#71 6/24/71

Memorandum 71-48

Subject: Study 71 - Pleading (Compulsory Joinder of Causes; Separate Statement of Causes)

Senate Bill 201, which would effectuate our recommendations concerning certain aspects of pleading, has passed the Legislature and has been sent to the Governor for approval. Attached is a letter prepared for Senator Song to send to the Governor explaining the bill.

Two provisions--the compulsory joinder requirement for plaintiffs and the revision of the separate statement of causes requirement--were deleted from the bill before it was enacted. Tentative recommendations on these matters have been prepared that take into consideration the suggestions made at the June meeting. Copies are attached.

The Chairman, Vice Chairman, and Executive Secretary met with the State Bar Committee on the Administration of Justice on June 19 to discuss the two tentative recommendations. The following is a summary of the discussion at that meeting. See Exhibit I attached for committee action.

Separate Statement Requirement

It appears that the members of the State Bar Committee strongly oppose the deletion of the separate statement requirement and the corresponding ground for demurrer. It became clear during the course of the discussion that lawyers and judges generally do not understand the meaning of "cause of action" (if indeed the requirement applies to causes of action in a technical sense). Apparently, as administered by the courts, the requirement is interpreted to require separate statement of theories of causes, remedies sought, and the like. The fear was expressed that deletion of the requirement would result

in notice pleading as provided in the Federal Rules of Civil Procedure. Moreover, deletion of the requirement would, in the view of some members of the Committee, result in a significant change in existing practice: Lawyers would commence pleading all causes, remedies, and facts in one count.

It was not possible to obtain an expression from the State Bar Committee as to the desirability of substituting a more technically accurate provision for the present one. For example, it would be possible to substitute a provision that required that each allegation be stated in a separate count where such separate statement would facilitate the clear presentation of the issues.

It is my view that it would not be profitable to devote further resources to this aspect of pleading. It is doubtful that any provision acceptable to the State Bar Committee could be developed. Moreover, with the substantial number of new lawyers becoming members of the bar each year, it is not unlikely that, in time, there will be pressure to adopt notice pleading. Many young lawyers, who have studied the federal rules in law school, are not particularly impressed with the existing California fact pleading system. Accordingly, the staff suggests that we give no further consideration to this matter at this time.

Compulsory Joinder of Causes by Plaintiffs

It is not possible to determine the exact view of the State Bar Committee on the compulsory joinder by plaintiffs requirement. It was apparent that some members believe that the tentative recommendation is sound. Others expressed the view that a better approach might be to adopt the operative facts theory of a cause of action generally. One member stated he did not believe any change in the law was needed because everything is satisfactory now.

No specific suggestions were presented for Commission consideration. (One member did suggest that the intercompany insurance arbitration provision might be modified to include a provision that the judgment in the plaintiff's action had no effect on the arbitration procedure.) One member expressed the view that the proposal might force more insurance companies to resort to arbitration of property damage claims, a result he believed would be desirable.

By a vote of nine to eight, the State Bar Committee recommended against further study of our proposal. However, I suggest that it be generally distributed for comment to all interested persons and organizations. At our September meeting, the Commission can then determine, after reviewing the comments received, whether to submit a recommendation to the 1972 Legislature.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 71-48

EXHIBIT I

LAW OFFICES
HORTON & FOOTE

1860 CALIFORNIA FEDERAL PLAZA
5670 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90036

TELEPHONE 936-1147

June 24, 1971

Thomas E. Stanton, Jr.
Chairman
Law Revision Commission
221 Sansome Street
San Francisco, California 94104

Re: Senate Bill 201

Dear Tom:

First, may I again express our appreciation for the attendance of yourself and Mr. Miller and Mr. DeMoully at the General Meeting of the CAJ in Los Angeles on June 19, and for the discussion of the Commission's tentative views on plaintiff's mandatory joinder of causes of action and the separate statement requirement.

The discussion, I think, indicated some of the problems our Committee members have been having with each proposal.

In response to your inquiry as to our views on whether a study in these areas should be continued, I am advising you of the action taken later in the CAJ meeting.

(1) Separate Statement

The Committee, with substantial unanimity, recommends against further study.

(2) Mandatory Joinder

By a vote of 9 to 8, the Committee recommends against further study.

As you know, the views of the Committee are not necessarily those of the Board of Governors.

With best regards, I am

Yours Sincerely,

Joseph K. Horton
Chairman, CAJ

JKH/lhc

cc: Mr. Miller
Mr. DeMoully

Senate Bill 201 has passed the Legislature and has been sent to you for your approval.

Although most areas of California Civil Procedure have been reviewed and modernized in recent years, there has been relatively little change in the California code pleading system since its adoption in 1851. Senate Bill 201 streamlines and modernizes a number of aspects of California pleading.

