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Memorandum 70-47

Subject: Studies 71 and 73 - Joinder of Claims; Counterclaims and Cross-Complaints

BACKGROUND

The Law Revision Commission has been authorized to study two topics: (1) joinder of claims, and (2) counterclaims and cross-complaints. It was anticipated that the study of these topics also would involve the study of related problems, such as joinder of parties.

Because the topics are interrelated, we retained the same consultant for both topics--Professor Jack Friedenthal of Stanford Law School--and suggested that he prepare one background study to cover both of the topics and any related problems. Attached to this memorandum is his background study.

Since the Commission has no significant legislative program for the 1971 legislative session, it would be desirable to submit a recommendation on these topics to the 1971 Legislature. This would be possible if we could prepare a tentative recommendation for distribution after the July meeting and if such recommendation met the general approval of persons commenting on it. This will require that the major policy decisions be tentatively made at the May meeting and that this project be given a priority. We believe that such priority is merited because we note that Senator Grunsky has introduced legislation at the current session on this subject. In addition, the Assembly Judiciary Committee has indicated great concern with the need to improve judicial procedures to provide for the more efficient administration of justice and looks to the Commission to assist in this effort.

In preparing this memorandum, we assume that you have read the study with some care and we merely highlight the points made in Parts I and II of the study. We do not plan to discuss Parts I and II of the study at the May meeting; we plan to direct our attention to Part III of the study, which summarizes the consultant's recommendations and to present those recommendations for tentative adoption by the Commission. You will, of course, need to be familiar with Parts I and II of the study to appreciate the significance of the consultant's recommendations. If the consultant's recommendations meet Commission approval, we will attempt to prepare a tentative recommendation (including proposed legislation) for review by the Commission at the June meeting.

BRIEF SUMMARY OF STUDY

JOINDER OF CAUSES OF ACTION

Joinder of causes of action is governed by Code of Civil Procedure Section 427. See study at pages 2-4. The research study points out that Section 427 is confused and repetitious and that the language of the section does not conform to its interpretation by the courts. See study at pages 5-8.

1. Need to abolish the categorical approach to joinder of causes of action. Our consultant strongly recommends that Section 427 be replaced by a provision allowing unlimited joinder of causes of action among those persons who have properly been made parties to the action. He believes that the entire substance of Section 427 makes little sense. He points out:

1. As virtually every writer on the subject has noted, the joinder categories under the section are for the most part arbitrary and not based on reasons of practical convenience.

2. There is no demonstrated need for any limitations on joinder of causes of action.

3. Any undesirable effects resulting from unlimited joinder of causes can easily be remedied by a severance of causes for trial.

4. The current categorical approach to Section 427 results in sufficient confusion, uncertainty, and unwarranted cost to justify revision.

5. The discretionary power of the court to consolidate separate causes cannot eliminate problems raised by limitations on joinder of causes.

Each of these points is developed in some detail in the study. See study at pages 8-15.

2. Permissive joinder of causes of action in cases involving multiple parties. The consultant recommends that California follow the lead of New York and other states and the Federal Rules and permit free joinder of causes of action between any adverse parties to the action. He sees no reason why a plaintiff should not have as broad a right to join causes of action as does the defendant and points out that the "affect all parties" limitation on joinder in Section 427 is arbitrary, inconsistent, and unnecessary and has been read out of the statute in the great majority of cases. See study at pages 16-20.

3. Joinder of causes and problems of venue. The consultant points out that the provision of Section 427 that causes cannot be joined if they "require different places of trial" has, for all practical purposes, been read out of the statute by the courts and should be omitted to avoid possible confusion in the future. He suggests that, since the complex venue provisions possibly could be interpreted to preclude venue of a given mixed action in any forum, provision perhaps should be made for a severance of the action and transfer of separate parts to courts where venue is permissible. (He notes that at present there does not appear to be any cases where no court would have proper venue but this is dependent on case law, much of which is found in decision by the courts of appeal.) See study at pages 21-23.

4. Mandatory joinder of causes. The consultant rejects the suggestion that a party be required to join all causes of action that he has against another party in the case. See study at pages 24-26. He urges, however, that the law be changes to require mandatory joinder of all claims arising out of a single set of transactions or occurrences. This would put the plaintiff in the same position as the defendant is under existing law as to a counterclaim arising from the same transaction. See study at pages 26-29.

5. Mandatory joinder of causes in multiparty cases. The consultant points out that the existing law concerning "indispensable" and "conditionally necessary" parties is far from clear and greatly in need of improvement. He suggests that the substance of Federal Rule 19 be adopted so that compulsory joinder of claims involving mutiple parties would be limited to situations where actual prejudice, such as inconsistent verdicts, would occur if a person is not joined as a party. He concludes that the advantages that might accrue from a broad compulsory joinder of parties are outweighed by problems of enforcement and the dangers of unnecessary litigation. See study at pages 30-38.

COUNTERCLAIMS AND CROSS-COMPLAINTS

The consultant concludes that the existing law regarding counterclaims and cross-complaints is wholly unsatisfactory.

Claims Against Plaintiff

The consultant points out that, in almost every jurisdiction, a cause of action filed by a defendant against a plaintiff, alone or with other persons, is denominated a "counterclaim" and is dealt with under a single set of rules. Under the Federal Rules of Civil Procedure and other modern provisions, any cause of action which defendant has against plaintiff may

be brought as a counterclaim, regardless of its nature. If defendant's cause arises from the same transaction or occurrence as plaintiff's cause, then most such jurisdictions make it a compulsory counterclaim; defendant must raise it in his answer or give it up, for he will not be allowed to raise it later in an independent action.

In California, however, the provisions are far more complex. A claim by defendant against plaintiff may qualify either as a counterclaim or as a cross-complaint, or it may qualify as neither or as both. Since the procedural aspects of counterclaims are quite different from those of cross-complaints, it is important--although sometimes not easy--to determine into which category, if any, defendant's cause of action will be placed. The consultant outlines the California situation pointing out that it "is manifestly in need of reform, preferably along the lines of the Federal Rules which have been adopted in many jurisdictions." See study at pages 40-42.

1. Counterclaims. The consultant points out that the counterclaim provision--Section 438--establishes two prerequisites to a counterclaim: It must tend to "diminish or defeat" plaintiff claim, and it must permit a several judgment between the parties to it. These requirements are discussed in the study at pages 42-48. The consultant concludes that the "diminish or defeat" requirement needs to be clarified if it is retained, primarily to prevent confusion and unfairness in the operation of the compulsory counterclaim statute. He concludes that the "several judgment rule" makes very little sense and should not be continued.

The consultant notes that the reference in Section 444 to "several causes of counterclaim," which have been "improperly joined," is inconsistent with Section 438 and this reference should be eliminated to avoid confusion. See study at page 49.

The consultant discusses the rights and duties of a plaintiff against whom a counterclaim has been filed at pages 49-52 of the study. He concludes that the plaintiff against whom a counterclaim has been filed should be treated as if he were a defendant in an independent action with all the rights and obligations appurtenant thereto. This would require that plaintiff reply to a counterclaim and would permit the plaintiff to assert a counterclaim or cross-complaint to the defendant's counterclaim. In other words, the consultant is suggesting the enactment of uniform pleading rules for both counterclaims and cross-complaints.

2. Cross-complaints against plaintiff. The consultant points out that the cross-complaint provision--Section 442--imposes only the requirement that a cross-complaint have a subject matter connection with the plaintiff's complaint. The consultant points out the problems of interpretation of Section 442 in the study at pages 52-54.

3. Compulsory counteractions. The consultant notes Section 439, which provides for compulsory counterclaims but fails to provide for compulsory cross-complaints. He concludes that the current statutory scheme ought to be revised to require defendant to assert all claims--whether cross-complaints or counterclaims--which he has against plaintiff if they arise from the same transaction or occurrence as the plaintiff's cause of action. He believes that the policy of compulsion applies whether or not defendant's claims happens to meet the "diminish or defeat" or "several judgment" requirements of Section 438. See discussion in study at pages 54-56.

4. Special rules of set-off. The consultant discusses Section 440, which provides for set-off and is significant where the defendant's claim is barred by the statute of limitations. He concludes the section is

desirable but suggests that it might be useful to include a requirement that one who wishes to rely upon it must give timely notice to that effect, at least before the limitations period runs on his own claim. He further suggests that the language of Section 440 be revised to eliminate apparent conflicts with the counterclaim provisions of Sections 438 and 439. See study at pages 56-60.

5. Overall solution. The consultant discusses the need for revision of the law to eliminate the need for two different sets of provisions (one for counterclaims and one for cross-complaints) to govern claims by a defendant against the plaintiff and for related revisions. See study at pages 60-61.

Claims Against Persons Other Than Plaintiffs

In almost every jurisdiction, a cause of action filed by one party against a co-party--whether a co-plaintiff or co-defendant--either alone or with other persons brought into the case for the first time, is denominated a "cross-claim." Under the Federal Rules and other modern procedural provisions, a cross-claim is proper if the cross-complainant alleges a cause of action arising from the same transaction or occurrence or affecting the same property as a plaintiff's original claim or a defendant's counterclaim. A cross-claim cannot be brought alone against persons who have not already been made parties to the action. The only claim that can be made in such case is one in interpleader whereby a party to the action alleges that, if he is held liable on a claim pending against him, he will have a claim over against a stranger to the action for all or part of such liability.

In California, the cross-complaint provision--Section 442--which has already been mentioned as a device for countersuits against plaintiffs,

is the sole basis for bringing causes against a co-party or a stranger to the action, including interpleader claims. Section 442 was amended in 1957 pursuant to a Law Revision Commission recommendation solely for the purpose of permitting joinder of third parties as co-defendants to a cross-complaint. However, the language has been given a much broader interpretation by the Supreme Court to increase the scope of cross-complaints well beyond that intended, and even beyond that permitted in other jurisdictions with the most liberal joinder rules. Because of this history, the rights and obligations of the parties to a cross-action are not spelled out and there are a number of situations which give rise to confusion and potential injustice and which necessitate further revision. See study at pages 62-64.

1. The scope of cross-complaints against non-plaintiffs. The recognition of an absolute right to interpleader requires that provisions dealing with the rights and obligations of the parties be provided. The consultant recommends revision of Section 442 to provide for interpleader along the lines of Federal Rule 14. See study at pages 65-66.

The consultant notes that Section 442 permits a defendant to file a cross-complaint against an outsider, even in a non-interpleader situation. Although the Federal Rules do not permit this, the consultant--recognizing the injustice that can result from requiring the outsider to defend an action far from his home--concludes that the most satisfactory way to control the situation would not be the enactment of strict limitations on cross-complaints; instead the courts, in addition to their power to sever causes of action for trial, should be given the discretion to transfer a severed cause to another county for trial as an independent action. See study at pages 66-68.

2. Cross-complaints and joinder of causes. The consultant recommends the rule--in effect in the Federal Rules and under modern procedural systems elsewhere--that permits any litigant, once he has filed a valid cross-claim, or interpleader claim, to join with it any other claim he has against the adverse party. This is not permitted under existing California law. See study at pages 68-69.

3. Rights and duties of a person against whom a cross-complaint has been filed. Pointing out the inadequacy of existing law, the consultant recommends that Section 442 be revised clearly to permit any person against whom a cross-complaint has been filed to bring any counterclaim or cross-complaint which he would have been permitted to bring had he been sued in an independent proceeding, and to require him to assert any compulsory counterclaims he might have. See study at page 70.

4. Mandatory cross-complaints against third parties. The consultant concludes that a rule making all cross-complaints mandatory would not seem to have sufficient advantages to outweigh the potential harm it might cause. See study at page 71.

CONSULTANT'S RECOMMENDATIONS

A number of the problems listed above could be alleviated by changes in the wording of the individual statutes regarding joinder of parties and causes, leaving intact the basic framework of joinder as it now stands. It seems clear, however--in light of the inconsistence, lack of coherence, and confusion among the various provisions--that what is required is the

enactment of new legislation based on a consistent set of principles. The basic principles recommended by the consultant are set out in Part III of the study (beginning on page 72). At the May meeting, the staff suggests that these principles be examined in detail and tentatively approved so that we will have a possibility of submitting a recommendation on these topics to the 1971 Legislature.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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THE NEED TO REVISE CALIFORNIA PROVISIONS

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

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

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

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

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

INTRODUCTION

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

PART I: JOINDER OF CAUSES

SCOPE

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

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

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

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

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

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

BACKGROUND

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

> The plaintiff may unite several causes of action in the same complaint, where they all arise out of:
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> 1. Contracts, express or implied. An action brought pursuant to Section 1692 of the Civil Code shall be deemed to be an action upon an implied contract within the meaning of that term as used in this section.
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> 2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same.
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> 3. Claims to recover specific personal property, with or without damages for the withholding thereof.
>
> 4. Claims against a trustee by virtue of a contract or by operation of law.
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> 5. Injuries to character.
>
> 6. Injuries to person.
>
> 7. Injuries to property.
>
> 8. Claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.
>
> 9. Any and all claims for injuries arising out of a conspiracy, whether of the same or of different character, or done at the same or different times.
>
> The causes of action so united must all belong to one only of these classes except as provided in cases of conspiracy, and must

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

affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person; provided, however, that in any action brought by the husband and wife, to recover damages caused by any injury to the wife, all consequential damages suffered or sustained by the husband alone, including loss of the services of his said wife, moneys expended and indebtedness incurred by reason of such injury to his said wife, may be alleged and recovered without separately stating such cause of action arising out of such consequential damages suffered or sustained by the husband; provided, further, that causes of action for injuries to person and injuries to property, growing out of the same tort, may be joined in the same complaint, and it is not required that they be stated separately.

