#34(L) 7/16/64

First Supplement to Memorandum 64-47

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--Division 8--Privileges)

Revised Memorandum 64-39 and Memorandum 64-47 contain various suggestions and comments concerning Division 8 (Privileges). This First Supplement to Memorandum 64-47 contains additional suggestions and comments concerning Division 8.

Attached to this memorandum are the following materials:

Exhibit I. Copy of Opinion of Judge McCoy

Exhibit II. Letter from Mr. Powers

In addition, we note in this memorandum certain of the comments and suggestions made by the staff of the Judicial Council.

These comments and suggestions were received after the memoranda previously sent to you relating to Division 8 were prepared.

Section 913

The staff of the Judicial Council suggests that the words "criminal case" be substituted for "criminal proceeding" in subdivision (b), since the term "case" is used in the Constitution, and may be broader than "proceeding." This seems to be a desirable change. If this change is made, subdivision (c) should be revised to substitute "In any proceeding not covered by subdivision (b)" in place of "In a civil proceeding."

The Judicial Council staff also comments:

> It is conceivable that under the recent decision of the U.S. Supreme Court in Mallory v. Hagan the portion of Art. I, Sec. 13 which permits comment on a criminal defendant's failure to testify may be held unconstitutional. However, until that occurs, SEC. 913(b) seems unobjectionable since it merely copies the language of the Constitution.

See also Exhibit II (page 2).

Section 914

The staff of the Judicial Council suggests that the section heading for this section be revised to read:

> 914. Determination of existence of privilege; limitation on punishment for contempt.

Section 915

The staff of the Judicial Council suggests that "presiding officer" be substituted for "judge" in subdivision (b). This subdivision was intended to be limited to cases where the Judge is ruling on a claim of privilege.

Section 919

The staff of the Judicial Council suggests that subdivision (b) be revised to read:

> (b) The presiding officer did not exclude the privileged matter as required by Section 916.

This seems to be a desirable change.

Section 930

The staff of the Judicial Council suggests that the word "case" be substituted for "proceeding" in this section. In support of this change, the staff of the Judicial Council states:

> Comment: Judge Alan Campbell of the L. A. Municipal Court, in a letter to the L.R.C. dated May 25, thinks the privilege should not extend to proceedings for removal of public officials. The question would seem to be whether such a proceeding is a "criminal case" within the meaning of Art. I, Sec. 13 of the Constitution. There is one early decision, Thurston v. Clark (1895), 107 Cal. 285 (which was a proceeding under Penal Code Sec. 772 to remove a sheriff from office, in which the defendant, over his objection, was required to testify) holding that it is. That the privilege may be claimed in proceedings other than criminal prosecutions is also indicated in a Cal.L.R. article on

the self-incrimination privilege (30 C.L.R. 547, 550) and in Witkin on Evidence, Sec. 450, both citing the Thurston case. Another case, In re Tahbel (1920), 46 Cal. App. 755, specifically held that the words "criminal case," as used in Art. I, Sec. 13, were broader than "criminal prosecution" and included a proceeding against a minor to have him adjudged a ward of the juvenile court. On the basis of these decisions, and also keeping in mind the implications of the recent U.S. Supreme Court decision in Malloy v. Hogan, we submit that since the self-incrimination privilege is derived from the federal and state constitutions, it will exist regardless of the statutory provision, and that while the scope of the privilege might be broadened, it certainly could not be limited, by statute. We therefore recommend use of the term "criminal case" since that is the one used in both the federal and state constitutions.

Another reason for using the language of the Constitution is that the scope of the self-incrimination privilege, including but not limited to the question of what constitutes a "criminal case," has recently been broadened by the U.S. Supreme Court decision in Malloy v. Hogan, holding that the federal privilege against self-incrimination, under the Fifth Amendment of the U.S. Constitution was applicable in a state investigation of local gambling activities. We submit that in the light of this decision, this is not an appropriate time to "freeze" the self-incrimination privilege to anything more limited than the language of the California Constitution.