The bill revises the law relating to permissive joinder of causes of action. The existing rules are a complex conglomerate of common law and equity rules, complicated by piecemeal attempts at improvement. Senate Bill 201 substitutes the modern unlimited joinder rule adopted in other states that have recently revised their law in this area.

The bill continues the existing requirement that a defendant must assert all claims arising out of the transaction upon which the plaintiff's claim is based but adds some exceptions to this requirement to avoid injustice.

The bill substitutes clear rules dealing with permissive joinder of plaintiffs and defendants for the conflicting, obsolete, and overlapping provisions now found in existing law.

The bill adopts the substance of the provision of the Federal Rules of Civil Procedure dealing with compulsory joinder of persons needed for a just adjudication. This provision, which has been adopted in the other states that have recently modernized their law, is generally recognized to have satisfactorily dealt with one of the most difficult problem areas of civil procedure.

The bill also deals with counterclaims and cross-complaints. 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. Senate Bill 201 would provide comparable treatment through a single form of pleading--to be called a cross-complaint--that

would be available against plaintiffs, codefendants, and strangers, would embody the relief now available by counterclaims and cross-complaints, and would eliminate technical requirements that serve no useful purpose.

Senate Bill 201 revises the present provision on severance for trial by adopting the language used in the Federal Rules of Civil Procedure, thus clarifying its effect and broadening its scope to permit severance not only of an action but also of issues.

In addition to the major changes mentioned above, the bill makes other technical or corrective changes in existing law. These changes are designed to streamline pleading and practice by eliminating obsolete and unnecessary requirements or by providing improved procedures.

Senate Bill 201 would become operative on July 1, 1972. This deferred operative date will permit lawyers and judges to become familiar with the revised procedure before it goes into effect.

Senate Bill 201 is the result of a study by the Law Revision Commission and is fully explained in the enclosed report of the Law Revision Commission. Some of the comments to various sections of the bill are revised or expanded in special reports which were adopted by the Senate and Assembly Judiciary Committees and printed in the Journals. Copies of these reports are enclosed. Mr. John H. DeMoully, Executive Secretary of the Law Revision Commission, will be delighted to supply you with any additional information you desire concerning the bill.

There is general agreement among all interested groups that Senate Bill 201 will accomplish a significant improvement and simplification in the California law.

## REQUEST FOR UNANIMOUS CONSENT TO PRINT IN JOURNAL

Mr. Warren was granted unanimous consent that the following communication relative to Senate Bill No. 201 be printed in the Journal:

## COMMUNICATION FROM ASSEMBLY COMMITTEE ON JUDICIARY ON SENATE BILL 201

*The Honorable Bob Moretti*
*Speaker of the Assembly*

Dear Mr. Speaker: The Assembly Committee on Judiciary, having considered Senate Bill 201 and having reported the bill with an "Amend and Do Pass" recommendation, submits the following report in order to indicate more fully its intent with respect to this bill.

Senate Bill 201 was introduced to effectuate the *Recommendation of the California Law Revision Commission Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions* (October 1970). Except for the new and revised comments set out below, the comments contained under the various sections of Senate Bill 201 as set out in the Commission's recommendation, as revised by the Report of the Senate Committee on Judiciary on Senate Bill 201 (printed in the Senate Journal for April 1, 1971), reflect the intent of the Assembly Judiciary Committee in approving the bill.

The following new and revised comments also reflect the intent of the Assembly Committee on Judiciary in approving Senate Bill 201.

*Code of Civil Procedure Section 378 (amended)*

*Comment.* Section 378 continues the substance of former California law. See 3 B. Witkin, California Procedure *Pleading* §§ 161–163 (2d ed. 1971). It supersedes former Code of Civil Procedure Section 381, portions of Code of Civil Procedure Section 378, and portions of former Code of Civil Procedure Sections 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 C. Clark, Code Pleading 367 n.86, 369 n.94 (2d ed. 1947); 3 B. Witkin, California Procedure *Pleading* § 163 (2d ed. 1971). Paragraph (2) of subdivision (a) is derived from the "interest in the subject of the action" provision formerly found in Section 378 and expressed in principle in former 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 (amended)*

*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 J. Chadbourn, H. Grossman & A. Van Alstyne, California Pleading § '18 (1961); 3 B. Witkin, California Procedure *Pleading* § 166 (2d ed. 1971). 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 3 B. Witkin, California Procedure *Pleading* § 172(b) (2d ed. 1971); Fed. R. Civ. Proc., 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); *Landau v. Salam*, 4 Cal.3d 873, __ P.2d __, __ Cal. Rptr. __ (May 24, 1971) (permitting joinder of two defendants who allegedly injured plaintiff in accidents occurring on separate days). See generally 3 B. Witkin, California Procedure *Pleading* §§ 172–176 (2d ed. 1971).

