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## The Marital Testimonial Privilege: California Evidence Code Section 970 and *Ivey v. United States*

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THE MARITAL TESTIMONIAL PRIVILEGE: CALIFORNIA  
EVIDENCE CODE SECTION 970 AND  
IVEY V. UNITED STATES

In the case of *Ivey v. United States*<sup>1</sup> the court held that it was error to admit over the defendant's objection an extrajudicial statement made by his wife. The question arose on an appeal from a conviction of the appellant for having imported a narcotic.

Ivey, his wife and two others had gone across the Texas border into Mexico where they purchased a gram of heroin. They each received an injection of part of it, and Ivey's wife brought the remainder back across the border. A customs agent, suspecting that Mrs. Ivey had a narcotic hidden on her person, took her to a hospital for examination. At the hospital she told the agent that she and defendant had gone to Mexico for a "fix" and that the heroin found on her person was the remainder of the purchase.

At defendant's trial, the customs agent reiterated the wife's statement, and this evidence was admitted over defendant's objection. On review, the court stated that admission of this evidence violated the hearsay rule and the marital testimonial privilege, which prohibits admission of one spouse's testimony over the objection of the other spouse.<sup>2</sup> In its discussion the court concerned itself solely with the testimonial privilege, and reversed the lower court on the ground of its violation. According to the court, "She might as well be permitted to testify against her husband in open court as to permit the introduction of a statement she had made against him out of court."<sup>3</sup>

*Case Law and Extrajudicial Statements*

In order to be admitted into evidence, an extrajudicial statement must first overcome objections based on the hearsay rule. If a statement falls within one of the exceptions to the rule,<sup>4</sup> then another possible objection may be that its admission violates a privilege, such as the marital testimonial privilege. Whether or not an otherwise admissible statement made by defendant's spouse out of court may be excluded from evidence by an exercise of the marital testimonial privilege does not seem settled in California law.

In *People v. Peak*<sup>5</sup> the court stated, "[B]y code provision one spouse may be an incompetent witness against the other, but the statements of one spouse made to someone else may be proven by competent testimony."<sup>6</sup> However, the *Peak* case was concerned with the introduction into evidence of a letter from husband to wife; and, thus, this case was solely a matter of a related, but separate privilege: the confidential communications privilege.<sup>7</sup> Thus, the statement in *Peak* regarding extrajudicial statements is pure dictum.

<sup>1</sup> 344 F.2d 770 (5th Cir. 1965).

<sup>2</sup> *Id.* at 772.

<sup>3</sup> *Ibid.*

<sup>4</sup> See generally 5 WIGMORE, EVIDENCE §§ 1420-27 (3d ed. 1940).

<sup>5</sup> 66 Cal. App. 2d 894, 153 P.2d 464 (1944).

<sup>6</sup> *Id.* at 906, 153 P.2d at 469.

<sup>7</sup> See generally 8 WIGMORE, EVIDENCE § 2332 (McNaughton rev. 1961) [hereinafter cited as WIGMORE].

Though distinct from the testimonial privilege, the confidential communication

*First National Bank v. DeMoulin*<sup>8</sup> and *People v. Chadwick*<sup>9</sup> have been cited as authority for the proposition that a spouse claiming the marital testimonial privilege must be a witness in a proceeding to which the other spouse was a party in order for the privilege to apply; and, therefore, otherwise competent evidence of extrajudicial statements made to a third person are not privileged.<sup>10</sup>

In *DeMoulin*, the defendant did not object to her husband's testimony until a letter between the husband and the plaintiff was introduced in which the husband made statements which were harmful to defendant's interests. The court held that the introduction of this letter did not contravene the spousal privilege contained in section 1881(1) of the Code of Civil Procedure.<sup>11</sup> Since the wife impliedly consented to her husband being a witness by not objecting thereto, she could not then object to the introduction of the letter unless it was a privileged communication between spouses. The court then added that section 1881(1) of the Code of Civil Procedure "does not render inadmissible an extrajudicial statement that either may have made to a third person if such statement be otherwise admissible."<sup>12</sup> This statement of the court does not seem to bear directly on the holding, since the decision was based on the fact that the wife did not object to her spouse being a witness and thus waived the marital testimonial privilege.

The *Chadwick* case involved a prosecution for perjury in which the court reporter testified as to what the wife of the defendant had said in the former trial in which the defendant had given false testimony. In neither the original trial nor the perjury trial did the defendant object to his wife's testimony. The court said that the testimonial privilege "does not preclude the people, in a criminal proceeding against either of the spouses, from proving the statements or declarations of the other (if otherwise admissible) by the testimony of a witness who heard them."<sup>13</sup> Unfortunately, this statement loses its force in light of the fact that the Supreme Court of California expressed its disapproval when it denied the case a hearing.<sup>14</sup>

privilege was set out in the same code section, CAL. CODE CIV. PROC. § 1881(1), which provides: "A husband cannot be examined for or against his wife without her consent; nor can either, 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."

