 C. 391 (1893) is applicable to the marital privilege. See memo on Physician-Patient privilege.

16. Savings Union Bank Etc. v. Crowley, 176 C. 543 (1917) (husband's executor v. widow); Estate of Gillett, 73 C.A.2d 588 (1946) (same); Durrell v. Bacon, 138 C.A. 396 (1934) (same). Cf., Perkins v. Maiden, 41 C.A.2d 243 (1940).

17. See interpreting and applying this provision: In re Kellogg, 41 C.A.2d 833 (1940); People v. Tidwell, 61 C.A.2d 58 (1943); People v. Pittullo, 116 C.A.2d 373 (1953); People v. Marshall, 126 C.A.2d 357 (1954); People v. Schlette, 139 C.A.2d 165 (1956).

18. Comment on A.L.I. Rule 216 (d).

19. Comment on A.L.I. Rule 218.

20. McCormick § 86.

21. People v. Swaile, 12 C.A. 192 (1909); People v. Peak, 66 C.A.2d 894 (1944).

22. See section entitled "Whose Privilege?", supra.

23. The leading case is Tobias v. Adams, 201 C. 689 (1927). Here a judgment creditor of the husband sued husband and wife to set aside allegedly fraudulent conveyances from husband to wife. Defendants defended in part on the basis of a written argreement between themselves whereby husband relinquished to wife community interests in the property. Held, both defendants could be required to testify as to the transactions between

themselves because (1) Such transactions were not confidential communications, and (2) Even if they were confidential communications, defendants had waived their § 1881 (1) privilege respecting same. Says the court:

> "It is manifest that the testimony here excluded was pertinent to the issue tendered by the defendants in their answer setting up said written agreement of September 17, 1926, which was exhibit 'A' thereto. Every question and answer related specifically to such matter covered by said agreement. It must be held that defendants as husband and wife by filing for record a written agreement between themselves and by pleading it in defense to plaintiff's action and by introducing it in evidence put the bona fides of such paper in issue and thereby waived expressly any privilege thrown around them by the law. It would be monstrous if husband and wife might between themselves conspire to defraud the creditors of the one or the other and to conceal their act produce a written instrument which is immune from all inquiries and which must be accepted by the defrauded party as final. The freedom of contract between husband and wife and the power to transmute community property into separate property or vice versa by agreement between themselves renders it imperative that when such an agreement is relied upon by their joint answer, thereby the whole subject matter of said agreement is open to inquiry which may include communications from one to the other. This we understand upon examination of the transcript to be the effect of the holding in Johnston v. St. Sure, 50 Cal. App. 735 [195 Pac. 947], rehearing denied by this court."

See also Schwartz v. Brandon, 97 C.A. 30 (1920) (similar to Tobias).

In In re Strand, 123 C.A. 170 (1932) wife and husband sue for injuries to wife. Wife refuses to answer

questions propounded upon the taking of her deposition. Refusal based on § 1881 (1). Held, wife must answer. Says the court:

> "Subdivision 1 of section 1881 relates to privilege rather than to competency and such privilege may be waived. We are not convinced that said section was intended in any case to shield a party to an action and deprive the adversary of the benefit of the testimony of such party; but be that as it may, we are of the opinion that as a wife is given the right to bring an action for her own injuries on behalf of the community, her act in so doing constitutes a waiver on behalf of the community of the right to invoke that section so far as her testimony is concerned. We are further of the opinion that where the husband and wife join as parties plaintiff in such action, their voluntary act in so doing constitutes a waiver of the right to invoke that section as to the testimony of either."

Note that the privilege which is here involved is the first of the two § 1881 (1) privileges. (See footnote 1.) Query: does the court mean that the second privilege (marital communication privilege) is also waived?

