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6/25/70

Memorandum 70-65

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

Attached are two copies of a tentative recommendation relating to counterclaims and cross-complaints, joinder of causes of action, and related provisions. We must distribute this for comment after the July meeting if we are to submit a recommendation to the 1971 Legislature. Accordingly, please mark your editorial changes on one copy to return to the staff at the July meeting so that they can be taken into account when the tentative recommendation is revised after the meeting before it is distributed for comment.

The tentative recommendation reflects prior Commission decisions. We have made, we believe, a number of improvements in the language of the provisions in the draft statute. You should read the statute with care prior to the meeting. We also include a number of conforming amendments. We have revised and, we believe, improved the Comments to the various sections. Do not overlook the last section of the statute (operative date; application to pending actions). We would use the letter of transmittal (included in the tentative recommendation) when we distribute the tentative recommendation for comment after the meeting.

With respect to the joinder of causes portion of the tentative recommendation, you will find of interest the Resolution of the San Francisco Bar Association (attached hereto as Exhibit I--pink). This Resolution is consistent with our recommendation and also would delete the separate statement of causes requirement.

We believe that it is important that the recommendation include provisions to clarify the law relating to joinder of parties. See Memorandum 70-71 (to be sent), Memorandum 70-66, and the First Supplement to Memorandum 70-66.

For your convenience, we also attach (blue pages) a copy of the Code of Civil Procedure Title on Pleading.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

**RESOLUTION PROPOSED BY
THE BAR ASSOCIATION OF SAN FRANCISCO**

RESOLVED that the Conference of Delegates recommends to the Board of Governors of the State Bar of California that the State Bar sponsor legislation to amend Sections 427 and 430 of the Code of Civil Procedure to read as follows:

- 1 Section 427.--(Joinder-of-causes-of-action)--The-plaintiff-may
- 2 unite-several-causes-of-action-in-the-same-complaint;-where-they
- 3 all-arise-out-of:
- 4 1.--Contracts;-express-or-implied;--An-action-brought-pursuant
- 5 to-Section-1692-of-the-Civil-Code-shall-be-deemed-to-be-an-action
- 6 upon-an-implied-contract-within-the-meaning-of-that-term-as-used
- 7 in-this-section;
- 8 2.--Claims-to-recover-specific-real-property;-with-or-without
- 9 damages-for-the-withholding-thereof;-or-for-waste-committed
- 10 thereon;-and-the-rents-and-profits-of-the-same;
- 11 3.--Claims-to-recover-specific-personal-property;-with-or-with-
- 12 out-damages-for-the-withholding-thereof;
- 13 4.--Claims-against-a-trustee-by-virtue-of-a-contract-or-by-op-
- 14 eration-of-law;
- 15 5.--Injuries-to-character;
- 16 6.--Injuries-to-person;
- 17 7.--Injuries-to-property;
- 18 8.--Claims-arising-out-of-the-same-transaction;-or-transactions
- 19 connected-with-the-same-subject-of-action;-and-not-included
- 20 within-one-of-the-foregoing-subdivisions-of-this-section;
- 21 9.--Any-and-all-claims-for-injuries-arising-out-of-a-conspiracy;
- 22 whether-of-the-same-or-of-different-character;-or-done-at-the
- 23 same-or-different-times;

24 The causes of action so united must all belong to one only of
25 these classes except as provided in cases of conspiracy; and
26 must affect all the parties to the action; and not require dif-
27 ferent places of trial; and must be separately stated; but an
28 action for malicious arrest and prosecution; or either of them;
29 may be united with an action for either an injury to character
30 or to the person; provided; however; that in any action brought
31 by the husband and wife; to recover damages caused by any injury
32 to the wife; all consequential damages suffered or sustained by
33 the husband alone; including loss of the services of his said
34 wife; moneys expended and indebtedness incurred by reason of
35 such injury to his said wife; may be alleged and recovered with-
36 out separately stating such cause of action arising out of such
37 consequential damages suffered or sustained by the husband; pro-
38 vided; further; that causes of action for injuries to persons
39 and injuries to property; growing out of the same tort; may be
40 joined in the same complaint; and it is not required that they
41 be stated separately.

42 Section 427. A party pleading a complaint, counterclaim, or
43 cross-complaint, may join as many causes of action as he has
44 against an opposing party; provided that, the court may order
45 separate trials or make such other order as the interests of
46 justice may require.

47 Section 430. (Grounds for demurrer.)

48 The defendant may demur to the complaint within the time re-
49 quired in the summons to answer, when it appears upon the fact
50 thereof, or from any matter of which the court must or may take
51 judicial notice, either:

52 1. That the court has no jurisdiction of the person of the de-
53 fendant, or the subject of the action;

54 2. That the plaintiff has not legal capacity to sue;

55 3. That there is another action pending between the same
56 parties for the same cause;

57 4. That there is a defect or misjoinder of parties plaintiff
58 or defendant;

59 ~~5. That several causes of action have been improperly united;~~
60 ~~or not separately stated;~~

61 6. 5. That the complaint does not state facts sufficient to
62 constitute a cause of action;

63 7. 6. That the complaint is uncertain; "uncertain," as used
64 herein, includes ambiguous and unintelligible;

65 8. 7. That, in actions founded upon a contract, it cannot be
66 ascertained from the complaint, whether or not the contract is
67 written or oral.

(Proposed new language underlined; language to be deleted stricken)

STATEMENT OF REASONS

The joinder of causes statute (C.C.P. 427) is a strange conglomeration of common law pleading, equity pleading, and haphazard attempts at piecemeal improvement. The first seven categories are based on the old writ system categories, and as such, are relics of the heyday of baroque pleading technicalities. Louisell and Hazard, Pleading and Procedure 639-640 (2nd Ed. 1968). The addition of category No. 8 in 1907 merely served to make the preceding categories largely redundant. (Chadbourn, Grossman & Van Alstyne, Calif. Pleading, Sec. 807).

These, and the further provisions of C.C.P. 427, have been whittled away by judicial interpretation. See Peters v. Bigelow, 137 CA 135 (1934), Kraft v. Smith, 24 C2d 124 (1944) and Chadbourn, Grossman & Van Alstyne, Calif. Pleading, Sec. 805, p. 725-276.

In response to this need for legislative clarification, it is proposed to enact a new CCP 427 which follows FRCP 18 and permits all causes of action to be joined in the pleadings and later severed for trial if

necessary in the discretion of the judge. To provide consistency, use of the special demurrer, as a device for attacking misjoinder or separate statement of causes of action, is eliminated by striking out CCP 430(5). If "causes of action" are jumbled together in a pleading, the "uncertain" clause of CCP 430 can be used to make a special demurrer.

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

Title VI.

PLEADINGS IN CIVIL ACTIONS

- Chap. 1. In General. §420-422.
Chap. 2. Complaint—Joinder of Causes. §423-427.
Chap. 3. Demurrer to Complaint. §430-431.
Chap. 4. Answer. §437-442.
Chap. 5. Demurrer to Answer or Counterclaim. §443-446.
Chap. 6. Verification of Pleadings. §466.
Chap. 7. General Rules of Pleading. §452-461.
Chap. 8. Variance—Mistakes in Pleadings and Amendments. §469-475.

CHAPTER 1 IN GENERAL

Defined. §420.
Forms and rules of pleading. §421.
Permissible pleadings enumerated. §422.

§420. Defined.—The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court.

§421. Forms and Rules of Pleading.—The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this code.

§422. Permissible Pleadings Enumerated.—The only pleadings allowed on the part of the plaintiff are:

1. The complaint;
2. The demurrer to the answer;
3. The demurrer to the cross-complaint;
4. The answer to the cross-complaint;

And on the part of the defendant:

1. The demurrer to the complaint;
2. The answer;
3. The cross-complaint;
4. The demurrer to the answer to the cross-complaint.

(In [1] justice courts [2] the pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended; in [3] justice courts, the pleadings may, except the complaint, or cross-complaint be oral or in writing; need not be verified, unless otherwise provided in this title; if in writing, must be filed with the [4] judge; if oral, an entry of their substance must be made in the docket.)

CHAPTER 2

COMPLAINT—JOINDER OF CAUSES

As first pleading. §423.

Contents. §426.

Information to be furnished on filing of divorce, annulment, or separate maintenance action. §426a.

Divorce action—Contents of complaint. §426c.
Joinder of causes. §427.

§423. As First Pleading.—The first pleading on the part of the plaintiff is the complaint.

§426. Contents.—The complaint must contain:

1. The title of the action, the name of the court and county, and, in municipal and [1] justice courts, the name of the [2] judicial district, in which the action is brought; the names of the parties to the action;

2. A statement of the facts constituting the cause of action, in ordinary and concise language;

3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated; provided, that in [3] justice courts, a copy of the account, note, bill, bond, or instrument upon which the action is based is a sufficient complaint. If the demand be for relief on account of the alleged infringement of the plaintiff's rights in and to a literary, artistic or intellectual production, there must be attached to the complaint a copy of the production as to which the infringement is claimed and a copy of the alleged infringing production. If, by reason of bulk or the nature of the production, it is not practicable to attach a copy to the complaint, that fact and the reasons why it is impracticable to attach a copy of the production to the complaint shall be alleged; and the court, in connection with any demurrer, motion or other proceedings in the cause in which a knowledge of the contents of such production may be necessary or desirable, shall make such order for a view of the production not attached as will suit the convenience of the court, to the end that the contents of such production may be deemed to be a part of the complaint to the same extent and with the same force as though such production had been capable of being and had been attached to the complaint. The attachment of any such production in accordance with the provisions hereof shall not be deemed a making public of the production within the meaning of Section 983 of the Civil Code.

§426a. Information to Be Furnished on Filing of Divorce, Annulment, or Separate Maintenance Action.—In [1] a proceeding for [2] dissolution of marriage, legal separation, or for a declaration of void or voidable marriage, there shall be furnished to the county clerk by the [3] petitioner at the time of filing of the [4] petition, or within 10 days thereafter and before the date of the first hearing, that information, required to be collected by the State Registrar of Vital Statistics, in the manner specified under Chapter 6.5 (commencing with Section 10360) of Division 9 of the Health and Safety Code. The clerk shall accept the [5] petition for filing, whether or not said information is then furnished. At any time after the filing of the [6] petition, the [7] respondent may also furnish such information, whether or not it has been first furnished by the [8] petitioner. The clerk shall take all ministerial steps required of him in the [9] proceeding, whether or not such information has been furnished; but the clerk shall advise the court, at the time set for any hearing, if at such time no party has furnished such information. In such cases, the court may decline to hear any matter encompassed within the [10] proceeding if good cause for such failure to furnish information has not been shown.

The court's inquiry in such cases shall be confined solely to the question of the existence of good cause for not furnishing the information; and such report and the contents thereof shall not be admissible in evidence and shall not be furnished to the court.

