

#71

5/29/70

Memorandum 70-50

Subject: Study 71 - Joinder of Causes; Counterclaims and Cross-Complaints

The attached draft statute has been prepared in accordance with the decisions made at the last meeting to serve as a basis for discussion at the June meeting.

We plan to go through the statute section by section at the meeting. We also attach (pink) the text of the existing title on pleading. It is apparent that we must revise a great portion of this title in order to make the changes required to effectuate the decisions made at the June meeting.

The staff has made some changes of a technical nature in existing law in preparing the attached draft statute even though these changes probably are not within the scope of the authorization to study joinder of causes and counterclaims and cross-complaints. We suspect that members of the Commission and others will suggest additional changes in the sections included in the statute because the provisions of the title on pleading are in need of revision even if the revision does not involve important or controversial changes. The Commission should consider requesting that the current legislative session authorize us to study the pleading title of the Code of Civil Procedure. Such authority would permit us to prepare a complete revision of the title. This would not be a substantial additional undertaking since we will have to revise much of the title anyway to accomplish our changes on the two topics we have already been authorized to study.

We should be sending the background study (at least) to the State Bar and Judicial Council so those groups can commence their consideration of this subject. Otherwise, they will not have time to consider it before the 1971 legislative session. Perhaps if the draft statute is generally satisfactory, we could send it also.

DRAFT STATUTE--CROSS-COMPLAINTS AND COUNTERCLAIMS

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Section 1. Chapter 1 (commencing with Section 420) of Title 6 of Part 2 of the Code of Civil Procedure is repealed.

Sec. 2. Chapter 2 (commencing with Section 425) of Title 6 of Part 2 of the Code of Civil Procedure is repealed.

Sec. 3. Chapter 3 (commencing with Section 430) of Title 6 of Part 2 of the Code of Civil Procedure is repealed.

Sec. 4. Chapter 4 (commencing with Section 437) of Title 6 of Part 2 of the Code of Civil Procedure is repealed.

Sec. 5. Chapter 5 (commencing with Section 443) of Title 6 of Part 2 of the Code of Civil Procedure is repealed.

Sec. 6. Chapter 6 (commencing with Section 446) of Title 6 of Part 2 of the Code of Civil Procedure is repealed.

Sec. 7. Chapter 1 (commencing with Section 420.10) is added to Title 6 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 1. GENERAL PROVISIONS

§ 420.10. Pleadings defined

420.10. The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court.

Comment. Section 420.10 is the same as former Code of Civil Procedure Section 420.

§ 420.20. Forms and rules of pleading

420.20. The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this code.

Comment. Section 420.20 is the same as former Code of Civil Procedure Section 421.

§ 420.30. Permissible pleadings enumerated

420.30. (a) Except as provided by statute or rule of the Judicial Council, the only pleadings allowed on the part of the plaintiff are:

- (1) The complaint.
- (2) A demurrer to the answer to the complaint.

(b) Except as provided by statute or rule of the Judicial Council, the only pleadings allowed on the part of the defendant are:

- (1) A demurrer to the complaint.
- (2) An answer to the complaint.
- (3) A countercomplaint.
- (4) A cross-complaint.

(c) Notwithstanding subdivisions (a) and (b), any party against whom a countercomplaint or cross-complaint has been filed may file:

- (1) A demurrer to the countercomplaint or cross-complaint.
- (2) An answer to the countercomplaint or cross-complaint.
- (3) A countercomplaint.
- (4) A cross-complaint.

(d) Notwithstanding subdivisions (a) and (b), any party who has filed a countercomplaint or cross-complaint may file a demurrer to the answer to his countercomplaint or cross-complaint.

Comment. Section 420.30 supersedes the first paragraph of former Code of Civil Procedure Section 422. The permissible pleadings listed in Section 420.30 reflect the fact that, for pleading purposes, all parties who file a pleading stating a cause of action--whether it be a complaint, countercomplaint, or cross-complaint--are treated the same, and all parties--whether

the party be the original plaintiff or the original defendant--filing a pleading in response to one stating a cause of action are treated the same.

§ 420.40. Pleadings in justice courts

420.40. (a) The rules stated in this section apply only to pleadings in justice courts.

(b) The pleadings are not required to be in any particular form but must be such as to enable a person of common understanding to know what is intended.

(c) The complaint or a cross-complaint shall be in writing. Other pleadings may be oral or in writing. If the pleadings are in writing, they shall be filed with the judge. If oral, an entry of their substance shall be made in the docket.

(d) A copy of the account, note, bill, bond, or instrument upon which the cause of action is based is a sufficient complaint, counter-complaint, or cross-complaint.

(e) Except as otherwise provided in this title, the pleadings need not be verified.

Comment. Subdivisions (a), (b), (c), and (e) of Section 420.40 continue without substantive change the second paragraph of former Code of Civil Procedure Section 422. Subdivisions (a) and (d) continue a portion of subdivision 3 of former Code of Civil Procedure Section 426 except that subdivision (d) applies to any pleadings demanding relief (complaint, countercomplaint, or cross-complaint) while the provision of Section 426 was limited to a complaint.

Sec. 8. Chapter 2 (commencing with Section 421.10) is added to Title 6 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 2. GENERAL REQUIREMENTS FOR PLEADINGS

Article 1. Caption; Names of Parties; Signing

§ 421.10. Caption

421.10. Every pleading shall contain a caption setting forth:

(a) The name of the court and county, and, in municipal and justice courts, the name of the judicial district, in which the action is brought; and

(b) The title of the action.

Comment. Section 421.10 retains the substance of the portion of subdivision 1 of former Section 426 which prescribed the caption to be used on a complaint. However, unlike the provision of former Section 426, Section 421.10 applies to all pleadings rather than merely to the complaint. The extension of the caption requirement to all pleadings is consistent with existing practice.

§ 421.20. Names of parties

421.20. In the complaint the title of the action shall include the names of all the parties; but, except as otherwise provided by statute or rule of the Judicial Council, in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

Comment. Section 421.20 continues the requirement formerly found in subdivision 1 of former Section 426 that the complaint include the names of the parties and adds a new provision applying to other pleadings. Section 421.20 is based on the second sentence of Rule 10(a) of the Federal Rules of Civil Procedure.

§ 421.30. Signing of pleadings

421.30. Every pleading (except in justice courts when the pleadings are oral) shall be subscribed by the party or his attorney.

Comment. Section 421.30 is the same as the first sentence of former Code of Civil Procedure Section 446.

Article 2. Verification of Pleadings

Article Comment. This article (commencing with Section 422.10) restates without substantive change the provisions of former Code of Civil Procedure Section 446 except for the first sentence of Section 446 which is superseded by Section 421.30.

§ 422.10. "Public entity" defined

422.10. As used in this article, "public entity" means the state, a county, city, school district, **district, public agency, or public corporation.**

Comment. Section 422.10 defines "public entity" to include the governmental entities listed in former Code of Civil Procedure Section 446.

§ 422.20. "Public officer" defined

422.20. As used in this article, "public officer" means an officer of a public entity.

Comment. Section 422.20 defines "public officer" to include the persons listed in former Code of Civil Procedure Section 446.

§ 422.30. Necessity of verified answer

422.30. Except in justice courts, when the complaint is verified, the answer shall be verified. However, when a public entity, or a public officer in his official capacity, is defendant, its or his answer need not be verified.

§ 422.40. Verification when public entity or public officer is plaintiff

422.40. When a public entity, or a public officer in his official capacity, is plaintiff:

(a) The complaint need not be verified.

(b) The answer shall be verified unless (1) an admission of the truth of the complaint might subject the party to criminal prosecution or (2) a public entity, or a public officer in his official capacity, is defendant.

§ 422.50. Persons who may verify

422.50. (a) Except as otherwise provided in this section, where a pleading is verified, it shall be by affidavit of a party.

(b) Where the parties are absent from the county where the attorney has his office or from some other cause are unable to verify the pleading, the verification may be made by affidavit of the party's attorney.

(c) Where a corporation or public entity is a party, the verification may be made by affidavit of any officer of such corporation or public entity.

(d) Where the facts are within the knowledge of the party's attorney or another person, the verification may be made by affidavit of such attorney or other person.

§ 422.60. Contents of affidavit

422.60. (a) The affidavit of the party shall state that the pleading is true of his own knowledge, except as to matters which are stated in the pleading as based on his information or belief and as to those matters the affidavit shall state that he believes the pleading to be true.

(b) When the pleading is verified by the attorney, or any other person except one of the parties, he shall set forth in the affidavit the reasons why it is not made by one of the parties.

(c) When the verification is made by the attorney for the reason that the parties are absent from the county where he has his office or from some other cause are unable to verify it, or when the verification is made on behalf of a corporation or public entity by any officer thereof, such attorney's or officer's affidavit shall state that he has read the pleading and that he is informed and believes the matters therein to be true and on that ground alleges that the matters therein stated are true; provided that in such cases the pleadings shall not otherwise be considered as an affidavit or declaration establishing the facts therein alleged.

§ 422.70. Verification under penalty of perjury

422.70. A person verifying a pleading need not swear to the truth or his belief in the truth of the matters stated therein but may, instead, assert the truth or his belief in the truth of such matters "under penalty of perjury."

Article 3. Filing and Service

§ 423.10. Pleadings subsequent to complaint

423.10. All pleadings subsequent to the complaint shall be filed with the clerk or judge and copies thereof served upon the adverse party or his attorney. In justice courts, when the pleadings are oral, an entry of their substance in the docket is sufficient compliance with this section.

Comment. Section 423.10 continues without substantive change the provisions of former Code of Civil Procedure Section 465.

Sec. 9. Chapter 3 (commencing with Section 425.10) is added to Title 6 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 3. CLAIMS FOR RELIEF

Article 1. General Provisions

§ 425.10. Content of pleading demanding relief

425.10. A pleading which sets forth a claim for relief, whether it be a complaint, countercomplaint, or cross-complaint, shall contain both of the following:

(a) A statement of the facts constituting the cause of action, in ordinary and concise language.

(b) A demand for judgment for the relief to which the person asserting the cause of action claims he is entitled. If the recovery of money or damages be demanded, the amount thereof shall be stated.

Comment. Section 425.10 continues requirements formerly found in subdivision 2 and subdivision 3 (first portion) of Code of Civil Procedure Section 426 except that these requirements have been extended to cover countercomplaints and cross-complaints to codify established practice.

§ 425.20. Separate statement of causes

425.20. Causes of action, whether alleged in a complaint, countercomplaint, or cross-complaint, shall be separately stated, but all causes of action requesting relief arising from a single transaction or occurrence may be stated together.

Comment. Section 425.20 supersedes the portion of former Code of Civil Procedure Section 427 that related to the separate statement of causes of action. Section 427 provided that certain types of causes of action that often arise from a single transaction or occurrence did not need to be separately stated; Section 425.20 provides a general rule to the same effect. Section 425.20 is consistent with the approach taken in Rule 10(b) of the Federal Rules of Civil Procedure.

Article 2. Compulsory Joinder of Causes of Action

§ 426.10. Definitions

426.10. As used in this article:

(a) "Complaint" means a complaint, countercomplaint, or cross-complaint.

(b) "Plaintiff" means a person who files and serves a complaint, countercomplaint, or cross-complaint.

(c) "Related cause of action" means a cause of action which arises out of the same transaction or occurrence as the cause of action which the plaintiff alleges in his complaint.

§ 426.20. Compulsory joinder of related causes of action

426.20. Except as otherwise provided in this article, if a plaintiff fails to allege in his complaint a related cause of action which, at the time of service of his complaint, he has against any party to the action, all of his rights against such party on the related cause of action not pleaded shall be deemed waived and extinguished.

Comment. Section 426.20 makes joinder of causes arising from a single transaction or occurrence mandatory. Such a rule has not been promulgated elsewhere. It is justified, however, by the fact that, unlike many jurisdictions, California follows the "primary rights" theory as to the scope of a cause of action which strictly limits the scope of res judicata in the state. In other jurisdictions, plaintiffs are induced to join all claims arising from a single transaction or occurrence because all such claims may constitute only a single cause; thus, in these states, a rule of mandatory joinder is unnecessary.

Section 426.20 applies to complaints, countercomplaints, and cross-complaints. See Section 426.10.

§ 426.30. Compulsory countercomplaints

426.30. (a) Except as otherwise provided in this article, if a party against whom a complaint has been filed and served fails to allege in a countercomplaint any related cause of action which, at the time of serving his answer to the complaint, he has against the plaintiff, all his rights against the plaintiff on the related cause of action not pleaded shall be deemed waived and extinguished.

(b) This section does not apply if either of the following are established:

(1) The court in which the action is pending does not have jurisdiction to render a personal judgment against the person who failed to plead the related cause of action.

(2) The person who failed to plead the related cause of action did not file an answer to the complaint against him.

Comment. Subdivision (a) of Section 426.30 continues the substance of the former compulsory counterclaim rule. However, since the scope of a countercomplaint is expanded to include what were formerly cross-complaints against a plaintiff, the scope of the former rule is expanded in subdivision (a) to include some causes of action that formerly were not compulsory.

Subdivision (b) is designed to prevent unjust forfeiture of a cause of action. Paragraph (1) treats the situation where a party is not subject to a personal judgment, jurisdiction having been obtained only over property owned by him. Paragraph (2) permits a party to default without waiving any cause of action.

§ 426.40. Exceptions to compulsory joinder requirement

426.40. This article does not apply if any of the following are established:

(a) The cause of action not pleaded requires for its adjudication the presence of additional parties over whom the court cannot acquire jurisdiction.

(b) The court in which the action is pending is prohibited by the federal or state constitution or by statute from entertaining the cause of action not pleaded.

(c) At the time the action was commenced, the cause of action not pleaded was the subject of another pending action.

Comment. Section 426.40 is required to prevent injustice. Subdivisions (a) and (b) prohibit waiver of a cause of action which cannot be maintained. Subdivision (c) makes clear the rule regarding causes already pleaded.

§ 426.50. Permission to assert unpleaded cause

426.50. A party who fails to plead a cause of action subject to the requirements of this article, whether through oversight, inadvertence, mistake, or neglect, shall, if he applies to the court prior to trial, be granted leave to assert such cause unless the granting of such leave will result in substantial injustice to the opposing party.

Comment. Section 426.50 makes clear that a forfeiture should not be taken lightly and that leave should be freely granted to plead a compulsory cause prior to trial. Even after trial has begun, leave to file a countercomplaint (Section 428.50) or cross-complaint (Section 429.50) may be granted.

Article 3. Permissive Joinder of Causes of Action

§ 427.10. Permissive joinder

427.10. (a) A plaintiff who in a complaint, alone or with coplaintiffs, alleges a cause of action against one or more defendants may unite with such cause any other causes which he has either alone or with coplaintiffs against any of such defendants.

(b) Causes of action may be joined in a countercomplaint or cross-complaint in accordance with Sections 428.10, 428.30, and 429.30.

Comment. Section 427.10 supersedes former Code of Civil Procedure Section 427 and eliminates the arbitrary categories set forth in that section.

Under former Section 427, plaintiff could join causes unrelated to one another only when they happened to fall within one of the stated categories. The change provided by Section 427.10 is in line with the modern unlimited joinder-of-causes rule in effect in the federal courts and elsewhere. See Fed. R. Civ. Proc. 18(a).

Although unlimited joinder of causes is permitted by Section 427.10, any undesirable effects that might otherwise result from unlimited joinder can be avoided by severance of causes for trial under Section 1048 of the Code of Civil Procedure.

Article 4. Countercomplaints

§ 428.10. Persons who may file countercomplaint

428.10. (a) Any defendant may, alone or with codefendants, file a countercomplaint setting forth any causes of action he has against any plaintiff who has asserted a cause of action against him in the action.

(b) Any person against whom a countercomplaint or cross-complaint has been filed may, alone or with coparties, file a countercomplaint setting forth any causes of action he has against any of the parties who filed the countercomplaint or cross-complaint against him.