THE CATEGORY REQUIREMENT

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

The Necessity For Revised Wording of Section 427

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

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2. Id. at 467.

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

4. Id. at 10-17.

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

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

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

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

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

6. Id. at 465-67.

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

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

The precise scope and meaning of the new category was unclear from the outset. Although it is now clear that courts read the words "same transaction" broadly to include causes arising out of a single tortious event, or related series of events, this did not come about until a series of special provisions, seemingly redundant,[9] were added to the statute. Thus in 1913 it was provided that a husband's damages for injuries to his wife could be joined with the wife's own claim for her injuries; apparently the 1907 amendment was not considered sufficient for such joinder.[10] In 1915 another amendment permitted a plaintiff to join "causes of action for injuries to persons and injuries to property growing out of the same tort." This addition appeared to be in response to a 1912[11] decision where, without discussing the "transaction" category, such joinder was denied. Finally, in 1931, a ninth category was added to section 427 providing for joinder of all claims for injuries arising out of a conspiracy. Again, this appeared to be in response to a specific decision refusing joinder despite the presence of the general "transaction" category.[12]

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

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

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

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

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

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

The Need to Abolish the Categorical Approach to Joinder

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

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

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

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

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

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

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

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

The Federal Rules of Civil Procedure also contain a provision for unlimited joinder[16] which has been a model for reform in many states. The success of such provisions has been summed up by one procedural expert as follows, "Of all the provisions of the Federal Rules and their state counterparts dealing with joinder, this rule on joinder of claims has operated most smoothly and satisfactorily."[17]

Perhaps even more significant than the experience of other states with broad joinder of claims provisions is the California experience with the broad joinder of counterclaims and cross-complaints by defendant. The scope of California's counterclaim provisions was set forth by the state supreme court in Terry Trading Corp. v. Barsky[18] in 1930, as follows:

> Under the amendment to section 438 of the Code of Civil Procedure, adopted in 1927 and prior to the filing of the answer and cross-complaint herein, the sole requisites of a counterclaim are that it "must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action." All of the other limitations were abolished by this amendment, and an intent on the part of the legislature to avoid multiplicity of suits and to have all conflicting claims between the parties settled in a single action was most clearly manifested. In the instant case, obviously, both the claim for damages and the demand that plaintiff account for sums collected and not credited on defendant's obligation tend to diminish or defeat plaintiff's recovery. Under the amendment it is not necessary

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16. Fed. R. Civ. P. 18(a). The rule is quoted in the text at 19 infra.

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

18. 210 Cal. 428, 435-36, 292 P. 474, 477 (1930).

> that there be any connection between the cause of action set up in the complaint and that which forms the basis of the counterclaim. Indeed, the statute contemplates the pleading of unrelated matters as counterclaims by providing that "the court may, in its discretion, order the counterclaim to be tried separately from the claim of the plaintiff." (Code Civ. Proc., sec. 438; McBaine, Recent Pleading Reforms in California, 16 Cal. L. Rev. 366.)

If defendant has a claim against plaintiff which does not qualify as a counterclaim but which arises out of the same transaction or occurrence as plaintiff's complaint, then defendant can plead such claim as a cross-complaint in addition to any counterclaims he has filed in his answer.[19] It is certainly anomalous for California law to permit defendant to plead such a broad range of counterclaims and cross-complaints and at the same time to adhere to the arbitrary categories set out for joinder of claims by plaintiff. If the purpose is to avoid multiplicity and to have all conflicting claims between the parties settled in a single action, the current restrictions on joinder by plaintiff are absurd. In this regard it should be noted that there has been no agitation whatsoever to cut back the scope of counterclaims or cross-complaints now permitted; indeed writers on the subject have adversely criticized the counterclaim provision for retaining the "diminish or defeat" language which restricts counterclaims to those cases where both plaintiff and defendant seek some monetary relief. The legislature has been urged to liberalize the rules so that defendant can join any causes whatsoever he has against plaintiff.[20]

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19. See Cal. Code Civ. Proc. § 442.

20. See, e.g., Comment, California Procedure and the Federal Rules, 1 U.C.L.A. L. Rev. 547, 551-52 (1954).

3. Any undesirable effects resulting from unlimited joinder of causes can easily be remedied by a severance of causes for trial. Joinder of causes, in and of itself, is never harmful. Only a joint trial of causes may be unjustified, either because the trial may become too complex for rational decision, or because evidence introduced on one cause will so tend to prejudice the trier of fact that it will be unlikely to render a fair decision on any other cause. These latter problems which are certainly not obviated by the current arbitrary categories can be avoided by resort to Code of Civil Procedure section 1048 which permits the court, in its discretion, to sever any action.[21] In addition, a number of other California provisions permit severance where appropriate because of multiple plaintiffs,[22] multiple defendants,[23] or the insertion of counterclaims.[24] These latter provisions, which seem redundant, can only emphasize the availability of severance whenever necessary.

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21. Section 1048 reads in its entirety:

> An action may be severed and actions may be consolidated, in the discretion of the court, whenever it can be done without prejudice to a substantial right.

22. Cal. Code Civ. Proc. § 378.

23. Cal. Code Civ. Proc. § 579.

24. Cal. Code Civ. Proc. § 438.

4. The current categorical approach of section 427 results in sufficient confusion, uncertainty, and unwarranted cost to justify revision. As a practical matter there will only be a small number of situations in which a plaintiff will have several causes of action against a defendant which do not arise from one set of transactions or occurrences so as to permit joinder under section 427. Even then such unrelated causes may be joined if they all fall within some other category of the statute. Thus the adoption of an unlimited joinder rule will not have much impact on the number of causes that can in fact be joined. Nevertheless, a number of benefits will accrue from such revision. Under the current provision defendants are encouraged, whenever tactically sound, to challenge the joinder of causes by arguing that no category applies. Even when unsuccessful, argument on such an issue is costly and time consuming. In those few cases where the challenge is successful, the plaintiff must file an amended complaint eliminating one or more of his original causes. If the original complaint was filed shortly before the statute of limitations ran on the various causes, plaintiff may even be forced to a final election as to which of the causes to pursue since a new independent action on any cause dropped from the case will be barred.

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

unrelated claims may involve certain common issues and may require the presence of the same witnesses.

5. The discretionary power of the court to consolidate separate cases cannot eliminate the problems raised by the limitations on joinder of causes. Since California's provision for consolidation of cases for trial contained in Code of Civil Procedure section 1048[25] does appear to give virtually unlimited discretion to the trial judge, one may ask whether it is not better to retain current joinder limitations than to provide for unlimited joinder subject to the court's power to sever the causes for trial. First of all, consolidation does not eliminate duplication of filing fees and other preliminary costs of suit. Furthermore, a court is likely to reject consolidation over one party's objection if the only reason advanced is that one trial is less costly than two, even though the causes sought to be joined are simple and, if joinder were permitted, severance would be rejected as totally inappropriate. The court would be justified in assuming that the failure of the legislature to provide for unlimited joinder of causes at plaintiff's option indicates a policy against such joinder by consolidation without a substantial showing of necessity in the particular case. Finally, if causes have been inappropriately joined, severance for trial can always be effected, but it may not be possible to consolidate actions since they may not have been instituted in the same court. Consider, for example, a situation in which plaintiff has two causes, one of which must be brought in superior court and the other of which, if sued on alone, would have to be instituted in municipal court. If section 427 permits plaintiff to unite them into a single case, and he does so, the California laws on jurisdiction provide that the entire action be brought in the

25. The full text of section 1048 is quoted in note 21, supra.

superior court,[26] which can in turn sever the causes for trial. However, if plaintiff, at the outset, divides the causes into two separate actions, the case before the municipal court cannot subsequently be sent to the superior court for consolidation with the case there pending;[27] once the municipal court obtains proper jurisdiction over a case, transfer to the superior court for consolidation[28] is precluded. One may, of course, argue that the legislature should alter the jurisdiction statutes to permit such consolidation rather than change the rules of joinder of causes, but such a procedure would add costs and would still not cure the confusion engendered by section 427 as it now stands.

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26. See 1 Chadbourn, Grossman & Van Alstyne, California Pleading § 182 (1961).

27. Cochrane v. Superior Court, 261 Cal. App.2d 201, 67 Cal. Rptr. 675 (2d Dist. 1968).

28. Ibid.

PERMISSIVE JOINDER OF CAUSES IN CASES INVOLVING MULTIPLE PARTIES

Section 427 is generally phrased as if every case involved but one plaintiff and one defendant. The only major reference[29] to multiple parties is the requirement that each cause of action to be joined must affect all parties to the action. This clause appeared in the original code at a time when joinder of parties was narrowly restricted. In 1927, however, California joined an ever growing number of states in liberalizing the joinder of parties provisions. Essentially these new statutes provide that parties can be joined if the claims by or against them, whether joint, several, or in the alternative, arise out of one transaction or occurrence or series of transactions or occurrences, and involve a common question of law or fact.[30] In making these reforms, however, state legislatures consistently ignored the existing joinder of claims statutory requirement that each cause of action affect all parties to the action. As a result, in a number of states, the joinder of parties reforms were virtually nullified. For example, two persons, each of whom suffered injuries due to a single tortious act by a defendant, could satisfy the joinder of parties requirements, but this was

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29. There is an additional reference to the situation where a husband and wife join to sue for their respective damages arising from an injury to the wife.

30. California Code of Civil Procedure section 378 governs joinder of parties and clearly states these requirements. Joinder of defendants is governed by a series of three provisions, California Code of Civil Procedure Sections 379, 379(a), 379(b), and 379(c), which are loosely drawn, overlap, and give no clear picture of what was intended. Most experts have taken the position that the result of these provisions is, and should be, to allow joinder of defendants if, but only if, the criteria for joinder of plaintiffs have been met. See 1 Chadbourn, Grossman & Van Alstyne, California Pleading § 618 (1961); 2 Witkin, California Procedure, Pleading, § 93 (1954).

meaningless since their causes could not be joined; each one's action for his own injuries would affect only him.[31]

California courts, unlike those of other states, have consistently taken a sophisticated approach by holding that the modern joinder of parties provisions should be given their intended effect and that the "affect all parties" requirement of section 427 is thus superseded as to those causes of action which are so related as to permit the joinder of parties.[32]

Although the California courts are to be commended for their rational approach to the problem, the decisions have turned out to be somewhat of a detriment in disguise. For, in many of those states where a restrictive approach was taken and hence the modern joinder of parties legislation mullified, the need for full-scale reform of the provisions for joinder of causes became clear. It was thus that New York[33] and other states scrapped the old code provision for joinder of causes in favor of a statute permitting free joinder of causes between any adverse parties to the action.

In California, however, the "affect all parties" requirement is still part of the statute and has an important effect on the scope of joinder. Assume, for example, that one person, X, has two causes of action against a defendant arising from two entirely separate contracts and that another person, Y, has a cause of action against the same defendant arising from one

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31. See, e.g., Ryder v. Jefferson Hotel Co., 121 S.C. 72, 113 S.E. 474 (1922). See generally Clark, Code Pleading 445-47 (2d ed. 1947).

32. The leading case was Peters v. Bigelow, 137 Cal. App. 135, 30 P.2d 450 (3d Dist. 1934), which subsequently was followed by the California Supreme Court in Kraft v. Smith, 24 Cal.2d 124, 148 P.2d 23 (1944).

33. See Tanbro Fabrics Corp. v. Beaunit Mills, Inc., 4 App. Div. 2d 519, 167 N.Y.S.2d 387 (1st Dep't 1957). The text of the current New York Provision is set out in note 15, supra.

of the two contracts. Both X and Y may join as plaintiffs in a single action against defendant if the only causes they allege arise from the one contract which involves both of them. But in such a case X cannot join his claim on the other contract; it does not affect Y, nor is it a claim giving rise to the joinder of X and Y as plaintiffs.[34] This puts X in a serious dilemma. If he wishes to join his two causes against defendant in a single action, which is possible since they are both within the contract category, Y cannot join in the action with him. If he teams with Y, X must either forgo his other cause or bring an entirely separate suit on it.