In Credit Bur. San Diego v. Smallen, 114 C.A.2d Supp. 834 (1952), the facts were as follows: Plaintiffs' assignor, Husband, lends defendant (his wife's brother) money to be repaid by purchase by defendant of U.S. Series E bonds in name of defendant, husband and wife. Defendant discovers he can purchase bonds in name of only two persons. Defendant inquires of sister whether this would be O.K. Sister replies "Yes". Later defendant turns bonds over to sister who is then estranged from husband. In present action defendant

claims what he did constituted payment of the loan. Defendant examines wife as to whether husband told her it would be O.K. for defendant to purchase bonds in names of defendant and wife. Held, proper on authority of Tobias v. Adams, supra. Says the court:

> "We think, on the authority of that case, it was not error to admit the testimony of the wife under the similar circumstances here present. The nature of the contract between the husband and wife and the wife's brother is the issue made by the complaint. By raising this issue, the husband thereby opened the door to determine what that contract was in its entirety, including any amendments or novations thereof.
>
> 'It would be monstrous (says the court in the Adams case, page 699) if husband and wife might between themselves conspire to defraud the creditors of the one or the other and to conceal their act produce a written instrument which is immune from all inquiries and which must be accepted by the defrauded party as final. The freedom of contract between husband and wife and the power to transmute community property into separate property or vice versa by agreement between themselves renders it imperative that when such an agreement is relied upon by their joint answer, thereby the whole subject matter of said agreement is open to inquiry which may include communications from one to the other. This we understand upon examination of the transcript to be the effect of the holding in Johnston v. St. Sure, 50 Cal.App. 735 [195 P. 947], rehearing denied by this court.'
>
> The informality of the family agreement sufficient for the needs of the parties until divorce litigation commenced, gives the agreement here in suit all the weight due to a written, recorded, agreement between the husband and wife alone. We think, under the circumstances here present, the privilege was waived by the husband, and find no error in the admission of the evidence.

> Section 1881, subdivision 1, of the Code of Civil Procedure, was not enacted to be used as an instrument to prevent justice, or to permit a husband to initiate litigation which could only succeed by locking the lips of his former wife."

Hagen v. Silva, 139 C.A.2d 199 (1956). Quiet title action against husband and wife. Held, in view of nature of defendants' answer they are in a position akin to that of plaintiffs in Strand, supra, and therefore waive privilege. It is not clear, however, whether the waiver is only of the first of the two § 1881 (1) privileges or whether it is a waiver of both privileges. See also Rinehart v. First Cupertino Co., 154 C.A.2d 842 (1957). (Similar to Hagen.)

These cases seem to indicate that we are in the course of developing a judge-made spouse-litigant exception to the rule of marital communication quite analagous to the patient-litigant exception to the physician-patient privilege. See memo on the latter privilege.

24. In their comment on 37 (b) the Commissioners state that its "principle is recognized generally".

NOTE: THIS MEMO IS A SUPPLEMENT TO MEMO ON MARITAL PRIVILEGE (RULE 23).

INTRODUCTION

In this supplemental memo we consider the provisions of Rule 23 (2) relating to the special marital privilege possessed by an accused in a criminal action.

Rule 23 (2) provides:

> "(2) An accused in a criminal action has a privilege to prevent his spouse from testifying in such action with respect to any confidential communication had or made between them while they were husband and wife, excepting only (a) in an action in which the accused is charged with (i) a crime involving the marriage relation, or (ii) a crime against the person or property of the other spouse or the child of either spouse, or (iii) a desertion of the other spouse or a child of either spouse, or (b) as to the communication, in an action in which the accused offers evidence of a communication between himself and his spouse."

Herein we compare Rule 23 (2) with Rule 28, the latter being the general rule of marital privilege reviewed in the original memo to which this is the supplement.

Preliminarily, it is well to emphasize that Rule 28 applies in all actions -- both civil and criminal. Furthermore, it applies to both parties and non-parties. On the other hand, 23 (2) applies only to the accused in a criminal case.

Moreover, there is a considerable overlap between the two rules. We begin by describing this overlap.

Overlap between 28 and 23 (2).

Let us suppose that a married man is defendant in a criminal action, charged with a crime other than one mentioned in 28 (2)(c)

or in 23(2)(a). Suppose, further, that defendant has made a confidential communication to his wife and at the trial the D.A. offers the wife to testify to defendant's communication to her. Defendant objects. Rule 23 requires that the objection be sustained, because it provides that "a spouse who . . . transmitted the communication, has a privilege . . . to prevent the other [spouse] from disclosing [the communication]." Rule 23 (2) likewise requires that the objection be sustained, because it provides that an "accused . . . has a privilege to prevent his spouse from testifying . . . to [a] confidential communication had or made between them . . ."