Comment. Subdivision (a) of Section 428.10 changes the former rule by permitting a defendant to assert all the causes of action he has against a plaintiff. This eliminates the arbitrary limitations on such countersuits which existed where neither former Section 438 nor former Section 442 applied. It also eliminates the distinctions between former Sections 438 and 442 regarding countersuits against plaintiffs and makes one procedure applicable. It would be unfair to deprive persons of the right to file countersuits simply because they are sued on a countercomplaint or a cross-complaint rather than on an independent action.

Subdivision (b) carries through the basic idea that countercomplaints and cross-complaints are to be treated as complaints and that the responses to them should be identical to the responses to complaints.

§ 428.20. Joinder of parties

428.20. Additional persons, whether or not they have already been made parties to the action, may be joined as parties to a countercomplaint if, had the countercomplaint been brought as an independent action, such joinder would have been permitted by the statutes governing joinder of parties.

Comment. Section 428.20 is designed to obviate the dilemma of a defendant who wishes to file a countercomplaint but formerly could do so only upon giving up the right to join another person whom he would join as a codefendant if the countercomplaint was asserted as an independent action. Former Section 442 was amended in 1957 to permit a cross-complainant to join outside persons who could have been joined in an independent suit. It made no sense not to extend the scope of this power to encompass all countersuits.

§ 428.30. Joinder of causes of action against person not already a party

428.30. Where a person filing a countercomplaint properly joins as a party a person who has not previously been a party to the action, the person filing the countercomplaint may set forth in the countercomplaint any causes of action he has against the other person.

Comment. Section 428.30 is consistent with treating a countercomplaint the same as if it were a complaint in an independent action. Thus, if a defendant properly joins an outsider as a codefendant on a countercomplaint, the defendant may then assert any additional causes of action he has against the outsider. This broad principle--that, once a party is properly joined in an action because of his connection to a single cause of action, adverse parties may join any other causes against him--has been adopted in many other jurisdictions. E.g., Rule 18(a) of the Federal Rules of Civil Procedure. Although unlimited joinder of causes is permitted by Sections 428.10 and 428.30, any undesirable effects that might otherwise result from unlimited joinder can be avoided by severance of causes for trial under Section 1048 of the Code of Civil Procedure.

§ 428.40. Countercomplaint may be combined with answer

428.40. A countercomplaint may but need not be included in the same document as the answer to the complaint, countercomplaint, or cross-complaint of the party against whom the countercomplaint is filed.

Comment. Section 428.40 is consistent with the practice regarding counterclaims under former Code of Civil Procedure Section 437, which made a counterclaim an integral part of the answer.

§ 428.50. Countercomplaint filed after answer only with leave of court

428.50. Leave of court is required to file any countercomplaint except one filed before or at the same time as the answer to the complaint, countercomplaint, or cross-complaint of the party against whom the countercomplaint is filed. Such leave may be granted in the interest of justice at any time during the course of the action.

Comment. Section 428.50 safeguards the rights of persons against whom an untimely countercomplaint is sought to be filed and who, on balance of all relevant factors, would be treated unjustly if such filing were permitted.

§ 428.60. Service of countercomplaint

428.60. A countercomplaint shall be served on the parties affected thereby. If any party affected by a countercomplaint has not appeared in the action, a summons upon the countercomplaint shall be issued and served upon him in the same manner as upon commencement of an original action.

Comment. Section 428.60 adopts the safeguards applicable to cross-complaints under former Code of Civil Procedure Section 442 (now Section 429.60).

Article 5. Cross-Complaints

§ 429.10. When cross-complaint permitted

429.10. Whenever a party against whom a cause of action has been asserted in a complaint, countercomplaint, or cross-complaint has a cause of action arising from the same transaction or occurrence, or affecting the same property, as the cause brought against him, he may file a cross-complaint asserting his cause against a person alleged to be liable thereon, whether or not such person is already a party to the action.

Comment. This article supersedes former Code of Civil Procedure Section 442 and provides generally for a cross-complaint analogous to the one permitted under that section. The article is generally in line with modern cross-complaint rules in force elsewhere. See, e.g., Fed. R. Civ. Proc. 13(g), (h).

§ 429.20. Joinder of parties

429.20. Any person may be made a party to a cross-complaint if, had the cross-complaint been filed as an independent action, his joinder would have been permitted by the statutes governing joinder of parties.

Comment. See Comment to Section 429.10.

§ 429.30. Joinder of causes of action

429.30. Where a person filing a cross-complaint states a cause of action against another person arising from the same transaction or occurrence, or affecting the same property, as the cause brought against him, the person filing the cross-complaint may set forth in the cross-complaint any other causes of action he has against the other person.

Comment. Section 429.30 makes treatment of cross-complaints consistent with the treatment of complaints and countercomplaints. It permits a person who files a cross-complaint to join all other causes he has against any person against whom the cross-complaint is filed. Although unlimited joinder of causes is permitted by Section 429.30, any undesirable effects that might otherwise result from unlimited joinder can be avoided by severance of causes for trial under Section 1048 of the Code of Civil Procedure. See also Section 1048.5 (transfer to another court for trial when cross-claim severed for trial). See also the Comment to Section 428.30 (countercomplaints).

§ 429.40. Cross-complaint may be combined with answer

429.40. A cross-complaint may but need not be included in the same document as the answer to the complaint, countercomplaint, or cross-complaint which contains the cause of action to which it is factually related.

Comment. Section 429.40 reflects prior practice. The phrase "factually related" refers to the cause of action which arises from the same transaction or occurrence or affects the same property.

§ 429.50. Cross-complaint filed after answer only with leave of court

429.50. Leave of court is required to file any cross-complaint except one filed before or at the same time as the answer to the complaint, countercomplaint, or cross-complaint which contains the cause of action to which the proposed cross-complaint is factually related. Such leave may be granted in the interest of justice at any time during the course of the action.

Comment. See the Comments to Sections 428.50, 429.10, and 429.40.

§ 429.60. Service of cross-complaint

429.60. A cross-complaint must be served on the parties affected thereby. If any party affected by a cross-complaint has not appeared in the action, a summons upon the cross-complaint shall be issued and served upon him in the same manner as upon commencement of an original action.

Comment. See the Comment to Section 429.10.

§ 429.70. Certain cross-complaints to be treated as countercomplaints

429.70. Any cross-complaint which qualifies in whole or in part as a countercomplaint under Article 4 (commencing with Section 428.10) of this chapter shall, to that extent, be treated as a countercomplaint and shall thus be subject to the provisions of Section 426.30.

Comment. Section 429.70 makes clear that a countercomplaint by any other name remains a countercomplaint and that Section 426.30 (compulsory countercomplaint) is always applicable.

§ 429.80. Rights of "third-party defendants"

429.80. (a) As used in this section:

(1) "Third-party plaintiff" means a person against whom a cause of action has been asserted in a complaint, countercomplaint, or cross-complaint, who claims the right to recover all or part of any amounts for which he may be held liable on such cause of action from a third person, and who files a cross-complaint stating such claim as a cause of action against the third person.

(2) "Third-party defendant" means the person who is alleged in a cross-complaint filed by a third-party plaintiff to be liable to the third-party plaintiff if the third-party plaintiff is held liable on the claim against him.

(b) In addition to the other rights and duties a third-party defendant has under this article, he may, at the time he files his answer to the cross-complaint, file a special answer alleging against the person who asserted the cause of action against the third-party plaintiff any defenses which the third-party plaintiff has to such cause of action.

Comment. Section 429.80 makes clear that, in addition to all rights and duties of a party against whom a cross-complaint has been filed, a third-party defendant has the right to prevent collusion against him by asserting all defenses which the third-party plaintiff should assert against the party who pleaded the cause of action against the third-party plaintiff. Cf. Fed. R. Civ. Proc. 14.

Article 6. Contents of Pleadings in Particular Actions

§ 430.10. Contents of petition in proceeding for dissolution of marriage

430.10. In a proceeding for dissolution of marriage, the petition must set forth among other matters as near as can be ascertained the following facts:

- (a) The state or country in which the parties were married.
- (b) The date of marriage.
- (c) The date of separation.
- (d) The number of years from marriage to separation.
- (e) The number of children of the marriage, if any, and if none a statement of that fact.
- (f) The age and birth date of each minor child of the marriage.
- (g) The social security numbers of the husband and wife, if available and if not available, a statement to such effect.

Comment. Section 430.10 continues without substantive change the provisions of former Section 426c of the Code of Civil Procedure.

§ 430.20. Additional information required in domestic relations cases

430.20. (a) In a proceeding for dissolution of marriage, legal separation, or for a declaration of void or voidable marriage, there shall be furnished to the county clerk by the petitioner at the time of filing of the petition, or within 10 days thereafter and before the date of the first hearing, that information, required to be collected by the State Registrar of Vital Statistics, in the manner specified under Chapter 6.5 (commencing with Section 10360) of Division 9 of the Health and Safety Code. The clerk shall accept the petition for filing, whether or not the information is then furnished. At any time after the filing of the petition, the respondent may also furnish the information, whether or not it has been first furnished by the petitioner.

(b) The clerk shall take all ministerial steps required of him in the proceeding, whether or not the information required by this section has been furnished; but the clerk shall advise the court, at the time set for any hearing, if at such time no party has furnished the information. In such cases, the court may decline to hear any matter encompassed within the proceeding if good cause for such failure to furnish the information has not been shown. The court's inquiry in such cases shall be confined solely to the question of the existence of good cause for not furnishing the information; and such report and the contents thereof shall not be admissible in evidence and shall not be furnished to the court.

Comment. Section 430.20 continues without substantive change the provisions of former Section 426a of the Code of Civil Procedure.

§ 430.30. Action for infringement of rights in literary, artistic, or intellectual production

430.30. (a) As used in this section:

(1) "Complaint" includes a countercomplaint or cross-complaint.

(2) "Plaintiff" includes the person filing a countercomplaint or cross-complaint.

(b) If the complaint contains a demand for relief on account of the alleged infringement of the plaintiff's rights in and to a literary, artistic, or intellectual production, there must be attached to the complaint a copy of the production as to which the infringement is claimed and a copy of the alleged infringing production. If, by reason of bulk or the nature of the production, it is not practicable to attach a copy to the complaint, that fact and the reasons why it is impracticable to attach a copy of the production to the complaint shall be alleged; and the court, in connection with any demurrer, motion, or other proceedings in the cause in which a knowledge of the contents of such production may be necessary or desirable, shall make such order for a view of the production not attached as will suit the convenience of the court, to the end that the contents of such production may be deemed to be a part of the complaint to the same extent and with the same force as though such production had been capable of being and had been attached to the complaint. The attachment of any such production in accordance with the provisions of this section shall not be deemed a making public of the production within the meaning of Section 983 of the Civil Code.

Comment. Section 430.30 continues the provisions of the last portion of former Section 426 of the Code of Civil Procedure, but these provisions have been extended to cover countercomplaints and cross-complaints.

Sec. 10. Chapter 4 (commencing with Section 435.10) is added to Title 6 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 4. OBJECTIONS TO PLEADINGS; DENIALS AND DEFENSES

Article 1. Objections to Pleadings

§ 435.10. Grounds for objections to pleadings requesting relief

435.10. The party against whom a complaint, countercomplaint, or cross-complaint has been filed may object to the pleading on any one or more of the following grounds:

(a) The court has no jurisdiction over his person.

(b) The court has no jurisdiction of the subject of the cause of action alleged in the pleading.

(c) The person who filed the complaint, countercomplaint, or cross-complaint does not have the legal capacity to sue.

(d) There is another action pending between the same parties on the same cause of action.

(e) There is a defect or misjoinder of parties.

(f) Several causes of action that should have been separately stated have not been separately stated.

(g) The complaint, countercomplaint, or cross-complaint does not state facts sufficient to constitute a cause of action.

(h) The complaint, countercomplaint, or cross-complaint is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.

(i) In an action founded upon a contract, it cannot be ascertained from the complaint, countercomplaint, or cross-complaint whether the contract is written or oral.

§ 435.10

Comment. Section 435.10 continues without substantive change the grounds for objection to a complaint by demurrer (former Code of Civil Procedure Section 430) or answer (former Code of Civil Procedure Section 433). The same grounds for objection are made applicable to counter-complaints and cross-complaints.

§ 435.20. Grounds for objection to answer

435.20. A party against whom an answer has been filed may object to the answer upon any one or more of the following grounds:

(a) The answer does not state facts sufficient to constitute a defense.

(b) The answer is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.

(c) Where the answer pleads a contract, it cannot be ascertained from the answer whether the contract is written or oral.

Comment. Section 435.20 continues without substantive change the portions of former Code of Civil Procedure Section 444 that specified the grounds for objection to the answer except that the grounds for objection to what formerly would have been a counterclaim are now the same as the grounds for objecting to a complaint. See Section 435.10.

§ 435.30. When objections made by demurrer or answer

435.30. (a) When any ground for objection to a complaint, countercomplaint, or cross-complaint appears on the face thereof, or from any matter of which the court must or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading.

(b) When any ground for objection to a complaint, countercomplaint, or cross-complaint does not appear on the face of the pleading, the objection may be taken by answer.

(c) An objection to an answer may be taken by demurrer to the answer.

(d) A party objecting to a complaint, countercomplaint, or cross-complaint may demur and answer at the same time.

Comment. Section 435.30 continues prior law under various sections of the Code of Civil Procedure except that former provisions applicable to complaints have been made applicable to countercomplaints and cross-complaints. Subdivision (a) continues the rule formerly found in Section 430; subdivision (b) continues the rule formerly found in Section 433; subdivision (c) continues the rule formerly found in Section 444; subdivision (d) continues the rule formerly found in Section 431.

§ 435.40. Time to demur

435.40. (a) The defendant may demur to the complaint within the time required in the summons to answer.

(b) A person against whom a countercomplaint or cross-complaint has been filed may demur to the countercomplaint or cross-complaint:

(1) Within 10 days after service of the countercomplaint or cross-complaint if the person who demurs has previously appeared in the action.

(2) Within the time required in the summons to answer if the person who demurs has not previously appeared in the action.

(c) A party who has filed a complaint, countercomplaint, or cross-complaint may, within 10 days after service of the answer to his pleading, demur to the answer.

Comment. Section 435.40 is generally consistent with the times specified in former Sections 430 and 443 of the Code of Civil Procedure. For new parties brought into the action on a countercomplaint or cross-complaint, the times are consistent with the practice under former Code of Civil Procedure Section 442.

§ 435.50. Demurrer may be taken to all or part of pleading

435.50. (a) A demurrer to a complaint, countercomplaint, or cross-complaint may be taken to the whole complaint, countercomplaint, or cross-complaint or to any of the causes of action stated therein.

(b) A demurrer to an answer may be taken to the whole answer or to any one or more of the several defenses set up in the answer.

Comment. Section 435.50 is consistent with prior law but treats countercomplaints and cross-complaints the same as complaints. See former Code of Civil Procedure Sections 431 (complaints) and 443 (answers).

§ 435.60. Statement of grounds for objection

435.60. A demurrer shall distinctly specify the grounds upon which any of the objections to the complaint, countercomplaint, cross-complaint, or answer are taken. Unless it does so, it may be disregarded.

Comment. Section 435.60 continues the rule formerly found in Section 431 of the Code of Civil Procedure except that the rule has been extended to cover countercomplaints, cross-complaints, and answers in accordance with the former practice.

§ 435.70. Judicial notice

435.70. When the ground of demurrer is based on a matter of which the court may take judicial notice pursuant to Sections 452 or 453 of the Evidence Code, such matter must be specified in the demurrer, or in the supporting points and authorities for the purpose of invoking such notice, except as the court may otherwise permit.

Comment. Section 435.70 continues without change the provisions of former Code of Civil Procedure Section 431.5.

§ 435.80. Objections waived by failure to demur or answer

435.80. If the party against whom a complaint, countercomplaint, or cross-complaint has been filed fails to object to the pleading, either by demurrer or answer, he is deemed to have waived the objection unless it is an objection that the court has no jurisdiction of the subject of the cause of action alleged in the pleading or an objection that the pleading does not state facts sufficient to constitute a cause of action.