§426c. Divorce Action—Contents of Complaint.—In [1] a proceeding for [2] dissolution of marriage the [3] petition must set forth among other matters as near as can be ascertained the following facts:

- (1) The state or country in which the parties were married.
- (2) The date of marriage.
- (3) The date of separation.
- (4) The number of years from marriage to separation.
- (5) The number of children of the marriage, if any, and if none a statement of that fact.
- (6) The [4] age and birth date of [5] each minor [6] child of the marriage.
- (7) The social security numbers of the husband and wife, if available and if not available, a statement to such effect.

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

1. Contracts, express or implied [1]. An action brought pursuant to Section 1692 of the Civil Code shall be deemed to be an action upon an implied contract within the meaning of that term as used in this section.

2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same [2].

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

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

5. Injuries to character [5].

6. Injuries to person [6].

7. Injuries to property [7].

8. Claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.

9. Any and all claims for injuries arising out of a conspiracy, whether of the same or of different character, or done at the same or different times.

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

CHAPTER 3 DEMURRER TO COMPLAINT

Grounds for demurrer. §430.
Statement of grounds—Answer at same time. §431.
Judicial notice. §431.5.
Amendment of complaint—Filing and service. §432.
Answer for grounds not apparent in complaint. §433.
Waiver by failure to demur or answer. §434.
Motion to strike complaint. §435.

§430. Grounds for Demurrer. — The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, or from any matter of which the court must or may take judicial notice, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action;
 2. That the plaintiff has not legal capacity to sue;
 3. That there is another action pending between the same parties for the same cause;
 4. That there is a defect or misjoinder of parties plaintiff or defendant;
 5. That several causes of action have been improperly united, or not separately stated;
 6. That the complaint does not state facts sufficient to constitute a cause of action;
- [2]
[3]
[4] 7. That the complaint is uncertain; "uncertain," as used herein, includes ambiguous and unintelligible;
- [5] 8. That, in actions founded upon a contract, it cannot be ascertained from the complaint, whether or not the contract is written or oral.

§431. Statement of Grounds—Answer at Same Time.—The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it does so, it may be disregarded. It may be taken to the whole complaint, or to any of the causes of action stated therein, and the defendant may demur and answer at the same time.

§431.5. Judicial Notice.—When the ground of demurrer is based on a matter of which the court may take judicial notice pursuant to Sections 452 or 453 of the Evidence Code, such matter must be specified in the demurrer, or in the supporting points and authorities for the purpose of invoking such notice, except as the court may otherwise permit.

§432. Amendment of Complaint; Filing and Service.—If the complaint is amended, a copy of the amendments must be filed, or the court may, in its discretion, require the complaint as amended to be filed, and a copy of the amendments or amended complaint must be served upon the defendants affected thereby. The defendant must answer the amendments, or the complaint as amended, within ten days after service thereof, or such other time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases.

§433. Answer for Grounds Not Apparent in Complaint. When any of the matters enumerated in Section 430 do not appear upon the face of the complaint, the objection may be taken by answer [2].

§434. Waiver by Failure to Demur or Answer.—If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

§435. Motion to Strike Complaint. — The defendant, within the time required in the summons to answer, either at the time he demurs to the complaint, or without demurring, may serve and file a notice of motion to strike the whole or any part of the complaint. The notice of motion to strike shall specify a hearing date not more than 15 days from the filing of said notice, plus any additional time that the defendant, as moving party, is otherwise required to give the plaintiff. If defendant serves and files such a notice of motion without demurring, his time to answer the complaint shall be extended and no default may be entered against him, except as provided in Sections 585 and 586, but the filing of such a notice of motion shall not extend the time within which to demur.

CHAPTER 4 ANSWER

Necessary allegations, methods of stating—Positive denial—Information and belief—General denial. §437.

Pleading exemption from liability under insurance policy. §437a.

Action less than \$500—General denial. §437b.

Summary judgment—Action without merit or defense. §437c.

Recovery of personal property. §437d.

Set-off and counterclaim—Essentials—Separate trial. §438.

Waiver of cause not set up in counterclaim—Transfer. §439.

Assignment or death cannot defeat compensation between cross demands. §440.

Joinder of defenses and cross demands separately stated—Demurrer with answer. §441.

Cross-complaint with answer or by permission—Service—Process for new parties. §442.

§437. Necessary Allegations, Method of Stating — Positive Denial; Information and Belief—General Denial.—The answer of the defendant shall contain:

1. A general or specific denial of the material allegations of the complaint controverted by the defendant.

2. A statement of any new matter constituting a defense or counterclaim.

Except in [1] justice courts, if the complaint be verified, the denial of the allegations controverted must be made positively, or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. The denials of the allegations controverted may be stated by reference to specific paragraphs or parts of the complaint; or by express admission of certain allegations of the complaint with a general denial of all of the allegations not so admitted; or by denial of certain allegations upon information and belief, or for lack of sufficient information or belief, with a general denial of all allegations not so denied or expressly admitted. If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint.

§437a.—Pleading Exemption from Liability Under Insurance Policy.—In an action to recover upon a contract of insurance wherein the defendant claims exemption from liability upon the ground that, although the proximate cause of the loss was a peril insured against, the loss was remotely caused by or would not have oc-

curred but for a peril excepted in the contract of insurance, the defendant shall in his answer set forth and specify the peril which was the proximate cause of the loss, in what manner the peril excepted contributed to the loss or itself caused the peril insured against, and if he claim that the peril excepted caused the peril insured against, he shall in his answer set forth and specify upon what premises or at what place the peril excepted caused the peril insured against.

§437b. Action Less Than Five Hundred Dollars—General Denial.—In any action on which the demand, exclusive of interest, or the value of the property in controversy does not exceed [1] five hundred dollars (\$500), the defendant at his option, in lieu of demurrer and other answer, may file a general written denial verified by his own oath and a brief statement similarly verified, of any new matter constituting a defense or counterclaim.

§437c. Summary Judgment—Action Without Merit or Defense.—In superior courts [11] and municipal courts [14] if it is claimed the action has no merit, or that there is no defense to the action [15], on motion of [4] either party, after notice of the time and place thereof in writing served on the [5] other [16] party at least 10 days before such motion, supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out or the complaint may be dismissed and judgment may be entered, in the discretion of the court [6] unless the [7] other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to [8] present a triable issue of fact. A judgment so entered is an appealable judgment as in other cases. The word "action" as used in this section shall be construed to include all types of proceedings. The word "answer" as used in this section shall be construed to include counterclaim and cross-complaint. [17] The filing of a motion under this section shall not extend the time within which a party must otherwise file an answer, demurrer or motion to strike.

The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff or defendant to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that [9] affiant, if sworn as a witness, can testify competently thereto.

The affidavit or affidavits in opposition to said motion shall be made by the plaintiff or defendant, or by any other person having knowledge of the facts, and together shall set forth facts showing that the [10] party has a good and substantial defense to the plaintiff's action (or to a portion thereof) or that a good cause of action exists upon the merits. The facts stated in each affidavit shall be within the personal knowledge of the affiant, shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto. When the party resisting the motion appears in a representative capacity, such as a trustee, guardian, executor, administrator, or receiver, then the affidavit in opposition by such representative may be made upon his information and belief.

If it appear that such defense applies only to a part of the plaintiff's claim, or that a good cause of action does not exist as to a part of the plaintiff's claim, or that any part of a claim is admitted or any part of a defense is conceded, the court shall, by order, so declare, [18] and the claim or defense shall be deemed established as to so much thereof as is by such order declared and the cause of action may be severed accordingly, and the action may proceed as to the [19] issues remaining between the parties. No judgment shall be entered prior to the termination of such action but the judgment in such action shall, in addition to any matters determined in such action, award [20] judgment as established by the proceedings herein provided for. A judgment entered under this section is an appealable judgment as in other cases.

§437d.—Recovery of Personal Property.—When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property, and the officer taking the property, or the sureties on any bond or undertaking is sued for taking the same, the officer or sureties may in their answer set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made or that the value in the affidavit stated was inserted by mistake, the court shall disregard the value as stated in the affidavit and give judgment according to the right of possession of said property at the time the affidavit was made.

§438. Set-off and Counterclaim—Essentials—Separate Trial.—The counterclaim mentioned in section 437 must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action; provided, that the right to maintain a counterclaim shall not be affected by the fact that either plaintiff's or defendant's claim is secured by mortgage or otherwise, nor by the fact that the action is brought, or the counterclaim maintained, for the foreclosure of such security; and provided further, that the court may, in its discretion, order the counterclaim to be tried separately from the claim of the plaintiff.

§439. Waiver of Cause Not Set Up In Counterclaim—Transfer.—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.

§440. Assignment or Death Cannot Defeat Compensation Between Cross Demands.—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.

§441. Joinder of Defenses and Cross Demands Separately Stated—Demurrer with Answer.—The defendant may set forth by answer as many defenses and counterclaims as he may have. They must be separately stated, and the several defenses must refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished. The defendant may also answer one or more of the several causes of action stated in the complaint and demur to the residue.

§442. Cross-Complaint with Answer or by Permission—Service—Process for New Parties.—Whenever the defendant seeks affirmative relief against any [1] 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.

CHAPTER 5 DEMURRER TO ANSWER OR COUNTERCLAIM

Time to demur. §443.
Grounds. §444.

§443. Time to Demur.—The plaintiff may within ten days after the service of the answer demur thereto, or to one or more of the several defenses or counterclaims set up therein.

§444. Grounds.—The demurrer may be taken upon one or more of the following grounds:

1. That several causes of counterclaim have been improperly joined, or not separately stated;
2. That the answer does not state facts sufficient to constitute a defense or counterclaim;

[2]
[3]
[4] 3. That the answer is uncertain; "uncertain", as used herein, includes ambiguous and unintelligible; or

[5] 4. That, where the answer pleads a contract, it can not be ascertained from the answer, whether or not the contract is written or oral.

CHAPTER 6 VERIFICATION OF PLEADINGS

Signing—Verifying—Form of affidavit—Who may make. §446.

§446. Signing—Verifying—Form of Affidavit—Who May Make.—Every pleading (except in [17] justice courts when the pleadings are oral) [1] shall be subscribed by the party or his attorney. When the state, [2] any county thereof, [3] city, school district, district, public agency, or public corporation, or any officer of the state, or of any county thereof, [4] city, school district, district, public agency, or public corporation, in his official capacity, is plaintiff, the answer [5] shall be verified, unless an admission of the truth of the complaint might subject the party to a criminal prosecution, or, unless a county thereof, [6] city, school district, district, public agency, or public corporation, or an officer of the state, or of any county, [7] city, school district, district, public agency, or public corporation, in his official capacity, is defendant. Except in [18] justice courts, when the complaint is verified, the answer [8] shall be verified. In all cases of a verification of a pleadings, the affidavit of the party [9] shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; and where a pleading is verified, it [10] shall be by the affidavit of a party, unless the parties are absent from the county where the attorney has his office, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he [11] shall set forth in the affidavit the reasons why it is not made by one of the parties.

