#71 9/28/70

Memorandum 70-104

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

SUMMARY

The following are the major policy questions for decision:

1. Should Section 378 be revised to permit joinder of plaintiffs "if it appears that their presence in the action will promote the convenient administration of justice" or should the section be otherwise revised?

2. Should Section 379 be revised to permit joinder of defendants "if it appears that their presence in the action will promote the convenient administration of justice" or should the section be otherwise revised?

3. Should Section 380 of the Code of Civil Procedure be repealed?

4. Should Section 384, which is proposed to be repealed in the tentative recommendation, be retained but revised?

5. Should a new provision, based on NY CPLR 1003, be included in the recommended legislation?

6. Should Section 425.20 (separate statement of causes of action) be revised?

7. Are exceptions needed to the compulsory joinder of causes of actions provisions (Sections 426.20 and 426.30)?

8. Should Section 1048.5 be restricted in its application?

There are a number of technical revisions needed in the tentative recommendation which are not listed in this summary.

The staff suggests that the recommendation, as revised at the October meeting, be approved for printing. Various persons and organizations--including the State Bar and Judicial Council--are still reviewing this recommendation. They have suggested it be printed so they can review the material and make suggested changes early in 1971.

BACKGROUND

The tentative recommendation and background study was sent to the Judicial Council, the State Bar, the California Trial Lawyers Association, various local bar associations, and a number of practicing attorneys. (Notices were published in legal newspapers and other legal publications that the tentative recommendation had been prepared and that the Commission seeks the comments of interested persons.)

Despite this distribution, we have not received any detailed comments on the tentative recommendation. (Exhibits I, II, and III, attached, are the three letters we received on the tentative recommendation that contained comments.) Nevertheless, both the Judicial Council and the State Bar urge us to submit our recommendation for enactment in 1971. They plan to review our proposal and to submit comments later, hopefully early in January so they can be considered and the bill amended before it is heard. The staff believes that this is a workable procedure. Also, we anticipate that ultimately a notice concerning the recommendation will be published in one of the State Bar publications that is sent to all lawyers, and we may get additional comments on the recommendation as a result of the publication of this notice. The staff believes that the recommendation on this subject should be approved for printing at the October 8-9 meeting. Any changes in the recommended legislation that we later determine are needed can be made after the bill is introduced.

We attached two copies of the tentative recommendation to this memorandum. Please mark your suggested editorial revisions (not involving policy questions) on one copy and turn it in to the staff at the October meeting so your suggested changes can be taken into account when the recommendation is edited prior to sending it to the printer.

We plan to go through the recommended legislation section by section at the meeting. Please raise any policy questions you have concerning the tentative recommendation at that time.

MATTERS SPECIFICALLY NOTED FOR COMMISSION ATTENTION

Scope of recommendation

There is some feeling that there is a need for an overall revision of pleading rules. Mr. Elmore of the State Bar believes that an overall revision of pleading rules should be the ultimate goal. Mr. Smock of the Judicial Council notes that our recommendation is limited in scope and that a more general revision of pleading rules would probably be desirable. The detailed comments in the letter from Mr. Kipperman (Exhibit II) go, for the most part, to provisions of existing law that we are not proposing to change. Nevertheless, the Commission is not authorized to study pleading generally. Our authorization is limited to joinder of causes of action and to cross-complaints and counterclaims. Both of these areas are in need of immediate reform. If we can accomplish the needed reforms in these areas at the 1971 session, perhaps the State Bar or the Judicial Council will decide to work on an overall revision.

Court rules

The Judicial Council letter (Exhibit I) suggests that some of the detail provided in the statute would seem ideal for coverage instead by Judicial Council rule. The staff suggests we do nothing with respect to this suggestion now. If and when the Judicial Council has specific proposals for revision, the specific proposals can then be considered. Moreover, the State Bar may have views on substituting court rules for statutory rules. Accordingly, although there is considerable merit to the

suggestion made by the Judicial Council, the staff suggests that action on this suggestion be deferred until specific suggested revisions are presented. Also, the suggestion may involve matters outside our authority, and we could not make such recommendations in our report. We would, however, agree to an amendment to the bill introduced to effectuate our recommendation to make any revisions in the bill that we conclude are desirable.

Joinder of parties (Sections 378-389) (pages 33-52 of tentative recommendation)

The effect of the tentative recommendation is to substitute the substance of Rule 20(a) (permissive joinder) and Rule 19(a) (compulsory joinder) of the Federal Rules of Civil Procedure for the existing California provisions on permissive and compulsory joinder of parties. We received no objections to this approach.

Mr. Elmore of the State Bar provided us with his suggested revision of the provisions of the Code of Civil Procedure relating to parties. The pertinent portion is attached as Exhibit IV. His revision presents two policy questions:

First, Mr. Elmore is unwilling to rely on revised Section 378 to supersede the various existing provisions relating to permissive joinder of plaintiffs. First, he is unwilling to rely on the phrase "same transaction, occurrence, or series of transactions or occurrences" to pick up what he includes in subdivision (b) of his Section 374 (first page of Exhibit IV):

> 374. . . . persons may join as plaintiffs in one action if:
>
> * * * * *
>
> (b) They have a claim or interest adverse to the defendant in the property, right in property or controversy which is the subject of the action.

The staff believes that this is clearly within the "same . . . series of transactions or occurrences" test provided in the Federal rules and in New York and other states that have based their joinder provisions on the federal rules. We think that including a provision like subdivision (b) would be undesirable because it could be construed to represent a legislative determination that the general phrase--"same transaction, occurrence, or series of transactions or occurrences"--is not broad enough to include what is described in subdivision (b). We believe that the joinder of parties provision in Section 378 of our tentative recommendation should be given a broad construction. However, in view of the concern expressed by Mr. Elmore, we suggest that the Commission consider including the substance of Michigan General Court Rule 206.1, which provides in part:

> All persons may join in 1 action as plaintiffs
>
> (1) if they assert any right to relief, jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action; or
>
> (2) if it appears that their presence in the action will promote the convenient administration of justice.

Subdivision (1) of the Michigan provision is the same as our Section 378. Subdivision (2) would cover the cases that might present a problem of interpretation under the language now used in Section 378 and would permit the court to allow joinder of parties where it would be appropriate. We think the choice is between what now appears in Section 378 and the substance of the Michigan provision. We recommend that the substance of the Michigan provision be adopted. See Exhibit V (blue) attached for a redraft of Section 378 to include the Michigan provision.

Section 379 of the tentative recommendation presents the same policy question as to joining persons as defendants. Should Section 379 include a provision permitting joinder of defendants "if it appears that their presence in the action will promote the convenient administration of justice"? We think it should. See Exhibit VI (buff) for a redraft of Section 379 to include the Michigan provision.

Second, Mr. Elmore suggested to the staff that a careful look should be taken at each of the joinder of parties sections proposed to be repealed to be sure that the repeal of the section would not have unintended consequences. Attached is a staff background study on joinder of parties in which the various existing provisions relating to joinder are discussed. The staff has concluded that three changes should be made in the joinder of parties provisions of the tentative recommendation:

(1) Section 380 of the Code of Civil Procedure, which is not proposed to be repealed in the tentative recommendation, should be repealed. See Exhibit VII (white) for the text of this section and the proposed Comment.

(2) Section 384, which is proposed to be repealed in the tentative recommendation, should not be repealed but should be revised. (Section 384--in addition to permitting joint tenants, tenants in common, or coparceners to join in an action to enforce property rights--provides (contrary to the common law rule) that title of all such tenants or coparcerners may be jointly asserted by one or less than all of them.) See Exhibit VIII (pink) for the text of the section as the staff proposes to revise it and for the proposed Comment to the revised section.

(3) The Comment to Section 389 should be revised by adding, after the third sentence of the first paragraph on page 48, the sentence: "Such dismissal would, of course, be without prejudice." (Existing Section 389

has an express provision to this effect in the text of the section.) Should this be in the text of the section (as in Section 389) or merely in the Comment? (The provision of the Federal Rules of Civil Procedure does not contain anything on the dismissal being without prejudice.)

New section relating to adding or dropping parties

Mr. Elmore's draft includes the following provision:

> Misjoinder of parties is not a ground for dismissal of an action. Parties may be added or dropped by the court on the motion of any party or its own initiative at any stage of the action and upon such terms as may be just.

This provision is based on NY CPLR § 1003. The staff recommends that we include the substance of this as a separate section in our proposed statute. We would eliminate the word "and" which appears before "upon such terms as may be just."

Tentative Recommendation (page 65)--Chapter Heading

The staff suggests that the heading for Chapter 2 read:

CHAPTER 2. PLEADINGS DEMANDING RELIEF

This revision is orally suggested by Mr. Elmore.

Section 425.10 (page 65)

For a revised version of this section that is shorter and more precise, see Exhibit IX (yellow). We recommend the approval of this revised version which is suggested orally by Mr. Elmore.

Separate statement of causes of action--Section 425.20 (page 66)

Section 425.20 requires that all causes of action be separately stated, whether or not they arise from the same transaction or occurrence. As Professor Friedenthal points out in his study (pages 27-29), most states

follow the so-called "operative facts" theory of a cause of action, which holds the scope of a single cause of action broad enough to cover all claims arising out of the same transaction or occurrence. California, however, follows the so-called "primary rights" theory under which the definition of a cause of action depends upon the nature of the harm suffered. Therefore, in California, a single act of a defendant may give rise to a number of different causes. For example, if defendant negligently drives his auto into plaintiff's vehicle, plaintiff has one cause for any personal injury he has suffered and another for damages to his car. Similarly, if a defendant wrongfully withholds from a plaintiff possession of a home, plaintiff has one cause of action for ejectment from the realty and an entirely different cause for wrongful detention of the furnishings. Hence, the effect of Section 425.20 is to require that the plaintiff state separately his causes of action for personal injury, injury to his personal property, injury to his real property, injury to his reputation, and the like, even where all arise from the same transaction. The requirement, however, does not compel plaintiff to separately state the different theories upon which he bases his cause of action for injury to a particular "primary right."

Unlike proposed Section 425.20, the existing California statute--Section 427--contains an exception to the separate statement requirement for those types of cases where injuries to more than one primary right ordinarily occur. It is the view of the staff, Professor Friedenthal, Mr. Witkin, and the persons that commented on the tentative recommendation that Section 425.20 is unsound. It is unsound not only because it requires a separate statement where one is not now required but also because the requirement of a separate statement of causes of action is not useful where the causes of action all arise out of the same transaction or occurrence. Where the pleading is

required to contain a "statement of the facts constituting the cause of action, in ordinary and concise language" and a "demand for judgment for the relief to which the pleader claims he is entitled" (proposed Section 425.10), and where the complaint is subject to demurrer if it is "uncertain" (which includes "ambiguous" and "unintelligible")(proposed Sections 430.10, 430.20), the separate statement requirement merely requires additional pleading that serves no useful purpose and tends to make pleading more complex rather than more simple.

At a minimum, the existing exception to the separate statement requirement should be continued. It should be noted, however, that a separate statement requirement directed to different primary rights only, where coupled with the requirements of Section 425.10, merely requires the pleading of the same facts (if they are the same) for each primary right affected: where recovery for harm to different primary rights depends on different facts being pleaded, they are required to be pleaded by Section 425.10.

It is important to note that the California theory of a cause of action is not based on the theory of recovery--it is based on the particular primary right involved. The staff suspects that, when the Commission adopted proposed Section 425.20, it had in mind a requirement of pleading different theories of recovery rather than pleading separate causes for each primary right affected. The present California practice of pleading alternative theories of recovery (i.e., pleading liability for damages from aircraft noise on a theory of negligence, nuisance, inverse condemnation, trespass) would not be affected by the elimination of the so-called separate statement requirement. For further discussion, see the letter from Mr. Kipperman (Exhibit II).

Having reviewed the matter, the staff again suggests that the requirement of a separate statement of causes of action apply only to causes not arising out of the same transaction or occurrence. See Exhibit X for the text of a revised Section 425.20 and Comment.

Compulsory joinder of causes of action--Section 426.20 (page 68)

Mr. Elmore orally raised the question whether Section 426.20 (which requires the plaintiff to allege all related causes of action in his complaint or waive them) will create problems as applied to certain types of proceedings such as dissolution of marriage or unlawful detainer.

We believe that the principle of Section 426.20 is sound. It is the same principle that now applies to a cross-complaint, and we see no reason why, as a matter of policy, the plaintiff should not be subject to the same requirement as the defendant.

A careful reading of the statute indicates that it applies only to causes of action alleged in a "complaint" or "cross-complaint." It would not apply to a "petition" for the dissolution of marriage. Perhaps this should be mentioned in the Comment to Section 426.10 (defining "complaint").

The unlawful detainer proceeding does present a problem. When the Commission was working on the lease law recommendation, we were advised by representatives of lessors that the expense of legal proceedings makes it impractical to bring two actions and that damages are ordinarily either sought in the unlawful detainer proceeding or not sought at all. Nevertheless, there will be circumstances, probably rare, where a lessor will want to obtain possession in an unlawful detainer proceeding and want to bring a later action for damages when the amount of damages has become certain. The best solution to the problem would be to add a section to Article 2 (commencing with Section 426.10), to read:

426.60. This article applies only to civil actions and not to special proceedings.

One change that should be made in Sections 426.20 and 426.30 is to change the introductory clause to read:

Except as otherwise provided ~~in this article~~ by statute ,

In addition, the unlawful detainer provisions could be examined and revised if necessary to provide that the bringing of an unlawful detainer action does not bar a subsequent action to collect for damages for breach of the lease. We do not believe that this revision is necessary.

If these revisions do not satisfy Mr. Elmore, it is suggested that he advise us of any particular types of cases where he believes that the plaintiff should be permitted to bring two different actions for causes of action arising out of the same transaction or occurrence.

Compulsory cross-complaints--Section 426.30 (page 69)

Subdivision (a) of proposed Section 426.30 continues the substance of existing Section 439 relating to compulsory counterclaims. The new section, however, deletes the reference made to assignees in the former section. The Commission requested the staff to determine whether and in what ways the deletion of the reference to assignees changes California law.

The staff has concluded that California law would not be changed by enactment of the proposed section. Under the proposed and existing section, if the claim is assigned after the first action, action on the assigned claim is barred. Although there are no California cases, under existing law, it appears that, where a claim is assigned before the first action, it could not be barred by failure of the assignor to assert it in

a counterclaim in the first action. And this is the result under the federal rule upon which proposed Section 426.30 is based.

See Exhibit XI for a background study on this point.

Code of Civil Procedure Section 428.60--Service of cross-complaint (page 83)

Section 428.60 is based on existing Code of Civil Procedure Section 442. Section 442 was amended at the 1970 session, and Section 428.60 needs to be conformed to the amendment. See Exhibit XII attached for the text of the revised Section 428.60.

Code of Civil Procedure Section 431.70--Set-off (page 109)

As worded in the tentative recommendation, Section 431.70 might be interpreted to change existing law. Under existing law, there is no remedy of set-off if a counterclaim is barred for failure to assert it in a prior action. However, Section 431.70 as it is now worded might be construed as reviving a claim which was barred because it was not pleaded in set-off in a prior action. The last sentence of Section 431.70 (in the tentative recommendation) should be revised to retain the existing law. See Exhibit XIII for the text of revised Section 431.70 and revised Comment. See Exhibit XIV for a background study on this point.

Transfer of severed cross-claims--Section 1048.5 (page 140)

Section 1048.5 provides that, where cause of action alleged in a cross-complaint is severed for trial under Section 1048, it is to be transferred to a court having subject jurisdiction of the severed cause and that the transferee court "shall deal with the matter as if it had been brought as an independent action." As Mr. Kipperman points out (Exhibit II), this language is subject to the interpretation that, if venue is not proper in the transferee court, there will have to be a

second transfer. We believe other procedural problems exist in Section 1048.5. Accordingly, we have redrafted the section and Comment. See Exhibit XV (pink) attached.

The transfer under Section 1048.5, it seems to us, is one for the convenience of witnesses and in the interest of justice. To avoid confusion, we have made that clear in Section 1048.5 and, further, that the transfer is to be treated in the same manner as a transfer under Section 398 on that ground.

Respectfully submitted,

E. Craig Smay
Legal Assistant

...E JUSTICE
...R. WRIGHT
CHAIRMAN

Memo 70-94

EXHIBIT I

JUDICIAL COUNCIL OF CALIFORNIA

ADMINISTRATIVE OFFICE OF THE COURTS
4200 STATE BUILDING, SAN FRANCISCO 94102
217 W. First St., Room 1001, Los Angeles 90012
109 Library and Courts Bldg., Sacramento 95814

...H N. KLEPS
RECTOR

ARD A. FRANK
DEPUTY DIRECTOR

September 22, 1970

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear John:

Now that the Legislature has concluded its marathon session I have the opportunity to thank you formally for sending to the Judicial Council and inviting our comment on Jack Friedenthal's study and your tentative recommendation dealing with counterclaims and cross-complaints, joinder of causes of action, and related provisions. As you are aware from our past discussions of these subjects, we are vitally interested in your work and desire to submit to you at a later time detailed suggestions and comments pertaining to this subject. Having in mind from personal experience your publication schedule, however, I want to give you the benefit of some very general, highly subjective, and quite probably not conclusively determined suggestions and comments at the staff level.

Generally speaking, it seems to us that your tentative recommendation would make a significant number of very highly desirable improvements in existing law. We note several rather minor matters, however, that pending a fuller and more comprehensive review of the subject you may wish to consider now. Some of the detail provided in your statutory scheme would seem ideal for coverage instead by Judicial Council rule. I am thinking, for example, of the content of the caption for pleadings. As you may know, the Judicial Council has been working diligently in recent years in developing uniform forms for use in our trial courts. We have enlisted the active cooperation of the California Continuing Education of the Bar with the assistance of a statewide committee on legal forms. Matters such as some of the statutory detail in your proposed tentative recommendation fall directly in the area of special expertise of the people working on these forms, and we believe such matters would better be handled in that manner rather than by legislative mandate.

Aside from such minor matters of detail, there is one substantive aspect that you also might want to consider at this time. We note that you would require a separate statement in full of each cause of action, even those arising out of the same transaction or occurrence. Your tentative recommendation would seem to impose an even more stringent pleading requirement than the existing law since Section 427 now provides some rather significant exceptions to the present requirement of separately stating causes of action. In this connection, it seems to us that Bernie Witkin's statement as set out in the tentative recommendation (note 16, page 7) is persuasive, at least as to those causes of action arising out of the same transaction. I think perhaps it would be appropriate also (although it is conceivable that you might be limited in scope by your legislative authorization) to provide for a more broad-based revision of the titles concerned rather than the somewhat narrower approach you have taken.

On the basis of our tentative review, we would encourage you to proceed with your recommendation for presentation before the 1971 legislative session. I think we will be able before that time to communicate to you more detailed and definitive comments on specific suggestions for change or revision, and if our suggestions meet with your approval, it seems likely that any defects in the proposed legislation could be easily corrected by appropriate amendment after the legislation is introduced. The foregoing also presupposes coordination with the State Bar and its Committee on Administration of Justice since I assume that they will be vitally interested in this proposal. For your further information I want you to know that we plan to submit your materials to our Superior Court Committee for its consideration and we very likely will have some specific suggestions to make on behalf of the Council after our November 1970 meeting.

Best personal regards to all.

Very truly yours,

Ralph N. Kleps, Director

By
Jon D. Smock
Attorney

JDS/sr

Memo 70-104

EXHIBIT II

STEVEN M. KIPPERMAN
ATTORNEY AT LAW
SUITE 200
544 PACIFIC AVENUE
SAN FRANCISCO, CALIFORNIA 94133
TELEPHONE (415) 982-5480

September 10, 1970

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

RE: TENTATIVE RECOMMENDATIONS RELATING TO COUNTERCLAIMS AND CROSS-COMPLAINTS, JOINDER OF CAUSES OF ACTION, AND RELATED PROVISIONS

Dear Sirs:

I am writing to set forth my comments concerning your pleading recommendations above-mentioned. Although I have not had many years of experience, I have had an opportunity to compare Federal and California pleading having served as law clerk to a Federal district judge in San Francisco.

425.20

I suggest abandoning the concept of "cause of action" altogether. Once out of the classroom, my impression is that all that lawyers really set forth separately in practice are theories of relief. The Federal Rules long ago opted for the concept of a "claim for relief" where only short and concise statement of facts was required. It would appear that §425.20 perpetuates two myths: (1) that lawyers care about or understand what the technical niceties are that surround the very concept of a "cause of action" as a legal concept in California (which, as you point out, differs from most other jurisdictions); and (2) that it makes any difference at all what a "cause of action" is, compare FED. R. CIV. P. 8(a), (f); 10(b).

With specific reference to your "Note" following §425.20, I would certainly opt for the third alternative since it most closely approaches the Federal rules. I would also, of course, abolish by statute the very concept of "cause of action" as it now exists and simply require pleadings to allege the facts of each transaction or series of acts which gives rise to a theory of entitlement to relief.

A court rule might require that a pleader in good faith attempt to denominate (without it in any way binding pleader) the legal theories on which he relies, perhaps on the face of the Complaint, since it seems to me that is more significant than the "right invaded".

430.40; 435

Would it not be helpful to allow a party to notice a hearing on a demurrer? Time limits could still be imposed, e.g. a demurrer could be required to be filed within 30 days and a hearing could be required to be noticed within 30 days of filing. The present time limits seem unrealistic.

Also, present practice might be codified by requiring motions to strike and demurrers to be heard on the same date.

430.80

Concerning the no-waiver-of-objection-to-subject-matter-jurisdiction rule, while this is certainly the present general rule apparently in most jurisdictions, the recent ALI Study of the Division of Jurisdiction Between State and Federal Courts makes a respectable argument that such a rule should not prevail, Id. at 366-69. Even a more restrictive California rule than is proposed for Federal courts could be promulgated since no fear of the Article III court problem would be relevant.

431.40

I would offer two additional possible suggestions: (1) Abolish the verified complaint in California and enact a statute comparable to FED. R. CIV. P. 11. Verified pleadings must be admitted to be unnecessary shams. (2) Either (a) permit a general denial of all complaints (similar to §431.40(a)) or (b) enact a clear statute similar in intent to FED. R. CIV. P. 8(b) and just require each and every properly pleaded allegation to be admitted or denied.

Admittedly these are opposite extremes. The bar should be invited to comment on whether, in view of using modern discovery practice to get at factual and legal contentions, denials should be permitted in all cases. At least one old, California decision holds that an unwarranted denial does not give rise to a malicious prosecution action, which probably explains why we see so many now-unwarranted denials.

In any event, of course, affirmative defenses should be well-pleaded.

1048.5

Although 28 U.S.C. §1404(a) has spurned much litigation over the "where it might have been brought" language, see ALI Study . . . at 149, 154, perhaps some attempt should be made to spell out guidelines for whether a transfer ought to be made to a court where an action is likely to wind up at the end. The present proposal requires only that subject-matter jurisdiction be considered in the initial transferor court. Only a second transferor (the initial transferee) court is required to consider proper venue of the severed claim by "deal[ing] with the matter as if it had been brought as an independent action."

Very truly yours,

STEVEN M. KIPPERMAN

SMK:lgl

Memo 70-104 EXHIBIT III

FITZGERALD, ABBOTT & BEARDSLEY
ATTORNEYS AT LAW
1730 FIRST WESTERN BUILDING
1330 BROADWAY
OAKLAND, CALIFORNIA 94612
AREA CODE 415 451-3300

JAMES H. ANGLIN
STACY H. DOBRZENSKY
JAMES C. SOPER
PHILIP M. JELLEY
JOHN L. McDONNELL, JR.
GERALD C. SMITH

LAWRENCE R. SHEPP
LLEWELLYN E. THOMPSON II

R. N. FITZGERALD 1858-1934
CARL H. ABBOTT 1867-1933
CHARLES A. BEARDSLEY 1862-1943

August 6, 1970

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Thank you for your letter of July 30 and enclosures, replying to mine of July 23 on the application of the "rules of pleading".

I have reviewed the Tentative Recommendations with respect to counterclaims and cross complaints and joinder of causes and certainly agree with the Commission and its approach, and the basic changes recommended in the report.

I am quite sure that if I went through the entire compilation I could find something about which a change might be suggested, but I am sure that would not contribute in any way to the main effort! The recommendations are sound and should be adopted and put into effect.

It occurs to me that, in connection with the point I presented and which you are kind enough to pass on to the members of the Commission, that Sections 426(2), 430(7) and 452 are the areas of interest.

Section 452 says that the allegations of a pleading are to be liberally construed with a view to substantial justice between the parties. I would guess that judges might take this to say that the rules of pleading are to be liberally applied.

Section 426(2) says that a complaint must contain "a statement of the facts constituting the cause of action, in ordinary and concise language." Section 430(7) says that a plaintiff may demur to a complaint when it appears "that the complaint is uncertain... (defining ambiguous and unintelligible as the same thing)".

I might add that I recall an experience in a hearing before the Division of Corporations (a number of years ago) in which the hearing officer, when an objection was made to some question or answer in the testimony, stated that he was not required to adhere to the rules of evidence and he therefore overruled the objection. I urged then and I think it fits into the point made in my earlier letter, that he should be subjected to a rule which says that the rules of evidence shall apply except in those instances in which, for good cause, the hearing officer determines that they need not be applied. This gives the attorney a clearer standard for his conduct of the trial or hearing, still gives the desired result with respect to the "relaxing" of the rules of evidence in administrative proceedings.

Sincerely,

Stacy H. Dobrzensky

SHD:ajr

Memo 70-104 EXHIBIT IV

Draft Prepared by Mr. Elmore of State Bar

Chapter III

Joinder of Parties

Article 1

General Rules - Permissible Joinder

Sec. 374. Except as otherwise provided for a particular action or proceeding, persons may join as plaintiffs in one action if

(a) They assert any right to relief jointly, severally or, in the alternative, arising out of the same transaction, occurrence, or series of transactions or occurrences, if any common question of law or of fact would arise; or

(b) They have a claim or interest adverse to the defendant in the property, right in property or controversy which is the subject of the action.

Sec. 374.1. Except as otherwise provided for a particular action or proceeding, persons may be joined as defendants in one action if there is asserted against them

(a) Any right to relief jointly, severally or, in the alternative, arising out of the same transaction, occurrence, or series of transactions or occurrences, if any common question of law or of fact would arise; or

(b) A claim or interest adverse to them in the property, right in property or controversy which is the subject of the action.

Sec. 374.2. It is not necessary that each plaintiff be interested in obtaining, or that each defendant be interested in defending against all the right demanded or as to every cause of action.

Comment: See CCP 378, 379, 379a, 379b, NY CPLR, Sec. 1002.

Sec. 374.3. If the consent of any one who should have been joined as a plaintiff cannot be obtained, he may be made a defendant, with the reason stated in the complaint.

Comment: See CCP 382, first part.

Sec. 374.4. A plaintiff who is in doubt as to the person from whom he is entitled to relief may join two or more defendants with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties.

Comment: See CCP 379c.

Sec. 374.5. Misjoinder of parties is not a ground for dismissal of an action. Parties may be added or dropped by the court on the motion of any party or its own initiative at any stage of

the action and upon such terms as may be just.

Comment: See NY CPLR, Sec. 1003.

Article 2

General Rules - Compulsory Joinder

Sec. 375. Except as otherwise provided for a particular action or proceeding,

(A) 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.

(B) If a person as described in subdivision (A)(1) or (2) 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: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) 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; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross complainant will have an adequate remedy if the action is dismissed for nonjoinder.

(C) A complaint or cross complaint shall state the names, if known to the pleader, of any persons as described in subdivision (A)(1) or (2) who are not joined, and the reasons why they are not joined.

(D) Nothing in this section affects the law applicable to class actions.

Comment: The foregoing, in substance, is the LRC text as of 8/1/70. It is here included for information only. The present relevant section is CCP 389 drafted by the LRC in or about 1957. Also see NY CPLR, Sec. 1001, 1003. It may be noted NY wording expressly refers to a dismissal "without prejudice" which is not included as such in the LRC tentative wording.

Chapter IV

Particular Actions

Sec. 376. The parents of a legitimate unmarried minor, acting jointly, and the mother of an illegitimate minor may maintain an action for injury to the minor caused by the wrongful act or neglect of another against the person causing the injury and if any other person is responsible for such wrongful act or neglect, against such other person also. A guardian may maintain an action for such injury to his ward.

Sec. 376.1. In the action such damages may be given as under all of the circumstances of the case may be just except that in an action maintained after the death of the minor or ward or against the executor or administrator of the person causing the injury or of the person responsible for the wrongful act or neglect, damages recoverable shall be as provided in Section 573 of the Probate Code. The death of the child or ward shall not abate the cause of action as to damages accruing before his death. The respective rights of the parents of a legitimate minor to any award shall be as determined by the court.

Sec. 376.3. If one parent of a legitimate minor shall fail on demand to join as plaintiff, or is dead or cannot be found,

the other parent may maintain the action. The parent, if living, shall be joined as a defendant and before trial or hearing of question of fact, shall be served with summons either in the manner provided by law for service of a summons in a civil action or by sending a copy of the summons and complaint by registered mail with postage prepaid addressed to such parent's last known address, return receipt requested. A return receipt purporting to be signed by the addressee creates a presumption affecting the burden of producing evidence that the summons and complaint have been duly served.

Sec. 377. When the death of a person not a minor, or when the death of minor who leaves surviving him a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another, his heirs, and his dependent parents, if any, who are not heirs, or personal representatives on their behalf, may maintain an action for damages against the person causing the death and, if any other person is responsible for any such wrongful act or neglect, against such other person also, or, in case of the death of the wrongdoer or such other person, whether before or after the death of the person injured, against the personal representative of the wrongdoer or other person.

Sec. 377.1. In the action, such damages may be given as under

all the circumstances of the case may be just but shall not include damages recoverable under Section 573 of the Probate Code. The respective rights of the heirs and dependent parents in any award shall be determined by the court.

Sec. 377.2. A cause of action by the personal representative pursuant to Section 573 of the Probate Code and a cause of action pursuant to Section 377 of this code may be joined in a single action if they arise out of the same wrongful act or neglect. If separate actions are brought, they shall be consolidated for trial on the motion of any interested party.

Sec. 377.3. An action pursuant to Section 377 shall be consolidated for trial with an action pursuant to Section 376 (if it arises) out of the same wrongful act or neglect, upon motion of any interested party.

Comment: It is intended to re-state Sec. 376 and 377 without substantive change, but with an estimated 30% reduction in wording. In Sec. 376 wording has been inserted to refer to the personal representative of the "other person", thereby conforming it to Sec. 377 in this regard. Both Sec. 376 and 377 refer to consolidation "for trial". Query, whether "for trial" should be deleted as unduly restrictive.

Sec. 380. An action concerning real property may be maintained

(a) By a person out of possession to determine an adverse

interest or estate. Persons in possession may be joined as defendants with the adverse claimant, or

(b) By two or more persons claiming an estate or interest under a common source of title, whether holding as tenants in common or in other co-ownership or in severalty, against adverse claimants, to determine adverse claims, to establish such common source of title or to declare a trust thereof, or to remove a cloud thereon.

Comment: Intended to re-state CCP 380 and 381 without substantive change but with a reduction in wording.

Sec. 381. All or any number of persons who hold property as tenants in common or in other forms of co-ownership may commence or defend a civil action or proceeding to enforce or protect their or his rights in such property.

Comment: Intended to re-state CCP 384 without substantive change.

Sec. 382. (a) Any partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name which it has assumed or by which it is known.

(b) Any member of the partnership or other unincorporated association may be joined as a party in an action against the unincorporated association. If service of process is made on such member as an individual, whether or not he is also served as a

person upon whom service is made on behalf of the unincorporated association, a judgment against him based on his personal liability may be obtained, whether such liability be joint, joint and several, or several.

Comment: Identical with CCP 388, except for omission of "in the action" in the last clause.

Sec. 383. When persons are severally liable on the same obligation or instrument, any or all may sue or be sued in an action concerning or affecting the obligation or instrument.

Comment: Intended to re-state CCP 383, first sentence, without substantive change, but with reduction in wording.

Sec. 384. If one person is insured by two or more insurers separately in respect to the same subject and interest, an action may be maintained against all or any of the insurers. In case of recovery, the judgment shall be several against each insurer according to its liability.

Comment: Intended to re-state CCP 383, second sentence, without substantive change, but with reduction in wording.

Chapter V

Interpleader and Deposit in Court

Sec. 386. When conflicting claims are or may be made upon a

Memorandum 70-104

EXHIBIT V

Code of Civil Procedure Section 378. Permissive joinder of plaintiffs

Sec. 4. Section 378 of the Code of Civil Procedure is amended to read:

~~378. All persons may be joined in one action as plaintiffs who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any question of law or fact would arise which are common to all the parties to the action, provided, that if upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled.~~ (a) All persons may join in one action as plaintiffs:

(1) If they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and any question of law or fact common to all these persons will arise in the action; or

(2) If it appears that their presence in the action will promote the convenient administration of justice.

(b) It is not necessary that each plaintiff be interested as to every cause of action or as to all relief prayed for.

Comment. Section 378 is amended to adopt language from the Federal Rules of Civil Procedure and the Michigan General Court Rules.

Paragraph (1) of subdivision (a) adopts the language of Rule 20(a) of the Federal Rules of Civil Procedure. This paragraph permits joinder where the claims arise from the same transaction or series of transactions and where there is a question of law or fact common to all. The paragraph permits joinder in every situation where it was formerly allowed. See generally 1 Chadbourn, Grossman & Van Alstyne, California Practice § 615 (1961); 2 Witkin, California Procedure Pleading §§ 91, 92 (1954); Clark, Code Pleading 367 n.86, 369 n.94 (2d ed.).

Paragraph (2) of subdivision (a) adopts language from Rule 206.1(2) of the Michigan General Court Rules (1963). The inclusion of this paragraph makes joinder a matter of convenient judicial administration.

