#71 10/20/70

First Supplement to Memorandum 70-110

Subject: Study 71 - Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions

At the October 8-9 meeting, the staff was directed "to consider how, if at all, the doctrine of anticipatory repudiation bears on the compulsory joinder provisions." We have examined what law there is in this area and have concluded that nothing need or should be added to the present recommendation to cover the relationship between anticipatory repudiation and compulsory joinder.

Section 426.20 provides that, where a plaintiff has, at the time of serving a complaint, a related cause of action against the party served, and fails to plead the related cause, it is deemed waived. Section 426.30 applies an analogous rule to defendants but in this respect merely continues the existing law relating to compulsory counterclaims.

The California doctrine of anticipatory repudiation bears on these provisions in only one situation. This is where a bilateral contract calls for performance continuously or in installments and there has already been an actual partial failure to perform accompanied by a repudiation of the obligation to perform in the future. In this situation, the law is clear that the promisee may sue for a total breach, the question is must he? That is, does existing law or would Section 426.20 permit him to ignore the repudiation and sue merely for the partial breach, deferring for a later time an action for total breach. Not surprisingly, we have found no California case in point. The rules that require the promisee in this situation to mitigate damages and the usual desire of all to have the entire matter resolved at one time for

both convenience and economy dictate that normally only one suit would be brought. Corbin asserts that this is the general rule--"non-performance plus the repudiation constitute one and only one cause of action." (See Exhibit I attached.) We believe that this is the rule that would probably be applied in the absence of anything to the contrary in our recommendation. Moreover, we do not suggest that anything explicit be added to the recommendation because we do not want to limit what judicial flexibility there is. Section 426.20, we believe, states a sound rule. However, it could perhaps in some unforeseen circumstance operate harshly. If such circumstances arise, we prefer that the statute and Comment be silent.

We stated above that, in California, the doctrine of anticipatory repudiation became involved with compulsory joinder in only one situation. The classic application of the doctrine comes where there is a repudiation prior to the time for any performance by the promisor. This involves no joinder problems because the promisee will either elect to sue for a total breach or he cannot sue at all. The other situation is where there is a unilateral contract or a bilateral contract that has become unilateral in effect through full performance by the promisee. The California law is that the doctrine of anticipatory breach does not apply in this situation. E. g., Minor v. Minor, 184 Cal. App.2d 118, 7 Cal. Rptr. 455 (1960). Thus, for example, a plaintiff who has fully performed a contract, may, in the absence of an acceleration clause, recover installment payments only as they become due. Minor v. Minor, supra. The latter example is one that was raised specifically at the meeting. The existing law is clear and our recommendation would make no change in this law. We accordingly suggest no further changes be made.

Respectfully submitted,

Jack I. Horton
Associate Counsel

1st Supplement
Memorandum 70-110

EXHIBIT I

CORBIN ON CONTRACTS

pages 829-835

§ 954. Breach by Repudiation of Obligation

The unexcused failure of a contractor to render a promised performance when it is due is always a breach of contract for which an action for an appropriate remedy can be maintained. Such failure may be of such great importance as to constitute what has been called herein a "total" breach.[50] This is true even though there may be a large part of his promised performance that is not yet due; and it is true also even though the failure to perform is not accompanied by any expression of repudiation of the contractual obligation. For a failure of performance constituting such a "total" breach, an action for remedies that are appropriate thereto is at once maintainable. Yet the injured party is not required to bring such an action. He has the option of treating the non-performance as a "partial" breach only and getting a judgment therefor without barring a later action for some subsequently occurring breach. It is reasonable for him to expect performance of the remainder of the contract as agreed and to ask a judicial remedy in case of disappointment.

Thus a contractor can get judgment for an unpaid progress payment, while proceeding with the work. By so proceeding he does not waive his right to damages for delay in completion caused by the non-payment[51] or for subsequently occurring breaches.

Likewise a seller who delivers a non-conforming instalment of goods commits a breach of contract, one that may be treated as "total" dependent on the relative materiality of the defect; but if there has been no repudiation the buyer may continue to insist on further deliveries. If sued for the price of the instalment delivered the buyer may recoup for the breach of warranty involved in the defective delivery. By obtaining such recoupment he bars any claim for further damages for such breach of warranty, a claim that he might have enforced by bringing his own action against the seller; but he does not bar his right to damages for the seller's failure to make further deliveries or for any other subsequent breach.[52]

An employee who has not been paid his wages or salary as it falls due, but has not been discharged or prevented from continuing to perform the service, has an immediate right of action for the amount so unpaid; he does not by getting such a payment bar his action for any subsequent breach, either an action for subsequently overdue wages or for damages for a subsequent discharge or repudiation of contract.[53] The failure to pay wages or salary may be under such circumstances as to justify the employee in stopping work and suing for damages for "total" breach; but if he does not choose to do this he is not, in the absence of a discharge or other repudiation, "splitting" his cause faction or vexatiously multiplying suits.

How are the rights of the parties affected and what is the character of the breach when a failure to render some performance when due is accompanied by a repudiation of the contractual obligation? In the first place, such a repudiation is called an "anticipatory breach" when it occurs before any performance by the repudiator is actually due.[54] The injured party is not required to bring action before the due date for performance; but if he can avoid losses without unreasonable effort or expense his damages will be limited accordingly.[55] If a contract requires a performance at one time only and it is not then rendered, the breach is not "total" if time is not of the essence; but it will certainly be "total" if then accompanied by a repudiation, and thereafter only one action is maintainable.[56] If time is of the essence, the non-performance is a "total" breach without any accompanying repudiation; and in any case time becomes of the essence when the delay continues so unreasonably long a time that patience ceases to be a virtue.[57]

