STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

The Marital "For and Against" Testimonial Privilege

November 15, 1956

LETTER OF TRANSMITTAL

To His Excellency Goodwin J. Knight
Governor of California
and to the Members of the Legislature

By Resolution Chapter 207 of the Statutes of 1955 the California Law Revision Commission was authorized to make a study to determine whether the "for and against" testimonial privilege of husband and wife should be revised in certain respects. The commission herewith submits its recommendation relating to this subject and the research study prepared by its staff.

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Executive Secretary

November 15, 1956

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to the Marital "For and Against" Testimonial Privilege

By virtue of Section 1881(1) of the Code of Civil Procedure and Section 1322 of the Penal Code, a married person has a privilege, subject to certain exceptions, not to have his spouse testify either for or against him in a civil or criminal action to which he is a party. Section 1322 of the Penal Code also gives his spouse a privilege not to testify for or against him in a criminal action to which he is a party. Since these privileges, which are based on ancient common law antecedents, operate to preclude access to otherwise competent testimony which may be of critical importance in particular cases, the Law Revision Commission has undertaken to re-examine them in light of modern conditions to determine whether their continuation in our law is justified.

The commission recommends that the marital testimonial privilege as to testimony by one spouse *for* the other be abolished in both civil and criminal actions. There would appear to be no need for this privilege, now given to a party to an action, not to call his spouse to testify in his *favor;* if a case can be imagined in which a party would wish to avail himself of this privilege, he could achieve the same result by simply not calling his spouse to the stand. Nor does it seem desirable to continue the present privilege of the nonparty spouse not to testify in favor of the party spouse in a criminal action. It is difficult to imagine a case in which this privelege would be claimed for other than mercenary or spiteful motives and it precludes access to evidence which might save an innocent person from conviction.

The commission recommends, however, that a marital testimonial privilege as to testimony by one spouse *against* the other in both civil and criminal actions continue to exist. The commission concurs in the long-accepted rationale of this privilege, that the giving of such testimony, even under compulsion, would in many cases seriously disturb if not completely disrupt the marital relationship of the persons involved and that society stands to lose more from such disruption than it stands to gain from the testimony which would be made available if the privilege were abolished. The commission recommends, however, that the privilege be taken away from the party spouse and given exclusively to the witness spouse because the latter is more likely than the former to determine whether or not to claim the privilege on the basis of its probable effect on the marital relationship. For example, a party spouse would be under considerable temptation, because of his interest in the outcome of the action, to claim the privilege even if the marriage were already hopelessly disrupted, whereas a witness spouse might not.

The commission recommends that an exception to the "against" privilege in civil actions be created for incompetency proceedings involving a married person. The commission has considered in connection

with this study a suggestion made by a superior court judge that the testimony of one spouse should be available in an incompetency proceeding involving the other. The commission's first recommendation, that the "for" privilege be abolished, may take care of this matter inasmuch as the courts of some states have held that such a proceeding is one for, rather than against, the spouse involved. Even if the courts of this State should consider such a proceeding to be one against the spouse, only the witness spouse would have the privilege under the commission's second recommendation and would probably not claim it in most cases. The commission believes, however, that in the interest of society a spouse should be a compellable witness in such a proceeding.

The commission recommends that all reference to the "for" and "against" marital privileges be removed from Section 1881 and that a new Section 1882 of the Code of Civil Procedure be enacted to continue the "against" privilege in civil actions. Section 1881 establishes several privileges as to communications between certain persons, including communications between husband and wife. The purpose of these privileges is to encourage confidences between the persons involved—husband and wife, attorney and client, doctor and patient, etc. This purpose is wholly unrelated to the "for and against" privilege of spouses and the two should be in separate sections in the code. The recommendation of the commission is not concerned with the testimonial privilege of married persons as to communications between them during marriage and the proposed statute does not affect this privilege.

The commission recommends that most of the exceptions to the marital privilege in civil actions specified in Section 1881 be eliminated. The present exception for civil actions between the spouses is no longer necessary since the privilege is given only to the witness spouse; in such a case, each spouse will presumably waive the privilege and testify against the other. All exceptions for criminal actions should be transferred to Penal Code Section 1322 as revised.

The commission recommends that Section 1322 of the Penal Code be revised to codify court decisions which have held that the exception to the marital privilege for cases involving "criminal violence * * * upon the child or children of one [spouse] by the other [spouse]" applies when the children involved are those of either spouse. It also recommends that the reference in present Section 1322 to "cases of criminal violence upon one [spouse] by the other" be eliminated because it is swallowed up by the later-enacted exception "in case of criminal actions or proceedings for a crime committed by one [spouse] against the person or property of the other [spouse]" which is retained in substance in Section 1322 as revised.

The commission recommends that Penal Code Section 1322 be revised and Section 1882 of the Code of Civil Procedure be drafted to make it clear that one spouse may be compelled to testify against the other in cases falling within the exceptions to the marital privilege. This is probably the present law but there is no decision on the question.

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

An act to amend Section 1881 of the Code of Civil Procedure and Section 1322 of the Penal Code and to enact Section 1882 of the Code of Civil Procedure, all relating to the testimonial privilege of married persons.