Subdivision (b) is based on a similar provision of Rule 20(a) of the Federal Rules of Civil Procedure.

Section 378 formerly specifically provided that persons might be joined as plaintiffs "who have an interest in the subject of the action." This phrase has not been continued because it would add nothing to the broad joinder authority given by Section 378 as amended. Moreover, since no appellate court had relied upon the "interest in the subject of the action" clause for more than 35 years, it appears that it had become a "dead letter." See 2 Witkin, California Procedure Pleading § 91 (1954).

The provision formerly found in Section 378 giving the court the power to sever causes where appropriate is now dealt with separately in Section 379.5 (new).

Memorandum 70-104

EXHIBIT VI

Code of Civil Procedure Section 379. Permissive joinder of defendants

Sec. 5. Section 379 of the Code of Civil Procedure is amended to read:

379. ~~Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. And in an action to determine the title or right of possession to real property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant.~~ (a) All persons may be joined in one action as defendants:

(1) If there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and any question of law or fact common to all these persons will arise in the action; or

(2) If it appears that their presence in the action will promote the convenient administration of justice.

(b) It is not necessary that each defendant be interested as to every cause of action or as to all relief prayed for.

Comment. Section 379 is amended to provide statutory requirements for joinder of defendants comparable to those governing joinder of plaintiffs. The amended section adopts language taken from the Federal Rules of Civil Procedure and the Michigan General Court Rules.

Paragraph (1) of subdivision (a) adopts language of Rule 20(a) of the Federal Rules of Civil Procedure. This paragraph permits joinder where the

claims arise from the same transaction or series of transactions and where there is a question of law or fact common to all. The paragraph permits joinder in every situation where it was formerly allowed. Paragraph (2) of subdivision (a) adopts language from Rule 206.1(2) of the Michigan General Court Rules (1963). The inclusion of this paragraph makes joinder a matter of convenient judicial administration. Subdivision (b) continues a portion of former Code of Civil Procedure Section 379b and is consistent with Rule 20(a) of the Federal Rules of Civil Procedure.

Former Sections 379 and 379a provided liberal joinder rules but were strongly criticized for their uncertainty and overlap. See 1 Chadbourn, Grossman & Van Alstyne, California Practice § 618 (1961); 2 Witkin, California Procedure Pleading § 93 (1954). Amended Section 379 substitutes the more understandable "transaction" test set forth in Rule 20(a) of the Federal Rules of Civil Procedure. The amended section probably merely makes explicit what was implicit in prior decisions. See Hoag v. Superior Court, 207 Cal. App.2d 611, 24 Cal. Rptr. 659 (1962).

Memorandum 70-104

EXHIBIT VII

Sec. . Section 380 of the Code of Civil Procedure is repealed.

~~380. In an action brought by a person out of possession of real property, to determine an adverse claim or an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed.~~

Comment. Section 380 is repealed. The section is made unecessary by the liberal rule of permissive joinder set forth in Section 379. See generally 1 Chadbourn, Grossman & Van Alstyne, California Practice § 615 (1961); 2 Witkin, California Procedure Pleading § 93 (1954). Repeal of Section 380 does not affect the power of the court to issue a writ for possession in the type of case described in the section. See Code Civ. Proc. §§ 681, 682(5). See also Montgomery v. Tutt, 11 Cal. 190 (1858) (power to issue writ is incident to power to hear action and make decree).

Memorandum 70-104

EXHIBIT VIII

Sec. . Section 384 of the Code of Civil Procedure is amended to read:

384. Except as otherwise provided in Section 389, ~~All~~ all persons holding as tenants in common, joint tenants, or co-parceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party.

Comment. The rule stated in Section 384 has been qualified by including a reference to Section 389 (which specifies the circumstances when joinder of parties is compulsory). Prior case law recognizes that, notwithstanding Section 384, under some circumstances all the cotenants must be joined as parties. See, e.g., Solomon v. Redona, 52 Cal. App. 300, 198 P. 643 (1921); Jameson v. Chanslor etc. Oil Co., 176 Cal. 1, 167 P. 369 (1917). Cf., Woodson v. Torgerson, 108 Cal. App. 386, 291 P. 663 (1930). See 2 Witkin, California Procedure Pleading § 79.

Memorandum 70-104

EXHIBIT IX

Code of Civil Procedure Section 425.10. Content of pleading demanding relief

425.10. A complaint 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 pleader 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. However, Section 425.10 applies to both complaints and cross-complaints while Section 426 by its terms applied to "complaints."

EXHIBIT X

Code of Civil Procedure Section 425.20. Separate statement of causes

425.20. Causes of action not arising out of the same transaction or occurrence, whether alleged in a complaint or cross-complaint, shall be separately stated.

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 425.20 requires a separate statement of causes of action not arising out of the same transaction or occurrence but does not require that causes arising out of the same transaction or occurrence be separately stated. Former Section 427 required that each cause of action be separately stated but provided exceptions for certain types of causes of action that often arise from the same transaction or occurrence. Where the complaint or cross-complaint is confusing because causes of action arising out of the same transaction or occurrence are not separately stated, the defect can be reached by demurrer for uncertainty. See Sections 430.10, 430.20.

Memorandum 70-104

EXHIBIT XI

BACKGROUND STUDY

Code of Civil Procedure Section 426.30. Compulsory cross-complaints

Subdivision (a) of proposed Section 426.30 continues the substance of existing Section 439 on compulsory counterclaims. The new section, however, deletes the reference made to assignees in the former section.[1] The question was raised whether and in what ways the deletion of the reference to assignees changes the California law. It does not appear that the law would be changed.

Existing Section 439 plainly bars later suits on a counterclaim arising out of the same transaction as plaintiff's claim where defendant failed to raise the counterclaim in the first action and later assigned it to another. Both defendant and his assignee would be barred from later suing on the counterclaim. Rule 13(a) of the Federal Rules of Civil Procedure is to the same effect. Proposed Section 426.30 would require the same result.

There is a question, however, whether existing Section 439 bars suits by assignees on claims assigned before suit is brought against the assignor on the same transaction. Federal Rule 13(a) has been held not to permit this effect.[2] While existing Section 439 would appear, on its face, to be a bar

---

1. Existing Section 439 reads:

> 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. [Emphasis added.]

2. Campbell v. Ashler, 320 Mass. 475, 70 N.E.2d 302 (1946)("We cannot give to the federal rule the effect of depriving of his cause of action a person who was never a party to the litigation in that court [the federal court in which the transaction giving rise to the claim was previously sued upon].").

in this situation, construction of the section with reference to companion sections reaches the same conclusion as obtains under the federal rule.

Existing Section 438, setting forth the requirements of a counterclaim, says it "must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action . . . ." Plainly, a previous assignee not joined in the suit is not a "defendant . . . in the action," and the assigned claim does not "exist in favor of" the assignor since the assignee of an assignable chose in action takes legal title thereto.[3] Whether this interpretation of Section 439 is correct or not, it appears that the California court would reach the same decision on Section 439 by applying constitutional principles as did the Massachusetts court on Federal Rule 13(a). In Datta v. Staab,[4] the court states the often repeated rule that the section derives from the doctrine of res judicata and notes that to apply the section as a bar to persons who have not had reasonable notice and an opportunity for hearing would be unconstitutional as infringing on due process.

---

3. Reios v. Mardis, 18 Cal. App. 276, 280, 22 P. 1091 (1912); 2 Witkin, California Procedure Pleading § 55 (1954). In cases where there is only a partial assignment or where the assignor retains beneficial title--as in an assignment for collection--the problem of barring an innocent assignee does not arise since the assignor cannot press his claim without joining his assignees. Witkin, supra, §§ 57, 83. In such cases, it would not appear to be wholly correct to say that the claim "exists in favor of" the assignor.

4. 173 Cal. App.2d 613, 343 P.2d 977 (1959)(the section bars claims previously dismissed with prejudice as well as claims decided on the merits).

No California case has been found where Section 439 was held to bar an assignee who took before suit on the transaction was brought against the assignor.[5]

It would thus appear that the effect of Section 439 is to bar only assignees who take after the action against the assignor. Section 426.30 would have the same effect.

---

5. The few suggestive cases do not reach a decision on the question whether existing Section 439 will bar an assignee who takes before suit is brought against the assignor on the same transaction where assignee has no notice of the action against assignor. In Hardware Mut. Ins. Co. v. Valentine, 119 Cal. App.2d 125, 259 P.2d 70 (1953), plaintiff-insurer paid for damages to insured's building due to fire in defendant's rented portion of the building and took an assignment of the insured's claim against defendant for negligence. Plaintiff brought an action on the assigned claim and the action was continued. Thereafter, defendant sued on the same transaction against the insured-owner and an electrical company. Plaintiff was not joined although it had notice of the second suit. Judgment in the second suit went for the insured-owner. Upon resumption of the first suit, defendant claimed plaintiff was barred for failure to bring its claim as a counterclaim in the second suit. The court said:

> Section 439 of the Code of Civil Procedure is not applicable where, as here, respondent's (insurer's) claim was fully set forth in the first complaint filed. The section plainly refers to a situation when a defendant omits to set up a counterclaim in an action theretofore filed and in that event he cannot afterward maintain an action against plaintiff therefor. [Emphasis in original.]

In Lerno v. Obergfell, 144 Cal. App.2d 221, 300 P.2d 846 (1956), a stay of execution was sought by a judgment debtor on the ground that he had been garnished in an attachment proceeding by a creditor of the judgment creditor. The court held that the general rule that a stay will be granted in such cases to protect the garnishee from double payment does not apply if the creditor (the garnishor) of the judgment debtor was the judgment debtor's assignee for suit since this brings into play the provisions of Section 439. There was only a bare allegation in the case that the garnishor had been the judgment debtor's assignee for suit, and the court ruled on the ground that the lower court's refusal to grant a stay would be upheld if any reasonable construction of the facts would support it. Such reasonable construction of the facts could have included the assumption that the creditor-assignee had actually been joined in or had actually tried the prior suit, in which case garnishor's claim would be foreclosed, and judgment debtor would not have stated a proper case for a stay. Supposing that the court meant assignee for collection by

"assignee for suit," it is clear the court assumed the creditor had at least been joined in the prior suit. In Rothtrock v. Ohio Farmers Ins. Co., 233 Cal. App.2d 616; 43 Cal. Rptr. 716 (1965), the court rejected the rule of LaFollette v. Herron, 211 F.Supp. 919, which had held under Rule 13(a) of the Federal Rules of Civil Procedure that dismissal of an action by an insurer does not prevent the insured from maintaining a later action on a claim even though that claim could have been raised as a transaction counterclaim to the dismissed action. The California court followed contrary holdings on substantially identical facts and statutes in Keller v. Keklikian, 362 Mo. 919, 244 S.W.2d 1001; Mensing v. Sturgeon, 250 Iowa 918; 97 N.W.2d 145; In re Estate of McClintock, 254 Iowa 593, 118 N.W.2d 540. The situation of the insured in these cases is not identical to that of a prior assignee, but it is substantially similar so that the same constitutional objections as to notice and opportunity for hearing might be raised to barring the insured as can be raised to barring the assignee. The Rothtrock decision and the Missouri and Iowa cases it relied upon, however, depend upon factors which distinguish insurance cases and obviate the constitutional objections. The court found that the insured had actual notice since, as in the normal course of such cases, he was first sued and assigned the case to the insurer for defense and that the insurer in effect acted as the agent of the insured.

Memorandum 70-104

EXHIBIT XII

Code of Civil Procedure Section 428.60. Service of cross-complaint

428.60. (a) A cross-complaint shall be served on the parties affected thereby in the manner provided in this section.

(b) If any party affected by the 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.

(c) If any party affected by the cross-complaint has appeared in the action, the cross-complaint shall be served upon his attorney, or upon the party if he has appeared without an attorney, in the manner provided for service of summons or in the manner provided by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 of this code.

Comment. Section 428.60 continues without substantive change requirements that were imposed under former Code of Civil Procedure Section 442.

Memorandum 70-104

EXHIBIT XIII

Code of Civil Procedure Section 431.70. Set-off

431.70. Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in his answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting his claim would at the time of filing his answer be barred by the statute of limitations. If the cross-demand would otherwise be barred by the statute of limitations, the relief accorded under this section shall not exceed the value of the relief granted to the other party. The defense provided by this section is not available if the cross-demand is barred for previous failure to assert it under Section 426.20 or 426.30. Neither person can be deprived of the benefits of this section by the assignment or death of the other.

Comment. Section 431.70 continues the substantive effect of former Code of Civil Procedure Section 440. See Jones v. Mortimer, 28 Cal.2d 627, 170 P.2d 893 (1946); Sunrise Produce Co. v. Malovich, 101 Cal. App.2d 520, 225 P.2d 973 (1951). Section 431.70, however, is expressly limited to cross-demands for money and specifies the procedure for pleading the defense provided by the section. It is not necessary under Section 431.70, as it was not necessary under Section 440, that the cross-demands be liquidated. See Hauger v. Gates, 42 Cal.2d 752, 269 P.2d 609 (1954). Section 431.70 ameliorates the effect of the statute of limitations; it does not revive claims which have

previously been waived by failure to plead them under Section 426.30. This was an implied holding (under former Code of Civil Procedure Section 439) in Jones v. Mortimer, supra. See also Franck v. J. J. Sugarman-Rudolph, 40 Cal.2d 81, 251 P.2d 949 (1952), holding that Code of Civil Procedure Section 440 did not revive claims previously waived. The same holding would be required with reference to claims barred by Section 426.20. It should be noted that, under Section 426.30 if defendant defaults without answering, he will not later be barred from maintaining an action on what would have been a compulsory counterclaim. Though the statute of limitations may run on such a claim saved by prior default, it will be permitted as set-off under Section 431.70 as in other cases.

Memorandum 70-104

EXHIBIT XIV

BACKGROUND STUDY

Code of Civil Procedure Section 431.70. Set-off

New Section 431.70 accurately states the existing law on the effect of the statute of limitations on cross-demands pleaded defensively for the purpose of set-off. The existing rule under old Section 440 was not set out until 1946 in Jones v. Mortimer,[1] where it was said that, where there are cross-demands between parties which "have existed under circumstances where if either brought an action thereon the other could have set up a counterclaim," "the demands are compensated. That can mean nothing more or less than that each of the claimants is paid to the extent that their claims are equal. To the extent that they are paid, how can the statute of limitations run on either of them? There is no outstanding claim upon which the statute can run. It is discharged."[2] Jones has been followed explicitly.[3]

The Jones case, however, does point to another aspect of the existing law of set-off which Section 431.70 might be thought to change. In Jones, the court first held that plaintiff's counterclaim in set-off was not barred for failure to plead the claim as a compulsory counterclaim in a prior action since the claim did not arise out of the same transaction as was the basis of the prior suit. The court then proceeded to the question whether plaintiff's counterclaim in set-off was barred because the statute of limitations had run. Apparently, had the court found that the counterclaim

---

1. 28 Cal.2d 627, 170 P.2d 893.

2. 28 Cal.2d at 632-633 (emphasis in original).

3. See, e.g., Sunrise Produce Co. v. Malovich, 101 Cal. App.2d 520, 225 P.2d 973 (1951).

was barred for failure to assert it under Section 439, there could have been no remedy of set-off. The court notes that, notwithstanding that the running of the statute of limitations does not necessarily bar a counterclaim in set-off, nothing prevents the interposition of other defenses to the counterclaim. The Jones reasoning that coexisting viable claims are paid and that thereafter the statute of limitations cannot run to the extent that the claims are paid does not seem to affect the rule of Section 439 that action on a claim can be waived.

Though Section 431.70 accurately adopts the reasoning of the Jones case on the effect of the statute of limitations, the section can also apparently be construed as reviving claims which would otherwise be barred if pleaded in set-off. The statute might be taken to indicate, for instance, that, had the claim in Jones been barred as a compulsory counterclaim, it might still be the basis for set-off if at some point it had coexisted with the opposing claim and the statute of limitations had not run on it at that time. If the Comment to Section 431.70 is correct, the last sentence of the section does not cure the problem here since failure to raise a compulsory counterclaim would not bar the claim entirely if pleaded later as a set-off; the claim would only be barred as to excess.

The problem with Section 431.70 is the last sentence, which is intended to eliminate a possible inconsistency between Section 426.30 and Section 431.70. There is no real inconsistency between the sections as far as the statute of limitations is concerned. Under Section 426.30, if defendant makes no answer--defaults--he will not be precluded from later suing on what would have been a compulsory cross-complaint in the first action. Quite apart from Section 426.30, if the statute of limitations runs on a claim, it

cannot later be brought as a cross-complaint or otherwise (whether or not a party has saved it by defaulting in a prior action). Section 431.70 ameliorates this: the section says that the claim can be pleaded as set-off if it coexisted with the opposing claim when neither was barred by the statute of limitations and even though the claim would now be barred by the statute of limitations. The section affects the statute of limitations, which is no part of Section 426.30.

There is an inconsistency between the two sections with regard to the bar of failure to plead a compulsory cross-complaint in a prior suit on the same transaction. Section 431.70 says that a claim is qualified as set-off if it coexisted with the opposing claim at a time when neither was barred by the statute of limitations. This flatly contradicts Section 426.30, which says that regardless of whether cross-demands coexisted at a time when neither was barred by the statute of limitations, if both arise from the same transaction and suit is brought on one, defendant in answering must set up a cross-complaint on his cross-demand or he may not later maintain an action on it against the plaintiff. The last sentence of Section 431.70 and the explanation of that sentence in the Comment to that section do not affect this problem.

The last sentence of Section 431.70 should be rewritten to read: "The defense provided by this section is not available if the cross-demand is barred for previous failure to assert it under Section 426.20 or Section 426.30." The Comment to Section 431.70 should be rewritten to reflect the fact that the section waives only the statute of limitations, but as to all claims, in whole or in part, including claims saved by default under Section 426.30.

Memorandum 70-104

EXHIBIT XV

Code of Civil Procedure Section 1048.5. Transfer to another court for trial when cross-claim severed for trial

Sec. 56. Section 1048.5 is added to the Code of Civil Procedure, to read:

1048.5. If the court orders that a cause of action alleged in a cross-complaint be severed for trial under Section 1048, the court may, in its discretion, for the convenience of witnesses and in the interest of justice, treat the cause severed for trial as if it had been brought as an independent action and order that it be transferred to another court in the manner provided by Section 398 for changing the place of trial when the convenience of witnesses and the ends of justice would be promoted by the change. The order severing and transferring a cause of action alleged in a cross-complaint to another court for trial shall specify the pleadings and papers to be transmitted to the other court under Section 399. The court to which the transfer is made shall deal with the matter as if it had been brought as an independent action and had been transferred to that court for the convenience of witnesses and in the interest of justice.

Comment. Section 399 permits a court to transfer a severed cause of action alleged in a cross-complaint to another court for trial. When a cause of action alleged in a cross-complaint is severed for trial, it may be unfair to one or both of the parties or to the witnesses to try such cause of action in the court where the cross-complaint is filed. Section 397 permits the transfer of an action in order to promote convenience of witnesses and the

ends of justice. Section 1048.5 permits the transfer of a severed portion of an action on the same grounds and in the same manner. However, only the pleadings and papers relating to the cause of action severed for trial and transferred are to be transmitted to the other court.

If the severed cause is not retained by the original court, it should be sent to the most convenient court having jurisdiction over it. Thus, if the cause alleged in the cross-complaint would be one cognizable in municipal court if brought as an independent proceeding, it should be transferred to a municipal court most convenient to the parties even though the original action is one in a superior court. It should be noted, however, that, where severance for trial is desirable but transfer would be undesirable, the court may retain the action for trial even though it would not have had jurisdiction if the action were initiated as an independent proceeding.

The party against whom the cause of action is alleged in the cross-complaint may not have the action retransferred to another court on the grounds of improper venue if a transfer is made pursuant to Section 1048.5. Code Civ. Proc. §§ 395, 398.

The power to transfer a severed cause is discretionary. The court should, however, consider not merely the convenience of the parties, witnesses, and the court, but also whether severance would prejudice a party's claim to a set-off. Thus, where actions, though severed, are retained in one court for trial, provision can be made for a single judgment providing for a proper set-off. On the other hand, where one action is transferred and brought to an earlier conclusion than the other, the losing party in this action can be at a serious practical disadvantage. He will have to satisfy this first judgment (which may be financially difficult) with no assurance that the other party will have funds available to satisfy his own judgment (set-off).

Memorandum 70-104

REVISED

EXHIBIT XV

Code of Civil Procedure Section 403. Transfer to another court for trial when cross-claim severed for trial

Sec. . Section 403 is added to the Code of Civil Procedure, to read:

403. If the court orders that a cause of action alleged in a cross-complaint be severed for trial under Section 1048, the court may, in its discretion, for any cause specified in subdivisions 2, 3, or 4 of Section 397, order that the cause severed for trial be transferred to another court pursuant to this title just as if the cause severed had been brought as an independent action. The order transferring the cause shall specify the pleadings and papers to be transmitted to the other court.

Comment. Section 403 permits a court to transfer a severed cause of action alleged in a cross-complaint to another court for trial. See Section 1048 (authorization to sever). Where the advantages of initial joinder are lost through severance, convenience of witnesses, general fairness to parties, or other reasons may dictate that the cause be tried elsewhere. See subdivisions 2, 3, and 4 of Section 397.

A transfer under Section 403 is made in the same manner as a transfer of an independent action. The court to which transfer is made must have subject jurisdiction (Section 398). Outside that restriction, the parties may agree upon a transferee court (Section 398). Failing an agreement of the parties, transfer may be made to any court having subject jurisdiction (Section 398). Thus, if the cause of action alleged in the cross-complaint

is one cognizable in municipal court if brought as an independent proceeding, if it is transferred, it must be transferred to a municipal court even though the original action is one in the Superior Court. It should be noted, however, that, where severance for trial is desirable but transfer would be undesirable, the court may retain the action for trial even though it would not have had jurisdiction if the action were initiated as an independent proceeding.

The general procedure for transmitting pleadings and papers is prescribed by Section 399. Section 403 further requires that the court making the transfer specify which pleadings and papers are to be transmitted to the other court; only those papers and pleadings relating to the cause of action severed for trial should be transmitted.

The power to transfer a severed cause is discretionary. The court should consider not merely the applicable grounds for transfer but also whether transfer would, for example, prejudice a party's claim for set-off. Thus, where actions, though severed, are retained in one court for trial, provision can be made for a single judgment providing for a proper set-off. On the other hand, where one action is transferred and brought to an earlier conclusion than the other, the losing party in this action can be at a serious disadvantage. He will have to satisfy the first judgment--which may be financially difficult--with no assurance that the other party will have funds available to satisfy his own judgment.

Memorandum 70-104

Code of Civil Procedure Section 583 (conforming amendment)

Sec. . Section 583 of the Code of Civil Procedure is amended to read:

583. (a) The court, in its discretion, may dismiss an action for want of prosecution pursuant to this subdivision if it is not brought to trial within two years after it was filed. The procedure for obtaining such dismissal shall be in accordance with rules adopted by the Judicial Council.

(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended. When, in any action after judgment, a motion for a new trial has been made and a new trial granted, such action shall be dismissed on motion of defendant after due notice to plaintiff, or by the court of its own motion, if no appeal has been taken, unless such action is brought to trial within three years after the entry of the order granting a new trial, except when the parties have filed a stipulation in writing that the time may be extended. When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial (or when an appeal has been taken from an order granting a new trial and

such order is affirmed on appeal), the action must be dismissed by the trial court, on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court.

(c) For the purposes of this section, "action" includes an action commenced by cross-complaint. ~~A "cross-complaint" includes a counterclaim to the extent that it seeks affirmative relief.~~

(d) The time during which the defendant was not amenable to the process of the court and the time during which the jurisdiction of the court to try the action is suspended shall not be included in computing the time period specified in this section.

Comment. The amendment to Section 583 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80.

71 9/24/70

A STUDY RELATING TO JOINDER OF PARTIES*

*This study was prepared for the California Law Revision Commission by Mr. E. Craig Smay of the Commission's legal staff. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

A STUDY RELATING TO JOINDER OF PARTIES

Permissive Joinder

A review of the California statutes on permissive joinder reveals that their language in many instances is not explicit of the existing practice and that there is a confusing lack of integration between the various statutory provisions. The prevailing California rule on permissive joinder of parties, both plaintiffs and defendants, is that parties may be joined where their interests arise out of the same transaction or series of transactions, and where questions of law or fact common to all will arise on the trial.[1] It is not necessary in the case of either plaintiffs or defendants that the party to be joined be interested in all causes of action or all relief sought.[2] Section 378, on permissive joinder of plaintiffs, however, contains the now extraneous criterion for joinder of "interest in the subject of the action," and

---

1. The language of Section 378, governing permissive joinder of plaintiffs, specifically sets forth these requirements. Sections 379 and 379a, governing permissive joinder of defendants, have been held to impose these requirements. See Hoag v. Superior Court, 207 Cal. App.2d 611, 24 Cal. Rptr. 659 (1962); Kane v. Mendenhall, 5 Cal.2d 749, 56 P.2d 498 (1936); 2 Witkin, California Procedure Pleading § 94 at 1072 (1954).

2. See, e.g., Peters v. Bigelow, 137 Cal. App. 135, 30 P. 450 (1934) for the rule regarding plaintiffs. The rule for defendants is specifically set out in Section 379b.

does not specify whether interest in all relief sought is required.[3] Sections 379 and 379a, on permissive joinder of defendants, speak of joinder of persons who claim an interest in the controversy adverse to plaintiff, who are necessary parties, or against whom the right to any relief, joint, several or in the alternative, is alleged to exist.[4] Following these provisions, the code retains a handful of sections[5] containing exceptions to restrictive permissive joinder rules superseded by the amendment and

---

3. Code of Civil Procedure Section 378 reads as follows:

> 378. All persons may be joined in one action as plaintiffs who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any question of law or fact would arise which are common to all the parties to the action; provided, that if upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled.

4. Code of Civil Procedure Sections 379 and 379a read as follows:

> 379. WHO MAY BE JOINED AS DEFENDANTS. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. And in an action to determine the title or right of possession to real property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant.
>
> 379a. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

5. Sections 380, 381, 383.

enactment, respectively, of Sections 378 and 379a in 1927.[6] Revision of permissive joinder provisions has been called for[7] and is clearly in order. The course the reform should take is also plain: Sections 378, 379 and 379a should be amended to state a uniform rule on permissive joinder based on the transaction and common question criteria; sections which state exceptions to rules which have been outmoded should be repealed.

Permissive Joinder of Plaintiffs

No substantial objections, except those noted above, have been raised to Section 378 as it now exists and operates. The section is substantially identical to Rule 20a of the Federal Rules of Civil Procedure, which provides for the broadest sort of permissive joinder of plaintiffs.[8] The provision is a fairly common one except in that it contains the criteria of "interest in the subject of the action.[9] In fact, the "interest in the

---

6. Cal. Stats. 1927, Ch. 386, p. 631; Cal. Stats. 1927, Ch. 259, p. 477. See Chadbourn, Grossman & Van Alstyne, California Practice § 615 (1961); Witkin, supra, §§ 92, 93.

7. Chadbourn, Grossman & Van Alstyne, supra, § 618 at 536; Witkin, supra, § 93 at 1071. The San Francisco Bar Association, in a resolution to the 1970 Conference of State Bar Delegates, notes:

> The present statutory rules are impossible for the practicing attorney to follow without unnecessary guesswork and extensive legal research. The Code of Civil Procedure should be a clear and concise guide for the attorney drafting pleadings and planning litigation.

8. See Clark, Code Pleading (2d ed.), p. 367, n.86; p. 369, n.94.

9. See Witkin, supra, § 91.

subject of the action" language is surplusage, since any joinder permitted under that language is equally permissible under the transaction clause of the section.[10] The transaction clause is broad enough to cover property transactions.[11] As noted above, the section does not specifically provide that parties to be joined as plaintiffs need not be interested in all causes or relief, but the cases have so held.[12]

Permissive Joinder of Defendants

The difficulty and ambiguity inherent in the provisions on permissive joinder of defendants rests in the fact that it is not clear on the face of the sections that, for parties to be joined as defendants, there must be a "factual nexus" relating the claims against them.[13] The nexus concept, which has always been applied under the "transaction" and "common questions" language of Section 378 on permissive joinder of plaintiffs, is

---

10. See Witkin, supra, §§ 91, 92; Clark, supra. The transaction clause covers "any occurrence between persons that may become the foundation of an action," "whatever may be done by one person which affects another's rights, and out of which a cause of action may arise." Colla v. Carmichael U-Drive Autos, 111 Cal. App. Supp. 784, 786, 294 P. 378 (1930). See also Todhunter v. Smith, 219 Cal. 690, 29 P.2d 916 (1934).

11. See Garrison v. Hogan, 112 Cal. App. 525, 297 P. 87 (1931); Witkin, supra, § 92.

12. See Peters v. Bigelow, supra, note 2.

13. See Hoag v. Superior Court, supra, note 1; Southern Cal. Edison Co. v. State Farm Mut. Aut. Ins. Co., 271 Cal. App.2d 744, 76 Cal. Rptr. 909 (1969).

not so obvious or easy to apply that it can safely be left unexpressed in the provisions on permissive joinder of defendants.[14]

Since the requirements for permissive joinder of defendants are regarded as identical with those for permissive joinder of plaintiffs, it would seem expedient to make them expressly identical in order to cure the ambiguity in the sections on defendants.

Special Provisions on Permissive Joinder

Section 378 was amended and Section 379a was enacted for the purpose of liberalizing former restrictive rules on permissive joinder. The sections permit the broadest sort of joinder and render unnecessary sections which merely state exceptions to the old restrictive rules.

Section 380 permits a person out of possession of property to join persons in possession and other adverse claimants in a dispute over adverse claims.[15] Section 381 permits joinder of persons claiming realty under a

---

14. Compare Kraft v. Smith, 24 Cal.2d 124, 148 P.2d 23 (1944)(permitting joinder of two separate doctors who operated on plaintiff at separate times for the same injuries with the result that she was injured further); Landau v. Salam, 10 Cal. App.3d 472, Cal. Rptr. (Aug. 12, 1970)(plaintiff injured in separate accident on separate days and alleged that he was uncertain which accident or defendant caused certain injuries; joinder denied).

15. Code of Civil Procedure Section 380 reads as follows:

> 380. In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed.

common source of title in a claim dispute.[16] Section 383 permits persons severally liable on the same obligation to join or be joined.[17] The joinder permitted by these sections is also permitted by Sections 378, 379, and 379a.[18] Section 380 also contains the provision that, in case the suit contemplated by that section goes for plaintiff, he may have a writ for possession of the premises against defendant. The court has power to issue such a writ notwithstanding Section 380.[19]

---

16. Code of Civil Procedure Section 381 reads as follows:

> 381. Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or if [of] establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same.

17. Code of Civil Procedure Section 383 reads as follows:

> 383. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff; and all or any of them join as plaintiffs in the same action, concerning or affecting the obligation or instrument upon which they are severally liable. Where the same person is insured by two or more insurers separately in respect to the same subject and interest, such person, or the payee under the policies, or the assignee of the cause of action, or other successor in interest of such assured or payee, may join all or any of such insureres in a single action for the recovery of a loss under the several policies, and in case of judgment a several judgment must be rendered against each of such insurers according as his liability shall appear.

18. See Chadbourn, Grossman & Van Alstyne, supra, § 615; Witkin, supra §§ 92, 93.

19. See Code Civ. Proc. §§ 681, 682(5); Montgomery v. Tutt, 11 Cal. 190 (1858).

Section 384 appears to be of a kind with Sections 380, 381, and 383. The section also contains, however, a special exception to a restrictive common law rule.[20] The section permits joint tenants, tenants in common, and coparceners to join and jointly or severally sue to enforce or protect their rights.[21] The common law rule was that such tenants must join.[22] The point of Section 384 is that it permits less than all such tenants to jointly assert the titles of all. The liberal rule of Section 384 has generally been held subject to the requirements of Section 389 (compulsory joinder).[23] Repeal of Section 384 would reinstate the restrictive common law rule.

---

20. See Jameson v. Chanslor etc. Oil Co., 176 Cal. 1, 9, 167 P. 369 (1917).

21. Code of Civil Procedure Section 384 reads as follows:

> 384. TENANTS IN COMMON, ETC., MAY SEVER IN BRINGING OR DEFENDING ACTIONS. All persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party.

22. Johnson v. Sepulbeda, 5 Cal. 149 (1855); Throckmorton v. Burr, 5 Cal. 400 (1855).

23. Thus, all must be joined in a suit for partition between them. Solomon v. Redona, 52 Cal. App. 300, 198 P. 643 (1921). A lease cannot be forclosed by less than all where the lease makes the right to forclose run to all jointly. Jameson v. Chanslor etc. Oil Co., supra, note 18. Less than all joint tenants cannot have a decree of quiet title against a third party. Woodson v. Torgerson, 108 Cal. App. 386, 291 P. 663 (1930). (Compare Messersmith v. Smith, 62 Cal. App. 446, 217 P. 105 (1923), holding that quiet title can be maintained by one tenant in common.) "[T]he liberalizing rule of C.C.P. 384 extends only to situations where the interests of other cotenants will not be affected." Witkin, supra, § 79.

Separate Trials

California courts have general discretionary power to sever causes in the interests of justice and judicial administration.[24] This power is specifically extended by Sections 378 and 379b to cover cases where joinder of plaintiffs or defendants results in embarrassment to the trial or the parties.[25] The difference in terms between Sections 378 and 379b might well be comprised by combining the sections in a single provision on severance, since the requirements of the two sections are held to be the same.[26]

---

24. Cal. Code Civ. Proc. § 1048, see, e.g., Oakland v. Darbee, 102 Cal. App.2d 493, 502, 227 P. 909 (1951).

25. See Westphal v. Westphal, 61 Cal. App.2d 544, 548, 143 P.2d 405 (1943); Witkin, supra § 98; Chadbourn, Grossman, & Van Alstyne, supra, § 622. The court may also, under these rules, sever the causes in cases of misjoinder. See Hoag v. Superior Court, supra, note 1.