*Code of Civil Procedure Section 379.5 (new)*

*Comment.* Section 379.5 continues without significant substantive change the discretion of the court to sever causes where appropriate by combining former Sections 378 and 379b and making them applicable uniformly to any party—plaintiff or defendant. See generally 1 J. Chadbourn, H. Grossman & A. Van Alstyne, California Pleading § 622 (1961); 3 B. Witkin, California Procedure *Pleading* § 177 (2d ed. 1971). The federal counterpart to Section 379.5 is Rule 20(b) of the Federal Rules of Civil Procedure.

The general authority of a court to sever causes of action and issues for trial is contained in Section 1048.

*Code of Civil Procedure Section 380 (repealed)*

*Comment.* Section 380 is repealed. The section is made unnecessary by the liberal rule of permissive joinder set forth in Section 379. See 3 B. Witkin, California Procedure *Pleading* § 166 (2d ed. 1971); *cf.* 1 J. Chadbourn, H. Grossman & A. Van Alstyne, California Pleading § 621 (1961). 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 inherent in power to hear action and make decree).

*Code of Civil Procedure Section 381 (repealed)*

*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 1 J. Chadbourn, H. Grossman & A. Van Alstyne, California Pleading § 615 (1961); 3 B. Witkin, California Procedure *Pleading* § 164 (2d. ed. 1971).

*Code of Civil Procedure Section 382 (amended)*

*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 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 invalidate a civil service examination and void 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, 153–154 (1952) (joint and several obligors may be sued individually). See generally 1 J. Chadbourn, H. Grossman & A. Van Alstyne, California Pleading § 593 (1961); 3 B. Witkin, California Procedure *Pleading* § 141 (2d ed. 1971).

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. 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)*

*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. See 1 J. Chadbourn, H. Grossman & A. Van Alstyne, California Pleading §§ 615, 621 (1961); 3 B. Witkin, California Procedure *Pleading* §§ 164–166 (2d ed. 1971).

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. See *People v. Love*, 25 Cal. 520, 526 (1864); *cf. 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)*

*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 J. Chadbourn, H. Grossman & A. Van Alstyne, California Pleading § 615 (1961); 3 B. Witkin, California Procedure *Pleading* §§ 164–166 (2d ed. 1971).

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). The enactment of Section 384 in 1872 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 former Cal. Code Civ. Proc. § 384; *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 3 B. Witkin, California Procedure *Pleading* § 144 (2d ed. 1971). 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 426.40 (new)*

*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 federal 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, 692 (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 B. *Jurisdiction* § 55 (2d ed. 1971). In these cases, subdivision (b) of Section 426.40, recognizing that the fed-

eral cause of action is not permitted to be brought in the state court, provides an exception to the compulsory joinder or compulsory cross-complaint requirements.

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 428.10 (new)*

*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 (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.

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 oppos-

ing 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.

Section 428.10 restricts cross-complaints in eminent domain actions to those that assert a cause of action arising out of the same transaction or occurrence or that involve the same property or controversy. Subdivision (a) which permits assertion of unrelated causes of action is made specifically inapplicable to eminent domain actions; but subdivision (b), which permits assertion of related causes, is applicable.

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 428.30 (new)*

*Comment.* Section 428.30 provides permissive joinder rules that treat a cross-complaint generally the same as a complaint in an independent action. *Cf.* Section 427.10. Thus, with a single exception, 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 any of the cross-defendants. See the Comment to Section 427.10. The exception is the filing of a cross-complaint *against the plaintiff* in an eminent domain action. In such a case, the cross-complaint may state only those causes of action which arise out of the same transaction or occurrence or involve the same property or controversy. See Section 428.10. 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.

*Code of Civil Procedure Section 429.40 (new)*

*Comment.* Section 429.40 makes clear that nothing in this title affects the authority of the Judicial Council to provide by rule for the practice and procedure under The Family Law Act, notwithstanding that former Code of Civil Procedure Sections 426a and 426c are continued as Sections 429.10 and 429.20 of the Code of Civil Procedure.

*Code of Civil Procedure Section 430.30 (new)*

*Comment.* Section 430.30 continues prior law under various repealed sections of the Code of Civil Procedure except that former pro-

visions 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.

Where a ground for objection to the complaint or cross-complaint *appears on the face of the pleading* and no objection is taken by demurrer, the objection is waived except as otherwise provided in Section 430.80. See 3 B. Witkin, California Procedure *Pleading* §§ 808–809 at 2418–2419 (2d ed. 1971). In this respect, Section 430.30 continues prior law.