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

SECTION 1. Section 1881 of the Code of Civil Procedure is amended to read:

1881. 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:

1. ~~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; nor can either.~~ *Neither a husband nor a wife, may* during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor 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; or in an action for damages against another person for adultery committed by either husband or wife.

2. An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity.

3. A clergyman, priest or religious practitioner of an established church can not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

4. A licensed physician or surgeon can not, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient; provided, however, that either before or after probate, upon the contest of any will executed, or claimed to have been executed, by such patient, or after the death of such patient, in any action involving the validity of any instrument executed, or claimed to have been executed, by him, conveying or transferring any real or personal property, such physician or surgeon may testify to the mental condition of said patient and in so testifying may disclose information acquired by him concerning said deceased which was necessary to enable him to prescribe or act for such deceased; provided further, that after the death of the patient, the executor of his will, or

* Matter in italics would be added to the present law; matter in "strikeout" type would be omitted.

the administrator of his estate, or the surviving spouse of the deceased, or if there be no surviving spouse, the children of the deceased personally, or, if minors, by their guardian, may give such consent, in any action or proceeding brought to recover damages on account of the death of the patient; provided further, that where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify; and provided further, that the bringing of an action, to recover for the death of a patient, by the executor of his will, or by the administrator of his estate, or by the surviving spouse of the deceased, or if there be no surviving spouse, by the children personally, or, if minors, by their guardian, shall constitute a consent by such executor, administrator, surviving spouse, or children or guardian, to the testimony of any physician who attended said deceased.

5. 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.

6. A publisher, editor, reporter, or other person connected with or employed upon a newspaper can not be adjudged in contempt by a court, the Legislature, or any administrative body, for refusing to disclose the source of any information procured for publication and published in a newspaper.

SEC. 2. Section 1882 is added to the Code of Civil Procedure to read:

1882. A married person may not be compelled to testify against his spouse in any civil action or proceeding except in an action for damages against another person for adultery committed by either husband or wife with such person or in an incompetency proceeding involving the spouse.

SEC. 3. Section 1322 of the Penal Code is amended to read:

1322. ~~Neither husband nor wife is a competent witness for or~~ *A married person may not be compelled to testify* against ~~the other~~ *his spouse* in a criminal action or proceeding *against the spouse* ~~to which one or both are parties~~, except *an* ~~with the consent of both, or in case of criminal~~ action s or proceeding s for ~~a~~ :

(a) A crime committed by one *spouse* against the person or property of the other, whether before or after marriage *;* ~~or in cases of~~

(b) A crime of violence committed ~~criminal violence upon~~ *by* one *spouse* ~~by the other, or~~ upon the child or children of *either spouse;* ~~one by the other or in cases of criminal actions or proceedings for~~

(c) ~~bigamy~~ *Bigamy* ~~;~~ or adultery *;* ~~; or in cases of criminal actions or proceedings brought under~~

(d) ~~the provisions of~~ *A crime defined by* section *s* 270 and 270a of this code or ~~under any provisions of~~ *by* the "Juvenile Court Law *;* "

(e) A crime committed against another person by one spouse while engaged in committing and connected with the commission of a crime against the other spouse.

A STUDY TO DETERMINE WHETHER THE "FOR AND AGAINST" TESTIMONIAL PRIVILEGE OF MARRIED PERSONS SHOULD BE REVISED *

The purpose of this study is to analyze the so-called "for and against" testimonial privilege of husband and wife and to consider certain changes in the law respecting this privilege.

At the outset it should be pointed out that this study is not concerned with the privilege of husband and wife not to testify concerning communications between themselves.[1] Modification or even abolition of the "for and against" privilege would, therefore, still leave it within the power of the spouses to refuse to testify in a large number of situations in which they could be compelled to do so but for the marital relationship.

The "for and against" privilege in this State is embodied in two statutes. Section 1881(1) of the Code of Civil Procedure provides, in relevant 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; * * * but this exception does not apply to a civil action or proceeding by one against the other, nor 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; or in an action for damages against another person for adultery committed by either husband or wife.

Section 1322 of the Penal Code provides:

> 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, or in case of criminal actions or proceedings for a crime committed by one against the person or property of the other, whether before or after marriage or in cases of criminal violence upon one by the other, or upon the child or children of one by the other or in cases of criminal actions or proceedings for bigamy, or adultery, or in cases of criminal actions or proceedings brought under the provisions of section 270 and 270a of this code or under any provisions of the "Juvenile Court Law."

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* This study was made by the staff of the Law Revision Commission with the assistance of Mr. C. Hugh Friedman.

[1] This is covered by Code of Civil Procedure Section 1881 (1), in the following language:

> "[N] or can either [husband or wife], during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage * * *."

It is applicable in criminal cases. People v. Godines, 17 Cal. App. 2d 721, 62 P. 2d 787 (1936).

In this report the history of these code sections will be reviewed, the general nature and scope of the privilege which they establish will be discussed, and several suggestions for their revision will be presented and analyzed.