26. See Witkin, supra, § 98.

Compulsory Joinder

The California rules on compulsory joinder are found in Sections 389 [27]

---

27. Code of Civil Procedure Section 389 reads as follows:

> 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 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.

The section was amended in 1957, at the recommendation of the California Law Revision Commission to make it conform to the developments in the case law to that date. See Recommendation and Study Relating to Bringing New Parties Into Civil Actions, 1 Cal. L. Revision Comm'n Reports, M-1 to M-24 (1957). The section has been widely criticized for its policy of attempting to avoid multiplicity of actions beyond what is necessary to avoid prejudice to interested persons. See Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 32 (mimeographed draft 1970); Comment, Bringing New Parties Into Civil Actions in California, 46 Cal. L. Rev. 100 (1958); Joinder of Parties in Civil Actions in California, 33 So. Cal. L. Rev. 428 (1960).

and 382.[28] The leading California case on compulsory joinder, the rule of which is said to have been written into Section 389 in 1957,[29] is Bank of California v. Superior Court.[30] The rule in Bank of California states essentially the same tests for indispensable and necessary parties as were laid down in the leading American case.[31]

---

28. Section 382 provides: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants . . . ." As a guide for determining who are indispensable parties and must be joined, the section is incomplete and unsafe. One may be an indispensable or necessary party absent unity of interest with plaintiff or defendant. See, e.g., Child v. State Personnel Board, 97 Cal. App.2d 467, 218 P.2d 52 (1950)(all successful candidates on civil service examination held indispensable in suit by unsuccessful candidate against Board members to cancel examination and eligible lists based thereon. Unity of interest does not always make one an indispensable or necessary party. See Williams v. Reed, 113 Cal. App.2d 195, 204, 248 P.2d 147 (1952)(joint and several obligors may be sued individually). Section 382 states a common law rule which modernly has been thoroughly criticized as a defective expression and defeative of the original proper purpose of compulsory joinder. See particularly Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327 (1957); Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Colum. L. Rev. 1254 (1961).

29. See note 24, supra.

30. 16 Cal.2d 516 (1940).

31. Shields v. Barrow, 58 U.S. (17 How.) 130 (1854).

Under the Bank of California case, the court, in determining which persons are indispensable parties and which the court may proceed without if necessary, is to consider whose interest will be affected by any particular adjudication of the cause presented, whether interests which may be affected are separable so that a decree may be formed which saves them, and to what extend the court can adhere to the general rule that a court will give a complete adjudication where possible. The possible answers to these questions are confused because of the rule of Section 382 that those united in interest must be joined, which may be taken as precluding a critical examination of which interests are affected in fact by the controversy and which may be treated as separable for the purposes of reaching an adjudication between parties before the court,[32] and the rule that the absence of a person whose interests will be affected by a judgment ousts the court of jurisdiction of the cause,[33] which seems to preclude an incomplete adjudication of just the interests of those before the court when a complete adjudication of all interests affected is not possible.

A statute which in fact enacts the rule of the Bank of California case would need to dispense, for the purpose of avoiding confusion, with the notion that indispensable or necessary parties are to be determined by labelling their interests "united," "joint," "joint and several," or the like, and the rule that failure to join an interested party spoils the

---

32. In practice, as noted, supra, note 25, it has not been found always useful to strictly apply Section 382 in determining who are indispensable or necessary parties.

33. See, e.g., Irwin v. City of Manhattan Beach, 227 Cal. App.2d 634 (1964); Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163 (1937).

court's jurisdiction to proceed.[34] Such a new rule should also correct the difficulties noticed in Section 389 by limiting its purpose to the prevention of prejudice to interested parties.

Rule 19 of the Federal Rules of Civil Procedure, amended in 1966, does all of these things.[35] The Federal Rule is based on the following principles: (1) All materially interested persons should, if feasible, be joined; notwithstanding failure to join others, the court has jurisdiction of these who are joined and only they are to be bound (affected) by the decree. (2) Interest is to be distinguished as to its two possible meanings: interest in the property or transaction which is the subject of the suit and actual interest in the controversy as defined by the complaint. Only those who are actually interested in the controversy can be indispensable; interest in the subject matter is not enough. (3) The rule is not mandatory but discretionary: The court may make less than a complete adjudication of all possible interests when it must make either an incomplete adjudication or none at all. The rule requires that the court refuse to proceed only where it has decided that it cannot frame a decree which will not have an actual inequitable effect upon interests either of parties present or absent unless absent parties are joined.

---

34. This notion is particularly noxious since it may result in leaving plaintiff without a remedy where he may be content with less than a complete satisfaction of his claim. In any case, the idea hardly stands to reason: certainly the court has no jurisdiction over persons not joined or represented, but it is difficult to see how this destroys jurisdiction of parties present. See Reed, supra, p. 330 et seq.

35. See the Advisory Committee's note on amended Rule 19.

#71 7/15/70

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

COUNTERCLAIMS AND CROSS-COMPLAINTS, JOINDER OF CAUSES OF ACTION, AND RELATED PROVISIONS

July 1970

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

C O N T E N T S

CODE OF CIVIL PROCEDURE

RECOMMENDATION OF THE LAW REVISION COMMISSION

INTRODUCTION

Although several areas of California civil procedure have been reviewed and modernized in recent years,[1] there has been relatively little change in the California code pleading system since its adoption in 1851.[2] While study reveals that a comprehensive review of the statutes relating to pleading is needed, the Commission has been authorized initially to deal with only two aspects that are in need of immediate reform: (1) counterclaims and cross-complaints and (2) joinder of causes of action.[3] This recommendation deals comprehensively with these two matters and the inextricably related matter of joinder of parties.

---

1. For example, completely new provisions relating to depositions and discovery, based largely on the Federal Rules of Civil Procedure, were enacted in 1957. Cal. Stats. 1957, Ch. 1904, § 3, p. 3322. See Code Civ. Proc. §§ 2016-2036. Rules governing pretrial procedures were first promulgated by the Judicial Council in 1957; major changes were adopted in 1963; and significant amendments were made in 1967. See Cal. Rules of Ct., Rules 206-218. Upon recommendation of the Law Revision Commission, the Evidence Code was enacted in 1965. Cal. Stats. 1965, Ch. 299. The provisions relating to appeals in civil actions were reorganized and streamlined in 1968. Cal. Stats. 1968, Ch. 442, adding Title 13 (commencing with Section 901) to Part 2 of the Code of Civil Procedure. A modern statute on jurisdiction and service of process was enacted in 1969. Cal. Stats. 1969, Ch. 1610, adding Title 5 (commencing with Section 410.10) to Part 2 of the Code of Civil Procedure.

2. The code pleading system was introduced in California by the Practice Act of 1851. Cal. Comp. Laws, Ch. 123, §§ 36-71. The Practice Act of 1851, which was based on the incomplete Field Code of Civil Procedure enacted in New York in 1848, was carried over into the 1872 California Code of Civil Procedure as Title 6 (commencing with Section 420) of Part 2.

3. The Commission may study only those topics that the Legislature, by concurrent resolution, has approved for study. Govt. Code § 10335. The Commission has not requested that it be granted authority to make an overall study of pleading because it has other major projects underway that must be given priority.

JOINDER OF CAUSES OF ACTION

Background

Section 427 of the Code of Civil Procedure,[4] which states the rules governing permissive joinder of causes of action, is a conglomerate of common law and

---

4. Section 427 provides:

> 427. The plaintiff may unite several causes of action in the same complaint, where they all arise out of:
>
> 1. Contracts, express or implied. 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.
>
> 3. Claims to recover specific personal property, with or without damages for the withholding thereof.
>
> 4. Claims against a trustee by virtue of a contract or by operation of law.
>
> 5. Injuries to character.
>
> 6. Injuries to person.
>
> 7. Injuries to property.
>
> 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

equity rules,[5] complicated by piecemeal attempts at improvement.[6] In general, the section permits a plaintiff to join several causes of action in one complaint if: (1) all causes belong to one and only one of the categories set forth in subdivisions 1 through 9 of the section; (2) all causes affect all parties to the action; (3) no cause requires a different place of trial; and (4) each cause is separately stated.

The Designated Categories Approach

The joinder categories created by Section 427 are, for the most part, arbitrary, are not based on reasons of practical convenience, and operate to defeat the purpose of permitting joinder of causes in order to settle all

---

> 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.

5. Louisell & Hazard, Pleading and Procedure 636-639 (2d ed. 1968).

6. The origin and history of the section is traced in Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 5-23 (mimeographed draft 1970).

conflicting claims between the parties in a single action.[7] Elimination of the joinder categories and adoption of an unlimited joinder rule would yield substantial benefits. As Professor Friedenthal, the Commission's research consultant, points out:[8]

> As a practical matter there will only be a small number of situations in which a plaintiff will have several causes of action against a defendant which do not arise from one set of transactions or occurrences so as to permit joinder under section 427. Even then such unrelated causes may be joined if they all fall within some other category of the statute. Thus the adoption of an unlimited joinder rule will not have much impact on the number of causes that can in fact be joined. Nevertheless, a number of benefits will accrue from such revision. Under the current provision defendants are encouraged, whenever tactically sound, to challenge the joinder of causes by arguing that no category applies. Even when unsuccessful, argument on such an issue is costly and time consuming. In those few cases where the challenge is successful, the plaintiff must file an amended complaint eliminating one or more of his original causes.

---

7. Virtually every writer on the subject has expressed this view. See Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 8 n.13 (mimeographed draft 1970). Practicing lawyers appear to be of the same view. The San Francisco Bar Association has proposed a resolution to the 1970 Conference of State Bar Delegates which would substitute for Section 427 an unlimited joinder provision based on the Federal Rules of Civil Procedure. In support of its resolution, the Association states:

> The present statutory rules are unnecessarily difficult for the practicing attorney to follow without guesswork and extensive legal research. The Code of Civil Procedure should be a clear and concise guide for the attorney drafting pleadings and planning litigation. The present statutes relating to joinder are highly unpredictable in their effect--an intolerable situation.

8. Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 13-14 (mimeographed draft 1970).

If the original complaint was filed shortly before the statute of limitations ran on the various causes, plaintiff may even be forced to a final election as to which of the causes to pursue since a new independent action on any cause dropped from the case will be barred.

There are a number of substantial practical reasons why failure to permit joinder of even totally unrelated claims is unsound. Separate cases require duplication of filing fees and of the costs of service of process, not to mention the costs of the unnecessary duplication of discovery proceedings and two trials instead of one. Furthermore, even unrelated claims may involve certain common issues and may require the presence of the same witnesses.

Other Limitations on Joinder of Causes

The other limitations that Section 427 imposes on joinder of causes also should be eliminated. The requirement that all causes of action joined "must affect all the parties to the action" is inconsistent with and superseded by subsequently enacted Section 379b of the Code of Civil Procedure.[9] The provision that causes of action cannot be joined if they "require different places of trial" serves no useful purpose and has rarely been relied upon.[10]

Recommendations

Permissive joinder of causes. The limitations Section 427 of the Code of Civil Procedure imposes on joinder of causes of action are undesirable. Section 427 should be replaced by a provision allowing unlimited joinder of causes

---

9. Section 379b specifically provides that "it shall not be necessary that each defendant shall be interested as . . . to every cause of action included in any proceeding against him . . . ." (Emphasis added.) This inconsistency had been judicially resolved by permitting Section 379b to prevail. Kraft v. Smith, 24 Cal.2d 124, 148 P.2d 23 (1944). See also Peters v. Bigelow, 137 Cal. App. 135, 30 P.2d 450 (1934). Nevertheless, the respective sections remain in apparent conflict.

10. Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 21-23 (mimeographed draft 1970).

of action against those persons who have properly been made parties to the action. The experience under Rule 18(a) of the Federal Rules of Civil Procedure,[11] providing for unlimited joinder of causes of action, has been entirely satisfactory.[12] This rule has been a model for reform in a steadily expanding number of states. The California experience with the broad joinder of causes in counterclaims has been equally good.[13] By way of contrast, the general California provision on joinder of causes--Section 427--is modeled on the joinder provision of the Field Code, a provision that has been criticized as "one of the least satisfactory provisions of the Field Code."[14] Accordingly, adoption of an unlimited joinder of causes provision would be a significant improvement in California law. Any undesirable effects that might result from unlimited joinder of causes can be avoided by a severance of the causes for trial.[15]

---

11. Rule 18(a) reads as follows:

> (a) A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join . . . as many claims, legal, equitable, or maritime, as he has against an opposing party.

12. Wright, Joinder of Claims and Parties Under Modern Pleading Rules, 36 Minn. L. Rev. 580, 586 (1952).

13. Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 10-11 (mimeographed draft 1970).

14. 2 Barron & Holtzoff, Federal Practice and Procedure 66 n.0.1 (1961).

15. As Professor Friedenthal points out:

> Joinder of causes, in and of itself, is never harmful. Only a joint trial of causes may be unjustified, either because the trial may become too complex for rational decision, or because evidence introduced on one cause will so tend to prejudice the trier of fact that it will be unlikely to render a fair decision on any other cause. These latter problems which are certainly not obviated by the current arbitrary categories can be avoided by resort to Code of Civil Procedure section 1048 which permits the court, in its discretion, to sever any action. [Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 12 (mimeographed draft 1970).]

Separate statement of causes. Section 427 requires generally that each cause of action be separately stated. It has been asserted that the requirement--especially as to causes arising out of the same transaction or occurrence--tends to "encourage prolixity and uncertainty in the statement of the facts constituting the cause or causes of action."[16] And, it might be noted that, if the separate statement requirement were eliminated and confusion resulted because the causes of action were not separately stated, the defect could be reached by demurrer for uncertainty.[17] Nevertheless, the Commission has concluded that the separate statement requirement may provide clarity--whether or not the cause joined arises out of the same transaction or occurrence--and has

---

16. 2 Witkin, California Procedure Pleading § 497 (1954). Witkin elaborates:

> No doubt it is desirable to require the plaintiff to state his causes of action separately and not in a confusing hodgepodge, but the distinct ground of uncertainty (infra, § 498) should be sufficient to take care of that defect. The demurrer for lack of separate statement goes much further and would condemn a pleading which is a model of organization, brevity and clarity, and which sets forth all the essential facts without repetition or needless admixture of legal theory. Under the primary right test of the cause of action the same acts or events may invade several rights and give rise to several causes of action. To withstand demurrer the complaint must either repeat or incorporate by reference the same facts in separately stated counts, so that each count will be complete in itself. (See supra, §§ 149, 204.) The difficulty of distinguishing between truly separate causes of action and the same cause pleaded in accordance with different legal theories (see supra, § 181) leads the pleader to err on the safe side and set forth as many "causes of action" as he can think of. In order to make the separate causes appear distinct, legalistic terminology appropriate to the different theories is employed in drafting the counts, with the result that many of the same facts are confusingly restated in different language. In brief, the requirement of separate statement, and its corresponding ground of demurrer, encourage prolixity and uncertainty in the statement of the facts constituting the cause or causes of action.

17 2 Witkin, California Procedure Pleading § 497 (1954).

determined that the requirement should be retained; but the present statutory exceptions[17a] to the separate statement requirement should not be continued.

Mandatory joinder of causes. Where one person files an action against another, and either of them has a cause of action against the other arising from the same transaction or occurrence as the cause filed, he should be required to assert such cause in the action; otherwise it should be deemed waived and all rights thereon extinguished. California does not now have such a statutory requirement applicable to plaintiffs.[18] However, the trial of one cause ordinarily will involve the same witnesses, if not the identical issues, as the trial of another cause arising out of the same transaction or occurrence. As a practical matter, the plaintiff seldom fails to plead all causes arising out of the same transaction or occurrence, both for the sake of convenience and because he fears that the rules of res judicata or collateral estoppel may operate to bar any causes he does not plead. The recommended rule is consistent with Section 439 of the Code of Civil Procedure which makes compulsory any counterclaim arising from the same transaction as that upon which the plaintiff's claim is based. Adoption of the rule would clarify the law by avoiding the need to rely on the uncertain rules of res judicata and collateral estoppel[19] to determine whether a cause is barred by failure to assert it in a prior action. More important, it would avoid the possibility that the parties to a lawsuit will fail to dispose of all claims arising out of the same transaction or occurrence in one action.

17a. The last paragraph of Section 427 provides an exception to the separate statement requirement for the husband's consequential damages in an action brought by the husband and wife for damages for injury to the wife and an exception for causes of action for injury to person and property resulting from the same tort. See note 4, supra.

18. For a discussion of the existing California law, see Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 21-23 (mimeographed draft 1970).

19. See id. at 26-28.

JOINDER OF PARTIES

Introduction

If every case involved but one plaintiff and one defendant, the rules governing permissive joinder of causes of action could be dealt with in isolation. However, in modern litigation, such a situation is probably the exception rather than the rule. It is essential, therefore, that the rules relating to joinder of parties be considered together with those relating to joinder of causes. Two separate situations require consideration: First, the circumstances under which parties may be joined at the option of the plaintiff or plaintiffs, i.e., permissive joinder and the effect of misjoinder; second, the circumstances under which a person should or must be joined, i.e., compulsory joinder and the effect of nonjoinder.

Permissive Joinder of Plaintiffs

Any persons may be joined as plaintiffs under Section 378 of the Code of Civil Procedure if (1) they claim a right to relief with respect to the same transaction or series of transactions, or they have an interest in the subject of the action and (2) there is a common question of law or fact which would have to be resolved if separate actions were brought.[20] Section 378

---

20. Section 378 of the Code of Civil Procedure provides:

> 378. All persons may be joined in one action as plaintiffs who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any question of law or fact would arise which are common to all the parties to the action; provided, that if upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court

seems to have operated satisfactorily since its amendment in 1927 and needs no basic revision. However, it is already strikingly similar to Rule 20(a) of the Federal Rules of Civil Procedure which provides in part:

> All persons may join in one action as plaintiffs if they assert any right to relief . . . in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

It should be noted that the "interest in the subject of the action" clause is omitted in the federal rule. It was predicted that this alternative ground for joinder in California "may become a dead letter."[21] In view of the broad scope granted the "transaction" clause,[22] and the apparent failure of any California appellate court to rely upon the "interest in the subject" clause for more than 35 years, the prophecy seems fulfilled. The Commission accordingly recommends that Section 378 be rephrased in conformity with Rule 20(a) and the present California practice.

Permissive Joinder of Defendants

Permissive joinder of defendants is governed generally by Sections 379 and 379a of the Code of Civil Procedure. These sections provide in part that any person may be joined as a defendant "who has or claims an interest in the controversy adverse to the plaintiff" (Section 379) or "against whom the right to any relief is alleged to exist" (Section 379a). Conspicuously

---

> may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled.

21. 2 Witkin, California Procedure Pleading § 91 at 1069 (1954).

22. Colla v. Carmichael U-Drive Autos, Inc., 111 Cal. App. Supp. 784, 294 P. 378 (1930)("any occurrence between persons that may become the foundation of an action").

absent are the joinder requirements for plaintiffs that the right to relief arise out of the same transaction and that common questions of law or fact be involved. These latter restrictions have, however, been inserted by judicial decision.[23] Nevertheless, the existing statutory deficiency and the inherent ambiguity and overlap in Sections 379 and 379a have been justly criticized.[24]

In contrast, Rule 20(a) of the Federal Rules of Civil Procedure explicitly provides the same substantive test for joinder of defendants as for joinder of plaintiffs. It states in part:

> All persons . . . may be joined in one action as defendants if there is asserted against them . . . any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

The substitution of a test for the permissive joinder of defendants based on

---

23. See Hoag v. Superior Court, 207 Cal. App.2d 611, 24 Cal. Rptr. 659 (1962), quoting with approval a statement from Chadbourn, Grossman, and Van Alstyne that "the holdings seem to demand that there be some sort of factual 'nexus' connecting or associating the claims pleaded against the several defendants."

24. Chadbourn, Grossman, and Van Alstyne state that, "it would seem to be desirable to amend the provisions governing joinder of defendants so that whatever requirements are intended will be express and not hidden in the implications of decisional law." California Practice § 618 at 536 (1961).

Mr. Witkin comments, "that we have liberal joinder rules [as to defendants], but too many of them and little integration." 2 Witkin, California Procedure Pleading § 93 at 1071 (1954).

More outspoken is the San Francisco Bar Association. The Association has proposed a resolution to the 1970 Conference of State Bar Delegates which would substitute provisions for permissive joinder of parties similar to Federal Rule 20. In support of their resolution, they state:

> The present statutory rules are impossible for the practicing attorney to follow without unnecessary guesswork and extensive legal research. The Code of Civil Procedure should be a clear and concise guide for the attorney drafting pleadings and planning litigation.

Federal Rule 20(a) would not change existing California practice but would provide clear and concise statutory guidelines. The Commission recommends that this be done.

Because revision of Section 379 to conform to Federal Rule 20(a) would eliminate any need for Section 379c of the Code of Civil Procedure,[25] the Commission recommends that Section 379c be repealed.[26]

Special Statutory Provisions for Permissive Joinder

Section 378 was amended[27] and Section 379a was added[28] in 1927 to liberalize the then existing statutory rules. The old restrictive provisions were

---

25. Section 379c of the Code of Civil Procedure provides:

> 379c. Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties.

26. Federal Rule 20(a) provides that, "all persons . . . may be joined in one action as defendants if there is asserted against them . . . in the alternative, any right to relief . . . ." The latter provision for joinder in the alternative would encompass any situation now covered by California Code of Civil Procedure Section 379c. See Kraft v. Smith, 24 Cal.2d 124, 148 P.2d 23 (1944). See generally 2 Witkin, California Procedure Pleading §§ 96, 97 (1954).

27. Cal. Stats. 1927, Ch. 386, p. 631.

28. Cal. Stats. 1927, Ch. 259, p. 477.

subject to several express statutory exceptions set out in Sections 381,[29] 383,[30] and 384.[31] These sections are now simply deadwood inasmuch as they merely authorize joinder that is permissible under Sections 378, 379, and 379a.[32] Any comprehensive revision of the statute relating to joinder of parties should include the elimination of these vestiges of an earlier day, and the Commission recommends that these three sections be repealed.

---

29. Section 381 of the Code of Civil Procedure provides:

> 381. Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or if [of] establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same.

30. Section 383 of the Code of Civil Procedure provides:

> 383. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff; and all or any of them join as plaintiffs in the same action, concerning or affecting the obligation or instrument upon which they are severally liable. Where the same person is insured by two or more insurers separately in respect to the same subject and interest, such person, or the payee under the policies, or the assignee of the cause of action, or other successor in interest of such assured or payee, may join all or any of such insurers in a single action for the recovery of a loss under the several policies, and in case of judgment a several judgment must be rendered against each of such insurers according as his liability shall appear.

31. Section 384 of the Code of Civil Procedure provides:

> 384. TENANTS IN COMMON, ETC., MAY SEVER IN BRINGING OR DEFENDING ACTIONS. All persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party.

32. See 1 Chadbourn, Grossman & Van Alstyne, California Practice § 615 (1961); 2 Witkin, California Procedure Pleading §§ 92, 93 (1954).

Separate Trials

The liberal rules of permissive joinder permit parties to be brought together in one action who are not interested in all of the issues to be tried. Situations can and do arise where joinder might cause undue hardship to a party or create unnecessary confusion or complexity at trial.[33] Accordingly, the provisions governing joinder of both plaintiffs[34] and defendants[35] provide for judicial control through severance where necessary.[36] Similarly where the scope of these rules has been exceeded and misjoinder occurs, the court will order severance for trial.[37] No substantive change in these rules is required or desirable, but the Commission recommends that the present provisions be consolidated.

Compulsory Joinder

We turn now from the question who may be joined if the plaintiff chooses to the question who must or should, if possible, be joined in an action. In

---

33. See generally 1 Chadbourn, Grossman & Van Alstyne, California Practice § 622 (1961); 2 Witkin, California Procedure Pleading § 98 (1954).

34. Section 378, dealing with joinder of plaintiffs, provides in part:

> [I]f upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials or make such other order as may be expedient . . . .

35. Section 379b, dealing with joinder of defendants, provides in part:

> [T]he court may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.

36. A similar rule with respect to discretionary severance prevails under the Federal rules. Rule 20(b) provides:

> The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

37. See Hoag v. Superior Court, 207 Cal. App.2d 611, 24 Cal. Rptr. 659 (1962).

California, two separate statutes deal with the question. Section 382 of the Code of Civil Procedure sets forth the old common law rule as follows:[38]

> Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants . . . .

Section 389 attempted to restate the developing California case law as follows:

> 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. . . .

Neither provision appears satisfactory. Section 382 does not even make clear that it contemplates the joinder of additional parties. More critically, as a guide, Section 382 is both incomplete and unsafe. Thus, on the one hand, one can be an indispensable or necessary party in the absence of a unity in interest.[39] On the other hand, the presence of a unity in interest does not always render a person either indispensable or necessary.[40]

---

38. Section 382 also deals with the joining of an involuntary plaintiff and representative or class actions. These matters are not within the scope of the Commission's study and no change is made with respect to these matters in the legislation recommended by the Commission.

39. See Child v. State Personnel Board, 97 Cal. App.2d 467, 218 P.2d 52 (1950). In an action brought by an unsuccessful candidate against the members of the Personnel Board, to cancel a civil service examination and eligibility lists based thereon, all the successful candidates were held to be indispensable parties. However, they do not seem to have been united in interest in the usual sense of the term with either plaintiff or defendants.

40. See Williams v. Reed, 113 Cal. App.2d 195, 204, 248 P.2d 147, (1952) (joint and several obligors may be sued individually). See generally 1 Chadbourn, Grossman & Van Alstyne, California Practice § 593 at 517 (1961); 2 Witkin, California Procedure Pleading § 76 at 1053 (1954).

Section 389 was amended to its present form in 1957 upon the recommendation of the Law Revision Commission.[41] As indicated above, the amended section merely attempted to clarify and restate existing case law.[42] However, the section was, with some merit, critically received.[43] For example, the second paragraph directs the 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." It has been noted that a broad literal reading of Section 389 "would mean that every person permitted to be joined would have to be joined."[44] The Commission obviously did not intend this language to be so broad, and it has not been so interpreted.[45] The Commission has accordingly reconsidered Section 389 and the purposes compulsory joinder should serve. Section 389 presently attempts not only to avoid prejudice to the parties but also to promote the general convenience of the courts by preventing a multiplicity of suits. The attempt to accomplish these purposes presents not only drafting problems, but problems of enforcement and the possibility of stimulating unnecessary litigation as well. A

---

41. See Recommendation and Study Relating to Bringing New Parties Into Civil Actions, 1 Cal. L. Revision Comm'n Reports, M-1 to M-24 (1957).

42. See id. at M-5, M-6.

43. See Comments, Bringing New Parties Into Civil Actions in California, 46 Cal. L. Rev. 100 (1958); Joinder of Parties in Civil Actions in California, 33 So. Cal. L. Rev. 428 (1960).

44. Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 32 (mimeographed draft 1970).

45. See, e.g., Duval v. Duval, 155 Cal. App.2d 627, 318 P.2d 16 (1957).

different approach is offered by Rule 19 of the Federal Rules of Civil Procedure.[46] Rule 19 limits compulsory joinder to those situations where the absence of a person may result in substantial prejudice to that person or

---

46. Rule 19 provides:

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 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.

to the parties already before the court. It is generally recognized that this rule has satisfactorily dealt with one of the most difficult problem areas of civil procedure. On balance, the approach of the federal rules appears to be the more desirable one. The Commission accordingly recommends that Section 382 be revised to delete the clause cited above and that Section 389 be revised to conform substantively to Federal Rule 19.

COUNTERCLAIMS AND CROSS-COMPLAINTS

Background

Under existing California law, a defendant may find that arbitrary limitations preclude him from asserting in the same action a claim he has against the plaintiff. Even where he is permitted to assert his claim in the same action, he must determine whether he should plead it as an affirmative defense, a counterclaim, or a cross-complaint, and whether it is a compulsory counterclaim.

By a cross-complaint, under Code of Civil Procedure Section 442, a defendant seeks affirmative relief, against any person, on a claim arising out of the same transaction or occurrence as the claim asserted against him. By a counterclaim, under Code of Civil Procedure Section 438, the defendant asserts a claim which "must tend to diminish or defeat the plaintiff's recovery" and which "must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action." Where his counterclaim "arises from the transaction set forth in the complaint," and in no other case, his claim will be deemed a compulsory counterclaim under Code of Civil Procedure Section 439, and he will be barred from maintaining an independent action against the plaintiff on the claim.

Thus, the defendant's claim may qualify either as a counterclaim under Section 438, a cross-complaint under Section 442, as neither, or as both.[47]

---

47. Both the counterclaim and cross-complaint serve the same general purpose:

> One of the objects of the reformed or code procedure is to simplify the pleadings and conduct of actions, and to permit of the settlement of all matters of controversy between the parties in one action, so far as may be practicable. And to this end most of the codes have provided that the defendant, in an action may, by appropriate pleadings, set up various kinds of new matter, or cross-claims, which must otherwise have been tried in separate actions. Generally speaking, in most of the states this new

The technical distinctions created by the different provisions for counterclaims and for cross-complaints create problems for both the defendant and the plaintiff. The defendant must determine how he should plead his claim--as an affirmative defense, counterclaim, or cross-complaint--and also whether his claim is a compulsory counterclaim. Without regard to how the defendant designates his pleading, the plaintiff must determine whether the defendant's claim is properly an affirmative defense or counterclaim (which need not be answered) or a cross-complaint (which requires an answer). The defendant may avoid worry, and perhaps time and effort, by simply pleading his claim as both a cross-complaint and a counterclaim. This throws the problem of distinction upon plaintiff or, if plaintiff chooses simply to answer without making distinctions, upon the court.[48] On one hand, the present system invites confusion, which may jeopardize valid claims; on the other, a multiplicity of pleadings, which is unnecessary.

> matter is broad enough to embrace all controversies which upon previous statutes might have been the subject of setoff, and all claims which under the adjudication of courts might have been interposed as defenses by way of recoupment, and secures to a defendant all the relief which an action at law, or a bill in equity, or a cross-bill would have secured on the same state of facts prior to the adoption of the code. The object of these remedial statutes is to enable, as far as possible, the settlement of cross-claims between the same parties in the same action, so as to prevent a multiplicity of actions. [Pacific Finance Corp. v. Superior Court, 219 Cal. 179, 182, 25 P.2d 983, (1933).]

48. The California courts have attempted to meet these problems by an extremely liberal rule of construction. The court will sometimes disregard the designation given the pleading by the defendant--and, if necessary, the construction placed on the pleading by the plaintiff--and will look to the substance of the claim to decide what designation is proper for the pleading under the facts. 2 Witkin, California Procedure Pleading § 570 at 1576 (1954). As Witkin notes: "This may mean one of two things: If the cross-claim comes under only a single classification, the court will reclassify and treat it as what it should be. But if the claim comes under more than one classification, the court will treat it as a counterclaim or cross-complaint or affirmative defense to reach the most desirable result in the particular case." Ibid. (emphasis in original).

Recommendations

No useful purpose is served by the present California system of separate, but overlapping, counterclaims and cross-complaints. In contrast to the complex California scheme, in the great majority of jurisdictions any cross-claim is dealt with under a single set of rules. Under the Federal Rules of Civil Procedure[49] and other modern provisions, any cause of action which one

---

49. E.g., Rule 13 of the Federal Rules of Civil Procedure, which provides:

COUNTERCLAIM AND CROSS-CLAIM

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) Counterclaim Against the United States. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

party has against an opposing party may be brought as a counterclaim, regardless of its nature.[50]

California should adopt a single form of pleading--to be called a cross-complaint[51]--that would be available against plaintiffs, codefendants, and strangers, would embody the relief now available by counterclaim and cross-complaint, and would eliminate technical requirements that serve no useful purpose.

(g) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

(i) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

50. See Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 26 (mimeographed draft 1970).

51. The term "cross-complaint" has been chosen to designate the single form of pleading because the pleading is to be treated the same in substance as a complaint. The term implies no difference from the federal "counterclaim" under Federal Rule 13(b). There is no requirement that the "cross-complaint" arise from the same transaction or occurrence.

The following rules should apply to the new cross-complaint:

(1) The counterclaim should be abolished; the defendant should be permitted to assert any claim he has against the plaintiff in a cross-complaint, regardless of its nature. This will permit the defendant to assert causes in a cross-complaint which today meet neither the counterclaim nor cross-complaint requirements. But only a few claims--those which neither arise from the same transaction or occurrence as the plaintiff's claim nor meet the current counterclaim requirements[52]--will be affected. There is no sound reason for excluding these claims; they can cause no more confusion than presently permitted counterclaims which are totally unrelated to the plaintiff's cause of action. Any undesirable effects that might result from this slight expansion of the claims that the defendant may assert against the plaintiff can be avoided by a severance of causes for trial.

(2) A person against whom a cross-complaint is filed should be required to answer. The cross-complaint will replace the present counterclaim and cross-complaint. Under existing law, an answer is required to a cross-complaint (which asserts a cause of action arising out of the same transaction as the plaintiff's cause), but none is required to a counterclaim (which may assert a cause of action completely unrelated to the plaintiff's cause). There is no justification for this distinction since a counterclaim is more likely to inject new matter into the litigation than a cross-complaint. An answer to what now constitutes a counterclaim would be useful in notifying the defendant and the court which of the defendant's allegations will be controverted and what affirmative defenses the plaintiff will rely upon at the trial of the defendant's claim.

---

52. The "diminish or defeat" and "several judgment" requirements now restrict the use of a counterclaim. See Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 43-48, 60-61 (mimeographed draft 1970).