*Code of Civil Procedure Section 1048 (amended)*

*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 but did not specifically authorize the 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 3 B. Witkin, California Procedure *Pleading* § 266 at 1936 (2d ed. 1971) ("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 does not deal with the authority of a court to enter a separate final judgment on fewer than all the causes of action or issues involved in an action or trial. See Code of Civil Procedure Sections 578–579; 3 Cal. Jur. 2d *Appeal and Error* § 40; California Civil Appellate Practice §§ 5.4, 5.15–5.26 (Cal. Cont. Ed. Bar 1966); 3 B. Witkin, California Procedure *Appeal* §§ 10–14 (1954). This question is determined primarily by case law, and Section 1048 leaves the question to case law development.

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.

Where there are multiple parties, the court, under Section 379.5, may order separate trials or make such other orders as appear just to prevent any party from being embarrassed, delayed, or put to undue expense.

I respectfully request that this report be printed in the Assembly Journal.

Respectfully yours,

CHARLES WARREN, Chairman
Assembly Committee on Judiciary

SENATE JUDICIARY COMMITTEE REPORT REVISING
LAW REVISION COMMISSION COMMENTS ON
SENATE BILL 201

## MOTION TO PRINT IN JOURNAL

Senator Song moved that the following letter of legislative intent be printed in the Journal.

Motion carried.

California Legislature
Senate Committee on Judiciary
Sacramento, April 1, 1971

*Lt. Governor Ed Reinecke, President of the Senate*

Dear Governor Reinecke: I respectfully request that the enclosed comments on Senate Bill 201 be printed in the Senate Daily Journal as the legislative intent of the Senate Committee on Judiciary.

Senate Bill 201 was considered by the Senate Committee on Judiciary, and is being reported out today with the recommendation "do pass as amended". The attached report adopted by the Senate Judiciary Committee on March 30 correctly states the intent of the committee in regard to the bill.

Sincerely,

SONG, Chairman

## REPORT OF SENATE COMMITTEE ON JUDICIARY ON SENATE BILL 201

In order to indicate more fully its intent with respect to Senate Bill 201, the Senate Committee on Judiciary makes the following report:

Except for the revised comments set out below, the comments contained under the various sections of Senate Bill 201 as set out in the *Recommendation of the California Law Revision Commission Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions* (October 1970), 10 Cal. L. Revision Comm'n Reports 501 (1971), reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Senate Bill 201.

**Code of Civil Procedure Section 425.20 (new)**

*Comment.* Section 425.20 continues without substantive change the portion of former Code of Civil Procedure Section 427 that related to the separate statement of causes of action.

**Code of Civil Procedure Section 426.30 (new)**

*Comment.* Section 426.30 continues the substance of the former compulsory counterclaim rule (former Code of Civil Procedure Section 439). However, since the scope of a cross-complaint is expanded to include claims which would not have met the "defeat or diminish" or "several judgment" requirements of the former counterclaim statute, the scope of the former rule is expanded by Section 426.30 to include some causes of action that formerly were not compulsory. See discussion in Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions,* 23 STAN. L. REV. 1, 17–27 (1970). As to the limitations under former law, *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, 964 (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.").

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.

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 the party applies for such leave. See Section 426.50.

Subdivision (b) is new. It 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(a) (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, although Section 426.30 may not apply to a particular case, independent application of the rules of res judicata or collateral estoppel, if any, is not affected.

**Code of Civil Procedure Section 426.50 (new)**

*Comment.* Under Section 426.50, the court must grant leave to assert a cause if the party requesting leave acted in good faith. This section is to be construed liberally to prevent forfeiture of causes of action. Where necessary, the court may grant such leave subject to terms or conditions which will prevent injustice, such as postponement or payment of costs.

Section 426.50 supplements the authority provided generally to amend pleadings. See Section 473 of the Code of Civil Procedure. For authority to file a permissive cross-complaint, see Section 428.50. Likewise, Section 426.50 does not preclude the granting of relief from a judgment or order under Section 473.

**Code of Civil Procedure Section 426.60 (new)**

*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 Sections 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, 82 P.2d 385, 388 (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 in 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. Chew 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 191, 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 B. WITKIN, CALIFORNIA PROCEDURE *Judgments* § 46 (b) (1954).

*Subdivision (c).* Subdivision (c) makes the provisions for compulsory joinder of causes inapplicable where the only remedy sought by any party to an action is a declaration of the rights and duties of the parties. If any party to an action seeks a remedy other than declaratory relief, the compulsory joinder provisions apply. The inapplicability of the compulsory joinder provisions in actions involving solely a claim for declaratory relief does not preclude any application of the doctrines of res judicata or collateral estoppel.

**Code of Civil Procedure Section 427.10 (new)**

*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.

**Code of Civil Procedure Section 428.30 (new)**

*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 any of the cross-defendants. 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.

**Code of Civil Procedure Section 428.50 (new)**

*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 grant" of Section 426.50 relating to compulsory cross-complaints.