HISTORY OF THE PRIVILEGE

Common Law Background

At common law, both husband and wife were disqualified from testifying either for or against the other.[2] All litigants were incompetent to testify because of interest; their spouses were also considered incompetent because husband and wife were "one" in the eyes of the law.[3] The disqualification of litigants based on interest was later discarded, but reasons other than the theoretical unity of married persons developed to support the rule disqualifying the spouses from testifying for or against each other. One spouse was thought to be incompetent to testify *for* the other because of the identity of interest between them—thus, the incompetency amounted to a disqualification for bias.[4] A spouse was considered incompetent to testify *against* the other on the theory that to permit it would endanger domestic harmony.[5] There was, however, an exception based on "necessity" which permitted one spouse to testify against the other for offenses against his or her person.[6] Thus, for example, a wife was held competent to testify against her husband in a prosecution for assault committed against her,[7] for instigating a rape against her,[8] or for forcing her to marry him.[9]

The California Law

History of the Rule as Applied in Civil Actions. The common law rule that spouses are incompetent to testify for or against each other was codified in Section 395 of the Practice Act of 1851, with, however, a "necessity" exception for actions by one spouse against the other. This incompetency was held not to be removed by a statute enacted in 1861 allowing the parties to an action to testify.[10] An amendment of Section 395 in 1863 abolished the disqualification, making husband and wife both competent and compellable witnesses, "the same as any other witnesses," except in actions for divorce or as to any communication by one to the other during the marriage.[11] However, in 1872 Section 1881(1) of the Code of Civil Procedure was enacted, establishing a privilege on behalf of the party-spouse as to testimony either for or against him by the other spouse in civil actions. Two exceptions were

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[2] The rule is said to date back to the time of Lord Coke. 8 WIGMORE, EVIDENCE § 2227 (3d ed. 1940). See generally, 2 WIGMORE, EVIDENCE §§ 600-610 (3d ed. 1940).

[3] Co. LITT. *6b.

[4] "[I]t is impossible that their testimony should be indifferent * * *" 1 BL. COMM. *443.

[5] "The foundations of society would be shakened * * * by permitting it." 2 KENT COMM. *179; "[I]t might occasion implacable dissention * * *." Mary Grigg's Case, 83 Eng. Rep. 1 (K. B. 1660). See also, Stapleton v. Crofts, 118 Eng. Rep. 137, 138 (Q. B. 1852); Clements v. Marston, 52 N. H. 31, 36 (1872).

[6] 8 WIGMORE, EVIDENCE § 2239 (3d ed. 1940).

[7] *Ibid.*

[8] *Ibid.*

[9] *Ibid.*

[10] Cal. Stat. 1861, c. 467, § 1, p. 521; Dawley v. Ayers, 23 Cal. 108 (1863). The great weight of authority is in accord concerning the effect of general statutes allowing parties and interested persons to testify. 2 WIGMORE, EVIDENCE § 619 (3d ed. 1940).

[11] Cal. Stat. 1863, c. 528, § 1, p. 771. In 1870 the husband and wife were made competent witnesses for or against the other in divorce actions, but corroboration was required. Cal. Stat. 1869-70, c. 188, § 2, p. 291.

made, however, one for civil actions by one against the other, and the other for criminal actions for crimes committed by one against the other. In 1907, Section 1881(1) of the Code of Civil Procedure was amended to add two further exceptions to the privilege of the party-spouse, one for an action brought by husband or wife against another person for alienation of affections and the other for an action for damages brought against another person for adultery committed by either.[12] In 1933, still another exception was added for a crime committed against another person by a husband or wife while engaged in committing a crime against his or her spouse.[13] In 1939, alienation of affections actions were deleted from the list of exceptions to the privilege.[14]

History of the Rule as Applied in Criminal Actions. Prior to 1866 spouses were incompetent to testify for or against each other in criminal actions. In that year a statute was enacted making husband and wife competent witnesses for or against each other in such actions "by consent of both," with an exception to the privilege thus created permitting the injured party to testify in cases involving "personal violence" by one spouse upon the other.[15] Thus, in criminal cases, the incompetency was reduced to a privilege which was given to both the party spouse and the witness spouse. In 1872 this privilege was carried over into Section 1322 of the Penal Code. In 1905 actions for bigamy and actions for failure of a father to provide his children with necessaries were made exceptions to the privilege.[16] In 1907 exceptions in actions for adultery and actions brought under Section 270a of the Penal Code for nonsupport of the wife were added.[17] In 1911 an exception was added for "criminal actions or proceedings for a crime committed by one against the person or property of the other,"[18] thus overlapping in part the earlier "criminal violence" exception. A 1933 amendment placed the section in its present form by adding exceptions for cases of criminal violence upon the children of one by the other and of criminal actions or proceedings brought under any of the provisions of the "Juvenile Court Law."[19]

NATURE AND SCOPE OF THE PRIVILEGE

The "for and against" marital privilege in civil actions differs from that in criminal actions in that the privilege may be claimed by either spouse in a criminal action but only by the party spouse in a civil action. However, the following elements of the privilege are the same in both civil and criminal actions:

[12] Cal. Stat. 1907, c. 68, § 1, p. 87.
[13] Cal. Stat. 1933, c. 536, § 1, p. 1423.
[14] Cal. Stat. 1939, c. 129, § 5, p. 1246.
[15] Cal. Stat. 1865-66, c. 64, § 1, p. 46.
[16] Cal. Stat. 1905, c. 139, § 1, p. 140. In this year Section 266g of the Penal Code was also enacted (Cal. Stat. 1905, c. 497, § 1, p. 656) creating the crime of placing or permitting the placing of one's wife in a house of prostitution, and making the wife a competent and compellable witness against her husband in all prosecutions thereunder.
[17] Cal. Stat. 1907, c. 230, § 1, p. 290.
[18] Cal. Stat. 1911, c. 103, § 1, p. 270. Also, in 1911, a statute creating the crime of pimping provided that the female involved should be competent as a witness for or against the accused, or as to any communications with the accused, even though she had married the accused before or after the alleged crime. Cal. Stat. 1911, c. 15, § 2, p. 10.
[19] Cal. Stat. 1933, c. 109, § 1, p. 565.

The privilege applies only where the spouses are lawfully married when the witness takes the stand.[20] A voidable marriage not yet annulled qualifiies [21] but a void marriage does not.[22] An illicit relationship cannot give rise to the privilege.[23] If the marriage has been dissolved by divorce,[24] or annulment,[25] the witness is no longer a "spouse" within the meaning of the sections, and hence the privilege does not exist.[26]

The privilege does not apply unless the nonwitness spouse is a party to the action, whether civil or criminal.[27] Thus, it is not applicable when a spouse is only a nominal party,[28] or where one spouse has pleaded guilty and the other testifies in the prosecution of his codefendant,[29] or where a spouse and another person are charged by separate information with the same offense and the wife of the one not on trial is called to testify for the other, even though her testimony implicates her husband.[30]

Under both Code of Civil Procedure Section 1881(1) and Penal Code Section 1322, the spouse must be a witness in the proceeding to which the other spouse is a party for the privilege to be applicable. Thus, otherwise competent evidence of extrajudicial statements made by a spouse to a third person is not excluded as within the privilege.[31] And even evidence of statements made by one spouse to the other or in the other's presence, and the other's assent or reaction to them is admissible.[32]

So far as the witness spouse has the privilege (in criminal actions), it is presumably waived by testifying without objection. The party spouse waives his privilege in a civil or criminal case by failing to make a timely and appropriately stated objection when his spouse is called by the adverse party to testify against him.[33] The party spouse also waives his privilege if he calls his spouse to testify for him, at least to the extent of proper cross-examination, and perhaps also as to any issue in the case.[34]

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[20] People v. Thornton, 106 Cal. App. 2d 514, 235 P. 2d 227 (1951) (evidence admitted on showing not married). Under Section 395 of the Practice Act of 1851, making husband and wife incompetent for or against each other, a witness was held competent where there was no lawful marriage, although the parties had lived together as husband and wife and had been received in public and society as such. People v. Anderson, 26 Cal. 130 (1864).

[21] People v. Livingston, 88 Cal. App. 713, 263 Pac. 1036 (1928).

[22] People v. Glab, 13 Cal. App. 2d 528, 57 P. 2d 588 (1936).

[23] People v. Alviso, 55 Cal. 230 (1880); People v. Anderson, 26 Cal. 130 (1864).

[24] People v. Loper, 159 Cal. 6, 112 Pac. 720 (1910) (divorced wife can testify, as intimate acquaintance, to mental condition of accused former husband).

[25] People v. Godines, 17 Cal. App. 2d 721, 62 P. 2d 787 (1936).

[26] This rule does not apply, of course, with respect to marital communications. *Ibid.*

[27] Fitzgerald v. Livermore, 2 Cal. Unrep. 744, 13 Pac. 167 (1887); People v. Langtree, 64 Cal. 256, 30 Pac. 813 (1883).

[28] Johnson v. St. Sure, 50 Cal. App. 735, 195 Pac. 947 (1920).

[29] People v. Albritton, 110 Cal. App. 188, 294 Pac. 76 (1930).

[30] People v. Langtree, 64 Cal. 256, 30 Pac. 813 (1883).

[31] People v. Murphy, 45 Cal. 137 (1872) (evidence of defendant's wife's declarations and conduct at scene of killing admissible); First National Bank v. De Moulin, 56 Cal. App. 313, 205 Pac. 92 (1922) (husband's letters to the plaintiff admissible against the wife-defendant). *But cf.* People v. Chadwick, 4 Cal. App. 63, 87 Pac. 384 (1906), wherein the opinion of the Supreme Court, denying hearing, indicates doubt that the testimony of defendant's wife at a former trial would be admissible if proper objection were made.

[32] People v. Colombo, 70 Cal. App. 489, 233 Pac. 413 (1924) (evidence of wife's warning to husband on approach of officers and his reaction thereto admissible).

[33] People v. Singh, 182 Cal. 457, 188 Pac. 987 (1920); People v. Chadwick, 4 Cal. App. 63, 87 Pac. 384 (1906).

