

#71

11/18/70

Memorandum 70-115

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

Summary

This memorandum presents last-minute changes and queries on the Commission's recommendation, including one technical defect in the suggested legislation.

Analysis

Attached (Exhibit I--pink) is a letter from Professor McCarthy of the University of San Francisco School of Law. Professor McCarthy commends the Commission's work but has several technical suggestions. These suggestions are reviewed below. Attached as Exhibit II (yellow) are the relevant sections--Code Civ. Proc. §§ 379, 379c, 427.10, 428.10, 428.20, 428.30, and 428.70--as sent to the printer.

Section 379c--Plaintiff in doubt as to defendant liable. As part of its recommendation relating to permissive joinder of parties, the Commission has recommended the repeal of Code of Civil Procedure Section 379c, which provides that, if the plaintiff is in doubt as to which of several defendants is liable for the injuries he has suffered, he may join the several defendants in one action and leave it to them to straighten out their respective liabilities among themselves. This provision is made unnecessary by the Commission's liberal joinder of defendants rule--Section 379--which allows defendants to be joined if there is asserted against them any right to relief, "jointly, severally, or in the alternative" arising out of the same or related transactions. The Comment to Section 379 states that it retains without change the law under former Section 379c.

Professor McCarthy objects to making the alternative joinder rule specifically subject to the related transaction provision. He dislikes the holding in Landau v. Salam, 10 Cal. App.3d 472, 89 Cal. Rptr. 239 (1970), that there must be some sort of factual nexus between the two defendants and the plaintiff's injury, in order to permit joinder of both. The Commission considered and cited the Landau case in the Comment to Section 379. In Landau, joinder was denied where the plaintiff was injured by two separate defendants acting separately on two separate days in two separate places. This was juxtaposed with the case of Kraft v. Smith, 24 Cal.2d 124, 184 P.2d 23 (1944) which permitted joinder of two doctors who operated on the plaintiff's leg for the same injury at different times. It could also be easily distinguished from the case of Summers v. Tice, cited by Professor McCarthy (33 Cal.2d 80 [1948]), in which joinder of two defendants was allowed where both had fired guns simultaneously, one of which injured the plaintiff, although the plaintiff was unsure which.

Professor McCarthy dislikes the Landau decision and would allow joinder in any case where the plaintiff is uncertain which defendant is liable without the related transaction limitation, and he does not like our revision because it makes clear the basis of the holding in the Landau case. The Commission, however, has previously decided to leave the limitation in, and to allow the courts to determine when the causes are sufficiently related to allow joinder.

Section 428.10--Permissive cross-complaint. As proposed by the Commission, Section 428.10(a) allows a person to file a cross-complaint against any party who has asserted a cause of action against him; in such a case, the person may allege any causes, related or unrelated, he has against the asserting party. In addition, proposed Section 428.10(b) allows a party against

whom a cause of action has been asserted to file a cross-complaint against any person at all; but, in so doing, he may allege only a cause of action related to the one asserted against him. Professor McCarthy feels that subdivision (b) could be interpreted to restrict the scope of subdivision (a). The staff does not believe such a restrictive interpretation is possible-- the statutory scheme to allow broad assertion of causes against directly adverse parties and limited assertion against third parties is clear from the face of the statute. However, to make certain that the provisions are not misconstrued, a paragraph could be added to the Comment to clearly differentiate the purpose of the two subdivisions of Section 428.10:

Subdivision (b) does not, of course, limit the right of a party against whom a cause of action has been asserted to join unrelated causes of action when filing a cross-complaint under subdivision (a) against the party who asserted the cause against him. Subdivisions (a) and (b) are completely independent provisions and it is necessary only that the person seeking to file the cross-complaint come within the provisions of one of the subdivisions.

Section 428.20--Joinder of parties in a cross-complaint. Section 428.20 allows a cross-complainant to join any persons as parties to the cross-complaint, whether plaintiff or defendant, if their joinder would have been permissible under joinder of party rules for original actions. This means that any parties joined must have some sort of transactional nexus with the cause asserted in the cross-complaint.