**Code of Civil Procedure Section 430.10 (new)**

*Comment.* Section 430.10 continues 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) except that improper joinder of causes of action is no longer a ground for objection. Any cause of action may be joined against any person who is *properly* a party in the action. See Sections 427.10, 428.10, and 428.30 (joinder of causes). See also Sections 378 and 379 (joinder of parties).

In addition, Section 430.10 applies to cross-complaints (which now include claims that formerly would have been asserted as counterclaims) while former Code of Civil Procedure Sections 430 applied only to a "complaint."

**Code of Civil Procedure Section 431.70 (new)**

*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 (1950). 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 Co.*, 40 Cal.2d 81, 251 P.2d 949 (1952), holding that Code of Civil Procedure Section 440 did not revive claims previously waived. 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(b)(2). 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 one not 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.

**Code of Civil Procedure Section 1048 (amended)**

*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 but did not specifically authorize the 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 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 160 at 1138 (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 does not deal with the authority of a court to enter a separate final judgment on fewer than all the causes of action or issues involved in an action or trial. See Code of Civil Procedure Sections 578-579; 3 Cal. Jur.2d *Appeal and Error* § 40; California Civil Appellate Practice §§ 5.4, 5.15-5.26 (Cal. Cont. Ed. Bar 1966); 3 Witkin, California Procedure *Appeal* §§ 10-14 (1954). This question is determined primarily by case law, and Section 1048 leaves the question to case law development.

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.

Where there are multiple parties, the court, under Section 379.5, may order separate trials or make such other orders as appear just to prevent any party from being embarrassed, delayed, or put to undue expense.

#71

June 12, 1971

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

# COMPULSORY JOINDER OF CAUSES OF ACTION

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

Note: This tentative recommendation is written on the assumption that SB 201 will be enacted at the 1971 legislative session. The tentative recommendation has been prepared to present the views of the Law Revision Commission at the June 19 meeting of the State Bar Committee on the Administration of Justice.

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

# COMPULSORY JOINDER OF CAUSES OF ACTION

## BACKGROUND

Since 1872, a defendant in a civil action in California has been required to assert by counterdemand any cause of action he has against the plaintiff that arises out of the same transaction or occurrence alleged in the complaint.[1] This requirement is continued in legislation enacted by the 1971 Legislature upon the recommendation of the Law Revision Commission,[2] along with added provisions to protect the defendant against unjust forfeiture of a cause of action.[3] There is at present no comparable requirement that a plaintiff join all causes of action that arise out of the same transaction or occurrence as the cause he alleges in his complaint.[4]

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1. See former Code of Civil Procedure Section 439:

> 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.

2. Cal. Stats. 1971, Ch. . See Code of Civil Procedure Section 426.30. Cf. Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions (1970), reprinted in 10 Cal. L. Revision Comm'n Reports 501 (1971).

3. See Code of Civil Procedure Sections 426.30(b) and 426.50. See also Code of Civil Procedure Sections 426.40 and 426.60.

4. For a discussion of the existing California law, see Friedenthal, Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions, 23 Stan. L. Rev. 1, 11-14 (1970).

The reasons that a defendant is required to assert all causes of action that arise out of the transaction or occurrence upon which he is sued are clear. It is desirable in the interest of judicial economy that parties to a lawsuit dispose of all related claims in one action. In addition to limiting multiple lawsuits, the requirement also minimizes trial expenses, for causes of action arising out of the same transaction or occurrence will ordinarily involve the same witnesses if not identical issues. And the defendant is prevented from harassing the plaintiff by bringing a separate suit to recover for damages arising out of the same transaction or occurrence.

The reasons that support the requirement that a defendant assert all related causes of action apply with equal or greater force to a plaintiff. The plaintiff, because he initiates the action, is normally in a better position than the defendant to determine the possible causes of action that arise out of the same transaction or occurrence. Often the plaintiff has more time and opportunity to determine the facts before he files his complaint than the defendant has before he must file his cross-complaint. In some cases, as where an employer is sued for the act of an employee, the defendant may not even be aware of the occurrence that gave rise to the plaintiff's action. Moreover, the disparate treatment of joinder requirements gives the plaintiff a possible tactical advantage in litigation over the defendant without apparent justification. For example, in a vehicle accident case, the plaintiff may first bring an action for property damage in the hope that it will not be vigorously defended. A judgment in the plaintiff's favor in that action will then be conclusive on the issue of liability in a subsequent action brought by the plaintiff for his personal injuries since collateral estoppel will preclude relitigating the issue of liability in the second action if the same factual issues are involved in both actions.[5]

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5. See 3 B. Witkin, California Procedure Judgment §§ 62-64 (1954).