The comments hereinafter made on proposed Sections 940 et. seq., relative to substitution, for these sections, of a mere statutory reference to the existence of the constitutional privilege, are not applicable to subsection (a) of Section 930, for the reason that essentially subsection (a)(particularly if the word "case" is substituted for "proceeding") does nothing more than refer to the existing provision in Art. I, Sec. 13 that no person can "be compelled, in any criminal case, to be a witness against himself."

The staff of the Judicial Council also suggests the deletion of subdivision (b) if the suggestion it makes on Sections 940-948 is approved.

Sections 940-948

The staff of the Judicial Council suggests that the alternative mentioned in Memorandum 64-47--that the self-incrimination privilege be stated in general terms to be recognized to the extent provided by the State Constitution without attempting to define its scope--be adopted.

We suggest that the language "who claims the privilege" be deleted from the statement of the privilege against self-incrimination, whether the privilege is stated in Section 941 of the Evidence Code or Section 940 (proposed in Memorandum 64-47). In State v. Kramer, 227 A.C.A. 212 (May 1964), it was held that the privilege against self-incrimination exists whether or not it is claimed. By permitting the defendant, unaided by counsel, to testify voluntarily without advising him of his constitutional rights, the court violated his privilege against self-incrimination, which defendant did not waive by voluntarily taking the stand. The conviction was reversed. With respect to the privilege against self-incrimination, under the circumstances of the particular case, the court held that a waiver must be informed and intelligent to be voluntary, and the defendant was almost completely without knowledge of evidentiary rules or of criminal judicial procedures.

Section 941

If this section is retained, the staff of the Judicial Council suggests that the phrase "may tend to incriminate" be substituted for "will incriminate."

Section 947

The staff suggests in Memorandum 64-47 that this section be compiled with the other sections dealing with cross-examination and that the words "upon the merits" be deleted. The Judicial Council staff agrees that these are desirable revisions, but recommends further that the word "case" be substituted for "proceeding" in the two places where the latter word is used. Section 947 is based on Penal Code Section 1323 which applies to the "defendant in a criminal action or proceeding."

Section 948

The staff of the Judicial Council would delete this section if the detail of the privilege against self-incrimination is deleted. Otherwise, the staff would substitute "criminal case" for "proceeding."

Section 956

The staff of the Judicial Council suggests that the foundational showing--"sufficient evidence, aside from the communication, has been introduced to warrant a finding that the services of the lawyer were sought" in connection with a crime, etc.--should be restored to this section. We deleted this foundational showing which the URE requires.

One of the primary reasons why the foundational showing was deleted can be indicated by a reference to the facts of the Ma Duncan case. In that case, Ma Duncan went to an attorney to obtain his assistance in obtaining a divorce for her son by fraud and misrepresentation to the court. The attorney declined to assist her in the matter. Yet, apparently, he could not testify because there was no evidence, aside from the communication, to show that this was the purpose of the consultation.

Section 958

Mr. Powers (Exhibit II) suggests a revision of this section. We think his suggestion is in accord with the Commission's intent and suggest that the following be added at the end of Section 958", including but not limited to a communication relevant to any issue of the adequacy of the representation of the client by the lawyer in any proceeding." If this addition is made, the Comment to the section can point out its importance in a criminal case.

Section 1004

The staff of the Judicial Council suggests that this section should be revised to read so that it is like Section 1017. This would limit the exception provided by Section 1004. The justification for this change is stated as follows:

> Comment: To the same extent that patients might refrain from seeking psychiatric assistance if the doctor could later participate in commitment proceedings, patients might avoid treatment for disabilities having an organic origin if the proposed rule were to be adopted. Unless the definition of psychotherapist is revised, the proposed rule would be difficult to apply because of the intimate relationship between physical and mental disability, and because of the difficulty in determining whether a doctor is subject to the physician-patient or the psychotherapist-patient privilege at any given time. An exception to the physician-patient privilege for examinations under court order would make the physician-patient and the psychotherapist-patient privileges coextensive in commitment and competency proceedings.