Professor McCarthy raises a hypothetical problem to test the application of this joinder rule. Suppose two plaintiffs have jointly sued one defendant. Suppose further that the defendant has several causes of action against the plaintiffs, although these causes are not against the plaintiffs jointly, but only individually, e.g., for separate and unrelated debts. Professor McCarthy, applying the joinder rules, concludes that, (1) the defendant may raise any claim, without restriction, which he has against any party which has asserted a cause against him, i.e., the defendant may cross-complain

against the plaintiffs on their unrelated debts; but (2) the plaintiffs may not be joined in a single cross-complaint if their debts are not factually connected.

This interpretation of the joinder rule is absolutely correct. Professor McCarthy is evidently worried how the defendant is to sue both plaintiffs if he cannot join them in a single cross-complaint. The answer is that the defendant files two cross-complaints--one against one plaintiff on his debts, and one against the other on his. See Section 428.10(a): "A party against whom a cause of action has been asserted . . . may file a cross-complaint setting forth . . . any cause of action he has against any of the parties who filed the complaint or cross-complaint against him." On the other hand, if the defendant has a cause against both plaintiffs jointly, he may join them in a cross-complaint on that cause. See Section 428.20:

When a person files a cross-complaint as authorized by Section 428.10, he may join any person as a cross-complainant or cross-defendant, whether or not such person is already a party to the action, 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.

The staff believes that the statutory scheme is again clear on its face and could not reasonably be interpreted to prevent a person from filing a cross-complaint alleging any cause of action against any party suing him. The sections need no further revision to meet this problem.

Section 428.30--Joinder of causes of action against a person not already a party. Section 428.30 allows a cross-complainant to assert any causes of action he may have against a cross-defendant who was not previously a party in the action. This section parallels the situation of an original complainant, who under Section 427.10 is allowed to join any causes he has, related or unrelated, against any defendant. See Section 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.

Professor McCarthy queries whether Section 428.30, unlimited joinder of causes against a cross-defendant, is inconsistent with Section 428.10(b), which limits the right of a party to cross-complain against persons other than those suing him, restricting the permissible causes of action to those arising out of the same or related transactions.

The two sections are not contradictory. Section 428.10 defines the situations under which a party may file a cross-complaint. Under subdivision (b) of that section, a cross-complainant may file against certain persons only if he is asserting a related cause against them. However, under Section 428.30, once a person has been properly joined as a party to a valid cross-complaint, then the cross-complainant may, in addition to the related cause, assert any unrelated causes he has against the cross-defendant. Likewise, the cross-defendant may now assert any related or unrelated causes he has against the cross-complainant under authority of Section 428.10(a). Professor McCarthy's impression that the intent of Section 428.30 is to limit causes asserted to related causes only is simply incorrect.

However, this focus on the provisions allowing joinder of causes in a cross-complaint reveals a technical defect in the proposed legislation. A plaintiff may join any causes he has against a defendant who is properly a party to the action. Likewise, a person against whom a complaint has been asserted may assert any causes against the person who filed the complaint against him. These provisions create no problem.

Where a person has a cross-complaint filed against him:

(1) He may assert in a cross-complaint any cause of action--related or not--he has against the party who filed the cross-complaint against him. This presents no problem.