Comment. Section 435.80 is the same in substance as former Code of Civil Procedure Section 434 except that Section 435.80 extends the rule to objections to countercomplaints and cross-complaints.

Article 2. Denials and Defenses

§ 440.10. "Material allegation" defined

440.10. A material allegation in a pleading is one essential to the claim or defense and which could not be stricken from the pleading without leaving it insufficient.

Comment. Section 440.10 continues without substantive change the provisions of former Code of Civil Procedure Section 463.

§ 440.20. Admission of material allegation by failure to deny

440.20. (a) Every material allegation of the complaint, countercomplaint, or cross-complaint, not controverted by the answer, shall, for the purposes of the action, be taken as true.

(b) The statement of any new matter in the answer, in avoidance or constituting a defense, must, on the trial, be deemed denied or avoided by the opposite party.

Comment. Section 440.20 supersedes former Section 462 of the Code of Civil Procedure. It is the same in substance as the former section except that it requires an answer to a countercomplaint while the former section did not require an answer to a counterclaim. The more precise phrase "denied or avoided" has been substituted in subdivision (b) for "controverted" which was used in former Section 462. This substitution adopts the language used in Rule 8(d) of the Federal Rules of Civil Procedure and makes no change in prior California law.

§ 440.30. Form and content of answer

440.30. (a) The answer to a complaint, countercomplaint, or cross-complaint shall contain:

(1) A general or specific denial of the material allegations of the complaint, countercomplaint, or cross-complaint denied by the party filing the answer.

(2) A statement of any new matter constituting a defense.

(b) If the complaint is not verified, a general denial is sufficient but only puts in issue the material allegations of the complaint, countercomplaint, or cross-complaint. Except in justice courts, if the complaint is verified, the denial of the allegations must be made positively or according to the information and belief of the defendant.

(c) If the person filing the answer is without knowledge or information sufficient to form a belief as to the truth of an allegation of the complaint, countercomplaint, or cross-complaint, he may so state and this has the effect of a denial of the allegation.

(d) The denials of the allegations may be stated by:

(1) Reference to specific paragraphs or parts of the complaint, countercomplaint, or cross-complaint.

(2) Express admission of certain allegations of the complaint, countercomplaint, or cross-complaint, with a general denial of all of the allegations not so admitted.

(3) A denial of certain allegations upon information and belief, or a denial of certain allegations by stating that the person filing the answer is without knowledge or information sufficient to form a belief as to the truth of the allegations, with a general denial of all allegations not so denied or expressly admitted.

Comment. Section 440.30 is the same in substance as former Code of Civil Procedure Section 437 except that it has been broadened to apply to countercomplaints and cross-complaints.

Subdivision (c) uses language taken from Rule 8 of the Federal Rules of Civil Procedure. The language of the federal rule will permit more concise pleadings and will avoid highly technical requirements that may trap an unwary pleader. See, e.g., Oliver v. Swiss Club Tell, 222 Cal. App.2d 528, 35 Cal. Rptr. 324 (1963).

§ 440.40. General denial where amount involved \$500 or less

440.40. In any action on which the demand, exclusive of interest, or the value of the property in controversy does not exceed five hundred dollars (\$500), the defendant at his option, in lieu of demurrer and other answer, may file a general written denial verified by his own oath and a brief statement similarly verified, of any new matter constituting a defense or counter-complaint.

Comment. Section 440.40 continues without substantive change the provisions of former Code of Civil Procedure Section 437b.

§ 440.50. Pleading exemption from liability under insurance policy

440.50. In an action to recover upon a contract of insurance wherein the defendant claims exemption from liability upon the ground that, although the proximate cause of the loss was a peril insured against, the loss was remotely caused by or would not have occurred but for a peril excepted in the contract of insurance, the defendant shall in his answer set forth and specify the peril which was the proximate cause of the loss, in what manner the peril excepted contributed to the loss or itself caused the peril insured against, and if he claim that the peril excepted caused the peril insured against, he shall in his answer set forth and specify upon what premises or at what place the peril excepted caused the peril insured against.

Comment. Section 440.50 is the same as former Code of Civil Procedure Section 437a.

§ 440.60. Recovery of personal property

440.60. When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property, and the officer taking the property, or the sureties on any bond or undertaking is sued for taking the same, the officer or sureties may in their answer set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made or that the value in the affidavit stated was inserted by mistake, the court shall disregard the value as stated in the affidavit and give judgment according to the right of possession of said property at the time the affidavit was made.

Comment. Section 440.60 is the same as former Code of Civil Procedure Section 437d.

§ 440.70. Set-off

440.70. (a) Where cross-demands for money have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up in a countercomplaint, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other.

(b) If one person described in subdivision (a) brings an action against the other person described in that subdivision, nothing in this section makes the cross-demand which the person against whom the action is brought has against the person bringing the action a defense subject to waiver if not raised in his answer.

Comment. Section 440.70 continues the substance of former Code of Civil Procedure Section 440. Section 440.70, however, is expressly limited to cross-demands for money, thus preserving the historical purposes of the statute. See generally Comment, 53 Cal. L. Rev. 224 (1965). Subdivision (b) is new and is designed to eliminate any possible inconsistency between Section 440.70 and the compulsory countercomplaint provision (Section 426.30).

Article 3. Motion to Strike

§ 445.10. Motion to strike complaint, countercomplaint, or cross-complaint

445.10. (a) As used in this section, "complaint" includes a countercomplaint or cross-complaint.

(b) A party, within the time he is allowed to answer a complaint, either at the time he demurs to the complaint, or without demurring, may serve and file a notice of motion to strike the whole or any part of the complaint. The notice of motion to strike shall specify a hearing date not more than 15 days from the filing of the notice, plus any additional time that the party, as moving party, is otherwise required to give the other party. If a party serves and files such a notice of motion without demurring, his time to answer the complaint is extended and no default may be entered against him except as provided in Section 585 and 586, but the filing of such a notice of motion does not extend the time within which to demur.

Comment. Section 445.10 continues the substance of former Code of Civil Procedure Section 435 except that it is extended to cover counter-complaints and cross-complaints.

Article 4. Summary Judgment

Comment. This article continues without substantive change the provisions of former Code of Civil Procedure Section 437c.

§ 446.10. Definitions

446.10. As used in this article:

- (a) "Action" includes all types of proceedings.
- (b) "Answer" includes countercomplaints and cross-complaints.

§ 446.20. Motion for summary judgment

446.20. (a) In superior courts and municipal courts if it is claimed that the action has no merit, or that there is no defense to the action, on motion of either party, after notice of the time and place thereof in writing served on the other party at least 10 days before such motion, supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out or the complaint may be dismissed and judgment may be entered, in the discretion of the court unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. A judgment so entered is an appealable judgment as in other cases.

(b) If it appears that the defense applies only to a part of the plaintiff's claim, or that a good cause of action does not exist as to a part of the plaintiff's claim, or that any part of a claim is admitted or any part of a defense is conceded, the court shall, by order, so declare, and the claim or defense shall be deemed established as to so much thereof as is by such order declared and the cause of action may be severed accordingly, and the action may proceed as to the issues remaining between the parties. As used in this subdivision and in Section 446.40 "plaintiff's claim" includes a counterclaim or cross-complaint. No judgment

shall be entered prior to the termination of the action but the judgment in the action shall, in addition to any matters determined in such action, award judgment as established by the proceedings provided for in this subdivision. A judgment entered under this subdivision is an appealable judgment as in other cases.

§ 446.30. Affidavits in support of motion

446.30. The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff or defendant to a judgment in the action.

§ 446.40. Affidavits in opposition to motion

446.40. The affidavit or affidavits in opposition to the motion shall be made by the plaintiff or defendant, or by any other person having knowledge of the facts, and together shall set forth facts showing that the party has a good and substantial defense to the plaintiff's claim or to a part thereof or that a good cause of action exists on the merits.

§ 446.50. Requirements for affidavits

446.50. The facts stated in each affidavit shall be within the personal knowledge of the affiant, shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto. When the party resisting the motion appears in a representative capacity, such as a trustee, guardian, executor, administrator, or receiver, then the affidavit in opposition by such representative may be made upon his information and belief.

§ 446.60. Time not extended

446.60. The filing of a motion under this article does not extend the time within which a party must otherwise file an answer, demurrer, or motion to strike.

§ 462

Sec. 11. Section 462 of the Code of Civil procedure is repealed.

~~462.--Every-material-allegation-of-the-complaint,-not-controverted
by-the-answer,-must,-for-the-purposes-of-the-action,-be-taken-as-true;
the-statement-of-any-new-matter-in-the-answer,-in-avoidance-or-consti-
tuting-a-defense-or-counter-claim,-must,-on-the-trial,-be-deemed
controverted-by-the-opposite-party.~~

§ 463

Sec. 12. Section 463 of the Code of Civil Procedure is repealed.

~~463.--A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.~~

§ 465

Sec. 13. Section 465 of the Code of Civil Procedure is repealed.

~~465. All pleadings subsequent to the complaint, must be filed with the clerk or judge, and copies thereof served upon the adverse party or his attorney; provided, that in actions in justice courts, when the pleadings are oral, an entry of their substance in the docket is sufficient.~~

§ 471.5

Sec. 14. Section 471.5 is added to the Code of Civil Procedure, to read:

471.5. If the complaint is amended, a copy of the amendments must be filed, or the court may, in its discretion, require the complaint as amended to be filed, and a copy of the amendments or amended complaint must be served upon the defendants affected thereby. The defendant must answer the amendments, or the complaint as amended, within ten days after service thereof, or such other time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases.

Comment. Section 471.5 is the same as former Code of Civil Procedure Section 432.

§ 1048.5. Transfer to another court for trial when cross-claim severed for trial

Sec. 15. Section 1048.5 is added to the Code of Civil Procedure, to read:

1048.5. If a cause of action alleged in a cross-complaint, other than one described in Section 429.80, is brought solely against a person or persons who were not previously parties to the action before the court and such cause of action is severed for trial under Section 1048, the court may, in its discretion, in the interest of justice, transfer the cause to another court which would have had subject jurisdiction over it had it been asserted as an independent action. The court to which the transfer is made shall deal with the matter as if it had been brought as an independent action.

Comment. Section 1048.5 is added to permit the court not only to sever matters for trial, but to sever matters into two independent actions in order that it may then transfer part of the original action to another court. The power is limited strictly to a nonimpleader cause of action alleged in a cross-complaint against a person who is a stranger to the action. Once such a cause of action is severed for trial, so that any advantages of original joinder are lost, it may be unfair for the court to retain such an action. If so, the severed cause should be sent to the most convenient court having jurisdiction over it. Thus, if the cause alleged in the cross-complaint if brought as an independent proceeding would be one cognizable in municipal court, it shall be transferred to a municipal court most convenient to the parties, even though the original action is one in a superior court.

STATUTE DRAFT

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

Section 1. Section 389 of the Code of Civil Procedure is repealed.

[389. A person is an indispensable party to an action if his absence will prevent the court from rendering any effective judgment between the parties or would seriously prejudice any party before the court or if his interest would be inequitably affected or jeopardized by a judgment rendered between the parties.

A person who is not an indispensable party but whose joinder would enable the court to determine additional causes of action arising out of the transaction or occurrence involved in the action is a conditionally necessary party.

When it appears that an indispensable party has not been joined, the court shall order the party asserting the cause of action to which he is indispensable to bring him in. If he is not then brought in, the court shall dismiss without prejudice all causes of action as to which such party is indispensable and may, in addition, dismiss without prejudice any cause of action asserted by a party whose failure to comply with the court's order is wilful or negligent.

When it appears that a conditionally necessary party has not been joined, the court shall order the party asserting the cause of action to which he is conditionally necessary to bring him in if he is subject to the jurisdiction of the court, if he can be brought in without undue delay, and if his joinder will not cause undue complexity or delay in the proceedings. If he is not then brought in, the court may dismiss

§ 389

without prejudice any cause of action asserted by a party whose failure to comply with the court's order is wilful or negligent.

Whenever a court makes an order that a person be brought into an action, the court may order amended or supplemental pleadings or a cross-complaint filed and summons thereon issued and served.

If, after additional conditionally necessary parties have been brought in pursuant to this section, the court finds that the trial will be unduly complicated or delayed because of the number of parties or causes of action involved, the court may order separate trials as to such parties or make such other order as may be just.]

Sec. 2. Section 389 is added to the Code of Civil Procedure, to read:

enact substance of Rule 19 of the
Federal Rules of Civil Procedure
(attached)

Note: Federal Rule 19 is a comprehensive provision governing mandatory joinder of parties which has at its core the basic idea that a person should be required to be joined as a party only if his absence may result in injustice to him or to persons already before the court. Simple convenience is not sufficient ground for mandatory joinder. Section 389 on its face requires joinder of persons whenever it would enable the court "to determine additional causes of action arising out of the transaction or occurrence involved in the action" before the court. The Law Revision Commission, which drafted the language of Section 389, never intended it to be as broad as it reads.

Rule 19.**JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION**

(a) **Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder

Rule 19 **RULES OF CIVIL PROCEDURE**

would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

As amended Feb. 28, 1966, eff. July 1, 1966.

Notes on Amendments to Federal Rule 19

Prior to 1966, Rule 19 read as follows:

(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

(c) **Same: Names of Omitted Persons and Reasons for Non-Joiner to be Pleadod.** In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

The Advisory Committee noted the alterations as follows:

Whenever feasible, the persons materially interested in the subject of an action—see the more detailed description of these persons in the discussion of new subdivision (a) below—should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished—a situation which may be encountered in Federal courts because of limitations on service of process, subject matter jurisdiction, and venue—the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

Defects in the Original Rule

The foregoing propositions were well understood in the older equity practice, see Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum.L.Rev. 1254 (1951), and Rule 19 could be and often was applied in consonance with them. But experience showed that the rule was defective in its phrasing and did not point clearly to the proper basis of decision.

*Textual defects. * * **

(2) The word "indispensable," appearing in original subdivision (b), was apparently intended as an inclusive reference to the interested persons in whose absence it would be advisable, all factors having been considered, to dismiss the action. Yet the sentence implied that there might be interested persons, not "indispensable," in whose absence the action ought also to be dismissed. Further, it seemed at least superficially plausible to equate the word "indispensable" with the expression "having a joint interest," appearing in subdivision (a). * * * But persons holding an interest technically "joint" are not always so related to an action that it would be unwise to proceed without joining all of them, whereas persons holding an interest not technically "joint" may have this relation to an action. See Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 Mich.L.Rev. 327, 356 ff., 483 (1957).

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(3) The use of "indispensable" and "joint interest" in the context of original Rule 19 directed attention to the technical or abstract character of the rights or obligations of the persons whose joinder was in question, and correspondingly distracted attention from the pragmatic considerations which should be controlling.

(4) The original rule, in dealing with the feasibility of joining a person as a party to the action, besides referring to whether the person was "subject to the jurisdiction of the court as to both service of process and venue," spoke of whether the person could be made a party "without depriving the court of jurisdiction of the parties before it." The second quoted expression used "jurisdiction" in the sense of the competence of the court over the subject matter of the action, and in this sense the expression was apt. However, by a familiar confusion, the expression seems to have suggested to some that the absence from the lawsuit of a person who was "indispensable" or "who ought to be [a] part[y]" itself deprived the court of the power to adjudicate as between the parties already joined. * * *

Failure to point to correct basis of decision. The original rule did not state affirmatively what factors were relevant in deciding whether the action should proceed or be dismissed when joinder of interested persons was infeasible. In some instances courts did not undertake the relevant inquiry or were misled by the "jurisdiction" fallacy. In other instances there was undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated by the shaping of final relief or other precautions.

Although these difficulties cannot be said to have been general, analysis of the cases showed that there was good reason for attempting to strengthen the rule. * * *

The Amended Rule

New subdivision (a) defines the persons whose joinder in the action is desirable. Clause (1) stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or "hollow" rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter. Clause (2) (i) recognizes the importance of protecting the person whose joinder is in question against the practical prejudice to him which may arise through a disposition of the action in his absence. Clause (2) (ii) recognizes the need for considering whether a party may be left, after the adjudication, in a position where a person not joined can subject him to a double or otherwise inconsistent liability. See Reed, *supra*, 85 Mich.L.Rev. at 330, 338 * * *.