When a corporation is a party, the verification may be made by any officer thereof. When the state, [12] any county thereof, [13] city, school district, district, public agency, or public corporation, or any officer of the state, or of any county thereof, [14] city, school district, district, public agency, or public corporation, in his official capacity is plaintiff, the complaint need not be verified; and if the state, [15] any county thereof, [16] city,

school district, district, public agency, or public corporation, or an officer of such state, county, [17] city, school district, district, public agency, or public corporation, in his official capacity is defendant, its or his answer need not be verified.

When the verification is made by the attorney for the reason that the parties are absent from the county where he has his office, or from some other cause are unable to verify it, or when the verification is made on behalf of a corporation or public agency by any officer thereof, such attorney's or officer's affidavit shall state that he has read the pleading and that he is informed and believes the matters therein to be true and on that ground alleges that the matters stated therein are true; provided that in such cases the pleading shall not otherwise be considered as an affidavit or declaration establishing the facts therein alleged.

A person verifying a pleading need not swear to the truth or his belief in the truth of the matters stated therein but may, instead, assert the truth or his belief in the truth of such matters "under penalty of perjury."

CHAPTER 7

GENERAL RULES OF PLEADING

Liberal construction—Substantial justice. §452.
Striking sham, irrelevant and redundant. §453.
Items on account—Copy on notice—Verification. §454.

Description of land. §455.

Judgment or judicial action. §456.

Performance of conditions. §457.

Bar of statute of limitations. §458.

Statute or ordinance — Performance of conditions. §459.

Libel and slander—Extrinsic facts. §460.

—Truth or mitigation. §461.

Admission by failure to deny—Affirmative defenses deemed denied. §462.

"Material allegation" defined. §463.

Supplemental pleadings—Motion for leave. §464.

—Filing and service. §465.

§452. Liberal Construction — Substantial Justice.—In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.

§453. Striking Sham, Irrelevant and Redundant.—Sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may, in its discretion, impose.

§454. Items of Account—Copy on Notice—Verification.—It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within [1] ten days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular.

If the pleading is verified the account must be verified by the affidavit of the party to the effect that he believes it to be true; or if the facts are within the personal knowledge of the agent or attorney for the party, or the party is not within the county where the attorney has his office or from some cause unable to make the affidavit, by the affidavit of the agent or attorney.

§455. Description of Land.—In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it.

§456. Judgment or Judicial Action.—In pleading a judgment or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made and to have become final. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction and creating finality.

§457. Performance of Conditions.—In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance.

§458. Bar of Statute of Limitations.—In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section — (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred.

§459. Statute or Ordinance—Performance of Conditions.—In pleading a private statute, or an ordinance of a county or municipal corporation, or a right derived therefrom, it is sufficient to refer to such statute or ordinance by its title and the day of its passage. In pleading the performance of conditions precedent under a statute or an ordinance of a county or municipal corporation, or of a right derived therefrom, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part required thereby; if such allegations be controverted the party pleading must establish on the trial the facts showing such performance.

§460. Libel and Slander—Extrinsic Facts.—In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish on the trial that it was so published or spoken.

§461. Truth or Mitigation.—In the actions mentioned in the last section the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

§462. Admission By Failure to Deny—Affirmative Defenses Deemed Denied.—Every material allegation of the complaint, not controverted by the answer, must, for the purpose of the action, be taken as true; the statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party.

§463. "Material Allegation" Defined.—A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.

§464. Supplemental Pleadings—Motion for Leave.—The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer.

§465. Filing and Service.—All pleadings subsequent to the complaint, must be filed with the clerk or [1] judge, and copies thereof served upon the adverse party or his attorney, provided that in actions in [2] justice courts, when the pleadings are oral, an entry of their substance in the docket is sufficient.

CHAPTER 8

VARIANCE—MISTAKES IN PLEADINGS AND AMENDMENTS

Material variance—Amendments meeting. §469.
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Unknown defendants—Adding true name. §474.
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§469. Material Variance—Amendments Meeting.—No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just.

§470. Immaterial Variance.—Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

§471. "Failure of Proof" Distinguished from Variance.—Where, however, the allegation of the claim or defense to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof.

§472. Amendment of Pleadings.—Any pleading may be amended once by the party of course, and without costs, at any time before the answer or demurrer is filed, or entered in the docket, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, who may have 10 days thereafter in which to answer or demur to the amended pleading; provided, that in [1] justice courts when the pleading is oral, the amendment may be oral, the substance thereof being entered in the docket, and the adverse party shall have 10 days from notice of such amendment in which to answer or demur thereto.

§472a. Demurrer Not Waived—Court's Discretion.—A demurrer is not waived by an answer filed (or entered in the [1] docket in the justice court) at the same time. When the demurrer to a complaint, or to a cross-complaint, is overruled, and there is no answer filed (or entered), the court may, upon such terms as may be just, allow an answer. If a demurrer to the answer be overruled, the action must proceed as if no demurrer had been interposed, and the facts alleged in the answer must be considered as denied to the extent mentioned in section 462 of this code.

When a demurrer is sustained, the court may grant leave to amend the pleading and shall fix the time within which such amendment or amended pleading shall be filed or entered in the docket.

§472b.—Time to Answer After Demurrer—Notice of Decision.—When a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from the service of notice of the decision or order, unless such notice is waived in open court, and the waiver entered in the minutes or docket.

§472c.—Order Sustaining Demurrer Open on Appeal—Not Retroactive.—When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made; provided, however, that this section shall not apply to any pending action or proceeding.

§472d. Ground for Sustaining Demurrer Shown in Order.—Whenever a demurrer in any action or proceeding is sustained, the court shall include in its decision or order a statement of the specific ground or grounds upon which the decision or order is based which may be by reference to appropriate pages and paragraphs of the demurrer.

The party against whom a demurrer has been sustained may waive these requirements.

§473. Amending Pleadings—Continuance—Relief from Mistake, Inadvertence, Surprise or Excusable Neglect—Time Limit—Correcting Clerical Errors.—The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

When it appears to the satisfaction of the court that such amendment renders it necessary, the court may postpone the trial, and may, when such postponement will by the amendment be rendered necessary, require, as a condition to the amendment, the payment to the adverse party of such costs as may be just.

The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken; provided, however, that, in the case of a judgment, order or other proceeding determining the ownership or right to possession of real or personal property, without extending such six months period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, order or other proceeding has been taken, and upon his attorney of record, if any, notifying said party and his attorney of record, if any, that said order, judgment or other proceeding was taken against him and that any rights said party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of said notice, then such application must be made within 90 days after service of such notice upon the defaulting party or his attorney of record, if any, whichever service shall be later.

The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.

§473.5. Service of Summons Too Late to Defend the Action — Time Limit on Seeking Relief of Default or Default Judgment.—(a) When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him in such action, he may serve and file a notice of motion to set aside such default or default judgment and for leave

to defend the action. Such notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him; or (ii) 180 days after service on him of a written notice that such default or default judgment has been entered.

(b) A notice of motion to set aside a default or default judgment and for leave to defend the action shall designate as the time for making the motion a date not less than 10 nor more than 20 days after filing of such notice, and it shall be accompanied by an affidavit showing under oath that such party's lack of actual notice in time to defend the action was not caused by his avoidance of service or inexcusable neglect. The party shall serve and file with such notice a copy of the answer, motion, or other pleading proposed to be filed in the action.

(c) Upon a finding by the court that the motion was made within the period permitted by subdivision (a) and that his lack of actual notice in time to defend the action was not caused by his avoidance of service or inexcusable neglect, it may set aside the default or default judgment on such terms as may be just and allow such party to defend the action.

§474. Unknown Defendants—Adding True Name.—When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly; provided, that no default or default judgment shall be entered against a defendant so designated, unless it appears that the copy of the summons or other process, or, if there be no summons or process, the copy of the first pleading or notice served upon such defendant bore on the face thereof a notice stating in substance: "To the person served: You are hereby served in the within action (or proceedings) as (or on behalf of) the person sued under the fictitious name of (designating it)." The certificate or affidavit of service must state the fictitious name under which such defendant was served and the fact that notice of identity was given by endorsement upon the document served as required by this section. The foregoing requirements for entry of

a default or default judgment shall be applicable only as to fictitious names designated pursuant to this section and not in the event the plaintiff has sued the defendant by an erroneous name and shall not be applicable to entry of a default or default judgment based upon service, in the manner otherwise provided by law, of an amended pleading, process or notice designating defendant by his true name.

§475. Disregard of Nonprejudicial Error — Presumption Against Prejudice.— The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown.

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION
TENTATIVE RECOMMENDATION

relating to

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

PRELIMINARY STAFF DRAFT

NOT APPROVED BY LAW REVISION COMMISSION

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

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

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

LETTER OF TRANSMITTAL

The California Law Revision Commission was authorized by Resolution Chapter 224 of the Statutes of 1969 to study two related topics: (1) "Whether the law relating to counterclaims and cross-complaints should be revised," and (2) "Whether the law relating to joinder of causes of action should be revised."

The Commission has prepared one tentative recommendation covering both of these topics and related matters. The tentative recommendation and a background study are being distributed to interested persons and organizations for review and comment. The study was prepared by Professor Jack Friedenthal of the Stanford Law School. Only the tentative recommendation (as distinguished from the research study) expresses the views of the Commission. However, the Commission has drawn heavily on the background study in preparing this recommendation.

The Commission plans to submit a recommendation on these topics to the 1971 session of the Legislature. The Commission solicits comments on the tentative recommendation from interested persons and organizations. Persons commenting on the tentative recommendation should note that the Commission has been authorized to study only the two topics listed above and related matters; the Commission has not been authorized to study and make recommendations concerning other aspects of pleading and practice.

Please send your comments on the tentative recommendation to the Commission not later than September 15, 1970. This deadline is necessary if the Commission is to have an opportunity to consider your comments and make any needed revisions before the recommendation is sent to the printer.

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RECOMMENDATION OF THE LAW REVISION COMMISSION

INTRODUCTION

Although several areas of California civil procedure have been reviewed and modernized in recent years,¹ there has been relatively little change in the California code pleading system since its adoption in 1851.² While study reveals that a comprehensive review of the statutes relating to pleading is needed, the Commission has been authorized initially to deal with only two aspects that are in need of immediate reform: (1) counterclaims and cross-complaints and (2) joinder of causes of action.³ This recommendation deals comprehensively with these two matters and the inextricably related matter of joinder of parties.