The Commission's staff believes that the need for the physician-patient privilege is not so great as to justify limiting the exception stated in Section 1004.

Section 1010

The staff of the Judicial Council concurs in the suggestion of Professor Sherry that the privilege should not apply to physicians who do not devote a substantial part of their time to psychiatry. See discussion on pages 13-14 of Revised Memorandum 64-39. The Judicial Council staff justifies its suggestion as follows:

> Comment: Certain problems may be eliminated if the definition of psychotherapist is limited in the case of physicians to those who devote a substantial proportion of time to psychiatry. For example, an ordinary doctor called in a criminal proceeding to testify on the defendant's susceptibility to alcohol would not be affected by the troublesome line between the patient's physical and mental disorders. The privilege is restricted to physicians and licensed psychologists only because any more generic definition

would present practical problems, and would be a departure from existing California law. The variety of psychological treatment which is available and which may possibly be effective is indicated by the L.R.C. consultant at page 434 of the Pamphlet.

The staff of the Judicial Council also appears to approve the staff suggestions set out on pages 12-15 of Revised Memorandum 64-39.

Sections 1030-1034

The staff of the Judicial Council approves the changes proposed by the Committee of the Judicial Conference. (See Revised Memorandum 64-39 (pages 16-17).) In addition, the staff of the Judicial Council suggests that the presumption of confidentiality under Section 917 should apply to Sections 1030-1034. These seem to be desirable changes.

Sections 1040-1042

Contrary to the opinion of the Conference of California Judges (Revised Memorandum 64-39--page 17), the staff of the Judicial Council recommends approval of these sections even though they do not provide the public entity with protection against eavesdroppers.

Sections 1070-1072

In connection with these sections, please read the opinion of Judge McCoy interpreting the existing statutory "privilege." As he points out in his opinion, the existing statute does not provide a privilege; it merely provides that a newsman shall not be held in contempt for his refusal to disclose the sources of his information.

We believe that Judge McCoy's analysis of the existing law is sound. Permitting an adverse order in a case where the newsman is a party and refuses to disclose is consistent with Section 1042 (official information and

identity of informer privileges). But, rather than drafting a section like Section 1042 to apply to the newsman's privilege, we suggest that the newsman's privilege be revised so that it is phrased in terms of immunity from being held in contempt. Accordingly, we suggest that the title of the article be revised to read:

Article 12. Immunity of Newsman from Citation for Contempt

We further suggest that Section 1072 be revised to read:

> 1072. A newsman may not be adjudged in contempt for refusing to disclose in any proceeding the source of news procured for publication and published in news media, unless the source has been previously disclosed or the disclosure of the source is required in the public interest.

We would add to the Comment to this section a citation to the opinion of Judge McCoy to indicate that the "privilege" will not protect a newsman who is a party to a discovery proceeding from an adverse order or other penalty for failing to disclose in the discovery proceeding. Phrasing Section 1072 as suggested above would seem desirable in case the "unless clause" is deleted during the legislative process.

Respectfully submitted,

John H. DeMoully
Executive Secretary

3-Cal. Disc. Proc. 72
METRO NEWS EDITION

PRESS PRIVILEGE SHOULD YIELD WHEN IN CONFLICT WITH INTEREST OF PUBLIC

Is a member of the press, who is a defendant in a libel suit, justified in refusing to disclose the source of any information procured for publication in (his) newspaper?