Such a situation makes little sense. Once a party is properly joined in an action, he should be permitted to bring any and all causes he has against all adverse parties. Such a new provision would not have a marked impact since, as already noted, in most situations the parties' potential causes of action all arise from a single transaction or occurrence or series of transactions or occurrences. But in those situations where additional unrelated causes do exist, joinder may result in considerable savings of time and money. Undue confusion and prejudice can always be handled by a severance of causes or issues for trial.

It is interesting to note that the federal courts recently faced a problem similar to that which now exists in California. Although Federal Rule 18(a) clearly provided for unlimited joinder of causes by one plaintiff against one defendant, at least one lower federal court[35] had held, by a

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34. See 1 Chadbourn, Grossman & Van Alstyne, California Pleading § 806 (1961).

35. Federal Housing Admr. v. Christianson, 26 F. Supp. 419 (D. Conn. 1939).

strained interpretation,[36] that, in a case involving multiple parties, a plaintiff was not entitled to join against a defendant a claim unrelated to that which had given rise to the joinder of parties. In 1966, in direct response, Rule 18(a) was amended to provide:

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

The notes of the Advisory Committee[37] clearly set forth the purposes of the amendment as follows:

> Rule 18(a) is now amended not only to overcome the Christianson decision and similar authority, but also to state clearly, as a comprehensive proposition, that a party asserting a claim (an original claim, counterclaim, cross-claim, or third-party claim) may join as many claims as he has against an opposing party. . . . This permitted joinder of claims is not affected by the fact there are multiple parties in the action. The joinder of parties is governed by other rules operating independently.
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> It is emphasized that amended Rule 18(a) deals only with pleading. As already indicated, a claim properly joined as a matter of pleading need not be proceeded with together with the other claims if fairness or convenience justifies separate treatment.

Insofar as California is concerned, it is useful to compare once again the existing situation regarding counterclaims and cross-complaints by defendants against plaintiffs to illustrate that the "affect all parties"

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36. See Wright, Federal Courts 344 (2d ed. 1970).

37. Advisory Committee's Notes on Rule 18(a), 39 F.R.D. 87 (1966). For a comprehensive analysis of the amendment, see Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II), 81 Harv. L. Rev. 591, 592-98 (1968).

limitation on joinder in section 427 is arbitrary, inconsistent, and unnecessary. If two plaintiffs join in one action, each requesting damages for personal injuries suffered in a collision with defendant, defendant may plead any counterclaims or cross-complaints he has against one plaintiff regardless of the fact that such claims in no way affect the other plaintiff;[38] indeed, the counterclaims may involve matters totally unrelated to the complaint.[39] Furthermore, defendant may file a cross-complaint solely against a person who has not previously been a party to the action[40] who in turn should and probably does have the right to counterclaim against cross-complainant regarding matters totally unrelated to the other parties or causes involved in the suit.[41] Apart from historical accident as to the way in which various joinder provisions were enacted, it is difficult to find any reason why a plaintiff should not have as broad a right to join causes as does defendant, particularly as there has been no visible agitation to curtail defendants' powers since the current counterclaim provision was first enacted in 1927.

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38. See California Code of Civil Procedure section 441, discussed at 49 infra, and California Code of Civil Procedure section 442 which provides that a cross-complaint may be filed against "any person whether or not a party to the action."

39. See Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474 (1930), quoted at 10-11 supra.

40. See Cal. Code Civ. Proc. § 442; Roylance v. Doelger, 57 Cal.2d 255, 19 Cal. Rptr. 7, 368 P.2d 535 (1962).

41. See page 54, infra. Two courts in recent cases have expressed divergent views on whether a defendant in a cross-action may assert a counterclaim. Compare Great Western Furniture Co. v. Porter Corp., 238 Cal. App.2d 502, 48 Cal. Rptr. 76 (1st Dist. 1965), with Carey v. Cusack, 245 Cal. App.2d 57, 54 Cal. Rptr. 244 (1st Dist. 1966). The views that such a counterclaim is improper was based on a literal reading of section 438 requiring a counterclaim to exist "in favor of a defendant and against a plaintiff." Such a view is unsound not only as a matter of statutory construction but also from a practical point of view. See 2 Chadbourn, Grossman & Van Alstyne, California Pleading § 1684 (Supp. 1968).

JOINDER OF CAUSE AND PROBLEMS OF VENUE

Section 427 provides that causes cannot be joined if they "require different places of trial." This clause could have resulted in severe restrictions on the right of plaintiffs to join causes of action. Fortunately, however, the clause has rarely been relied upon[42] and can and should be eliminated.

The "place of trial" clause appears to inject the varied problems of venue into the joinder statute, and there can be no question that the current California venue laws are a morass of provisions which nearly defy understanding.[43] Had defendants, from the time the code was enacted, consistently challenged the right to join causes on the ground that different places of venue were required, the situation might be quite different than it is today. Instead, however, when different causes were joined, each of which alone would have required a different place of trial, defendants made the initial challenge to the venue itself.[44] This gave the courts the opportunity to assume that joinder was proper and to interpret the venue statutes on that basis. The results of such interpretations have been dramatic since an entire set of venue rules have emerged regarding so-called mixed actions, where causes of action each requiring different places of venue have been

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42. See 1 Chadbourn, Grossman & Van Alstyne, California Pleading § 818 at 746 (1961).

43. See Van Alstyne, Venue of Mixed Actions in California, 44 Calif. L. Rev. 685-87 (1956).

44. This is probably due to the fact that a challenge to venue will be determined prior to a demurrer for improper joinder of causes. See 1 Chadbourn, Grossman & Van Alstyne, California Pleading § 818 at 748 (1961).

joined. Venue in these cases has been viewed as a matter determined by the entire action and not by the causes joined in it.[45]

The result of these court-made rules has appeared to nullify any effect that "the place of trial" clause of section 427 might have had. For now,

> when two causes are joined, which if sued upon separately would require separate places of trial, there is a prescribed venue for them as joined, and hence they do not require different places of trial. It is obvious that this latter conclusion is based on circular reasoning as follows: there is a single place of venue for two causes because they are joined; hence, they can be joined because they do not require different places of venue.

Yet, despite this, virtually no challenges to joinder of causes has been made under the "place of trial" clause and the courts themselves have carefully avoided the matter.

There is no justification for retaining on the statute books any requirement which appears useless on the one hand and, at the same time, has the potential for causing confusion and unnecessary cost in a future case. The courts now have had considerable experience in operating under venue rules as applied to joined causes, and there is no reason whatsoever why joinder should be prohibited because each cause, if sued upon alone, would require a different place of trial.

What must be guarded against is a possible situation in which joinder will destroy venue entirely. It is not significant if venue can be laid only in a county other than the one in which suit is brought, for when venue is challenged in such a case, transfer is not only available, but required.[46]

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45. See id. §§ 375-89; Van Alstyne, supra note 43, at 688.

46. Cal. Code Civ. Proc. § 396(b).

But if the complex venue provisions are interpreted to preclude venue of a given mixed action in any forum, provision should be made for a severance of the action and transfer of separate parts to courts where venue is permissible. At present, there do not appear to be any cases where no court would have proper venue. This situation depends, however, on case holdings alone, and many of the decisions are by the courts of appeals, not the California Supreme Court, which conceivably could come to opposite conclusions.[47]

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47. For example, it has been held by a court of appeal in Channell v. Superior Court, 226 Cal. App.2d 246, 38 Cal. Rptr. 13 (3d Dist. 1964), that the special statutory provision for venue regarding suits against counties, California Code of Civil Procedure Section 394, applies only if the action is against the county alone. It is not inconceivable that in the future the legislature, if not the California Supreme Court, may enforce a contrary position which could possibly lead to a situation, in a suit brought against individual defendants as well as a county, where no one court would be a proper place of trial for the entire action.

MANDATORY JOINDER OF CAUSES

Actions Involving One Plaintiff and One Defendant

Once it has been determined to permit unlimited or broad joinder of causes of action by a plaintiff, the question arises whether or not a further step should be taken to require joinder of causes in those cases where it would most likely save the time and cost of the court and the parties. The idea is not a new one; various commentators have from time to time advocated mandatory joinder,[48] but such a provision has rarely been adopted.[49] Just recently, a bill was introduced into the California State Senate which will, if passed, require plaintiffs to join or waive all factually related causes of action.[50]

There are obvious advantages in requiring one party to join all causes of action he has against another party in the case. There is always a good

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48. See, e.g., Blume, Required Joinder of Claims, 45 Mich. L. Rev. 797, 811-12 (1947); Clark, Code Pleading 145-46 (2d ed. 1947).

49. Michigan is the only state which appears to have such a provision. Rule 203.1 of the Michigan General Court Rules of 1963 reads as follows:

> A complaint shall state as a claim every claim either legal or equitable which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject of the action and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. Failure by motion or at the pretrial conference to object to improper joinder of claims or to a failure to join claims required to be joined constitutes a waiver of the required joinder rules, and the judgment shall not merge more than the claims actually litigated.

50. Senate Bill No. 847, April 1, 1970. The text of the bill is set out at 36 infra.

chance that joinder will avoid undue cost and duplication of effort; prejudice can be eliminated by a severance of causes for trial. And it is not at all clear why plaintiff should have an option to determine when the advantages of such joinder should accrue and when they should not. Such a choice provides a tactical weapon available, at least in the first instance, only to one party.

There are several reasons, however, why rules of mandatory joinder have been rejected. First, the traditional and most practical method of enforcing such a rule is by declaring that any cause of action which plaintiff improperly failed to join cannot later be asserted in a separate suit.[51] Application of such a provision will induce every plaintiff to join every possible cause

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51. This is the method used to enforce provisions requiring defendant to file cumpulsory counterclaims; see California Code of Civil Procedure Section 439. It is also the way in which a plaintiff is precluded from bringing a second action on a claim which is held under the rules of res judicata to have been within the scope of a cause of action litigated in a prior case. See 2 Witkin, California Procedure, Pleading, § 14 (1954).

Other methods of enforcement have been suggested. For example, a party could be permitted to sue on a cause not raised in a prior action only upon payment of all of his opponent's costs, including attorney's fees, of litigating the second suit. See Cleary, Res Judicata Reexamined, 57 Yale L.J. 339, 350 (1948). The trouble with this approach is that such compensation does not make up either for the loss of time of a party in preparing for and testifying in a second trial or the emotional stress that often accompanies a law suit. Furthermore, there is no remedy for the inconvenience to witnesses who must testify a second time and to the court. The approach taken under Michigan Rule 203.1, which is set out in note 49, supra, apparently puts the burden on defendant in the first action to require plaintiff to join his causes. If defendant does not object, then plaintiff may institute a second action. This places defendant in a serious dilemma. On the one hand, he would like to avoid a second suit; on the other hand, he does not want to suggest to plaintiff the availability of additional causes which might otherwise never be pursued. But even if this provision is thought to give sufficient protection to defendant, it certainly does not avoid the costs and inconvenience of the court and the witnesses.

he might have even though, if joinder was not mandatory, he might well allow all but the most serious to drop.[52] At least when plaintiff's causes are unrelated to one another, the potential advantages of mandatory joinder would appear to be outweighed by the disadvantage of encouraging additional litigation. Second, many modern counterclaim provisions, although not California's, permit a defendant to bring all causes of action which he has against plaintiff.[53] When such a provision is coupled with a provision for declaratory judgment, defendant can, by asking for declarations of non-liability, force plaintiff to litigate all his claims in a single suit.[54] This effectively equalizes the tactical opportunities available to the parties.

The situation changes, however, when the proposed mandatory joinder relates only to causes of action arising from a single set of transactions or occurrences. In such circumstances, there is a strong likelihood that the trial of one cause will involve the same witnesses if not identical issues as the other causes. The danger that mandatory joinder will encourage unnecessary litigation is markedly reduced for two reasons. First, the trial of one cause will often cover most of the related causes anyway. Second, when a plaintiff believes he has two causes, but the causes are closely related, plaintiff will hesitate to omit one of the causes for fear that the court will hold it not to be separate at all, but a part of the cause that was tried, and hence the rules of res judicata will be held to bar further

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52. James, Civil Procedure 555 (1965).