Moreover, it is sometimes possible to bring the property damage suit in one county and the personal injury suit in another, thus unjustifiably inconveniencing the defendant and unnecessarily increasing the cost of defending the suits. At the same time, an unwary plaintiff may not realize that collateral estoppel will bar the personal injury action where the property damage suit is tried first and results in a judgment for the defendant. This can happen where the plaintiff fails to prosecute vigorously the property damage suit because of the small amount involved. Finally, as a practical matter, the requirement of compulsory joinder of related causes will not impose an undue burden on the plaintiff; 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.[6]

## RECOMMENDATION

The Commission recommends that the plaintiff in a civil action be required to join all causes that arise out of the transaction or occurrence that is the basis of his complaint. The same provisions designed to prevent unjust forfeiture of a related cause of action of a defendant should apply

6. For a discussion of the existing California law, see Friedenthal, Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions, 23 Stan. L. Rev. 1, 11-14 (1970).

to the plaintiff.[7] Adoption of these rules will have several beneficial consequences. The litigation positions of plaintiffs and defendants will be equalized. Court time and expense will be economized. The law governing compulsory joinder of causes of action will be clarified, thus eliminating the need to rely on the uncertain rules of res judicata and collateral estoppel to determine whether a cause is barred by failure to assert it in a prior action.

While adoption of these rules will clarify and improve the law, they will not impose any substantial new burdens on litigants or on the court system. The courts have adequately handled problems arising under the defendant's compulsory joinder requirement. And the possibility that plaintiffs will be encouraged to press causes of action they would not ordinarily pursue is minimal in view of the common practice of joining all related causes as a matter of course. Any burdens added to the litigation will be outweighed by benefits the compulsory joinder rule will provide.

The Commission also recommends that somewhat narrower language be used to describe those actions which must be joined.[8] The compulsory joinder provisions should not be broadly interpreted to bar unpleaded causes. In addition, it is recommended that a section be added to the pleading statute to make clear that the compulsory joinder of causes requirement has no effect on intercompany insurance arbitration.

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7. _E.g._, Code of Civil Procedure Sections 426.40 (compulsory joinder not required where cause of action not pleaded requires for its adjudication the presence of additional parties over whom the court cannot acquire jurisdiction, where 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, or where, at the time the action was commenced, the cause of action not pleaded was the subject of another pending action), 426.50 (relief for party who acted in good faith in failing to plead related cause of action), 426.60 (compulsory joinder not required in special proceedings, in actions in small claim court, or where only relief sought is declaratory relief).

8. See the discussion, _infra_, in the Comment to Section 426.10 of the recommended legislation.

## PROPOSED LEGISLATION

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

An act to amend the heading for Article 2 (commencing with Section 426.10) of Chapter 2 of Title 6 of Part 2 of, to amend Sections 426.10 and 431.70 of, and to add Sections 426.20 and 426.70 to, the Code of Civil Procedure, relating to pleading.

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

Section 1. The heading for Article 2 (commencing with Section 426.10) of Chapter 2 of Title 6 of Part 2 of the Code of Civil Procedure is amended to read:

Article 2. Compulsory Joinder of Causes of Action; Compulsory Cross-Complaints

§ 426.10. Definitions (amended)

Sec. 2. Section 426.10 of the Code of Civil Procedure is amended to read:

426.10. As used in this article:

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

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

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

Comment. The definition of 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. Subdivision (c) adopts substantially the same language as was used in former Code of Civil Procedure Section 439 (compulsory counterclaims). As to the interpretation given this language, see Brunswig Drug Co. v. Springer, 55 Cal. App.2d 444, 130 P.2d 758 (1942); Sylvester v. Soulsburg, 252 Cal. App.2d 185, 60 Cal. Rptr. 218 (1967). The language used in subdivision (c) of Section 426.10 is not as broad as the somewhat similar language used in subdivision (b) of Section 428.10(b)(permissive cross-complaints) since the two provisions serve different purposes and should be interpreted accordingly. Subdivision (c) defines a term used in sections which operate to bar an unpleaded cause of action and these sections should not be broadly interpreted to bar unpleaded causes; Section 439, on the other hand, permits but does not require the joinder of causes in a cross-complaint and should be liberally interpreted to permit joinder.

§ 426.20. Compulsory joinder of related causes (new)

Sec. 3. Section 426.20 is added to the Code of Civil Procedure, to read:

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 named as a defendant in his complaint who is served or appears in the action, the plaintiff may not thereafter in any other action assert such related cause of action against such party.

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, in the past, California has followed the "primary rights theory" of a cause of action, and res judicata has applied only where the cause not pleaded is for injury to the same primary right. See 3 B. Witkin, California Procedure Pleading §§ 22, 23 (2d ed. 1971); 3 id. Judgment §§ 59-60 (1954). Nevertheless, even where different primary rights are injured, collateral estoppel makes a determination in a prior action conclusive in a suit on the unpleaded cause of action if precisely the same factual issues are involved in both actions. See 3 B. Witkin, California Procedure Judgment §§ 62-64 (1954).