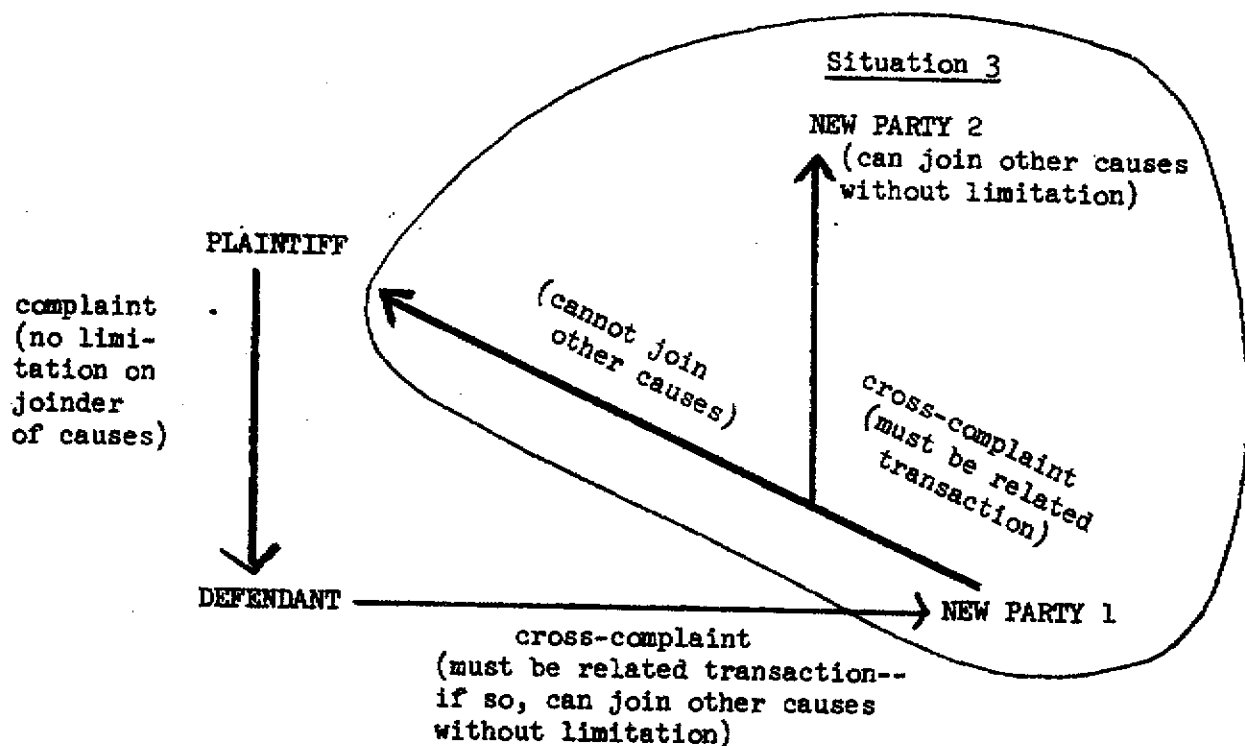
(2) He may assert in a cross-complaint a related cause of action against any other party to the action or against a new party and may bring in additional parties to that cause of action. This presents no problem.

(3) If he has filed a cross-complaint of the type described in paragraph (2), he:

(a) May assert any other cause of action he has against any new party he brings into the action on the cross-complaint. (This presents no problem.)

(b) May not assert any other cause of action he has against a person already a party to the action even though he has asserted a cross-complaint against that party unless that party has filed a complaint or cross-complaint against him. This is the technical defect.

The situation described in paragraph (3) can be indicated more clearly by a diagram.



The problem is created by the way Section 428.30 is phrased. This section reads:

§ 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.

Because the plaintiff in our hypothetical is not a newly joined party, the cross-complainant may not join unrelated causes against him, although he is free to join unrelated causes against the cross-defendant he brings into the action on the cross-complaint. This situation can easily be remedied by the expansion of the language of Section 428.30.

§ 428.30. Joinder of causes of action against cross-defendant

428.30. When a person files a cross-complaint as authorized by Section 428.10, he may unite with the cause of action asserted in the cross-complaint any other causes of action he has against any of the cross-defendants, whether or not such cross-defendant is already a party to the action.

Comment. Section 428.30 provides permissive joinder rules that treat a cross-complaint the same as a complaint in an independent action. Cf. Section 427.10. Thus, if a party files a cross-complaint against either an original party or a stranger or both, he may assert in his cross-complaint any additional causes of action he has against the party or the stranger. See Comment to Section 427.10. 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.

It should be noted that both the cross-complainant and the cross-defendant are subject to the compulsory joinder requirements of Sections 426.20 and 426.30.