53. See, e.g., Fed. R. Civ. P. 13(b); N.Y.C.P.L.&R. § 3019(a).

54. See Rose v. Bourne, Inc., 176 F. Supp. 605 (S.D.N.Y. 1959), aff'd, 279 F.2d 79 (2d Cir. 1960).

suit upon it.[55] Indeed, the chief argument given against mandatory joinder is that the rules of res judicata make it unnecessary.[56] This argument is certainly true in the majority of states, which follow the so-called "operative facts" theory of a cause of action, where the scope of a single cause of action is held broad enough to cover all claims arising from a single set of transactions or occurrences. The general uncertainty that invariably exists in such jurisdictions as to the precise limits of a cause of action for res judicata purposes has sufficient in terrorem effect to force plaintiffs to bring all related claims at once, even if ultimately some of those claims might be considered separate causes.[57]

In California, as in a number of other states, however, the scope of a cause of action for res judicata purposes is defined in terms of "primary rights," as opposed to "operative facts."[58] Although the precise lines of a cause of action are not always clear under California law,[59] they are generally more precise and narrower than they are under the operative rights theory. Under the primary rights doctrine the definition of a cause of action depends upon the nature of the harm suffered. An individual has a right to be free from personal injury, a separate right to be free of injury to his

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55. See Clark, Code Pleading 476-78 (2d ed. 1947).

56. See James, Civil Procedure 555 (1965); Clark, Code Pleading 473-75 (2d ed. 1947).

57. See generally James, Civil Procedure §§ 11.10-.14 (1965).

58. Holmes v. David H. Bricker, Inc., 70 Cal.2d 786, 76 Cal. Rptr. 431, 452 P.2d 647 (1969); 1 Chadbourn, Grossman & Van Alstyne, California Pleading § 761 (1961); 2 Witkin, California Procedure, Pleading, § 11 (1954).

59. See Holmes v. David H. Bricker, Inc., 70 Cal.2d 786, 76 Cal. Rptr. 431, 452 P.2d 647 (1969).

realty, another to be free of injury to his personality, etc.[60] Therefore, a single act of a defendant may give rise to a number of different causes. For example, if defendant negligently drives his auto into plaintiff's vehicle, plaintiff has one cause for any personal injury he has suffered and another for damage to his car.[61] Similarly, if a defendant wrongfully withholds from a plaintiff possession of a home, plaintiff has one cause of action for ejectment from the realty and an entirely different cause for wrongful detention of the furnishings.[62] It makes little sense to permit a plaintiff to bring two separate actions for damages arising from a single tortious act of a defendant. The courts themselves should be protected from the ensuing duplication of trials. Of course, when precisely the same factual issues are involved in both cases, their resolution in the first case will be binding in the second under the doctrine of collateral estoppel. However, collateral estoppel applies only to those issues which are identical and has no effect when the issues in the second action differ, even though all of the witnesses are the same.[63]

Given a general policy favoring resolution of all related causes in a single action, coupled with the fact that California's narrow definition of a cause of action makes res judicata less effective than it is in most other jurisdictions as a force for compulsory joinder, it would seem appropriate

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60. See authorities cited at note 58, supra.

61. See Holmes v. David H. Bricker, Inc., 70 Cal.2d 786, 789, 76 Cal. Rptr. 431, 433-34, 452 P.2d 647, 649-50 (1969).

62. McNulty v. Copp, 125 Cal. App.2d 697, 708, 271 P.2d 90, 98 (1st Dist. 1954).

63. 3 Witkin, California Procedure, Judgment, § 62 (1954).

in revising section 427 to provide specifically for mandatory joinder of claims arising out of a single set of transactions or occurrences. Once again, it is important to consider California's practice relating to counterclaims. Under section 439 of the Code of Civil Procedure, first enacted in 1872, any counterclaim arising from the same transaction as that upon which plaintiff's claim is based is a compulsory counterclaim which must be asserted in the answer or forever waived.[64] It certainly is no more onerous to require a plaintiff to join causes than it is to require defendant to do so. The drawbacks, if any, are precisely the same in both cases. Enactment of section 439 would seem to be a clear policy decision favoring the advantages of mandatory joinder over any possible detriments.

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64. The current text of section 439 is quoted in full at 55, infra.

Mandatory Joinder of Causes in Multiparty Cases

So far discussion has centered on the situation where one plaintiff has several related claims against one defendant. Suppose, however, several plaintiffs each have related causes against one defendant, or one plaintiff has a number of related causes against several defendants, under circumstances in which the multiple parties may be joined under the current joinder of parties provisions. Since these provisions essentially require that the claims by or against them arise from a single set of transactions or occurrences and involve a common question of law or fact,[65] the reasons for a single trial are manifest.

California, in Code of Civil Procedure section 389, already does have a provision for compulsory joinder of parties who are termed "indispensable" or "conditionally necessary." An indispensable party is defined as one without whom the court cannot render an effective judgment. An indispensable party must be joined in the action; until and unless he is, the court has no jurisdiction to proceed with the case.[66] A "conditionally necessary" party is "a person who is not an indispensable party but whose joinder would enable the court to determine additional causes of action arising out of the transaction or occurrence involved in the action."[67] The court, on its own motion, must order him to be joined "if

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65. See page 16, note 30, supra.

66. Holder v. Home Sav. & Loan Ass'n, 267 Cal. App.2d 91, 107, 72 Cal. Rptr. 704, 715 (4th Dist. 1968).

67. Cal. Code Civ. Proc. § 389 (emphasis added).

he is subject to the jurisdiction of the court, if he can be brought in without undue delay, and his joinder will not cause undue complexity or delay in the proceedings."[68] However, a failure to join a conditionally necessary party is not treated as a jurisdictional defect.[69]

Under the wording of section 389 California would seem to require joinder of parties and causes on a broad scale. Indeed, the statute would appear to compel joinder of parties and claims in a situation where, if there was but one plaintiff and one defendant, the claims would not have to be joined.

The relevant text of section 389 was added in 1957 on the basis of a study of the California Law Revision Commission, which gave as the purpose of the alteration a mere declaration of the existing law[70] as developed in the leading case of Bank of California v. Superior Court.[71] The court there defined "necessary parties" as those not indispensable but who "might possibly be affected by the decision, or whose interests in the subject matter or transaction are such that it cannot be finally and completely settled without them; but nevertheless their interests are so separable that a decree may be rendered between the parties before

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68. Ibid.

69. See Bowles v. Superior Court, 44 Cal.2d 574, 283 P.2d 704 (1955).

70. Cal. L. Revision Comm'n, Recommendation and Study Relating to Bringing New Parties Into Civil Actions M-5 (1957).

71. 16 Cal.2d 516, 106 P.2d 879 (1940).

the court without affecting those others."[72] This language clearly implies that something more than factually related causes of action is needed before absent parties are to be deemed "conditionally necessary." Had the legislature intended a broad interpretation of the amendment to section 389, it would have repealed the sections of the code providing for permissive joinder of parties.[73] Those sections require that, for any additional parties to be joined, the causes of action by or against them must arise from the same transactions or occurrences as other causes before the court;[74] thus a broad reading of section 389 would mean that every person permitted to be joined would have to be joined. Obviously, such a result was not intended, and those courts which have dealt with the problem have refused to so hold.[75] Nevertheless, it is very difficult to formulate a precise test for determining who is a conditionally necessary party under the current state of the law. Indeed it has been argued that the decision should be made on a case by case basis without formulation of a rule.[76]

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72. Id. at 523, 106 P.2d at 884.

73. Cal. Code Civ. Proc. §§ 378, 379, 379(a), 379(b), 379(c).

74. See page 16, note 30, supra.

75. See, e.g., Duval v. Duval, 155 Cal. App.2d 627, 318 P.2d 16 (4th Dist. 1957).

76. Comment, Bringing New Parties Into Civil Actions in California, 46 Calif. L. Rev. 100, 102 (1958). For additional analysis and criticism of the 1957 amendment, see Comment, Joinder of Parties in Civil Actions in California, 33 So. Cal. L. Rev. 428 (1960).

Perhaps the clearest case for holding a party to be conditionally necessary is one in which the interests of absentees depend upon a resolution of identical issues, and only identical issues, as those between the parties before the court. In Bank of California, for example, plaintiff sought to enforce provisions of an alleged contract by which a decedent agreed to leave her entire estate to plaintiff. Plaintiff joined only the residuary legatee of decedent's will; the other legatees and devisees, some of whom apparently lived out of the state, were not joined. The court held that the legacy of defendant could be impressed with a constructive trust in favor of plaintiff, which would in no way affect the rights of others taking under the will. Thus those others were not indispensable; but the Court indicated that they were "necessary" and should have been brought in if it were convenient and possible to do so.[77]

In tort cases the traditional view has been to permit plaintiff his choice of defendants among joint tortfeasors and to permit persons injured in a single accident to choose whether or not to join together in pursuing their remedies.[78] In situations where defendant is only vicariously liable for the acts of another, the law is unclear as to whether the individual who is primarily liable is a conditionally necessary party.[79] He is so deemed by statute in a number of situations,[80]

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77. 16 Cal.2d at 526, 106 P.2d at 886 (dictum).

78. See 2 Witkin, California Procedure, Pleading, §§ 76, 95 (1954).

79. See 2 id. § 74.

80. See 2 id. § 85.

for example, where the owner of a motor vehicle is sued because of the wrongful acts of a driver to whom the vehicle was entrusted. In such case the driver must be joined if he is amenable to process.[81] The justification for compulsory joinder in indemnity cases is to protect the person who is vicariously liable from inconsistent verdicts in which he is held liable to the injured party and then denied recovery against the primary tortfeasor.

By now it should be clear that a straightforward policy decision is required regarding the compulsory joinder of claims involving multiple parties. If the purpose of joinder is to be limited to situations where actual prejudice, such as inconsistent verdicts, may occur if a person, whether or not indispensable, is not joined, then section 389 should be revised to eliminate the reference to joinder of causes and should be patterned after Federal Rule 19, which was amended in 1966 after careful study and which is limited to situations where absence of a party may result in such prejudice.[82]

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81. Cal. Vehicle Code § 17152. This section not only provides for joinder; it also requires plaintiff to seek execution against property of the driver before going against the property of the vehicle owner.

82. Federal Rule 19(a) reads as follows:

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

If the purpose of compulsory joinder is not only to avoid prejudice but also to promote the general convenience of the court and of the parties and to avoid a multiplicity of suits, then sections 427 and 389 must be altered to say so clearly; they must be harmonized with one another and with those provisions allowing permissive joinder of parties.

On balance the narrower view of Federal Rule 19 seems the most appropriate one for California to adopt. The advantages that may accrue from broad compulsory joinder are outweighed by problems of enforcement and the dangers of unnecessary litigation. In the case where a number of potential plaintiffs are all injured by a single tortious act of defendant, it would be extremely unfair to place a duty on the first person to file suit to locate and join, willingly or unwillingly, all possible co-plaintiffs. It is difficult to see how such a duty would be enforced. The most that could be done would be for the court to order plaintiff to join specified persons who might have claims related to his cause of action, but then there is the distinct danger that the new parties will have been dragged into the case even though they had never intended to bring suit.

The problems are somewhat less difficult when plaintiff has related causes against different defendants since a rule of mandatory joinder could be enforced by prohibiting him from later instituting an action against a defendant who should have been joined originally. This could prove extremely unfair, however, in a case where plaintiff was unaware of all possible defendants and did not learn of the existence and identity of some of them until the action was terminated. Even when plaintiff does know of all possible defendants, a mandatory joinder rule could have a

serious negative effect in inducing him to bring in parties who might otherwise never be sued. Presently, a plaintiff, who chooses not to sue all possible defendants, will select those persons who are most likely to be held liable and who can afford to pay a judgment. If he is successful, it is very unlikely he will bring a second action; and even if he loses, he must balance the costs of an additional trial against the reduced chances of ultimate success; in many cases this will result in a decision not to go forward. An added factor is that plaintiff must at least commit himself to a second action prior to the running of the statute of limitations. Especially in personal injury actions under California's one-year limitations period,[83] it will usually be known before trial of the first action whether or not a second action will be brought, and consolidation of the two cases may be available. On balance, then, a rule requiring joinder of related causes against different defendants would not appear sufficiently beneficial to overcome the problems it would tend to create.

The problems of drafting a mandatory joinder proposal are illustrated by the recent bill introduced into the California State Senate[84] which reads as follows:

> Section 1. Section 428 is added to the Code of Civil Procedure, to read:
>
> 428. Whenever several causes of action arise out of the same transaction or occurrence, if the plaintiff prosecutes an action to judgment upon a complaint which does not allege each such cause of action, or does not name as a defendant a person against whom any such cause of action could have been asserted, the plaintiff shall be deemed to have elected his remedies and cannot thereafter maintain an action against such person or upon such cause of action if the plaintiff knew or reasonably should have known of such person or cause of action prior to the entry of judgment.

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83. Cal. Code Civ. Proc. § 340(3).

84. Senate Bill 847, April 1, 1970.

As used in this section, "plaintiff" includes a defendant who asserts a cross-complaint.

Nothing in this section shall be construed as affecting the provisions of Section 378 relating to separate trials or expedient orders, or Section 1048 relating to the severance of actions.