(3) A party against whom a cross-complaint is filed should be permitted to file a cross-complaint just as if the cross-complaint filed against him had been a complaint[53] and should also be subject to compulsory cross-complaint rules.

(4) A person who files a cross-complaint should be permitted and required to join any additional persons whom he would have been permitted or required to join had his cause been asserted in an independent action.

(5) A person who files a cross-complaint should be subject to the provisions relating to mandatory joinder of causes of action.

(6) Whenever a party is sued on a cause of action arising out of the same transaction or occurrence, or affecting the same property, as an unpleaded cause which the party has against either a nonadverse party or a stranger to the lawsuit, he should be permitted, along with his answer, to file a cross-complaint setting forth his cause and bringing any such stranger into the lawsuit. This principle has been completely accepted in California.[54]

---

53. The existing law is unclear. Compare Great Western Furniture Co. v. Porter Corp., 238 Cal. App.2d 502, 48 Cal. Rptr. 76 (1965)(counterclaim stated to be proper)(dicta), with Carey v. Cusack, 245 Cal. App.2d 57, 54 Cal. Rptr. 244 (1966)(court indicates counterclaim not proper).

54. California courts have held that impleader claims meet the "transaction and occurrence" test embodied in the cross-complaint provision. Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 62-71 (mimeographed draft 1970). They did so erroneously, however, misinterpreting wording which was not intended to go so far and, hence, which did not provide any safeguard against possible collusion that can occur in such a case. Id. at 65-66.

(7) A statutory provision should be added to provide specifically that a third party may claim that the person who seeks indemnity from him by a cross-complaint is not liable on the underlying cause. This would provide protection against collusion on the underlying cause similar to that provided by Rule 14 of the Federal Rules of Civil Procedure.

(8) When a cause of action asserted in a cross-complaint is severed for trial, the court should have power to transfer such cause to a more convenient forum for trial as an independent action.[55] California law does not permit part of a case, although severed from the rest, to be transferred to a separate court.

---

55. Cf. Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 67-68 (mimeographed draft 1970).

CONSISTENT PROCEDURAL TREATMENT OF ORIGINAL AND CROSS-CLAIMS

To eliminate the inconsistency, lack of coherence, and confusion of the existing statutory provisions, the Commission recommends that a consistent set of rules be adopted to apply to every situation where one person asserts a cause of action against another, whether the cause is asserted in a complaint or in the new, expanded cross-complaint. These rules should be based on the basic principle that, where one person asserts a cause of action against another, regardless of whether they were original parties to the action, the person asserting the cause and the person against whom it is asserted will be treated in substance as plaintiff and defendant, respectively, with all the obligations and rights that they would have had had the cause been instituted as an independent action.

Adoption of this basic principle would permit simplification of the existing procedure for pleading causes and responding to pleadings requesting affirmative relief and would eliminate most of the practical problems of current California practice regarding joinder and counterclaims and cross-complaints. Often it is fortuitous whether or not a person sues or is sued on a counterclaim or cross-complaint rather than in an independent action. It may simply involve a race to the courthouse. There is no sound reason to treat parties to the new cross-complaint--which will replace the present dual system of counterclaims and cross-complaints--any differently than they would have been treated in a separate suit.

The recommended basic principle has been followed in drafting the legislation recommended by the Commission. The most significant effect is that the provisions relating to pleadings requesting relief (complaints and the new cross-complaint) have been consolidated and made uniform, and the provisions relating to objections to complaints and to denials, and defenses have been made applicable to all pleadings requesting relief.

PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by the enactment of the following measure:

An act to amend Section 1692 of the Civil Code, to amend Sections 117h, 117r, 378, 379, 382, 389, 396, 435, 437c, 581, 626, 631.8, 666, 871.2, 871.3, and 871.5 of, to add Sections 379.5, 422.10, 422.20, 422.30, 422.40, and 1048.5 to, to add Chapter 2 (commencing with Section 425.10) and Chapter 3 (commencing with Section 430.10) to Title 6 of Part 2 of, to add a new chapter heading immediately preceding Section 435 of, to add a new chapter heading immediately preceding Section 437c of, and to repeal Sections 379a, 379b, 379c, 381, 383, 384, 422, 430, 431, 431.5, 432, 433, 434, 437, 437a, 437b, 437d, 438, 439, 440, 441, 442, 462, and 463 of, to repeal Chapter 2 (commencing with Section 425) of Title 6 of Part 2 of, to repeal the heading for Chapter 3 (commencing with Section 430) of Title 6 of Part 2 of, to repeal the heading for Chapter 4 (commencing with Section 437) of Title 6 of Part 2 of, and to repeal Chapter 5 (commencing with Section 443) of Title 6 of Part 2 of, the Code of Civil Procedure, to amend Sections 3522 and 3810 of the Revenue and Taxation Code, and to amend Sections 26304, 26305, 37161, 37162, and 51696 of the Water Code, relating to civil actions and proceedings.

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

Civil Code Section 1692 (Conforming Amendment)

Section 1. Section 1692 of the Civil Code is amended to read:

1692. When a contract has been rescinded in whole or in part, any party to the contract may seek relief based upon such rescission by (a) bringing an action to recover any money or thing owing to him by any other party to the contract as a consequence of such rescission or for any other relief to which he may be entitled under the circumstances or (b) asserting such rescission by way of defense ~~, counterclaim~~ or cross-complaint.

If in an action or proceeding a party seeks relief based upon rescission and the court determines that the contract has not been rescinded, the court may grant any party to the action any other relief to which he may be entitled under the circumstances.

A claim for damages is not inconsistent with a claim for relief based upon rescission. The aggrieved party shall be awarded complete relief, including restitution of benefits, if any, conferred by him as a result of the transaction and any consequential damages to which he is entitled; but such relief shall not include duplicate or inconsistent items of recovery.

If in an action or proceeding a party seeks relief based upon rescission, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require and may otherwise in its judgment adjust the equities between the parties.

Comment. The amendment of Section 1692 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80.

Code of Civil Procedure Section 117h (Conforming Amendment)

Sec. 2. Section 117h of the Code of Civil Procedure is amended to read:

117h. No formal pleading, other than the said claim and notice, shall be necessary and the hearing and disposition of all such actions shall be informal, with the sole object of dispensing speedy justice between the parties. The defendant in any such action may file a verified ~~answer~~ cross-complaint stating any new matter which shall constitute a ~~counter-claim~~ cause of action against the plaintiff ; a copy of such ~~answer~~ cross-complaint shall be delivered to the plaintiff in person not later than 48 hours prior to the hour set for the appearance of said defendant in such action. The provisions of this code as to ~~counterclaims~~ cross-complaints are hereby made applicable to small claims courts, so far as included within their jurisdiction. Such ~~answer~~ cross-complaint shall be made on a blank substantially in the following form:

In the Small Claims Court of ....., County of ....., State of California.

...., Plaintiff,)
vs.)
...., Defendant.)

~~Counterclaim~~ Cross-complaint of Defendant.

State of California,)
) ss.
County of .....,)

....., being first duly sworn, deposes and says: That said plaintiff is indebted to said defendant in the sum of .....($.....) for ....., which amount defendant prays ~~may~~ be allowed ~~as a counterclaim~~ to the defendant against the ~~claim of~~ plaintiff herein.

Subscribed and sworn to before me this ..... day of ....., 19....

.....
Judge (Clerk or Notary Public.)

Comment. The amendment to Section 117h substitutes references to "cross-complaint" for the former references to "counterclaim" and makes other conforming changes to reflect the fact that counterclaims have been abolished and claims formerly asserted as counterclaims are now to be asserted as cross-complaints. See Code of Civil Procedure Section 428.80.

Code of Civil Procedure Section 117r (Conforming Amendment)

Sec. 3. Section 117r of the Code of Civil Procedure is amended to read:

117r. If a defendant in a small claims action shall have a claim against the plaintiff in such action and such claim be for an amount over the jurisdiction of the small claims court as set forth in Section 117, but of a nature which would be the subject ~~to counterclaim or~~ of a cross-complaint in such action under the rules of pleading and practice governing the superior court, then defendant may commence an action against said plaintiff in a court of competent jurisdiction and file with the justice of said small claims court wherein said plaintiff has commenced his action, at or before the time set for the trial of said small claims action, an affidavit setting forth the facts of the commencement of such action by such defendant. He shall attach to such affidavit a true copy of the complaint so filed by said defendant against plaintiff, and pay to said justice the sum of one dollar ($1) for a transmittal fee, and shall deliver to said plaintiff in person a copy of said affidavit and complaint at or before the time above stated. Thereupon the justice of said small claims court shall order that said small claims court action shall be transferred to said court set forth in said affidavit, and he shall transmit all files and papers in his court in such action to such other court, and said actions shall then be tried together in such other court.

The plaintiff in the small claims action shall not be required to pay to the clerk of the court to which the action is so transferred any transmittal, appearance or filing fee in said action, but shall be required to pay the filing and any other fee required of a defendant, if he appears in the action filed against him.

Comment. The amendment of Section 117r deletes the reference to a "counte claim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80.

Code of Civil Procedure Section 378. Permissive joinder of plaintiffs

Sec. 4 . Section 378 of the Code of Civil Procedure is amended to read:

~~378. All persons may be joined in one action as plaintiffs who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any question of law or fact would arise which are common to all the parties to the action, provided, that if upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled.~~ All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. It shall not be necessary that each plaintiff shall be interested as to every cause of action or as to all relief prayed for.

Comment. Section 378 is rephrased in conformity with Rule 20(a) of the Federal Rules of Civil Procedure. However, it continues without substantial change the requirements which must be met by plaintiffs seeking to join together in one action. Section 378 formerly provided in part that persons might be joined as plaintiffs "who have an interest in the subject of the action or in

whom any right to relief . . . arising out of the same transaction . . . is alleged to exist . . . ." The first ground has been deleted. However, the failure of any court to rely on this clause for more than 35 years suggests that it has become a "dead letter." See 2 Witkin, California Procedure Pleading § 91 (1954). The power of the court to sever causes where appropriate is now dealt with separately in Section 379.5 (new).

Code of Civil Procedure Section 379. Permissive joinder of defendants

Sec. 5 . Section 379 of the Code of Civil Procedure is amended to read:

~~379. Any-person-may-be-made-a-defendant-who-has-or-claims-an-interest-in-the-controversy-adverse-to-the-plaintiff,-or-who-is-a-necessary party-to-a-complete-determination-or-settlement-of-the-question-involved therein.--And-in-an-action-to-determine-the-title-or-right-of-possession to-real-property-which,-at-the-time-of-the-commencement-of-the-action,-is in-the-possession-of-a-tenant,-the-landlord-may-be-joined-as-a-party defendant.~~ All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. It shall not be necessary that each defendant shall be interested as to every cause of action or as to all relief prayed for.

Comment. Section 379 is amended to provide statutory requirements for joinder of defendants which are comparable to those governing joinder of plaintiffs. Former Sections 379 and 379a provided liberal joinder rules but were strongly criticized for their uncertainty and overlap. See Chadbourn, Grossman & Van Alstyne, California Practice § 618 (1961); 2 Witkin, California Procedure Pleading § 93 (1954). Amended Section 379 substitutes the more understandable "transaction" test set forth in Rule 20(a) of the Federal Rules of Civil Procedure. However, in so doing, the section probably merely makes explicit what was implicit in prior decisions. See Hoag v. Superior Court, 207 Cal. App.2d 611, 24 Cal. Rptr. 659 (1962). For the power of the court to sever causes where appropriate, see Section 379.5 (new).

Code of Civil Procedure Section 379a (Repealed)

Sec. 6 . Section 379a of the Code of Civil Procedure is repealed.

~~379a.--All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities.~~

Comment. Section 379a is superseded by Section 379.

Code of Civil Procedure Section 379b (Repealed)

Sec. 7 . Section 379b of the Code of Civil Procedure is repealed.

~~379b. It shall not be necessary that each defendant shall be interested as to all relief prayed for, or as to every cause of action included in any proceeding against him; but the court may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.~~

Comment. Section 379b is superseded by the last sentence of Section 379 and by Section 379.5.

Code of Civil Procedure Section 379c (Repealed)

Sec. 8. Section 379c of the Code of Civil Procedure is repealed.

~~379c. --Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties.~~

Comment. Section 379c is repealed as unnecessary. The authority granted by Section 379 to join defendants liable in the alternative is broad enough to encompass any situation formerly covered by Section 379c. See Kraft v. Smith, 24 Cal.2d 124, 148 P.2d 23 (1944). See generally 2 Witkin, California Procedure Pleading §§ 96, 97 (1954).

Code of Civil Procedure Section 379.5. Separate trials

Sec. 9. Section 379.5 is added to the Code of Civil Procedure, to read:

379.5. When parties have been joined under Section 378 or 379, the court may make such orders as may appear just to prevent any party from being embarrassed, delayed, or put to undue expense, and may order separate trials or make such other order as the interests of justice may require.

Comment. Section 379.5 continues without substantive change the discretion of the court to sever causes where appropriate. See former Sections 378 and 379b. See generally Chadbourn, Grossman & Van Alstyne, California Practice § 622 (1961); 2 Witkin, California Procedure Pleading § 98 (1954). The federal counterpart to Section 375.5 is Rule 20(b) of the Federal Rules of Civil Procedure.

Code of Civil Procedure Section 381 (Repealed)

Sec. 10. Section 381 of the Code of Civil Procedure is repealed.

~~381. Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or if [of] established such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same.~~

Comment. Section 381 is repealed as unnecessary. Its express statutory authorization of joinder of certain persons as plaintiffs was eclipsed in 1927 by the revision of Section 378. See Chadbourn, Grossman & Van Alstyne, California Practice § 615 (1961); 2 Witkin, California Procedure Pleading § 92 (1954).

Code of Civil Procedure Section 382. Unwilling plaintiffs made defendants; class actions

Sec. 11. Section 382 of the Code of Civil Procedure is amended to read:

382. ~~Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if~~ If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all.

Comment. Section 382 is amended to delete the 1872 enactment of the old common law rule of compulsory joinder. This provision has been superseded by Section 389. See Section 389 and Comment thereto. The former rule, while perhaps of some aid in determining whether one was an indispensable or necessary party, was an incomplete and unsafe guide. One could be an indispensable or necessary party in the absence of any unity in interest. Thus, in an action brought by an unsuccessful candidate against the members of the Personnel Board to cancel a civil service examination and eligibility lists based thereon, all the successful candidates were held to be indispensable parties. However, they do not seem to have been united in interest in the usual sense of the term with either plaintiff or defendants. See Child v. State Personnel Board, 97 Cal. App.2d 467, 218 P.2d 52 (1950). On the other hand, the presence of a unity in interest did not always make one either an indispensable or necessary party. See Williams v. Reed, 113 Cal. App.2d 195, 204, 248 P.2d 147, (1952)(joint and several obligors

may be sued individually). See generally 1 Chadbourn, Grossman & Van Alstyne, California Practice § 593 at 517 (1961); 2 Witkin, California Procedure Pleading § 76 at 1053 (1954).

Note: Section 382 also deals with joining an unwilling plaintiff as a defendant and with representative or class actions. The subjects are beyond the scope of the Commission's authority for study. Accordingly, this portion of the section was not reviewed by the Commission and its retention neither indicates approval of these provisions nor makes any change in this area of the law.

Code of Civil Procedure Section 383 (Repealed)

Sec. 12. Section 383 of the Code of Civil Procedure is repealed.

~~383.--Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff; and all or any of them join as plaintiffs in the same action, concerning or affecting the obligation or instrument upon which they are severally liable.--Where the same person is insured by two or more insurers separately in respect to the same subject and interest, such person, or the payee under the policies, or the assignee of the cause of action, or other successor in interest of such assured or payee, may join all or any of such insurers in a single action for the recovery of a loss under the several policies, and in case of judgment a several judgment must be rendered against each of such insurers according as his liability shall appear.~~

Comment. Section 383 is repealed. The section is made unnecessary by the liberal rules of permissive joinder set forth in Sections 378 (plaintiffs) and 379 (defendants). See generally 1 Chadbourn, Grossman & Van Alstyne, California Practice § 615 (1961); 2 Witkin, California Procedure Pleading §§ 92, 93 (1954).

Code of Civil Procedure Section 384 (Repealed)

Sec. 13. Section 384 of the Code of Civil Procedure is repealed.

~~384. All persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party.~~

Comment. Section 384 is repealed. The section is made unnecessary by the liberal rules of permissive joinder set forth in Sections 378 (plaintiffs) and 379 (defendants). See generally 1 Chadbourn, Grossman & Van Alstyne, California Practice § 615 (1961); 2 Witkin, California Procedure Pleading §§ 92, 93 (1954).

Code of Civil Procedure Section 389. Compulsory joinder of parties

Sec. 14. Section 389 of the Code of Civil Procedure is amended to read:

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 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.~~

(a) 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.

(b) If a person as described in subdivision (a)(1) or (2) 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: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) 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; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder.

(c) A complaint or cross-complaint shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1) or (2) who are not joined, and the reasons why they are not joined.

(d) Nothing in this section affects the law applicable to class actions.

Comment. Section 389 is revised to substitute practically in its entirety Rule 19 of the Federal Rules of Civil Procedure for former Section 389. Basically, as amended, Section 389 requires joinder of persons materially interested in an action whenever feasible. In certain instances, joinder cannot be accomplished because it would deprive the court of subject matter jurisdiction. For example, the federal courts have exclusive jurisdiction over proceedings against foreign consuls or vice consuls (28 U.S.C.A. § 1351) and, more importantly, suits against the United States under the Federal Tort Claims Act. See 28 U.S.C.A. §§ 1346(b), 2679. In other situations, joinder will be impossible because personal jurisdiction over the party cannot be achieved.

When joinder cannot be accomplished, the circumstances must be examined and a choice made between proceeding on or dismissing the action. The adequacy of the relief that may be granted in a person's absence and the possibility of prejudice to either such person or the parties before the court are factors to be considered in making this choice. However, a person is regarded as indispensable only in the conclusory sense that in his absence the court has decided the action should be dismissed. Where the decision is to proceed, the court has the power to make a legally binding adjudication between the parties properly before it.

Under the former law, an indispensable party had to be joined in the action; until and unless he was, the court had no jurisdiction to proceed with the case. See, e.g., Irwin v. City of Manhattan Beach, 227 Cal. App.2d 634 (1964). This absolute rule has been changed; however, practically speaking, the change is perhaps more one of emphasis. The guidelines provided in Section 389 are substantially those that have guided the courts for years. See Bank of California v. Superior Court, 16 Cal.2d 516 (1940). These guidelines should require dismissal in the same circumstances where formerly a person was characterized as indispensable.

As noted above, Section 389 has been revised to conform substantially to Rule 19 of the Federal Rules of Civil Procedure. Accordingly, the explanatory note prepared by the Advisory Committee in conjunction with the amendment of Rule 19 in 1966 is particularly helpful in describing the nature and effect of Section 389. This explanatory note is set out below with appropriate deletions and additions:

General Considerations.

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 . . . because of limitations on service of process [and] subject matter jurisdiction . . . --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, Indespensable Party: The Historical Origin of a Procedural Phantom, 61 Colum. L. Rev. 1254 (1961), and Rule 19 could be and often was applied in consonance with them. But experience showed that the [original] rule was defective in its phrasing and did not point clearly to the proper basis of decision.

* * * * *

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, [Compulsory Joinder of Parties in Civil Actions,] 55 Mich. L. Rev. 327, 330, 338 (1957); Note, [Indispensable Parties in the Federal Courts,] 65 Harv. L. Rev. 1050, 1052-57 (1952); Developments in the Law [--Multiparty Litigation in the Federal Courts,] 71 Harv. L. Rev. 874, 881-85 (1958).

The subdivision (a) definition of persons to be joined is not couched in terms of the abstract nature of their interests "joint," "united," "separable," or the like. See . . . Developments in the Law, supra, at 880. It should be noted particularly, however, that the description is not at variance with the settled authorities holding that a tortfeasor with the usual "joint-and-several" liability is merely a permissive party to an action against another with like liability. See 3 Moore's Federal Practice 2153 (2d ed. 1963); 2 Barron & Holtzoff, Federal Practice & Procedure § 513.8 (Wright ed. 1961). Joinder of these tortfeasors continues to be regulated by Rule 20 . . . . [Cal. Code Civ. Proc. §§ 378, 379. Where an indemnity action would lie against a third person, the California rule appears to be that the indemnitor is not an "indispensable," but is a "conditionally necessary" party. See Stackelberg v. Lamb Transp. Co., 168 Cal. App.2d 174, 335 P.2d 522 (1959). In practice, where advantageous, a defendant-indemnitee will simply join his indemnitor by cross-complaint. See Cal. Code Civ. Proc. §§ 428.10, 428.20.]

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. . . .

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 Roos v. Texas Co., 23 F.2d 171 (2d Cir. 1927), cert. denied, 277 U.S. 587 (1928); Niles-Bement-Pond Co. v. Iron Moulders' Union, 254 U.S. 77, 80 (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? See the elaborate discussion in Reed, supra; cf. A.L. Smith Iron Co. v. Dickson, 141 F.2d 3 (2d Cir. 1944); Caldwell Mfg. Co. v. Unique Balance Co., 18 F.R.D. 258 (S.D.N.Y. 1955).

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); Miller & Lux, Inc. v. Nickel, 141 F. Supp. 41 (N.D. Calif. 1956). On the use of "protective provisions," see Roos v. Texas Co., supra; Atwood v. Rhode Island Hosp. Trust Co., 275 Fed. 513, 519 (1st Cir. 1921), cert. denied, 257 U.S. 661 (1922); cf. Stumpf v. Fidelity Gas Co., 294 F.2d 886 (9th Cir. 1961); and the general statement in National Licorice Co. v. Labor Board, 309 U.S. 350, 363 (1940).

Sometimes the party is himself able to take measures to avoid prejudice. Thus a defendant faced with a prospect of a second suit by an absentee may be in a position to bring the latter into the action by defensive interpleader. See [Cal. Code Civ. Proc. §§ 428.10, 428.20;] Hudson v. Newell, 172 F.2d 848, 852 mod., 174 F.2d 546 (5th Cir. 1949); Gauss v. Kirk, 198 F.2d 83, 86 (D.C. Cir. 1952); Abel v. Brayton Flying Service, Inc., 248 F.2d 713, 716 (5th Cir. 1957)(suggestion of possibility of counter-claim under Rule 13(h)); cf. Parker Rust-Proof Co. v. Western Union Tel. Co., 105 F.2d 976 (2d Cir. 1939), cert. denied, 308 U.S. 597 (1939). So also the absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis. See Developments in the Law, supra, 71 Harv. L. Rev. at 882; Annot., Intervention or Subsequent Joinder of Parties as Affecting Jurisdiction of Federal Court Based on Diversity of Citizenship, 134 A.L.R. 335 (1941); Johnson v. Middleton, 175 F.2d 535 (7th Cir. 1949); Kentucky Nat. Gas Corp. v. Duggins, 165 F.2d 1011 (6th Cir. 1948); McComb v. McCormack, 159 F.2d 219 (5th Cir. 1947). The court should consider whether this, in turn, would impose undue hardship on the absentee. (For the possibility of the court's informing an absentee of the pendency of the action, see comment under subdivision (c) below.)

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. Cf. Kroese v. General Steel Castings Corps., 179 F.2d 760 (3d Cir. 1949), cert. denied, 339 U.S. 983 (1950).

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. See Fitzgerald v. Haynes, 241 F.2d 417, 420 (3d Cir. 1957); Fouke v. Schenewerk, 197 F.2d 234, 236 (5th Cir. 1952); cf. Warfield v. Marks, 190 F.2d 178 (5th Cir. 1951).

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.

A person may be added as a party at any stage of the action on motion or on the court's initiative . . . ; and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his absence, may be made as late as the trial on the merits . . . . However, when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subdivision (a)(2)(ii)), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subdivision (a)(2)(i)), his undue delay in making the motion can properly be counted against him as a reason for denying the motion. A joinder question should be decided with reasonable promptness, but decision may properly be deferred if adequate information is not available at the time. Thus the relationship of an absent person to the action, and the practical effects of an adjudication upon him and others, may not be sufficiently revealed at the pleading stage; in such a case it would be appropriate to defer decision until the action was further advanced. . . .

* * * * *

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.

Subdivision (d) repeats the exception contained in the first clause of the predecessor subdivision (a).

Code of Civil Procedure Section 396 (Conforming Amendment)

Sec. 15. Section 396 of the Code of Civil Procedure is amended to read:

396. If an action or proceeding is commenced in a court which lacks jurisdiction of the subject matter thereof, as determined by the complain or petititon, if there is a court of this State which has such jurisdiction, the action or proceeding shall not be dismissed (except as provided in Section 581b, and as provided in subdivision 1 of Section 581 of this code) but shall, on the application of either party, or on the court's own motion, be transferred to a court having jurisdiction of the subject matter which may be agreed upon by the parties, or, if they do not agree, to a court having such jurisdiction which is designated by law as a proper court for the trial or determination thereof, and it shall thereupon be entered and prosecuted in the court to which it is transferred as if it had been commenced therein, all prior proceedings being saved. In any such case, if summons is served prior to the filing of the action or proceeding in the court to which it is transferred, as to any defendant, so served, who has not appeared in the action or proceeding, the time to answer or otherwise plead shall date from service upon such defendant of written notice of the filing of such action or proceeding in the court to which it is transferred.

If an action or proceeding is commenced in or transferred to a court which has jurisdiction of the subject matter thereof as determined by the complaint or petition, and it thereafter appears from the verified pleadin or at the trial, or hearing, that the determination of the action or proceeding, or of a ~~counterclaim, or of~~ a cross-complaint, will necessarily

involve the determination of questions not within the jurisdiction of the court, in which the action or proceeding is pending, the court, whenever such lack of jurisdiction appears, must suspend all further proceedings therein and transfer the action or proceeding and certify the pleadings (or if the pleadings be oral, a transcript of the same), and all papers and proceedings therein, to a court having jurisdiction thereof which may be agreed upon by the parties, or, if they do not agree, to a court having such jurisdiction which is designated by law as a proper court for the trial or determination thereof.

An action or proceeding which is transferred under the provisions of this section shall be deemed to have been commenced at the time the complaint or petition was filed in the court from which it was originally transferred.

Nothing herein shall be construed to preclude or affect the right to amend the pleadings as provided in this code.

Nothing herein shall be construed to require the superior court to transfer any action or proceeding because the judgment to be rendered, as determined at the trial or hearing, is one which might have been rendered by a municipal or justice court in the same county or city and county.

In any case where the lack of jurisdiction is due solely to an excess in the amount of the demand, the excess may be remitted and the action may continue in the court where it is pending.

Upon the making of an order for such transfer, proceedings shall be had as provided in Section 399 of this code, the costs and fees thereof, and of filing the case in the court to which transferred, to be paid by

the plaintiff unless the court ordering the transfer shall otherwise direct. If the party obligated to pay such costs and fees shall fail to do so within the time specifically provided, or, if none, then within five (5) days after service of notice of the order for transfer or as to costs and fees, then any party may pay such costs and fees and, if other than a party originally obligated to do so, shall be entitled to credit therefor or recovery thereof, in the same manner as is provided in Section 399.

Comment. The amendment of Section 396 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80.

Code of Civil Procedure Section 422 (Repealed)

Sec. 16. Section 422 of the Code of Civil Procedure is repealed.

~~422. 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 justice courts, 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 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 judge; if oral, an entry of their substance must be made in the docket.)~~

Comment. The portion of former Section 422 that enumerated the permissible pleadings is superseded by Section 422.10; the portion relating to pleadings in justice courts is superseded by Section 422.20.

Code of Civil Procedure Section 422.10. Permissible pleadings enumerated

Sec. 17 . Section 422.10 is added to the Code of Civil Procedure, to read:

422.10. The pleadings allowed in civil actions are complaints, demurrers, answers, and cross-complaints.

Comment. Section 422.10 supersedes the first paragraph of former Code of Civil Procedure Section 422. However, unlike Section 422 which specified the pleadings to which a demurrer or answer could be filed, Section 422.10 merely lists the pleadings allowed; the circumstances where a particular pleading is required or permitted are specified in subsequent sections. See also Code of Civil Procedure Section 411.10 ("A civil action is commenced by filing a complaint with the court."). The only pleadings that can request affirmative relief are complaints and cross-complaints; a counterclaim is no longer permitted. See Section 428.80.

Code of Civil Procedure Section 422.20. Pleadings in justice courts

Sec. 18 . Section 422.20 is added to the Code of Civil Procedure, to read:

422.20. (a) The rules stated in this section apply only to pleadin 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 substanc shall be made in the docket.

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

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

Comment. Subdivisions (a), (b), (c), and (e) of Section 422.20 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 both complaints and cross-complaints while Section 426 by its terms applied to "complaints."

Code of Civil Procedure Section 422.30. Caption for pleadings

Sec. 19 . Section 422.30 is added to the Code of Civil Procedure, to read:

422.30. 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 422.30 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 422.30 applies to all pleadings rather than merely to the complaint. This extension of the caption requirement is consistent with former practice. Cal. Rules of Ct., Rules 201(c)(Superior Court), 501 (municipal court).

Code of Civil Procedure Section 422.40. Names of parties in title of action

Sec. 20. Section 422.40 is added to the Code of Civil Procedure, to read:

422.40. 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 422.40 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. The inclusion of the phrase "et al." would be "an appropriate indication of other parties" for the purposes of Section 422.40. Section 422.40 is based on the second sentence of Rule 10(a) of the Federal Rules of Civil Procedure.

Code of Civil Procedure Sections 425, 426, 426a, 426c, and 427 (Repealed)

Sec. 21. Chapter 2 (commencing with Section 425) of Title 6 of Part 2 of the Code of Civil Procedure is repealed.

Comment. Section 425 has been repealed as unnecessary because it duplicates Code of Civil Procedure Section 411.10 (added by Cal. Stats. 1969, Ch. 1610). The remaining sections in Chapter 2 are superseded by the new provision of the Code of Civil Procedure indicated below:

Repealed Provision	New Provision
Section 426	
Subdivision 1	Section 422.30 (caption) Section 422.40 (names of parties)
Subdivision 2	Section 425.10
Subdivision 3	Section 422.20 (justice courts) Section 425.10 (demand for relief) Section 429.30 (infringement of rights in production)
Section 426a	Section 429.20
Section 426c	Section 429.10
Section 427	Section 425.20 (separate statement of causes of action) Section 427.10 (joinder of causes)

Note: The repealed sections in Chapter 2 read as follows:

425. Complaint, first pleading. The first pleading on the part of the plaintiff is the complaint.

426. The complaint must contain:

1. The title of the action, 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; 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 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 sa force as though such production had been capable of being and had been attached to the complaint. The attachment of any such production in accorda with the provisions hereof shall not be deemed a making public of the production within the meaning of Section 983 of the Civil Code.

426a. 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 said information is then furnished. At any time after the filing of the petition, the respondent may also furnish such information, whether or not it has been first furnished by the petitioner. The clerk shall take all ministerial steps required of him in the 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 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.

426c. In a proceeding for dissolution of marriage the 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 age and birth date of each minor 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.

---

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

1. Contracts, express or implied. 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.

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

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

5. Injuries to character.

6. Injuries to person.

7. Injuries to property.

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.

Sec. 22 . Chapter 2 (commencing with Section 425.10) is added to Title 6 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 2. CLAIMS FOR RELIEF

Article 1. General Provisions

Code of Civil Procedure Section 425.10. Content of pleading demanding relief

425.10. A pleading which sets forth a claim for relief, whether it be a complaint 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 pleader 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. However, Section 425.10 applies to both complaints and cross-complaints while Section 426 by its terms applied to "complaints."

Code of Civil Procedure Section 425.20. Separate statement of causes

425.20. Causes of action, whether alleged in a complaint or cross-complaint, shall be separately stated.

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 the same transaction or occurrence did not need to be separately stated. Section 425.20 changes that rule and requires all causes of action to be separately stated.

Note: The policy reflected in this section was tentatively adopted to provide a basis for discussion. The Commission would especially appreciate comments directed towards whether (1) separate statement should always be required; (2) separate statement should never be required (any defect being alleviated by a demurrer for uncertainty); (3) separate statement should not be required for causes of action arising from the same transaction or occurrence (similar to present rule that causes of action for injuries to person and injuries to property, arising from the same tort, need not be separately stated).

Article 2. Compulsory Joinder of Causes of Action

Code of Civil Procedure Section 426.10. Definitions

426.10. As used in this article:

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

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

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

Comment. The definition in Section 426.10 of "related cause of action" provides a convenient means for referring to a cause of action which arises out of the same transaction or occurrence. As under prior law (former Code of Civil Procedure Section 439), subdivision (c) includes a series of related acts or conduct. Brunswig Drug Co. v. Springer, 55 Cal. App.2d 444, 130 P.2d 758 (1942)("transaction" means the entire series of acts and mutual conduct of the parties); Sylvester v. Soulsburg, 252 Cal. App.2d 185, 60 Cal. Rptr. 218 (1967)(in vendor's suit to terminate contract for sale of realty and personalty, quiet title to realty and foreclose chattel mortgage, entry of vendors upon real property, taking possession of personal property and remaining in possession for a time were a continuous series of acts and a single transaction giving rise to purchasers' claim for damages for trespass); Holmes v. David H. Bricker, Inc., 265 Adv. Cal. App. 695, 71 Cal. Rptr. 562 (1968)(automobile accident giving rise to separate causes of action for damages to property and for personal injury is single "transaction").

Code of Civil Procedure Section 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 the same transaction or occurrence mandatory. (See Section 426.10 defining "related causes of action.") This is the rule in those jurisdictions which follow the so-called operative facts theory of a cause of action for res judicata purposes. However, California follows the "primary rights" theory of a cause of action, and res judicata applies only where the cause not pleaded is for injury to the same "primary right." See 2 Witkin, California Procedure Pleading § 11 (1954). Nevertheless, even where different primary rights are injured, collateral estoppel will bar an unpleaded cause of action if precisely the same factual issues are involved in both actions. See 2 Witkin, California Procedure Pleading §§ 11-22 (1954). The rule provided by Section 426.20 is consistent with the former California practice relating to counterclaims under former Code of Civil Procedure Section 439. For further discussion, see Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 24-29 (mimeographed draft 1970).