Section 428.70--Rights of "third-party defendants." Section 428.70 deals with the impleader problem by allowing a party against whom a cross-complaint has been filed to himself file a special answer asserting defenses which the cross-complainant might have against the original plaintiff in the action. Professor McCarthy states that a hypothetical might be added to the Comment

to clarify the situation to which this section applies. The staff believes that the section is self-explanatory. However, if an example is needed for the Comment, perhaps the following paragraph added to it will suffice:

The special answer provided by Section 428.70 is designed primarily to meet the problem that arises where a plaintiff sues a defendant and the defendant cross-complains against a third party for indemnity. To protect himself from the defendant's failure or neglect to assert a proper defense to the plaintiff's action, through collusion or otherwise, the third-party defendant is allowed to assert any defenses available to the original defendant directly against the plaintiff.

Respectfully submitted,

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SCHOOL OF LAW

November 12, 1970

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

RE: California Law Revision Commission Recommendation
relating to Counterclaims, Cross-Complaints,
Joinder of Causes and Related Provisions -
October 1970

Gentlemen:

I have had an opportunity to look over the October, 1970 recommendations and proposed legislation of the California Law Revision Commission regarding pleading and am impressed by the fine job that has been done.

I take a special interest in your study and proposed changes because I authored the joinder changes proposed by the San Francisco Bar Association at the 1970 State Bar Conference, which is referred to in footnotes 7 and 27 of your recommendations, (State Bar Resolutions 3-1 and 3-2). The Commission's proposed legislation substantially incorporates the changes I proposed.

I also take interest in your study because I have taught Civil Procedure at the University of San Francisco Law School for five years. I have often been embarrassed trying to explain to students the confusing and often absurd provisions which the Commission proposes to change. I have assigned third-year students over the years to write a proposal for legislative change in the form of a letter to the Commission. They have often chosen the statutes which are the subject of the Commission's proposals. Their proposals closely parallel those of the Commission.

That such change is essential and long-overdue cannot be seriously questioned. As I stated in the San Francisco Bar Association's proposal, "The present statutory rules are unnecessarily difficult for the practicing attorney to follow without guesswork and extensive legal research."

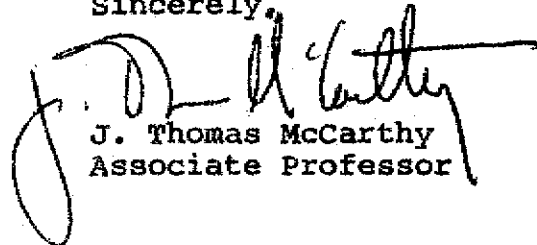
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I believe that the Commission's recommendations and proposed legislation is, in the main, a very good job and should be aggressively pursued through the legislature. While it is easy to criticize the present rules, it is quite difficult to present a workable alternative. I believe the Commission's recommendations present a well-constructed alternative to the present unacceptable structure of litigation control. A glance at the Judicial Council's most recent court statistics reveal the present intolerable log-jam of litigation which clogs the civil calendar of the California Courts. The median delay of civil jury trials in urban Superior Courts from Complaint to trial ranges from 11 months in San Bernardino to 41 months in San Francisco (1970 Annual Report of the Administrative Office of the California Courts, 102, Table XXIV). Hopefully, a streamlining of procedural rules can help to cut down this backlog. A visit to the Law and Motion Department of any urban California Court reveals how the present obsolete joinder and cross-demand procedures can obscure and confuse the underlying merits of civil cases.

If litigants and the public are to maintain any respect for our judicial system, it is up to the bar, the judiciary and the Law Revision Commission to make corrections and improvements when necessary. We can no longer process the urban civil litigation of the 1970's according to rules devised for the basically rural society of the 19th Century.

I do have a few suggestions for clarification and modification of the Commission's proposals. These are attached. However, viewed against the total picture, they are of a minor nature. I wholeheartedly endorse the efforts and the proposals of the Commission and offer to help in any way I can to see to it that they become law.