By its designation as "Section 428" to appear after section 427 dealing with joinder of causes, the proposal seems to be primarily involved with related causes of action. In fact, it would go much further by requiring joinder of all defendants who are now allowed to be joined in an action since, as previously noted, it is presently a prerequisite to joinder of defendants that the causes of action against them must arise from the same transaction or occurrence.[85] At the very least the new proposal should also directly refer to the statutes dealing with joinder of defendants and should also reconcile section 389 regarding joinder of conditionally necessary parties.

The proposal attempts to handle the situation where defendant is unaware of an omitted cause of action or potential defendant by excluding situations where the person had no reason to know that the cause of action or potential defendant existed. Such a flexible standard raises serious practical questions. What will the standard be for determining when the lack of knowledge was reasonable? When will such a matter be determined, before or at the trial on the merits? And will the question be left to the trier of fact?

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85. See page 16, note 30, supra.

The problems the courts are likely to face in administering such a proposal,[86] coupled with the tendency to force plaintiffs to join defendants who otherwise would not be sued, raise grave questions as to its value as a device for aiding in the more effective administration of justice, regarding either the parties or the courts.

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86. There are several other problems with the language of the proposed bill. For example, it refers to causes arising out of "the same transaction or occurrence," which varies from the precise language used in section 439 regarding compulsory counterclaims. Surely the terms of the two sections should be reconciled to present a consistent policy as to mandatory joinder. Furthermore, the bill should also provide that all claims of defendant against plaintiff should be compulsory if they arise out of the same transaction as plaintiff's complaint. At present such claims which qualify as cross-complaints but not as counterclaims are not compulsory. See pages 54-56, infra. This gap becomes even more pronounced since the proposed bill does state that, once a defendant files a cross-complaint, he is subject to the mandatory joinder proposals.

Finally, the proposal refers to the election-of-remedies doctrine which is inapplicable to the compulsory joinder situation and can only confuse matters. See Clark, Code Pleading § 77 (2d ed. 1947).

PART II: COUNTERCLAIMS AND CROSS-COMPLAINTS

SCOPE

The current California law regarding counterclaims and cross-complaints is wholly unsatisfactory. Questions of revision involve the following considerations:

1. To what extent should a defendant be permitted or required to plead causes of action against a plaintiff?

2. To what extent should a defendant be permitted or required to plead causes of action against a person other than a plaintiff?

3. To what extent should a defendant who pleads a cause of action against a plaintiff be permitted to plead those causes against other persons in the same action?

4. How should a claim by defendant be treated for procedural purposes?

5. What rights and obligations should a party against whom a defendant has pleaded a cause of action have to respond to defendant's pleading and to join causes of action on his own behalf against defendant and others?

6. Should California's provision for automatic set-off of claims be retained?

The inquiry will be divided into two parts, one dealing with actions brought by defendant against plaintiff, and the other involving actions brought by defendant against persons other than plaintiff.

CLAIMS AGAINST PLAINTIFF

Background

In almost every jurisdiction a cause of action filed by defendant against a plaintiff, alone or with other persons, is denominated a "counterclaim" and is dealt with under a single set of rules.[87] Under the Federal Rules of Civil Procedure and other modern provisions, any cause of action which defendant has against plaintiff may be brought as a counterclaim, regardless of its nature.[88] If defendant's cause arises from the same transaction or occurrence as plaintiff's cause, then most such jurisdictions make it a compulsory counterclaim;[89] defendant must raise it in his answer or give it up, for he will not be allowed to raise it later in an independent action.

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87. See, e.g., Federal Rule of Civil Procedure 13.

88. Federal Rule of Civil Procedure 13(b) provides:

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

This follows Federal Rule of Civil Procedure 13(a), quoted in note 89, infra, which not only permits but requires defendant to assert counterclaims arising out of the same transaction or occurrence as plaintiff's claim.

89. Federal Rule of Civil Procedure 13(a) provides:

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

In California, however, the provisions are far more complex. A claim by defendant against plaintiff may qualify either as a counterclaim under section 438 of the Code of Civil Procedure or as a cross-complaint under section 442, or it may qualify as neither or as both. Since the procedural aspects of counterclaims are quite different from those of cross-complaints, it is important, although sometimes not easy, to determine into which category, if any, defendant's cause of action will be placed.

Roughly speaking, a counterclaim is any cause of action by defendant requesting some money damages in a case where plaintiff has also requested some monetary relief.[90] There need be no factual relationship whatever between the two causes.[91] A cross-complaint, on the other hand, is any claim by defendant arising from the same transaction as plaintiff's cause, regardless of the nature of the relief sought.[92] A counterclaim which arises from the same transaction as plaintiff's complaint will thus also qualify as a cross-complaint. A claim by defendant which neither seeks monetary relief nor arises from the same transaction as plaintiff's cause will not qualify either as a counterclaim or a cross-complaint and therefore can only be asserted in an independent lawsuit although there seems little reason to distinguish such a case from one where both plaintiff and defendant seek monetary relief on unrelated claims. To

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90. See 2 Chadbourn, Grossman & Van Alstyne, California Pleading § 1686 (1961); 2 Witkin, California Procedure, Pleading, § 580 (1954).

91. See Terry Trading Corp. v. Barsky, 210 Cal. 428, 435-36, 292 P. 474, 477 (1930), which is quoted and discussed at 10-11, supra.

92. See Cal. Code Civ. Proc. § 442, quoted in text at 52, infra.

further complicate the situation, California law provides that defendant's cause of action is a compulsory counterclaim if it meets the counterclaim requirements and arises from the same foundation as plaintiff's cause;[93] but there is no provision for compulsory cross-complaints.

Overall, the California situation is manifestly in need of reform, preferably along the lines of the federal rules which have been adopted in many jurisdictions.

The Current Provision for Counterclaims

Section 438 provides as follows:

> The counterclaim . . . must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action; provided, that the right to maintain a counterclaim shall not be affected by the fact that either plaintiff's or defendant's claim is secured by mortgage or otherwise, nor by the fact that the action is brought, or the counterclaim maintained, for the foreclosure of such security; and provided further, that the court may, in its discretion, order the counterclaim to be tried separately from the claim of the plaintiff.

It should be noted that there are but two prerequisites to a counterclaim; it must tend to "diminish or defeat" plaintiff's claim and it must permit a several judgment between the parties to it. Not only is there no requirement that the counterclaim have any subject matter connection with any cause of action brought by plaintiff, but the plaintiff's cause and the defendant's counterclaim need not even both fall within one of the categories specified by section 427 for joinder of causes by plaintiff.

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93. See Cal. Code Civ. Proc. § 439, quoted in text at 55, infra.

1. The diminish or defeat requirement. The "diminish or defeat" requirement is the most serious practical limitation on the right of defendant to institute a counterclaim. As interpreted by the California courts, the requirement is satisfied when both plaintiff and defendant pray for monetary relief, either alone or with other relief.[94] Thus if plaintiff seeks an injunction plus damages of ten dollars against defendant who has been running over his flowers, defendant may by counterclaim seek cancellation of a contract to deliver milk plus five dollars in damages for breakage of bottles. But if plaintiff omits his prayer for damages, no counterclaim would be available.

Even when both parties do claim some monetary relief, however, the California courts are not clear whether the "diminish or defeat" requirement is satisfied in a case where recovery by defendant on his proposed counterclaim would necessarily prevent recovery by plaintiff on his cause of action. Consider, for example, an automobile accident case in which plaintiff has sued for damages alleging defendant's negligence and where defendant wishes to countersue for his own injuries on the basis that plaintiff's negligence was the sole cause of the accident. Obviously both parties cannot recover on their respective claims. In a number of such cases courts have assumed, without discussion, that the "diminish or

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94. See 2 Witkin, California Procedure, Pleading, § 5480 (1954), and cases cited therein. There is one situation when the defeat or diminish requirement may be satisfied although both parties do not seek monetary relief. This occurs when one party sues to quiet title to property against which the opposing side seeks to establish a lien. See Hill v. Snidow, 100 Cal. App.2d 31, 222 P.2d 958 (2d Dist. 1950).

defeat" requirement has been met.[95] On the other hand, in a recent contract case, Olsen v. County of Sacramento,[96] just the opposite result was reached. Plaintiff brought suit for damages incurred when defendant county cancelled plaintiff's exclusive franchise to collect garbage. The county not only defended on the ground that the plaintiff had obtained the franchise through fraud, but sought also to recover payments made to plaintiff under the franchise prior to the time of cancellation. The appellate court held, without citing authority, that defendant's claim did not tend to "diminish or defeat" plaintiff's claim because recovery by one party would necessarily preclude recovery by the other.

The history of section 438 lends some, although not conclusive, support to the Olsen decision. At common law counterclaims as such did not exist. Defendant could in certain instances put forth his claims in the form of defenses to plaintiff's right to recover.[97] This was permitted either when defendant had a cause of action arising from the same transaction involved in plaintiff's complaint or when defendant had a liquidated contract claim against plaintiff whose own cause was also based on a liquidated contract claim. In both of these situations defendant could

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95. E.g., Schrader v. Neville, 34 Cal.2d 112, 207 P.2d 1057 (1949); Datta v. Staab, 173 Cal. App.2d 613, 343 P.2d 977 (1st Dist. 1959); Manning v. Wymer, 273 Adv. Cal. App. 556, 561-62, 78 Cal. Rptr. 600, 603-04 (1st Dist. 1969)(dictum).

96. 274 Adv. Cal. App. 347, 354-55, 79 Cal. Rptr. 140, 144 (3d Dist. 1969).

97. See N.Y. Judicial Council, Second Report 124-126 (1930); Howell, Counterclaims and Cross-Complaints in California, 10 So. Cal. L. Rev. 415-18 (1937).

not obtain affirmative relief; he could only offset any recovery by plaintiff.[98] Obviously then, when recovery by one party would necessarily preclude recovery by the other, the common law procedures were inoperative. In 1851 California enacted a fairly typical code provision,[99] closely related to the common law approach, which permitted as counterclaims the following:

> 1st. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;
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> 2d. In an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action.

One important difference from the common law was enactment of a separate provision permitting defendant to obtain an affirmative recovery.[100]

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98. See Boyd, The Development of Set-Off, 64 U. Pa. L. Rev. 541, 552-53 (1916).

99. Cal. Stats. 1851, c. 5, §§ 46-47.

100. Current section 666 of the Code of Civil Procedure, first enacted in 1872, reads as follows:

> If a counterclaim, established at the trial, exceed the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief judgment must be given accordingly.
>
> When the amount found due to either party exceeds the sum for which the court is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue.

This raises the question whether the new counterclaim law was intended to sweep away the common law concept that defendants' claims were defenses, thus eliminating as a prerequisite the possibility of mutual victory, or whether the intent was simply to allow defendant to recover the excess of his claim over that of plaintiff in a situation where both parties could prevail on their respective causes.

In 1927, the legislature amended the counterclaim provision to its present form, but it retained the uncertainty under the prior law by including the ambiguous "diminish or defeat" language. "Defeat" could simply be the ultimate of "diminish," illustrating the viability of the common law defense approach. On the other hand, "defeat" could be read quite differently to include any situation where recovery by defendant would be exclusive of victory by plaintiff on his cause of action.

The need to clarify the meaning of the "diminish or defeat" requirement exists if for no other reason than to prevent confusion and unfairness in the operation of the compulsory counterclaim statute. If defendant's cause of action is such that a verdict for him would necessarily preclude victory by plaintiff on his cause, then the two causes invariably will arise out of the same transaction. Hence, if defendant's claim qualifies as a counterclaim, it will be compulsory; failure to raise it will bar him from ever suing on it again. Defendant should not be left in doubt regarding a matter of this importance.

2. Prohibition against new parties--the several judgment requirement. Under the express terms of section 438 a counterclaim can be brought against a plaintiff only; a third person cannot be joined. Obviously,

this is another manifestation of the historical view that a counterclaim is merely a defense. Unfortunately, this rule presents a serious dilemma to a defendant who, if he were to pursue his cause in an independent action, would not only sue plaintiff but another person as well. The benefits of such an independent action must be balanced against what may be substantial advantages of a counterclaim against plaintiff alone, particularly if defendant expects that plaintiff will prevail on his complaint. If defendant forgoes the counterclaim in favor of an independent action and plaintiff's case is decided first, defendant may have to liquidate his assets at a loss in order to pay a judgment against him; in any event he will be deprived of the use of any funds so paid. By the time defendant wins his independent suit against plaintiff, plaintiff may have dissipated all of his funds, including those received from defendant, or he may have converted them into assets exempt from execution. Had defendant elected to bring his cause as a counterclaim, the amounts awarded him would have been deducted from plaintiff's damages and much, if not all, of the financial hardship would have been avoided.