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)(compulsory counterclaims); Babb v. Superior Court, 3 Cal.3d 841, Cal. Rptr. , P.2d (1971) (permissive cross-complaint).

Section 426.20 operates to bar only those related causes of action which the plaintiff "has . . . at the time his complaint is filed." Where the plaintiff fails to join a related cause of action which is required to be joined under Section 426.20 and later purports to assign it to another, suit on the assigned claim is clearly barred under Section 426.20. Where there has been a complete assignment of a cause of action prior to the time the assignor sues on one or more related causes arising out of the same transaction of occurrence, Section 426.20 does not bar an action by the assignee on the assigned cause, since the assigned cause is not one that the assignor "has" at the time he commenced his action. (Where there has been a complete assignment of the beneficial interest in a cause of action, the assignee takes legal title and sues alone in his own name; the assignor cannot sue. See 3 B. Witkin, California Procedure Pleading § 100 (2d ed. 1971).) However, where there has been a complete assignment for collection or for collateral security, for example, the assignor is still the beneficial owner of the assigned cause of action and his failure to join the assigned cause when he sues on related causes arising out of the same transaction or occurrence would bar a later

suit on the assigned cause. (The assignor is permitted to bring suit on the assigned claim in such a case if he joins the assignee. See 3 B. Witkin, California Procedure Pleading § 100 (2d ed. 1971).) If the assignor has made only a partial assignment, he remains beneficially interested in the claim and hence the claim is one he "has" at the time he commences his action. He cannot split his cause of action by a partial assignment and subject the defendant to two suits by different plaintiffs. See Stein v. Cobb, 38 Cal. App.2d 8, 10, 100 P.2d 358, (1940); Potter v. Lawton, 118 Cal. App. 558, 560, 5 P.2d 904, (1931). Accordingly, the plaintiff's failure to join the assigned cause when he sues on related causes arising out of the same transaction or occurrence would bar a later suit on the assigned cause. (The partial assignor may sue on the assigned claim if he joins the partial assignee. Id.) The same rules as to complete and partial assignments apply to cases where there is a total or partial subrogation. See 3 B. Witkin, California Procedure Pleading §§ 101-102 (2d ed. 1971).

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, actions in small claims court, or where only declaratory relief is sought. See Section 426.60. See also, e.g., Civil Code Section 4001 (Judicial Council rule 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 amend his complaint to assert a related cause of action not pleaded. See Section 426.50.

§ 426.70. Intercompany insurance arbitration (new)

Sec. 4. Section 426.70 is added to the Code of Civil Procedure, to read:

**426.70.** (a) As used in this section:

(1) "Injury" includes injury, damage, or death.

(2) "Insured" includes the insured or other beneficiary under a policy of insurance, his legal representative, or his heirs.

(b) Where an insurer who has paid a claim under a policy of insurance is subrogated to any extent to the rights of an insured against a person causing injury and the person causing the injury is insured against all or a portion of his liability for such injury:

(1) Except to the extent the insurer is subrogated to the rights of the insured, the fact that the rights between the two insurers are determined by agreement between them or by arbitration does not affect the right of the insured to maintain an action against the person who caused the injury.

(2) No award in an arbitration proceeding between the insurers or a judgment confirming such an award shall be deemed res judicata or collateral estoppel on any party in an action between the insured and the person who caused the injury.

Comment. Section 426.70 is included to make clear that this article does not preclude or affect the determination of the rights between insurers by agreement or arbitration in a case where an insurer is subrogated to any extent to the rights of an insured. Thus, this article has no effect on intercompany arbitration.

Section 426.70 also makes clear that settlement between insurers of a dispute by agreement or arbitration may not adversely affect the right of the insured to maintain an action against the person who caused the injury, damage, or death. Of course, to the extent the insurer is subrogated to the rights of the insured, the determination of the subrogated matter between the insurers is binding on the insured.

Section 426.70 does not make this article inapplicable where an insurer is subrogated to rights of the insured and brings an action in the name of the insured against the person who caused the damage, injury, or death. In such a case, except as otherwise provided by statute, the compulsory joinder provisions of this article are applicable. However, in some cases, statutory provisions permit separate actions by the insurer and the insured. See, e.g., Govt. Code §§ 21451-21453 (state retirement fund), Labor Code §§ 3852, 3853, 6115, 11662 (workmen's compensation). These special statutory provisions are not affected by this article. As to the effect of the assignment of a cause of action on the compulsory joinder requirement, see the Comment to Section 726.20.