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1. For example, completely new provisions relating to depositions and discovery, based largely on the Federal Rules of Civil Procedure, were enacted in 1957. Cal. Stats. 1957, Ch. 1904, § 3, p. 3322. See Code Civ. Proc. §§ 2016-2036. Rules governing pretrial procedures were first promulgated by the Judicial Council in 1957; major changes were adopted in 1963; and significant amendments were made in 1967. See Cal. Rules of Ct., Rules 206-218. Upon recommendation of the Law Revision Commission, the Evidence Code was enacted in 1965. Cal. Stats. 1965, Ch. 299. The provisions relating to appeals in civil actions were reorganized and streamlined in 1968. Cal. Stats. 1968, Ch. 442, adding Title 13 (commencing with Section 901) to Part 2 of the Code of Civil Procedure. A modern statute on jurisdiction and service of process was enacted in 1969. Cal. Stats. 1969, Ch. 1610, adding Title 5 (commencing with Section 410.10) to Part 2 of the Code of Civil Procedure.
 2. The code pleading system was introduced in California by the Practice Act of 1851. Cal. Comp. Laws, Ch. 123, §§ 36-71. The Practice Act of 1851, which was based on the incomplete Field Code of Civil Procedure enacted in New York in 1848, was carried over into the 1872 California Code of Civil Procedure as Title 6 (commencing with Section 420) of Part 2.
 3. The Commission may study only those topics that the Legislature, by concurrent resolution, has approved for study. Govt. Code § 10335. The Commission has not requested that it be granted authority to make an overall study of pleading because it has other major projects underway that must be given priority.

JOINDER OF CAUSES OF ACTION

Background

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

4. Section 427 provides:

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

1. Contracts, express or implied. An action brought pursuant to Section 1692 of the Civil Code shall be deemed to be an action upon an implied contract within the meaning of that term as used in this section.

2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same.

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

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

5. Injuries to character.

6. Injuries to person.

7. Injuries to property.

8. Claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.

9. Any and all claims for injuries arising out of a conspiracy, whether of the same or of different character, or done at the same or different times.

The causes of action so united must all belong to one only of these classes except as provided in cases of conspiracy, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person; provided, however, that in any action brought by the husband and wife, to recover damages caused by any injury to the wife, all consequential damages suffered or sustained by

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

The Designated Categories Approach

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

the husband alone, including loss of the services of his said wife, moneys expended and indebtedness incurred by reason of such injury to his said wife, may be alleged and recovered without separately stating such cause of action arising out of such consequential damages suffered or sustained by the husband; provided, further, that causes of action for injuries to person and injuries to property, growing out of the same tort, may be joined in the same complaint, and it is not required that they be stated separately.

5. Louisell & Hazard, Pleading and Procedure 636-639 (2d ed. 1968).
6. The origin and history of the section is traced in Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 5-23 (mimeographed draft 1970).

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

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

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

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

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

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

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

Other Limitations on Joinder of Causes

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

Recommendations

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

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

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

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

11. Rule 18(a) reads as follows:

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

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

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

14. 2 Barron & Holtzoff, Federal Practice and Procedure 66 n.o.1 (1961).

15. As Professor Friedenthal points out:

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

Separate statement of causes. The requirement of Section 427 that each cause of action be separately stated should not be continued as to causes that arise out of the same transaction or occurrence. As to these causes, the requirement tends to "encourage prolixity and uncertainty in the statement of the facts constituting the cause or causes of action."¹⁶ Where the complaint is confusing because the causes of action are not separately stated, the defect can be reached by a motion to make more certain or by demurrer for uncertainty.¹⁷ The separate statement requirement does make for clarity where the cause joined arises out of a different transaction or occurrence, and as to those causes the requirement should be retained.

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

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

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

Mandatory joinder of causes. Where one person files an action against another, and either of them has a cause of action against the other arising from the same transaction or occurrence as the cause filed, he should be required to assert such cause in the action; otherwise it should be deemed waived and all rights thereon extinguished. California does not now have such a statutory requirement applicable to plaintiffs.¹⁸ However, the trial of one cause ordinarily will involve the same witnesses, if not the identical issues, as the trial of another cause arising out of the same transaction or occurrence. As a practical matter, the plaintiff seldom fails to plead all causes arising out of the same transaction or occurrence, both for the sake of convenience and because he fears that the rules of res judicata or collateral estoppel may operate to bar any causes he does not plead. The recommended rule is consistent with Section 439 of the Code of Civil Procedure which makes compulsory any counterclaim arising from the same transaction as that upon which the plaintiff's claim is based. Adoption of the rule would clarify the law avoiding the need to rely on the uncertain rules of res judicata and collateral estoppel¹⁹ to determine whether a cause is barred by failure to assert it in a prior action. More important, it would avoid the possibility that the parties to a lawsuit will fail to dispose of all claims arising out of the same transaction or occurrence in one action.

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

19. See Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 26-28 (mimeographed draft 1970).

COUNTERCLAIMS AND CROSS-COMPLAINTS

Background

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

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

Thus, the defendant's claim may qualify either as a counterclaim under Section 438, a cross-complaint under Section 442, as neither, or as both.²⁰

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

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

The technical distinctions created by the different provisions for counter-claims and for cross-complaints create problems for both the defendant and the plaintiff. The defendant must determine how he should plead his claim--as an affirmative defense, counterclaim, or cross-complaint--and also whether his claim is a compulsory counterclaim. Without regard to how the defendant designates his pleading, the plaintiff must determine whether the defendant's claim is properly an affirmative defense or counterclaim (which need not be answered) or a cross-complaint (which requires an answer). The defendant may avoid worry, and perhaps time and effort, by simply pleading his claim as both a cross-complaint and a counterclaim. This throws the problem of distinction upon plaintiff, or, if plaintiff chooses simply to answer without making distinctions, upon the court.²¹ On one hand, the present system invites confusion, which may jeopardize valid claims; on the other, a multiplicity of pleadings, which is unnecessary.

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

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

Recommendations

No useful purpose is served by the present California system of separate, but overlapping, counterclaims and cross-complaints. In contrast to the complex California scheme, in the great majority of jurisdictions any cross-claim is dealt with under a single set of rules. Under the Federal Rules of Civil Procedure²² and other modern provisions, any cause of action which one

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

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

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

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

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

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

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

party has against an opposing party may be brought as a counterclaim, regardless of its nature.²³

California should adopt a single form of pleading--to be called a cross-complaint²⁴--that would be available against plaintiffs, codefendants, and strangers, would embody the relief now available by counterclaim and cross-complaint, and would eliminate technical requirements that serve no useful purpose.

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

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

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

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

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

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

(1) The counterclaim should be abolished; the defendant should be permitted to assert any claim he has against the plaintiff in a cross-complaint, regardless of its nature. This will permit the defendant to assert causes in a cross-complaint which today meet neither the counterclaim nor cross-complaint requirements. But only a few claims--those which neither arise from the same transaction or occurrence as the plaintiff's claim nor meet the current counterclaim requirements²⁵--will be affected. There is no sound reason for excluding these claims; they can cause no more confusion than presently permitted counterclaims which are totally unrelated to the plaintiff's cause of action. Any undesirable effects that might result from this slight expansion of the claims that the defendant may assert against the plaintiff can easily be avoided by a severance of causes for trial.

(2) A person against whom a cross-complaint is filed should be required to answer. The cross-complaint will replace the present counterclaim and cross-complaint. Under existing law, an answer is required to a cross-complaint (which asserts a cause of action arising out of the same transaction as the plaintiff's cause), but none is required to a counterclaim (which may assert a cause of action completely unrelated to the plaintiff's cause). An answer to what now constitutes a counterclaim would be useful in notifying the defendant and the court which of the defendant's allegations will be controverted and what affirmative defenses the plaintiff will rely upon at the trial of the defendant's claim.

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

(3) A party against whom a cross-complaint is filed should be permitted to file a cross-complaint just as if the cross-complaint filed against him had been a complaint and should also be subject to compulsory cross-complaint rules. The existing law is unclear.²⁶

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

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

(6) Whenever a party is sued on a cause of action arising out of the same transaction or occurrence, or affecting the same property, as an unpleaded cause which the party has against either a nonadverse party or a stranger to the lawsuit, he should be permitted, along with his answer, to file a cross-complaint setting forth his cause and bringing any such stranger into the lawsuit. This principle has been completely accepted in California.²⁷

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

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

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

(8) When a cause of action asserted in a cross-complaint brought solely against a stranger to the action is severed, the court should have power to transfer such cause to a more convenient forum for trial as an independent action.²⁸ 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 nonimpleader 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. 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 to be filed in a county more convenient to him. If such a cause is severed, it is only just that the court, in its discretion, be allowed to transfer it.

28. For further discussion, see Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 67-68 (mimeographed draft 1970).

JOINDER OF PARTIES

[A discussion of the existing law and recommended changes in the provisions relating to joinder of parties--both permissive and compulsory--will be inserted here after the Commission has determined how it desires to handle the joinder of parties problems.]

CONSISTENT PROCEDURAL TREATMENT OF ORIGINAL AND CROSS-CLAIMS

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

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

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

PROPOSED LEGISLATION

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

An act to amend Section 1692 of the Civil Code, to amend Sections 117h, 117r, 389, 396, 435, 437c, 581, 626, 631.8, 666, 871.3, and 871.5 of, to add Sections 422.10, 422.20, 422.30, 422.40, and 1048.5 to, to add Chapter 2 (commencing with Section 425.10) and Chapter 3 (commencing with Section 430.10) to Title 6 of Part 2 of, to add a new chapter heading immediately preceding Section 435 of, to add a new chapter heading immediately preceding Section 437c of, and to repeal Sections 422, 430, 431, 431.5, 432, 433, 434, 437, 437a, 437b, 437d, 438, 439, 440, 441, 442, 462, and 463 of, to repeal Chapter 2 (commencing with Section 425) of Title 6 of Part 2 of, to repeal the heading for Chapter 3 (commencing with Section 430) of Title 6 of Part 2 of, to repeal the heading for Chapter 4 (commencing with Section 437) of Title 6 of Part 2 of, and to repeal Chapter 5 (commencing with Section 443) of Title 6 of Part 2 of, the Code of Civil Procedure, to amend Section 995 of the Government Code, to amend Sections 3522 and 3810 of the Revenue and Taxation Code, and to amend Sections 26304, 26305, 37161, 37162, and 51696 of the Water Code, relating to civil actions and proceedings.

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

Civil Code Section 1692 (Conforming Amendment)

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

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

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

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

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

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

Code of Civil Procedure Section 117h (Conforming Amendment)

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

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

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

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

~~Counterclaim~~ Cross-complaint of Defendant.

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

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

Code of Civil Procedure Section 117h

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

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

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

Code of Civil Procedure Section 117r (Conforming Amendment)

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

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

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

Code of Civil Procedure Section 117r

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

Code of Civil Procedure Section 389 (Amended)

Sec. 4. Section 389 of the Code of Civil Procedure is amended
to read:

Note: Section 389 is the general provision relating to necessary parties.
This section is the subject of Memorandum 70-66, but we anticipate that the
amendment to Section 389 will be incorporated into this bill.

Code of Civil Procedure Section 396 (Conforming Amendment)

Sec. 5. Section 396 of the Code of Civil Procedure is amended to read:

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

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

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

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

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

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

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

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

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

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

Code of Civil Procedure Section 422 (Repealed)

Sec. 6 . Section 422 of the Code of Civil Procedure is repealed.