In the face of the provisions permitting a plaintiff to join as defendants all persons against whom he has a cause of action arising from a single transaction, there seems little justification for prohibiting defendant from similar joinder in like circumstances. Any argument that the prohibition is necessary in order to avoid complicating the case is weak in light of the fact that the statute governing cross-complaints not only permits a defendant in pursuing a cause against an existing party to

join a stranger, but also permits such an action against the stranger alone.[101]

The several judgment requirement[102] is closely related to the rule prohibiting defendant from joining third persons and stems directly from the theory that a counterclaim is a defense. For example, if plaintiff sues two defendants on a contract on which they are jointly liable and if but one defendant seeks to counterclaim against plaintiff, he cannot do so because his claim would not be a defense to the joint liability. If the two defendants had a joint claim against plaintiff, then it could be brought as a counterclaim because it would be a direct counter to plaintiff's right to recover. The rule is not operative where defendants are jointly and severally liable, since a several judgment is rendered against each defendant in such case and each can bring counterclaims individually against plaintiff.

The several judgment rule makes very little sense indeed. There is no sound reason in a case to which it applies why defendant should be required to seek redress in a separate action instead of being permitted to counterclaim; if dire confusion at trial seems likely, the court can order separate trials. Indeed, if such rejected counterclaim meets the cross-complaint requirements, it can be brought in the same suit without question.

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101. E.g., Linday v. American President Lines, Ltd., 214 Cal. App.2d 146, 29 Cal. Rptr. 465 (1st Dist. 1963). See Friedenthal, The Expansion of Joinder in Cross-Complaints by the Erroneous Interpretation of Section 442 of the California Code of Civil Procedure, 51 Calif. L. Rev. 494 (1963).

102. See generally 2 Witkin, California Procedure, Pleading, §§ 582-83 (1954), and cases cited therein.

3. The right of defendant to join all counterclaims against plaintiff. Section 427, as previously noted,[103] prohibits a plaintiff from joining causes of action which do not fall within its enumerated categories. Section 438 on its face has no similar limitation as to counterclaims, and section 441 specifically permits a defendant "to set forth by answer as many defenses and counterclaims as he may have." This is consistent with section 440 which provides for the automatic set-off of potential claims and counterclaims between any two parties.[104]

The only question concerning such unlimited joinder, other than the inconsistency between it and section 427, is contained in section 444 providing that plaintiff may demur to defendant's answer on the ground that "several causes of counterclaim have been improperly joined." This provision is parallel to that allowing a defendant to demur to the improper joinder of causes of action by plaintiff.[105] But whereas plaintiff may improperly join his causes, there seems to be no time when defendant can be guilty of improper joinder of counterclaims.

Whatever the original reason for the reference to improper joinder in section 444, such reference should be eliminated to avoid confusion.

4. Rights and duties of plaintiff against whom a counterclaim has been filed. Since a counterclaim is treated basically as a defense, it is dealt with in the same manner as a denial or an affirmative defense. Plaintiff, who is not permitted to file a reply to an answer, thus never need

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103. See pp. 2-8, supra.

104. See the discussion of section 440 at 56-60, infra.

105. Cal. Code Civ. Proc. § 430(5).

answer the allegations of a counterclaim; they are deemed controverted.[106] As shall be seen, however, a cross-complaint is treated as a separate action. If plaintiff fails to reply to a cross-complaint, a default judgment will be entered against him.[107]

When plaintiff is uncertain whether a claim against him is a counterclaim or a cross-complaint, he may be in a quandary as to how to proceed. When defendant's claim qualifies as both a counterclaim and a cross-complaint, the courts have held that for pleading purposes they will regard the claim as one or the other as best suits the interests of justice.[108] Therefore in most cases the claim is held to be a counterclaim so that plaintiff's failure to answer does not result in a default judgment.[109] In one decision, however, in which a default was taken, judgment entered, and execution ordered before plaintiff raised any objections, the supreme court treated the claim as a cross-complaint since, under the circumstances, it would have been manifestly unfair to defendant to have allowed the decision to be set aside.[110] Although the results of this case, as well as others on point, seem proper, the costs of a case by case

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106. E.g., Luse v. Peters, 219 Cal. 625, 630, 28 P.2d 357, 359 (1933).

107. E.g., Wettstein v. Cameto, 61 Cal.2d 838, 40 Cal. Rptr. 705, 395 P.2d 665 (1964).

108. See, e.g., Schrader v. Neville, 34 Cal.2d 112, 114, 207 P.2d 1057, 1058 (1949).

109. See, e.g., Taliaferro v. Taliaferro, 154 Cal. App.2d 495, 499, 316 P.2d 393, 395 (1st Dist. 1957); see also Wettstein v. Cameto, 61 Cal.2d 838, 40 Cal. Rptr. 705, 395 P.2d 665 (1964).

110. Wettstein v. Cameto, supra note 107.

determination by the appellate courts seems a high price to pay for a matter of this nature. Surely enactment of uniform pleading rules for both counterclaims and cross-complaints would be preferable.

There is little reason why plaintiff should not be required to reply to a counterclaim. A counterclaim in its effect is just like an independent action; indeed it may encompass an entirely different transaction than that involved in plaintiff's cause. A reply to a counterclaim would at least be useful in notifying defendant and the court which of defendant's allegations will be controverted and what affirmative defenses plaintiff will rely upon at the trial of the counterclaim. Although the new California discovery rules are available to obtain this information, there is no reason why defendant should not be informed of such basic matters in the pleadings. No one has yet suggested that defendants generally be relieved from answering complaints filed by plaintiffs; yet that is the result with respect to counterclaims.

Since plaintiff cannot answer a counterclaim, it seems clear that he can file neither a counterclaim nor a cross-complaint to it. This is unjustified since, if defendant's counterclaim has no subject matter connection with plaintiff's suit but plaintiff has a separate cause which arises from the same transaction as the counterclaim, plaintiff should at least be permitted to join that separate cause to avoid duplication of witnesses. If defendant had brought an independent action on his claim, plaintiff would not only have been allowed to assert a factually connected counterclaim, he would have had to do so under the compulsory counterclaim statute. There seems little reason not to treat plaintiff against whom

a counterclaim has been filed as if he were a defendant in an independent action, with all the rights and obligations appurtenant thereto.

The rule prohibiting plaintiff from counterclaiming against a counterclaim is somewhat alleviated by the fact that under section 440 he may assert, as a set-off to the counterclaim against him, any cause he has that would qualify as a counterclaim to defendant's cause had it been brought as an independent action. However, set-off can only be used defensively and under it plaintiff could not obtain affirmative relief if his right to recover exceeds that of defendant.[111]

Cross-Complaints Against Plaintiff

Section 442 provides for cross-complaints as follows:

> Whenever the defendant seeks affirmative relief against any person, whether or not a party to the original action, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto, or file a notice of motion to strike the whole or any part thereof, as to the original complaint. If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action.

The only requirement of a cross-complaint is that it have a subject matter connection with the plaintiff's complaint. Unlike a counterclaim, it is not imbued with a long history as a defense. Hence, a cross-complaint need not diminish nor defeat plaintiff's action; it can be brought despite

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111. See the discussion of section 440 at 56-60, infra.

the fact that a several judgment is not possible between plaintiff and defendant, and plaintiff must answer the cross-complaint as if it were an independent suit. Unlike a counterclaim, a cross-complaint is never compulsory.

Prior to 1957 a cross-complaint could only be filed against a party to the action.[112] Defendant could thus cross-complain against plaintiff and a co-defendant, but he could not join an outsider unless the outsider was indispensable or necessary under the provisions of section 389.[113] In 1957 section 442 was amended to provide that a cross-complaint could be brought "against any person, whether or not a party." The express reason for this alteration was to permit defendant to join with an existing party all those persons whom he would have joined had he brought his cross-complaint as an independent action.[114] It was recognized unfair to require defendant to choose between a cross-complaint against only an existing party and a separate suit against all those persons whom he wishes to join. It is surprising that this amendment has not been followed by an amendment to the counterclaim statute under which, as we have seen, defendant must still choose between a countersuit against plaintiff alone and a separate action against all persons he wishes to join.

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112. E.g., Alpers v. Bliss, 145 Cal. 565, 570, 70 P. 171, 173 (1904); Argonaut Ins. Exchange v. San Diego Gas & Elec. Co., 139 Cal. App.2d 157, 293 P.2d 118 (4th Dist. 1956).

113. The latter situation was treated as an exception to the general rule. See Tonini v. Ericcsen, 218 Cal. 43, 47, 21 P.2d 566, 568 (1933); Alpers v. Bliss, 145 Cal. 565, 570-71, 79 P. 171, 173-74 (1904)(dictum).

114. See Cal. L. Revision Comm'n, Recommendation and Study Relating to Bringing New Parties Into Civil Actions, at M-9, M-10 (1957).

The terms of section 442 permit the person against whom a cross-complaint is filed, whether or not a plaintiff, to "demur or answer thereto . . . as to the original complaint." This would appear to allow such person to file his own counterclaims and cross-complaints to the cross-complaint against him. Indeed, it would seem that he would be subject to the compulsory counterclaim rule. There are, however, no appellate court holdings directly in point, and discussions in two recent cases have reached opposing conclusions.[115] In the one case in which it was stated that a defendant in a cross-action could not file a counterclaim, the court emphasized the language in section 438 that a counterclaim is by "a plaintiff against a defendant" and gave that phrase a literal reading;[116] presumably the court would have reached the same result in interpreting section 442 which uses similar language. Not only does this position fly in the face of the wording of section 442, but it makes no practical sense since the responding party should at least have the right to set up a cause of action based on the same transaction as the cross-complaint. It should be noted that, had defendant elected to file his cross-complaint as an independent action, the full scope of the counterclaim and cross-complaint laws would apply.

Compulsory Counteractions

Section 439 of the Code of Civil Procedure, first enacted in 1872, reads as follows:

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115. Compare Great Western Furniture Co. v. Porter Corp., 238 Cal. App.2d 502, 48 Cal. Rptr. 76 (1st Dist. 1965)(counterclaim stated to be proper), with Carey v. Cusack, 245 Cal. App.2d 57, 54 Cal. Rptr. 244 (1st Dist. 1966)(court indicates counterclaim not proper).

116. Ibid.

> If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor.

The purpose of the statute is clear and unmistakable, yet it is inconsistent both with the practice as to joinder of claims by plaintiff and with the cross-complaint provisions, neither of which provides for compulsory joinder of causes of action.

The situation as to joinder by a plaintiff is somewhat different since the rules of res judicata will at least force plaintiff to join all claims for relief within the scope of a single cause of action.[117] But the failure to provide for compulsory cross-complaints by defendants against plaintiffs is incomprehensible.

One reason why the problem is not acute is undoubtedly due to the fact that the courts apply the compulsory counterclaim provision to all those cross-complaints which also qualify as compulsory counterclaims,[118] as most cross-complaints against plaintiffs do. Thus, whenever a cross-complaint against a plaintiff, which must by definition be factually related to plaintiff's complaint, also satisfies the "diminish or defeat" and "several judgment" requirements of the counterclaim statute, it is likely to be a compulsory counterclaim and defendant will assert it rather than risk being barred from suit on it in the future.

Nevertheless, the current statutory scheme ought to be revised to require defendant to assert all claims, whether cross-complaints or

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117. See pp. 26-29, supra.

118. See Schrader v. Neville, 34 Cal.2d 112, 115, 207 P.2d 1057, 1058 (1949)(dictum); Counterclaims, Cross-Complaints, and Confusion, 3 Stan. L. Rev. 99, 106 (1950).

counterclaims, which he has against plaintiff if they arise from the same transaction or occurrence as plaintiff's cause of action. The policy of compulsion applies whether or not defendant's claim happens to meet the "diminish or defeat" or "several judgment" requirements of section 438.

Even if the current distinction between cross-complaints and counterclaims is retained, the wording of section 439 should be revised clearly to reflect the true scope of its operation. As it now stands, the transactional language of section 439 appears much narrower than that of section 442. Yet the courts have given a broad interpretation to section 439 in holding that defendants' subsequent independent actions are barred by their failure to assert them as counterclaims in an original suit brought by plaintiffs.[119] It would seem sensible to harmonize the transactional language of sections 439 and 442 to prevent an unwanted forfeiture of a potential counterclaim by an unsuspecting litigant who, because of the current language difference, incorrectly believes the claim falls within the broad language of section 442, but not within section 439.

Special Rules of Set-Off

Any reform of current counterclaim provisions must include consideration of special statutes regarding the automatic set-off of claims between two parties. Foremost of these is Code of Civil Procedure section 440 which reads as follows:

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119. See, e.g., Sylvester v. Soulsburg, 252 Cal. App.2d 185, 60 Cal. Rptr. 218 (5th Dist. 1967); Saunders v. New Capital for Small Business, Inc., 231 Cal. App.2d 324, 41 Cal. Rptr. 703 (1st Dist. 1964).