Suppose next that the contract requires performance in instalments or continuously for some period and that there has been such a partial failure of performance as justifies immediate action for a partial breach. If this partial breach is accompanied by repudiation of the contractual obligation such repudiation is anticipatory with respect to the performances that are not yet due. In most cases the repudiator is now regarded as having committed a "total" breach, justifying immediate action for the remedies appropriate thereto. In determining the damages recoverable in such an action, it is necessary for the court to look into the future. In spite of the uncertainty involved in this, the trier of fact is permitted to make an estimate to be added to the damages awarded for the actual non-performance that has already occurred.[58] In most cases this remedy is regarded as adequate and the injured party is allowed only one action for his wrong. The non-performance plus the repudiation constitute one and only one cause of action.[59]

If the buyer of goods in instalments fails to pay for one of them and also refuses to take and pay for any more, there is a "total" breach; and the seller can get but one judgment for damages.[60] If the seller fails to deliver one instalment of goods, or delivers a defective instalment, and also repudiates his obligation to deliver any more, the buyer can get only one judgment for damages.[61]

In any case of repudiation by one party, the injured party is expected to avoid losses if he can do so without unreasonable effort and expense, and his damages are limited accordingly. Where such avoidance is possible we have a sound reason for not permitting the injured party to proceed with his performance and compel payment of the agreed price. He must stop performance, avoid loss, and be content with compensatory damages obtained in one action.

There are cases in which the plaintiff has already fully performed his part when the repudiation occurs and in which there is nothing he can do to avoid loss. The contractual obligation was, or has become, unilateral. In such cases, the courts may permit the injured party to maintain a series of actions for non-performance of instalments by the repudiator, especially when these are mere money instalments.[62] Indeed, it is often held that no action can be maintained until the instalments fall due.[63] This may be justifiable in cases where the payments will be due only on some contingency that is uncertain. In view of the uncertainty and conflict in the law of anticipatory repudiation of contracts to pay money in instalments, a plaintiff who is acting in good faith and not for vexation in disregarding a repudiation and bringing actions for instalments as they regularly fall due by the contract should not be penalized by holding that his first judgment bars his other actions.[64]

An especially notable conflict and confusion may be found in the law of landlord and tenant. For a full discussion of the authorities, works on that subject must be consulted. It has been held that on repudiation or other total breach of a long-term lease by the lessee the lessor can not maintain an action at once for his entire future injury.[65] The contrary has been held, however, and is supported by reasoning that is quite consistent with the law of remedies that is applicable to breaches of contract in general.[66]

§ 955. Rule against "Splitting a Cause of Action"

We have thus far considered what constitutes a breach of contract, what different kinds of breaches there may be, the possible number of breaches of a single contract, and the time and number of remedial actions. No mention has been made, however, of "splitting a cause of action." The reason for not mentioning it is that "cause of action" has no such consistent and commonly accepted definition that it can be used to advantage.[67] An immediate action can be maintained for non-payment of an instalment of money, not because such a non-payment is a separate "cause of action" but because the creditor needs the payment as promised and an immediate action is not vexatious or unjust to the debtor.[68] After two instalments are overdue an action can at once be maintained for the two, but two actions can not. This is because one action satisfies the needs of the creditor at the least expense and because two actions would be unnecessary and vexatious and unjust. The truth is that we have to know whether it would be vexatious and unjust to bring two actions before we can tell whether a "cause of action" is being "split."

The attention of the court and of the lawyer, must therefore be directed to the factors that cause us to believe litigation to be unnecessary, vexatious, and unjust. If a creditor promptly sues for

the first instalment and later brings a second action for a second instalment, there is just the same "splitting" as there would be if he delays the first action and brings two actions simultaneously after the second instalment is due. In the first instance the "splitting" is reasonable; in the second instance it is not. Even in the first one, the court may be able to combine the two actions into one for purposes of trial.

There are indeed many cases in which it is difficult to determine whether bringing two actions is reasonable or unreasonable, just or unjust. "Justice" is not always so clear that men can agree on its requirements; but it lies at the foundation of all supposed "rules" of law, and to this foundation we must of necessity go when a "rule" is stated in terms so variable as to have no accepted meaning. Such is the rule that two actions can not be maintained upon a single cause of action. Cases supporting such a rule can be piled up (uselessly) with a scoop-shovel. A similar substantially meaningless rule is that two actions can not be maintained for breach of a contract that is "entire and indivisible." [69]

#71 10/21/70

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

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

October 1970

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

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NOTE

This pamphlet begins on page 501. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 10 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

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APPENDIX

October 26, 1970

To HIS EXCELLENCY, RONALD REAGAN

Governor of California and

THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was authorized by Resolution Chapter 224 of the Statutes of 1969 to study whether the law relating to joinder of causes of action and to counterclaims and cross-complaints should be revised.

The Commission herewith submits its recommendation and a research study relating to these two topics. The study, which was prepared by Professor Jack H. Friedenthal of the Stanford Law School, was previously published in the Stanford Law Review and is republished here with permission. Only the recommendation (as distinguished from the research study) expresses the views of the Commission.

Respectfully submitted,

Thomas E. Stanton, Jr.,
Chairman

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

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

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 with certain inextricably related matters such as 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

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> 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. 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. A resolution was adopted by the 1970 Conference of State Bar Delegates to substitute for Section 427 an unlimited joinder provision based on the Federal Rules of Civil Procedure. The resolution was prepared by the San Francisco Bar Association. In support of its resolution, the Association stated:

   > 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.[11] The experience under Rule 18(a) of the Federal Rules of Civil Procedure,[12] providing for unlimited joinder of causes of action, has been entirely satisfactory.[13] 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.[14] 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."[15] 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.[16]

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11. The separate statement of causes of action requirement of Section 427 is discussed _infra_.

12. 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.

13. Wright, _Joinder of Claims and Parties Under Modern Pleading Rules_, 36 Minn. L. Rev. 580, 586 (1952).

14. Friedenthal, _The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints_ 10-11 (mimeographed draft 1970).

15. 2 Barron & Holtzoff, Federal Practice and Procedure 66 n.0.1 (1961).