If a person as described in subdivision (a) (1)-(2) is amenable to service of process and his joinder would not deprive the court of jurisdiction in the sense of competence over the action, he should be joined as a party; and if he has not been joined, the court should order him to be brought into the action. If a party joined has a valid ob-

jection to the venue and chooses to assert it, he will be dismissed from the action.

Subdivision (b). When a person as described in subdivision (a) (1)-(2) cannot be made a party, the court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed. That this decision is to be made in the light of pragmatic considerations has often been acknowledged by the courts. See *Ross v. Texas Co.*, 23 F.2d 171 (2d Cir. 1927), cert. denied, 277 U.S. 587 (1928); *Niles-Bement-Pond Co. v. Iron Molders' Union*, 254 U.S. 77, 89 (1920). The subdivision sets out four relevant considerations drawn from the experience revealed in the decided cases. The factors are to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations.

The *first factor* brings in a consideration of what a judgment in the action would mean to the absentee. Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor? The possible collateral consequences of the judgment upon the parties already joined are also to be appraised. Would any party be exposed to a fresh action by the absentee, and if so, how serious is the threat? * * *

The *second factor* calls attention to the measures by which prejudice may be averted or lessened. The "shaping of relief" is a familiar expedient to this end. See, e. g., the award of money damages in lieu of specific relief where the latter might affect an absentee adversely. *Ward v. Deavers*, 203 F.2d 72 (D.C.Cir. 1953) * * *.

The *third factor*—whether an "adequate" judgment can be rendered in the absence of a given person—calls attention to the extent of the relief that can be accorded among the parties joined. It meshes with the other factors, especially the "shaping of relief" mentioned under the second factor. * * *

The *fourth factor*, looking to the practical effects of a dismissal, indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible. * * *

The subdivision uses the word "indispensable" only in a conclusory sense, that is, a person is "regarded as indispensable" when he cannot be made a party and, upon consideration of the factors above-mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.

* * *

Subdivision (c) parallels the predecessor subdivision (c) of Rule 19. In some situations it may be desirable to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court in its discretion may itself convey this information by directing a letter or other informal notice to the absentee.

- Chap. 4. Answer. §437-442.
 Chap. 5. Demurrer to Answer or Counterclaim. §443-444.
 Chap. 6. Verification of Pleadings. §456.
 Chap. 7. General Rules of Pleading. §452-465.
 Chap. 8. Variance—Mistakes in Pleadings and Amendments. §469-475.

Anno. CCP 422: W.P. pp. 975, 1202, 1209, 1467; 39 Cal.J.2d 20, 187, 319, 489-490.

McK.D. Pleading §§1 et seq.

Forms CCP 422: Cal. Pl&Pr, Ans. & Countercl., Form 17; Caption, Forms 7, 13-17, 101, 102, 115, 116, 120-122; Cal. P&A, Actions & Spec. Proc., p. 19; Amend. & Suppl. Plea, p. 9; Ans. & Countercl., p. 7; Complaint, p. 6; Law & Motion Proc., pp. 6, 21; Motions, p. 7.

CHAPTER 1 IN GENERAL

- Defined. §420.
 Forms and rules of pleading. §421.
 Permissible pleadings enumerated. §422.

§420. Defined.—The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court. Leg.H. 1872.

Anno. CCP 420: W.P. p. 975; 39 Cal.J.2d 14.

McK.D. Pleading §1.

§421. Forms and Rules of Pleading.—The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this code. Leg.H. 1872.

Anno. CCP 421: W.P. p. 978; 39 Cal.J. 2d 16.
 McK.D. Pleading §5.

Forms CCP 421: Cal. P&A, Actions & Spec. Proc., p. 18.

§422. Permissible Pleadings Enumerated.—The only pleadings allowed on the part of the plaintiff are:

1. The complaint;
2. The demurrer to the answer;
3. The demurrer to the cross-complaint;
4. The answer to the cross-complaint;

And on the part of the defendant:

1. The demurrer to the complaint;
2. The answer;
3. The cross-complaint;
4. The demurrer to the answer to the cross-complaint.

(In [1] justice courts [2] the pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended; in [3] justice courts, the pleadings may, except the complaint, or cross-complaint be oral or in writing; need not be verified, unless otherwise provided in this title; if in writing, must be filed with the [4] judge; if oral, an entry of their substance must be made in the docket.) Leg.H. 1872, 1907 p. 705, 1933 ch. 744, 1951 ch. 1737.

§422. 1951 Deletes. 1. justices' 2. of
 Class B 3. such justices' 4. justice
 See note to §17 above.
 See note (200) preceding Section 372.

CHAPTER 2

COMPLAINT—JOINDER OF CAUSES

As first pleading. §425.

Contents. §426.

Information to be furnished on filing of divorce, annulment, or separate maintenance action. §426a.

Divorce action—Contents of complaint. §426c.
 Joinder of causes. §427.

§425. As First Pleading.—The first pleading on the part of the plaintiff is the complaint. Leg.H. 1872.

Anno. CCP 425: W.P. c. 1207; 39 Cal.J.2d 111.

McK.D. Pleading §48.

Forms CCP 425: Cal. Pl&Pr, Caption, Forms 12, 13, 83-86; Cal. P&A, Abate., p. 13; Complaint, p. 6; Demur., p. 20.

§426. Contents.—The complaint must contain:

1. The title of the action, the name of the court and county, and, in municipal and [1] justice courts, the name of the [2] judicial district, in which the action is brought; the names of the parties to the action;

2. A statement of the facts constituting the cause of action, in ordinary and concise language;

3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated; provided, that in [3] justice courts, a copy of the account, note, bill, bond, or instrument upon which the action is based is a sufficient complaint. If the demand be for relief on account of the alleged infringement of the plaintiff's rights in and to a literary, artistic or intellectual production, there must be attached to the complaint a copy of the production as to which the infringement is claimed and a copy of the alleged infringing production. If, by reason of bulk or the nature of the production, it is not practicable to attach a copy to the complaint, that fact and the reasons why it is impracticable to attach a copy of the production to the complaint shall be alleged; and the court, in connection with any demurrer, motion or other proceedings in the cause in which

a knowledge of the contents of such production may be necessary or desirable, shall make such order for a view of the production not attached as will suit the convenience of the court, to the end that the contents of such production may be deemed to be a part of the complaint to the same extent and with the same force as though such production had been capable of being and had been attached to the complaint. The attachment of any such production in accordance with the provisions hereof shall not be deemed a making public of the production within the meaning of Section 983 of the Civil Code. Leg.H. 1872, 1933 ch. 744, 1947 ch. 481, 1951 ch. 1737.

§426. 1951 Deletes and Leg. 1. justices' 2. city, town or judicial township 3. justices' courts of Class B The word "justice" was substituted for delete one; the words "judicial district" for delete two; and the words "justice courts" for delete three. Remaining bold type added 1947.

See note to §17 above.

See note (200) preceding Section 372.

Anno. CCP 426: W.P. pp. 978, 1139, 1141, 1178, 1207-1209, 1216-1217, 1239, 1324; 1 B.A.J.I. Instn. 173; 1 Cal.J.2d 675; 5 Cal.J.2d 731; 8 Cal.J.2d 676; 31 Cal.J.2d 708, 710-712; 39 Cal.J.2d 50, 113-114, 116-117, 135-136, 489. McK.D. Pleading §§48-52.

Forms CCP 426: Cal. Pl&Pr, Caption, Forms 12, 13; Complaint, Form 1; Inj., Form 1; Lit. Prop., Forms 1, 2, 5, 7, 8; Prayer, Form 1; Cal. P&A, Complaint, pp. 6, 7; Law & Motion Proc., p. 6; Lit. Prop., pp. 2-11; Motions, pp. 7-9, 12, 13, 25, 47, 56; Prob., pp. 21, 61, 65, 70.

§426a. Information to Be Furnished on Filing of Divorce, Annulment, or Separate Maintenance Action.—In [1] a proceeding for [2] dissolution of marriage, legal separation, or for a declaration of void or voidable marriage, there shall be furnished to the county clerk by the [3] petitioner at the time of filing of the [4] petition, or within 10 days thereafter and before the date of the first hearing, that information, required to be collected by the State Registrar of Vital Statistics, in the manner specified under Chapter 6.5 (commencing with Section 10360) of Division 9 of the Health and Safety Code. The clerk shall accept the [5] petition for filing, whether or not said information is then furnished. At any time after the filing of the [6] petition, the [7] respondent may also furnish such information, whether or not it has been first furnished by the [8] petitioner. The clerk shall take all ministerial steps required of him in the [9] proceeding, whether or not such information has been furnished; but the clerk shall advise the court, at the time set for any hearing, if at such time no party has furnished such information. In such cases,

the court may decline to hear any matter encompassed within the [10] proceeding if good cause for such failure to furnish information has not been shown.

The court's inquiry in such cases shall be confined solely to the question of the existence of good cause for not furnishing the information; and such report and the contents thereof shall not be admissible in evidence and shall not be furnished to the court. Leg.H. 1913 p. 232, 1965 ch. 1893, effective from January 1, 1966 until December 31, 1969, 1969 ch. 1608, operative January 1, 1970.

§426a. 1969 Deletes and Leg. 1. an action 2. divorce, annulment or separate maintenance 3. 8. plaintiff 4. initial complaint 5. 6. complaint 7. defendant 9, 10. action

Added "a proceeding" at [1]; "dissolution of marriage, legal separation, or for a declaration of void or voidable marriage" at [2]; "petitioner" at [3], [8]; "petition" at [5], [6]; "respondent" at [7]; "proceeding" at [9], [10]. All remaining bold type relates to earlier legislative history below.

§426a. 1965 Deletes and Leg. Before the 1965 amendment the section read as follows:

In an action for divorce the complaint must set forth, for the statistics required to be collected by the State bureau of vital statistics, among other matters as near as can be ascertained the following facts:

1. The State or country in which the parties were married.
2. The date of marriage.
3. The date of separation.
4. The number of years from marriage to separation.
5. The number of children of the marriage, if any, and if none, a statement of that fact.
6. The names of the minor children.

The deleted requirements as to contents of a divorce complaint are now found in §426c below.

Note: For detailed requirements concerning the filing of information in connection with complaints and judgments in actions for annulment, divorce, and legal separation, see Civil Code §§89, 134; Government Code §26879; Health and Safety Code §§10000.1, 10360-10371, 10620.

Anno. CCP 426a: W.P. pp. 1208, 1442, 1447; 16 Cal.J.2d 363.

McK.D. Divorce and Separation §72.

Forms CCP 426a: Cal. Pl&Pr, Annul. Mar., Forms 1-3, 2.5, 6, 8, 12, 24, 26; Div., Forms 1, 1.5, 1.6, 2; Cal. P&A, Complaint, p. 7.

§426b.—Divorce or Separate Maintenance Action, Not Necessary to Plead Acts or Cruelty.—Leg.H. 1939 ch. 333, 1961 ch. 1062. Repealed 1969 ch. 1608, operative January 1, 1970.

Anno. CCP 426b: W.P. pp. 1148, 1208, 1444-1445, 1845; 16 Cal.J.2d 365.

W.S. Husband and Wife §§35, 71.

Forms CCP 426b: Cal. Pl&Pr, Demur., Form 12; Div., Forms 34, 36, 44-46, 55-59; Put. Mar., Form 3; Cal. P&A, Complaint, p. 7; Demur., p. 259.

§426c. Divorce Action—Contents of Complaint—In [1] a proceeding for [2] dissolution of marriage the [3] petition must set forth among other matters as near as can be ascertained the following facts:

(1) The state or country in which the parties were married.

(2) The date of marriage.

(3) The date of separation.

(4) The number of years from marriage to separation.

(5) The number of children of the marriage, if any, and if none a statement of that fact.

(6) The [4] age and birth date of [5] each minor [6] child of the marriage.

(7) The social security numbers of the husband and wife, if available and if not available, a statement to such effect. Leg. H. 1966 1st Extra. Sess. ch. 107, 1968 ch. 938, 1969 ch. 1608, operative January 1, 1970.

§426c. 1969 Deletes and Leg. 1. an action 2. divorce 3. complaint 4. ages 5. the 6. children Added "a proceeding" at [1]; "dissolution of marriage" at [2]; "petition" at [3]; "age" at [4]; "each" at [5]; "child of the marriage" at [6]. All remaining bold type relates to earlier legislative history below.

Note: The requirements as to contents of a divorce complaint were formerly contained in §426a prior to amendment of that section in 1967.

Forms CCP 426c; Cal. Pl&Pr, Div., Form 1.

§427. Joinder of Causes.—The plaintiff may unite several causes of action in the same complaint, where they all arise out of:

1. Contracts, express or implied [1]. An action brought pursuant to Section 1692 of the Civil Code shall be deemed to be an action upon an implied contract within the meaning of that term as used in this section.

2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same [2].

3. Claims to recover specific personal property, with or without damages for the withholding thereof [3].

4. Claims against a trustee by virtue of a contract or by operation of law [4].

5. Injuries to character [5].

6. Injuries to person [6].

7. Injuries to property [7].

8. Claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.

9. Any and all claims for injuries arising out of a conspiracy, whether of the same or of different character, or done at the same or different times.

The causes of action so united must all belong to one only of these classes except as provided in cases of conspiracy, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person; provided, however, that in any action brought by the husband and wife, to recover damages caused by any injury to the wife, all consequential damages suffered or sustained by the husband alone, including loss of the services of his said wife, moneys expended and indebtedness incurred by reason of such injury to his said wife, may be alleged and recovered without separately stating such cause of action arising out of such consequential damages suffered or sustained by the husband; provided, further, that causes of action for injuries to person and injuries to property, growing out of the same tort, may be joined in the same complaint, and it is not required that they be stated separately. Leg.H. 1872, 1907 p. 705, 1913 p. 219, 1915 p. 30, 1931 ch 224, 1961 ch. 589.

§427. 1961 Deletes. 1, 2, 3, 4, 5, 6, and 7.

Anno. CCP 427: W.P. pp. 749-750, 994, 1123-1129, 1293; 1 B.A.J.L. Instn. 178-178C; 1 Cal.J.2d 648, 655, 678-679, 661, 663-664, 669-671, 673-676, 681, 699; 3 Cal.J.2d 578; 8 Cal.J.2d 674; 10 Cal.J.2d 523-524, 750; 11 Cal.J.2d 279; 17 Cal.J.2d 193, 225; 26 Cal.J.2d 266; 39 Cal.J.2d 126-127, 207; 48 Cal.J.2d 22; 51 Cal.J.2d 163.

McK.D. Actions §§35-71; W.S. Torts §§3, 150.

Forms CCP 427; Cal. Pl&Pr, Auto., Forms 1, 3, 4; Complaint, Forms 1, 6; Damg., Forms 25, 26; Demur., Forms 10, 11; Prayer, Form 4; Cal. P&A, Acctg., p. 13; Complaint, p. 98; Conspir., pp. 5, 21; Demur., pp. 104, 105, 107, 109, 192, 193-196, 197, 199-204, 206-212, 218-220, 224, 225, 229, 231, 232; Husband, p. 147; Venue, p. 42.

CHAPTER 3

DEMURRER TO COMPLAINT

Grounds for demurrer. §430.

Statement of grounds—Answer at same time. §431.

Judicial notice. §431.5.

Amendment of complaint—Filing and service. §432.

Answer for grounds not apparent in complaint. §433.

Waiver by failure to demur or answer. §434.

Motion to strike complaint. §435.