~~422.--The-only-pleadings-allowed-on-the-part-of-the-plaintiff are:~~

- ~~1.--The-complaint;~~
- ~~2.--The-demurrer-to-the-answer;~~
- ~~3.--The-demurrer-to-the-cross-complaint;~~
- ~~4.--The-answer-to-the-cross-complaint;~~

~~And-on-the-part-of-the-defendant:~~

- ~~1.--The-demurrer-to-the-complaint;~~
- ~~2.--The-answer;~~
- ~~3.--The-cross-complaint;~~
- ~~4.--The-demurrer-to-the-answer-to-the-cross-complaint.~~

~~(In-justice-courts,-the-pleadings-are-not-required-to-be-in any-particular-form,-but-must-be-such-as-to-enable-a-person-of common-understanding-to-know-what-is-intended;-in-justice-courts, the-pleadings-may,-except-the-complaint,-or-cross-complaint-be oral-or-in-writing;-need-not-be-verified,-unless-otherwise-provided-in-this-title;-if-in-writing,-must-be-filed-with-the-judge; if-oral,-an-entry-of-their-substance-must-be-made-in-the-docket.)~~

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

§ 422.10. Permissible pleadings enumerated

Sec. 7 . Section 422.10 is added to the Code of Civil Procedure,
to read:

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

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

§ 422.20. Pleadings in justice courts

Sec. 8 . Section 422.20 is added to the Code of Civil Procedure,
to read:

422.20. (a) The rules stated in this section apply only to pleadings
in justice courts.

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

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

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

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

Comment. Subdivisions (a), (b), (c), and (e) of Section 422.20 continue
without substantive change the second paragraph of former Code of Civil Pro-
cedure Section 422. Subdivisions (a) and (d) continue a portion of subdivi-
sion 3 of former Code of Civil Procedure Section 426 except that subdivision
(d) applies to both complaints and cross-complaints while Section 426 by its
terms applied to "complaints."

§ 422.30. Caption for pleadings

Sec. 9 . Section 422.30 is added to the Code of Civil Procedure,
to read:

422.30. Every pleading shall contain a caption setting forth:

(a) The name of the court and county, and, in municipal and justice courts, the name of the judicial district, in which the action is brought; and

(b) The title of the action.

Comment. Section 422.30 retains the substance of the portion of subdivision 1 of former Section 426 which prescribed the caption to be used on a complaint. However, unlike the provision of former Section 426, Section 422.30 applies to all pleadings rather than merely to the complaint. This extension of the caption requirement is consistent with former practice. Cal. Rules of Ct., Rules 201(c)(Superior Court), 501 (municipal court).

§ 422.40. Names of parties in title of action

Sec. 10. Section 422.40 is added to the Code of Civil Procedure, to read:

422.40. In the complaint, the title of the action shall include the names of all the parties; but, except as otherwise provided by statute or rule of the Judicial Council, in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

Comment. Section 422.40 continues the requirement formerly found in subdivision 1 of former Section 426 that the complaint include the names of the parties and adds a new provision applying to other pleadings. The inclusion of the phrase "et al." would be "an appropriate indication of other parties" for the purposes of Section 422.40. Section 422.40 is based on the second sentence of Rule 10(a) of the Federal Rules of Civil Procedure.

§§ 425, 426, 426a, 426c, and 427 (Repealed)

Sec. 11. Chapter 2 (commencing with Section 425) of Title 6 of Part 2 of the Code of Civil Procedure is repealed.

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

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

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

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

426. The complaint must contain:

1. The title of the action, the name of the court and county, and, in municipal and justice courts, the name of the judicial district, in which the action is brought; the names of the parties to the action;

2. A statement of the facts constituting the cause of action, in ordinary and concise language;

3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated; provided, that in justice courts, a copy of the account, note, bill, bond, or instrument upon which the action is based is a sufficient complaint. If the demand be for relief on account of the alleged infringement of the plaintiff's rights in and to a literary, artistic or intellectual production, there must be attached to the complaint a copy of the production as to which the infringement is claimed and a copy of the alleged infringing production. If, by reason of bulk or the nature of the production, it is not practicable to attach a copy to the complaint, that fact and the reasons why it is impracticable to attach a copy of the production to the complaint shall be alleged; and the court, in connection with any demurrer, motion or other proceedings in the cause in which a knowledge of the contents of such production may be necessary or desirable, shall make such order for a view of the production not attached as will suit the convenience of the court, to the end that the contents of such production may be deemed to be a part of the complaint to the same extent and with the same force as though such production had been capable of being and had been attached to the complaint. The attachment of any such production in accordance with the provisions hereof shall not be deemed a making public of the production within the meaning of Section 983 of the Civil Code.

426a. In a proceeding for dissolution of marriage, legal separation, or for a declaration of void or voidable marriage, there shall be furnished to the county clerk by the petitioner at the time of filing of the petition, or within 10 days thereafter and before the date of the first hearing, that information, required to be collected by the State Registrar of Vital Statistics, in the manner specified under Chapter 6.5 (commencing with Section 10360) of Division 9 of the Health and Safety Code. The clerk shall accept the petition for filing, whether or not said information is then furnished. At any time after the filing of the petition, the respondent may also furnish such information, whether or not it has been first furnished by the petitioner. The clerk shall take all ministerial steps required of him in the proceeding, whether or not such information has been furnished; but the clerk shall advise the court, at the time set for any hearing, if at such time no party has furnished such information. In such cases, the court may decline to hear any matter encompassed within the proceeding if good cause for such failure to furnish information has not been shown.

The court's inquiry in such cases shall be confined solely to the question of the existence of good cause for not furnishing the information; and such report and the contents thereof shall not be admissible in evidence and shall not be furnished to the court.

426c. In a proceeding for dissolution of marriage the petition must set forth among other matters as near as can be ascertained the following facts:

- (1) The state or country in which the parties were married.

- (2) The date of marriage.
- (3) The date of separation.
- (4) The number of years from marriage to separation.
- (5) The number of children of the marriage, if any, and if none a statement of that fact.
- (6) The age and birth date of each minor child of the marriage.
- (7) The social security numbers of the husband and wife, if available, and if not available, a statement to such effect.

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

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

The causes of action so united must all belong to one only of these classes except as provided in cases of conspiracy, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an

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

Sec. 12 . Chapter 2 (commencing with Section 425.10) is added to Title 6 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 2. CLAIMS FOR RELIEF

Article 1. General Provisions

§ 425.10. Content of pleading demanding relief

425.10. A pleading which sets forth a claim for relief, whether it be a complaint or cross-complaint, shall contain both of the following:

(a) A statement of the facts constituting the cause of action, in ordinary and concise language.

(b) A demand for judgment for the relief to which the person asserting the cause of action claims he is entitled. If the recovery of money or damages be demanded, the amount thereof shall be stated.

Comment. Section 425.10 continues requirements formerly found in subdivision 2 and subdivision 3 (first portion) of Code of Civil Procedure Section 426. However, Section 425.10 applies to both complaints and cross-complaints while Section 426 by its terms applied to "complaints."

§ 425.20. Separate statement of causes

425.20. Causes of action, whether alleged in a complaint or cross-complaint, shall be separately stated, but all causes of action requesting relief arising from the same transaction or occurrence may be stated together.

Comment. Section 425.20 supersedes the portion of former Code of Civil Procedure Section 427 that related to the separate statement of causes of action. Section 427 provided that certain types of causes of action that often arise from the same transaction or occurrence did not need to be separately stated; Section 425.20 provides a general rule to the same effect. As to the construction to be given "same transaction or occurrence," see the Comment to Section 426.10. For criticism of the requirement of a separate statement, see 2 Witkin, California Procedure, Pleading § 497 (1954) ("In brief, the requirement of a separate statement, and its corresponding ground of demurrer, encourages prolixity and uncertainty in the statement of the facts constituting the cause or causes of action.").

Article 2. Compulsory Joinder of Causes of Action

§ 426.10. Definitions

426.10. As used in this article:

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

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

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

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

§ 426.20. Compulsory joinder of related causes of action

426.20. Except as otherwise provided in this article, if a plaintiff fails to allege in his complaint a related cause of action which, at the time of service of his complaint, he has against any party to the action, all of his rights against such party on the related cause of action not pleaded shall be deemed waived and extinguished.

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

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

§ 426.30. Compulsory cross-complaints

426.30. (a) Except as otherwise provided in this article, if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which, at the time of serving his answer to the complaint, he has against the plaintiff, all his rights against the plaintiff on the related cause of action not pleaded shall be deemed waived and extinguished.

(b) This section does not apply if either of the following are established:

(1) The court in which the action is pending does not have jurisdiction to render a personal judgment against the person who failed to plead the related cause of action.

(2) The person who failed to plead the related cause of action did not file an answer to the complaint against him.

Comment. Subdivision (a) of Section 426.30 continues the substance of the former compulsory counterclaim rule (former Code of Civil Procedure Section 439). However, since the scope of a cross-complaint is expanded to include claims which would not have met the "defeat or diminish" or "several judgment" requirements of the former counterclaim statute, the scope of the former rule is expanded by Section 426.30 to include some causes of action that formerly were not compulsory. See discussion in Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 39-56 (mimeographed draft 1970). Since "complaint" is defined in Section 426.10 to include a cross-complaint, Section 426.30 makes cross-complaints arising out of the same transaction or occurrence mandatory when the other party has filed and served a cross-complaint.

Subdivision (b) is designed to prevent unjust forfeiture of a cause of action. Paragraph (1) treats the situation where a party is not subject to a personal judgment, jurisdiction having been obtained only over property owned by him. The paragraph is similar to Rule 13(a)(2) of the Federal Rules of Civil Procedure. Although the party against whom the complaint (or cross-complaint) is filed is not required to plead his related cause of action in a cross-complaint, he may do so at his election. If, however, he does elect to file a cross-complaint, he is required under Section 426.20 (defining complaints to include cross-complaints) to assert all related causes of action in such cross-complaint.

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

§ 426.40. Exceptions to compulsory joinder requirement

426.40. This article does not apply if any of the following are established:

(a) The cause of action not pleaded requires for its adjudication the presence of additional parties over whom the court cannot acquire jurisdiction.

(b) The court in which the action is pending is prohibited by the federal or state constitution or by statute from entertaining the cause of action not pleaded.

(c) At the time the action was commenced, the cause of action not pleaded was the subject of another pending action.

Comment. Section 426.40 is required to prevent injustice. Subdivisions (a) and (b) prohibit waiver of a cause of action which cannot be maintained. Subdivision (a) uses language taken from Rule 13(a) of the Federal Rules of Civil Procedure. See also Code of Civil Procedure Section 389 (joinder of persons needed for just adjudication)[note: it is anticipated that the substance of Rule 19 of the Federal Rules of Civil Procedure will be enacted in lieu of present Section 389]. Subdivision (c) makes clear the rule regarding causes already pleaded. Subdivision (c) is the same in substance as Rule 13(a)(1) of the Federal Rules of Civil Procedure.