16. 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).]

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.[17] 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 and limit the need to rely on the uncertain rules of res judicata and collateral estoppel[18] 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.

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17. 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).

18. See id. at 26-28.

However, the requirement that a plaintiff allege all related causes of action he has against the defendant, as well as the requirement that a defendant allege by cross-demand all related causes he has against the plaintiff, should be tempered by the dictates of fairness. A party who, acting in good faith, fails to join a compulsory cause should be granted leave by the court to assert the cause at any time prior to trial, unless to do so would result in substantial injustice to the opposing party. This is basically the plan of Rule 13(f) of the Federal Rules of Civil Procedure.[19] Likewise, if a party has failed to plead a related cause of action but a cross-demand is subsequently served upon him, he should be allowed to assert the unpleaded cause by way of cross-demand without obtaining leave of court since he is now subject to added liabilities.

There are other situations which in fairness to the parties should be excepted from the broad compulsory joinder requirements. If a cause of action would require for its adjudication the presence of additional parties over whom the court cannot acquire jurisdiction, that cause should not be required to be joined.[20] If at the time an action is commenced, the related but unpleaded cause of action was the subject of another pending action, that cause should not be required to be joined.[21] And if the unpleaded cause is within the exclusive jurisdiction of federal courts, that cause should not be required to be joined in an action in the state courts.

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19. The rule is set out at note 49, _infra_.

20. This proposal is based on Rule 13(a) of the Federal Rules of Civil Procedure, set out at note 49 _infra_.

21. This proposal is based on Rule 13(a)(1) of the Federal Rules of Civil Procedure.

Finally, the compulsory joinder requirements should apply only to ordinary civil litigation. Special proceedings should be excepted from the general compulsory joinder rules, for special proceedings have their own particular pleading and joinder requirements, peculiar to them. And the compulsory cross-demand and joinder requirements should be inapplicable in small claims court so that parties will have a free choice of fora, rather than being forced to litigate all their claims, related or unrelated, in the small claims court.[22]

Separate statement of causes. Section 427, which requires that each cause of action be separately stated but provides exceptions for certain types of frequently occurring causes of action,[23] has been criticized as

22. The problems resulting from the application of the compulsory counterclaim rule in the small claims court are discussed and criticized in Friedenthal, Civil Procedure, Cal. Law--Trends and Developments 238-243 (1969).

23. 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.

tending to "encourage prolixity and uncertainty in the statement of the facts constituting the cause or causes of action."[24] The Commission has concluded that this defect can be corrected by providing that the party objecting to the pleading must show not only that the causes of action are not separately stated but also that the pleading is confusing as a result. This will limit the separate statement requirement to cases where it serves a useful purpose.

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24. 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.

JOINDER OF PARTIES

Introduction

If every case involved but one plaintiff and one defendant, the rules governing 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.[25] Section 378

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25. 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.

The Commission recommends that Section 378 be rephrased in substantial 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 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.[26] Nevertheless, the existing statutory deficiency and

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> 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.

26. 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."

the inherent ambiguity and overlap in Sections 379 and 379a have been justly criticized.[27]

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 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.

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27. 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 are practicing lawyers. A resolution was adopted by the 1970 Conference of State Bar Delegates which would substitute provisions for permissive joinder of parties similar to Federal Rule 20. This resolution was introduced by the San Francisco Bar Association, which stated in support of it:

    > 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.

Special Statutory Provisions for Permissive Joinder

Section 378 was amended[28] and Section 379a was added[29] in 1927 to liberalize the then existing statutory rules on permissive joinder of parties. The old restrictive provisions were subject to several express statutory exceptions set out in Sections 380, 381, 383, and 384.[30] Sections 381 and 383 are now simply deadwood inasmuch as they merely authorize joinder that is permissible under Sections 378, 379, and 379a.[31] Sections 380 and 384 will be rendered superfluous by the suggested revisions. 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 four sections be repealed.

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,[32] the Commission recommends that Section 379c be repealed.[33]

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

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

30. For the text of these sections, see the recommended legislation at 15-22 infra.

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

32. 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.

33. 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).

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.[34] Accordingly, the provisions governing joinder of both plaintiffs[35] and defendants[36] provide for judicial control through severance where necessary.[37] Similarly where the scope of these rules has been exceeded and misjoinder occurs, the court will order severance for trial.[38] No substantive change in these rules is required or desirable, but the Commission recommends that the present provisions be consolidated and made uniformly applicable to both plaintiffs and defendants.

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

35. 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 . . . .

36. 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.

37. 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.

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

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 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:[39]

> 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 of 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, Section 382 is both incomplete and unsafe as a guide. For, on the one hand, a person may be indispensable or necessary even absent a unity in interest,[40]

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39. 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.

40. 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 where 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.

while on the other, the presence of a unity in interest does not always render a person either indispensable or necessary.[41]

Section 389 was amended to its present form in 1957 upon the recommendation of the Law Revision Commission.[42] As indicated above, the amended section merely attempted to clarify and restate existing case law.[43] However, the section was, with some merit, critically received.[44] 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." A broad literal reading of this language would mean that every person permitted to be joined would have to be joined. The Commission did not intend the language be given this broad interpretation, and it has not been so interpreted.[45]

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 both of these purposes presents problems of enforcement and the possibility of stimulating unnecessary litigation as well. A

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41. 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).

42. 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).

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

44. 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).

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 Rule 19 of the Federal Rules of Civil Procedure 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]

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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 hand, it tends to 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

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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.

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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 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]

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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 assert any defenses to the underlying cause of action that could be asserted by the person who seeks indemnity from him by a cross-complaint. This would provide protection against collusion on the underlying cause similar to that provided by Rule 14 of the Federal Rules of Civil Procedure.