§430. Grounds for Demurrer.—The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, or from any matter of which the court must or may take judicial notice, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action;
2. That the plaintiff has not legal capacity to sue;
3. That there is another action pending between the same parties for the same cause;
4. That there is a defect or misjoinder of parties plaintiff or defendant;
5. That several causes of action have been improperly united, or not separately stated;
6. That the complaint does not state facts sufficient to constitute a cause of action;

[2]

[3]

[4] 7. That the complaint is uncertain; "uncertain," as used herein, includes ambiguous and unintelligible;

[5] 8. That, in actions founded upon a contract, it cannot be ascertained from the complaint, whether or not the contract is written or oral. Leg.H. 1872, 1907 p. 706, 1939 ch. 446, 1967 ch. 512, 1968 ch. 307.

§430. 1968 Leg. Added bold type in first paragraph. Remaining bold type relates to earlier legislative history below.

§430. 1967 Deletes and Leg. 2. 7. That the complaint is ambiguous; 3. 8. That the complaint is unintelligible; [1] 4. 9 5. 10

Eliminated former subdivisions 7 and 8, substituted "7" for delete 4, "8" for delete 5 and added bold type in renumbered subdivision 7. Remaining bold type in section and delete and bold type contained in 1967 deletes are from 1939 amendment.

§430. 1939 Deletes. 1. or,

Anno. CCP 430: W.P. pp. 977, 1449, 1469, 1471, 1476-1477, 1480-1481, 1483-1487, 1489, 1491, 1551, 1556, 1559, 1565; 1 Cal.J.2d 34, 38, 42, 59, 76, 686; 3 Cal.J.2d 626; 10 Cal.J.2d 524; 31 Cal.J.2d 656; 32 Cal.J.2d 265; 37 Cal.J.2d 410, 413; 39 Cal.J.2d 185, 187, 193-194, 202, 204-207, 209, 211, 214, 221, 221, 472.

McK.D. Pleading §§80-94.

Forms CCP 430: Cal. P&A, Abate, Forms 1-4, 11-15, 17-21, 23, 37; Adv. Poss., Form 10; Alleg., Forms 28-30; Assn. & Club, Forms 26-29; Auto., Form 1; Beauty, Form 18; Build. Contr., Form 12; Claim & D., Form 16; Contract, Form 26; Demur., Forms 1-13; Labor, Form 44; Landlord, Forms 14, 15; Libel, Forms 12, 13; Lim. Actn., Form 19; Mand., Form 9; Notary, Form 3; Partner., Forms 2-5, 12; Prob., Forms 43, 68; Res. Jud., Form 1; Cal. P&A, Abate., pp. 15, 19, 23, 26, 29, 31, 34, 39, 85, 92-95, 107, 110-112, 120, 134, 135, 141, 142,

144, 155, 161, 203, 206, 211; Accord., pp. 5, 54; Acctg., pp. 7, 13, 21, 27, 30; Alc. Bev., pp. 24, 58, 62, 67; Atty., pp. 83, 95; Brokers & Sismen., pp. 14, 26, 29, 33, 76; Civ. Rights, pp. 25, 26, 30; Class & Rep. Actions, pp. 5, 7, 8, 22; Com. Court, pp. 9, 10, 17, 25, 26, 29; Comm. Paper, pp. 56, 49; Complaint, pp. 7, 54; Conspir., pp. 5, 6, 7, 21, 22; Contempt, p. 15; Contract, pp. 8, 9, 28, 29, 72, 87; Contrib. Negl., pp. 10, 11, 15; Corp., pp. 10, 12, 13, 51, 158, 159; Death Actn., pp. 5, 6, 10, 12, 16; Decl. Rel., pp. 7, 10, 12, 13, 25-27, 32, 35, 46; Default, pp. 93, 94, 119; Demur., pp. 19-21, 24, 25, 34, 46, 48, 49, 54, 56, 57, 60, 68-70, 78-80, 84, 86, 88-90, 93, 95, 97, 98, 101-103, 105, 109, 111, 112, 115, 117, 118, 120, 122, 124-126, 128-133, 135, 137, 140, 148-151, 153-155, 161, 162, 167-171, 174, 178-181, 186, 189, 192, 193, 195, 199, 202, 204, 206, 209, 212, 214, 218, 219, 221, 223, 226, 228, 230, 237, 238, 243-247, 247, 256, 257, 261, 262, 286; Dis. Corp., pp. 26, 27; Div., pp. 12, 15; Em. Dom., pp. 18, 24, 25, 59, 61, 67, 68, 74, 76; Escrow, p. 29; Fict. Def., pp. 29, 31, 43, 44; Fraud, pp. 13, 14, 33, 34, 55, 56, 66-68, 76, 77, 81, 82, 97, 98, 108, 109; Guard., pp. 88, 89, 97, 99, 100; Guest, pp. 68, 69, 74, 79, 82, 83, 86, 87; Inj., pp. 41, 51, 78, 107, 113, 114, 119, 125; Insan., pp. 71, 73, 74, 83, 85, 116, 118, 130, 132; Insolv., pp. 49, 53, 54, 63, 65, 66, 71, 72, 81, 83; Insur., pp. 27, 28, 31, 32, 54, 55, 62, 64; Interfer., pp. 7, 8, 18, 19; Interpl., pp. 35, 36; Juria, pp. 45, 88, 95, 99, 158, 159, 167, 168, 173, 283; Landlord, pp. 6-8, 13, 17-19, 23, 26, 41-43; Law & Motion Proc., pp. 6, 7-9, 10-12, 59; Libel, pp. 9, 10, 17, 18, 26, 27, 33; Lim. Actn., pp. 9, 30, 33-35, 38, 39, 53, 55, 64, 75, 76, 90, 91; Lit. Prop., pp. 4, 5, 9, 10; Mech. Lien, pp. 15, 17, 21-23, 32, 34, 36, 37, 46, 48; Motions, pp. 5, 108; Negl., pp. 5, 7, 8, 20; Parties, p. 67; Partner., pp. 11, 13, 22, 23; Prob., pp. 7-9, 28, 29, 31; Surety, pp. 10, 12, 31, 32, 48, 50, 51, 60, 61; Trust Deed, pp. 31, 32, 38; Venue, p. 42.

§431. Statement of Grounds—Answer at Same Time.—The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it does so, it may be disregarded. It may be taken to the whole complaint, or to any of the causes of action stated therein, and the defendant may demur and answer at the same time. Leg.H. 1872, 1907 p. 706.

Anno. CCP 431: W.P. pp. 1468, 1473, 1476, 1480; 39 Cal.J.2d 185-186, 222-223, 231, 262.
McK.D. Pleading §95.

Forms CCP 431: Cal. P&A, Demur., pp. 20, 46, 52; Law & Motion Proc., pp. 6, 8; Prob., pp. 7, 9, 28, 29, 31.

§431.5. Judicial Notice.—When the ground of demurrer is based on a matter of which the court may take judicial notice pursuant to Sections 452 or 453 of the Evidence Code, such matter must be specified in the demurrer, or in the supporting points and authorities for the purpose of invoking such notice, except as the court may otherwise permit. Leg.H. 1968 ch. 307.

§432. Amendment of Complaint; Filing and Service.—If the complaint is amended, a copy of the amendments must be filed, or the court may, in its discretion, require the complaint as amended to be filed, and a copy of the amendments or amended complaint must be served upon the defendants affected thereby. The defendant must answer the amendments, or the complaint as amended, within ten days after service thereof, or such other time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases. Leg.H. 1872, 1880 p. 2.

Anno. CCP 432; W.P. pp. 1601, 1694; Owens F. p. 360; 28 Cal.J.2d 618; 39 Cal.J.2d 402, 404, 409; 40 Cal.J.2d 63.

McK.D. Pleading §167.

Forms CCP 432; Cal. Pl&Pr. Amend. & Suppl. Plea, Forms 9, 19, 21; Caption, Forms 127-130; Cal. P&A, Amend. & Suppl. Plea, pp. 9, 33, 34; Default, pp. 9, 67-69.

§433. Answer for Grounds Not Apparent in Complaint. When any of the matters enumerated in Section 430 do not appear upon the face of the complaint, the objection may be taken by answer [2]. Leg.H. 1872, 1957 ch. 1442, 1965 ch. 299, operative January 1, 1967, 1968 ch. 307.

§433. 1968 Delete. 2. ; except that when the ground of demurrer is that there is another action or proceeding pending between the same parties for the same cause [1] and the court may take judicial notice of the other action or proceeding under Division 4 (commencing with Section 450) of the Evidence Code, an affidavit may be filed with the demurrer for the sole purpose of establishing such fact or invoking such notice.

§433. 1965 Deletes and Leg. 1. , the court may take judicial notice of other actions and proceedings pending in the same court, or in other courts of the State, and for this purpose only an affidavit may be filed with the demurrer to establish such fact or invoke such notice.

Added "or proceeding" between the words "action" and "pending", and substituted for delete 1 the language beginning "and the court may" and continuing to the end of the section. Remaining bold type added in 1977.

Anno. CCP 433; W.P. pp. 977, 1467, 1469, 1551; 1 Cal.J.2d 34, 38, 39, 76; 3 Cal.J.2d 626; 37 Cal.J.2d 410; 39 Cal.J.2d 188, 204, 229, 266, 472.

McK.D. Pleading §§83, 112.

Forms CCP 433; Cal. Pl&Pr, Abate., Forms 23, 24; Demur., Form 7; Juris., Form 3; Cal. P&A, Abate., pp. 19, 39, 85, 93, 107, 135, 141, 142, 144, 155, 160-162, 166, 184; Complaint, p. 7; Corp., pp. 10, 12, 51; Demur., pp. 21, 78, 84, 86, 88, 102, 267, 172; Law & Motion Proc., pp. 6, 10, 12, 15; Parties, p. 67.

§434. Waiver by Failure to Demur or Answer.—If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdic-

tion of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action. Leg.H. 1872.

Anno. CCP 434; W.P. pp. 194, 1474-1476, 1480, 1491-1492, 1553, 1559; 1 Cal.J.2d 79; 3 Cal.J.2d 605, 626; 13 Cal.J.2d 730; 37 Cal.J.2d 414; 39 Cal.J.2d 261, 266, 472.

McK.D. Pleading §109.

Forms CCP 434; Cal. P&A, Abate., pp. 19, 30, 44, 60, 85, 92, 95, 107, 135, 141, 161; Ans. & Countercl., p. 8; Class & Rep. Actions, pp. 5, 22; Corp., pp. 12, 52; Demur., pp. 21, 48, 52, 53, 66, 78, 88, 102, 161, 167; Interven., p. 37; Juris., p. 38; Law & Motion Proc., pp. 7, 9, 10; Parties, pp. 11, 52, 67; Venue, p. 42.

§435. Motion to Strike Complaint. — The defendant, within the time required in the summons to answer, either at the time he demurs to the complaint, or without demurring, may serve and file a notice of motion to strike the whole or any part of the complaint. The notice of motion to strike shall specify a hearing date not more than 15 days from the filing of said notice, plus any additional time that the defendant, as moving party, is otherwise required to give the plaintiff. If defendant serves and files such a notice of motion without demurring, his time to answer the complaint shall be extended and no default may be entered against him, except as provided in Sections 585 and 586, but the filing of such a notice of motion shall not extend the time within which to demur. Leg.H. 1955 ch. 1452.

Anno. CCP 435; W.P. pp. 1504-1505, 1778, 1640-1641, 1693; Owens F. pp. 807, 547; 39 Cal.J.2d 414, 430, 432-433.

Forms CCP 435; Cal. Pl&Pr, Abate., Forms 30, 38; Demur., Form 31; Prob., Forms 44, 69, 72; Cal. P&A, Abate., p. 14; Actions & Spec. Proc., p. 9; Atty., pp. 47, 50; Brokers & Slsmen., p. 12; Class & Rep. Actions, pp. 22, 42; Com. Court, p. 8; Com. Prop., pp. 3-5, 9; Complaint, pp. 8-12, 15, 20, 21, 24, 36; Corp., pp. 11, 13, 14; Demur., p. 22; Fict. Def., p. 37; Fraud, p. 63; Motions, pp. 5, 7, 8, 12, 16, 34, 37, 38, 47, 48; Prob., pp. 8, 46, 47, 49, 60, 61, 69-71.

CHAPTER 4 ANSWER

Necessary allegations, methods of stating—Positive denial—Information and belief—General denial. §437.

Pleading exemption from liability under insurance policy. §437a.

Action less than \$500—General denial. §437b. Summary judgment—Action without merit or defense. §437c.

Recovery of personal property. §437d.

Set-off and counterclaim—Essentials—Separate trial. §438.

Waiver of cause not set up in counterclaim—Transfer. §439.

Assignment or death cannot defeat compensation between cross demands. §440.

Joinder of defenses and cross demands separately stated—Demurrer with answer. §441.
Cross-complaint with answer or by permission—Service—Process for new parties. §442.

§437. **Necessary Allegations, Method of Stating — Positive Denial; Information and Belief—General Denial.**—The answer of the defendant shall contain:

1. A general or specific denial of the material allegations of the complaint controverted by the defendant.

2. A statement of any new matter constituting a defense or counterclaim.

Except in [1] justice courts, if the complaint be verified, the denial of the allegations controverted must be made positively, or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. The denials of the allegations controverted may be stated by reference to specific paragraphs or parts of the complaint; or by express admission of certain allegations of the complaint with a general denial of all of the allegations not so admitted; or by denial of certain allegations upon information and belief, or for lack of sufficient information or belief, with a general denial of all allegations not so denied or expressly admitted. If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint. Leg.H. 1872, 1874 p. 300, 1927 p. 529, 1933 ch. 744, 1951 ch. 1737.

§437. 1951 Deletes. 1. justices' courts of Class B

See note to §17 above.

See note (200) preceding Section 372.

Anno. CCP 437: W.P. pp. 975, 1156, 1198, 1506, 1512-1514, 1524, 1589; 10 Cal.J.2d 544; 16 Cal.J.2d 373; 34 Cal.J.2d 260; 38 Cal.J.2d 388; 39 Cal.J.2d 265, 282-284, 294-295, 394; 39 Cal.J.2d Supp. p. 3; 44 Cal.J.2d 641.

McK.D. Pleading §514.

Forms CCP 437: Cal. Pl&Pr, Alleg., Forms 20.5, 21; Ans. & Countercl., Forms 1, 22-23; Caption, Forms 105, 106, 108, 109, 131, 132, 138; Prob., Forms 45, 73; Cal. P&A, Ans. & Countercl., pp. 7, 8, 26, 29, 31, 41; Brokers & Slsmen., p. 12; Demur., pp. 267, 284; Motions, pp. 76, 89, 96, 102.

§437a.—**Pleading Exemption from Liability Under Insurance Policy.**—In an action to recover upon a contract of insurance wherein the defendant claims exemption from liability upon the ground that, although the proximate cause of the loss was a peril insured against, the loss was remotely caused by or would not have oc-

curred but for a peril excepted in the contract of insurance, the defendant shall in his answer set forth and specify the peril which was the proximate cause of the loss, in what manner the peril excepted contributed to the loss or itself caused the peril insured against, and if he claim that the peril excepted caused the peril insured against, he shall in his answer set forth and specify upon what premises or at what place the peril excepted caused the peril insured against. Leg.H. 1907 p. 836.

Anno. CCP 437a: 13 Cal.J.2d 719; 27 Cal.J.2d 762; 28 Cal.J.2d 364.

§437b. **Action Less Than Five Hundred Dollars—General Denial.**—In any action on which the demand, exclusive of interest, or the value of the property in controversy does not exceed [1] five hundred dollars (\$500), the defendant at his option, in lieu of demurrer and other answer, may file a general written denial verified by his own oath and a brief statement similarly verified, of any new matter constituting a defense or counter-claim. Leg.H. 1933 ch. 744, 1951 ch. 1737.

§437b. 1951 Deletes. 1. three

See note to §17 above.

See note (200) preceding Section 372.

Anno. CCP 437b: W.P. p. 1507; 39 Cal.J.2d 266, 393.

McK.D. Insurance §257.

Forms CCP 437b: Cal. Pl&Pr, Ans. & Countercl., Form 22; Cal. P&A, Ans. & Countercl., p. 41.