Section 426.20 applies to cross-complaints as well as complaints. See Section 426.10.

Code of Civil Procedure Section 426.30. Compulsory cross-complaints

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 cross-complaint 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 (former Code of Civil Procedure Section 439). However, since the scope of a cross-complaint is expanded to include claims which would not have met the "defeat or diminish" or "several judgment" requirements of the former counterclaim statute, the scope of the former rule is expanded by Section 426.30 to include some causes of action that formerly were not compulsory. See discussion in Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 39-56 (mimeographed draft 1970).

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. In this situation, although the party against whom the complaint (or cross-complaint) is filed is not required to plead his related cause of action in a cross-complaint, he made do so at his election. If he elects to file a cross-complaint, he is required to assert all related causes of action in his cross-complaint. Paragraph (1) is similar to Rule 13(a)(2) of the Federal Rules of Civil Procedure. See Section 426.10 (defining complaints to include cross-complaints).

Paragraph (2) of subdivision (b) permits a party to default without waiving any cause of action. If the party does not desire to defend the action and a default judgment is taken, it would be unfair if an additional consequence of such default were that all related causes of action the party had would be waived and extinguished.

Code of Civil Procedure Section 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 (a) uses language taken from Rule 13(a) of the Federal Rules of Civil Procedure. See also Code of Civil Procedure Section 389 (joinder of persons needed for just adjudication). Subdivision (c), which makes clear the rule regarding pending actions, is the same in substance as Rule 13(a)(1) of the Federal Rules of Civil Procedure.

Subdivision (b) of Section 426.40 is designed to meet problems that may arise when the federal courts have jurisdiction to enforce a cause of action created by federal statute. In some cases, state courts have concurrent jurisdiction with the federal courts to enforce a particular cause of action. For example, such concurrent jurisdiction exists by express statutory provision in

actions under the Federal Employers' Liability Act. 45 U.S.C.A. § 56. Moreover, even though the federal statute does not contain an express grant of concurrent jurisdiction, the general rule is that state courts have concurrent jurisdiction to determine rights and obligations thereunder where nothing appears in the statute to indicate an intent to make federal jurisdiction exclusive. Miller v. Municipal Court, 22 Cal.2d 818, 836, 142 P.2d 297, (1943); Gerry of California v. Superior Court, 32 Cal.2d 119, 122, 194 P.2d 689, (1948); Business Women's Ass'n v. Knight, 94 Cal. App.2d 93, 97, 210 P.2d 295, (1949). In cases where the state and federal courts have concurrent jurisdiction, if the cause of action created by the federal statute arises out of the same transaction or occurrence, Section 426.30 requires joinder in the state court proceeding, and subdivision (b) of Section 426.40 is not applicable.

In some cases, the federal courts have exclusive jurisdiction of the federal cause of action. See 1 Witkin, California Procedure Jurisdiction § 38 (1954, 1967 Supp.). In these cases, subdivision (b) of Section 426.40, recognizing that the federal cause of action is not permitted to be brought in the state court, provides an exception to the compulsory joinder or compulsory cross-complaint requirement.

Under some circumstances, more complex situations may arise. For example, if the claim which is the subject of a state court action by the plaintiff arises out of the same transaction as a claim which the defendant may have under the state and federal anti-trust acts, the defendant must file a cross-complaint for his cause of action under the state Cartwright Act (Business and Professions Code Sections 16700 et seq.) in the proceeding

in the state court to avoid waiver of that cause of action under Section 426.30 and must assert his federal cause of action under the Sherman Anti-Trust Act in the federal court (since his cause of action under the Sherman Anti-Trust Act is one over which the federal courts have exclusive jurisdiction). Thus, in this instance, defendant's state action must be brought as a cross-complaint and his federal action must be brought as an independent action in the federal courts. Subdivision (b) makes clear that his inability to assert his federal cause of action in the state court does not preclude him from bringing a later action in the federal court to obtain relief under the federal statute.

Code of Civil Procedure Section 426.50. Permission to assert unpleaded cause

426.50. (a) A party who, in good faith, fails to plead a cause of action subject to the requirements of this article, whether through oversight, inadvertence, mistake, or neglect, shall, upon application 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.

(b) If a plaintiff fails to plead a cause of action that he is required to plead under Section 426.20, and a cross-complaint is filed against him alleging a related cause of action, he may, without obtaining leave of court, file a cross-complaint alleging any related cause of action that he failed to plead earlier.

Comment. Subdivision (a) of Section 426.50 makes clear that leave should be freely granted to plead a compulsory cause prior to trial: The court is required to grant leave to assert the cause if the party requesting leave acted in good faith in failing to plead the cause unless granting leave will result in substantial injustice to the opposing party. The rule provided by this subdivision is similar to, but more liberal than, Rule 13(f) of the Federal Rules of Civil Procedure.

Subdivision (b) integrates the operation of Sections 426.20 and 426.30. A plaintiff may either inadvertently or by design fail to plead a related cause of action pursuant to Section 426.20 (compulsory joinder of related causes of action). If a cross-complaint is then filed against him based on a related cause of action, he may then plead by way of cross-complaint any related cause of action that he failed to plead earlier in his original complaint. Ordinarily, the same end could be accomplished by obtaining leave

of court under subdivision (a) to amend the original complaint. Subdivision (b) provides an alternate procedure without the necessity of pursuing an application to the court.

Section 426.50 does not affect any other provisions that may provide relief from failure to plead a compulsory cause, even where relief would not be available under Section 426.50. For example, after trial has begun, leave to file a cross-complaint (Section 428.50) may be granted. Likewise, Section 426.50 does not preclude the granting of any relief which the party may be entitled to obtain under Section 473 of the Code of Civil Procedure.

Article 3. Permissive Joinder of Causes of Action

Code of Civil Procedure Section 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 any coplaintiffs against any of such defendants.

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

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). For further discussion, see Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 2-30 (mimeographed draft 1970).

Any undesirable effects that might result from the unlimited joinder permitted by Section 427.10 may be avoided by severance of causes for trial under Section 1048 of the Code of Civil Procedure.

Article 4. Cross-Complaints

Code of Civil Procedure Section 428.10. Permissive cross-complaint

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

(b) Whenever a party against whom a cause of action has been asserted in a complaint or cross-complaint has a cause of action arising from the same transaction, occurrence, or series of transactions or occurrences, 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. Section 428.10 reflects the fact that a cross-complaint is the only type of pleading that may be filed to request relief by a party against whom a complaint or cross-complaint has been filed. It should be noted that, if the cause arises out of the same transaction or occurrence, the cross-complaint is compulsory. See Section 426.30. Counterclaims have been abolished. Section 428.80.

Subdivision (a) adopts the simple rule that a party against whom a complaint or cross-complaint has been filed may bring any cause of action he has (regardless of its nature) against the party who filed the complaint or cross-complaint. There need be no factual relationship between his cause and the cause of the other party. This is the rule under the Federal Rules of Civil Procedure and other modern provisions. E.g., Fed. R. Civ. Proc. 13. Third persons may be joined pursuant to Section 428.20.

Subdivision (a) is generally consistent with prior law (former Code of Civil Procedure Section 438) which provided for a counterclaim; but, under prior law, some causes which a party had against an opposing party did not qualify as counterclaims because they did not satisfy the "diminish or defeat" or "several judgment" requirements. For further discussion, see Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 42-48 (mimeographed draft 1970). These requirements are not continued, and subdivision (a) permits unlimited scope to a cross-complaint against an opposing party.

Subdivision (b) continues the rule (former Code of Civil Procedure Section 442) that a cross-complaint may be asserted against any person, whether or not a party to the action, if the cause of action asserted in the cross-complaint arises out of the same transaction or occurrence (see discussion in Comment to Section 426.10). Subdivision (b) thus permits a party to assert a cause of action against a person who is not already a party to the action if the cause has a subject matter connection with the cause already asserted in the action. For further discussion, see Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 52-54 (mimeographed draft 1970).

Any undesirable effects that might result from joinder of causes under Section 428.10 may be avoided by severance of causes for trial under Section 1048 of the Code of Civil Procedure.

Code of Civil Procedure Section 428.20. Joinder of parties

428.20. When a person files a cross-complaint as authorized by Section 428.10, he may join any person as additional party to the cross-complaint if, had the cross-complaint been filed as an independent action, the joinder of that party would have been permitted by the statutes governing joinder of parties.

Comment. Section 428.20 makes clear that, when a cross-complaint is permitted under Section 428.10, persons may be joined as cross-complainants who were not previously parties to the action and the cross-complaint may be brought against persons who were not previously parties to the action. Thus, Section 428.20 is consistent with the general principle that a cross-complaint is to be treated as if it were a complaint in an independent action.

Where the cause of action asserted in the cross-complaint arises out of the same transaction or occurrence, Section 428.20 retains prior law under former Code of Civil Procedure Section 439. The cross-complaint may be brought against a person or persons not previously parties to the action if it asserts a cause of action that arises out of the same transaction or occurrence; there is no requirement that it assert a cause of action against a person already a party to the action. However, where the cause of action asserted in the cross-complaint does not arise out of the same transaction or occurrence, Section 428.20 provides a more liberal rule than former law. Under prior law, a counterclaim could be brought against a plaintiff only; a third person could not be joined because this was precluded by the "several judgment" requirement of former Code of Civil Procedure Section 438. This limitation on joinder of parties is not continued in Section 428.20. For further discussion, see Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 46-48 (mimeographed draft 1970).

Code of Civil Procedure Section 428.30. Joinder of causes of action against person not already a party

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

Comment. Section 428.30 is consistent with treating a cross-complaint the same as if it were a complaint in an independent action. Thus, if a defendant properly joins a stranger as a codefendant on a cross-complaint, the defendant may then assert any additional causes of action he has against the stranger. 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. Any undesirable effects that might result from joinder of causes under Section 428.30 may be avoided by severance of causes for trial under Section 1048 of the Code of Civil Procedure.

It should be noted that both the cross-complainant and the new cross-defendant are subject to the compulsory joinder requirements of Sections 428.20 and 428.30.

Code of Civil Procedure Section 428.40. Cross-complaint to be separate document

428.40. The cross-complaint shall be a separate document.

Comment. Section 428.40 requires the cross-complaint to be a separate document. Under prior practice, a counterclaim could be a part of the answer. However, the counterclaim is now abolished and a cross-complaint is treated generally as a separate and independent action.

Code of Civil Procedure Section 428.50. Cross-complaint filed after answer only with leave of court

428.50. A party shall obtain leave of court to file any cross-complaint except one filed before or at the same time as his answer to the complaint or cross-complaint. Such leave may be granted in the interest of justice at any time during the course of the action.

Comment. The first sentence of Section 428.50 continues the substance of a portion of former Code of Civil Procedure Section 442 except that it makes clear that a cross-complaint may be filed "before" as well as at the same time as the answer. As under former Section 442, permission of the court is required to file a cross-complaint subsequent to the answer. The language "may be granted" of Section 428.50 places the question of leave to file a cross-complaint after the answer wholly in the discretion of the court; it is to be distinguished from the mandatory language "shall . . . be granted" of Section 426.50 relating to compulsory cross-complaints.

Code of Civil Procedure Section 428.60. Service of cross-complaint

428.60. 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. Section 428.60 continues without substantive change requirements that were imposed under former Code of Civil Procedure Section 442.

Code of Civil Procedure Section 428.70. Rights of "third-party defendants"

428.70. (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 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 as a separate document 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. The special answer shall be served on the third-party plaintiff and on the person who asserted the cause of action against the third-party plaintiff.

Comment. Section 428.70 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 assert any defenses which the third-party plaintiff could have asserted against the party who pleaded the cause of action against the third-party plaintiff. Cf. Fed. R. Civ. Proc. 14.

Code of Civil Procedure Section 428.80. Counterclaim abolished

428.80. The counterclaim is abolished. Any cause of action that formerly was asserted by a counterclaim shall be asserted by a cross-complaint. Where any statute refers to asserting a cause of action as a counterclaim, such cause shall be asserted as a cross-complaint. The erroneous designation of a pleading as a counterclaim shall not affect its validity, but such pleading shall be deemed to be a cross-complaint.

Comment. Section 428.80 abolishes the counterclaim. Section 428.10 provides for a cross-complaint that permits a party to assert any cause of action he formerly could have asserted as a counterclaim. There is no provision for counterclaims under the revised provisions relating to pleading. However, although conforming changes have been made in the various codes, sections may be found that refer to counterclaims. E.g., Com. Code § 1201(1), (2), (13). Section 428.80 makes clear that these statutes are to be interpreted in a manner consistent with the revised provisions relating to pleading and that the causes of action referred to in these statutes are to asserted as cross-complaints, not as counterclaims.

Article 5. Contents of Documents in Particular Actions or Proceedings

Code of Civil Procedure Section 429.10. Petition in proceeding for dissolution of marriage

429.10. 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 429.10 continues without substantive change the provisions of former Section 426c of the Code of Civil Procedure.

Code of Civil Procedure Section 429.20. Additional information required in domestic relations cases

429.20. (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 429.20 continues without substantive change the provisions of former Section 426a of the Code of Civil Procedure.

Code of Civil Procedure Section 429.30. Action for infringement of rights in literary, artistic, or intellectual production

429.30. (a) As used in this section:

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

(2) "Plaintiff" includes the person filing a 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 429.30 continues the provisions of the last portion of former Section 426 of the Code of Civil Procedure, but subdivision (a) has been added to extend these provisions to cross-complaints.

Sec. 23. The heading for Chapter 3 (commencing with Section 430) of Title 6 of Part 2 of the Code of Civil Procedure is repealed.

~~CHAPTER 3.--DEMURRER TO COMPLAINT~~

Code of Civil Procedure Section 430 (Repealed)

Sec. 24. Section 430 of the Code of Civil Procedure is repealed.

~~430.--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 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;~~

~~7.--That the complaint is uncertain; "uncertain," as used herein, includes ambiguous and unintelligible;~~

~~8.--That, in actions founded upon a contract, it cannot be ascertained from the complaint, whether or not the contract is written or oral.~~

Comment. Section 430 is superseded by Sections 430.10, 430.30, and 430.40.

Code of Civil Procedure Section 431 (Repealed)

Sec. 25. Section 431 of the Code of Civil Procedure is repealed.

~~431. 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.~~

Comment. Section 431 is superseded by Sections 430.30, 430.50, and 430.60.

Code of Civil Procedure Section 431.5 (Repealed)

Sec. 26. Section 431.5 of the Code of Civil Procedure is repealed.

~~431.5. When the ground of a 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 431.5 is superseded by Section 430.70.

Sec. 27. Chapter 3 (commencing with Section 430.10) is added to Title 6 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 3. OBJECTIONS TO PLEADINGS; DENIALS AND DEFENSES

Article 1. Objections to Pleadings

Code of Civil Procedure Section 430.10. Grounds for objection to complaint or cross-complaint

430.10. The party against whom a complaint 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 of the subject of the cause of action alleged in the pleading.

(b) The person who filed the pleading does not have the legal capacity to sue.

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

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

(e) Several causes of action have not been separately stated as required by Section 425.20.

(f) The pleading does not state facts sufficient to constitute a cause of action.

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

(h) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written or oral.

Comment. Section 430.10 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). Section 430.10 extends the provisions of former Code of Civil Procedure Section 430 to cross-complaints (which now include claims that would have been counterclaims under former law).

Code of Civil Procedure Section 430.20. Grounds for objection to answer

430.20. 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 430.20 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 430.10.

Code of Civil Procedure Section 430.30. When objections made by demurrer or answer

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

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

Comment. Section 430.30 continues prior law under various sections of the Code of Civil Procedure except that former provisions applicable to complaints have been made applicable to cross-complaints. Subdivision (a) continues the rule formerly found in Sections 430 and 444; subdivision (b) continues the rule formerly found in Section 433; and subdivision (c) continues the rule formerly found in Section 431.

Code of Civil Procedure Section 430.40. Time to demur

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

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

(1) Within 10 days after service of the 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 or cross-complaint may, within 10 days after service of the answer to his pleading, demur to the answer.

Comment. Section 430.40 is 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 cross-complaint, the times are consistent with the practice under former Code of Civil Procedure Section 442.

Code of Civil Procedure Section 430.50. Demurrer may be taken to all or part of pleading

430.50. (a) A demurrer to a complaint or cross-complaint may be taken to the whole complaint 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 430.50 is consistent with prior law but provides specifically that cross-complaints (which include what formerly were counterclaims) are treated the same as complaints. See former Code of Civil Procedure Sections 431 (complaints) and 443 (answers).

Code of Civil Procedure Section 430.60. Statement of grounds for objection

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

Comment. Section 430.60 continues the rule formerly found in Section 431 of the Code of Civil Procedure except that the rule has been extended--in accordance with the former practice--to cover specifically cross-complaints and answers.

Code of Civil Procedure Section 430.70. Judicial notice

430.70. When the ground of demurrer is based on a matter of which the court may take judicial notice pursuant to Section 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 430.70 continues without change the provisions of former Code of Civil Procedure Section 431.5.

Code of Civil Procedure Section 430.80. Objections waived by failure to object

430.80. If the party against whom a complaint 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 430.80 is the same in substance as former Code of Civil Procedure Section 434 except that Section 430.80 makes clear that the rule applies to objections to cross-complaints.

Article 2. Denials and Defenses

Code of Civil Procedure Section 431.10. "Material allegation" defined

431.10. 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 431.10 continues without substantive change the provisions of former Code of Civil Procedure Section 463.

Code of Civil Procedure Section 431.20. Admission of material allegation by failure to deny

431.20. (a) Every material allegation of the complaint 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 controverted by the opposite party.

Comment. Section 431.20 continues without substantive change the provisions of former Section 462 of the Code of Civil Procedure except that the section is made specifically applicable to a cross-complaint. Under prior law, an answer was required to a cross-complaint, but no answer to a counterclaim was required. Since cross-complaints now include what formerly were counterclaims, an answer is now required in some cases where one was not previously required. For further discussion, see Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 49-51 (mimeographed draft 1970).

Code of Civil Procedure Section 431.30. Form and content of answer

431.30. (a) As used in this section:

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

(2) "Defendant" includes a person filing an answer to a cross-complaint.

(b) The answer to a complaint 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.

(c) Affirmative relief may not be claimed in the answer.

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

(e) 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.

(f) 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.

(g) The defenses shall 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.

Comment. Section 431.30, subdivision (a) and subdivisions (c)-(e) is the same in substance as former Code of Civil Procedure Section 437 except that it has been broadened to specifically include cross-complaints. See the Comment to Section 431.20. Subdivision (b) makes clear that affirmative relief may not be claimed in the answer. The former counterclaim is abolished. Section 428.80. Cf. Section 431.70 (set-off). Subdivision (g) is the same in substance as the second sentence of former Code of Civil Procedure Section 441.

Code of Civil Procedure Section 431.40. General denial where amount involved $500 or less

431.40. (a) 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 or 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.

(b) Nothing in this section excuses the defendant from complying with the provisions of law applicable to a cross-complaint, and any cross-complaint of the defendant shall be subject to the requirements applicable in any other action.

Comment. Section 431.40 continues the provisions of former Code of Civil Procedure Section 437b except that the relaxed requirements under the former section for counterclaims (now asserted as cross-complaints) are not continued.

Code of Civil Procedure Section 431.50. Pleading exemption from liability under insurance policy

431.50. 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 431.50 is the same as former Code of Civil Procedure Section 437a.

Code of Civil Procedure Section 431.60. Recovery of personal property

431.60. 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 431.60 is the same as former Code of Civil Procedure Section 437d.

Code of Civil Procedure Section 431.70. Set-off

431.70. Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in his answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting his claim would at the time of filing his answer be barred by the statute of limitations. If the cross-demand would otherwise be barred by the statute of limitations, the relief accorded under this section shall be limited to the value of the relief granted to the other party. Neither person can be deprived of the benefits of this section by the assignment or death of the other. The failure of a person to assert his cross-demand in a cross-complaint amounts to a waiver of his cross-demand only to the extent provided by Section 426.30.

Comment. Section 431.70 continues the substantive effect of former Code of Civil Procedure Section 440. Section 431.70, however, is expressly limited to cross-demands for money and specifies the procedure for pleading the defense provided by the section, thus preserving the historical purposes of the statute. See generally Comment, 53 Cal. L. Rev. 224 (1965). The last sentence is included to eliminate any possible inconsistency between Section 431.70 and the compulsory cross-complaint provision (Section 426.30). When a cross-demand is otherwise barred by the statute of limitations, no other action may be had on it except by way of set-off as provided by this section. If, however, the cross-demand is still viable and the party asserting it claims any part of it in excess of the claim against him, he may make his claim by way of cross-complaint, and he must do so where his cross-demand arises out of the same

transaction as the claim against him or his claim for excess will be extinguished under Section 426.30. For further discussion, see Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 56-60 (mimeographed draft 1970). Some claims are not within the scope of Section 431.70. E.g., Williams v. Williams, 8 Cal. App.3d 636 (1970)(alimony and child support payments).

Code of Civil Procedure Section 432 (Repealed)

Sec. 28. Section 432 of the Code of Civil Procedure is repealed.

~~432.--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 432 is continued without change as Section 471.5.

Code of Civil Procedure Section 433 (Repealed)

Sec. 29. Section 433 of the Code of Civil Procedure is repealed.

~~433.--When-any-of-the-matters-numerated-in-Section-430-do not-appear-upon-the-face-of-the-complaint,-the-objection-may-be taken-by-answer.~~

Comment. Section 433 is superseded by subdivision (b) of Section 430.30.

Code of Civil Procedure Section 434 (Repealed)

Sec. 30. Section 434 of the Code of Civil Procedure is repealed.

~~434. OBJECTIONS, WHEN DEEMED WAIVED. 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 jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.~~

Comment. Section 434 is superseded by Section 430.80.

Sec. 31. A new chapter heading is added immediately preceding Section 435 of the Code of Civil Procedure, to read:

CHAPTER 4. MOTION TO STRIKE

Code of Civil Procedure Section 435. Motion to strike

Sec. 32. Section 435 of the Code of Civil Procedure is amended to read:

435. (a) As used in this section, "complaint" includes a cross-complaint.

(b) ~~The defendant~~ Any party , within the time ~~required in summons~~ 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 ~~said~~ the notice, plus any additional time that the ~~defendant~~ party , as moving party, is otherwise required to give the ~~plaintiff~~ other party . If ~~defendant~~ a party serves and files such a notice of motion without demurring, his time to answer the complaint ~~shall be~~ is 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.

Comment. Section 435 is amended to make its provisions specifically applicable to cross-complaints. With respect to a cross-complaint that would have been a cross-complaint under prior law, Section 435 continues prior law under former Code of Civil Procedure Section 442. Section 435 also makes clear that a motion to strike may be directed to a cross-complaint that formerly would have been asserted as a counterclaim in the answer. The prior law was not clear. But see Code Civ. Proc. § 453 (striking sham or irrelevant answer).

Sec. 33. The heading for Chapter 4 (commencing with Section 437) of Title 6 of Part 2 of the Code of Civil Procedure is repealed.

~~CHAPTER-4---THE-ANSWER~~

Code of Civil Procedure Section 437 (Repealed)

Sec. 34. Section 437 of the Code of Civil Procedure is repealed.

~~437.--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 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.~~

Comment. Section 437 is superseded by Section 431.30.

Code of Civil Procedure Section 437a (Repealed)

Sec. 35. Section 437a of the Code of Civil Procedure is repealed.

~~437a. 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 437a is continued without change as Section 431.50.

Code of Civil Procedure Section 437b (Repealed)

Sec. 36. Section 437b of the Code of Civil Procedure is repealed.

~~437b. --In any action in 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 claim.~~

Comment. Section 437b is superseded by Section 431.40.

Sec. 37 A new chapter heading is added immediately preceding Section 437c of the Code of Civil Procedure, to read:

CHAPTER 5. SUMMARY JUDGMENTS

Code of Civil Procedure Section 437c (Amended)

Sec. 38 Section 437c of the Code of Civil Procedure is amended to read:

437c. In superior courts and municipal courts if it is claimed 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. The word "action" as used in this section shall be construed to include all types of proceedings. The word ~~"answer"~~ "complaint" as used in this section shall be construed to include a ~~counterclaim and~~ cross-complaint. The phrase "plaintiff's claim" as used in this section includes a cause of action, asserted by any party, in a cross-complaint. The filing of a motion under this section shall not extend the time within which a party must otherwise file an answer, demurrer , cross-complaint, 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 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 party has a good and substantial defense to the plaintiff's ~~action~~ claim (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, 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. 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 judgment as established by the proceedings herein provided for. A judgment entered under this section is an appealable judgment as in other cases.

Comment. The amendments to Section 437c merely conform the section to the revisions made in the provisions relating to pleading.

Code of Civil Procedure Section 437d (Repealed)

Sec. 39. Section 437d of the Code of Civil Procedure is repealed.

~~437d. 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 437d is continued without change as Section 431.60.

Code of Civil Procedure Section 438 (Repealed)

Sec. 40. Section 438 of the Code of Civil Procedure is repealed.

~~438. 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.~~

Comment. Except for the last proviso, Section 438 is superseded by Section 428.10. The permissiveness of Section 428.10 obviates any need to maintain the first proviso of Section 438. Section 428.10 places no restrictions on the right of a defendant to assert by way of cross-complaint either an unsecured claim where the original action is to foreclose a mortgage or a cause of action to foreclose upon his secured claim, subject to Section 726 of the Code of Civil Procedure.

Code of Civil Procedure Section 439 (Repealed)

Sec. 41. Section 439 of the Code of Civil Procedure is repealed.

~~439.--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.~~

Comment. Section 439 is superseded by Sections 426.30-426.50.

Code of Civil Procedure Section 440 (Repealed)

Sec. 42. Section 440 of the Code of Civil Procedure is repealed.

~~440. 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.~~

Comment. Section 440 is superseded by Section 431.70.

Code of Civil Procedure Section 441 (Repealed)

Sec. 43. Section 441 of the Code of Civil Procedure is repealed.

~~441.--ANSWER-MAY-CONTAIN-SEVERAL-GROUNDS-OF-DEFENSE.--DEFENDANT MAY-ANSWER-PART-AND-DEMUR-TO-PART-OF-COMPLAINT.--The-defendant-may-set forth-by-answer-as-many-defenses-and-counter-claims-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.~~

Comment. The first sentence of Section 441 is superseded by Section 431.30(b)(2) and Section 428.10. The second sentence is superseded by Section 431.30(g). The last sentence is superseded by Section 430.30(c).

Code of Civil Procedure Section 442 (Repealed)

Sec. 44. Section 442 of the Code of Civil Procedure is repealed.

~~442.--Whenever the defendant seeks affirmative relief against any 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.~~

Comment. Section 442 is superseded by Article 4 (commencing with Section 428.10); the portion of Section 442 relating to the motion to strike is continued in Section 435 as amended.

Code of Civil Procedure Sections 443 and 444 (Repealed)

Sec. 45. Chapter 5 (commencing with Section 443) of Title 6 of Part 2 of the Code of Civil Procedure is repealed.

Comment. Chapter 5, consisting of Sections 443 and 444, is superseded by the provisions indicated below.

Old Section	New Provision
443	Sections 430.40, 430.50
444	Sections 430.10-430.30

Note: The repealed sections read as follows:

> 443. 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.

> 444. 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;
>
> 3. That the answer is uncertain; "uncertain", as used herein, includes imbiguous and unintelligible; or
>
> 4. That, where the answer pleads a contract, it cannot be ascertained from the answer, whether or not the contract is written or oral.

Code of Civil Procedure Section 462 (Repealed)

Sec. 46. Section 462 of the Code of Civil Procedure is repealed.

~~462.--ALLEGATIONS-NOT-DENIED,-WHEN-TO-BE-DEEMED-TRUE.--WHEN-TO-BE DEEMED-CONTROVERTED.--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-constituting-a-defense-or-counter-claim,-must,-on-the trial,-be-deemed-controverted-by-the-opposite-party.~~

Comment. Section 462 is superseded by Section 431.20.

Code of Civil Procedure Section 463 (Repealed)

Sec. 47. Section 463 of the Code of Civil Procedure is repealed.

~~463.--A-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.~~

Comment. Section 463 is superseded by Section 431.10.

Code of Civil Procedure Section 471.5. Amendment of complaint; filing and service

Sec. 48. 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.

Code of Civil Procedure Section 581 (Conforming Amendment)

Sec. 49. Section 581 of the Code of Civil Procedure is amended to read:

581. An action may be dismissed in the following cases:

1. By plaintiff, by written request to the clerk, filed with the papers in the case, or by oral or written request to the judge where there is no clerk, at any time before the actual commencement of trial, upon payment of the costs of the clerk or judge; provided, that ~~a counter claim has not been set up, or~~ affirmative relief has not been sought by the cross-complaint ~~or answer~~ of the defendant. If a provisional remedy has been allowed, the undertaking shall upon such dismissal be delivered by the clerk or judge to the defendant who may have his action thereon. A trial shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or his counsel, and if there shall be no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence.

2. By either party, upon the written consent of the other. No dismissal mentioned in subdivisions 1 and 2 of this section shall be granted unless upon the ~~written~~ consent of the attorney of record of the party or parties applying therefor, or if such consent is not obtained ~~upon order~~ of the court after notice to such attorney.

3. By the court, when either party fails to appear on the trial and the other party appears and asks for the dismissal, or when a demurrer is sustained without leave to amend, or when, after a demurrer to the complaint has been sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court, and either party moves for such dismissal.

4. By the court, with prejudice to the cause, when upon the trial and before the final submission of the case, the plaintiff abandons it.

5. The provisions of subdivision 1, of this section, shall not prohibit a party from dismissing with prejudice, either by written request to the clerk or oral or written request to the judge, as the case may be, any cause of action at any time before decision rendered by the court. Provided, however, that no such dismissal with prejudice shall have the effect of dismissing a ~~counterclaim or~~ cross-complaint filed in said action ~~or of depriving the defendant of affirmative relief sought by his answer therein~~ . Dismissals without prejudice may be had in either of the manners provided for in subdivision 1 of this section, after actual commencement of the trial, either by consent of all of the parties to the trial or by order of court on showing of just cause therefor.

Comment. The amendment to Section 581 deletes the reference to "counterclaim" and to seeking affirmative relief in an answer. Counterclaims have been abolished; claims that formerly were asserted as counterclaims (in the answer) are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80. Affirmative relief may not be sought by answer; rather, where affirmative relief is sought in the same action on a cross-demand, it must be done by cross-complaint. See Sections 431.30, 431.70, and the Comments to those sections.

Code of Civil Procedure Section 626 (Conforming Amendment)

Sec. 50. Section 626 of the Code of Civil Procedure is amended to read:

626. ~~Verdict-in-actions-for-recovery-of-money-or-on-establishing-counter claim.~~ When a verdict is found for the plaintiff in an action for the recovery of money, or ~~for-the-defendant,-when-a-counter-claim~~ when the claim of a party who has asserted a claim for the recovery of money in a cross-complaint is established, ~~exceeding-the-amount-of-the-plaintiff's-claim-as established,~~ the jury must also find the amount of the recovery.

Comment. The amendment to Section 626 substitutes a reference to "cross-complaint" for the former reference to "counterclaim" and makes other conforming changes to reflect the fact that counterclaims have been abolished and claims formerly asserted as counterclaims are now to be asserted as cross-complaints. See Code of Civil Procedure Section 428.80.

Code of Civil Procedure Section 631.8 (Conforming Amendment)

Sec. 51. Section 631.8 of the Code of Civil Procedure is amended to read:

631.8. After a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for a judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party, in which case the court shall make findings as provided in Sections 632 and 634 of this code, or may decline to render any judgment until the close of all the evidence. Such motion may also be made and granted as to any ~~counterclaim or~~ cross-complaint.

If the motion is granted, unless the court in its order for judgment otherwise specifies, such judgment operates as an adjudication upon the merits.

Comment. The amendment to Section 631.8 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80.

Code of Civil Procedure Section 666 (Conforming Amendment)

Sec. 52. Section 666 of the Code of Civil Procedure is amended to read:

666. If a ~~counterclaim,~~ claim asserted in a cross-complaint is established at the trial ~~, exceed the plaintiff's~~ and the amount so established exceeds the demand of the party against whom the claim asserted in the cross-complaint is established , judgment for the ~~defendant~~ party asserting the cross-complaint must be given for the excess; or if it appear that the ~~defendant~~ party asserting the cross-complaint is entitled to any other affirmative relief, judgment must be given accordingly.

When the amount found due to either party exceeds the sum for which the court is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue.

Comment. The amendment of Section 666 deletes the reference to a "counterclaim" and makes other conforming changes. Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80.

Code of Civil Procedure Section 871.2 (Technical Amendment)

Sec. 53. Section 871.2 of the Code of Civil Procedure is amended to read:

871.2. As used in this ~~section~~ chapter , "person" includes an unincorporated association.

Comment. The amendment of Section 871.2 corrects an obvious technical defect.

Code of Civil Procedure Section 871.3 (Conforming Amendment)

Sec. 54. Section 871.3 of the Code of Civil Procedure is amended to read:

871.3. A good faith improver may bring an action in the superior court or, subject to Section 396, may file a cross-complaint ~~or counter-claim~~ in a pending action in the superior or municipal court for relief under this chapter. In every case, the burden is on the good faith improver to establish that he is entitled to relief under this chapter, and the degree of negligence of the good faith improver should be taken into account by the court in determining whether the improver acted in good faith and in determining the relief, if any, that is consistent with substantial justice to the parties under the circumstances of the particular case.