In an action for damages for libel, Judge Philbrick McCoy, Los Angeles Superior Court, in a decision last week in **Bramson v. Wilkerson**, points out that while 1881 subd. (6) C.C.P. holds that the newspaperman may not be adjudged in contempt by a court for so refusing, it must be kept in mind that the burden is on the newspaperman to show that there is such a privilege existing in the specific cause before the court so that justice may not be defeated by the suppression of truth. A fundamental privilege inherent in our form of government, as an essential part of due process of law, is that a litigant who resorts to the courts for redress of grievances is entitled to judicial aid in compelling the attendance and the testimony of witnesses. In short, Judge McCoy added, in the absence of a statute there no evidentiary privilege which protects a journalist from testifying as to both the source and the substance of his information. Recognizing the canon of journalistic ethics, Judge McCoy stated that it must yield when in conflict with the interests of justice — the private interest involved must of necessity yield to the interests of the public.

The CCP section relied upon does not create an evidentiary privilege justifying the refusal of the defendant in this case to answer the questions put to him on the taking of his deposition, either as to the source or the substance of the information upon which he based his published statements concerning the plaintiff. To hold otherwise would be to ignore the express terms of the statute, which, the court concluded, it may not do.

Plaintiffs' motion was granted and the defendant was directed to answer the questions which are the subject of the motion.

Text of the opinion follows:

In the Superior Court of the State of California, in and for the County of Los Angeles.

No. 760,973

MARY McCALL BRAMSON, also known as MARY McCALL, et al., Plaintiffs, vs. W. R. WILKERSON, et al., Defendants.

Attorney for Plaintiffs — Nimmer and Selvin.

Attorneys for Defendants—Bautzer and Grant.

MEMORANDUM

This is an action for damages for libel. At the time of the publication, plaintiffs were representing the Writers Guild of America, West, Inc., in negotiations with certain motion picture and television producers for the settlement of the Guild's strike against the producers. Their complaint is based on two columns written by the defendant Mike Connolly for, and published in the defendant newspaper, The Hollywood Reporter. It is pleaded by way of innuendo that the articles are "false and defamatory and were intended to and do carry on their face the false and libelous implication and meaning that the policies of the Guild affecting the strike therein referred to were determined by persons who are Communists or Communist sympathizers, that the Guild is controlled by Communists or Communist sympathizers, and that the plaintiffs herein and each of them are Communist or Communist sympathizers, and the many readers of said items so understood them." Among other things, defendants plead as a separate defense that the items complained of "were neither false, defamatory, nor untrue, nor were they of, or concerning the plaintiffs, or any of them."

After the case was at issue, plaintiffs took the deposition of the defendant Connolly. They now ask the court for an order pursuant to section 2034, Code Civ. Proc., to require him to answer certain questions which he refused to answer on the taking of his deposition.

During the course of his deposition, Connolly admitted that he had no knowledge of the political or social beliefs of the plaintiffs, or of who their acquaintances were, or of the position of alleged communists or of the plaintiffs with respect to various proposals which were before the Guild at the time he wrote the two columns. He testified, however, that his columns were based on information furnished to him by sources which he considered reliable, that he had conversations with his three sources probably the day before the first column appeared, that he recalled and has in mind the names of the persons he spoke with, and had a present recollection of what was said and by whom in those conversations. He also testified that before the publication of the second column he had a conversation with an officer of the Guild to determine the accuracy of another item in one of the columns. The witness was then asked to state "what was said and by whom" in each of these four conversations, but without disclosing the identity of the persons with whom he had such conversations. Counsel for defendant objected and instructed the witness not to answer each of these four questions on the ground that "it is an attempt to accomplish by indirection what can't be accomplished directly and would be a violation of privilege." Counsel then agreed that the objection "goes to any question relating to the contents of a conversation with anyone whom [defendant] would characterize as a source within the statute relating to the newspaperman's privilege even though the question does not concern the identity of that source."