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

This section, which has a fascinating history dating back to the Roman law, has been thoroughly explored in a recent scholarly comment.[120] For present purposes it need only be noted that the major thrust of the section has to do with the operation of the statute of limitations and is a means of avoiding unfairness through tactical manipulations by one of two parties each of whom has a claim for money against the other. Obviously, if the parties agree to a cancellation of mutual debts, there is no need for section 440. Difficulty arises only when the party, on whose claim the statute of limitations runs last, waits until the other party's claim is barred before filing suit. In such case section 440 permits the defendant to allege his otherwise untimely counteraction but only to the extent that it cancels any recovery by plaintiff; defendant cannot obtain affirmative relief on his claim.

The value of section 440 lies in the fact that it avoids unnecessary litigation. A party who wishes to utilize his cause of action merely to cancel his own debt ought not to be forced to bring suit on his claim merely because the statute of limitations will otherwise run on it. As currently written and applied, however, section 440 has one unfortunate consequence in that it does not require an individual who relies upon it to give notice to that effect. Thus an individual may refuse to pay a

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120. Comment, 53 Calif. L. Rev. 224 (1965).

debt on the theory that it has been cancelled by a totally unrelated obligation to him without ever communicating to his creditor his reason for not paying.[121] The creditor may first learn of the reliance on a compensating claim only after filing suit. This defeats, at least in part, the policy of section 440 in avoiding unnecessary litigation. It would seem useful in a redraft of the section to include a requirement that one who wishes to rely upon it must give timely notice to that effect, at least before the limitations period runs on his own claim.

Section 440 involves another important feature in that it permits a person to allege a set-off even though suit is brought against him by an assignee of the cause against him. In this sense section 440 overlaps with section 368 which reads as follows:

> Assignment of thing in action not to prejudice defense. In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before maturity.

These provisions are important to prevent manifest injustice by the tactical maneuverings of individuals who have mutual claims against one another. For example, in such a case one individual, who has no other assets subject to execution, could assign his claim against the other party to a friend or relative. Without sections 368 and 440 the assignee could sue and collect the full amount on the assigned claim from the opposing party who would be left with a worthless cause against the assignor. Therefore, in any general revision of counterclaim and cross-complaint provisions care must be taken not to eliminate the important

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121. See Comment, 46 Calif. L. Rev. 224, 270 (1965).

features now contained in sections 368 and 440.

At the same time, however, the language of section 440 should be changed to eliminate apparent conflicts with the counterclaim provisions of sections 438 and 439. Such a conflict now occurs in situations in which a plaintiff successfully sues on a cause of action to which defendant elected not to assert a non-compulsory counterclaim. If defendant asserts his cause in an independent suit, plaintiff in the first action may argue that, since section 440 automatically deemed his claim extinguished to the extent of the counterclaim, any recovery he received in the first action must be presumed to have been an amount over and above any value of such counterclaim and that the principles of res judicata should bar defendant in the first suit from relying on the fact that he never raised such a defense in his pleadings. This argument, if accepted, would of course fly in the face of section 439 which strictly limits the scope of compulsory counterclaims.

Section 440 also appears to contradict section 427 in allowing a plaintiff to join in one action, in which defendant files a counterclaim, causes which could otherwise not be joined. For example, if plaintiff sues on one cause and defendant counterclaims, plaintiff, under section 440, may allege as defenses to the counterclaim his other causes of action against defendant even though under section 427 they could not have been joined either with the original cause or with each other.

Obviously, by utilizing section 440 in this manner, plaintiff is also permitted to overcome the rule that he cannot file a counterclaim to a counterclaim; but at the same time his recovery is restricted to a set-off

and he cannot obtain affirmative relief. To the extent that neither the statute of limitations nor assignment of causes are involved, so that the basic purposes of section 440 are not at issue, permitting plaintiff a set-off rather than full relief is absurd. Surely if the issues are to be tried in a single action, plaintiff should obtain all the relief to which he is entitled. He should not be required to face an independent suit simply because he wants an affirmative recovery.

The Need For A New Approach To Counteractions By Defendant Against Plaintiff

It is clear from the foregoing discussions that most of the problems involving counteractions by defendant against plaintiff can be attributed to the fact that such actions are governed by two different sets of provisions, one for counterclaims and the other for cross-complaints. It should be equally clear that no justification whatsoever exists for such dual treatment. The California legislature should repeal the absurd conglomeration of existing statutes and substitute a simple unified procedure for all such claims.

Such a revision should also broaden the scope of counteractions to permit a defendant to assert any claim he has against plaintiff, regardless of its nature. Only a few claims--those which neither arise from the same transaction or occurrence as plaintiff's claim nor meet the current counterclaim requirements--will be affected. Obviously, there is little reason for excluding these claims; they certainly can cause no more confusion than those counterclaims, now permitted under current law,

which are totally unrelated to plaintiff's cause of action. Severance of the causes for trial is always available.

In one way the current countersuit statutes are inconsistent and more restrictive than the current joinder of causes provisions in section 427. If, for example, plaintiff has two unrelated causes of action, each based on a contract, he may join them even though he seeks monetary relief on one and injunctive relief on the other.[122] But, in response to such a complaint, defendant is not allowed to assert a counteraction based on yet a third contract on which he seeks a non-monetary remedy. On the other hand, if plaintiff wishes to have this third cause joined with the other two, he can do so merely by asking for a declaratory judgment of non-liability on it.[123] This only further illustrates that the restrictions on countersuits are meaningless and supports the notion that defendant, as well as plaintiff, should be afforded the right to allege in a single action all claims he has against his adversary.

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122. See pp. 8-9 supra.

123. California Code of Civil Procedure section 1060 provides:

> 1060. Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action in the superior court or file a cross-complaint in a pending action in the superior or municipal court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.

CLAIMS AGAINST PERSONS OTHER THAN PLAINTIFFS

Background

In almost every jurisdiction a cause of action filed by one party against a co-party, whether a co-plaintiff or co-defendant, either alone or with other persons brought into the case for the first time, is denominated a "cross-claim."[124] Under the federal rules and other modern procedural provisions, a cross-claim is proper if the cross-complainant alleges a cause of action arising from the same transaction or occurrence or affecting the same property as a plaintiff's original claim or a defendant's counter-claim. A cross-claim cannot be brought alone against persons who have not already been made parties to the action. The only claim that can be made in such case is one in impleader whereby a party to the action alleges that, if

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124. Federal Rule of Civil Procedure 13(g) reads as follows:

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

he is held liable on a claim pending against him, he will have a claim over against a stranger to the action for all or part of such liability.[125]

In California, the cross-complaint provision, section 442, which has already been discussed as a device for countersuits against plaintiffs, is the sole basis for bringing causes against a co-party or a stranger to the

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125. See Federal Rule of Civil Procedure 14, which reads as follows:

> (a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.
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> (b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

action, including impleader claims. Originally, the scope of section 442 was narrowly limited to actions against persons who were already parties to the suit,[126] and a cross-complaint could not join an outsider even though the cross-complainant, had he brought an independent action, would have been permitted to join a co-party and a stranger as defendants. In 1957, pursuant to a study by the California Law Revision Commission, section 442 was amended solely for the purpose of permitting the joinder of such outsiders as co-defendants to a cross-complaint.[127] However, the wording of the amendment, allowing a cross-complaint "against any person, whether or not a party to the original action," was unnecessarily broad. The state supreme court, ignoring completely the legislative history of the amendment as contained in the Law Revision Commission report, gave the new language a literal construction, thereby increasing the scope of cross-complaints well beyond that intended, and even beyond that permitted in other jurisdictions with the most liberal joinder rules.[128]

Because of the bizarre manner in which the scope of section 442 was expanded, it is not surprising that many important procedural matters regarding the rights and obligations of the parties to a cross-action were not spelled out. As a result, there are a number of situations which give rise to confusion and potential injustice and which necessitate further revision.

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126. See pp. 52-54, supra.

127. See ibid.

128. Friedenthal, The Expansion of Joinder in Cross-Complaints by the Erroneous Interpretation of Section 442 of the California Code of Civil Procedure, 51 Calif. L. Rev. 494 (1963).

The Scope of Cross-Complaints Against Non-Plaintiffs

In cases decided prior to 1957, it was held that a claim by defendant--alleging that, if he was held liable on the original complaint, he would be entitled to indemnity from a third person--met the transactional requirements of section 442.[129] As already noted, however, at that time such a cross-complaint could only be pursued against a person who was already a party to the action. After the 1957 amendment, it was held that such a cross-complaint could be brought against an outsider, thus establishing an impleader procedure as broad as that permitted in most modern jurisdictions.[130] It is clear, however, that the 1957 amendment was never intended to go so far. Indeed, the Law Revision Commission, which drafted the amendment, specifically rejected a proposed separate impleader provision as being beyond the scope of its study.[131] The rejected proposal, which made the right of impleader subject to the discretion of the trial court, followed Federal Rule 14 in carefully spelling out the rights and obligations of the parties regarding

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129. See, e.g., Atherley v. MacDonald, Young & Nelson, Inc., 135 Cal. App.2d 383, 287 P.2d 529 (1st Dist. 1955).

130. The California Supreme Court specifically so held in Roylance v. Doelger, 57 Cal.2d 255, 368 P.2d 535, 19 Cal. Rptr. 7 (1962).

131. See Friedenthal, supra note 128, at 496-98.

such a claim once it was permitted.[132] For example, the third party was expressly treated as a defendant on an ordinary claim, with all the same rights and duties, including the power to bring his own counterclaims, cross-complaints, and impleader claims. In addition, he was given the power to challenge the right of plaintiff to collect from defendant so as to protect himself from any collusion between them as to plaintiff's initial right to recover.

By misinterpreting the 1957 amendment to section 442, the California courts set up an absolute right of impleader without any details regarding the rights and obligations of the parties other than those which apply generally in cross-complaint situations and which, as already noted, are not at all clear. It would seem desirable to revise section 442 at least to provide a safeguard against collusion in impleader situations.

The broad interpretation of section 442 also permits defendant to file a cross-complaint against an outsider even in a non-impleader situation.

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132. The text of the proposal read as follows:

> § 442a. Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, may assert any defenses which he has to the third-party complaint or which the third-party plaintiff has to the plaintiff's claim and shall have the same right to file a counterclaim, cross-complaint, or third-party complaint as any other defendant. If the plaintiff desires to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant, he may do so by an appropriate pleading. When a counterclaim or cross-complaint is filed against a party, he may in like manner proceed against third parties. Service of process shall be had upon a new party in like manner as is provided for service upon a defendant.

Assume, for example, that plaintiff brings suit for injuries received when his car was struck from behind by defendant's automobile and that defendant received injuries at the same time when his vehicle was struck from the side by a third car. Defendant may bring a cross-complaint against the driver of the third vehicle even though he was not made a co-defendant in the original complaint.

Under Federal Rule 13(g), such a cross-claim is not permitted.[133] Presumably, the reason is that it would be unfair to a third party to force him to try a case in a federal court where the subject matter jurisdiction or venue would normally be improper. It is important to note that severance of the cross-claim for trial would not be of help in alleviating such unfairness since the cross-claim would still be heard in the court where the action was filed. On the other hand, even though defendant may not file a cross-claim against the third party, defendant may, if otherwise possible, file a separate suit against the third party in the court where the original suit is pending, in which situation the two cases may be consolidated. The federal rule permitting impleader is an exception to the general rule against claims against third parties alone; impleader is justified by the fact that the need to protect defendant from inconsistent liability outweighs any unfairness to the third party who may be called upon to litigate the case in a court where it could not be brought as an independent action.

California section 442 makes no allowances for any unfairness that might result to a third party who is sued in a court where, under the venue laws, an independent action could not be maintained against him. The

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133. See United States v. Zashin, 60 F. Supp. 843 (E.D.N.Y. 1958); Comment, 46 Calif. L. Rev. 100, 104 & n.24 (1958).

situation is not as acute as it might be in the federal courts where the forum may be in a different state. Nevertheless, California covers a large area, and great inconvenience may result if a person is required to fight an action five or six hundred miles from his home. Furthermore, unlike actions in the federal courts which normally must involve more than $10,000,[134] California cases may seek any amount no matter how small.[135] A third party may well default on a cross-complaint involving only a few hundred dollars rather than become involved in litigation in a distant county. The most satisfactory way to control the situation would not seem to be enactment of strict limitations on cross-complaints; instead the courts, in addition to their power to sever causes of action for trial, should be given the discretion to transfer a severed cause to another county for trial as an independent action. Where the advantages of a unified trial are outweighed by the inconvenience to a third party, the means should be available to rectify any harm not only by severance of the cause against him but also by permitting the severed cause to be tried in the most convenient forum.