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.[55] The provisions relating to objections to complaints and to denials and defenses have been made applicable to all pleadings requesting relief.

55. For example, the new cross-complaint should be a separate document. Similarly, since the cross-complaint is to be treated basically the same as a complaint, the relaxed pleading requirements under Code of Civil Procedure Section 437b in disputes involving less than $500 should not be continued for what formerly were counterclaims.

SEVERANCE OR CONSOLIDATION FOR TRIAL

Section 1048 of the Code of Civil Procedure provides: "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." The Commission recommends that this section be revised to conform in substance to Rule 42 of the Federal Rules of Civil Procedure.[56] This will make clear not only that the court may sever causes of action for trial but also that the court may sever issues for trial.[57] Absent some specific statute dealing with the particular situation,[58] the law is now unclear whether an issue may be severed for trial.[59]

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56. Rule 42 provides:

CONSOLIDATION; SEPARATE TRIALS

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.
>
> (b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

57. For further discussion, see Advisory Committee's Note of 1966 to Subdivision (b) of Rule 42 of the Federal Rules of Civil Procedure.

58. The recommended revision of Section 1048 would not affect any statute that requires that a particular issue be severed for trial. E.g., Code of Civil Procedure Section 597.5 (separate trial on issue whether action for negligence of person connected with healing arts barred by statute of limitations required on motion of any party). The authority to sever issues for trial under Section 1048 would duplicate similar authority given under other statutes dealing with particular issues. E.g., Code of Civil Procedure Sections 597 (separate trial of special defenses not involving merits), 598 (separate trial of issue of liability before trial of other issues). These sections should be retained, however, because they include useful procedural details which should continue to apply.

59. See 2 Witkin, California Procedure Pleading § 160 (1954)("There is a dearth of California authority on the meaning and effect of [the "action may be severed" portion of Section 1048]; the relatively few decisions merely emphasize its discretionary character.").

OPERATIVE DATE

The operative date of the proposed statute should be deferred until July 1, 1972, and the statute should apply to actions commenced on or after that date. This will give lawyers and judges sufficient time to become familiar with the new procedures. However, because some of the provisions of the proposed statute might appropriately be applied to actions pending on July 1, 1972, the Judicial Council should be authorized to adopt rules making such specific provisions applicable to these pending actions.

MISCELLANEOUS REVISIONS

In addition to the major changes discussed above, the Commission recommends other technical and relatively minor changes in existing legislation. One change of note among these is the extension of time to answer an amended complaint from ten to thirty days,[60] in conformity with the general pleading requirements of the Code of Civil Procedure. Other changes are indicated in the Comments to the proposed statutory provisions that follow.

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60. The 10-day provision of Code of Civil Procedure Section 432, set out in the appendix, is a relic of prior practice.

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, 583, 626, 631.8, 666, 871.2, 871.3, 871.5, and 1048 of, to add Sections 379.5, 422.10, 422.20, 422.30, 422.40, and 471.5, 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, 380, 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~~ If the defendant in any such action has a claim against the plaintiff which is for an amount within the jurisdiction of the small claims court as set forth in Section 117, he may file ~~a verified answer~~ an affidavit stating ~~any new matter which shall constitute a counterclaim~~ such claim ; a copy of ~~such answer~~ the affidavit 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 are hereby made applicable to small claims courts, so far as included within their jurisdiction.~~ Such ~~answer~~ affidavit 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~~ Claim 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 deletes the former references to "counterclaim" and makes other conforming changes to reflect the fact that counterclaims have been abolished. See Code of Civil Procedure Section 428.80. There are no compulsory joinder of actions or compulsory cross-complaint requirements imposed upon either the plaintiff or defendant in small claims actions. See Code of Civil Procedure Section 426.60(b) and the Comment thereto.

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. Section 426.30 of the Code of Civil Procedure, relating to compulsory cross-complaints, is not applicable in actions commenced in the small claims court, whether or not the amount of the defendant's claim exceeds the jurisdictional limit of the small claims court. See Code of Civil Procedure Section 426.40(d).

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 if:

(1) 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; or

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

(b) It is not necessary that each plaintiff be interested as to every cause of action or as to all relief prayed for. Judgment may be given for one or more of the plaintiffs according to their respective right to relief.

Comment. Section 378 continues the substance of former California law. See 2 Witkin, California Procedure Pleading §§ 90, 91 (1954). It supersedes former Section 381 of the Code of Civil Procedure and portions of Code of Civil Procedure Sections 378, 383, and 384.

Subdivision (a)(1) and subdivision (b) of Section 378 are phrased in substantial conformity with Rule 20(a) of the Federal Rules of Civil Procedure. The broadest sort of joinder is permitted under the transaction clause of the federal rule and of Section 378. See Clark, Code Pleading 367 n.86, 369 n.94 (2d ed.); 2 Witkin, California Procedure Pleading § 91 (1954). Paragraph (2) of subdivision (a) is derived from the "interest in the subject of the action" provision formerly found in Section 378 and the principle formerly expressed in Code of Civil Procedure Sections 381, 383, and 384. Paragraph (2) is not needed to expand the broad scope of permissive joinder under the transaction clause of subdivision (a)(1) but has been included to eliminate any possibility that the omission of the "interest in the subject of the action" provision formerly found in Section 378 and the deletion of other permissive joinder provisions might be construed to preclude joinder in cases where it was formerly permitted.

The power of the court to sever causes where appropriate, formerly found in Section 378, 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.~~

(a) All persons may be joined in one action as defendants if there is asserted against them:

(1) 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;

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

(b) It is not necessary that each defendant be interested as to every cause of action or as to all relief prayed for. Judgment may be given against one or more defendants according to their respective liabilities.

Comment. Section 379 is amended to provide statutory standards for joinder of defendants comparable to those governing joinder of plaintiffs. See the Comment to Section 378.