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

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

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

Under some circumstances, more complex situations may arise. For example, if the claim which is the subject of a state court action by the plaintiff arises out of the same transaction as a claim which the defendant may have under the state and federal anti-trust acts, the defendant must file a cross-complaint for his cause of action under the state Cartwright Act (Business and Professions Code Sections 16700 et seq.) in the proceeding in the state court to avoid waiver of that cause of action under Section 426.30 and must assert his federal cause

of action under the Sherman Anti-Trust Act in the federal court (since his cause of action under the Sherman Anti-Trust Act is one over which the federal courts have exclusive jurisdiction). Thus, in this instance, defendant's state action must be brought as a cross-complaint and his federal action must be brought as an independent action in the federal courts.

§ 426.50. Permission to assert unpleaded cause

426.50. A party who, in good faith, fails to plead a cause of action subject to the requirements of this article, whether through oversight, inadvertence, mistake, or neglect, shall, upon application to the court prior to trial, be granted leave to assert such cause unless the granting of such leave will result in substantial injustice to the opposing party.

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

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

Article 3. Permissive Joinder of Causes of Action

§ 427.10. Permissive joinder

427.10. (a) A plaintiff who in a complaint, alone or with coplaintiff, alleges a cause of action against one or more defendants may unite with such cause any other causes which he has either alone or with coplaintiffs against any of such defendants.

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

Comment. Section 427.10 supersedes former Code of Civil Procedure Section 427 and eliminates the arbitrary categories set forth in that section.

Under former Section 427, plaintiff could join causes unrelated to one another only when they happened to fall within one of the stated categories. The change provided by Section 427.10 is in line with the modern unlimited joinder-of-causes rule in effect in the federal courts and elsewhere. See Fed. R. Civ. Proc. 18(a). For further discussion, see Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 2-30 (mimeographed draft 1970).

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

Article 4. Cross-Complaints

§ 428.10. When cross-complaint permitted

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

(b) Whenever a party against whom a cause of action has been asserted in a complaint or cross-complaint has a cause of action arising from the same transaction or occurrence, or affecting the same property, as the cause brought against him, he may file a cross-complaint asserting his cause against a person alleged to be liable thereon, whether or not such person is already a party to the action.

Comment. Section 428.10 reflects the fact that a cross-complaint is the only type of pleading that may be filed to request relief by a party against whom a complaint or cross-complaint has been filed. Counterclaims have been abolished. Section 428.80.

Subdivision (a) adopts the simple rule that a party against whom a complaint or cross-complaint has been filed may bring any cause of action he has (regardless of its nature) against the party who filed the complaint or cross-complaint. There need be no factual relationship between his cause and the cause of the other party. This is the rule under the Federal Rules of Civil Procedure and other modern provisions. E.g., Fed. R. Civ. Proc. 13. If the cause arises out of the same transaction or occurrence, the cross-complaint is compulsory. See Section 426.30.

Subdivision (a) is generally consistent with prior law (former Code of Civil Procedure Section 438) which provided for a counterclaim; but, under

prior law, some causes which a party had against an opposing party did not qualify as counterclaims because they did not satisfy the "diminish or defeat" or "several judgment" requirements. For further discussion, see Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 42-48 (mimeographed draft 1970). These requirements are not continued, and subdivision (a) permits unlimited scope to a cross-complaint against an opposing party.

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

§ 428.20. Joinder of parties

428.20. Any person may be made a party to a cross-complaint if, had the cross-complaint been filed as an independent action, his joinder would have been permitted by the statutes governing joinder of parties.

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

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

§ 428.30. Joinder of causes of action against person not already a party

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

Comment. Section 428.30 is consistent with treating a cross-complaint the same as if it were a complaint in an independent action. Thus, if a defendant properly joins an outsider as a codefendant on a cross-complaint, the defendant may then assert any additional causes of action he has against the outsider. This broad principle--that, once a party is properly joined in an action because of his connection to a single cause of action, adverse parties may join any other causes against him--has been adopted in many other jurisdictions. E.g., Rule 18(a) of the Federal Rules of Civil Procedure. Although unlimited joinder of causes is permitted by Sections 428.10 and 428.30, any undesirable effects that might result from unlimited joinder may be avoided by severance of causes for trial under Section 1048 of the Code of Civil Procedure.

§ 428.40. Cross-complaint in same document as answer

428.40. If the cross-complaint is against only persons who were previously parties to the action, it may but need not be included in the same document as the answer to the complaint or cross-complaint of the party against whom it is filed. If the cross-complaint is against any person not previously a party to the action, it shall be a separate document.

Comment. Section 428.40 permits a cross-complaint to be included in the same document as the answer if no new parties are being brought into the action. This is generally consistent with prior practice where a counterclaim was a part of the answer. Nevertheless, the person filing the cross-complaint may make it a separate document if he wishes. If any of the parties against whom the cross-complaint is brought is not already a party to the action, the cross-complaint is required to be a separate document.

§ 428.50. Cross-complaint filed after answer only with leave of court

428.50. Leave of court is required to file any cross-complaint except one filed before or at the same time as the answer to the complaint or cross-complaint which contains the cause of action to which the proposed cross-complaint is directed. Such leave may be granted in the interest of justice at any time during the course of the action.

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

§ 428.60. Service of cross-complaint

428.60. A cross-complaint must be served on the parties affected thereby. If any party affected by a cross-complaint has not appeared in the action, a summons upon the cross-complaint shall be issued and served upon him in the same manner as upon commencement of an original action.

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

§ 428.70. Rights of "third-party defendants"

428.70. (a) As used in this section:

(1) "Third-party plaintiff" means a person against whom a cause of action has been asserted in a complaint or cross-complaint, who claims the right to recover all or part of any amounts for which he may be held liable on such cause of action from a third person, and who files a cross-complaint stating such claim as a cause of action against the third person

(2) "Third-party defendant" means the person who is alleged in a cross-complaint filed by a third-party plaintiff to be liable to the third-party plaintiff if the third-party plaintiff is held liable on the claim against him.

(b) In addition to the other rights and duties a third-party defendant has under this article, he may, at the time he files his answer to the cross-complaint, file as a separate document a special answer alleging against the person who asserted the cause of action against the third-party plaintiff any defenses which the third-party plaintiff has to such cause of action. The special answer shall be served on the third-party plaintiff and on the person who asserted the cause of action against the third-party plaintiff.

Comment. Section 428.70 makes clear that, in addition to all rights and duties of a party against whom a cross-complaint has been filed, a third-party defendant has the right to prevent collusion against him by asserting all defenses which the third-party plaintiff could assert against the party who pleaded the cause of action against the third-party plaintiff. Cf. Fed. R. Civ. Proc. 14.

§ 428.80. Counterclaim abolished

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

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

Article 5. Contents of Documents in Particular Actions or Proceedings

§ 429.10. Petition in proceeding for dissolution of marriage

429.10. In a proceeding for dissolution of marriage, the petition must set forth among other matters as near as can be ascertained the following facts:

- (a) The state or country in which the parties were married.
- (b) The date of marriage.
- (c) The date of separation.
- (d) The number of years from marriage to separation.
- (e) The number of children of the marriage, if any, and if none a statement of that fact.
- (f) The age and birth date of each minor child of the marriage.
- (g) The social security numbers of the husband and wife, if available and if not available, a statement to such effect.

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

§ 429.20. Additional information required in domestic relations cases

429.20. (a) In a proceeding for dissolution of marriage, legal separation, or for a declaration of void or voidable marriage, there shall be furnished to the county clerk by the petitioner at the time of filing of the petition, or within 10 days thereafter and before the date of the first hearing, that information, required to be collected by the State Registrar of Vital Statistics, in the manner specified under Chapter 6.5 (commencing with Section 10360) of Division 9 of the Health and Safety Code. The clerk shall accept the petition for filing, whether or not the information is then furnished. At any time after the filing of the petition, the respondent may also furnish the information, whether or not it has been first furnished by the petitioner.

(b) The clerk shall take all ministerial steps required of him in the proceeding, whether or not the information required by this section has been furnished; but the clerk shall advise the court, at the time set for any hearing, if at such time no party has furnished the information. In such cases, the court may decline to hear any matter encompassed within the proceeding if good cause for such failure to furnish the information has not been shown. The court's inquiry in such cases shall be confined solely to the question of the existence of good cause for not furnishing the information; and such report and the contents thereof shall not be admissible in evidence and shall not be furnished to the court.

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

§ 429.30. Action for infringement of rights in literary, artistic, or intellectual production

429.30. (a) As used in this section:

- (1) "Complaint" includes a cross-complaint.
- (2) "Plaintiff" includes the person filing a cross-complaint.

(b) If the complaint contains a demand for relief on account of the alleged infringement of the plaintiff's rights in and to a literary artistic, or intellectual production, there must be attached to the complaint a copy of the production as to which the infringement is claimed and a copy of the alleged infringing production. If, by reason of bulk or the nature of the production, it is not practicable to attach a copy to the complaint, that fact and the reasons why it is impracticable to attach a copy of the production to the complaint shall be alleged; and the court, in connection with any demurrer, motion, or other proceeding in the cause in which a knowledge of the contents of such production may be necessary or desirable, shall make such order for a view of the production not attached as will suit the convenience of the court, to the end that the contents of such production may be deemed to be a part of the complaint to the same extent and with the same force as though such production had been capable of being and had been attached to the complaint. The attachment of any such production in accordance with the provisions of this section shall not be deemed a making public of the production within the meaning of Section 983 of the Civil Code.

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

Sec. 13 . The heading for Chapter 3 (commencing with Section 430)
of Title 6 of Part 2 of the Code of Civil Procedure is repealed.

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

§ 430 (Repealed)

Sec. 14. Section 430 of the Code of Civil Procedure is repealed.

~~430.--The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, or from any matter of which the court must or may take judicial notice, either:~~

~~1.--That the court has no jurisdiction of the person of the defendant, or the subject of the action;~~

~~2.--That the plaintiff has not legal capacity to sue;~~

~~3.--That there is another action pending between the same parties for the same cause;~~

~~4.--That there is a defect or misjoinder of parties plaintiff or defendant;~~

~~5.--That several causes of action have been improperly united, or not separately stated;~~

~~6.--That the complaint does not state facts sufficient to constitute a cause of action;~~

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

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

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

§ 431 (Repealed)

Sec. 15. Section 431 of the Code of Civil Procedure is repealed.

~~431.--The-demurrer-must-distinctly-specify-the-grounds-upon which-any-of-the-objections-to-the-complaint-are-taken.--Unless it-dees-so,-it-may-be-disregarded.--It-may-be-taken-to-the-whole complaint,-or-to-any-of-the-causes-of-action-stated-therein,-and the-defendant-may-demur-and-answer-at-the-same-time.~~

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

§ 431.5 (Repealed)

Sec. 16. Section 431.5 of the Code of Civil Procedure is repealed.