<sup>8</sup> 56 Cal. App. 313, 205 Pac. 92 (1922).

<sup>9</sup> 4 Cal. App. 63, 87 Pac. 384, *hearing denied*, 4 Cal. App. 75, 87 Pac. 389 (1906).

<sup>10</sup> Hines, *Privileged Testimony of Husband and Wife in California*, 19 CALIF. L. REV. 390, 394 (1930); 1 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES F12 (1957) [hereinafter cited as CAL. L. REVISION COMM'N].

<sup>11</sup> 56 Cal. App. at 322, 205 Pac. at 96.

<sup>12</sup> *Id.* at 323, 205 Pac. at 96.

<sup>13</sup> 4 Cal. App. at 72, 87 Pac. at 388.

<sup>14</sup> In denying the hearing the court said, "If the decision of the district court of appeals was intended to declare, as the defendant insists it does, that when, upon the trial of a case, the wife of a defendant has testified against him without objection by him, her testimony then given may, in all cases, be read against him, over his objection,

A contrary position was taken in *People v. Francis*.<sup>15</sup> In this case a police officer testified as to statements made to him by defendant's wife concerning defendant's whereabouts on the night of a crime. Once the court decided that the statement was inadmissible as hearsay evidence,<sup>16</sup> it added, as a secondary ground,<sup>17</sup> that a wife's extrajudicial statements are privileged under section 1322 of the Penal Code.<sup>18</sup> Since the court had already decided that the statement was inadmissible before it mentioned the marital testimonial privilege, the weight of the *Francis* position on the applicability of the privilege to extrajudicial statements is questionable.

### *The California Evidence Code*

Section 970<sup>19</sup> of the new California Evidence Code has made some significant changes in California law regarding the marital testimonial privilege. Under the prior law, the non-party spouse could claim the privilege and refuse to testify *for* or *against* the party spouse. In addition, by evoking the privilege, the party spouse could prevent even a willing spouse from testifying *for* or *against* him.<sup>20</sup> Under the new Evidence Code only the non-party spouse may claim the privilege, and he may claim it only in so far as he wishes not to testify *against* the other spouse. Thus, the privilege not to testify *for* one's spouse has been completely abolished.

These changes in the law attempt to provide a more liberal rule of admissibility<sup>21</sup> and to give effect to the true reason for the marital privilege: the preservation of domestic tranquility.<sup>22</sup> The California Law Revision Commission has indicated that the party least interested in the litigation should determine whether the marriage ought to be preserved; determination of this question should not be made by the spouse who is primarily interested in winning his case, but rather it should be made by the non-party spouse, who is in a position to be more honest in his conclusion about the marriage.<sup>23</sup> The privilege not to testify *for* one's

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upon another trial . . . we do not approve of that portion of it. No such question was necessarily involved in the case." *People v. Chadwick*, 4 Cal. App. 63, 75, 87 Pac. 384, 389 (1906).

<sup>15</sup> 156 Cal. App. 2d 1, 319 P.2d 103 (1957).

<sup>16</sup> *Id.* at 5, 319 P.2d at 107.

<sup>17</sup> *Id.* at 6, 319 P.2d at 107.

<sup>18</sup> CAL. PEN. CODE § 1322 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[s] 270 and 270a of this code or under any provisions of the 'Juvenile Court Law.'"

<sup>19</sup> CAL. EVIDENCE CODE § 970 provides: "Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding."

<sup>20</sup> CAL. CODE CIV. PROC. § 1881(1); CAL. PEN. CODE § 1322.

<sup>21</sup> See 1 CAL. L. REVISION COMM'N F14-F15.

<sup>22</sup> See 1 CAL. L. REVISION COMM'N F17-F18.