§437c. **Summary Judgment—Action Without Merit or Defense.**—In superior courts [11] and municipal courts [14] if it is claimed the action has no merit, or that there is no defense to the action [15], on motion of [4] either party, after notice of the time and place thereof in writing served on the [5] other [16] party at least 10 days before such motion, supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out or the complaint may be dismissed and judgment may be entered, in the discretion of the court [6] unless the [7] other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to [8] present a triable issue of fact. A judgment so entered is an appealable judgment as in other cases. The word "action" as used in this section shall be construed to include all types of proceedings. The word "answer" as used in this section shall be construed to include counterclaim and cross-complaint. [17] The filing of a motion under this section

shall not extend the time within which a party must otherwise file an answer, demurrer or motion to strike.

The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff or defendant to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that [9] affiant, if sworn as a witness, can testify competently thereto.

The affidavit or affidavits in opposition to said motion shall be made by the plaintiff or defendant, or by any other person having knowledge of the facts, and together shall set forth facts showing that the [10] party has a good and substantial defense to the plaintiff's action (or to a portion thereof) or that a good cause of action exists upon the merits. The facts stated in each affidavit shall be within the personal knowledge of the affiant, shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto. When the party resisting the motion appears in a representative capacity, such as a trustee, guardian, executor, administrator, or receiver, then the affidavit in opposition by such representative may be made upon his information and belief.

If it appear that such defense applies only to a part of the plaintiff's claim, or that a good cause of action does not exist as to a part of the plaintiff's claim, or that any part of a claim is admitted or any part of a defense is conceded, the court shall, by order, so declare, [18] and the claim or defense shall be deemed established as to so much thereof as is by such order declared and the cause of action may be severed accordingly, and the action may proceed as to the [19] issues remaining between the parties. No judgment shall be entered prior to the termination of such action but the judgment in such action shall, in addition to any matters determined in such action, award [20] judgment as established by the proceedings herein provided for. A judgment entered under this section is an appealable judgment as in other cases. Leg.H. 1933 ch. 744, 1937 ch. 533, 1939 ch. 331, 1951 ch. 1737, 1953 ch. 908, 1957 ch. 1457, 1965 chs. 162, 1877.

§437c. 1965 Deletes and Leg. by ch. 1877. 17. A motion filed pursuant to the provisions of this section shall be considered a pleading. 18. and plaintiff's claim shall be deemed established as to so much thereof as such defense shall not apply to, or as is admitted 19. re-

mainder of each claim 20. to plaintiff the amount of his claim so

Substituted last sentence of the first paragraph for delete 17 and added all bold type in last paragraph. Remaining deletes and bold type relate to earlier legislative history below.

Ch. 162 amendments were included in those of ch. 1877.

§437c. 1957 Deletes and Leg. 14. [1] when an answer is filed in [12] any kind of action [13] 15. [3] or that the action has no merit. 16. side

Added the words "the action has no merit, or" in the first sentence, added the comma following delete 15, substituted "party" for delete 16 and added the last two sentences in the first paragraph. Remaining deletes and bold type, including those within 1957 deletes, relate to earlier legislative history below.

§437c. 1953 Deletes and Leg. 12. an 13. to recover upon a debt or upon a liquidated demand [2] including an action to enforce or foreclose a lien or mortgage [3] or to recover an unliquidated debt or demand for a sum of money only arising on a contract express or implied in fact or in law or to recover possession of specific real or personal property or for specific performance of a contract in writing for the sale or purchase of property, or for an accounting arising on a written contract

The words "any kind of" were substituted for delete 12, and the sentence in bold type at the end of the first paragraph was added. Remaining deletes and bold type, including those within the 1953 deletes, relate to earlier legislative history below.

§437c. 1951 Deletes. 11. and justices' courts of class A

See note to §17 above.

§437c. 1939 Deletes and Leg. 1. and justices courts of class A 2. 3. 4. the plaintiff 5. answering defendant 6. 7. defendant 8. entitle him to defend 9. the 10. defendant

The phrase deleted was replaced preceding instead of following "municipal courts." All bold type except that specified in 1973 legislative history above was added.

Sec. 2. The amendment made by this act in section 437c of the Code of Civil Procedure applies to pending causes of action, 1939 ch. 331.

§437c. 1937 Leg. added at beginning of section "and justices' courts of class A" deleted and replaced in 1939.

See note (200) preceding Section 372.

Anno. CCP 437c: W.P. pp. 493, 1497, 1711-1712, 1714-1715, 1717-1718, 1937, 2160, 2543, 2560; Owens F. pp. 586-587; 2 Cal.J.2d 456, 632, 638; 4 Cal.J.2d 719; 6 Cal.J.2d 400; 28 Cal.J.2d 667-667, 669, 673; 39 Cal.J.2d 419.

McK.D. Judgment §61, Pleading §§241-257, Muni. Ct. §14.

Forms CCP 437c: Cal. Pl&Pr, Abate., Form 38; Disticks., Forms 13, 24; Prob., Forms 46, 47, 74, 75; Cal. P&A, Accord. pp. 6-8, 10, 31, 32; Alc. Bev., p. 39; Ans. & Countercl., pp. 9, 49, 51, 70, 93; Atty., pp. 72, 80; Atty. Fees, pp. 8, 13, 17; Brokers & Slsmen., pp. 12, 33, 51, 52, 64; Class & Rep. Actions, pp. 22, 26; Comm. Paper, pp. 14, 34, 35; Complaint, pp. 8-10, 12-14, 16, 21, 22, 24, 26, 27; Contract, pp. 31, 32, 36, 37, 29, 36, 95; Corp., p. 61; Death Actn., pp. 26, 27, 32; Decl. Rel., pp. 8, 28; Demur., p. 325; Em. Dom., p. 50; Escrow,

pp. 13-20, 29, 33, 47, 49, 50, 59, 65; Fraud, pp. 44, 45, 50, 51, 118-120, 126, 127, 133-135, 144, 145; Guests, pp. 9, 11, 15, 16, 40, 41, 47, 50, 51; Husband, pp. 13, 19, 42, 44, 45; Insan., pp. 92-94, 104, 106, 107; Insur., pp. 9-11, 20-22, 38-41, 47, 49, 50, 73, 75, 85-87, 90-92; Interfer., pp. 32-34; Landlord, pp. 31-33; Lim. Actn., p. 10; Motions, p. 57; Negl., pp. 5, 6; Partner, pp. 41, 43, 56, 53; Prob., pp. 61, 77, 79, 80, 82, 84, 85, 107, 109, 110; Real Prop., pp. 6, 8, 9, 12, 18, 25, 30, 31; Sum. Judgm., pp. 3-5, 7, 8, 21, 22, 24, 25, 27, 32-36, 39-41, 45, 51-53, 56, 57, 65, 66, 69-72, 74, 75, 86-88, 94, 99, 100, 103, 110, 111, 120; Surety, pp. 77, 79, 80.

§437d.—Recovery of Personal Property.—When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property, and the officer taking the property, or the sureties on any bond or undertaking is sued for taking the same, the officer or sureties may in their answer set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made or that the value in the affidavit stated was inserted by mistake, the court shall disregard the value as stated in the affidavit and give judgment according to the right of possession of said property at the time the affidavit was made. Leg.H. 1933 ch. 744.

See note (200) preceding Section 372.

Anno. CCP 437d: W.P. p. 812; Owens F. p. 204; 10 Cal.J.2d 592.

McK.D. Claim and Delivery §§88-97; Suretyship §43.

§438. Set-off and Counterclaim—Essentials—Separate Trial.—The counterclaim mentioned in section 437 must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action: provided, that the right to maintain a counterclaim shall not be affected by the fact that either plaintiff's or defendant's claim is secured by mortgage or otherwise, nor by the fact that the action is brought, or the counterclaim maintained, for the foreclosure of such security; and provided further, that the court may, in its discretion, order the counterclaim to be tried separately from the claim of the plaintiff. Leg.H. 1927 p. 1620

Anno. CCP 438: W.P. pp. 1138, 1571-1572, 1577, 1589-1590, 1592-1593, 1597; Owens F. p. 551; 1 Cal.J.2d 373, 406; 4 Cal.J.2d 25; 8 Cal.J.2d 127; 10 Cal.J.2d 549; 34 Cal.J.2d 115, 269, 372; 39 Cal.J.2d 154-155; 44 Cal.J.2d 613-615, 628, 630, 633-634, 646-647.

McK.D. Set-off & C. §§4, 14-40; W.S. Nego-

nable Insts. §68; Security Transactions in Real Property §50.

Forms CCP 438: Cal. Pl&Pr, Ans. & Countercl., Forms 1, 37; Cal. P&A, Ans. & Countercl., pp. 26, 27, 31, 38, 39, 41, 49, 52, 74, 58, 59, 71, 73, 87, 98, 99; Comm. Paper, pp. 37, 39; Complaint, pp. 35, 36, 36, 59, 61; Consol., p. 21; Demur., pp. 284, 285, 312, 314, 323, 323; Juris., p. 70; Law & Motion Proc., p. 6; Partner., pp. 19, 20.

§439. Waiver of Cause Not Set Up In Counterclaim—Transfer.—If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor.

[1] Leg.H. 1872, 1907 p. 706, 1939 ch. 533, 1941 ch. 454.

§439. 1939 and 1941 Leg. 1. The following paragraph was added in 1939 and deleted in 1941: "If the defendant pleads a counterclaim in an amount in excess of the jurisdiction of the court in which the action is filed, the court shall thereupon order the case transferred to a court whose jurisdiction extends to the amount of the counterclaim."

Anno. CCP 439: W.P. pp. 452, 1578, 1594-1597; 29 Cal.J.2d 213; 34 Cal.J.2d 270; 44 Cal.J.2d 638, 640.

McK.D. Set-off & C. §§13-42.

Forms CCP 439: Cal. Pl&Pr, Ans. & Countercl., Form 37; Res. Jud., Form 6; Cal. P&A, Ans. & Countercl., pp. 26-29, 33, 34, 38, 41; Complaint, pp. 36, 37; Judgm., pp. 121, 122; Juris., pp. 70, 72, 82; Sum. Judgm., p. 43.

§440. Assignment or Death Cannot Defeat Compensation Between Cross Demands.—When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other. Leg.H. 1872, 1874 p. 300.

Anno. CCP 440: W.P. pp. 600, 1594, 1597-1598; 1 Cal.J.2d 436; 5 Cal.J.2d 341; 20 Cal.J.2d 815; 31 Cal.J.2d 440; 44 Cal.J.2d 613, 616, 621, 623, 644.

McK.D. Set-off & C. §§4, 38.

Forms CCP 440: Cal. Pl&Pr, Assign., Forms 8, 9; Cal. P&A, Ans. & Countercl., pp. 43, 46, 77, 81-89; Comm. Paper, pp. 39, 40; Complaint, p. 38; Demur., pp. 318, 321; Judgm., pp. 105, 109, 110, 114, 115, 120, 122, 123, 128, 129, 134.

§441. Joinder of Defenses and Cross Demands Separately Stated—Demurrer with Answer.—The defendant may set forth by answer as many defenses and counterclaims as he may have. They must

be separately stated, and the several defenses must refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished. The defendant may also answer one or more of the several causes of action stated in the complaint and demur to the residue. Leg.H. 1872.

Anno. CCP 441: W.P. pp. 1468, 1526-1527; 1 Cal.J.2d 656; 39 Cal.J.2d 186, 275-276; 44 Cal.J.2d 643.

McK.D. Pleading §120.

Forms CCP 441: Cal. Pl&Pr, Ans. & Countercl., Forms 1, 1, 18-20, 37; Cal. P&A, Demur., p. 288.

§442. Cross-Complaint with Answer or by Permission—Service—Process for New Parties.—Whenever the defendant seeks affirmative relief against any [1] person, whether or not a party to the original action, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto, or file a notice of motion to strike the whole or any part thereof, as to the original complaint. If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action. Leg.H. 1872, 1874 p. 300, 1907 p. 706, 1909 p. 966, 1915 p. 298, 1923 p. 756, 1955 ch. 1452, 1957 ch. 1498.

§442. 1957 Deletes and Leg. 1. party Substituted language in bold type immediately following delete 1. Remaining bold type added 1957.

§442. 1955 Leg. Added phrase in bold type beginning "or file a notice."

Anno. CCP 442: W.P. pp. 976-977, 1504, 1571-1572, 1577-1579, 1581, 1585, 1587, 1589, 1600; 15 Cal.J.2d 167; 18 Cal.J.2d 44; 34 Cal.J.2d 274, 276; 37 Cal.J.2d 94, 368; 37 Cal.J.2d Supp. p. 11; 39 Cal.J.2d 152, 154, 162-163, 167-168, 170, 176-177, 179-180, 403, 410, 430, 432, 437; 40 Cal.J.2d 55, 168.

McK.D. Pleading §§67-79.

Forms CCP 442: Cal. Pl&Pr, Ans. & Countercl., Form 17; Caption, Forms 15, 117-119; Complaint, Forms 2, 3, 7-9; Indem., Form 12; Parties, Forms 9-11; Cal. P&A, Abate., pp. 85, 110; Acctg., pp. 20, 26; Actions & Spec. Proc., pp. 10, 11, 19, 25-27, 29, 45, 47, 52, 54; Ans. & Countercl., pp. 27, 55, 75; Complaint, pp. 32, 33, 35-37, 40-42, 44, 45, 47-51, 53-54, 57, 62, 65, 68, 72, 79, 82, 84, 91-94, 98, 101, 102, 106; Demur., p. 22; Juris., pp. 70, 83, 99, 121;

Law & Motion Proc., pp. 6, 12; Motions, pp. 7, 12, 47, 54; Parties, p. 58; Surety, pp. 51, 55.

CHAPTER 5 DEMURRER TO ANSWER OR COUNTERCLAIM

Time to demur. §443.
Grounds. §444.

§443. Time to Demur.—The plaintiff may within ten days after the service of the answer demur thereto, or to one or more of the several defenses or counterclaims set up therein. Leg.H. 1872, 1874 p. 301, 1907 p. 706.

Anno. CCP 443: W.P. pp. 1798-1799; 31 Cal.J.2d 656; 39 Cal.J.2d 312, 410; 44 Cal.J.2d 645.

McK.D. Pleading §145.

Forms CCP 443: Cal. Pl&Pr, Demur., Forms 14, 15; Cal. P&A, Ans. & Countercl., pp. 10, 44, 48; Demur., pp. 19-21, 264, 266, 278, 286, 288, 289, 291, 292, 294, 297, 323; Husband, pp. 149, 150; Law & Motion Proc., p. 12; Mand., p. 5.

§444. Grounds.—The demurrer may be taken upon one or more of the following grounds:

1. That several causes of counterclaim have been improperly joined, or not separately stated;

2. That the answer does not state facts sufficient to constitute a defense or counterclaim;

[2]

[3]

[4] 3. That the answer is uncertain; "uncertain", as used herein, includes ambiguous and unintelligible; or

[5] 4. That, where the answer pleads a contract, it can not be ascertained from the answer, whether or not the contract is written or oral. Leg.H. 1872, 1907 p. 707, 1943 ch. 209, 1967 ch. 512.

§444. 1967 Deletes and Leg. 2. 3. That the answer is ambiguous; 3. 4. That the answer is unintelligible; [1] 4. 5 5. 6

Deleted former subdivisions 3 and 4, substituted "3" for delete 4, "4" for delete 5, and added "uncertain," as used herein, includes ambiguous and unintelligible." in renumbered subdivision 3. Remaining bold type in section and delete and bold type contained in 1967 deletes are from 1943 amendment.

§444. 1943 Deletes. 1 or.

Anno. CCP 444: W.P. pp. 553, 1799; Owens F. p. 553; 31 Cal.J.2d 656; 39 Cal.J.2d 312-313; 44 Cal.J.2d 646.

McK.D. Pleading §147.

Forms CCP 444: Cal. Pl&Pr, Abate., Form 26; Demur., Forms 14, 15; Cal. P&A, Abate., pp. 164, 166; Accord, pp. 5, 49; Acctg., pp. 7, 20, 26; Ans. & Countercl., pp. 10, 12, 43, 44, 48, 49, 58, 70; Comm. Paper, pp. 55, 70, 75, 76, 94; Demur., pp. 21, 264-267, 270, 271, 273, 279, 280, 282, 286, 288, 290-293, 297-299, 309, 312, 315, 317, 320; Escrow, p. 29; Fraud, pp.