~~431.5.--When the ground of a demurrer is based on a matter of which the court may take judicial notice pursuant to Sections 452 or 453 of the Evidence Code, such matter must be specified in the demurrer, or in the supporting points and authorities for the purpose of invoking such notice, except as the court may otherwise permit.~~

Comment. Section 431.5 is superseded by Section 430.70.

Sec. 17 . Chapter 3 (commencing with Section 430.10) is added to Title 6 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 3. OBJECTIONS TO PLEADINGS; DENIALS AND DEFENSES

Article 1. Objections to Pleadings

§ 430.10. Grounds for objection to complaint or cross-complaint

430.10. The party against whom a complaint or cross-complaint has been filed may object to the pleading on any one or more of the following grounds:

- (a) The court has no jurisdiction over his person.
- (b) The court has no jurisdiction of the subject of the cause of action alleged in the pleading.
- (c) The person who filed the pleading does not have the legal capacity to sue.
- (d) There is another action pending between the same parties on the same cause of action.
- (e) There is a defect or misjoinder of parties.
- (f) Several causes of action that should have been separately stated have not been separately stated.
- (g) The pleading does not state facts sufficient to constitute a cause of action.
- (h) The pleading is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.
- (i) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written or oral.

Comment. Section 430.10 continues without substantive change the grounds for objection to a complaint by demurrer (former Code of Civil Procedure Section 430) of answer (former Code of Civil Procedure Section 433). Section 430.10 extends the provisions of former Code of Civil Procedure Section 430 to cross-complaints (which now include claims that would have been counterclaims under former law).

§ 430.20. Grounds for objection to answer

430.20. A party against whom an answer has been filed may object to the answer upon any one or more of the following grounds:

- (a) The answer does not state facts sufficient to constitute a defense.
- (b) The answer is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.
- (c) Where the answer pleads a contract, it cannot be ascertained from the answer whether the contract is written or oral.

Comment. Section 430.20 continues without substantive change the portions of former Code of Civil Procedure Section 444 that specified the grounds for objection to the answer except that the grounds for objection to what formerly would have been a counterclaim are now the same as the grounds for objecting to a complaint. See Section 430.10.

§ 430.30. When objections made by demurrer or answer

430.30. (a) When any ground for objection to a complaint, cross-complaint, or answer appears on the face thereof, or from any matter of which the court must or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading.

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

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

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

§ 430.40. Time to demur

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

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

(1) Within 10 days after service of the cross-complaint if the person who demurs has previously appeared in the action.

(2) Within the time required in the summons to answer if the person who demurs has not previously appeared in the action.

(c) A party who has filed a complaint or cross-complaint may, within 10 days after service of the answer to his pleading, demur to the answer.

Comment. Section 430.40 is **consistent** with the times specified in former Sections 430 and 443 of the Code of Civil Procedure. For new parties brought into the action on a cross-complaint, the times are consistent with the practice under former Code of Civil Procedure Section 442.

§ 430.50. Demurrer may be taken to all or part of pleading

430.50. (a) A demurrer to a complaint or cross-complaint may be taken to the whole complaint or cross-complaint or to any of the causes of action stated therein.

(b) A demurrer to an answer may be taken to the whole answer or to any one or more of the several defenses set up in the answer.

Comment. Section 430.50 is consistent with prior law but provides specifically that cross-complaints are treated the same as complaints. See former Code of Civil Procedure Sections 431 (complaints) and 443 (answers).

§ 430.60. Statement of grounds for objection

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

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

§ 430.70. Judicial notice

430.70. When the ground of demurrer is based on a matter of which the court may take judicial notice pursuant to Section 452 or 453 of the Evidence Code, such matter must be specified in the demurrer, or in the supporting points and authorities for the purpose of invoking such notice, except as the court may otherwise permit.

Comment. Section 430.70 continues without change the provisions of former Code of Civil Procedure Section 431.5.

§ 430.80. Objections waived by failure to object

430.80. If the party against whom a complaint or cross-complaint has been filed fails to object to the pleading, either by demurrer or answer, he is deemed to have waived the objection unless it is an objection that the court has no jurisdiction of the subject of the cause of action alleged in the pleading or an objection that the pleading does not state facts sufficient to constitute a cause of action.

Comment. Section 430.80 is the same in substance as former Code of Civil Procedure Section 434 except that Section 430.80 makes clear that the rule applies to objections to cross-complaints.

Article 2. Denials and Defenses

§ 431.10. "Material allegation" defined

431.10. A material allegation in a pleading is one essential to the claim or defense and which could not be stricken from the pleading without leaving it insufficient.

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

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§ 431.20. Admission of material allegation by failure to deny

431.20. (a) Every material allegation of the complaint or cross-complaint, not controverted by the answer, shall, for the purposes of the action, be taken as true.

(b) The statement of any new matter in the answer, in avoidance or constituting a defense, must, on the trial, be deemed controverted by the opposite party.

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

§ 431.30. Form and content of answer

431.30. (a) As used in this section:

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

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

(b) The answer to a complaint shall contain:

(1) A general or specific denial of the material allegations of the complaint controverted by the defendant.

(2) A statement of any new matter constituting a defense.

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

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

(e) If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer and place his denial on that ground.

(f) The denials of the allegations controverted may be stated by reference to specific paragraphs or parts of the complaint; or by express admission of certain allegations of the complaint with a general denial of all of the allegations not so admitted; or by denial of certain allegations upon information and belief, or for lack of sufficient information or belief, with a general denial of all allegations not so denied or expressly admitted.

(g) The defenses shall be separately stated, and the several defenses must refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished.

§ 431.30

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

§ 431.40. General denial where amount involved \$500 or less

431.40. (a) In any action on which the demand, exclusive of interest, or the value of the property in controversy does not exceed five hundred dollars (\$500), the defendant at his option, in lieu of demurrer or other answer, may file a general written denial verified by his own oath and a brief statement, similarly verified, of any new matter constituting a defense.

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

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

§ 431.50. Pleading exemption from liability under insurance policy

431.50. In an action to recover upon a contract of insurance wherein the defendant claims exemption from liability upon the ground that, although the proximate cause of the loss was a peril insured against, the loss was remotely caused by or would not have occurred but for a peril excepted in the contract of insurance, the defendant shall in his answer set forth and specify the peril which was the proximate cause of the loss, in what manner the peril excepted contributed to the loss or itself caused the peril insured against, and if he claim that the peril excepted caused the peril insured against, he shall in his answer set forth and specify upon what premises or at what place the peril excepted caused the peril insured against.

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

§ 431.60. Recovery of personal property

431.60. When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property, and the officer taking the property, or the sureties on any bond or undertaking is sued for taking the same, the officer or sureties may in their answer set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made or that the value in the affidavit stated was inserted by mistake, the court shall disregard the value as stated in the affidavit and give judgment according to the right of possession of said property at the time the affidavit was made.

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

§ 431.70. Set-off

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

Comment. Section 431.70 continues the substantive effect of former Code of Civil Procedure Section 440. Section 431.70, however, is expressly limited to cross-demands for money and specifies the procedure for pleading the defense provided by the section, thus preserving the historical purposes of the statute. See generally Comment, 53 Cal. L. Rev. 224 (1965). The last sentence is included to eliminate any possible inconsistency between Section 431.70 and the compulsory cross-complaint provision (Section 426.30). When a cross-demand is otherwise barred by the statute of limitations, no other action may be had on it except by way of set-off as provided by this section. If, however, the cross-demand is still viable and the party asserting it claims any part of it in excess of the claim against him, he may make his claim by way of cross-complaint, and he must do so where his cross-demand arises out of the same transaction as the claim against him or his claim for excess will be extinguished under Section 426.30. For further discussion, see Friedenthal, The Need to Revise California Provisions Regarding Joinder of Claims, Counterclaims, and Cross-Complaints 56-60 (mimeographed draft 1970).

§ 432 (Repealed)

Sec. 18. Section 432 of the Code of Civil Procedure is repealed.

~~432.--If the complaint is amended, a copy of the amendments must be filed, or the Court may, in its discretion, require the complaint as amended to be filed, and a copy of the amendments or amended complaint must be served upon the defendants affected thereby.--The defendant must answer the amendments, or the complaint as amended, within ten days after service thereof, or such other time as the Court may direct, and judgment by default may be entered upon failure to answer, as in other cases.~~

Comment. Section 432 is continued without change as Section 471.5.

§ 433 (Repealed)

Sec. 19. Section 433 of the Code of Civil Procedure is repealed.

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

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

§ 434 (Repealed)

Sec. 20. Section 434 of the Code of Civil Procedure is repealed.

~~434. --OBJECTIONS, --WHEN-DEEMED-WAIVED. --If no objection be taken, --either by demurrer or answer, --the defendant must be deemed to have waived the same, --excepting only the objection to the jurisdiction of the Court, --and the objection that the complaint does not state facts sufficient to constitute a cause of action.~~

Comment. Section 434 is superseded by Section 430.80.

Sec. 21. A new chapter heading is added immediately preceding Section 435 of the Code of Civil Procedure, to read:

CHAPTER 4. MOTION TO STRIKE

§ 435. Motion to strike

Sec. 22. Section 435 of the Code of Civil Procedure is amended to read:

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

(b) ~~The defendant~~ Any party , within the time ~~required in summons~~ he is allowed to answer a complaint , either at the time he demurs to the complaint, or without demurring, may serve and file a notice of motion to strike the whole or any part of the complaint. The notice of motion to strike shall specify a hearing date not more than 15 days from the filing of said the notice, plus any additional time that the ~~defendant~~ party , as moving party, is otherwise required to give the ~~plaintiff~~ other party . If ~~defendant~~ a party serves and files such a notice of motion without demurring, his time to answer the complaint ~~shall be~~ is extended and no default may be entered against him, except as provided in Sections 585 and 586, but the filing of such a notice of motion shall not extend the time within which to demur.

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

Sec.23 . The heading for Chapter 4 (commencing with Section 437)
of Title 6 of Part 2 of the Code of Civil Procedure is repealed.

~~CHAPTER 4. THE ANSWER~~

§ 437 (Repealed)

Sec. 24. Section 437 of the Code of Civil Procedure is repealed.

~~437.--The answer of the defendant shall contain:~~

~~1.--A general or specific denial of the material allegations of the complaint controverted by the defendant.~~

~~2.--A statement of any new matter constituting a defense or counterclaim.~~

~~Except in justice courts, if the complaint be verified, the denial of the allegations controverted must be made positively, or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. The denials of the allegations controverted may be stated by reference to specific paragraphs or parts of the complaint; or by express admission of certain allegations of the complaint with a general denial of all of the allegations not so admitted; or by denial of certain allegations upon information and belief, or for lack of sufficient information or belief, with a general denial of all allegations not so denied or expressly admitted. If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint.~~

Comment. Section 437 is superseded by Section 431.30.

§ 437a (Repealed)

Sec.25 . Section 437a of the Code of Civil Procedure is repealed.