In each rule certain criminal actions are excluded. Thus under 23 (2) (c) the Rule 28 privilege is inapplicable in the following:

> ". . . in a criminal action in which one of them is charged with a crime against the person or property of the other or of a child of either, or a crime against the person or property of a third person committed in the course of committing a crime against the other, or bigamy or adultery, or desertion of the other or of a child of either, . . ."

Under 23 (2) (a) the Rule 23 privilege is inapplicable in the following:

> ". . . in an action in which the accused is charged with (i) a crime involving the marriage relation, or (ii) a crime against the person or property of the other spouse or the child of either spouse, or (iii) a desertion of the other spouse or a child of either spouse, . . ."

It seems to be intended that 23 (2) (c) and 23 (2) (a) should cover the same area. This being so, would it not be well to use the same language in both? We think so and we therefore suggest that if 23 (2) is accepted, 23 (2) (a) should be amended to read as follows:

(a) in an action in which the accused spouse is charged with a crime against the person or property of the other or of a child of either, or a crime against the person or property of a third person committed in the course of committing a crime against the other or bigamy or adultery, or desertion of the other or of a child of either

Under each rule the spouse who would otherwise have the privilege there stated loses the same by testifying or calling another to testify to inter-spousal communication. 23 (2) (b) so provides in re the Rule 23 privilege. 28 (3) so provides in re the Rule 28 privilege. Again we think it would be wise to use the same language in both Rules. Therefore we recommend that if 23 (2) is accepted, 23 (2) (b) be amended to read as follows:

An accused who would otherwise have a privilege under this rule has no such privilege if he testifies or causes another to testify to any communication between the spouses upon the same subject matter.

Differences between 28 and 23 (2).

(a) Accused has privilege though he is not the communicating spouse.

Let us suppose again that a married man is defendant in a criminal action, being charged with a crime other than one mentioned in 28 (2) (c) or in 23 (2) (a). Suppose, further,

that defendant's wife has made a confidential communication to the defendant and the D.A. offers the wife (who does not object) to testify to such communication. In these circumstances Rule 28 does not extend the privilege there provided to defendant since defendant is not in this situation the communicating spouse. However, Rule 23 (2) gives defendant a privilege, notwithstanding the fact that he is not the communicating spouse. Therefore, as the Comment to 23 (2) indicates, 23 (2) "is broader than Rule 28 in that the accused has the privilege under [23 (2)] in criminal actions regardless of whether he is or is not the communicating spouse."

(b) Post-coverture privilege of accused.

The Rule 28 privilege is applicable only "during the marital relationship" and is therefore terminated by divorce or annulment.

Is it the intent of 23 (2) to impose a like limitation on the Rule 23 privilege? Possibly so, since the person the accused may prevent from testifying is "his spouse", which in this context may mean his present spouse only thereby excluding an ex-spouse. However, because this meaning is not altogether clear, 23 (2) might be read as creating a post-coverture privilege.

(c) Summary of differences.

Rule 23 (2) gives to an accused a privilege broader in atleast one respect than that given him by Rule 28: namely, under 23 (2) though the accused is the non-communicating spouse he is privileged to prevent the other (communicating) spouse from testifying to the confidential communication. Moreover 23 (2) may mean that after the marriage tie is severed, the accused may prevent the

ex-spouse from testifying to accused's confidential statements to the ex-spouse or the ex-spouse's confidential statements to the accused.

Evaluation of 23 (2).

Two policies exert opposite pulls whenever we try to mark off the scope of any privilege. On the one hand is the policy of full disclosure in a law suit of all the facts relevant to the controversy. On the other hand, is the policy of promoting some other objective, such as the free exchange of inter-spousal communication. The basic question is how far to yield to the one pull and how far to the other.

In our opinion, this policy conflict is wisely resolved by Rule 28. Therefore we oppose the special and broader privilege which Rule 23 (2) sets up in favor of an accused. If, however, the principle of 23 (2) is approved, we advise amending 23 (2) (a) and (b) as proposed above.

Respectfully submitted,

James H. Chadbourn