Comment. The amendment of Section 871.3 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80.

Code of Civil Procedure Section 871.5 (Conforming Amendment)

Sec. 55. Section 871.5 of the Code of Civil Procedure is amended to read:

871.5. When an action , or cross-complaint ~~, or counterclaim~~ is brought pursuant to Section 871.3, the court may, subject to Section 871.4, effect such an adjustment of the rights, equities, and interests of the good faith improver, the owner of the land, and other interested parties (including, but not limited to, lessees, lienholders, and encumbrancers) as is consistent with substantial justice to the parties under the circumstances of the particular case. The relief granted shall protect the owner of the land upon which the improvement was constructed against any pecuniary loss but shall avoid, insofar as possible, enriching him unjustly at the expense of the good faith improver. In protecting the owner of the land against pecuniary loss, the court shall take into consideration the expenses the owner of the land has incurred in the action in which relief under this chapter is sought, including but not limited to reasonable attorney fees. In determining the appropriate form of relief under this section, the court shall take into consideration any plans the owner of the land may have for the use or development of the land upon which the improvement was made and his need for the land upon which the improvement was made in connection with the use or development of other property owned by him.

Comment. The amendment of Section 871.5 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80.

Code of Civil Procedure Section 1048.5. Transfer to another court for trial when cross-claim severed for trial

Sec. 56. 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 is severed for trial under Section 1048, the court may, in its discretion, in the interest of justice, transfer the cause to any 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. 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 the severed cause is not retained by the original court, it 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 should be transferred to a municipal court most convenient to the parties even though the original action is one in a superior court. It should be noted, however, that, where severance for trial is desirable but transfer would be undesirable, the court may retain the action for trial even though it would not have had jurisdiction if the action were initiated as an independent proceeding.

The power to transfer a severed cause is discretionary. The court should, however, consider not merely the convenience of the parties, witnesses, and the

court, but also whether severance would prejudice a party's claim to a set-off. Thus, where actions, though severed, are retained in one court for trial, provision can be made for a single judgment providing for a proper set-off. On the other hand, where one action is transferred and brought to an earlier conclusion than the other, the losing party in this action can be at a serious practical disadvantage. He will have to satisfy this first judgment (which may be financially difficult) with no assurance that the other party will have funds available to satisfy his own judgment (set-off).

Revenue and Taxation Code Section 3522 (Conforming Amendment)

Sec. 57. Section 3522 of the Revenue and Taxation Code is amended to read:

3522. A defense ~~counter-claim~~ or cross-complaint based on an alleged invalidity or irregularity of any deed to the State for taxes or of any proceeding leading up to deed can only be maintained in a proceeding commenced within one year after the date of recording the deed to the State in the county recorder's office or within one year after October 1, 1949, whichever is later.

Comment. The amendment of Section 3522 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80. The amendment of Section 3522 has no effect on any action commenced prior to July 1, 1972.

Revenue and Taxation Code Section 3810 (Conforming Amendment)

Sec. 58. Section 3810 of the Revenue and Taxation Code is amended to read:

3810. A defense ~~, counterclaim,~~ or cross-complaint based on the alleged invalidity or irregularity of any agreement or deed executed under this article can only be maintained in a proceeding commenced within a year after the execution of the instrument.

Comment. The amendment of Section 3810 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80. The amendment of Section 3810 has no effect on any action commenced prior to July 1, 1972.

Water Code Section 26304 (Conforming Amendment)

Sec. 59. Section 26304 of the Water Code is amended to read:

26304. An action, proceeding, defense, answer, ~~counterclaim~~, or cross-complaint based on the alleged invalidity or irregularity of any collector's deed executed to the district or based on the alleged ineffectiveness of the deed to convey the absolute title to the property described in it may be commenced or interposed only within one year after the recordation of the deed.

Comment. The amendment of Section 26304 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80. The amendment of Section 26304 has no effect on any action commenced prior to July 1, 1972.

Water Code Section 26305 (Conforming Amendment)

Sec. 60. Section 26305 of the Water Code is amended to read:

26305. An action, proceeding, defense, answer, ~~counterclaim,~~ or cross-complaint based on the alleged invalidity or irregularity of any agreement of sale, deed, lease, or option executed by a district in connection with property deeded to it by its collector or based on the alleged ineffectiveness of the instrument to convey or affect the title to the property described in it may be commenced or interposed only within one year after the execution by the district of the instrument.

Comment. The amendment of Section 26305 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80. The amendment of Section 26305 has no effect on any action commenced prior to July 1, 1972.

Water Code Section 37161 (Conforming Amendment)

Sec. 61. Section 37161 of the Water Code is amended to read:

37161. An action, proceeding, defense, answer, ~~counterclaim,~~ or cross complaint based on the alleged invalidity or irregularity of any collector's deed executed to the district or based on the alleged ineffectiveness of the deed to convey the absolute title to the property described in it may be commenced or interposed only within one year after the recordation of the deed.

Comment. The amendment of Section 37161 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80. The amendment of Section 37161 has no effect on any action commenced prior to July 1, 1972.

Water Code Section 37162 (Conforming Amendment)

Sec. 62. Section 37162 of the Water Code is amended to read:

37162. An action, proceeding, defense, answer, ~~counterclaim,~~ or cross complaint based on the alleged invalidity or irregularity of any agreement of sale, deed, lease, or option executed by a district in connection with property deeded to it by its collector or based on the alleged ineffectiveness of the instrument to convey or affect the title to the property described in it may be commenced or interposed only within one year after the execution by the district of the instrument.

Comment. The amendment of Section 37162 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80. The amendment of Section 37162 has no effect on any action commenced prior to July 1, 1972.

Water Code Section 51696 (Conforming Amendment)

Sec. 63. Section 51696 of the Water Code is amended to read:

51696. An action, proceeding, defense, ~~counterclaim~~ or cross complaint based on the alleged invalidity or irregularity of any sale by the county treasurer as trustee of a district of a parcel deeded to him as a result of the nonpayment of an assessment, or some portion thereof, may be commenced or interposed only within one year from the date of the sale.

Comment. The amendment of Section 51696 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80. The amendment of Section 51696 has no effect on any action commenced prior to July 1, 1972.

Operative Date; Application to Pending Actions

Sec. 64. This act becomes operative on July 1, 1972, and applies only to actions commenced on or after that date. Any action commenced before July 1, 1972, is governed by the law as it would exist had this act not been enacted.

Comment. The provisions of this act apply only to actions commenced on or after July 1, 1972. The operative date of the act is deferred so that lawyers and judges will have sufficient time to become familiar with the new procedures.

71 4/22/70

THE NEED TO REVISE CALIFORNIA PROVISIONS

REGARDING JOINDER OF CLAIMS, COUNTERCLAIMS, AND CROSS-COMPLAINTS*

*This study was prepared for the California Law Revision Commission by Professor Jack Friedenthal. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

CONTENTS

#71 4/22/70

THE NEED TO REVISE CALIFORNIA PROVISIONS REGARDING JOINDER OF CLAIMS, COUNTERCLAIMS, AND CROSS-COMPLAINTS

INTRODUCTION

Any study of joinder of causes of action involves considerations also affecting counterclaims and cross-complaints, and is necessarily intertwined with problems of joinder of parties. In California the law of joinder has developed in piecemeal fashion, resulting in an overabundance of confusing, inconsistent, and sometimes meaningless provisions. The purpose of the present study is to consider the provisions as they stand, attempt to extract from them the basic principles upon which they were based, and from there to reconstruct a new set of statutes which will be consistent, coherent, and hopefully, easier to understand and to administer.

PART I: JOINDER OF CAUSES

SCOPE

Joinder of causes of action in California is governed by Code of Civil Procedure section 427. The question of revision of this section involves the following considerations:

1. To what extent should the language of the section be revised to eliminate the ambiguity and redundancy that it now contains?

2. To what extent should the language be altered to reflect court interpretations of the section?

3. To what extent should the restrictions on permissive joinder of causes by plaintiffs be altered or removed?

4. To what extent should the section be harmonized or merged with provisions for joinder of claims by parties other than plaintiffs?

5. To what extent should rules for mandatory joinder be imposed?

BACKGROUND

Section 427 is based on the original provision for joinder of causes contained in the Field Code and enacted into law in New York in 1848.[1] The section currently reads as follows:

> The plaintiff may unite several causes of action in the same complaint, where they all arise out of:
>
> 1. Contracts, express or implied. 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.
>
> 3. Claims to recover specific personal property, with or without damages for the withholding thereof.
>
> 4. Claims against a trustee by virtue of a contract or by operation of law.
>
> 5. Injuries to character.
>
> 6. Injuries to person.
>
> 7. Injuries to property.
>
> 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

---

1. Toelle, Joinder of Actions--With Reference to the Montana and California Practice, 18 Calif. L. Rev. 459, 465 (1930).

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.

THE CATEGORY REQUIREMENT

The requirement that all causes to be joined must fall within one of the designated statutory categories is a remnant from common law pleading and has aptly been described as "illogical and arbitrary."[2] Under the common law writ system, a plaintiff could join all claims he had against a defendant which fell within the scope of a single writ, whether or not the various causes arose out of the same or different transactions or events and regardless of the nature of the injuries suffered. On the other hand, if the causes did not fall within the same writ, they could not be joined even though they arose out of a single event at the same time and before the same witnesses.[3] The harsh rules of common law could be avoided, however, by resort to equity jurisdiction. Courts in equity would determine an otherwise purely legal action in order to avoid a multiplicity of suits, at least when various causes, which could not be joined at common law, involved common questions of law and fact.[4]

The Necessity For Revised Wording of Section 427

When the common law and equity rules were scrapped in favor of the code, the drafters, by instituting categories of cases that could be joined, simply reaffirmed a modified common law approach; while in some instances joinder was broader than at common law, in other situations

---

2. Id. at 467.

3. See Clark, Code Pleading 436 (2d ed. 1947); Blume, A Rational Theory for Joinder of Causes of Action and Defences, and for the Use of Counterclair 26 Mich. L. Rev. 1-10 (1927).

4. Id. at 10-17.

joinder was actually restricted.[5] Originally in California there were only seven categories,[6] which still comprise, with minor modification, the first seven categories in the current statute.

Strange as it may seem, there was no provision whatsoever for joinder of causes of action arising out of the same transaction or occurrence, and despite the fact that New York in 1852 amended its own statute to add such a category, California did not do so until 1907, after a number of cases in which joinder of different causes arising from a single event had been rejected.[7]

Even then the amending legislation was poorly drafted since the new eighth category provided for joinder of claims "arising out of the same transaction or transactions connected with the same subject of the action, and not included within one of the foregoing subdivisions of this section." This language was in accord with the wording of the paragraph following the listing of categories which reads, "The causes of action so united must all belong to one only of these classes. . . ."

On its face this wording would seem to preclude joinder of any claim which falls within one of the first seven categories of claims even if it arose out of the same transaction as the claim with which it was to be joined. Since the first seven categories cover almost all possible causes, the utility of the new eighth category would have been limited indeed had not the courts simply ignored the wording of the section and

---

5. See Toelle, supra note 1, at 467.

6. Id. at 465-67.

7. E.g., Stark v. Wellman, 96 Cal. 400, 402, 31 P. 259, 260 (1892).

recognized the intent of the legislature to permit unlimited joinder of all claims arising from a single transaction.[8] Despite the fact that section 427 has since been frequently amended, however, the offending language in subdivision eight and in the subsequent paragraph have not been eliminate

The precise scope and meaning of the new category was unclear from the outset. Although it is now clear that courts read the words "same transaction" broadly to include causes arising out of a single tortious event, or related series of events, this did not come about until a series of special provisions, seemingly redundant,[9] were added to the statute. Thus in 1913 it was provided that a husband's damages for injuries to his wife could be joined with the wife's own claim for her injuries; apparently the 1907 amendment was not considered sufficient for such joinder. In 1915 another amendment permitted a plaintiff to join "causes of action for injuries to persons and injuries to property growing out of the same tort." This addition appeared to be in response to a 1912[11] decision where, without discussing the "transaction" category, such joinder was denied. Finally, in 1931, a ninth category was added to section 427 providing for joinder of all claims for injuries arising out of a conspiracy. Again, this appeared to be in response to a specific decision refusing joinder despite the presence of the general "transaction" category.[12]

---

8. See 1 Chadbourn, Grossman & Van Alstyne, California Pleading § 815 at 740-41 (1961).

9. See generally 2 Witkin, California Procedure, Pleading, § 146 (1954).

10. See 1 Chadbourn, Grossman & Van Alstyne, California Pleading § 815 at 741 (1961).

11. Schermerhorn v. Los Angeles Pac. Ry., 18 Cal. App. 454, 123 P. 351 (2d Dist. 1912).

12. See 1 Chadbourn, Grossman & Van Alstyne, California Pleading § 816 (1961

The result of these amendments is a statute which on its face is confused and repetitious and which can result in unnecessary concern and research by an attorney who is new to the California Bar or who is not well versed in California litigation practice. By itself, this would not be sufficient reason to call for an amendment, but if other facets of the joinder statute are to be altered, so surely should the current language.

The Need to Abolish the Categorical Approach to Joinder

Much more serious than the way in which section 427 is worded is the fact that the entire substance of the statute makes little sense and should be replaced by a provision allowing unlimited joinder among those persons who have properly been made parties to the action. Although ultimately such a proposal requires a discussion of the rights of parties other than plaintiffs to join claims, for purposes of analyzing the current categorical approach, it is necessary to treat only the case in which a single plaintiff wishes to assert a number of causes against a single defendant.

1. As virtually every writer on the subject has noted, the joinder categories under the code are for the most part arbitrary and not based on reasons of practical convenience.[13] For example, plaintiff can bring suit on a contract implied in law, and join with it a claim under an unrelated written agreement to which he was not a party but which has been

---

13. See, e.g., Clark, Code Pleading 436 (2d ed. 1947); Wright, Joinder of Claims and Parties Under Modern Pleading Rules, 36 Minn. L. Rev. 580, 582 (1952); Blume, A Rational Theory For Joinder of Causes of Action and Defences, and For the Use of Counterclaims, 26 Mich. L. Rev. 1, 17-18 (1927); Toelle, Joinder of Actions--With Reference to the Montana and California Practice, 18 Calif. L. Rev. 459, 467 (1930).

assigned to him for purpose of litigation.[14] Yet plaintiff cannot join a cause of action for battery with a cause of action for defamation unless he can demonstrate that the two causes arose out of a single set of transactions or were the result of a single conspiracy. In the contract action, where joinder is allowed, the witnesses, the nature of the proof, and even the legal issues regarding one cause will have nothing whatsoever to do with the other cause. On the other hand in the tort case, where joinder is not permitted, the history of the relationship between plaintiff and defendant may be germane to both causes of action, meaning that the same evidence may have to be presented twice.

2. There is no demonstrated need for any limitations on joinder of causes of action. Every one of the five amendments to section 427 of the Code of Civil Procedure has been enacted for the purpose of expanding joinder. The fact that entirely different, unrelated claims may be joined if they happen to fall within a single category has not induced any suggestion that such joinder should be curtailed. In a steadily expanding number of other jurisdictions all restrictions on joinder of causes have been eliminated. In New York, where the original code provision was first enacted, such reform was enacted in 1935.[15]

---

14. See Fraser v. Oakdale Lumber & Water Co., 73 Cal. 187, 14 P. 829 (1897).

15. See Clark, Code Pleading 440 (2d ed. 1947). The current New York Provision, § 601 of the Civil Practice Law and Rules, reads as follows:

> The plaintiff in a complaint or the defendant in an answer setting forth a counterclaim or cross-claim may join as many claims as he may have against an adverse party. There may be like joinder of claims when there are multiple parties.

The Federal Rules of Civil Procedure also contain a provision for unlimited joinder[16] which has been a model for reform in many states. The success of such provisions has been summed up by one procedural expert as follows, "Of all the provisions of the Federal Rules and their state counterparts dealing with joinder, this rule on joinder of claims has operated most smoothly and satisfactorily."[17]

Perhaps even more significant than the experience of other states with broad joinder of claims provisions is the California experience with the broad joinder of counterclaims and cross-complaints by defendant. The scope of California's counterclaim provisions was set forth by the state supreme court in Terry Trading Corp. v. Barsky[18] in 1930, as follows:

> Under the amendment to section 438 of the Code of Civil Procedure, adopted in 1927 and prior to the filing of the answer and cross-complaint herein, the sole requisites of a counterclaim are that it "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." All of the other limitations were abolished by this amendment, and an intent on the part of the legislature to avoid multiplicity of suits and to have all conflicting claims between the parties settled in a single action was most clearly manifested. In the instant case, obviously, both the claim for damages and the demand that plaintiff account for sums collected and not credited on defendant's obligation tend to diminish or defeat plaintiff's recovery. Under the amendment it is not necessary

---

16. Fed. R. Civ. P. 18(a). The rule is quoted in the text at 19 infra.

17. Wright, Joinder of Claims and Parties Under Modern Pleading Rules, 36 Minn. L. Rev. 580, 586 (1952).

18. 210 Cal. 428, 435-36, 292 P. 474, 477 (1930).

> that there be any connection between the cause of action set up in the complaint and that which forms the basis of the counterclaim. Indeed, the statute contemplates the pleading of unrelated matters as counterclaims by providing that "the court may, in its discretion, order the counterclaim to be tried separately from the claim of the plaintiff." (Code Civ. Proc., sec. 438; McBaine, Recent Pleading Reforms in California, 16 Cal. L. Rev. 366.)

If defendant has a claim against plaintiff which does not qualify as a counterclaim but which arises out of the same transaction or occurrence as plaintiff's complaint, then defendant can plead such claim as a cross-complaint in addition to any counterclaims he has filed in his answer.[19] It is certainly anomalous for California law to permit defendant to plead such a broad range of counterclaims and cross-complaints and at the same time to adhere to the arbitrary categories set out for joinder of claims by plaintiff. If the purpose is to avoid multiplicity and to have all conflicting claims between the parties settled in a single action, the current restrictions on joinder by plaintiff are absurd. In this regard it should be noted that there has been no agitation whatsoever to cut back the scope of counterclaims or cross-complaints now permitted; indeed writers on the subject have adversely criticized the counterclaim provision for retaining the "diminish or defeat" language which restricts counterclaims to those cases where both plaintiff and defendant seek some monetary relief. The legislature has been urged to liberalize the rules so that defendant can join any causes whatsoever he has against plaintiff.[20]

---

19. See Cal. Code Civ. Proc. § 442.

20. See, e.g., Comment, California Procedure and the Federal Rules, 1 U.C.L.A. L. Rev. 547, 551-52 (1954).

3. Any undesirable effects resulting from unlimited joinder of causes can easily be remedied by a severance of causes for trial. Joinder of causes, in and of itself, is never harmful. Only a joint trial of causes may be unjustified, either because the trial may become too complex for rational decision, or because evidence introduced on one cause will so tend to prejudice the trier of fact that it will be unlikely to render a fair decision on any other cause. These latter problems which are certainly not obviated by the current arbitrary categories can be avoided by resort to Code of Civil Procedure section 1048 which permits the court, in its discretion, to sever any action.[21] In addition, a number of other California provisions permit severance where appropriate because of multiple plaintiffs,[22] multiple defendants,[23] or the insertion of counterclaims.[24] These latter provisions, which seem redundant, can only emphasize the availability of severance whenever necessary.

---

21. Section 1048 reads in its entirety:

> An action may be severed and actions may be consolidated, in the discretion of the court, whenever it can be done without prejudice to a substantial right.

22. Cal. Code Civ. Proc. § 378.

23. Cal. Code Civ. Proc. § 579.

24. Cal. Code Civ. Proc. § 438.

4. The current categorical approach of section 427 results in sufficient confusion, uncertainty, and unwarranted cost to justify revision. As a practical matter there will only be a small number of situations in which a plaintiff will have several causes of action against a defendant which do not arise from one set of transactions or occurrences so as to permit joinder under section 427. Even then such unrelated causes may be joined if they all fall within some other category of the statute. Thus the adoption of an unlimited joinder rule will not have much impact on the number of causes that can in fact be joined. Nevertheless, a number of benefits will accrue from such revision. Under the current provision defendants are encouraged, whenever tactically sound, to challenge the joinder of causes by arguing that no category applies. Even when unsuccessful, argument on such an issue is costly and time consuming. In those few cases where the challenge is successful, the plaintiff must file an amended complaint eliminating one or more of his original causes. If the original complaint was filed shortly before the statute of limitations ran on the various causes, plaintiff may even be forced to a final election as to which of the causes to pursue since a new independent action on any cause dropped from the case will be barred.

There are a number of substantial practical reasons why failure to permit joinder of even totally unrelated claims is unsound. Separate cases require duplication of filing fees and of the costs of service of process, not to mention the costs of the unnecessary duplication of discovery proceedings and two trials instead of one. Furthermore, even

unrelated claims may involve certain common issues and may require the presence of the same witnesses.

5. The discretionary power of the court to consolidate separate cases cannot eliminate the problems raised by the limitations on joinder of causes. Since California's provision for consolidation of cases for trial contained in Code of Civil Procedure section 1048[25] does appear to give virtually unlimited discretion to the trial judge, one may ask whether it is not better to retain current joinder limitations than to provide for unlimited joinder subject to the court's power to sever the causes for trial. First of all, consolidation does not eliminate duplication of filing fees and other preliminary costs of suit. Furthermore, a court is likely to reject consolidation over one party's objection if the only reason advanced is that one trial is less costly than two, even though the causes sought to be joined are simple and, if joinder were permitted, severance would be rejected as totally inappropriate. The court would be justified in assuming that the failure of the legislature to provide for unlimited joinder of causes at plaintiff's option indicates a policy against such joinder by consolidation without a substantial showing of necessity in the particular case. Finally, if causes have been inappropriately joined, severance for trial can always be effected, but it may not be possible to consolidate actions since they may not have been instituted in the same court. Consider, for example, a situation in which plaintiff has two causes, one of which must be brought in superior court and the other of which, if sued alone, would have to be instituted in municipal court. If section 427 permits plaintiff to unite them into a single case, and he does so, the California laws on jurisdiction provide that the entire action be brought in the

25. The full text of section 1048 is quoted in note 21, supra.

superior court,[26] which can in turn sever the causes for trial. However, if plaintiff, at the outset, divides the causes into two separate actions, the case before the municipal court cannot subsequently be sent to the superior court for consolidation with the case there pending;[27] once the municipal court obtains proper jurisdiction over a case, transfer to the superior court for consolidation[28] is precluded. One may, of course, argue that the legislature should alter the jurisdiction statutes to permit such consolidation rather than change the rules of joinder of causes, but such a procedure would add costs and would still not cure the confusion engendered by section 427 as it now stands.

---

26. See 1 Chadbourn, Grossman & Van Alstyne, California Pleading § 182 (1961).

27. Cochrane v. Superior Court, 261 Cal. App.2d 201, 67 Cal. Rptr. 675 (2d Dist. 1968).

28. Ibid.

PERMISSIVE JOINDER OF CAUSES IN CASES INVOLVING MULTIPLE PARTIES

Section 427 is generally phrased as if every case involved but one plaintiff and one defendant. The only major reference[29] to multiple parties is the requirement that each cause of action to be joined must affect all parties to the action. This clause appeared in the original code at a time when joinder of parties was narrowly restricted. In 1927, however, California joined an ever growing number of states in liberalizing the joinder of parties provisions. Essentially these new statutes provide that parties can be joined if the claims by or against them, whether joint, several, or in the alternative, arise out of one transaction or occurrence or series of transactions or occurrences, and involve a common question of law or fact.[30] In making these reforms, however, state legislatures consistently ignored the existing joinder of claims statutory requirement that each cause of action affect all parties to the action. As a result, in a number of states, the joinder of parties reforms were virtually nullified. For example, two persons, each of whom suffered injuries due to a single tortious act by a defendant, could satisfy the joinder of parties requirements, but this was

---

29. There is an additional reference to the situation where a husband and wife join to sue for their respective damages arising from an injury to the wife.

30. California Code of Civil Procedure section 378 governs joinder of parties and clearly states these requirements. Joinder of defendants is governed by a series of three provisions, California Code of Civil Procedure Sections 379, 379(a), 379(b), and 379(c), which are loosely drawn, overlap, and give no clear picture of what was intended. Most experts have taken the position that the result of these provisions is, and should be, to allow joinder of defendants if, but only if, the criteria for joinder of plaintiffs have been met. See 1 Chadbourn, Grossman & Van Alstyne, California Pleading § 618 (1961); 2 Witkin, California Procedure, Pleading, § 93 (1954).

meaningless since their causes could not be joined; each one's action for his own injuries would affect only him.[31]

California courts, unlike those of other states, have consistently taken a sophisticated approach by holding that the modern joinder of parties provisions should be given their intended effect and that the "affect all parties" requirement of section 427 is thus superseded as to those causes of action which are so related as to permit the joinder of parties.[32]

Although the California courts are to be commended for their rational approach to the problem, the decisions have turned out to be somewhat of a detriment in disguise. For, in many of those states where a restrictive approach was taken and hence the modern joinder of parties legislation mullified, the need for full-scale reform of the provisions for joinder of causes became clear. It was thus that New York[33] and other states scrapped the old code provision for joinder of causes in favor of a statute permitting free joinder of causes between any adverse parties to the action.

In California, however, the "affect all parties" requirement is still part of the statute and has an important effect on the scope of joinder. Assume, for example, that one person, X, has two causes of action against a defendant arising from two entirely separate contracts and that another person, Y, has a cause of action against the same defendant arising from one

---

31. See, e.g., Ryder v. Jefferson Hotel Co., 121 S.C. 72, 113 S.E. 474 (1922). See generally Clark, Code Pleading 445-47 (2d ed. 1947).

32. The leading case was Peters v. Bigelow, 137 Cal. App. 135, 30 P.2d 450 (3d Dist. 1934), which subsequently was followed by the California Supreme Court in Kraft v. Smith, 24 Cal.2d 124, 148 P.2d 23 (1944).

33. See Tanbro Fabrics Corp. v. Beaunit Mills, Inc., 4 App. Div. 2d 519, 167 N.Y.S.2d 387 (1st Dep't 1957). The text of the current New York Provision is set out in note 15, supra.

of the two contracts. Both X and Y may join as plaintiffs in a single actior against defendant if the only causes they allege arise from the one contract which involves both of them. But in such a case X cannot join his claim on the other contract; it does not affect Y, nor is it a claim giving rise to the joinder of X and Y as plaintiffs.[34] This puts X in a serious dilemma. If he wishes to join his two causes against defendant in a single action, which is possible since they are both within the contract category, Y cannot join in the action with him. If he teams with Y, X must either forgo his other cause or bring an entirely separate suit on it.

Such a situation makes little sense. Once a party is properly joined in an action, he should be permitted to bring any and all causes he has against all adverse parties. Such a new provision would not have a marked impact since, as already noted, in most situations the parties' potential causes of action all arise from a single transaction or occurrence or series of transactions or occurrences. But in those situations where additional unrelated causes do exist, joinder may result in considerable savings of time and money. Undue confusion and prejudice can always be handled by a severance of causes or issues for trial.

It is interesting to note that the federal courts recently faced a problem similar to that which now exists in California. Although Federal Rule 18(a) clearly provided for unlimited joinder of causes by one plaintiff against one defendant, at least one lower federal court[35] had held, by a

---

34. See 1 Chadbourn, Grossman & Van Alstyne, California Pleading § 806 (1961).

35. Federal Housing Admr. v. Christianson, 26 F. Supp. 419 (D. Conn. 1939).

strained interpretation,[36] that, in a case involving multiple parties, a plaintiff was not entitled to join against a defendant a claim unrelated to that which had given rise to the joinder of parties. In 1966, in direct response, Rule 18(a) was amended to provide:

> A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.

The notes of the Advisory Committee[37] clearly set forth the purposes of the amendment as follows:

> Rule 18(a) is now amended not only to overcome the Christianson decision and similar authority, but also to state clearly, as a comprehensive proposition, that a party asserting a claim (an original claim, counterclaim, cross-claim, or third-party claim) may join as many claims as he has against an opposing party. . . . This permitted joinder of claims is not affected by the fact there are multiple parties in the action. The joinder of parties is governed by other rules operating independently.
>
> It is emphasized that amended Rule 18(a) deals only with pleading. As already indicated, a claim properly joined as a matter of pleading need not be proceeded with together with the other claims if fairness or convenience justifies separate treatment.

Insofar as California is concerned, it is useful to compare once again the existing situation regarding counterclaims and cross-complaints by defendants against plaintiffs to illustrate that the "affect all parties"

---

36. See Wright, Federal Courts 344 (2d ed. 1970).

37. Advisory Committee's Notes on Rule 18(a), 39 F.R.D. 87 (1966). For a comprehensive analysis of the amendment, see Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II), 81 Harv. L. Rev. 591, 592-98 (1968).

limitation on joinder in section 427 is arbitrary, inconsistent, and unnecessary. If two plaintiffs join in one action, each requesting damages for personal injuries suffered in a collision with defendant, defendant may plead any counterclaims or cross-complaints he has against one plaintiff regardless of the fact that such claims in no way affect the other plaintiff;[38] indeed, the counterclaims may involve matters totally unrelated to the complaint.[39] Furthermore, defendant may file a cross-complaint solely against a person who has not previously been a party to the action[40] who in turn should and probably does have the right to counterclaim against cross-complainant regarding matters totally unrelated to the other parties or causes involved in the suit.[41] Apart from historical accident as to the way in which various joinder provisions were enacted, it is difficult to find any reason why a plaintiff should not have as broad a right to join causes as does defendant, particularly as there has been no visible agitation to curtail defendants' powers since the current counterclaim provision was first enacted in 1927.

---

38. See California Code of Civil Procedure section 441, discussed at 49 infra, and California Code of Civil Procedure section 442 which provides that a cross-complaint may be filed against "any person whether or not a party to the action."

39. See Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474 (1930), quoted at 10-11 supra.

40. See Cal. Code Civ. Proc. § 442; Roylance v. Doelger, 57 Cal.2d 255, 19 Cal. Rptr. 7, 368 P.2d 535 (1962).

41. See page 54, infra. Two courts in recent cases have expressed divergent views on whether a defendant in a cross-action may assert a counterclaim. Compare Great Western Furniture Co. v. Porter Corp., 238 Cal. App.2d 502, 48 Cal. Rptr. 76 (1st Dist. 1965), with Carey v. Cusack, 245 Cal. App.2d 57, 54 Cal. Rptr. 244 (1st Dist. 1966). The views that such a counterclaim is improper was based on a literal reading of section 438 requiring a counterclaim to exist "in favor of a defendant and against a plaintiff." Such a view is unsound not only as a matter of statutory construction but also from a practical point of view. See 2 Chadbourn, Grossman & Van Alstyne, California Pleading § 1684 (Supp. 1968).

JOINDER OF CAUSE AND PROBLEMS OF VENUE

Section 427 provides that causes cannot be joined if they "require different places of trial." This clause could have resulted in severe restrictions on the right of plaintiffs to join causes of action. Fortunately, however, the clause has rarely been relied upon[42] and can and should be eliminated.

The "place of trial" clause appears to inject the varied problems of venue into the joinder statute, and there can be no question that the current California venue laws are a morass of provisions which nearly defy understanding.[43] Had defendants, from the time the code was enacted, consistently challenged the right to join causes on the ground that different places of venue were required, the situation might be quite different than it is today. Instead, however, when different causes were joined, each of which alone would have required a different place of trial, defendants made the initial challenge to the venue itself.[44] This gave the courts the opportunity to assume that joinder was proper and to interpret the venue statutes on that basis. The results of such interpretations have been dramatic since an entire set of venue rules have emerged regarding so-called mixed actions, where causes of action each requiring different places of venue have been

---

42. See 1 Chadbourn, Grossman & Van Alstyne, California Pleading § 818 at 746 (1961).

43. See Van Alstyne, Venue of Mixed Actions in California, 44 Calif. L. Rev. 685-87 (1956).

44. This is probably due to the fact that a challenge to venue will be determined prior to a demurrer for improper joinder of causes. See 1 Chadbourn, Grossman & Van Alstyne, California Pleading § 818 at 748 (1961).

joined. Venue in these cases has been viewed as a matter determined by the entire action and not by the causes joined in it.[45]

The result of these court-made rules has appeared to nullify any effect that "the place of trial" clause of section 427 might have had. For now, when two causes are joined, which if sued upon separately would require separate places of trial, there is a prescribed venue for them as joined, and hence they do not require different places of trial. It is obvious that this latter conclusion is based on circular reasoning as follows: there is a single place of venue for two causes because they are joined; hence, they can be joined because they do not require different places of venue. Yet, despite this, virtually no challenges to joinder of causes has been made under the "place of trial" clause and the courts themselves have carefully avoided the matter.

There is no justification for retaining on the statute books any requirement which appears useless on the one hand and, at the same time, has the potential for causing confusion and unnecessary cost in a future case. The courts now have had considerable experience in operating under venue rules as applied to joined causes, and there is no reason whatsoever why joinder should be prohibited because each cause, if sued upon alone, would require a different place of trial.

What must be guarded against is a possible situation in which joinder will destroy venue entirely. It is not significant if venue can be laid only in a county other than the one in which suit is brought, for when venue is challenged in such a case, transfer is not only available, but required.[46]

---

45. See id. §§ 375-89; Van Alstyne, supra note 43, at 688.

46. Cal. Code Civ. Proc. § 396(b).

But if the complex venue provisions are interpreted to preclude venue of a given mixed action in any forum, provision should be made for a severance of the action and transfer of separate parts to courts where venue is permissible. At present, there do not appear to be any cases where no court would have proper venue. This situation depends, however, on case holdings alone, and many of the decisions are by the courts of appeals, not the California Supreme Court, which conceivably could come to opposite conclusions.[47]

---

47. For example, it has been held by a court of appeal in Channell v. Superior Court, 226 Cal. App.2d 246, 38 Cal. Rptr. 13 (3d Dist. 1964), that the special statutory provision for venue regarding suits against counties, California Code of Civil Procedure Section 394, applies only if the action is against the county alone. It is not inconceivable that in the future the legislature, if not the California Supreme Court, may enforce a contrary position which could possibly lead to a situation, in a suit brought against individual defendants as well as a county, where no one court would be a proper place of trial for the entire action.