[34] Steinburg v. Meany, 53 Cal. 425 (1879).

The courts have also held that the privilege is "waived," at least in civil actions, when both spouses join as plaintiffs or are joined as defendants to an action. Thus, for example, when suit is brought to set aside a conveyance from husband to wife allegedly in fraud of the husband's creditors, both spouses being named as defendants, it has been held that setting up the conveyance in the answer as a defense waives all marital privileges.[35] And when husband and wife are joined as defendants in a quiet title action and assert a claim to the property they have been held to have waived the privilege.[36] Similarly, when the spouses join as plaintiffs in an action to recover for damages to one of them, the cause of action being community property, each has been held to have waived the privilege as to the testimony of the other.[37] This rule has seemingly been developed to prevent a spouse from refusing to testify as to matters which affect his own interest on the ground that such testimony would also be "against" his spouse under Section 1881(1).[38] While the rule seems sound enough, it appears to be more in the nature of a judicially-created exception to the marital privilege than a situation of genuine waiver.

POSSIBLE REVISIONS OF THE LAW RELATING TO THE "FOR AND AGAINST" PRIVILEGE

A re-examination of the "for and against" testimonial privilege of spouses under Code of Civil Procedure Section 1881(1) and Penal Code Section 1322 suggests several questions which appear to merit consideration by the Legislature.

Should the "For" Privilege Be Abolished?

In both civil and criminal actions a party to the action has a privilege not to have his spouse testify in his favor. In criminal cases the nonparty spouse also has a privilege not to testify in favor of the party spouse. As we have seen, these privileges exist by virtue of statutes which are traceable to the outmoded common law rule which made spouses *incompetent* to testify for each other because of apprehension that they would be so biased in each other's favor as to commit perjury. This common law rule was developed in an era when all interested persons were disqualified as witnesses and was logical enough as long as the premise of both rules, that interest begets perjury, was generally accepted. However, that premise was rejected in the nineteenth century with the general enactment of statutes permitting interested persons to testify. At that time the disqualification of spouses to testify in each other's favor should logically have been simply abolished as one aspect of the outmoded view of testimonial disqualification because of interest. Instead, in this State the disqualification was reduced to a privilege.

[35] Tobias v. Adams, 201 Cal. 689, 258 Pac. 588 (1927); Schwartz v. Brandon, 97 Cal. App. 30, 275 Pac. 448 (1929). *But cf.* Marple v. Jackson, 184 Cal. 411, 193 Pac. 940 (1920).

[36] Hagen v. Silva, 139 Cal. App. 2d 199, 293 P. 2d 143 (1956).

[37] *In re* Strand, 123 Cal. App. 170, 11 P. 2d 89 (1932). However, the privilege is available to a plaintiff-spouse who sues alone to recover for his personal injuries even though the recovery will be community property. Rothschild v. Superior Court, 109 Cal. App. 345, 293 Pac. 106 (1930). *But cf.* Credit Bureau of San Diego v. Smallen, 114 Cal. App. 2d 834, 249 P. 2d 619 (Supp. 1952).

[38] It has been held, however, that a spouse does not waive the privilege by making the other spouse his agent, even as to transactions involving the agency. Ayres v. Wright, 103 Cal. App. 610, 284 Pac. 1077 (1930).

As applied to testimony "for" the party spouse (as contrasted with the "against" privilege discussed below) this legislative change would almost appear to have been the result of inadvertence. There appears to be little, if any, logic in giving a party a privilege not to have someone testify *for* him; such a privilege will presumably atrophy from lack of use. Indeed, the only reported case in this State in which the "for" privilege was operative involved a civil action in which a wife was not permitted to testify in favor of her insane husband on the ground that he was incapable of waiving his privilege not to have her do so![39] Moreover, if a case should arise in which a competent party did not wish his spouse to testify in his behalf he could achieve this result by simply not calling the spouse as a witness; the "for" privilege adds nothing to a litigant's power to determine who his witnesses shall be.

Nor does the privilege of the nonparty spouse not to testify in favor of the party spouse in a criminal action seem to be justifiable. By depriving criminal defendants of this favorable evidence it creates the possibility that persons whose innocence could be established by the testimony of their spouses will be convicted of crimes they did not commit. Moreover, it creates opportunities for blackmail by the nonparty spouse. And the exercise of the privilege would certainly disturb domestic tranquility if a case can be imagined in which such tranquility existed at the time the witness spouse refused to testify.

There is considerable precedent for abolishing the "for" privilege. The legislatures of fourteen states have eliminated this aspect of the marital privilege in both civil and criminal cases.[40] In five other states the "for" privilege has been abolished in criminal cases[41] and in four other states it has been abolished in civil cases.[42]

Should the "Against" Privilege Be Abolished?

In both civil and criminal actions a party to the action has a privilege not to have his spouse testify against him. In criminal cases the nonparty spouse also has a privilege not to testify against the party spouse. These privileges, too, exist by virtue of statutes which are traceable to common law rules of testimonial incompetency. The stated rationale for the common law "against" rule has two aspects: (1) that there is a natural repugnance to using one spouse against the other; and (2) that to compel adverse testimony by one spouse against the other

[39] Falk v. Wittram, 120 Cal. 479, 52 Pac. 707 (1898).