The deleted provisions of Section 379 and former Code of Civil Procedure Sections 379a, 379b, 379c, 380, and 383 provided liberal joinder rules but were criticized for their uncertainty and overlap. See 1 Chadbourn, Grossman & Van Alstyne, California Practice § 618 (1961); 2 Witkin, California Procedure Pleading § 93 (1954). The amendment to 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). Paragraph (2) of subdivision (a) of Section 379 is included merely to make clear that Section 379 as amended permits joinder in any case where it formerly was permitted. See Comment to Section 378. Paragraph (2) is derived from the deleted provisions of Section 379 and the principle stated in former Code of Civil Procedure Sections 379a, 379b, 379c, 380, and 383.

The phrase "in the alternative" in Section 379 retains without change the prior law under former Code of Civil Procedure Sections 379a and 379c. See 2 Witkin, California Procedure Pleading § 96(b)(1954); Federal Rules of Civil Procedure, Rule 20(a)(permitting joinder of defendants where right to relief is asserted against them "in the alternative") and Official Form 10 ("Complaint for negligence where plaintiff is unable to determine definitely whether the person responsible is C.D. or E.F. or whether both are responsible . . ."). Compare Kraft v. Smith, 24 Cal.2d 124, 148 P.2d 23 (1944)(permitting joinder of two doctors who operated on plaintiff's leg at different times), with Landau v. Salam, 10 Cal. App.3d 472, Cal. Rptr. (1970)(denying joinder of two defendants who operated the vehicles involved in accidents with plaintiff occurring on separate days). See generally 2 Witkin, California Procedure Pleading §§ 96, 97 (1954).

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 subdivision (b) 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 379c to join defendants liable in the alternative is continued without change in revised Section 379. See the Comment to Section 379.

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 379.5 is Rule 20(b) of the Federal Rules of Civil Procedure.

Code of Civil Procedure Section 380 (Repealed)

Sec. 10. 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 unnecessary 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).

Code of Civil Procedure Section 381 (Repealed)

Sec. 11. 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. 12. 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).

No change has been made in Section 382 insofar as it deals with joining an unwilling plaintiff as a defendant and with representative or class actions because these aspects of the section were beyond the scope of the Law Revision Commission's 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. 13. 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 in part by the liberal rules of permissive joinder set forth in Sections 378 (plaintiffs) and 379 (defendants) and is superseded in part by the rules for compulsory joinder set forth in Section 389.

Section 383 provided that all or any number less than all of a number of persons who are severally liable on the same obligation, or who are sureties, or who are insurers against the same loss, may sue or be sued in the same action. This rule was in part an exception to the common law

rule that one or all of such persons, but not an intermediate number, might be joined. People v. Love, 25 Cal. 520, 526 (1864); Stearns v. Aguirre, 6 Cal. 176 (1856)(dictum). Insofar as Section 383 permitted such persons to join or be joined as parties to an action, it has since been replaced by Sections 378 and 379. Insofar as Section 383 provided an exception to a common law rule of compulsory joinder, it has been superseded by Section 389. See Section 389 and Comment thereto. If compulsory joinder is not required pursuant to the latter section, nothing prohibits an intermediate number of such persons from joining or being joined.

Code of Civil Procedure Section 384 (Repealed)

Sec. 14. 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 in part by the liberal rules of permissive joinder set forth in Sections 378 (plaintiffs) and 379 (defendants) and is superseded in part by the rules for compulsory joinder set forth in Section 389. See generally 1 Chadbourn, Grossman & Van Alstyne, California Practice § 615 (1961); 2 Witkin, California Procedure Pleading §§ 92, 93 (1954).

At common law, in certain circumstances, all coholders of property were required to be joined in an action affecting such property; in other circumstances, coholders were prohibited from joining in one action. See Throckmorton v. Burr, 5 Cal. 400 (1855); Johnson v. Sepulbeda, 5 Cal. 149 (1855). Section 384 changed both these rules to a flexible one permitting either all or "any number less than all" to commence or defend actions concerning their common property. See Cal. Code Civ. Proc. § 384 (1872); Merrill v. California Petroleum Corp., 105 Cal. App. 737, 288 P. 721 (1930). Insofar as Section 384 permitted all coholders to join or be joined, it has been eclipsed by the liberal joinder rules provided in Sections 378 and 379. Although Section 384 also permitted less than all coholders to join or be joined, prior case law recognized 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-Canfield Midway 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. The rules determining whether all the cotenants must be joined are now set forth in Section 389. See Section 389 and Comment thereto. If compulsory joinder is not required pursuant to those rules, nothing prohibits less than all coholders to join or be joined.

Code of Civil Procedure Section 389. Compulsory Joinder of parties

Sec. 15. 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 clause (1) or (2) of subdivision (a) 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 without prejudice, 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 clause (1) or (2) of subdivision (a) 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. The words "without prejudice" have been added to the language of the Federal Rule in subdivision (b) of Section 389 merely to avoid any contrary implication that might be created by the omission of the somewhat similar provision formerly found in Section 389. See Wilson v. Frakes, 178 Cal. App.2d 580, 3 Cal. Rptr. 434 (1960).

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.

To the extent that former Sections 383 and 384 of the Code of Civil Procedure dealt with joinder, those sections are superseded by the permissive joinder provisions of Sections 378 and 379 and by the compulsory joinder provisions of Section 389. See the Comments to former Sections 383 and 384.

Section 389 formerly attempted not only to avoid prejudice to the parties or absent person but also to promote the general convenience of the courts by preventing a multiplicity of suits. As revised, Section 389 takes a different approach; it limits compulsory joinder to those situations where the absence of a person may result in substantial prejudice to that person or to the parties already before the court. See Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions, 10 Cal. L. Revision Comm'n Reports 000 (1971). Section 389 was widely criticized because it

formerly appeared to require joinder of parties merely for the general convenience of the courts by preventing a multiplicity of suits. See Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints, 00 Stan. L. Rev. 000 (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). However, an examination of the appellate cases decided since the convenience of the courts provision was added to Section 389 in 1957 discloses that the provision was not relied upon; instead, the courts continued to apply the principles enunciated in Bank of California v. Superior Court, 16 Cal.2d 516, 106 P.2d 879 (1940).