§ 431.70. Set-off (amended)

Sec. 5. Section 431.70 of the Code of Civil Procedure is amended to read:

431.70. Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in his answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting his claim would at the time of filing his answer be barred by the statute of limitations. If the cross-demand would otherwise be barred by the statute of limitations, the relief accorded under this section shall not exceed the value of the relief granted to the other party. The defense provided by this section is not available if the cross-demand is barred for failure to assert it in a prior action 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 ameliorates the effect of the statute of limitations; it does not revive claims that have previously been waived by failure to plead them under Section 426.20.

#71

June 14, 1971

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

## TENTATIVE RECOMMENDATION

relating to

## SEPARATE STATEMENT OF CAUSES OF ACTION

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

Note: This tentative recommendation is written on the assumption that SB 201 will be enacted at the 1971 legislative session. The tentative recommendation has been prepared to present the views of the Law Revision Commission at the June 19 meeting of the State Bar Committee on the Administration of Justice.

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

SEPARATE STATEMENT OF CAUSES OF ACTION

In 1971, upon recommendation of the Law Revision Commission,[1] the Legislature enacted legislation that modernized certain aspects of California pleading practice.[2] The 1971 legislation does not, however, make any change in the requirement that causes of action be separately stated, and the substance of former Code of Civil Procedure Section 427 is continued in Code of Civil Procedure Section 425.20.

Section 425.20, which requires that each cause of action be separately stated but provides exceptions for certain types of frequently occuring causes of action, reads:

> 425.20. (a) Except as otherwise provided by law, causes of action shall be separately stated.
>
> (b) 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 wife, money expended and indebtedness incurred by reason of such injury to his 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.
>
> (c) Causes of action for injuries to person and injuries to property, growing out of the same tort, need not be separately stated.

The separate statement requirement--while sometimes raised as an additional ground for demurrer when a complaint is objected to as uncertain--is

1. Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions, 10 Cal. L. Revision Comm'n Reports 501 (1971).

2. Cal. Stats. 1971, Ch. .

a technical requirement that serves no useful purpose. As Witkin[3] points out:

> 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 . . . 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. . . . The difficulty of distinguishing between truly separate causes of action and the same cause pleaded in accordance with different legal theories . . . 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.

There is no need to retain failure to separately state causes of action as a distinct ground for demurrer. In cases where a separate statement is needed for a clear presentation of the issues or to permit a party to frame a responsive pleading, the court has adequate authority to require appropriate amendment of the complaint where the pleading is objected to on the ground that it is uncertain. Accordingly, the Commission recommends that Section 425.20 of the Code of Civil Procedure be repealed and that Section 430.10 of the Code of Civil Procedure be amended to delete the reference to the separate statement requirement.

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3. 2 B. Witkin, California Procedure Pleading § 497(2) at 1486 (1954) (citations omitted). The meaning of "cause of action" is "elusive and subject to frequent dispute and misconception." 3 B. Witkin, California Procedure Pleading § 23 at 1708 (2d ed. 1971). See generally 3 id. Pleading §§ 22-31 (2d ed. 1971).

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

An act to amend Section 430.10 of, and to repeal Section 425.20 of, the Code of Civil Procedure, relating to pleading.

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

Section 1. Section 425.20 of the Code of Civil Procedure is repealed.

~~425.20.--(a)--Except-as-otherwise-provided-by-law,-causes-of action-shall-be-separately-stated.~~

~~(b)--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-wife,-money-expended-and-indebtedness-incurred-by reason-of-such-injury-to-his-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.~~

~~(c)--Causes-of-action-for-injuries-to-person-and-injuries-to property,-growing-out-of-the-same-tort,-need-not-be-separately-stated.~~

Comment. See the Comment to Section 430.10.

Sec. 2. Section 430.10 of the Code of Civil Procedure is amended to read:

430.10. The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, 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) Causes of action are not separately stated as required by Section 425.20.~~

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

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

~~(h)~~ (g) 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 is amended to delete failure to state causes of action separately as a distinct ground for demurrer. As Witkin points out, the meaning of "cause of action" is "elusive and subject to frequent dispute and misconception." 3 B. Witkin, California Procedure Pleading § 23 at 1708 (2d ed. 1971). See generally 3 id. Pleading §§ 22-31 (2d ed. 1971). Because

of this confusion, the former separate statement requirement tended to encourage "prolixity and uncertainty in the statement of the facts constituting the cause or causes of action." See <u>Recommendation Relating to Separate Statement of Causes of Action</u> (1971), reprinted in 10 Cal. L. Revision Comm'n Reports ___ (1971). In cases where a separate statement is needed for a clear presentation of the issues or to permit a party to frame a responsive pleading, the court has adequate authority to require appropriate amendment of a pleading where the pleading is objected to on the ground that it is uncertain. The deletion of the separate statement requirement as a separate ground for demurrer has no effect on the substantive law as to what constitutes a cause of action.