<sup>23</sup> 1 CAL. L. REVISION COMM'N F17.

spouse has been abandoned because it only creates the possibility that an innocent party may be deprived of a defense if his spouse refuses to testify.<sup>24</sup>

### *Possible Construction of Section 970*

Specifically, section 970 of the Evidence Code states that a married person has a privilege not to testify against his spouse in any proceeding. Where a spouse's extrajudicial statements are admissible under an exception to the hearsay rule and the husband-wife testimonial privilege is claimed, there are two possible constructions of the code section. First, one could say that an extrajudicial statement is neither "testimony" nor a statement in a "proceeding." Therefore, there is no way such a statement can be excluded by an objection of the witness spouse under section 970. This would be a very literal construction of section 970 which would strictly limit the privilege. Second, the Commissioners have indicated that the change was proposed in order to give effect to the true purpose of the privilege: the protection of domestic tranquility.<sup>25</sup> Therefore, one could argue that this intent indicates the alternate construction; *i.e.* while the wife was not forced to appear at a judicial proceeding and offer testimony against her husband, the admission of evidence of what she may have said against him out of court has the same effect as forcing her to testify against her will. If the judicial interpretation of the new Evidence Code is to conform to the purpose of the privilege, then evidence of statements which the wife does not wish to say in court against her spouse should not be admitted through the testimony of a third person. The admission of such testimony would seem to be just as damaging to the marital relationship as if she repeated the statement herself in the courtroom. This is the position of the *Ivey* case.

The California courts will undoubtedly follow the more restrictive construction of the privilege contained in section 970. In the past they have not favorably regarded the testimonial privilege of husband and wife.<sup>26</sup> While prior statutory law set forth situations in which the privilege could not be claimed,<sup>27</sup> the courts limited the privilege even further by maintaining a fairly liberal waiver policy.<sup>28</sup> As the California Law Revision Commission has indicated, the doctrine of waiver was really a judicially created exception to the marital privilege rather than a true waiver.<sup>29</sup> In addition to the broad waiver policy, the California courts have further limited the privilege by insisting that the witness be a legal spouse<sup>30</sup> and that the person against whom the testimony is offered be an actual party in the proceedings at hand.<sup>31</sup> Thus, if a husband is not on trial, the wife cannot claim the privilege, even though the wife's testimony may tend to incriminate the husband.<sup>32</sup>

The trend in California seems to be toward a narrow application of the

<sup>24</sup> 1 CAL. L. REVISION COMM'N F14.

<sup>25</sup> See 1 CAL. L. REVISION COMM'N F17.

<sup>26</sup> See *Marple v. Jackson*, 184 Cal. 411, 414, 193 Pac. 940, 941 (1920); *People v. Langtree*, 64 Cal. 256, 259, 30 Pac. 813, 814 (1883).

<sup>27</sup> See notes 7 and 8 *supra*.

<sup>28</sup> See, *e.g.*, *People v. Singh*, 182 Cal. 457, 188 Pac. 987 (1920).

<sup>29</sup> 1 CAL. L. REVISION COMM'N F13.

<sup>30</sup> *People v. Thornton*, 106 Cal. App. 2d 514, 235 P.2d 227 (1951).

<sup>31</sup> *Sylvester v. Kilpatrick*, 79 Cal. App. 2d 443, 180 P.2d 36 (1947).

<sup>32</sup> *People v. Langtree*, 64 Cal. 256, 30 Pac. 813 (1883).

privilege, and section 970 of the Evidence Code merely reflects this trend. All of the exceptions to the privilege which were codified in the Code of Civil Procedure<sup>33</sup> and in the Penal Code<sup>34</sup> are retained in the Evidence Code,<sup>35</sup> and the broad waiver doctrine developed by the courts has been written into the Code.<sup>36</sup> The privilege can still be waived by almost any testimonial act of the non-party spouse.<sup>37</sup> In addition, the privilege is available only to the witness spouse, and the privilege not to testify *for* one's spouse has been abandoned entirely. The Law Revision Commission indicates that the reason for the change in the code is to give a more true effect to the purpose of the privilege.<sup>38</sup> It would seem that allowing the witness to exercise the privilege to exclude her extrajudicial statements in order to protect the marriage would also effectuate the purpose of the privilege. However, the Law Revision Commission apparently has regarded this reason only as a basis for limiting the privilege to the witness spouse, rather than for extending it to the spouse's extrajudicial statements.

Section 980 of the Evidence Code deals with the privilege of a spouse to prevent the admission into evidence of confidential communications between husband and wife. It is intended to reject the doctrine of the *Peak* line of cases<sup>39</sup> which admitted confidential communications into evidence through the testimony of an eavesdropper.<sup>40</sup> In the *Peak* case the court did not distinguish between statements made by a spouse *to* a third person and confidential communications overheard *by* a third person. Indeed, until fairly recently the two privileges were often considered as one.<sup>41</sup> When the testimonial privilege began to fall into disfavor and became modified or abandoned, the independent existence of the confidential communications privilege became clear.<sup>42</sup> When states abandon or modify the *for* and *against* testimonial privilege, they almost always preserve the confidential communications privilege.<sup>43</sup> California is no exception. Section 980 of the Evidence Code deals only with the privilege to exclude confidential communications from evidence, and section 970 deals with the testimonial *against* privilege. Therefore, rejection of the *Peak* line of cases as to confidential com-

<sup>33</sup> CAL. CODE CIV. PROC. § 1881(1).