13, 14, 33-37, 76, 81; Husband, pp. 149, 150; Law & Motion Proc., pp. 12, 13; Mand., p. 7; Real Prop., p. 8.

CHAPTER 6 VERIFICATION OF PLEADINGS

Signing—Verifying—Form of affidavit—Who may make. §446.

§446. **Signing—Verifying—Form of Affidavit—Who May Make.**—Every pleading (except in [17] justice courts when the pleadings are oral) [1] shall be subscribed by the party or his attorney. When the state, [2] any county thereof, [3] city, school district, district, public agency, or public corporation, or any officer of the state, or of any county thereof, [4] city, school district, district, public agency, or public corporation, in his official capacity, is plaintiff, the answer [5] shall be verified, unless an admission of the truth of the complaint might subject the party to a criminal prosecution, or, unless a county thereof, [6] city, school district, district, public agency, or public corporation, or an officer of the state, or of any county, [7] city, school district, district, public agency, or public corporation, in his official capacity, is defendant. Except in [18] justice courts, when the complaint is verified, the answer [8] shall be verified. In all cases of a verification of a pleadings, the affidavit of the party [9] shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; and where a pleading is verified, it [10] shall be by the affidavit of a party, unless the parties are absent from the county where the attorney has his office, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he [11] shall set forth in the affidavit the reasons why it is not made by one of the parties.

When a corporation is a party, the verification may be made by any officer thereof. When the state, [12] any county thereof, [13] city, school district, district, public agency, or public corporation, or any officer of the state, or of any county thereof, [14] city, school district, district, public agency, or public corporation, in his official capacity is plaintiff, the complaint need not be verified; and if the state, [15] any county thereof, [16] city,

school district, district, public agency, or public corporation, or an officer of such state, county, [17] city, school district, district, public agency, or public corporation, in his official capacity is defendant, its or his answer need not be verified.

When the verification is made by the attorney for the reason that the parties are absent from the county where he has his office, or from some other cause are unable to verify it, or when the verification is made on behalf of a corporation or public agency by any officer thereof, such attorney's or officer's affidavit shall state that he has read the pleading and that he is informed and believes the matters therein to be true and on that ground alleges that the matters stated therein are true; provided that in such cases the pleading shall not otherwise be considered as an affidavit or declaration establishing the facts therein alleged.

A person verifying a pleading need not swear to the truth or his belief in the truth of the matters stated therein but may, instead, assert the truth or his belief in the truth of such matters "under penalty of perjury." Leg.H. 1872, 1907 p. 707, 1933 ch. 744, 1939 ch. 712, 1945 ch. 505, 1951 ch. 1737, 1955 ch. 873, 1963 ch. 732, 1967 ch. 1242.

§446. 1967 Leg. Added "district, public agency, or public corporation" following "school district," in four places in first paragraph and three places in second paragraph, and added "district, public agency, or public corporation," following last place where "school district" appears in second paragraph. Deletes and remaining bold type relate to earlier legislative history below.

§446. 1963 Leg. Added third paragraph. Deletes and remaining bold type relate to earlier legislative history below.

§446. 1955 Leg. Added the last paragraph. Deletes and remaining bold type relate to earlier legislative history below.

§446. 1951 Deletes and Leg. 17. and 18. [justice] courts of Class B. The words "justice courts" were substituted in both cases. Remaining deletes and bold type relate to earlier legislative history below.

See note to §17 above.

§446. 1945 Deletes and Leg. 1, 5, 8, 9, 10 and 11. must 2, 12 and 15 or 3, 4, 13, 14 and 16 or any 6. or a 7. thereof, or any

Substituted the word "shall" for deletes 1, 5, 8, 9, 10 and 11 and added the words "or school district" where they appear.

§446. 1939 Leg. Following is reprinted two excerpts. The bold type was added in 1939, words in brackets were deleted in 1945.

"When the State [or] any county thereof [or any] city, or any officer of the State, or of any county thereof, [or any] city, in his official capacity, is plaintiff, the answer must be verified, unless an admission of the truth

of the complaint might subject the party to a criminal prosecution, or, unless a county, [or a] city, or an officer of the State, or of any county [thereof, or any] city, in his official capacity, is defendant. * * * When the State, or any county thereof, [or any] city, or any officer of the State, or of any county thereof, [or any] city, in his official capacity is plaintiff, the complaint need not be verified; and if the State—[or] any county thereof, [or any] city or an officer of such State, county, [or] city, in his official capacity is defendant, its or his answer need not be verified."

See note (200) preceding Section 372.

Anno. CCP 446: W.P. pp. 1116, 1198-1200, 1202-1203, 1207-1208; 3 Cal.J.2d 616, 620, 632; 6 Cal.J.2d 304, 342; 13 Cal.J.2d 178, 442; 27 Cal.J.2d 178; 39 Cal.J.2d 95, 389-391, 393-395, 399, 490; 40 Cal.J.2d 8; 44 Cal.J.2d 216; 45 Cal.J.2d 501, 519.

McK.D. Pleading §§219-224.

Forms CCP 446: Cal. Pl&Pr, Ans. & Countercl., Forms 1, 42; Complaint, Form 1; Guard., Forms 99, 100; Mech. Lien, Form 1; Prob., Forms 16, 17; Cal. P&A, Complaint, p. 7; Judge, pp. 49, 50; Motions, p. 76.

§§447-449. Enacted 1872. Repealed 1965 ch. 105.

CHAPTER 7

GENERAL RULES OF PLEADING

Liberal construction—Substantial justice. §452.
Striking sham, irrelevant and redundant. §453.
Items on account—Copy on notice—Verification. §454.

Description of land. §455.

Judgment or judicial action. §456.

Performance of conditions. §457.

Bar of statute of limitations. §458.

Statute or ordinance — Performance of conditions. §459.

Libel and slander—Extrinsic facts. §460.

—Truth or mitigation. §461.

Admission by failure to deny—Affirmative defenses deemed denied. §462.

"Material allegation" defined. §463.

Supplemental pleadings—Motion for leave. §464.

—Filing and service. §465.

§452. **Liberal Construction — Substantial Justice.**—In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties. Leg.H. 1872.

Anno. CCP 452: W.P. pp. 1187-1188; 15 Cal.J.2d 159; 39 Cal.J.2d 19, 105, 107; 49 Cal.J.2d 698.

McK.D. Pleading §§137, 142.

Forms CCP 452: Cal. P&A, Demur., p. 141.

§453. **Striking Sham, Irrelevant and Redundant.**—Sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out,

upon such terms as the court may, in its discretion, impose. Leg.H. 1872.

Anno. CCP 453: W.P. pp. 1504-1506, 1508; Owens F. p. 547; 39 Cal.J.2d 430, 441.

McK.D. Pleading §§248-257.

Forms CCP 453: Cal. P&A, Abate., p. 14; Ans. & Countercl., p. 9; Com. Count, p. 8; Com. Prop., pp. 3, 4, 9; Complaint, pp. 8, 9, 24; Corp., pp. 52, 66; Demur., pp. 22, 23; Em. Dom., pp. 48, 50, 51, 80, 81; Fict. Def., pp. 7, 8, 12-14; Motions, pp. 7, 7, 8, 17, 22, 24, 47, 56, 59, 61, 62, 68, 79, 89, 90, 92-94, 101, 102, 108; Prob., pp. 8, 64, 65, 70.

§454. **Items of Account—Copy on Notice—Verification.**—It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within [1] ten days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular.

If the pleading is verified the account must be verified by the affidavit of the party to the effect that he believes it to be true; or if the facts are within the personal knowledge of the agent or attorney for the party, or the party is not within the county where the attorney has his office or from some cause unable to make the affidavit, by the affidavit of the agent or attorney. Leg.H. 1872, 1880 p. 2, 1939 ch. 63.

§454. 1939 Delete. 1. five

Anno. CCP 454: W.P. pp. 1208, 1217, 1219-1223, 1225; Owens F. pp. 83, 319, 323, 541-543; 1 Cal.J.2d 345, 348, 350, 401; 19 Cal.J.2d 285; 28 Cal.J.2d 638; 39 Cal.J.2d 141, 144-145, 148-150.

McK.D. Pleading §§19-66, Accounts and Accounting §§17, 20-28.

Forms CCP 454: Cal. Pl&Pr, Com. Count, Forms 14-25, 26, 26.1, 26.2; Cal. P&A, Com. Count, pp. 5, 19-21, 23, 37-39, 41, 49; Complaint, p. 7.

§455. **Description of Land.**—In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it. Leg.H. 1872.

Anno. CCP 455: W.P. pp. 1208, 1292, 1304; 17 Cal.J.2d 202; 39 Cal.J.2d 118.

McK.D. Pleading §§32, 53, Ejectment §42, Mortgages §376, Quiet Title §62.

Forms CCP 455: Cal. Pl&Pr, Acctg. Action, Form 7; Cal. P&A, Complaint, p. 7.

§456. **Judgment or Judicial Action.**—In pleading a judgment or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made and to have become final. If such

allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction and creating finality. Leg.H. 1872, 1957 ch. 1365.

Anno. CCP 456: W.P. pp. 1148-1149, 1450; 21 Cal.J.2d 413; 29 Cal.J.2d 313-315; 32 Cal.J.2d 90; 39 Cal.J.2d 53.

McK.D. Judgment §134.

Forms CCP 456: Cal. Pl&Pr, Abate., Form 1; Alleg., Form 32; Judgm., Forms 44, 45; Res Jud., Form 8.

§457. Performance of Conditions.—In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance. Leg.H. 1872.

Anno. CCP 457: W.P. pp. 1147, 1233, 1374; 6 Cal.J.2d 403; 12 Cal.J.2d 511; 16 Cal.J.2d 187; 23 Cal.J.2d 359; 39 Cal.J.2d 73, 70; 45 Cal.J.2d 377.

McK.D. Contracts §266, Pleading §§14, 15, 73; W.S. Contracts §233.

Forms CCP 457: Cal. Pl&Pr, Build. Contr., Forms 1, 2; Contract, Form 12; Cal. P&A, Contract, pp. 6, 22, 24, 30, 76.

§458. Bar of Statute of Limitations.—In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section — (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred. Leg.H. 1872.

Anno. CCP 458: W.P. pp. 1147, 1543-1545; 31 Cal.J.2d 662; 39 Cal.J.2d 53.

McK.D. Limit. of Act. §§135-155, Pleading §§14, 115.

Forms CCP 458: Cal. Pl&Pr, Lim. Actn., Forms 17, 19; Cal. P&A, Ans. & Countercl., p. 44; Law & Motion Proc., p. 9; Lim. Actn., pp. 23, 51-53, 102, 107, 109.

§459. Statute or Ordinance—Performance of Conditions.—In pleading a private statute, or an ordinance of a county or municipal corporation, or a right derived therefrom, it is sufficient to refer to such statute or ordinance by its title and the day of its passage. In pleading the performance of conditions precedent under a statute or an ordinance of a county or municipal corporation, or of a right derived therefrom, it is not necessary to state the facts showing such performance, but it

may be stated generally that the party duly performed all the conditions on his part required thereby; if such allegations be controverted the party pleading must establish on the trial the facts showing such performance. Leg.H. 1872, 1907 p. 707.

Anno. CCP 459: W.P. pp. 1147, 1289; 39 Cal.J.2d 38, 53, 71.

McK.D. Stats. §§14, 16, Pleading §§14-16, Muni. Corp. §250.

Forms CCP 459: Cal. Pl&Pr, Buses. Form 35; Elevator, Form 19; Excav., Form 6; Prem. Liab., Form 9; Stats., Forms 1, 4, 7.

§460. Libel and Slander—Extrinsic Facts.—In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish on the trial that it was so published or spoken. Leg.H. 1872.

Anno. CCP 460: W.P. pp. 918, 1147, 1208, 1352-1353; 30 Cal.J.2d 677, 686, 699, 704-705.

McK.D. Pleading §§48, 53, Libel & S. §§41-52; W.S. Torts §§90, 113.

Forms CCP 460: Cal. P&A, Complaint, p. 7; Libel, pp. 5, 21.

§461. Truth or Mitigation.—In the actions mentioned in the last section the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances. Leg.H. 1872.

Anno. CCP 461: W.P. pp. 1349, 1537; 30 Cal.J.2d 764; 31 Cal.J.2d 34, 57.

McK.D. Libel & S. §§54-58; W.S. Torts §403.

Forms CCP 461: Cal. Pl&Pr, Libel, Form 11.

§462. Admission By Failure to Deny—Affirmative Defenses Deemed Denied.—Every material allegation of the complaint, not controverted by the answer, must, for the purpose of the action, be taken as true; the statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party. Leg.H. 1872.

Anno. CCP 462: W.P. pp. 494, 976, 1194, 1509-1511, 1525; 3 Cal.J.2d 799; 5 Cal.J.2d 253; 19 Cal.J.2d 539; 29 Cal.J.2d 140; 34 Cal.J.2d 294; 39 Cal.J.2d 304, 318, 321, 327, 453-454; 44 Cal.J.2d 645.

McK.D. Pleading §§139-156.

Forms CCP 462: Cal. P&A, Ans. & Countercl., pp. 8, 27, 32, 47; Complaint, pp. 36, 90; Demur., p. 285; Findings, pp. 67, 70.

§463. "Material Allegation" Defined.—A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient. Leg.H. 1872.

Anno. CCP 463: 39 Cal.J.2d 31, 451.
McK.D. Pleading §§11, 142.

Forms CCP 463: Cal. P&A, Ans. & Countercl., pp. 7, 25; Complaint, p. 64; Motions, pp. 5, 7-9, 12, 25, 26, 28, 29, 47, 56, 89, 96, 102; Prob., pp. 8, 65, 70.

§464. Supplemental Pleadings—Motion for Leave.—The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer. Leg.H. 1872.

Anno. CCP 464: W.P. 1629, 1634; 16 Cal.J.2d 364; 34 Cal.J.2d 238; 39 Cal.J.2d 327, 411.
McK.D. Pleading §§179-166.

Forms CCP 464: Cal. Pl&Pr, Amend. & Suppl. Plea, Forms 29, 30, 33-35; Ans. & Countercl., Forms 15, 16; Caption, Forms 137, 139; Prob., Forms 153, 154, 156; Cal. P&A, Amend. & Suppl. Plea, pp. 8, 84-87, 92-96, 100, 102, 111, 112, 114, 122.

§465. Filing and Service.—All pleadings subsequent to the complaint, must be filed with the clerk or [1] judge, and copies thereof served upon the adverse party or his attorney, provided that in actions in [2] justice courts, when the pleadings are oral, an entry of their substance in the docket is sufficient. Leg.H. 1872, 1874 p. 301, 1933 ch. 744, 1951 ch. 1737.

§465. 1951 Deletes. 1. justice 2. justices' courts of Class B

See note to §17 above.

See note (200) preceding Section 372.

Anno. CCP 465: W.P. pp. 980-981, 1779, 1602; 6 Cal.J.2d 342; 20 Cal.J.2d 88; 28 Cal.J.2d 639; 39 Cal.J.2d 401, 403-405, 491.

McK.D. Pleading §§225-230.

Forms CCP 465: Cal. Pl&Pr, Complaint, Forms 2, 7-9; Cal. P&A, Default, p. 69.

CHAPTER 8

VARIANCE—MISTAKES IN PLEADINGS AND AMENDMENTS

Material variance—Amendments meeting. §469.

Immaterial variance §470.

"Failure of proof" distinguished from variance. §471.

Amendment of pleadings. §472.

Demurrer not waived—Court's discretion. §472a.

Time to answer after demurrer—Notice of decision. §472b.

Order sustaining demurrer open on appeal—Not retroactive. §472c.

Ground for sustaining demurrer shown in order. §472d.