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, 106 P.2d 879 (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. 16. 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. 17. 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. 18. 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 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. 19 . 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 pleadings in justice courts.

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

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

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

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

Comment. Subdivisions (a), (b), (c), and (e) of Section 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. 20 . 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. 21. 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.

Sec. 22. 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.

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.

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

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.

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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. 23 . 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. PLEADINGS DEMANDING RELIEF

Article 1. General Provisions

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."

Code of Civil Procedure Section 425.20. Separate statement of causes

425.20. Causes of action need not be separately stated unless separate statement is necessary to avoid confusion.

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, which requires a separate statement of causes of action only where necessary to avoid confusion, serves the same basic purpose as Rule 10(b) of the Federal Rules of Civil Procedure ("Each claim founded upon a separate transaction or occurrence . . . shall be stated in a separate count . . . whenever a separation facilitates the clear presentation of the matters set forth"). Former Section 427, which required that each cause of action be separately stated but provided exceptions for certain types of frequently occurring causes of action, was criticized as tending to "encourage prolixity and uncertainty in the statement of the facts constituting the cause or causes of action." 2 Witkin, California Procedure Pleading § 497 (1954). See Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes, and Related Provisions, 10 Cal. L. Revision Comm'n Reports 000 (1971). Section 425.20, on the other hand, requires that, in addition to the former requirement of showing that causes of action are not separately stated, the party objecting to the pleading must show that it is confusing because the causes are not separately stated. This new requirement is intended to avoid the prolixity and uncertainty that sometimes resulted under the former rule.

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 suit by vendors to terminate contract for sale of realty and personalty, to quiet title to realty, and to foreclose chattel mortgage, the entry by vendors upon real property, the taking possession of personal property, and the 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 by statute, if the plaintiff fails to allege in his complaint a related cause of action which (at the time his complaint is filed) he has against any party who is served or who appears in the action, all his rights against such party on the related cause of action not pleaded shall be deemed waived and extinguished.

Comment. Section 426.20 requires a party to join all causes of action arising from the transaction or occurrence pleaded in his complaint or cross-complaint. (See Section 426.10 defining "complaint," "plaintiff," and "related cause of action.")

This requirement results normally under the rule in those jurisdictions which follow the so-called operative facts theory of a cause of action for res judicata purposes. However, California has followed 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 would 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 repealed Code of Civil Procedure Section 439. For further discussion, see Friedenthal, Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions, 23 Stan. L. Rev. 1, 12-14 (1970).

Only related causes of action that exist at the time the party files his complaint or cross-complaint must be joined. Thus, for example, although Section 426.20 may operate to bar an unpleaded related cause of action for damages

accrued at the time of filing a complaint, it does not bar a later action for recovery of damages accruing thereafter for which the party did not have a cause of action existing at the time the complaint was filed. Cf. Chavez v. Carter, 256 Cal. App.2d 577, 64 Cal. Rptr. 350 (1967), relating to compulsory counter-claims.

Service on or appearance of a particular party determines whether a related cause of action against that party is required by Section 426.20 to be alleged in the complaint or cross-complaint. Thus, if a particular party is not served at all and makes no appearance, Section 426.20 does not bar a related cause of action against him. Moreover, Section 426.20 does not apply under certain circumstances because of jurisdictional considerations. See Section 426.40.

Section 426.20 is inapplicable to special proceedings and actions in small claims court. See Section 426.60. See also, e.g., Civil Code Sections 4001 and 4363 (Judicial Council rules governing proceedings under Family Law Act). Specific statutes may allow the splitting of causes, and these statutes prevail over Section 426.20. See, e.g., Civil Code Section 1951.4. Section 426.20 has no effect on the independent application, if any, of the rules of res judicata (including the rule against splitting a cause of action) and collateral estoppel.

It is important to note that a court must grant a party who acted in good faith leave to assert a related cause of action not pleaded unless the grant of such leave will result in substantial injustice to the opposing party. See Section 426.50.

Code of Civil Procedure Section 426.30. Compulsory cross-complaints

426.30. (a) Except as otherwise provided by statute, 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. Compare Hill v. Snidow, 100 Cal. App.2d 37, 222 P.2d 962 (1950)(later action by purchaser to recover money paid under land sale contract barred for failure to assert it by counterclaim in prior quiet title action), with Hanes v. Coffee, 212 Cal. 777, 780, 300 P.

963, (1931)("The complaint seeks to quiet title; the counterclaim is for damages. The granting of the recovery prayed for in the counterclaim would not diminish or defeat the plaintiff's recovery; it would not affect the relief demanded in the complaint in the slightest degree."). See discussion in Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 39-56 (mimeographed draft 1970).

Only related causes of action that exist at the time of service of the answer to the complaint on the particular plaintiff are affected by Section 426.30. See the discussion of a similar requirement in the Comment to Section 426.20.

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 may 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.

Note that Section 426.20 does not apply under certain circumstances or in special proceedings or particular types of actions and that merely because Section 426.30 is not applicable does not preclude application of the rules of res judicata or collateral estoppel. See the discussion in the Comment to Section 426.20. A court must grant to a party who acted in good faith leave to assert a related cause of action he failed to allege in a cross-complaint if, prior to trial, the party applies for leave to assert the cause unless the granting of such leave will result in substantial injustice to the opposing party. See Section 426.50.

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) Both the court in which the action is pending and any other court to which the action is transferrable pursuant to Section 396 are prohibited by the federal or state constitution or by a 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). 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 (b). 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. Gerry of California v. Superior Court, 32 Cal.2d 119, 122, 194 P.2d 689, (1948). 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 both 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 Section 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.