<sup>34</sup> CAL. PEN. CODE § 1322.

<sup>35</sup> CAL. EVIDENCE CODE § 972.

<sup>36</sup> CAL. EVIDENCE CODE § 973.

<sup>37</sup> It should be noted that if, as in *Ivey*, a wife takes the stand to deny extrajudicial statements and to offer contrary testimony, the court would not even have to consider whether extrajudicial statements are privileged under § 970. Under § 973 of the Evidence Code it would seem that she waived her privilege to refuse to testify against her husband by taking the stand to testify for him.

<sup>38</sup> See 1 CAL. L. REVISION COMM'N F17-F18.

<sup>39</sup> CAL. EVIDENCE CODE § 980, comment.

<sup>40</sup> *People v. Peak*, 66 Cal. App. 2d 894, 153 P.2d 464 (1944); *People v. Morhar*, 78 Cal. App. 380, 348 Pac. 975 (1926); *People v. Mitchell*, 61 Cal. App. 569, 215 Pac. 117 (1923); *People v. Swaile*, 12 Cal. App. 192, 107 Pac. 139 (1909); *People v. Chadwick*, 4 Cal. App. 63, 87 Pac. 384, *appeal denied*, 4 Cal. App. 75, 87 Pac. 389 (1906).

<sup>41</sup> 8 WIGMORE § 2333, at 644.

<sup>42</sup> *Id.* at 645.

<sup>43</sup> *Ibid.*

munications does not affect the question of the admissibility of extrajudicial statements of a spouse.

An extrajudicial statement by a wife to an officer is clearly not a confidential communication to be barred by section 980. Therefore, any claim of privilege must seek justification under section 970. Section 970, however, contains no clause similar to that in section 980 which permits a spouse to prevent a third person from disclosing a confidential communication between the spouses. It appears that the legislative intent is to deny similar treatment to the marital testimonial privilege with respect to extrajudicial statements of a spouse.

### Conclusion

The history of the privilege of one spouse not to testify for or against the other dates back to the 1600's.<sup>44</sup> While the original reason for the privilege was the disqualification of interested parties,<sup>45</sup> the privilege was retained after interested parties were permitted to testify.<sup>46</sup> The reason then given was the protection of the marital relationship.<sup>47</sup> Wigmore has severely criticized the privilege, and believes that it has no place in the modern law.<sup>48</sup> While California has not gone so far as to abandon the testimonial privilege, certainly in the past the courts have not been willing to extend the privilege; and the new Evidence Code indicates that the attitude in California has not changed.

In view of the restrictive judicial attitude in California, it cannot be expected that the courts would apply the rule of the *Ivey* case in a similar situation. The reasoning of *Ivey* is sound; if the privilege is to be retained, it should be applied to statements made out of court as well as to statements made in court. The effect of the statement is the same in either case. If it is believed that the privilege does protect the marital relationship, or if it offends the sensibilities of society to pit wife against husband,<sup>49</sup> then the *Ivey* rule should be followed.

If, like Wigmore, the legislature believes that the privilege has no place in the law, the privilege should be entirely abandoned in favor of a more liberal rule of admissibility; neither courtroom testimony nor extrajudicial statements, otherwise admissible, should be privileged. California, apparently, is not willing to abandon the privilege. Yet, case law and the language of the new Evidence Code clearly indicate that California has greatly limited the marital testimonial privilege and is not likely to extend the privilege to extrajudicial statements.

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<sup>44</sup> 8 WIGMORE § 2227, at 212.

<sup>45</sup> *Stickney v. Stickney*, 131 U.S. 227, 236 (1888); *Yoder v. United States*, 80 F.2d 665, 667 (10th Cir. 1935); 1 CAL. L. REVISION COMM'N F 10.

<sup>46</sup> Note, *The Marital "For and Against" Privilege in California*, 8 STAN. L. REV. 420, 421 (1956).

<sup>47</sup> *Hawkins v. United States*, 358 U.S. 74, 75 (1958); *Commonwealth v. Allen*, 191 Ky. 624, 231 S.W. 41 (1921); *Kelley v. Procter*, 41 N.H. 139, 140 (1860); *Stapelton v. Crofts*, 18 Q.B. 367, 118 Eng. Rep. 137 (1852).

<sup>48</sup> See 8 WIGMORE § 2228.

<sup>49</sup> It has been said that there is a "natural repugnance . . . to compelling the husband or wife to be the means of the other's condemnation." *Commonwealth v. Allen*, 191 Ky. 624, 625, 231 S.W. 41, 42 (1921); 8 WIGMORE § 2228, at 217.

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