Amending pleadings—Continuance—Relief from mistake, inadvertence, surprise or excusable neglect—Time limit—Correcting clerical errors. §473.

Non-service of summons—Time limit on seeking relief. §473a. (Repealed July 1, 1970.)

Service of summons too late to defend the action—Time limit on seeking relief of default or default judgment. §473.5.

Unknown defendants—Adding true name. §474.
Disregard of nonprejudicial error—Presumption against prejudice. §475.

§469. Material Variance—Amendments Meeting.—No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just. Leg.H. 1872, 1874 p. 302.

Anno. CCP 469: W.P. pp. 1612-1613, 1615; 1 Cal.J.2d 362; 4 Cal.J.2d 507; 39 Cal.J.2d 370, 377, 380, 469.

McK.D. Pleading §§172, 198.

Forms CCP 469: Cal. P&A, Amend. & Suppl. Plea, pp. 12, 40, 47, 79, 82.

§470. Immaterial Variance.—Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs. Leg.H. 1872.

Anno. CCP 470: W.P. p. 1612; 4 Cal.J.2d 507; 13 Cal.J.2d 231; 39 Cal.J.2d 350, 377, 381, 460, 463.

McK.D. Pleading §§273-275.

Forms CCP 470: Cal. P&A, Amend. & Suppl. Plea, pp. 12, 41, 46, 47, 78, 80, 82.

§471. "Failure of Proof" Distinguished from Variance.—Where, however, the allegation of the claim or defense to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof. Leg.H. 1872.

Anno. CCP 471: W.P. p. 1615; 16 Cal.J.2d 206; 39 Cal.J.2d 460, 469.

McK.D. Pleading §276.

Forms CCP 471: Cal. P&A, Amend. & Suppl. Plea, pp. 41, 47, 83.

§472. Amendment of Pleadings.—Any pleading may be amended once by the party of course, and without costs, at any time before the answer or demurrer is filed, or entered in the docket, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, who may have 10 days thereafter in which to answer or demur to the amended pleading; provided, that in [1] justice courts when the pleading is oral, the amendment may be oral,

the substance thereof being entered in the docket, and the adverse party shall have 10 days from notice of such amendment in which to answer or demur thereto. Leg.H. 1872, 1874 p. 302, 1933 ch. 744, 1951 ch. 1737.

§472. 1951 Deletes. 1. justices' courts of Class B

See note to §17 above.

See note (200) preceding Section 372.

Anno. CCP 472: W.P. pp. 1603-1602, 1604; Owens F. pp. 353, 1019a; 13 Cal.J.2d 231; 39 Cal.J.2d 336-337, 350, 361, 403, 405, 409, 491. McK.D. Pleading §166.

Forms CCP 472: Cal. Pl&Pr, Amend. & Suppl. Plea, Forms 21, 22, 31, 32; Caption, Forms 123, 124, (27-130); Cal. P&A, Accord, p. 3; Amend. & Suppl. Plea, pp. 6, 9, 11, 13, 23, 24, 34, 35, 111; Ans. & Countercl., pp. 29, 30; Death Actn., p. 18; Default, pp. 67, 68; Motions, pp. 33, 34, 40, 72, 73; Prob., pp. 65, 67.

§472a. Demurrer Not Waived—Court's Discretion.—A demurrer is not waived by an answer filed (or entered in the [1] docket in the justice court) at the same time. When the demurrer to a complaint, or to a cross-complaint, is overruled, and there is no answer filed (or entered), the court may, upon such terms as may be just, allow an answer. If a demurrer to the answer be overruled, the action must proceed as if no demurrer had been interposed, and the facts alleged in the answer must be considered as denied to the extent mentioned in section 462 of this code.

When a demurrer is sustained, the court may grant leave to amend the pleading and shall fix the time within which such amendment or amended pleading shall be filed, or entered in the docket. Leg.H. 1933 ch. 744, 1951 ch. 1737.

§472a. 1951 Deleted. 1. justice's docket

See note to §17 above.

See note (200) preceding Section 372.

Anno. CCP 472a: W.P. pp. 1468, 1492-1495, 1602; Owens F. p. 353; 39 Cal.J.2d 186, 243, 259, 262, 316, 318, 490.

McK.D. Pleading §85.

Forms CCP 472a: Cal. Pl&Pr, Caption, Forms 127-130; Demur., Forms 14, 19, 21; Dismiss., Forms 9, 26, 27; Cal. P&A, Amend. & Suppl. Plea, p. 11.

§472b.—Time to Answer After Demurrer—Notice of Decision.—When a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from the service of notice of the decision or order, unless such notice is waived in open court, and the waiver entered in the minutes or docket. Leg.H. 1874 p. 304, 1933 ch. 744.

See note (200) preceding Section 372.

Anno. CCP 472b: W.P. pp. 977, 1493, 1693;

4 Cal.J.2d 50; 28 Cal.J.2d 643; 39 Cal.J.2d 238, 409.

McK.D. Pleading §§103-106.

Forms CCP 472b: Cal. Pl&Pr, Demur., Forms 14, 20, 23.

§472c.—Order Sustaining Demurrer Open on Appeal — Not Retroactive.—When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made; provided, however, that this section shall not apply to any pending action or proceeding. Leg.H. 1939 ch. 714.

Anno. CCP 472c: W.P. p. 1497; 3 Cal.J.2d 621; 39 Cal.J.2d 250, 252, 254, 315.

Forms CCP 472c: Cal. Pl&Pr, Demur., Form 14; Cal. P&A, Demur., p. 330.

§472d. Ground for Sustaining Demurrer Shown in Order.—Whenever a demurrer in any action or proceeding is sustained, the court shall include in its decision or order a statement of the specific ground or grounds upon which the decision or order is based which may be by reference to appropriate pages and paragraphs of the demurrer.

The party against whom a demurrer has been sustained may waive these requirements. Leg.H. 1961 ch. 727.

Anno. CCP 472d: W.P. Supp. p. 427; 39 Cal.J.2d Supp. Pleading §164.

Forms CCP 472d: Cal. Pl&Pr, Demur., Forms 14, 21, 22.

§473. Amending Pleadings—Continuance—Relief from Mistake, Inadvertence, Surprise or Excusable Neglect—Time Limit—Correcting Clerical Errors.—The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

When it appears to the satisfaction of the court that such amendment renders it necessary, the court may postpone the trial, and may, when such postponement will by the amendment be rendered necessary, require, as a condition to the amendment,

the payment to the adverse party of such costs as may be just.

The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months after such judgment, order or proceeding was taken; provided, however, that, in the case of a judgment, order or other proceeding determining the ownership or right to possession of real or personal property, without extending such six months period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, order or other proceeding has been taken, and upon his attorney of record, if any, notifying said party and his attorney of record, if any, that said order, judgment or other proceeding was taken against him and that any rights said party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of said notice, then such application must be made within 90 days after service of such notice upon the defaulting party or his attorney of record, if any, whichever service shall be later.

The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order. Leg.H. 1872, 1874 p. 302, 1917 p. 242, 1933 ch. 744, 1961 ch. 722.

See note (200) preceding Section 372.

Anno. CCP 473; W.P. pp. 191, 315, 320, 348, 387, 407-410, 772, 979, 1223-1226, 1500-1502, 1605-1606, 1609-1610, 1642, 1644, 1662, 1694, 1700-1701, 1746, 1751, 1754, 1757, 1863, 1896, 1898-1899, 1918-1919, 2040, 2047, 2068, 2075, 2095, 2098-2100, 2102, 2104, 2107-2110, 2112-2114, 2116-2118, 2129, 2143, 2163, 2169-2172, 2174, 2178, 2189, 2215, 2245, 2322, 2405, 2538; Owens P. pp. 359, 1019; Fricke C.P. p. 163; 2 Cal.J.2d 456; 3 Cal.J.2d 387, 488, 493, 513, 614, 789, 830, 834; 4 Cal.J.2d 81, 353, 583, 762; 10 Cal.J.2d 59, 64, 84, 160; 12 Cal.J.2d 115, 140, 171; 13 Cal.J.2d 231, 330, 628, 722; 16 Cal.J.2d 222, 225, 228, 432, 435-436; 19 Cal.J.2d 370, 375, 378; 20 Cal.J.2d 107-108, 130, 139, 314, 329, 340, 598, 602, 719, 777, 825, 852, 888; 21 Cal.J.2d 26, 167, 169-170, 238, 467; 22 Cal.J.2d 388; 24 Cal.J.2d 389-391; 26 Cal.J.2d 796; 27 Cal.J.2d 394-395,

397; 28 Cal.J.2d 733; 29 Cal.J.2d 13, 15, 18, 26-27, 31-33, 36, 40, 43, 46, 50, 61, 70-72, 76, 86, 87, 88, 92-93, 97, 106, 113, 120-122, 139, 161, 306, 432, 529; 34 Cal.J.2d 336-337, 509, 512, 524, 528, 530, 532-534; 36 Cal.J.2d 381, 384; 37 Cal.J.2d 364, 367, 374, 377; 39 Cal.J.2d 149, 338-339, 341, 346, 349-350, 360-361, 364, 412; 40 Cal.J.2d 211; 46 Cal.J.2d 14; 54 Cal.J.2d 85, 90, 116, 167; 55 Cal.J.2d 291; Fricke C.P. 5th Ed. p. 176.

McK.D. Pleading §§171-216, Judgment §§134-226, Continuance §§1-3; W.S. Workmen's Compensation §125, Husband and Wife §§8, 45, 65, 80, 89, 91, 109, 113, Community Property §73, Wills and Probate §§189, 233, 281, 301.

Forms CCP 473; Cal. Pl&Pr, Adopt., Form 48; Amend. & Suppl. Plea, Forms 1-3, 6, 7, 9, 12-15, 13.6, 19.5, 21, 22, 26, 31, 32; Caption, Forms 123, 123; Cost, Forms 18, 19; Default, Forms 15, 16, 16.3, 23, 25, 26, 28; Dismiss., Forms 28, 29; Findings, Form 16; Judgm., Forms 37-39; Prayer, Forms 14, 15; Cal. P&A, Accord, pp. 5, 6; Actions & Spec. Proc., p. 9; Amend. & Suppl. Plea, pp. 6, 7, 9, 11, 13, 14, 18, 21, 23, 24, 31, 34, 35, 40, 47, 83, 85, 86, 94, 95, 111; Ana. & Countercl., pp. 10, 29, 30, 41; Contin., pp. 13, 48, 49, 52, 150; Cost, pp. 36, 40-47; Death Actm., p. 24; Default, pp. 9, 16, 17, 30, 31, 39-44, 48-50, 55, 57, 58, 60, 61, 66, 67, 69, 70, 74, 79-84, 88, 89, 91, 98, 109, 111-114, 116, 120; Dismiss., pp. 35, 69, 70-73; Div., pp. 9, 11, 14, 23-25, 28-31, 33, 34, 76, 85, 86, 94; Extension, pp. 4-7, 9-12, 14-20, 43-47, 49, 51, 54, 58, 59, 64, 68, 70, 71; Fict. Def., pp. 5, 10, 35, 53-55, 57; Fraud, pp. 111, 115; Guard., pp. 47, 48, 54, 70, 76, 86; Insolv., pp. 7, 19, 30-32; Judge, p. 19; Judgm., pp. 9, 15, 17, 46, 52-54, 61, 64-66, 80, 138, 149, 150, 183, 189, 194, 210; Juris., pp. 147, 191, 242, 245, 247-256, 259, 268, 272; Motions, pp. 7, 7-10, 12, 31-35, 40, 47; Parties, p. 11; Pretrial, pp. 18, 28, 31; Prob., pp. 8, 66-68; Review, pp. 34, 35, 62; Sum. Judgm., p. 121; Venue, p. 20.

§473a. Non-Service of Summons—
Time Limit on Seeking Relief.—Leg.H. 1933 ch. 744, 1961 ch. 722. Repealed 1969 ch. 1510, operative July 1, 1970.

§473a which will remain in effect until July 1, 1970, reads as follows:

When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action; provided, however, that, without extending said one year period, in the case of a judgment, order or other proceeding determining the ownership or right to possession of real or personal property, when a notice in writing is personally served within or without the State of California both upon said defendant and upon his attorney of record, if any, notifying said defendant and his attorney of record, if any, that such judgment had been rendered against him and that any rights said defendant has to apply for relief under Section 473a of the Code of Civil Procedure shall expire 180 days after service of said notice, then the time within which said defendant or his legal representatives may apply for such relief shall not exceed 180 days after said service of said notice upon said defendant or his attorney of record, if any, whichever service shall be later.

Anno. CCP 473a: W.P. pp. 337, 2118, 2171-2172; 29 Cal.J.2d 23, 27, 33, 39, 42-44, 91, 93, 103, 139; 39 Cal.J.2d 408.

McK.D. Judgments §198.

Forms CCP 473a: Cal. P&Pr, Service, Forms 27, 28; Cal. P&A, Actions & Spec. Proc., p. 63; Default, pp. 10, 16, 17, 74-79; Juris., pp. 160, 246, 247, 250, 253, 255, 259.

§473.5. Service of Summons Too Late to Defend the Action — Time Limit on Seeking Relief of Default or Default Judgment.—(a) When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him in such action, he may serve and file a notice of motion to set aside such default or default judgment and for leave to defend the action. Such notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him; or (ii) 180 days after service on him of a written notice that such default or default judgment has been entered.

(b) A notice of motion to set aside a default or default judgment and for leave to defend the action shall designate as the time for making the motion a date not less than 10 nor more than 20 days after filing of such notice, and it shall be accompanied by an affidavit showing under oath that such party's lack of actual notice in time to defend the action was not caused by his avoidance of service or inexcusable neglect. The party shall serve and file with such notice a copy of the answer, motion, or other pleading proposed to be filed in the action.

(c) Upon a finding by the court that the motion was made within the period permitted by subdivision (a) and that his lack of actual notice in time to defend the action was not caused by his avoidance of service or inexcusable neglect, it may set aside the default or default judgment on such terms as may be just and allow such party to defend the action. Leg.H. 1969 ch. 1610, operative July 1, 1970.

§474. Unknown Defendants—Adding True Name.—When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly; provided, that no default or default judgment shall be enter-

ed against a defendant so designated, unless it appears that the copy of the summons or other process, or, if there be no summons or process, the copy of the first pleading or notice served upon such defendant bore on the face thereof a notice stating in substance: "To the person served: You are hereby served in the within action (or proceedings) as (or on behalf of) the person sued under the fictitious name of (designating it)." The certificate or affidavit of service must state the fictitious name under which such defendant was served and the fact that notice of identity was given by endorsement upon the document served as required by this section. The foregoing requirements for entry of a default or default judgment shall be applicable only as to fictitious names designated pursuant to this section and not in the event the plaintiff has sued the defendant by an erroneous name and shall not be applicable to entry of a default or default judgment based upon service, in the manner otherwise provided by law, of an amended pleading, process or notice designating defendant by his true name. Leg.H. 1872, 1953 ch. 1244, 1955 ch. 886.

§474. 1955 Leg. Added the words "or in the affidavit if the action is commenced by affidavit." Remaining bold type added 1971.

Anno. CCP 474: W.P. pp. 812-814, 1210-1212, 1214-1215, 1700-1701; 3 Cal.J.2d 626; 28 Cal.J.2d 655; 39 Cal.J.2d 378, 383; 39 Cal.J.2d 114.

McK.D. Parties §§39, 48.

Forms CCP 474: Cal. P&Pr, Alleg., Forms 1-4, 19; Amend. & Suppl. Plea, Forms 19, 19.1-19.3; Caption, Forms 52, 53, 110; Complaint, Form 1; Inj., Form 1; Negl., Form 1; Parties, Form 25; Service, Forms 1, 2, 7; Cal. P&A, Amend. & Suppl. Plea, p. 6; Pict. Def., pp. 4-8, 12-14, 17, 18, 20, 22-25, 29, 30, 33, 46, 47, 53-59; Juris., p. 140.

§475. Disregard of Nonprejudicial Error — Presumption Against Prejudice.—The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling,

instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown. Leg.H. 1872, 1897