[40] ARK. STAT. ANN. §§ 28-601, 28-603 (civil), §§ 43-2019, 43-2020 (criminal) (1947); DEL. CODE ANN. tit. 10, § 4304 (civil), tit. 11, § 3502 (criminal) (1953); FLA. STAT. § 90.04 (civil), § 932.31 (criminal) (1953); ILL. STAT. ANN. c. 51, § 5 (civil) (1950), c. 38, § 734 (criminal) (Supp. 1955); IND. STAT. ANN. §§ 2-1713, 2-1714 (civil) (Burns, 1946), § 9-1602 (criminal) (Burns, 1942); IOWA CODE §§ 622.7, 622.8 (both) (1954); N. H. REV. STAT. ANN. c. 516, § 27 (both) (1955); N. Y. CIV. PRAC. ACT § 346 (civil), N. Y. PENAL LAW § 2445 (criminal); PA. STAT. ANN. tit. 28, §§ 316-17 (civil), tit. 19, § 683 (criminal) (Purdon, 1930); S. C. CODE § 26-403 (both) (1952); TENN. CODE ANN. § 24-103 (civil), § 40-2404 (criminal) (1955); VT. REV. STAT. § 1738 (both) (1947); WIS. STAT. § 325.18 (both) (1953); WYO. COMP. STAT. ANN. § 3-2605 (both) (1945). Maine may also be in this group; see ME. REV. STAT. c. 113, § 114 (civil), c. 148, § 22 (criminal) (1954).

[41] KAN. GEN. STAT. § 62-1420 (1949); NEB. REV. STAT. § 25-1203 (1948); OKLA. STAT. tit. 22, § 702 (1951); TEX. CODE CRIM. PROC. art. 714 (1948); W. VA. CODE ANN. § 5728 (1955).

[42] N. MEX. STAT. ANN. §§ 20-1-9, 20-1-12 (1953); N. C. GEN. STAT. § 8-56 (1953) (with some exceptions); TEX. REV. STAT. art. 3715 (Vernon, 1948); W. VA. CODE ANN. § 5727 (1955).

would disrupt domestic tranquility.[43] Even if both of these assertions be accepted, the question remains whether these considerations are of sufficient weight to warrant depriving a court of evidence upon which the outcome of a criminal or civil action may turn. Does the natural repugnance of using one spouse against the other justify depriving the public prosecutor of testimony upon which the conviction of a murderer depends? Does preservation of a negligent defendant's domestic tranquility justify depriving the plaintiff of the testimony of the defendant's spouse in a civil action when the outcome of the case depends on whether he or she is required to take the stand? Such questions as these suggest that the validity of the "against" privilege deserves careful re-examination by the Legislature.

Those who have studied the "against" privilege have unanimously concluded that it is not justified. For example, the California Supreme Court has quoted with approval the following statement from Schouler's *Husband and Wife:*

> "On the whole, * * * the prevailing tendency of late years in both England and America is to regard the domestic confidence or the ties of a spouse as of little consequence compared with the public convenience of extending the means of ascertaining the truth in all cases * * * ."[44]

Moreover, doubt has been expressed that the privilege actually does protect domestic tranquility in the cases in which it is asserted. Thus, Professor Wigmore has said:

> When one thinks of the multifold circumstances of life that contribute to cause marital dissension, the liability to give unfavorable testimony appears as only a casual and minor one, not to be exaggerated into a foundation for so important a rule.[45]

[43] "Possibly the true explanation is, after all, the simplest one, namely, that a natural and strong repugnance was felt (especially in those days of closer family unity and more rigid paternal authority) to condemning a man by admitting to the witness-stand against him those who lived under his roof, shared the secrets of his domestic life, depended on him for sustenance, and were almost numbered among his chattels." 8 WIGMORE, EVIDENCE § 2227 (3d ed. 1940).

"It is very manifest that the rule which prevents a wife from being compelled to testify against her husband is based on principles which are deemed important to preserve the marriage relation as one of full confidence and affection, and that this is regarded as more important to the public welfare than that the exigencies of lawsuits should authorize domestic peace to be disregarded, for the sake of ferreting out some fact not within the knowledge of strangers. * * * The power of declining to call such a witness is not reserved to protect from awkward disclosures, but out of respect to the better feelings of humanity, which impel all right-minded persons to shrink from any needless exposure to the ordeal of public examination, of persons who would be unnatural and unworthy if they did not feel a very strong bias in favor of their consorts." Knowles v. People, 15 Mich. 408, 413-14 (1867).

The "reason why the law will not suffer a wife to be a witness for or against her husband is to preserve the peace of families." Barker v. Kixie, Lee tr. Hardwicke, 264 (1736).

For a collection of other citations containing similar statements, see 8 WIGMORE, EVIDENCE § 2228 (3d ed. 1940).