Section 2016, subd. (b), Code Civ. Proc., provides that any person, including a party, "may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of any other party. . . . All matters which are privileged against disclosure upon the trial under the law of this State are privileged against disclosure through any discovery proceeding." Defendant's primary contention is that the evidence sought by the four questions is privileged within the meaning of this section. In doing so he relies on section 1881, subd. (6), Code Civ. Proc. So far as pertinent here, that subdivision reads: "(6) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, . . . cannot be adjudged in contempt by a court . . . for refusing to disclose the source of any informa-

tion procured for publication and published in a newspaper." To this, plaintiffs reply that they are only asking the witness to disclose the information procured by him and not the source of that information. However, as defendant's counsel now point out, each one of the four questions is phrased "in such a manner that if the deponent were required to answer these questions he would in effect be required to disclose his source of information." This is borne out by the form of each question in which the witness was asked to state "what was said and by whom" in each of the four conversations.

The question thus before the court is whether defendant is justified in refusing to answer the questions because of some supposed evidentiary privilege. In seeking an answer to this question it must be kept in mind that, "[w]hatever the rule may have been when anticommunist sentiment was less crystallized than it is today, . . . it is now settled that a charge of membership in the Communist Party or communist affiliation or sympathy is libelous on its face." **MacLeod v. Tribune Publishing Co.**, 52 Cal. 2d 536, 546, and cases cited. Plaintiffs have pleaded that defendants knew that the publication was "false, defamatory and untrue, and defendants had no honest belief in the truth of said publication nor any reasonable grounds for believing said publication to be true." These allegations are denied by defendants. The witness testified that his statements were based on information furnished to him by sources which he considered reliable, which is just another way of saying that he did have reasonable grounds for believing his statements concerning plaintiffs to be true. The questions which Connolly refused to answer are relevant to the subject matter of the lawsut. (Cf. **Filipoff v. Superior Court**, 56 Adv. Cal. 441, 449, in which no claim of privilege was made.)

Unless precluded by some privilege on which the witness may rely, plaintiffs are entitled to an order requiring him to answer the questions. The burden is on the defendant to show that there is such a privilege. As said in **Samish v. Superior Court**, 28 Cal. App. 2d 685 at 695: "Since the protection against privileged communications often leads to the suppression of the truth and to a defeat of justice, the tendency of the courts is toward a strict construction of such statutes. (**Dwelly v. McReynolds**, 6 Cal. 2d 128, 131; 27 Cal. Jur. 44, sec. 30.) Unless the statute expressly extends the privilege to specific persons or classes, the law will not justify such individuals in refusing to disclose facts contained in documents which would otherwise be competent evidence in a particular proceeding. In the **Dwelly** case, **supra**, the court said: "'The burden is upon the party seeking to suppress the evidence to show that it is within the terms of the statute." (**Sharon v. Sharon**, 79 Cal 633, 677; **Collette v. Sarrasin**, 184 Cal. 283.) The statements to be privileged and hence inadmissible must come within the express terms of the section. (**Edison Electric L. Co. v. United States Electric L. Co.**, 44 Fed. 294; **Peden v. Peden's Admr.**, 121 Va. 147 [92 S.E. 984, 2 A.L.R. 1414]; **Hawthorne v. Delano**, 183 Iowa 444 [167 N.W. 196]; **Thaden v. Bagan**, 139 Minn. 46 [165 N.W. 864].)'"

Although the compulsory disclosure of a journalist's sources of information may entail an abridgment of the freedom of the press by imposing some limitation upon the availability of the news, the witness has no constitutional right to refuse an answer to questions which are otherwise proper. **Garland v. Torre**, 259 F. 2d 545; **In re Appeal of Goodfader** (Nov. 1961), ... Hawaii, ... P. 2d ..... "[A] fundamental privilege inherent in our form of government as an essential part of due process of law is that a litigant when resorting to the courts for redress of grievances or determination of rights, is entitled to judicial aid in compelling the attendance and the testimony of witnesses. Correlatively, every person, properly summoned, is required to attend court and give his testimony unless specially exempted or privileged." **In re Appeal of Goodfader**, **supra**; **Blackmer v. United States**, 284 U.S. 421, 438, 76 L. Ed. 375. Aside from exceptions not applicable here, "the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry." **Blair v. United States**, 250 U.S. 273, 281, 63 L. Ed. 979.