Sincerely,



J. Thomas McCarthy
Associate Professor

JTM/sal

Attachment

SUGGESTIONS FOR MODIFICATION

Professor J. Thomas McCarthy
University of San Francisco
School of Law
November 12, 1970

1. Repeal of CCP379c

I do not believe that 379c is "unnecessary" even in view of the words "in the alternative" in new CCP379. In fact, in view of Landau v. Salam, 10 CA3d 442, 89 CR 239 (1970), I believe a stronger and clearer version of 379c is needed. I believe the court in Landau ignored the true meaning of 379c and a similar result could be reached even under new 379. In Schwartz v. Swan, 211 NE2d 122 (Ill. 1965) (Louisell & Hazard Casebook p. 675, 2d Ed 1968) the Illinois court reached a conclusion opposite to Landau under Illinois C.P.A. sec. 24. (Similar to 379 and 379c). The judicial resistance of Landau leads me to believe that a strongly worded version of 379c is necessary to prevent a plaintiff in such a situation being left with no recovery because the two defendants each point the finger at each other. It should not be the plaintiff's burden to prove which defendant caused what injury. Landau appears to me to be directly contrary to Summers v. Tice, 33C2d80 (1948).

2. 428.10

Sections (a) and (b) are not entirely consistent. 428.10(a) permits even unrelated claims to be the subject of a cross-complaint against any party who filed against cross-complainant. However, 428.10(b) appears to require a transactionally related claim against a person "whether or not such person is already a party to the action". Why include this phrase? 428.10(b) appears to restrict what 428.10(a) leaves open. Clarification in sec. (b) seems necessary.

3. CCP428.20

This section states that an additional person may be named in a cross-complaint only if joinder of that person would have been permitted by new 379. 379 requires a transactionally related claim and common questions of law or fact. Does this not conflict with new 428.10 which only requires a transactionally related claim for third parties and allows any claim back against parties to the suit?

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e.g. P1 + P2 v D

428.10(a) allows D to file a cross-complaint against Plaintiffs without restriction. But do 428.20 and 379 require that D's cross-complaint against two cross-defendants P1 and P2 be transactionally-related and that there be common questions of law or fact? Perhaps D has separate debts owing from P1 and P2 which have nothing to do with the complaint of P1 and P2. Does not the combination of 428.20 and 379 foreclose a joinder of P1 and P2 as cross-defendants?

I believe 428.20 needs to be clarified to foreclose such an argument being raised.

4. 428.30

This section allows a cross-complainant naming a third-party to set forth "any causes of action he has against the newly joinded party". However, 428.10(b) requires a transactionally related claim for cross-complaints against third persons. The provisions could be construed as contradictory. 428.30 should be reworded to make clear it only allows unlimited joinder of causes of action which are related to the case brought against cross-complainant as defined in 428.10.

5. 428.70

I think I understand the factual situation that this relates to. However, I believe a factual hypothetical in the comment would go far in clarifying the type of situation covered. What exactly is gained by allowing the "third-party defendant" to file a "special answer"?

EXHIBIT II

§ 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; or

(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 Pleading § 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 . . ."). See 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). But see Landau v. Salam, 10 Cal. App.3d 472, 89 Cal. Rptr. 239 (1970)(denying joinder of two defendants who allegedly injured plaintiff in accidents occurring on separate days). See generally 2 Witkin, California Procedure Pleading §§ 96, 97 (1954).

§ 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.

Article 3. Permissive Joinder of Causes of Action

§ 427.10. Permissive joinder

427.10. (a) A plaintiff who in a complaint, alone or with coplaintiffs, alleges a cause of action against one or more defendants may unite with such cause any other causes which he has either alone or with 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 ^{the} compulsory joinder requirements of Section 426.20.

Article 4. Cross-Complaints

§ 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 or 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., Rule 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. These requirements are not continued, and subdivision (a) permits unlimited scope to a cross-complaint against an opposing party. For discussion of the prior law, see the Comment to Section 426.30 and Friedenthal, Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions, 23 Stan. L. Rev. 1, 19-23 (1970).

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 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, supra, at 25-26.

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.

§ 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, Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions, 23 Stan. L. Rev. 1, 21-23 (1970).

§ 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 provides permissive joinder rules that treat a cross-complaint the same as a complaint in an independent action. Cf. Section 427.10. Thus, if a defendant properly joins a stranger as a co-defendant on a cross-complaint, the defendant may then assert any additional causes of action he has against the stranger. See the Comment to Section 427.10. 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.

It should be noted that both the cross-complainant and the new cross-defendant are subject to the compulsory joinder requirements of Sections 426.20 and 426.30.

§ 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., Rule 14.