[44] People v. Langtree, 64 Cal. 256, 259, 30 Pac. 813, 814 (1883); see also Marple v. Jackson, 184 Cal. 411, 414, 193 Pac. 940, 941 (1920).

[45] 8 WIGMORE, EVIDENCE § 2228 (3d ed. 1940). See also Hutchins and Slesinger, *Some Observations on the Law of Evidence: Family Relations,* 13 MINN. L. REV. 675, 679 (1929).

It has also been pointed out that if preservation of domestic tranquility is the purpose of the privilege, it ought not to be available when there is no longer such tranquility between the spouses. Judge Clark, dissenting in United States v. Walker, 176 F. 2d 564, 569 (2d Cir. 1949) has said: "Should we not therefore turn to the only solid ground—if any—for the exclusion, namely, the promotion of marital peace, etc.? * * * But then we must recognize that the reason for the exclusion is now gone entirely, put to an end by the husband's acts. * * * Certainly it is not * * * difficult to conclude that the marriage is already wrecked * * *." See also 8 WIGMORE, EVIDENCE § 2228 (3d ed. 1940); Note, 38 VA. L. REV. 359, 374 (1952).

Another critic has agreed:

> The privilege has sometimes been defended, after the manner in which we find reasons for inherited customs generally, as protecting family harmony. But family harmony is nearly always past saving when the spouse is willing to aid the prosecution. The privilege, in truth, is an archaic survival of a mystical religious dogma and of a way of thinking about the marital relation, which are today outmoded.[46]

Apart from expressions of doubt as to the soundness of the very basis of the "against" privilege, it has been vigorously criticized by Professor Wigmore in the following terms:

> [I]f Doe has committed a wrong against Roe, and Doe's wife's testimony is needed for proving that wrong, Doe, the very wrongdoer, is to be licensed to withhold it and thus to secure immunity from giving redress, because, forsooth, Doe's own marital peace will be thereby endangered,—a curious piece of policy, by which the wrongdoer's own interests are consulted in determining whether justice shall have its course against him. This alone, without further following into the details of the reasoning, will serve to exhibit that argument's fallacy.[47]

And Professor Maguire has characterized the privilege as "sheer nonsense."[48]

The "against" privilege has also been abolished by statute in a number of states. Ten states have abolished this aspect of the marital privilege in both civil and criminal actions[49] and four other states have abolished it in civil actions only.[50] No marital privilege is provided in the Uniform Rules of Evidence drafted by the Commissioners on Uniform Laws.

Which Spouse Should Have the Privilege?

Under Code of Civil Procedure Section 1881(1) the party spouse has both a "for" and an "against" privilege in civil cases. Under Penal Code Section 1322 both spouses have both a "for" and an "against" privilege in criminal cases. No explanation for this difference as to who has the privilege in civil and criminal cases appears to have been offered.

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[46] MCCORMICK, EVIDENCE § 66 (1954).

[47] 8 WIGMORE, EVIDENCE § 2228 (3d ed. 1940). See also BENTHAM, TREATISE ON JUDICIAL EVIDENCE 226, 238 (Dumont 1825).

[48] MAGUIRE, EVIDENCE, COMMON SENSE, AND COMMON LAW 90 (1947). See also, Hines, *Privileged Testimony of Husband and Wife In California*, 19 CALIF. L. REV. 390 (1931), and Notes, 2 CALIF. L. REV. 148 (1914); 13 IOWA L. REV. 481 (1928); 35 MICH. L. REV. 329 (1936); 20 MINN. L. REV. 693 (1936); 38 VA. L. REV. 359 (1952).

In 1937-38, the marital privilege was placed on the subject-program of the American Bar Association's Committee on the Improvement of the Law of Evidence. The Committee's personnel consisted of five members (three being judges) and 65 advisory members (one from each state and territory and 15 members-at-large, these being chiefly professors of the law of evidence). The Committee reported: "It is recommended that the *privilege* protecting from being called one [spouse] against the other be abolished (1) in civil cases, and (2) in criminal cases." The Committee voted in favor of the recommendation, 25 to 14. However, this recommendation apparently was not included in those adopted by the American Bar Association in July, 1938. See VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 321-24, 583 (1949).

[49] Delaware, Florida, Illinois, Indiana, New Hampshire, New York, South Carolina, Tennessee, Vermont and Wisconsin. Note 40 *supra*.

[50] See note 42 *supra*.

It is arguable that if the "against" privilege is to continue to exist it should belong exclusively to the witness spouse on the ground that he or she is more likely to exercise it on its theoretical basis—i.e., whether domestic tranquility within the family would be seriously jeopardized by the testimony—than is the party spouse who is necessarily under considerable temptation to assert the privilege solely or largely for motives of self-interest unrelated to the ends which it is designed to achieve. If the "against" privilege were given to the witness spouse rather than the party spouse, it would presumably not be asserted in cases in which domestic tranquility is already hopelessly disrupted as, for example, where the parties are permanently separated but not divorced. Such a change in the law would meet one criticism which has been made of the privilege.