In the absence of a statute there is no evidentiary privilege which protects a journalist from testifying as to both the sources and the substance of his information. **People v. Durrant**, 116 Cal. 179, 220; **Ex parte Lawrence**, 116 Cal. 298; **People ex rel. Mooney v. Sheriff of New York County**, 269 N.Y. 291, 199 N.E. 415, 102 A.L.R. 769, and other cases cited in annotation, 102 A.L.R. 771; **Garland v. Torre**, 259 F. 2d 545, 548. **In re Appeal of Goodfader** (Nov. 1961), ... Hawaii ....., ... P. 2d ..... "Though there is a canon of journalistic ethics forbidding the disclosure of a newspaper's source of information,—a canon worthy of respect and undoubtedly well-founded, it is subject to a qualification: It must yield when in conflict with the interests of justice,—the private interests involved must yield to the interests of the public." **In re Wayne**, 4 U.S. Dist. Ct. Hawaii 475,476, as quoted in **In re Appeal of Goodfader**, **supra**. See also 4 Wigmore, **Evidence**, sec. 2192, p. 2965, sec. 2286, p. 3186, also quoted in **In re Appeal of Goodfader**, **supra**.

Subdivision (6) of section 1881, Code Civ. Proc., does not create an evidentiary privilege justifying the refusal of the defendant Connolly to answer the questions put to him on the taking of his deposition either as to the source or the substance of the information upon which he based his published statements concerning the plaintiff. To hold otherwise would be to ignore the express terms of the statute, which we may not do. **Samish v. Superior Court**, 28 Cal. App. 2d 685 at p. 695, and cases there cited.

Section 1881 specifically provides that "[t]here are particular relations in which it is the policy of the law to encourage confidence and preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases." Before the section was amended by the addition of subdivision (6) by Chapter 532 of the Statutes of 1935, it related only to the relationships of husband and wife, attorney and client, clergyman and confessor, and physician and patient. It is significant that subdivision (6) of that section, unlike the first five subdivisions, does not provide that a journalist "cannot be examined as a witness." Had the Legislature intended to create an evidentiary privilege in favor of journalists it could have done so by appropriate language. (Cf. **Ex parte Sparrow**, 14

F.R.D. 351, in which the court so construed the language of an Alabama statute providing that no journalist "shall be compelled to disclose, in any legal proceeding or trial, before any court, . . . or elsewhere, the source of any information procured or obtained by him and published in the newspaper on which he is engaged, connected with or employed.") Here the Legislature went no further than to provide explicitly that a journalist "cannot be adjudged in contempt by a court . . . for refusing to disclose the source of any information procured for publication and published in a newspaper." This court cannot read into the statute a legislative intent to extend to journalists the restrictive privilege of refusing to testify as to the sources of their information where the plain language of the statute evidences a legislative intention not to do so. (Cf. **People ex rel. Mooney v. Sheriff of New York County**, 269 N.Y. 291, 199 N.E. 415, 102 A.L.R. 769.)

Defendant also opposes the motion on the ground that plaintiffs are attempting to establish that, as a party defendant, Connolly would be subject to sanctions as provided in section 2034, Code Civ. Proc., if he should fail to comply with an order requiring him to answer the questions relating to the sources of his information, even though he could not be adjudged in contempt for such refusal. Such a ruling, defendant argues, "would destroy the protection afforded newsmen by the provisions of C.C.P. 1881 (6). In effect, it is substituting one form of punishment for a form denied by law," thus accomplishing by indirection what may not be done directly. While we may not here anticipate a refusal by the witness to answer the questions if ordered to do so, it should be pointed out that, in a proper case, the default of a defendant may be entered for his failure to comply with an order requiring him to answer questions in a discovery proceeding, even though he may not be adjudged in contempt for such failure. (See opinion on denial of rehearing in **Unger v. Los Angeles Transit Lines**, 180 Cal. App. 2d 172, at 186.)