MANDATORY JOINDER OF CAUSES

Actions Involving One Plaintiff and One Defendant

Once it has been determined to permit unlimited or broad joinder of causes of action by a plaintiff, the question arises whether or not a further step should be taken to require joinder of causes in those cases where it would most likely save the time and cost of the court and the parties. The idea is not a new one; various commentators have from time to time advocated mandatory joinder,[48] but such a provision has rarely been adopted.[49] Just recently, a bill was introduced into the California State Senate which will, if passed, require plaintiffs to join or waive all factually related causes of action.[50]

There are obvious advantages in requiring one party to join all causes of action he has against another party in the case. There is always a good

---

48. See, e.g., Blume, Required Joinder of Claims, 45 Mich. L. Rev. 797, 811-12 (1947); Clark, Code Pleading 145-46 (2d ed. 1947).

49. Michigan is the only state which appears to have such a provision. Rule 203.1 of the Michigan General Court Rules of 1963 reads as follows:

> A complaint shall state as a claim every claim either legal or equitable which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject of the action and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. Failure by motion or at the pretrial conference to object to improper joinder of claims or to a failure to join claims required to be joined constitutes a waiver of the required joinder rules, and the judgment shall not merge more than the claims actually litigated.

50. Senate Bill No. 847, April 1, 1970. The text of the bill is set out at 36 infra.

chance that joinder will avoid undue cost and duplication of effort; prejudi can be eliminated by a severance of causes for trial. And it is not at all clear why plaintiff should have an option to determine when the advantages of such joinder should accrue and when they should not. Such a choice provides a tactical weapon available, at least in the first instance, only to one party.

There are several reasons, however, why rules of mandatory joinder have been rejected. First, the traditional and most practical method of enforcin such a rule is by declaring that any cause of action which plaintiff impropel failed to join cannot later be asserted in a separate suit.[51] Application of such a provision will induce every plaintiff to join every possible cause

---

51. This is the method used to enforce provisions requiring defendant to file cumpulsory counterclaims; see California Code of Civil Procedure Section 439. It is also the way in which a plaintiff is precluded fr bringing a second action on a claim which is held under the rules of res judicata to have been within the scope of a cause of action litigated in a prior case. See 2 Witkin, California Procedure, Pleading, § 14 (1954).

Other methods of enforcement have been suggested. For example, a party could be permitted to sue on a cause not raised in a prior actic only upon payment of all of his opponent's costs, including attorney's fees, of litigating the second suit. See Cleary, Res Judicata Reexamined, 57 Yale L.J. 339, 350 (1948). The trouble with this approach is that such compensation does not make up either for the loss of tim of a party in preparing for and testifying in a second trial or the emotional stress that often accompanies a law suit. Furthermore, there is no remedy for the inconvenience to witnesses who must testif a second time and to the court. The approach taken under Michigan Rule 203.1, which is set out in note 49, supra, apparently puts the burden on defendant in the first action to require plaintiff to join his causes. If defendant does not object, then plaintiff may institute a second action. This places defendant in a serious dilemm On the one hand, he would like to avoid a second suit; on the other hand, he does not want to suggest to plaintiff the availability of additional causes which might otherwise never be pursued. But even if this provision is thought to give sufficient protection to defendant, it certainly does not avoid the costs and inconvenience of the court and the witnesses.

he might have even though, if joinder was not mandatory, he might well allow all but the most serious to drop.[52] At least when plaintiff's causes are unrelated to one another, the potential advantages of mandatory joinder would appear to be outweighed by the disadvantage of encouraging additional litigation. Second, many modern counterclaim provisions, although not California's, permit a defendant to bring all causes of action which he has against plaintiff.[53] When such a provision is coupled with a provision for declaratory judgment, defendant can, by asking for declarations of non-liability, force plaintiff to litigate all his claims in a single suit.[54] This effectively equalizes the tactical opportunities available to the parties.

The situation changes, however, when the proposed mandatory joinder relates only to causes of action arising from a single set of transactions or occurrences. In such circumstances, there is a strong likelihood that the trial of one cause will involve the same witnesses if not identical issues as the other causes. The danger that mandatory joinder will encourage unnecessary litigation is markedly reduced for two reasons. First, the trial of one cause will often cover most of the related causes anyway. Second, when a plaintiff believes he has two causes, but the causes are closely related, plaintiff will hesitate to omit one of the causes for fear that the court will hold it not to be separate at all, but a part of the cause that was tried, and hence the rules of res judicata will be held to bar further

---

52. James, Civil Procedure 555 (1965).

53. See, e.g., Fed. R. Civ. P. 13(b); N.Y.C.P.L.&R. § 3019(a).

54. See Rose v. Bourne, Inc., 176 F. Supp. 605 (S.D.N.Y. 1959), aff'd, 279 F.2d 79 (2d Cir. 1960).

suit upon it.[55] Indeed, the chief argument given against mandatory joinder is that the rules of res judicata make it unnecessary.[56] This argument is certainly true in the majority of states, which follow the so-called "operative facts" theory of a cause of action, where the scope of a single cause of action is held broad enough to cover all claims arising from a single set of transactions or occurrences. The general uncertainty that invariably exists in such jurisdictions as to the precise limits of a cause of action for res judicata purposes has sufficient in terrorem effect to force plaintiffs to bring all related claims at once, even if ultimately some of those claims might be considered separate causes.[57]

In California, as in a number of other states, however, the scope of a cause of action for res judicata purposes is defined in terms of "primary rights," as opposed to "operative facts."[58] Although the precise lines of a cause of action are not always clear under California law,[59] they are generally more precise and narrower than they are under the operative rights theory. Under the primary rights doctrine the definition of a cause of action depends upon the nature of the harm suffered. An individual has a right to be free from personal injury, a separate right to be free of injury to his

---

55. See Clark, Code Pleading 476-78 (2d ed. 1947).

56. See James, Civil Procedure 555 (1965); Clark, Code Pleading 473-75 (2d ed. 1947).

57. See generally James, Civil Procedure §§ 11.10-.14 (1965).

58. Holmes v. David H. Bricker, Inc., 70 Cal.2d 786, 76 Cal. Rptr. 431, 452 P.2d 647 (1969); 1 Chadbourn, Grossman & Van Alstyne, California Pleading § 761 (1961); 2 Witkin, California Procedure, Pleading, § 11 (1954).

59. See Holmes v. David H. Bricker, Inc., 70 Cal.2d 786, 76 Cal. Rptr. 431, 452 P.2d 647 (1969).

realty, another to be free of injury to his personality, etc.[60] Therefore, a single act of a defendant may give rise to a number of different causes. For example, if defendant negligently drives his auto into plaintiff's vehicle, plaintiff has one cause for any personal injury he has suffered and another for damage to his car.[61] Similarly, if a defendant wrongfully withholds from a plaintiff possession of a home, plaintiff has one cause of action for ejectment from the realty and an entirely different cause for wrongful detention of the furnishings.[62] It makes little sense to permit a plaintiff to bring two separate actions for damages arising from a single tortious act of a defendant. The courts themselves should be protected from the ensuing duplication of trials. Of course, when precisely the same factual issues are involved in both cases, their resolution in the first case will be binding in the second under the doctrine of collateral estoppel. However, collateral estoppel applies only to those issues which are identical and has no effect when the issues in the second action differ, even though all of the witnesses are the same.[63]

Given a general policy favoring resolution of all related causes in a single action, coupled with the fact that California's narrow definition of a cause of action makes res judicata less effective than it is in most other jurisdictions as a force for compulsory joinder, it would seem appropriate

---

60. See authorities cited at note 58, supra.

61. See Holmes v. David H. Bricker, Inc., 70 Cal.2d 786, 789, 76 Cal. Rptr. 431, 433-34, 452 P.2d 647, 649-50 (1969).

62. McNulty v. Copp, 125 Cal. App.2d 697, 708, 271 P.2d 90, 98 (1st Dist. 1954).

63. 3 Witkin, California Procedure, Judgment, § 62 (1954).

in revising section 427 to provide specifically for mandatory joinder of claims arising out of a single set of transactions or occurrences. Once again, it is important to consider California's practice relating to counterclaims. Under section 439 of the Code of Civil Procedure, first enacted in 1872, any counterclaim arising from the same transaction as that upon which plaintiff's claim is based is a compulsory counterclaim which must be asserted in the answer or forever waived.[64] It certainly is no more onerous to require a plaintiff to join causes than it is to require defendant to do so. The drawbacks, if any, are precisely the same in both cases. Enactment of section 439 would seem to be a clear policy decision favoring the advantages of mandatory joinder over any possible detriments.

---

64. The current text of section 439 is quoted in full at 55, infra.

Mandatory Joinder of Causes in Multiparty Cases

So far discussion has centered on the situation where one plaintiff has several related claims against one defendant. Suppose, however, several plaintiffs each have related causes against one defendant, or one plaintiff has a number of related causes against several defendants, under circumstances in which the multiple parties may be joined under the current joinder of parties provisions. Since these provisions essentially require that the claims by or against them arise from a single set of transactions or occurrences and involve a common question of law or fact,[65] the reasons for a single trial are manifest.

California, in Code of Civil Procedure section 389, already does have a provision for compulsory joinder of parties who are termed "indispensable" or "conditionally necessary." An indispensable party is defined as one without whom the court cannot render an effective judgment. An indispensable party must be joined in the action; until and unless he is, the court has no jurisdiction to proceed with the case.[66] A "conditionally necessary" party is "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."[67] The court, on its own motion, must order him to be joined "if

---

65. See page 16, note 30, supra.

66. Holder v. Home Sav. & Loan Ass'n, 267 Cal. App.2d 91, 107, 72 Cal. Rptr. 704, 715 (4th Dist. 1968).

67. Cal. Code Civ. Proc. § 389 (emphasis added).

he is subject to the jurisdiction of the court, if he can be brought in without undue delay, and his joinder will not cause undue complexity or delay in the proceedings."[68] However, a failure to join a conditionally necessary party is not treated as a jurisdictional defect.[69]

Under the wording of section 389 California would seem to require joinder of parties and causes on a broad scale. Indeed, the statute would appear to compel joinder of parties and claims in a situation where, if there was but one plaintiff and one defendant, the claims would not have to be joined.

The relevant text of section 389 was added in 1957 on the basis of a study of the California Law Revision Commission, which gave as the purpose of the alteration a mere declaration of the existing law[70] as developed in the leading case of Bank of California v. Superior Court.[71] The court there defined "necessary parties" as those not indispensable but who "might possibly be affected by the decision, or whose interests in the subject matter or transaction are such that it cannot be finally and completely settled without them; but nevertheless their interests are so separable that a decree may be rendered between the parties before

---

68. Ibid.

69. See Bowles v. Superior Court, 44 Cal.2d 574, 283 P.2d 704 (1955).

70. Cal. L. Revision Comm'n, Recommendation and Study Relating to Bringing New Parties Into Civil Actions M-5 (1957).

71. 16 Cal.2d 516, 106 P.2d 879 (1940).

the court without affecting those others."[72] This language clearly implies that something more than factually related causes of action is needed before absent parties are to be deemed "conditionally necessary." Had the legislature intended a broad interpretation of the amendment to section 389, it would have repealed the sections of the code providing for permissive joinder of parties.[73] Those sections require that, for any additional parties to be joined, the causes of action by or against them must arise from the same transactions or occurrences as other causes before the court;[74] thus a broad reading of section 389 would mean that every person permitted to be joined would have to be joined. Obviously, such a result was not intended, and those courts which have dealt with the problem have refused to so hold.[75] Nevertheless, it is very difficult to formulate a precise test for determining who is a conditionally necessary party under the current state of the law. Indeed it has been argued that the decision should be made on a case by case basis without formulation of a rule.[76]

---

72. Id. at 523, 106 P.2d at 884.

73. Cal. Code Civ. Proc. §§ 378, 379, 379(a), 379(b), 379(c).

74. See page 16, note 30, supra.

75. See, e.g., Duval v. Duval, 155 Cal. App.2d 627, 318 P.2d 16 (4th Dist. 1957).

76. Comment, Bringing New Parties Into Civil Actions in California, 46 Calif. L. Rev. 100, 102 (1958). For additional analysis and criticism of the 1957 amendment, see Comment, Joinder of Parties in Civil Actions in California, 33 So. Cal. L. Rev. 428 (1960).

Perhaps the clearest case for holding a party to be conditionally necessary is one in which the interests of absentees depend upon a resolution of identical issues, and only identical issues, as those between the parties before the court. In Bank of California, for example, plaintiff sought to enforce provisions of an alleged contract by which a decedent agreed to leave her entire estate to plaintiff. Plaintiff joined only the residuary legatee of decedent's will; the other legatees and devisees, some of whom apparently lived out of the state, were not joined. The court held that the legacy of defendant could be impressed with a constructive trust in favor of plaintiff, which would in no way affect the rights of others taking under the will. Thus those others were not indispensable; but the Court indicated that they were "necessary" and should have been brought in if it were convenient and possible to do so.[77]

In tort cases the traditional view has been to permit plaintiff his choice of defendants among joint tortfeasors and to permit persons injured in a single accident to choose whether or not to join together in pursuing their remedies.[78] In situations where defendant is only vicariously liable for the acts of another, the law is unclear as to whether the individual who is primarily liable is a conditionally necessary party.[79] He is so deemed by statute in a number of situations,[80]

---

77. 16 Cal.2d at 526, 106 P.2d at 886 (dictum).

78. See 2 Witkin, California Procedure, Pleading, §§ 76, 95 (1954).

79. See 2 id. § 74.

80. See 2 id. § 85.

for example, where the owner of a motor vehicle is sued because of the wrongful acts of a driver to whom the vehicle was entrusted. In such case the driver must be joined if he is amenable to process.[81] The justification for compulsory joinder in indemnity cases is to protect the person who is vicariously liable from inconsistent verdicts in which he is held liable to the injured party and then denied recovery against the primary tortfeasor.

By now it should be clear that a straightforward policy decision is required regarding the compulsory joinder of claims involving multiple parties. If the purpose of joinder is to be limited to situations where actual prejudice, such as inconsistent verdicts, may occur if a person, whether or not indispensable, is not joined, then section 389 should be revised to eliminate the reference to joinder of causes and should be patterned after Federal Rule 19, which was amended in 1966 after careful study and which is limited to situations where absence of a party may result in such prejudice.[82]

---

81. Cal. Vehicle Code § 17152. This section not only provides for joinder it also requires plaintiff to seek execution against property of the driver before going against the property of the vehicle owner.

82. Federal Rule 19(a) reads as follows:

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

If the purpose of compulsory joinder is not only to avoid prejudice but also to promote the general convenience of the court and of the parties and to avoid a multiplicity of suits, then sections 427 and 389 must be altered to say so clearly; they must be harmonized with one another and with those provisions allowing permissive joinder of parties.

On balance the narrower view of Federal Rule 19 seems the most appropriate one for California to adopt. The advantages that may accrue from broad compulsory joinder are outweighed by problems of enforcement and the dangers of unnecessary litigation. In the case where a number of potential plaintiffs are all injured by a single tortious act of defendant, it would be extremely unfair to place a duty on the first person to file suit to locate and join, willingly or unwillingly, all possible co-plaintiffs. It is difficult to see how such a duty would be enforced. The most that could be done would be for the court to order plaintiff to join specified persons who might have claims related to his cause of action, but then there is the distinct danger that the new parties will have been dragged into the case even though they had never intended to bring suit.

The problems are somewhat less difficult when plaintiff has related causes against different defendants since a rule of mandatory joinder could be enforced by prohibiting him from later instituting an action against a defendant who should have been joined originally. This could prove extremely unfair, however, in a case where plaintiff was unaware of all possible defendants and did not learn of the existence and identity of some of them until the action was terminated. Even when plaintiff does know of all possible defendants, a mandatory joinder rule could have a

serious negative effect in inducing him to bring in parties who might otherwise never be sued. Presently, a plaintiff, who chooses not to sue all possible defendants, will select those persons who are most likely to be held liable and who can afford to pay a judgment. If he is successful, it is very unlikely he will bring a second action; and even if he loses, he must balance the costs of an additional trial against the reduced chances of ultimate success; in many cases this will result in a decision not to go forward. An added factor is that plaintiff must at least commit himself to a second action prior to the running of the statute of limitations. Especially in personal injury actions under California's one-year limitations period,[83] it will usually be known before trial of the first action whether or not a second action will be brought, and consolidation of the two cases may be available. On balance, then, a rule requiring joinder of related causes against different defendants would not appear sufficiently beneficial to overcome the problems it would tend to create.

The problems of drafting a mandatory joinder proposal are illustrated by the recent bill introduced into the California State Senate[84] which reads as follows:

> Section 1. Section 428 is added to the Code of Civil Procedure, to read:
>
> 428. Whenever several causes of action arise out of the same transaction or occurrence, if the plaintiff prosecutes an action to judgment upon a complaint which does not allege each such cause of action, or does not name as a defendant a person against whom any such cause of action could have been asserted, the plaintiff shall be deemed to have elected his remedies and cannot thereafter maintain an action against such person or upon such cause of action if the plaintiff knew or reasonably should have known of such person or cause of action prior to the entry of judgment.

---

83. Cal. Code Civ. Proc. § 340(3).

84. Senate Bill 847, April 1, 1970.

As used in this section, "plaintiff" includes a defendant who asserts a cross-complaint.

Nothing in this section shall be construed as affecting the provisions of Section 378 relating to separate trials or expedient orders, or Section 1048 relating to the severance of actions.

By its designation as "Section 428" to appear after section 427 dealing with joinder of causes, the proposal seems to be primarily involved with related causes of action. In fact, it would go much further by requiring joinder of all defendants who are now allowed to be joined in an action since, as previously noted, it is presently a prerequisite to joinder of defendants that the causes of action against them must arise from the same transaction or occurrence.[85] At the very least the new proposal should also directly refer to the statutes dealing with joinder of defendants and should also reconcile section 389 regarding joinder of conditionally necessary parties.

The proposal attempts to handle the situation where defendant is unaware of an omitted cause of action or potential defendant by excluding situations where the person had no reason to know that the cause of action or potential defendant existed. Such a flexible standard raises serious practical questions. What will the standard be for determining when the lack of knowledge was reasonable? When will such a matter be determined, before or at the trial on the merits? And will the question be left to the trier of fact?

---

85. See page 16, note 30, supra.

The problems the courts are likely to face in administering such a proposal,[86] coupled with the tendency to force plaintiffs to join defendants who otherwise would not be sued, raise grave questions as to its value as a device for aiding in the more effective administration of justice, regarding either the parties or the courts.

---

86. There are several other problems with the language of the proposed bill. For example, it refers to causes arising out of "the same transaction or occurrence," which varies from the precise language used in section 439 regarding compulsory counterclaims. Surely the terms of the two sections should be reconciled to present a consistent policy as to mandatory joinder. Furthermore, the bill should also provide that all claims of defendant against plaintiff should be compulsory if they arise out of the same transaction as plaintiff's complaint. At present such claims which qualify as cross-complaints but not as counterclaims are not compulsory. See pages 54-56, infra. This gap becomes even more pronounced since the proposed bill does state that, once a defendant files a cross-complaint, he is subject to the mandatory joinder proposals.

Finally, the proposal refers to the election-of-remedies doctrine which is inapplicable to the compulsory joinder situation and can only confuse matters. See Clark, Code Pleading § 77 (2d ed. 1947).

PART II: COUNTERCLAIMS AND CROSS-COMPLAINTS

SCOPE

The current California law regarding counterclaims and cross-complaints is wholly unsatisfactory. Questions of revision involve the following considerations:

1. To what extent should a defendant be permitted or required to plead causes of action against a plaintiff?

2. To what extent should a defendant be permitted or required to plead causes of action against a person other than a plaintiff?

3. To what extent should a defendant who pleads a cause of action against a plaintiff be permitted to plead those causes against other persons in the same action?

4. How should a claim by defendant be treated for procedural purposes?

5. What rights and obligations should a party against whom a defendant has pleaded a cause of action have to respond to defendant's pleading and to join causes of action on his own behalf against defendant and others?

6. Should California's provision for automatic set-off of claims be retained?

The inquiry will be divided into two parts, one dealing with actions brought by defendant against plaintiff, and the other involving actions brought by defendant against persons other than plaintiff.

CLAIMS AGAINST PLAINTIFF

Background

In almost every jurisdiction a cause of action filed by defendant against a plaintiff, alone or with other persons, is denominated a "counterclaim" and is dealt with under a single set of rules.[87] Under the Federal Rules of Civil Procedure and other modern provisions, any cause of action which defendant has against plaintiff may be brought as a counterclaim, regardless of its nature.[88] If defendant's cause arises from the same transaction or occurrence as plaintiff's cause, then most such jurisdictions make it a compulsory counterclaim;[89] defendant must raise it in his answer or give it up, for he will not be allowed to raise it later in an independent action.

---

87. See, e.g., Federal Rule of Civil Procedure 13.

88. Federal Rule of Civil Procedure 13(b) provides:

> A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

This follows Federal Rule of Civil Procedure 13(a), quoted in note 89, infra, which not only permits but requires defendant to assert counterclaims arising out of the same transaction or occurrence as plaintiff's claim.

89. Federal Rule of Civil Procedure 13(a) provides:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

In California, however, the provisions are far more complex. A claim by defendant against plaintiff may qualify either as a counterclaim under section 438 of the Code of Civil Procedure or as a cross-complaint under section 442, or it may qualify as neither or as both. Since the procedural aspects of counterclaims are quite different from those of cross-complaints, it is important, although sometimes not easy, to determine into which category, if any, defendant's cause of action will be placed.

Roughly speaking, a counterclaim is any cause of action by defendant requesting some money damages in a case where plaintiff has also requested some monetary relief.[90] There need be no factual relationship whatever between the two causes.[91] A cross-complaint, on the other hand, is any claim by defendant arising from the same transaction as plaintiff's cause, regardless of the nature of the relief sought.[92] A counterclaim which arises from the same transaction as plaintiff's complaint will thus also qualify as a cross-complaint. A claim by defendant which neither seeks monetary relief nor arises from the same transaction as plaintiff's cause will not qualify either as a counterclaim or a cross-complaint and therefore can only be asserted in an independent lawsuit although there seems little reason to distinguish such a case from one where both plaintiff and defendant seek monetary relief on unrelated claims. To

---

90. See 2 Chadbourn, Grossman & Van Alstyne, California Pleading § 1686 (1961); 2 Witkin, California Procedure, Pleading, § 580 (1954).

91. See Terry Trading Corp. v. Barsky, 210 Cal. 428, 435-36, 292 P. 474, 477 (1930), which is quoted and discussed at 10-11, supra.

92. See Cal. Code Civ. Proc. § 442, quoted in text at 52, infra.

further complicate the situation, California law provides that defendant's cause of action is a compulsory counterclaim if it meets the counterclaim requirements and arises from the same foundation as plaintiff's cause;[93] but there is no provision for compulsory cross-complaints.

Overall, the California situation is manifestly in need of reform, preferably along the lines of the federal rules which have been adopted in many jurisdictions.

The Current Provision for Counterclaims

Section 438 provides as follows:

> The counterclaim . . . 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.

It should be noted that there are but two prerequisites to a counterclaim; it must tend to "diminish or defeat" plaintiff's claim and it must permit a several judgment between the parties to it. Not only is there no requirement that the counterclaim have any subject matter connection with any cause of action brought by plaintiff, but the plaintiff's cause and the defendant's counterclaim need not even both fall within one of the categories specified by section 427 for joinder of causes by plaintiff.

---

93. See Cal. Code Civ. Proc. § 439, quoted in text at 55, infra.

1. The diminish or defeat requirement. The "diminish or defeat" requirement is the most serious practical limitation on the right of defendant to institute a counterclaim. As interpreted by the California courts, the requirement is satisfied when both plaintiff and defendant pray for monetary relief, either alone or with other relief.[94] Thus if plaintiff seeks an injunction plus damages of ten dollars against defendant who has been running over his flowers, defendant may by counterclaim seek cancellation of a contract to deliver milk plus five dollars in damages for breakage of bottles. But if plaintiff omits his prayer for damages, no counterclaim would be available.

Even when both parties do claim some monetary relief, however, the California courts are not clear whether the "diminish or defeat" requirement is satisfied in a case where recovery by defendant on his proposed counterclaim would necessarily prevent recovery by plaintiff on his cause of action. Consider, for example, an automobile accident case in which plaintiff has sued for damages alleging defendant's negligence and where defendant wishes to countersue for his own injuries on the basis that plaintiff's negligence was the sole cause of the accident. Obviously both parties cannot recover on their respective claims. In a number of such cases courts have assumed, without discussion, that the "diminish or

---

94. See 2 Witkin, California Procedure, Pleading, § 5480 (1954), and cases cited therein. There is one situation when the defeat or diminish requirement may be satisfied although both parties do not seek monetary relief. This occurs when one party sues to quiet title to property against which the opposing side seeks to establish a lien. See Hill v. Snidow, 100 Cal. App.2d 31, 222 P.2d 958 (2d Dist. 1950).

defeat" requirement has been met.[95] On the other hand, in a recent contract case, Olsen v. County of Sacramento,[96] just the opposite result was reached. Plaintiff brought suit for damages incurred when defendant county cancelled plaintiff's exclusive franchise to collect garbage. The county not only defended on the ground that the plaintiff had obtained the franchise through fraud, but sought also to recover payments made to plaintiff under the franchise prior to the time of cancellation. The appellate court held, without citing authority, that defendant's claim did not tend to "diminish or defeat" plaintiff's claim because recovery by one party would necessarily preclude recovery by the other.

The history of section 438 lends some, although not conclusive, support to the Olsen decision. At common law counterclaims as such did not exist. Defendant could in certain instances put forth his claims in the form of defenses to plaintiff's right to recover.[97] This was permitted either when defendant had a cause of action arising from the same transaction involved in plaintiff's complaint or when defendant had a liquidated contract claim against plaintiff whose own cause was also based on a liquidated contract claim. In both of these situations defendant could

---

95. E.g., Schrader v. Neville, 34 Cal.2d 112, 207 P.2d 1057 (1949); Datta v. Staab, 173 Cal. App.2d 613, 343 P.2d 977 (1st Dist. 1959); Manning v. Wymer, 273 Adv. Cal. App. 556, 561-62, 78 Cal. Rptr. 600, 603-04 (1st Dist. 1969)(dictum).

96. 274 Adv. Cal. App. 347, 354-55, 79 Cal. Rptr. 140, 144 (3d Dist. 1969).

97. See N.Y. Judicial Council, Second Report 124-126 (1930); Howell, Counterclaims and Cross-Complaints in California, 10 So. Cal. L. Rev. 415-18 (1937).

not obtain affirmative relief; he could only offset any recovery by plaintiff.[98] Obviously then, when recovery by one party would necessarily preclude recovery by the other, the common law procedures were inoperative. In 1851 California enacted a fairly typical code provision,[99] closely related to the common law approach, which permitted as counterclaims the following:

> 1st. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;
>
> 2d. In an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action.

One important difference from the common law was enactment of a separate provision permitting defendant to obtain an affirmative recovery.[100]

---

98. See Boyd, The Development of Set-Off, 64 U. Pa. L. Rev. 541, 552-53 (1916).

99. Cal. Stats. 1851, c. 5, §§ 46-47.

100. Current section 666 of the Code of Civil Procedure, first enacted in 1872, reads as follows:

> If a counterclaim, established at the trial, exceed the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief judgment must be given accordingly.
>
> When the amount found due to either party exceeds the sum for which the court is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue.

This raises the question whether the new counterclaim law was intended to sweep away the common law concept that defendants' claims were defenses, thus eliminating as a prerequisite the possibility of mutual victory, or whether the intent was simply to allow defendant to recover the excess of his claim over that of plaintiff in a situation where both parties could prevail on their respective causes.

In 1927, the legislature amended the counterclaim provision to its present form, but it retained the uncertainty under the prior law by including the ambiguous "diminish or defeat" language. "Defeat" could simply be the ultimate of "diminish," illustrating the viability of the common law defense approach. On the other hand, "defeat" could be read quite differently to include any situation where recovery by defendant would be exclusive of victory by plaintiff on his cause of action.

The need to clarify the meaning of the "diminish or defeat" requirement exists if for no other reason than to prevent confusion and unfairness in the operation of the compulsory counterclaim statute. If defendant's cause of action is such that a verdict for him would necessarily preclude victory by plaintiff on his cause, then the two causes invariably will arise out of the same transaction. Hence, if defendant's claim qualifies as a counterclaim, it will be compulsory; failure to raise it will bar him from ever suing on it again. Defendant should not be left in doubt regarding a matter of this importance.

2. Prohibition against new parties--the several judgment requirement. Under the express terms of section 438 a counterclaim can be brought against a plaintiff only; a third person cannot be joined. Obviously,

this is another manifestation of the historical view that a counterclaim is merely a defense. Unfortunately, this rule presents a serious dilemma to a defendant who, if he were to pursue his cause in an independent action, would not only sue plaintiff but another person as well. The benefits of such an independent action must be balanced against what may be substantial advantages of a counterclaim against plaintiff alone, particularly if defendant expects that plaintiff will prevail on his complaint. If defendant forgoes the counterclaim in favor of an independent action and plaintiff's case is decided first, defendant may have to liquidate his assets at a loss in order to pay a judgment against him; in any event he will be deprived of the use of any funds so paid. By the time defendant wins his independent suit against plaintiff, plaintiff may have dissipated all of his funds, including those received from defendant, or he may have converted them into assets exempt from execution. Had defendant elected to bring his cause as a counterclaim, the amounts awarded him would have been deducted from plaintiff's damages and much, if not all, of the financial hardship would have been avoided.

In the face of the provisions permitting a plaintiff to join as defendants all persons against whom he has a cause of action arising from a single transaction, there seems little justification for prohibiting defendant from similar joinder in like circumstances. Any argument that the prohibition is necessary in order to avoid complicating the case is weak in light of the fact that the statute governing cross-complaints not only permits a defendant in pursuing a cause against an existing party to

join a stranger, but also permits such an action against the stranger alone.[101]

The several judgment requirement[102] is closely related to the rule prohibiting defendant from joining third persons and stems directly from the theory that a counterclaim is a defense. For example, if plaintiff sues two defendants on a contract on which they are jointly liable and if but one defendant seeks to counterclaim against plaintiff, he cannot do so because his claim would not be a defense to the joint liability. If the two defendants had a joint claim against plaintiff, then it could be brought as a counterclaim because it would be a direct counter to plaintiff's right to recover. The rule is not operative where defendants are jointly and severally liable, since a several judgment is rendered against each defendant in such case and each can bring counterclaims individually against plaintiff.

The several judgment rule makes very little sense indeed. There is no sound reason in a case to which it applies why defendant should be required to seek redress in a separate action instead of being permitted to counterclaim; if dire confusion at trial seems likely, the court can order separate trials. Indeed, if such rejected counterclaim meets the cross-complaint requirements, it can be brought in the same suit without question.

---

101. E.g., Linday v. American President Lines, Ltd., 214 Cal. App.2d 146, 29 Cal. Rptr. 465 (1st Dist. 1963). See Friedenthal, The Expansion of Joinder in Cross-Complaints by the Erroneous Interpretation of Section 442 of the California Code of Civil Procedure, 51 Calif. L. Rev. 494 (1963).

102. See generally 2 Witkin, California Procedure, Pleading, §§ 582-83 (1954), and cases cited therein.

3. The right of defendant to join all counterclaims against plaintiff. Section 427, as previously noted,[103] prohibits a plaintiff from joining causes of action which do not fall within its enumerated categories. Section 438 on its face has no similar limitation as to counterclaims, and section 441 specifically permits a defendant "to set forth by answer as many defenses and counterclaims as he may have." This is consistent with section 440 which provides for the automatic set-off of potential claims and counterclaims between any two parties.[104]

The only question concerning such unlimited joinder, other than the inconsistency between it and section 427, is contained in section 444 providing that plaintiff may demur to defendant's answer on the ground that "several causes of counterclaim have been improperly joined." This provision is parallel to that allowing a defendant to demur to the improper joinder of causes of action by plaintiff.[105] But whereas plaintiff may improperly join his causes, there seems to be no time when defendant can be guilty of improper joinder of counterclaims.

Whatever the original reason for the reference to improper joinder in section 444, such reference should be eliminated to avoid confusion.

4. Rights and duties of plaintiff against whom a counterclaim has been filed. Since a counterclaim is treated basically as a defense, it is dealt with in the same manner as a denial or an affirmative defense. Plaintiff, who is not permitted to file a reply to an answer, thus never need

---

103. See pp. 2-8, supra.

104. See the discussion of section 440 at 56-60, infra.

105. Cal. Code Civ. Proc. § 430(5).

answer the allegations of a counterclaim; they are deemed controverted.[106] As shall be seen, however, a cross-complaint is treated as a separate action. If plaintiff fails to reply to a cross-complaint, a default judgment will be entered against him.[107]

When plaintiff is uncertain whether a claim against him is a counterclaim or a cross-complaint, he may be in a quandary as to how to proceed. When defendant's claim qualifies as both a counterclaim and a cross-complaint, the courts have held that for pleading purposes they will regard the claim as one or the other as best suits the interests of justice.[108] Therefore in most cases the claim is held to be a counterclaim so that plaintiff's failure to answer does not result in a default judgment.[109] In one decision, however, in which a default was taken, judgment entered, and execution ordered before plaintiff raised any objections, the supreme court treated the claim as a cross-complaint since, under the circumstances, it would have been manifestly unfair to defendant to have allowed the decision to be set aside.[110] Although the results of this case, as well as others on point, seem proper, the costs of a case by case

---

106. E.g., Luse v. Peters, 219 Cal. 625, 630, 28 P.2d 357, 359 (1933).

107. E.g., Wettstein v. Cameto, 61 Cal.2d 838, 40 Cal. Rptr. 705, 395 P.2d 665 (1964).

108. See, e.g., Schrader v. Neville, 34 Cal.2d 112, 114, 207 P.2d 1057, 1058 (1949).

109. See, e.g., Taliaferro v. Taliaferro, 154 Cal. App.2d 495, 499, 316 P.2d 393, 395 (1st Dist. 1957); see also Wettstein v. Cameto, 61 Cal.2d 838, 40 Cal. Rptr. 705, 395 P.2d 665 (1964).