Subdivision (c). 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.

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, neglect, or other cause, 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 party fails to plead a cause of action that he is required to plead under Section 426.20 and a cross-complaint is thereafter filed against him, he may, without obtaining leave of court, file a cross-complaint alleging the cause of action that he earlier failed to plead.

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 must 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. If the party failed to plead the related cause of action because he did not know he had such cause, for example, the court should grant leave to assert the cause except in very extreme circumstances. The rule provided by subdivision (a) 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. For example, 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 subsequently filed against him, he may then plead by way of cross-complaint the cause of action that he earlier failed to plead in his original complaint. Ordinarily, the same

result could be accomplished by obtaining leave of court under subdivision (a) to amend the original complaint. Subdivision (b) provides an alternate procedure without need to pursue 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.

Code of Civil Procedure Section 426.60. Special proceedings and small claims actions excepted

426.60. (a) This article applies only to civil actions and does not apply to special proceedings.

(b) This article does not apply to actions in the small claims court.

Comment. Section 426.60 limits the application of compulsory joinder of causes to ordinary civil actions.

Subdivision (a). Subdivision (a) makes the provisions for compulsory joinder of causes inapplicable to special proceedings. The statute governing a particular special proceeding may, of course, provide compulsory joinder rules for that proceeding, and Section 426.60 has no effect on those rules. Likewise, the fact that this article is not applicable in special proceedings does not preclude the independent application, if any, of res judicata or collateral estoppel.

The extent to which former Code of Civil Procedure Section 439 (compulsory counterclaims) applied to special proceedings was unclear. Cf. Bacciocco v. Curtis, 12 Cal.2d 109, 116, 89 P.2d 385, (1938)(court stated that res judicata did not bar subsequent action by lessee to recover deposit paid to lessor where lessee failed to assert his claim for return of deposit in earlier unlawful detainer proceeding). As a practical matter, the requirement that the counterclaim diminish or defeat the plaintiff's recovery probably severely limited the applicability of Section 439 in special proceedings. See discussion in Comment to Section 426.30.

Subdivision (b). Subdivision (b) excepts actions brought in small claims court from compulsory joinder requirements. Thus, the compulsory joinder rules do not require that a person join a related cause of action when he brings an

action in the small claims court--even where the related cause is for an amount within the court's jurisdiction.

The substance of the rule that the only claim by the defendant that is permitted in the small claims court is one within the jurisdictional limit of the small claims court is continued in Code of Civil Procedure Sections 117h and 117r. However, such a claim is not compulsory under Section 426.30. This changes prior law under which counterclaims within the jurisdictional limits of the small claims court apparently were compulsory. See Thompson v. Quan, 167 Cal. App.2d Supp. 825, 334 P.2d 1074 (1959)(dictum). For a criticism of the prior law and a discussion of the problems resulting from the application of the former compulsory counterclaim rule in the small claims court, see Friedenthal, Civil Procedure, Cal Law--Trends and Developments 238-243 (1969). As to the application of the doctrine of res judicata to small claims courts, see Sanderson v. Niemann, 17 Cal.2d 563, 110 P.2d 1025 (1941). See also 3 Witkin, California Procedure Judgments § 46(b)(1954).

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. Section 427.10 relates only to joinder of causes of action against persons who are properly made parties to the action; the rules governing permissive joinder of parties are stated in Sections 378, 379, and 428.20.

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 broad principle reflected in Section 427.10 (complaints) and Sections 428.10 and 428.30 (cross-complaints)--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. See, *e.g.*, Rule 18(a) of the Federal Rules of Civil Procedure. For further discussion, see Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 Stan. L. Rev. 1 (1970).

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

It should be noted that the plaintiff is subject to *compulsory* joinder requirements of Section 427.20.

Code of Civil Procedure Section 428.10. Permissive cross-complaint

428.10. A party against whom a cause of action has been asserted in a complaint or cross-complaint may file a cross-complaint setting forth either or both of the following:

(a) Any cause of action he has against any of the parties who filed the complaint or cross-complaint against him.

(b) Any cause of action he has against a person alleged to be liable thereon, whether or not such person is already a party to the action, if the cause of action asserted in his cross-complaint (1) arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him or (2) asserts a claim, right, or interest in the property of controversy which is the subject of the cause brought against him.

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 or involves the same property or controversy (see discussion in Comments to Code of Civil Procedure Sections 378, 379, and 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 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 or issues 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 an 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.

Section 428.20 retains prior law that a 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. See former Code of Civil Procedure Section 442. 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 prior law. Formerly, 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. Cf. Code of Civil Procedure Section 427.10. 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 or issues 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.

426.20 and 426.30.

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. See Section 428.80.

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) A cross-complaint shall be served on each of 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.

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. 24. 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. 25. 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. 26 . 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. 27. 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.

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.

Sec. 29. 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 repealed 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 Sections 431 and 441.

Code of Civil Procedure Section 430.40. Time to demur

430.40. (a) A person against whom a complaint or cross-complaint has been filed may, within 30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint.

(b) 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, 442, and 443 of the Code of Civil Procedure. See also Sections 412.20(a)(3) and 432.10.

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 441 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 (c) 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 demend, exclusive of interest, or the value of the property in controversy does not exceed five hundred do[illegible] ($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 437c 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, althoug 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 claims 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 agains

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 defence 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 implied (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 for claims barred by Section 426.20. It should be noted that, if defendant defaults without answering, he will not later be barred from maintaining an action on what would have been a compulsory counterclaim. See Section 426.30. 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. Where a cause of action is not one required to be asserted in a cross-complaint under Section 426.30, there is no requirement that it be asserted by way of defense under Section 431.70.

Article 3. Time to Respond to Cross-Complaint

Code of Civil Procedure Section 432.10. Time to respond to cross-complaint

432.10. A party served with a cross-complaint may within 30 days after service move, demur, or otherwise plead to the cross-complaint in the same manner as to an original complaint.