It is also suggested by defendant that a publication in a newspaper under what he calls "proper circumstances" can be a matter of privilege by reason of section 47, subd. 3, Civ. Code, in spite of the wording of subdivision (6), section 1881, Code Civ. Proc., and that somehow he is entitled to the protection of that privilege. The suggestion is without merit. The term, "not privileged," as used in section 2016, subd. (b), Code Civ. Proc., on which defendant relies, refers to a privilege as that term is understood in the law of evidence. (**United States v. Reynolds**, 345 U.S. 1, 6, 97 L. Ed. 727; **In re Appeal of Goodfader**, (Nov. 1961) —— Hawaii ——, — P. 2d ——.) We have seen that no such evidentiary privilege exists in this State. The "privilege" established by section 47 of the Civil Code relates to the merits of plaintiffs' case — where the publication is privileged under that section, plaintiffs have no cause of action. (**Gosewisch v. Doran**, 161 Cal. 511, 516; **Irwin v. Murphy**, 129 Cal. App. 713, 716.) Whether the publication here complained of is privileged within the meaning of that section is of no moment here.

Plaintiff also seeks an order requiring the witness to answer a question as to the compensation he receives from the defendant, Hollywood Reporter Corporation. The question is proper since plaintiffs seek to recover punitive damages, and should be answered.

For the reasons stated herein, a minute order will be entered upon the filing of this memorandum granting plaintiffs' motion and directing the defendant Connolly to answer the five questions which are the subject of the motion and all other questions properly related thereto on the resumption of his deposition on not less than five days notice after notice of said order.

Dated January 4, 1962.

PHILBRICK McCOY,
Judge

(Metro News — Issue of 1/8/62)

3—Cal. Disc. Proc. 74

METRO NEWS EDITION

PLEADINGS ARE DETERMINING FACTOR IN 'ADVERSE PARTY' DISCOVERY

Any party may serve interrogatories upon any "adverse party," under Sec. 2030 C.C.P., but the pleadings are the controlling factor in determining whether the party is in fact "adverse."

Superior Court Judge Philbrick McCoy ruled last week in **United Wood Heel Company v. Century Wood Heel Corporation**, that while under our present discovery procedures construction must be liberally in favor of discovery, at the same time the statutory limitations on discovery must be applied when the facts so warrant.

In this instance a cross-defendant served a number of interrogatories on the plaintiff seeking generally to ascertain the facts on which plaintiff based its action against the defendant. Plaintiff thereupon moved to strike on the ground that it was not an adverse party to the cross-defendant within the meaning of Section 2030 C.C.P.

Judge McCoy sustained plaintiff's motion, pointing out that this construction of the section does not deprive the cross-defendant upon proper notice to all parties. from obtaining full knowledge of the facts on which plaintiff bases its complaint against the defendant and cross-complainant.

Text of the opinion follows:

No. 741,516

In the Superior Court of the State of California, in and for the County of Los Angeles.

UNITED WOOD HEEL COMPANY, a corporation, Plaintiff, vs. CENTURY WOOD HEEL CORPORATION, a corporation, Defendant.

CENTURY WOOD HEEL CORPORATION, a corporation, Cross-complainant, vs. PABCAST CORPORATION, Cross-defendant.

Gibson, Dunn & Crutcher, attorneys for Plaintiff.

Bolton, Gross & Dunne, attorneys for Defendant Century.

A. J. Blackman, attorney for Cross-Defendant Pabcast.

MEMORANDUM AND ORDER

Upon being sued by plaintiff, United Wood Heel Co., for damages for breach of warranty with respect to certain merchandise sold to plaintiff by the defendant, Century Wood Heel Corporation, defendant filed a cross-complaint aganist Pabcast Corporation, from whom it had purchased the merchandise, for a judgment against Pabcast in the amount of any judgment plaintiff might obtain against Century, claiming