110. Wettstein v. Cameto, supra note 107.

determination by the appellate courts seems a high price to pay for a matter of this nature. Surely enactment of uniform pleading rules for both counterclaims and cross-complaints would be preferable.

There is little reason why plaintiff should not be required to reply to a counterclaim. A counterclaim in its effect is just like an independent action; indeed it may encompass an entirely different transaction than that involved in plaintiff's cause. A reply to a counterclaim would at least be useful in notifying defendant and the court which of defendant's allegations will be controverted and what affirmative defenses plaintiff will rely upon at the trial of the counterclaim. Although the new California discovery rules are available to obtain this information, there is no reason why defendant should not be informed of such basic matters in the pleadings. No one has yet suggested that defendants generally be relieved from answering complaints filed by plaintiffs; yet that is the result with respect to counterclaims.

Since plaintiff cannot answer a counterclaim, it seems clear that he can file neither a counterclaim nor a cross-complaint to it. This is unjustified since, if defendant's counterclaim has no subject matter connection with plaintiff's suit but plaintiff has a separate cause which arises from the same transaction as the counterclaim, plaintiff should at least be permitted to join that separate cause to avoid duplication of witnesses. If defendant had brought an independent action on his claim, plaintiff would not only have been allowed to assert a factually connected counterclaim, he would have had to do so under the compulsory counterclaim statute. There seems little reason not to treat plaintiff against whom

a counterclaim has been filed as if he were a defendant in an independent action, with all the rights and obligations appurtenant thereto.

The rule prohibiting plaintiff from counterclaiming against a counterclaim is somewhat alleviated by the fact that under section 440 he may assert, as a set-off to the counterclaim against him, any cause he has that would qualify as a counterclaim to defendant's cause had it been brought as an independent action. However, set-off can only be used defensively and under it plaintiff could not obtain affirmative relief if his right to recover exceeds that of defendant.[111]

Cross-Complaints Against Plaintiff

Section 442 provides for cross-complaints as follows:

> Whenever the defendant seeks affirmative relief against any 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.

The only requirement of a cross-complaint is that it have a subject matter connection with the plaintiff's complaint. Unlike a counterclaim, it is not imbued with a long history as a defense. Hence, a cross-complaint need not diminish nor defeat plaintiff's action; it can be brought despite

---

111. See the discussion of section 440 at 56-60, infra.

the fact that a several judgment is not possible between plaintiff and defendant, and plaintiff must answer the cross-complaint as if it were an independent suit. Unlike a counterclaim, a cross-complaint is never compulsory.

Prior to 1957 a cross-complaint could only be filed against a party to the action.[112] Defendant could thus cross-complain against plaintiff and a co-defendant, but he could not join an outsider unless the outsider was indispensable or necessary under the provisions of section 389.[113] In 1957 section 442 was amended to provide that a cross-complaint could be brought "against any person, whether or not a party." The express reason for this alteration was to permit defendant to join with an existing party all those persons whom he would have joined had he brought his cross-complaint as an independent action.[114] It was recognized unfair to require defendant to choose between a cross-complaint against only an existing party and a separate suit against all those persons whom he wishes to join. It is surprising that this amendment has not been followed by an amendment to the counterclaim statute under which, as we have seen, defendant must still choose between a countersuit against plaintiff alone and a separate action against all persons he wishes to join.

---

112. E.g., Alpers v. Bliss, 145 Cal. 565, 570, 70 P. 171, 173 (1904); Argonaut Ins. Exchange v. San Diego Gas & Elec. Co., 139 Cal. App.2d 157, 293 P.2d 118 (4th Dist. 1956).

113. The latter situation was treated as an exception to the general rule. See Tonini v. Ericcsen, 218 Cal. 43, 47, 21 P.2d 566, 568 (1933); Alpers v. Bliss, 145 Cal. 565, 570-71, 79 P. 171, 173-74 (1904)(dictum).

114. See Cal. L. Revision Comm'n, Recommendation and Study Relating to Bringing New Parties Into Civil Actions, at M-9, M-10 (1957).

The terms of section 442 permit the person against whom a cross-complaint is filed, whether or not a plaintiff, to "demur or answer thereto . . . as to the original complaint." This would appear to allow such person to file his own counterclaims and cross-complaints to the cross-complaint against him. Indeed, it would seem that he would be subject to the compulsory counterclaim rule. There are, however, no appellate court holdings directly in point, and discussions in two recent cases have reached opposing conclusions.[115] In the one case in which it was stated that a defendant in a cross-action could not file a counterclaim, the court emphasized the language in section 438 that a counterclaim is by "a plaintiff against a defendant" and gave that phrase a literal reading;[116] presumably the court would have reached the same result in interpreting section 442 which uses similar language. Not only does this position fly in the face of the wording of section 442, but it makes no practical sense since the responding party should at least have the right to set up a cause of action based on the same transaction as the cross-complaint. It should be noted that, had defendant elected to file his cross-complaint as an independent action, the full scope of the counterclaim and cross-complaint laws would apply.

Compulsory Counteractions

Section 439 of the Code of Civil Procedure, first enacted in 1872, reads as follows:

---

115. Compare Great Western Furniture Co. v. Porter Corp., 238 Cal. App.2d 502, 48 Cal. Rptr. 76 (1st Dist. 1965)(counterclaim stated to be proper) with Carey v. Cusack, 245 Cal. App.2d 57, 54 Cal. Rptr. 244 (1st Dist. 1966)(court indicates counterclaim not proper).

116. Ibid.

> 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.

The purpose of the statute is clear and unmistakable, yet it is inconsistent both with the practice as to joinder of claims by plaintiff and with the cross-complaint provisions, neither of which provides for compulsory joinder of causes of action.

The situation as to joinder by a plaintiff is somewhat different since the rules of res judicata will at least force plaintiff to join all claims for relief within the scope of a single cause of action.[117] But the failure to provide for compulsory cross-complaints by defendants against plaintiffs is incomprehensible.

One reason why the problem is not acute is undoubtedly due to the fact that the courts apply the compulsory counterclaim provision to all those cross-complaints which also qualify as compulsory counterclaims,[118] as most cross-complaints against plaintiffs do. Thus, whenever a cross-complaint against a plaintiff, which must by definition be factually related to plaintiff's complaint, also satisfies the "diminish or defeat" and "several judgment" requirements of the counterclaim statute, it is likely to be a compulsory counterclaim and defendant will assert it rather than risk being barred from suit on it in the future.

Nevertheless, the current statutory scheme ought to be revised to require defendant to assert all claims, whether cross-complaints or

---

117. See pp. 26-29, supra.

118. See Schrader v. Neville, 34 Cal.2d 112, 115, 207 P.2d 1057, 1058 (1949)(dictum); Counterclaims, Cross-Complaints and Confusion, 3 Stan. L. Rev. 99, 106 (1950).

counterclaims, which he has against plaintiff if they arise from the same transaction or occurrence as plaintiff's cause of action. The policy of compulsion applies whether or not defendant's claim happens to meet the "diminish or defeat" or "several judgment" requirements of section 438.

Even if the current distinction between cross-complaints and counterclaims is retained, the wording of section 439 should be revised clearly to reflect the true scope of its operation. As it now stands, the transactional language of section 439 appears much narrower than that of section 442. Yet the courts have given a broad interpretation to section 439 in holding that defendants' subsequent independent actions are barred by their failure to assert them as counterclaims in an original suit brought by plaintiffs.[119] It would seem sensible to harmonize the transactional language of sections 439 and 442 to prevent an unwanted forfeiture of a potential counterclaim by an unsuspecting litigant who, because of the current language difference, incorrectly believes the claim falls within the broad language of section 442, but not within section 439.

Special Rules of Set-Off

Any reform of current counterclaim provisions must include consideration of special statutes regarding the automatic set-off of claims between two parties. Foremost of these is Code of Civil Procedure section 440 which reads as follows:

---

119. See, e.g., Sylvester v. Soulsburg, 252 Cal. App.2d 185, 60 Cal. Rptr. 218 (5th Dist. 1967); Saunders v. New Capital for Small Business, Inc., 231 Cal. App.2d 324, 41 Cal. Rptr. 703 (1st Dist. 1964).

> 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.

This section, which has a fascinating history dating back to the Roman law, has been thoroughly explored in a recent scholarly comment.[120] For present purposes it need only be noted that the major thrust of the section has to do with the operation of the statute of limitations and is a means of avoiding unfairness through tactical manipulations by one of two parties each of whom has a claim for money against the other. Obviously, if the parties agree to a cancellation of mutual debts, there is no need for section 440. Difficulty arises only when the party, on whose claim the statute of limitations runs last, waits until the other party's claim is barred before filing suit. In such case section 440 permits the defendant to allege his otherwise untimely counteraction but only to the extent that it cancels any recovery by plaintiff; defendant cannot obtain affirmative relief on his claim.

The value of section 440 lies in the fact that it avoids unnecessary litigation. A party who wishes to utilize his cause of action merely to cancel his own debt ought not to be forced to bring suit on his claim merely because the statute of limitations will otherwise run on it. As currently written and applied, however, section 440 has one unfortunate consequence in that it does not require an individual who relies upon it to give notice to that effect. Thus an individual may refuse to pay a

---

120. Comment, 53 Calif. L. Rev. 224 (1965).

debt on the theory that it has been cancelled by a totally unrelated obligation to him without ever communicating to his creditor his reason for not paying.[121] The creditor may first learn of the reliance on a compensating claim only after filing suit. This defeats, at least in part, the policy of section 440 in avoiding unnecessary litigation. It would seem useful in a redraft of the section to include a requirement that one who wishes to rely upon it must give timely notice to that effect, at least before the limitations period runs on his own claim.

Section 440 involves another important feature in that it permits a person to allege a set-off even though suit is brought against him by an assignee of the cause against him. In this sense section 440 overlaps with section 368 which reads as follows:

> Assignment of thing in action not to prejudice defense. In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before maturity.

These provisions are important to prevent manifest injustice by the tactical maneuverings of individuals who have mutual claims against one another. For example, in such a case one individual, who has no other assets subject to execution, could assign his claim against the other party to a friend or relative. Without sections 368 and 440 the assignee could sue and collect the full amount on the assigned claim from the opposing party who would be left with a worthless cause against the assignor. Therefore, in any general revision of counterclaim and cross-complaint provisions care must be taken not to eliminate the important

---

121. See Comment, 46 Calif. L. Rev. 224, 270 (1965).

features now contained in sections 368 and 440.

At the same time, however, the language of section 440 should be changed to eliminate apparent conflicts with the counterclaim provisions of sections 438 and 439. Such a conflict now occurs in situations in which a plaintiff successfully sues on a cause of action to which defendant elected not to assert a non-compulsory counterclaim. If defendant asserts his cause in an independent suit, plaintiff in the first action may argue that, since section 440 automatically deemed his claim extinguished to the extent of the counterclaim, any recovery he received in the first action must be presumed to have been an amount over and above any value of such counterclaim and that the principles of res judicata should bar defendant in the first suit from relying on the fact that he never raised such a defense in his pleadings. This argument, if accepted, would of course fly in the face of section 439 which strictly limits the scope of compulsory counterclaims.

Section 440 also appears to contradict section 427 in allowing a plaintiff to join in one action, in which defendant files a counterclaim, causes which could otherwise not be joined. For example, if plaintiff sues on one cause and defendant counterclaims, plaintiff, under section 440, may allege as defenses to the counterclaim his other causes of action against defendant even though under section 427 they could not have been joined either with the original cause or with each other.

Obviously, by utilizing section 440 in this manner, plaintiff is also permitted to overcome the rule that he cannot file a counterclaim to a counterclaim; but at the same time his recovery is restricted to a set-off

and he cannot obtain affirmative relief. To the extent that neither the statute of limitations nor assignment of causes are involved, so that the basic purposes of section 440 are not at issue, permitting plaintiff a set-off rather than full relief is absurd. Surely if the issues are to be tried in a single action, plaintiff should obtain all the relief to which he is entitled. He should not be required to face an independent suit simply because he wants an affirmative recovery.

The Need For A New Approach To Counteractions By Defendant Against Plaintiff

It is clear from the foregoing discussions that most of the problems involving counteractions by defendant against plaintiff can be attributed to the fact that such actions are governed by two different sets of provisions, one for counterclaims and the other for cross-complaints. It should be equally clear that no justification whatsoever exists for such dual treatment. The California legislature should repeal the absurd conglomeration of existing statutes and substitute a simple unified procedure for all such claims.

Such a revision should also broaden the scope of counteractions to permit a defendant to assert any claim he has against plaintiff, regardless of its nature. Only a few claims--those which neither arise from the same transaction or occurrence as plaintiff's claim nor meet the current counterclaim requirements--will be affected. Obviously, there is little reason for excluding these claims; they certainly can cause no more confusion than those counterclaims, now permitted under current law,

which are totally unrelated to plaintiff's cause of action. Severance of the causes for trial is always available.

In one way the current countersuit statutes are inconsistent and more restrictive than the current joinder of causes provisions in section 427. If, for example, plaintiff has two unrelated causes of action, each based on a contract, he may join them even though he seeks monetary relief on one and injunctive relief on the other.[122] But, in response to such a complaint, defendant is not allowed to assert a counteraction based on yet a third contract on which he seeks a non-monetary remedy. On the other hand, if plaintiff wishes to have this third cause joined with the other two, he can do so merely by asking for a declaratory judgment of non-liability on it.[123] This only further illustrates that the restrictions on countersuits are meaningless and supports the notion that defendant, as well as plaintiff, should be afforded the right to allege in a single action all claims he has against his adversary.

---

122. See pp. 8-9 supra.

123. California Code of Civil Procedure section 1060 provides:

> 1060. Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action in the superior court or file a cross-complaint in a pending action in the superior or municipal court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.

CLAIMS AGAINST PERSONS OTHER THAN PLAINTIFFS

Background

In almost every jurisdiction a cause of action filed by one party against a co-party, whether a co-plaintiff or co-defendant, either alone or with other persons brought into the case for the first time, is denominated a "cross-claim."[124] Under the federal rules and other modern procedural provisions, a cross-claim is proper if the cross-complainant alleges a cause of action arising from the same transaction or occurrence or affecting the same property as a plaintiff's original claim or a defendant's counter-claim. A cross-claim cannot be brought alone against persons who have not already been made parties to the action. The only claim that can be made in such case is one in impleader whereby a party to the action alleges that, if

---

124. Federal Rule of Civil Procedure 13(g) reads as follows:

> A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

he is held liable on a claim pending against him, he will have a claim over against a stranger to the action for all or part of such liability.[125]

In California, the cross-complaint provision, section 442, which has already been discussed as a device for countersuits against plaintiffs, is the sole basis for bringing causes against a co-party or a stranger to the

---

125. See Federal Rule of Civil Procedure 14, which reads as follows:

> (a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.
>
> (b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

action, including impleader claims. Originally, the scope of section 442 was narrowly limited to actions against persons who were already parties to the suit,[126] and a cross-complaint could not join an outsider even though the cross-complainant, had he brought an independent action, would have been permitted to join a co-party and a stranger as defendants. In 1957, pursuant to a study by the California Law Revision Commission, section 442 was amended solely for the purpose of permitting the joinder of such outsiders as co-defendants to a cross-complaint.[127] However, the wording of the amendment, allowing a cross-complaint "against any person, whether or not a party to the original action," was unnecessarily broad. The state supreme court, ignoring completely the legislative history of the amendment as contained in the Law Revision Commission report, gave the new language a literal construction, thereby increasing the scope of cross-complaints well beyond that intended, and even beyond that permitted in other jurisdictions with the most liberal joinder rules.[128]

Because of the bizarre manner in which the scope of section 442 was expanded, it is not surprising that many important procedural matters regarding the rights and obligations of the parties to a cross-action were not spelled out. As a result, there are a number of situations which give rise to confusion and potential injustice and which necessitate further revision.

---

126. See pp. 52-54, supra.

127. See ibid.

128. Friedenthal, The Expansion of Joinder in Cross-Complaints by the Erroneous Interpretation of Section 442 of the California Code of Civil Procedure, 51 Calif. L. Rev. 494 (1963).

The Scope of Cross-Complaints Against Non-Plaintiffs

In cases decided prior to 1957, it was held that a claim by defendant--alleging that, if he was held liable on the original complaint, he would be entitled to indemnity from a third person--met the transactional requirement of section 442.[129] As already noted, however, at that time such a cross-complaint could only be pursued against a person who was already a party to the action. After the 1957 amendment, it was held that such a cross-complai could be brought against an outsider, thus establishing an impleader procedu as broad as that permitted in most modern jurisdictions.[130] It is clear, however, that the 1957 amendment was never intended to go so far. Indeed, the Law Revision Commission, which drafted the amendment, specifically rejected a proposed separate impleader provision as being beyond the scope of its study.[131] The rejected proposal, which made the right of impleader subject to the discretion of the trial court, followed Federal Rule 14 in carefully spelling out the rights and obligations of the parties regarding

---

129. See, e.g., Atherley v. MacDonald, Young & Nelson, Inc., 135 Cal. App.2d 383, 287 P.2d 529 (1st Dist. 1955).

130. The California Supreme Court specifically so held in Roylance v. Doelger, 57 Cal.2d 255, 368 P.2d 535, 19 Cal. Rptr. 7 (1962).

131. See Friedenthal, supra note 128, at 496-98.

such a claim once it was permitted.[132] For example, the third party was expressly treated as a defendant on an ordinary claim, with all the same rights and duties, including the power to bring his own counterclaims, cross-complaints, and impleader claims. In addition, he was given the power to challenge the right of plaintiff to collect from defendant so as to protect himself from any collusion between them as to plaintiff's initial right to recover.

By misinterpreting the 1957 amendment to section 442, the California courts set up an absolute right of impleader without any details regarding the rights and obligations of the parties other than those which apply generally in cross-complaint situations and which, as already noted, are not at all clear. It would seem desirable to revise section 442 at least to provide a safeguard against collusion in impleader situations.

The broad interpretation of section 442 also permits defendant to file a cross-complaint against an outsider even in a non-impleader situation.

---

132. The text of the proposal read as follows:

> § 442a. Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, may assert any defenses which he has to the third-party complaint or which the third-party plaintiff has to the plaintiff's claim and shall have the same right to file a counter-claim, cross-complaint, or third-party complaint as any other defendant. If the plaintiff desires to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant, he may do so by an appropriate pleading. When a counterclaim or cross-complaint is filed against a party, he may in like manner proceed against third parties. Service of process shall be had upon a new party in like manner as is provided for service upon a defendant.

Assume, for example, that plaintiff brings suit for injuries received when his car was struck from behind by defendant's automobile and that defendant received injuries at the same time when his vehicle was struck from the side by a third car. Defendant may bring a cross-complaint against the driver of the third vehicle even though he was not made a co-defendant in the original complaint.

Under Federal Rule 13(g), such a cross-claim is not permitted.[133] Presumably, the reason is that it would be unfair to a third party to force him to try a case in a federal court where the subject matter jurisdiction or venue would normally be improper. It is important to note that severance of the cross-claim for trial would not be of help in alleviating such unfairness since the cross-claim would still be heard in the court where the action was filed. On the other hand, even though defendant may not file a cross-claim against the third party, defendant may, if otherwise possible, file a separate suit against the third party in the court where the original suit is pending, in which situation the two cases may be consolidated. The federal rule permitting impleader is an exception to the general rule against claims against third parties alone; impleader is justified by the fact that the need to protect defendant from inconsistent liability outweighs any unfairness to the third party who may be called upon to litigate the case in a court where it could not be brought as an independent action.

California section 442 makes no allowances for any unfairness that might result to a third party who is sued in a court where, under the venue laws, an independent action could not be maintained against him. The

---

133. See United States v. Zashin, 60 F. Supp. 843 (E.D.N.Y. 1958); Comment, 46 Calif. L. Rev. 100, 104 & n.24 (1958).

situation is not as acute as it might be in the federal courts where the forum may be in a different state. Nevertheless, California covers a large area, and great inconvenience may result if a person is required to fight an action five or six hundred miles from his home. Furthermore, unlike actions in the federal courts which normally must involve more than $10,000,[134] California cases may seek any amount no matter how small.[135] A third party may well default on a cross-complaint involving only a few hundred dollars rather than become involved in litigation in a distant county. The most satisfactory way to control the situation would not seem to be enactment of strict limitations on cross-complaints; instead the courts, in addition to their power to sever causes of action for trial, should be given the discretic to transfer a severed cause to another county for trial as an independent action. Where the advantages of a unified trial are outweighed by the inconvenience to a third party, the means should be available to rectify any harm not only by severance of the cause against him but also by permitting the severed cause to be tried in the most convenient forum.

Cross-Complaints and Joinder of Causes

Suppose a defendant not only has a cause of action against a co-defendant which meets the transactional requirements of section 442, but also another unrelated cause of action against him as well. The second cause may not be joined in the cross-complaint even though, had the

---

134. See 28 U.S.C. §§ 1331, 1332 (1964).

135. The California requirements for subject matter jurisdiction are discussed in 1 Chadbourn, Grossman & Van Alstyne, California Pleading, §§ 51-54 (1961), and in 1 Witkin, California Procedure, Courts, §§ 70-107 (1954).

cross-complainant brought his action independently, he could have joined both causes under section 427. Once again the procedure rules place a litigant in a dilemma; the cross-complainant must decide either to pursue his cross-complaint alone, knowing a separate action will be necessary later on the other cause, or to forgo the cross-complaint and bring all his causes together in one separate action. Modern procedural systems elesewhere, such as the federal rules, permit any litigant, once he has filed a valid cross-claim or impleader claim, to join with it any other claim he has against the adverse party.[136] This rule does not have an overall substantial impact since the number of situations is small indeed where one party has more than one claim against another, particularly claims which are factually unrelated. But in the few situations where this does occur, the advantages to the litigants and the court may be substantial. This is especially true of impleader situations where a defendant risks inconsistent verdicts against himself if he elects to bring his cause of action independently.

It seems clear that the law should provide that, once a party has pleaded a valid cross-complaint against a third person, he should be permitted to join all other claims he has against that person. It is important to remember that, even if a party is allowed to join all of his claims, the court may sever any claims or issues for trial when justice so requires.

---

136. See, e.g., Federal Rule 18(a) quoted supra at 19, and N.Y.C.P.L.&R. § 601, quoted in note 15, supra at 9.

Rights and Duties of a Person Against Whom a Cross-Complaint Has Been Filed

On their faces, sections 438 and 442 are limited to use by defendants. This raises the question, already discussed with respect to plaintiffs, whether a person against whom a cross-complaint has been filed may himself file a counterclaim or a cross-complaint. As noted previously, the few cases which discuss the matter give opposing views[137] although sound logic would seem to dictate that such countersuits should be permitted. Surely a litigant should not be denied the right to bring an impleader action, thus exposing him to the possibility of inconsistent verdicts. A similar problem exists regarding a plaintiff against whom a counterclaim unrelated to his complaint has been filed. It would be extremely unfair to expose plaintiff to the possibility of double liability because he cannot allege an impleader claim.

Even in a non-impleader situation, it is unjust to deprive a party of the right to have all related claims brought in a single action merely because the cause against him arose as a countersuit and not in an independent action. Section 442 should be revised clearly to permit any person against whom a cross-complaint has been filed to bring any counterclaim or cross-complaint which he would have been permitted to bring had he been sued in an independent proceeding and, indeed, to require him to assert any compulsory counterclaim he might have.

---

137. See p. 54, supra.

Mandatory Cross-Complaints Against Third Parties

Since a cross-complaint in California must, by definition, have a subject matter connection with plaintiff's original cause of action, the question arises why all cross-complaints should not be mandatory, particularly in light of the previous conclusion that cross-complaints against plaintiffs should be compulsory.

However, there are sound reasons for distinguishing cross-complaints against a plaintiff from those against co-parties or outsiders. In the latter situation, the parties are not as yet adverse; potential claims among them may never be pressed simply because they prove unnecessary or because they are unlikely to succeed. But if a litigant is forced to an early choice of asserting a claim or forever waiving it, he will be disposed to add it to his pleadings, along with any necessary defendants, just to be safe. Furthermore, the insertion of a new party into a controversy may dramatically change the character of the action. For example, a small-scale suit by the purchaser against the seller of an allegedly defective electric toaster may be converted into an important test case if the seller cross-complains against the manufacturer which is a huge industrial corporation. The latter may feel impelled for public relations purposes to put time and money into a case in which the retail purchaser is involved although it would not do so in an independent action solely between itself and one of its dealers. On balance, a rule making all cross-complaints mandatory would not seem to have sufficient advantages to outweigh the potential harm it might cause.

PART III: SUMMARY AND RECOMMENDATIONS

BASIC PRINCIPLES FOR DECISION

A number of the problems discussed in Parts I and II could be alleviated by changes in the wording of the individual statutes regarding joinder of parties and causes, leaving intact the basic framework of joinder as it now stands. It seems clear, however, in light of the inconsistency, lack of coherence, and confusion among the various provisions, that it is vital to engage in an overall revision of the joinder regulations based on a consistent set of principles.[138] These principles, as developed from the foregoing discussions, are summarized below.

Uniform procedural treatment

One uniform set of procedures should be applied to every situation where one person files a cause of action against another so that, regardless of whether they were original parties or not, the person filing the cause and the person against whom it is filed will be treated as plaintiff and defendant, respectively, with all the obligations and rights that they would have had had the cause been instituted in an independent lawsuit.

a. Adherence to this basic principle would eliminate most of the practical problems of current California joinder practice regarding counterclaims and cross-complaints. Often it is fortuitous whether or not a person sues or is sued on a counterclaim or cross-complaint rather than in an independent action. It may simply involve a race to the courthouse.

---

138. For an example of how problems may arise from piecemeal revision of current provisions, see discussion at 36-38, supra, of the bill recently introduced in the California Senate regarding proposed mandatory joinder of claims.

Surely there is no reason to treat parties to a counterclaim or cross-complaint differently than they would have been treated in a separate suit.

b. The following alterations of current practices would occur:

(1) Persons against whom a counterclaim is alleged would be required to answer. They would be permitted to file any counterclaims or cross-complaints they might have, and they would be bound by compulsory counterclaim rules.

(2) Persons against whom a cross-action is filed would clearly be allowed to file their own counterclaims and cross-actions and would in addition be subject to compulsory counterclaim rules.

(3) Persons who file a counterclaim or cross-action would be permitted and required to join any additional persons whom they would have been permitted or required to join had their cause been alleged in an independent action.

(4) Persons who file a counterclaim or cross-action would be bound by any new provisions requiring mandatory joinder of causes of action.

c. These changes would eliminate the absurd procedural distinctions that now exist between counterclaims and cross-complaints. They would permit persons against whom such causes were filed to file cross-complaints in impleader to avoid the possibility of inconsistent verdicts. They would eliminate the dilemma of a party who must now choose between a counterclaim against his adversary alone and an independent suit against all persons liable to him on his cause of action. And they would eliminate a similar dilemma of a party who must now choose between a cross-complaint alleging only those causes of action factually connected to a cause already

alleged in the suit and an independent action in which all joinable causes against defendant may be alleged. In addition the changes would force factually related claims between adverse parties to be joined in a single case.

Permissive joinder of claims and counterclaims

A plaintiff in his complaint should be permitted to join all causes of action he has against a defendant; a defendant, along with his answer, should be permitted to file a pleading, known as a counterclaim, setting forth any causes of action he has against a plaintiff.

a. This principle is intended to apply to parties to counterclaims and cross-actions as well as to parties to an original complaint. There is little reason to require adverse parties to engage in multiple lawsuits. If appropriate, causes of action may always be severed for trial.

b. The following alterations of current practices would occur:

(1) The current categorical approach to joinder of causes by plaintiff would be abolished.

(2) A defendant could file against a plaintiff causes which today meet neither the counterclaim nor cross-complaint requirements.

(3) All claims by defendant against plaintiff would be denominated "counterclaims," thus harmonizing the nomenclature with that used in virtually every jurisdiction outside California.

c. Under present law, plaintiff can already join many factually unrelated claims against defendant, and defendant, in turn, can countersue on many causes not related either to each other or to causes alleged by plaintiff. The rules which prohibit joinder of all causes which the

parties have against one another are arbitrary and inconsistent. From a practical point of view, few causes are prohibited; but the rules engender considerable confusion and lead to meaningless litigation on technical points.

Compulsory joinder of claims and counterclaims

When one person files a cause of action against another, and either of them has an unpleaded cause of action against the other arising from the same transaction or occurrence as the cause filed, then such unpleaded cause must also be filed in the action; otherwise it should be deemed waived and all rights thereon extinguished.

a. This principle is based on the premise that time, effort, and cost will be saved if all factually related causes between adverse parties are brought in a single proceeding. This premise has already been accepted to the extent that the compulsory counterclaim statute applies.

b. The following alterations of current practices would occur:

(1) For the first time plaintiffs would be required to join related causes of action.

(2) Defendants would be required to join related causes which are not now mandatory because they qualify only as cross-complaints and not as counterclaims.

c. There is no reason why current cross-complaints by defendants against plaintiffs, which do not qualify as counterclaims, should not be subject to compulsory joinder rules. The major restriction on counterclaims--the "defeat or diminish" requirement--has no relationship whatsoever to the policy underlying the compulsory joinder of factually related claims and should not govern its application.

The policy of compulsory joinder applies to plaintiff's causes as well as to those of defendant. Unlike other jurisdictions which take a broad view of the scope of a cause of action, compulsory joinder is not, in fact, accomplished in California by operation of the common law principles of res judicata. Thus a specific provision for compulsory joinder is required.

Permissive filing of claims against co-parties or strangers

Whenever a party is sued on a cause of action arising out of the same transaction or occurrence, or affecting the same property, as an unpleaded cause which the party has against either a non-adverse party or a stranger to the lawsuit, he should be permitted, along with his answer, to file a pleading setting forth his cause and bringing any such stranger into the lawsuit; such a pleading should be denominated a cross-claim.

a. This principle, except for nomenclature, has been completely accepted in California by the courts' broad interpretation of the current cross-complaint statute.

b. Current practice would be altered only to the extent that the many statutory provisions now relating to "cross-complaints" would need revision.

c. The value of a clear delineation between claims by defendant against plaintiff and claims by defendant against a co-party or stranger cannot be denied. The current confusion between counterclaims and cross-complaints by defendant against plaintiff must be eliminated. The above principle would abolish the current "cross-complaint," and give the title "cross-claim" only to pleadings filed against a non-adverse party; this

is in line with nomenclature used in almost all jurisdictions outside California.

It should be noted, however, that many provisions in the California codes now refer to "cross-complaints," and each such provision would have to be studied to determine precisely how it should be amended.

Impleader claims for indemnity

A party against whom a cause of action has been filed should clearly be permitted to file as a cross-claim any impleader claim for indemnity which he has against a third person; however, the third person should be protected from collusion by being afforded the opportunity directly to contest the liability of the person who filed such cross-claim.

a. California courts have already held that impleader claims meet the "transaction and occurrence" test embodied in the cross-complaint provision. They did so erroneously, however, misinterpreting wording which was not intended to go so far and, hence, which did not provide any safeguard against possible collusion that can occur in such a case.

b. Current practice would be altered to permit a third party to claim that the person who seeks indemnity from him is himself not liable on the cause for which indemnity is sought.

c. A separate section dealing specifically with impleader would seem desirable to make clear the extent to which it exists and any special procedures which it involves. Federal Rule of Civil Procedure 14 provides a model for such a separate provision.

Severing of causes or issues for trial

Whenever a lawsuit involves multiple causes of action, the court should have broad discretion to sever causes or issues for trial. When a non-impleader cross-claim brought solely against a stranger to the action is severed, the court should have power to transfer such a claim to a more convenient forum for trial as an independent action.

a. California law already provides for severance in the court's discretion. There are, however, a variety of clauses giving such power in specific cases in addition to a provision with general application. Retention of but one clear-cut, omnibus provision would seem desirable.

California law does not permit part of a case, although severed from the rest, to be transferred to a separate court. In the special case where the suit is brought only against third persons, in non-impleader situations, the only justification for joinder is unity for trial. This purpose fails when severance occurs and, if the cause is otherwise in an inconvenient forum, transfer should be allowed.

b. Current practice would be altered in that, under the narrow circumstances described, a severed portion of an action could be sent to another court to be treated as an independent lawsuit.

c. Under current law, a stranger to an action may be joined therein on a cross-complaint even though he lives many miles away and the cause against him, if brought independently, would have had to have been filed in a county much more convenient to him. If such a cause is severed, it is only just that the court, in its discretion, be allowed to transfer the cause.

Special set-off provisions

The statutes should retain the substance of special set-off provisions to the extent that they prevent one party from taking advantage of another through tactical manipulations.

Sections 368 and 440 of the Code of Civil Procedure now prevent a party from avoiding counterclaims merely by transferring his own cause to a friend who files the suit in his own name. In addition section 440 prohibits one party from taking advantage of an adversary by waiting until the statute of limitations runs on the latter's cause before filing his own. If a full-scale reform of current joinder of provisions takes place, these provisions will need revision; but their substance should be retained.

PROPOSED LEGISLATION

[This material will be prepared at a later date.]