Comment. Section 432.10 is the same as the last sentence of former Code of Civil Procedure Section 442.

Code of Civil Procedure Section 433 (Repealed)

Sec. 30. Section 433 of the Code of Civil Procedure is repealed.

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

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

Code of Civil Procedure Section 434 (Repealed)

Sec. 31. 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. 32. 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. 33. 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. 34. 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. 35. 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. 36. 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. 37. 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 counterclaim.~~

Comment. Section 437b is superseded by Section 431.40.

Sec. 38. 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. 39. 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. 40. 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. 41. 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. 42. 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. 43. 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. 44. 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. 45. 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-shall-be-served-upon-each-of-the-parties-affected-thereby.--If any-such-parties-have-not-appeared-in-the-action,-a-summons-upon-the-cross-complaint-shall-be-issued-and-served-upon-them-in-the-same-manner-as-upon the-commencement-of-an-original-action.--If-any-such-parties-have-appeared in-the-action,-the-cross-complaint-shall-be-served-upon-the-attorneys-of such-parties,-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)-Title-14-of-Part-2.--A-party served-with-a-cross-complaint-may-within-30-days-after-service-move,-demur, or-otherwise-plead-to-the-cross-complaint-in-the-same-manner-as-to-an original-complaint.~~

Comment. Section 442 is superseded generally 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. The last sentence of Section 442 is continued in Section 432.10. See also Sections 430.40(a) and 435.

Code of Civil Procedure Sections 443 and 444 (Repealed)

Sec. 46. 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.

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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 ambiguous 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. 47. 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. 48. 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. 49. 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 30 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 except that the time to answer has been increased from 10 to 30 days to conform to the general rule as to the time within which the defendant must answer.

Code of Civil Procedure Section 581 (Conforming Amendment)

Sec. 50. 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 by cross-complaint. See Sections 431.30, 431.70, and the Comments to those sections.

Code of Civil Procedure Section 583 (conforming amendment)

Sec. 51. 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 . ~~; "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.

Code of Civil Procedure Section 626 (Conforming Amendment)

Sec. 52. Section 626 of the Code of Civil Procedure is amended to read:

626. ~~VERDICT-IN-ACTIONS-FOR-RECOVERY-OF-MONEY-OR-ON-ESTABLISHING COUNTERCLAIM.~~ When a verdict is found for the plaintiff in an action for the recovery of money, or for the ~~defendant,-when-a-counter-claim~~ cross-complainant when a cross-complaint for the recovery of money 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. 53. 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 judgmen 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 Cod of Civil Procedure Section 428.80.

Code of Civil Procedure Section 666 (Conforming Amendment)

Sec. 54. 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 established by the party against whom the cross-complaint is asserted , judgment for the ~~defendant~~ party asserting the cross-complaint must be given for the excess; or if it ~~appear~~ appears 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. 55. 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. 56. 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. 57. 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. Severance or consolidation for trial

Sec. 58. Section 1048 of the Code of Civil Procedure is amended to read:

1048. ~~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.~~

(a) When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the constitution or a statute of this state or of the United States.

Comment. Section 1048 is revised to conform in substance to Rule 42 of the Federal Rules of Civil Procedure. The revision makes clear not only that the court may sever causes of action for trial but also that the court may sever issues for trial. For further discussion, see the Advisory Committee's Note of 1966 to Subdivision (b) of Rule 42 of the Federal Rules of Civil Procedure. Formerly, Section 1048 provided that "an action may be severed" by the court and did not specifically authorize severance of issues

for trial. Absent some specific statute dealing with the particular situation, the law was unclear whether an issue could be severed for trial. See 2 Witkin, California Procedure Pleading § 160 (1954)("There is a dearth of California authority on the meaning and effect of [the "action may be severed" portion of Section 1048]; the relatively few decisions merely emphasize its discretionary character.").

Section 1048 permits the court to sever issues for trial. It does not affect any statute that requires that a particular issue be severed for trial. *E.g.*, Code of Civil Procedure Section 597.5 (separate trial on issue whether action for negligence of person connected with healing arts barred by statute of limitations required on motion of any party). The authority to sever issues for trial under Section 1048 may duplicate similar authority given under other statutes dealing with particular issues. *E.g.*, Code of Civil Procedure Sections 597 (separate trial of special defenses not involving merits), 598 (separate trial of issue of liability before trial of other issues). These sections have been retained, however, because they include useful procedural details which continue to apply.

Revenue and Taxation Code Section 3522 (Conforming Amendment)

Sec. 59. 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.

Revenue and Taxation Code Section 3810 (Conforming Amendment)

Sec. 60. 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.

Water Code Section 26304 (Conforming Amendment)

Sec. 61. 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.

Water Code Section 26305 (Conforming Amendment)

Sec. 62. 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.

Water Code Section 37161 (Conforming Amendment)

Sec. 63. 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.

Water Code Section 37162 (Conforming Amendment)

Sec. 64. 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.

Water Code Section 51696 (Conforming Amendment)

Sec. 65. 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.

Operative Date; Application to Pending Actions

Sec. 66. (a) This act becomes operative on July 1, 1972, and applies to actions commenced on or after July 1, 1972.

(b) Except as otherwise provided by rules adopted by the Judicial Council effective on or after July 1, 1972, this act does not apply to actions pending on July 1, 1972, and any action to which this act does not apply is governed by the law as it would exist had this act not been enacted.

Comment. The operative date of the act is deferred so that lawyers and judges will have sufficient time to become familiar with the new procedures. Because some of the provisions of the act might appropriately be made applicable to actions pending on July 1, 1972, subdivision (b) permits the Judicial Council to make such specific provisions applicable to these pending actions. An action is "commenced" upon the filing of a complaint with the court. See Code of Civil Procedure Section 411.10.