Cross-Complaints and Joinder of Causes

Suppose a defendant not only has a cause of action against a co-defendant which meets the transactional requirements of section 442, but also another unrelated cause of action against him as well. The second cause may not be joined in the cross-complaint even though, had the

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134. See 28 U.S.C. §§ 1331, 1332 (1964).

135. The California requirements for subject matter jurisdiction are discussed in 1 Chadbourn, Grossman & Van Alstyne, California Pleading, §§ 51-54 (1961), and in 1 Witkin, California Procedure, Courts, §§ 70-107 (1954).

cross-complainant brought his action independently, he could have joined both causes under section 427. Once again the procedure rules place a litigant in a dilemma; the cross-complainant must decide either to pursue his cross-complaint alone, knowing a separate action will be necessary later on the other cause, or to forgo the cross-complaint and bring all his causes together in one separate action. Modern procedural systems elesewhere, such as the federal rules, permit any litigant, once he has filed a valid cross-claim or impleader claim, to join with it any other claim he has against the adverse party.[136] This rule does not have an overall substantial impact since the number of situations is small indeed where one party has more than one claim against another, particularly claims which are factually unrelated. But in the few situations where this does occur, the advantages to the litigants and the court may be substantial. This is especially true of impleader situations where a defendant risks inconsistent verdicts against himself if he elects to bring his cause of action independently.

It seems clear that the law should provide that, once a party has pleaded a valid cross-complaint against a third person, he should be permitted to join all other claims he has against that person. It is important to remember that, even if a party is allowed to join all of his claims, the court may sever any claims or issues for trial when justice so requires.

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136. See, e.g., Federal Rule 18(a) quoted supra at 19, and N.Y.C.P.L.&R. § 601, quoted in note 15, supra at 9.

Rights and Duties of a Person Against Whom a Cross-Complaint Has Been Filed

On their faces, sections 438 and 442 are limited to use by defendants. This raises the question, already discussed with respect to plaintiffs, whether a person against whom a cross-complaint has been filed may himself file a counterclaim or a cross-complaint. As noted previously, the few cases which discuss the matter give opposing views[137] although sound logic would seem to dictate that such countersuits should be permitted. Surely a litigant should not be denied the right to bring an impleader action, thus exposing him to the possibility of inconsistent verdicts. A similar problem exists regarding a plaintiff against whom a counterclaim unrelated to his complaint has been filed. It would be extremely unfair to expose plaintiff to the possibility of double liability because he cannot allege an impleader claim.

Even in a non-impleader situation, it is unjust to deprive a party of the right to have all related claims brought in a single action merely because the cause against him arose as a countersuit and not in an independent action. Section 442 should be revised clearly to permit any person against whom a cross-complaint has been filed to bring any counterclaim or cross-complaint which he would have been permitted to bring had he been sued in an independent proceeding and, indeed, to require him to assert any compulsory counterclaims he might have.

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137. See p. 54, supra.

Mandatory Cross-Complaints Against Third Parties

Since a cross-complaint in California must, by definition, have a subject matter connection with plaintiff's original cause of action, the question arises why all cross-complaints should not be mandatory, particularly in light of the previous conclusion that cross-complaints against plaintiffs should be compulsory.

However, there are sound reasons for distinguishing cross-complaints against a plaintiff from those against co-parties or outsiders. In the latter situation, the parties are not as yet adverse; potential claims among them may never be pressed simply because they prove unnecessary or because they are unlikely to succeed. But if a litigant is forced to an early choice of asserting a claim or forever waiving it, he will be disposed to add it to his pleadings, along with any necessary defendants, just to be safe. Furthermore, the insertion of a new party into a controversy may dramatically change the character of the action. For example, a small-scale suit by the purchaser against the seller of an allegedly defective electric toaster may be converted into an important test case if the seller cross-complains against the manufacturer which is a huge industrial corporation. The latter may feel impelled for public relations purposes to put time and money into a case in which the retail purchaser is involved although it would not do so in an independent action solely between itself and one of its dealers. On balance, a rule making all cross-complaints mandatory would not seem to have sufficient advantages to outweigh the potential harm it might cause.

PART III: SUMMARY AND RECOMMENDATIONS

BASIC PRINCIPLES FOR DECISION

A number of the problems discussed in Parts I and II could be alleviated by changes in the wording of the individual statutes regarding joinder of parties and causes, leaving intact the basic framework of joinder as it now stands. It seems clear, however, in light of the inconsistency, lack of coherence, and confusion among the various provisions, that it is vital to engage in an overall revision of the joinder regulations based on a consistent set of principles.[138] These principles, as developed from the foregoing discussions, are summarized below.

Uniform procedural treatment

One uniform set of procedures should be applied to every situation where one person files a cause of action against another so that, regardless of whether they were original parties or not, the person filing the cause and the person against whom it is filed will be treated as plaintiff and defendant, respectively, with all the obligations and rights that they would have had had the cause been instituted in an independent lawsuit.

a. Adherence to this basic principle would eliminate most of the practical problems of current California joinder practice regarding counterclaims and cross-complaints. Often it is fortuitous whether or not a person sues or is sued on a counterclaim or cross-complaint rather than in an independent action. It may simply involve a race to the courthouse.

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138. For an example of how problems may arise from piecemeal revision of current provisions, see discussion at 36-38, supra, of the bill recently introduced in the California Senate regarding proposed mandatory joinder of claims.

Surely there is no reason to treat parties to a counterclaim or cross-complaint differently than they would have been treated in a separate suit.

b. The following alterations of current practices would occur:

(1) Persons against whom a counterclaim is alleged would be required to answer. They would be permitted to file any counterclaims or cross-complaints they might have, and they would be bound by compulsory counterclaim rules.

(2) Persons against whom a cross-action is filed would clearly be allowed to file their own counterclaims and cross-actions and would in addition be subject to compulsory counterclaim rules.

(3) Persons who file a counterclaim or cross-action would be permitted and required to join any additional persons whom they would have been permitted or required to join had their cause been alleged in an independent action.

(4) Persons who file a counterclaim or cross-action would be bound by any new provisions requiring mandatory joinder of causes of action.

c. These changes would eliminate the absurd procedural distinctions that now exist between counterclaims and cross-complaints. They would permit persons against whom such causes were filed to file cross-complaints in impleader to avoid the possibility of inconsistent verdicts. They would eliminate the dilemma of a party who must now choose between a counterclaim against his adversary alone and an independent suit against all persons liable to him on his cause of action. And they would eliminate a similar dilemma of a party who must now choose between a cross-complaint alleging only those causes of action factually connected to a cause already

alleged in the suit and an independent action in which all joinable causes against defendant may be alleged. In addition the changes would force factually related claims between adverse parties to be joined in a single case.

Permissive joinder of claims and counterclaims

A plaintiff in his complaint should be permitted to join all causes of action he has against a defendant; a defendant, along with his answer, should be permitted to file a pleading, known as a counterclaim, setting forth any causes of action he has against a plaintiff.

a. This principle is intended to apply to parties to counterclaims and cross-actions as well as to parties to an original complaint. There is little reason to require adverse parties to engage in multiple lawsuits. If appropriate, causes of action may always be severed for trial.

b. The following alterations of current practices would occur:

(1) The current categorical approach to joinder of causes by plaintiff would be abolished.

(2) A defendant could file against a plaintiff causes which today meet neither the counterclaim nor cross-complaint requirements.

(3) All claims by defendant against plaintiff would be denominated "counterclaims," thus harmonizing the nomenclature with that used in virtually every jurisdiction outside California.

c. Under present law, plaintiff can already join many factually unrelated claims against defendant, and defendant, in turn, can countersue on many causes not related either to each other or to causes alleged by plaintiff. The rules which prohibit joinder of all causes which the

parties have against one another are arbitrary and inconsistent. From a practical point of view, few causes are prohibited; but the rules engender considerable confusion and lead to meaningless litigation on technical points.

Compulsory joinder of claims and counterclaims

When one person files a cause of action against another, and either of them has an unpleaded cause of action against the other arising from the same transaction or occurrence as the cause filed, then such unpleaded cause must also be filed in the action; otherwise it should be deemed waived and all rights thereon extinguished.

a. This principle is based on the premise that time, effort, and cost will be saved if all factually related causes between adverse parties are brought in a single proceeding. This premise has already been accepted to the extent that the compulsory counterclaim statute applies.

b. The following alterations of current practices would occur:

(1) For the first time plaintiffs would be required to join related causes of action.

(2) Defendants would be required to join related causes which are not now mandatory because they qualify only as cross-complaints and not as counterclaims.

c. There is no reason why current cross-complaints by defendants against plaintiffs, which do not qualify as counterclaims, should not be subject to compulsory joinder rules. The major restriction on counterclaims--the "defeat or diminish" requirement--has no relationship whatsoever to the policy underlying the compulsory joinder of factually related claims and should not govern its application.

The policy of compulsory joinder applies to plaintiff's causes as well as to those of defendant. Unlike other jurisdictions which take a broad view of the scope of a cause of action, compulsory joinder is not, in fact, accomplished in California by operation of the common law principles of res judicata. Thus a specific provision for compulsory joinder is required.

Permissive filing of claims against co-parties or strangers

Whenever a party is sued on a cause of action arising out of the same transaction or occurrence, or affecting the same property, as an unpleaded cause which the party has against either a non-adverse party or a stranger to the lawsuit, he should be permitted, along with his answer, to file a pleading setting forth his cause and bringing any such stranger into the lawsuit; such a pleading should be denominated a cross-claim.

a. This principle, except for nomenclature, has been completely accepted in California by the courts' broad interpretation of the current cross-complaint statute.

b. Current practice would be altered only to the extent that the many statutory provisions now relating to "cross-complaints" would need revision.

c. The value of a clear delineation between claims by defendant against plaintiff and claims by defendant against a co-party or stranger cannot be denied. The current confusion between counterclaims and cross-complaints by defendant against plaintiff must be eliminated. The above principle would abolish the current "cross-complaint," and give the title "cross-claim" only to pleadings filed against a non-adverse party; this

is in line with nomenclature used in almost all jurisdictions outside California.

It should be noted, however, that many provisions in the California codes now refer to "cross-complaints," and each such provision would have to be studied to determine precisely how it should be amended.

Impleader claims for indemnity

A party against whom a cause of action has been filed should clearly be permitted to file as a cross-claim any impleader claim for indemnity which he has against a third person; however, the third person should be protected from collusion by being afforded the opportunity directly to contest the liability of the person who filed such cross-claim.

a. California courts have already held that impleader claims meet the "transaction and occurrence" test embodied in the cross-complaint provision. They did so erroneously, however, misinterpreting wording which was not intended to go so far and, hence, which did not provide any safeguard against possible collusion that can occur in such a case.

b. Current practice would be altered to permit a third party to claim that the person who seeks indemnity from him is himself not liable on the cause for which indemnity is sought.

c. A separate section dealing specifically with impleader would seem desirable to make clear the extent to which it exists and any special procedures which it involves. Federal Rule of Civil Procedure 14 provides a model for such a separate provision.

Severing of causes or issues for trial

Whenever a lawsuit involves multiple causes of action, the court should have broad discretion to sever causes or issues for trial. When a non-impleader cross-claim brought solely against a stranger to the action is severed, the court should have power to transfer such a claim to a more convenient forum for trial as an independent action.

a. California law already provides for severance in the court's discretion. There are, however, a variety of clauses giving such power in specific cases in addition to a provision with general application. Retention of but one clear-cut, omnibus provision would seem desirable.

California law does not permit part of a case, although severed from the rest, to be transferred to a separate court. In the special case where the suit is brought only against third persons, in non-impleader situations, the only justification for joinder is unity for trial. This purpose fails when severance occurs and, if the cause is otherwise in an inconvenient forum, transfer should be allowed.

b. Current practice would be altered in that, under the narrow circumstances described, a severed portion of an action could be sent to another court to be treated as an independent lawsuit.

c. Under current law, a stranger to an action may be joined therein on a cross-complaint even though he lives many miles away and the cause against him, if brought independently, would have had to have been filed in a county much more convenient to him. If such a cause is severed, it is only just that the court, in its discretion, be allowed to transfer the cause.

Special set-off provisions

The statutes should retain the substance of special set-off provisions to the extent that they prevent one party from taking advantage of another through tactical manipulations.

Sections 368 and 440 of the Code of Civil Procedure now prevent a party from avoiding counterclaims merely by transferring his own cause to a friend who files the suit in his own name. In addition section 440 prohibits one party from taking advantage of an adversary by waiting until the statute of limitations runs on the latter's cause before filing his own. If a full-scale reform of current joinder of provisions takes place, these provisions will need revision; but their substance should be retained.

PROPOSED LEGISLATION

[This material will be prepared at a later date.]