It seems doubtful, however, that if the "for" privilege is to be continued the witness spouse should have it. Its exercise by a spouse called by the other to testify in his behalf would seem to threaten rather than to protect domestic tranquility. Moreover, it is difficult to imagine when the privilege would be exercised by the witness spouse save out of spiteful or mercenary motives.

Should a Spouse Be a Compellable Witness in Cases Falling Within the Exceptions to the Privilege?

Both Code of Civil Procedure Section 1881(1) and Penal Code Section 1322 contain a number of exceptions to the privilege which they establish. May one spouse be compelled to testify against the other in cases covered by these exceptions? While no reported case has decided this point, the answer would appear to be in the affirmative on the following analysis: (1) The general rule, established by Code of Civil Procedure Section 1879 and Penal Code Section 1321, is that any person is a compellable witness as to any matter on which he is competent to testify; (2) The "for and against" marital privilege in each code establishes a limited exception to this rule; (3) Cases falling within the exceptions to Code of Civil Procedure Section 1881(1) and Penal Code Section 1322 and thus outside of the "for and against" privilege fall under the general rule. Assuming that this now is the law, should the rule be changed to give the witness spouse a privilege not to testify in *all* cases, thus limiting the exceptions to depriving the party spouse of the privilege in cases to which they apply?

This problem is likeliest to arise in a criminal case in which one spouse does not wish to testify against the other. Typically, the situation is one in which a complaint is filed by a wife against her husband but she has a change of heart by the time the matter comes on for trial. This is not only exasperating to the district attorney but in most such cases means that a man who has committed a crime against a member of his family will go unpunished. In a particular case it may be preferable not to prosecute the defendant in these circumstances. But should his spouse have the power to decide that question? If the wife were made a compellable witness in such a case it would give the district attorney the power to determine whether the offense is sufficiently aggravated to warrant prosecution even with a reluctant witness or whether the spouses should be left to work out matters between themselves.

Nevertheless, an argument can be made that one spouse should have a privilege not to testify against the other in all cases. Most of the exceptions to the privilege appear to have been created primarily to protect the witness spouse—i.e., because of apprehension that the spouse against whom the testimony would be used would exercise the privilege and thus deprive the other spouse of protection afforded him by the civil and criminal law. This danger would be averted by providing that the witness spouse has the privilege and the party spouse does not. Under such a rule the privilege would seldom if ever be claimed in a civil action between the spouses; if a spouse presses or defends such an action, he will presumably testify in support of his position. It would occasionally be claimed, however, in a criminal action when a spouse who instigated a criminal action against the other spouse has had a change of heart by the time the matter comes to trial. But if this situation has come about, as seems likely often to be the case, through a reconciliation between the spouses, it is open to question whether this newly established harmony should be jeopardized by requiring one spouse to testify against the other. Indeed, it is arguable that the rationale of the "against" privilege is importantly involved here and that if the privilege is to be retained on the ground that it will prevent disruption of domestic tranquility, it should be available in the very class of cases in which the balance of domestic harmony is apt to be the most delicate. If this reasoning is found persuasive, it would lead to one of the following recommendations: (1) If both spouses are to continue to have the "against" privilege in criminal actions, the exceptions to Penal Code Section 1322 should be limited to denying the privilege to the party spouse in the cases to which they pertain; (2) If the suggestion made above that the "against" privilege be given to the witness spouse only in both civil and criminal actions is accepted, there should be no exception to the privilege.

Should Certain Technical Revisions Be Made in Code of Civil Procedure Section 1881(1) and Penal Code Section 1322?

If substantive revisions of these code sections are made, it would be desirable to make the following technical revisions in them as well:

1. The language in Code of Civil Procedure Section 1881(1) relating to exceptions to the "for and against" privilege in certain criminal actions should be deleted therefrom and transferred in substance to Penal Code Section 1322, insofar as the matter is not now covered there,[51] thus confining Section 1881(1) to civil cases.

2. The clause in Penal Code Section 1322 creating an exception for "cases of criminal violence upon one by the other" should be eliminated as superfluous because of the later enactment of the broader exception covering "criminal actions or proceedings for a crime committed by one against the person or property of the other."

3. The clause in Penal Code Section 1322 creating an exception to the marital privilege "in cases of criminal violence * * * upon the child

[51] The exception in Code of Civil Procedure Section 1881(1) for "a criminal action or proceeding for a crime committed by one [spouse] against the other" can simply be deleted since it is covered in substance in the exception in Penal Code Section 1322 for "criminal actions or proceedings for a crime committed by one [spouse] against the person or property of the other." Section 1322 has been held to control in cases falling within both exceptions. *In re* Kellogg, 41 Cal. App. 2d 833, 107 P. 2d 964 (1940).

or children of one by the other" should be revised to reflect decisions which have held that "child or children" as used therein means those of either spouse.[52]

It may be questionable, however, whether any of these technical revisions would be warranted if no substantive revision of these code sections is undertaken by the Legislature.

[52] People v. Kasunic, 95 Cal. App. 2d 676, 213 P. 2d 778 (1950) (not necessary that children be those of both spouses); People v. Vera, 131 Cal. App. 2d 669, 281 P. 2d 65 (1955) (not necessary that child be offspring of witness spouse).

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