~~437a:--In-an-action-to-recover-upon-a-contract-of-insurance wherein-the-defendant-claims-exemption-from-liability-upon-the ground-that,-although-the-proximate-cause-of-the-loss-was-a-peril insured-against,-the-loss-was-remotely-caused-by-or-would-not-have occurred-but-for-a-peril-excepted-in-the-contract-of-insurance; the-defendant-shall-in-his-answer-set-forth-and-specify-the-peril which-was-the-proximate-cause-of-the-loss,-in-what-manner-the peril-excepted-contributed-to-the-loss-or-itself-caused-the-peril insured-against,-and-if-he-claim-that-the-peril-excepted-caused the-peril-insured-against,-he-shall-in-his-answer-set-forth-and specify-upon-what-premises-or-at-what-place-the-peril-excepted caused-the-peril-insured-against.~~

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

§ 437b (Repealed)

Sec. 26. Section 437b of the Code of Civil Procedure is repealed.

~~437b.--In any action in which the demand, exclusive of interest, or the value of the property in controversy, does not exceed five hundred dollars (\$500), the defendant at his option, in lieu of demurrer and other answer, may file a general written denial verified by his own oath and a brief statement similarly verified, of any new matter constituting a defense or counterclaim.~~

Comment. Section 437b is superseded by Section 431.40.

Sec. 27. A new chapter heading is added immediately preceding Section 437c of the Code of Civil Procedure, to read:

CHAPTER 5. SUMMARY JUDGMENTS

§ 437c (Amended)

Sec. 28. Section 437c of the Code of Civil Procedure is amended to read:

437c. In superior courts and municipal courts if it is claimed the action has no merit, or that there is no defense to the action, on motion of either party, after notice of the time and place thereof in writing served on the other party at least 10 days before such motion, supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out or the complaint may be dismissed and judgment may be entered, in the discretion of the court unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. A judgment so entered is an appealable judgment as in other cases. The word "action" as used in this section shall be construed to include all types of proceedings. The word "~~answer~~" "complaint" as used in this section shall be construed to include a counterclaim and cross-complaint. The phrase "plaintiff's claim" as used in this section includes a cause of action, asserted by either plaintiff or defendant, in a cross-complaint. The filing of a motion under this section shall not extend the time within which a party must otherwise file an answer, demurrer, cross-complaint, or motion to strike.

The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff or defendant to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that affiant, if sworn as a witness, can testify competently thereto.

The affidavit or affidavits in opposition to said motion shall be made by the plaintiff or defendant, or by any other person having knowledge of the facts, and together shall set forth facts showing that the party has a good and substantial defense to the plaintiff's action claim (or to a portion thereof) or that a good cause of action exists upon the merits. The facts stated in each affidavit shall be within the personal knowledge of the affiant, shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto.

When the party resisting the motion appears in a representative capacity, such as a trustee, guardian, executor, administrator, or receiver, then the affidavit in opposition by such representative may be made upon his information and belief.

If it appear that such defense applies only to a part of the plaintiff's claim, or that a good cause of action does not exist as to a part of the plaintiff's claim, or that any part of a claim is admitted or any part of a defense is conceded, the court shall, by order, so declare, and the claim or defense shall be deemed established as to so much thereof as is by such order declared and the cause of action may be severed accordingly, and the action may proceed as to the issues remaining between the parties. No judgment

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shall be entered prior to the termination of such action but the judgment in such action shall, in addition to any matters determined in such action, award judgment as established by the proceedings herein provided for. A judgment entered under this section is an appealable judgment as in other cases.

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

§ 437d (Repealed)

Sec. 29. Section 437d of the Code of Civil Procedure is repealed.

~~437d.--When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property, and the officer taking the property, or the sureties on any bond or undertaking is sued for taking the same, the officer or sureties may in their answer set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made, or that the value in the affidavit stated was inserted by mistake, the court shall disregard the value as stated in the affidavit and give judgment according to the right of possession of said property at the time the affidavit was made.~~

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

§ 438 (Repealed)

Sec. 30. Section 438 of the Code of Civil Procedure is repealed.

~~438.--The-counterclaim-mentioned-in-section-437-must-tend-to diminish-or-defeat-the-plaintiff's-recovery-and-must-exist-in-favor of-a-defendant-and-against-a-plaintiff-between-whom-a-several-judgment might-be-had-in-the-action; provided,--that-the-right-to-maintain-a counterclaim-shall-not-be-affected-by-the-fact-that-either-plaintiff's or-defendant's-claim-is-secured-by-mortgage-or-otherwise,-nor-by-the fact-that-the-action-is-brought,-or-the-counterclaim-maintained,-for-the foreclosure-of-such-security;-and-provided-further,-that-the-court-may, in-its-discretion,-order-the-counterclaim-to-be-tried-separately-from the-claim-of-the-plaintiff.~~

Comment. Except for the last proviso, Section 438 is superseded by Section 428.10. The last proviso is omitted as unnecessary since it merely duplicated Section 1048.

§ 439 (Repealed)

Sec. 31 . Section 439 of the Code of Civil Procedure is repealed.

~~439.--If-the-defendant-omits-to-set-up-a-counterclaim-upon-a
cause-arising-out-of-the-transaction-set-forth-in-the-complaint-as
the-foundation-of-the-plaintiff's-claim, neither-he-nor-his-assignee
can-afterwards-maintain-an-action-against-the-plaintiff-therefor.~~

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

§ 440 (Repealed)

Sec. 32 . Section 440 of the Code of Civil Procedure is repealed.

~~440.--When-cross-demands-have-existed-between-persons-under-such
circumstances-that,-if-one-had-brought-an-action-against-the-other,-a
counterclaim-could-have-been-set-up,-the-two-demands-shall-be-deemed
compensated,-so-far-as-they-equal-each-other,-and-neither-can-be
deprived-of-the-benefit-thereof-by-the-assignment-or-death-of-the-other.~~

Comment. Section 440 is superseded by Section 431.70.

§ 441 (Repealed)

Sec. 33. Section 441 of the Code of Civil Procedure is repealed.

~~441.--ANSWER-MAY-CONTAIN-SEVERAL-GROUNDS-OF-DEFENSE.--DEFENDANT
MAY-ANSWER-PART-AND-DEMUR-TO-PART-OF-COMPLAINT.--The-defendant-may-set
forth-by-answer-as-many-defenses-and-counter-claims-as-he-may-have.
They-must-be-separately-stated,-and-the-several-defenses-must-refer-to
the-causes-of-action-which-they-are-intended-to-answer,-in-a-manner-by
which-they-may-be-intelligibly-distinguished.--The-defendant-may-also
answer-one-or-more-of-the-several-causes-of-action-stated-in-the
complaint-and-demur-to-the-residue.~~

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

§ 442 (Repealed)

Sec. 34. Section 442 of the Code of Civil Procedure is repealed.

~~442.--Whenever the defendant seeks affirmative relief against any person, whether or not a party to the original action, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto, or file a notice of motion to strike the whole or any part thereof, as to the original complaint.--If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action.~~

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

§§ 443 and 444 (Repealed)

Sec. 35 . Chapter 5 (commencing with Section 443) of Title 6 of Part 2 of the Code of Civil Procedure is repealed.

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

| <u>Old Section</u> | <u>New Provision</u> |
|--------------------|-------------------------|
| 443 | Sections 430.40, 430.50 |
| 444 | Sections 430.10-430.30 |

Note: The repealed sections read as follows:

443. The plaintiff may within ten days after the service of the answer demur thereto, or to one or more of the several defenses or counterclaims set up therein.

444. The demurrer may be taken upon one or more of the following grounds:

1. That several causes of counterclaim have been improperly joined, or not separately stated;
2. That the answer does not state facts sufficient to constitute a defense or counterclaim;
3. That the answer is uncertain; "uncertain", as used herein, includes ambiguous and untelligible; or
4. That, where the answer pleads a contract, it cannot be ascertained from the answer, whether or not the contract is written or oral.

§ 462

§ 462 (Repealed)

Sec. 36. Section 462 of the Code of Civil Procedure is repealed.

~~462.--ALLEGATIONS-NOT-DENIED,-WHEN-TO-BE-DEEMED-TRUE,-WHEN-TO-BE
DEEMED-CONTROVERTED.--Every-material-allegation-of-the-complaint,-not
controverted-by-the-answer,-must,-for-the-purposes-of-the-action,-be
taken-as-true;-the-statement-of-any-new-matter-in-the-answer,-in
avoidance-or-constituting-a-defense-or-counter-claim,-must,-on-the
trial,-be-deemed-controverted-by-the-opposite-party.~~

Comment. Section 462 is superseded by Section 431.20.

§ 463

§ 463 (Repealed)

Sec. 37 . Section 463 of the Code of Civil Procedure is repealed.

~~463.--A-MATERIAL-ALLEGATION-DEFINED.--A-material-allegation-in-a
pleading-is-one-essential-to-the-claim-or-defense,-and-which-could-not
be-stricken-from-the-pleading-without-leaving-it-insufficient.~~

Comment. Section 463 is superseded by Section 431.10.

§ 471.5. Amendment of complaint; filing and service

Sec. 38. Section 471.5 is added to the Code of Civil Procedure, to read:

471.5. If the complaint is amended, a copy of the amendments must be filed, or the court may, in its discretion, require the complaint as amended to be filed, and a copy of the amendments or amended complaint must be served upon the defendants affected thereby. The defendant must answer the amendments, or the complaint as amended, within ten days after service thereof, or such other time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases.

Comment. Section 471.5 is the same as former Code of Civil Procedure Section 432.

Code of Civil Procedure Section 581 (Conforming Amendment)

Sec. 39 . Section 581 of the Code of Civil Procedure is amended to read:

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

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

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

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

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

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

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

Code of Civil Procedure Section 626 (Conforming Amendment)

Sec. 40 . Section 626 of the Code of Civil Procedure is amended to read:

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

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

Code of Civil Procedure Section 631.8 (Conforming Amendment)

Sec. 41. Section 631.8 of the Code of Civil Procedure is amended to read:

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

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

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

Code of Civil Procedure Section 666 (Conforming Amendment)

Sec. 42. Section 666 of the Code of Civil Procedure is amended to read:

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

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

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

Code of Civil Procedure Section 871.3 (Conforming Amendment)

Sec. 42.1. Section 871.3 of the Code of Civil Procedure is amended to read:

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

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

Code of Civil Procedure Section 871.5 (Conforming Amendment)

Sec. 42.2. Section 871.5 of the Code of Civil Procedure is amended to read:

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

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

§ 1048.5

§ 1048.5. Transfer to another court for trial when cross-claim severed for trial

Sec. 43. Section 1048.5 is added to the Code of Civil Procedure, to read:

1048.5. If a cause of action alleged in a cross-complaint, other than one described in Section 428.70, is brought solely against a person or persons who were not previously parties to the action before the court and such cause of action is severed for trial under Section 1048, the court may, in its discretion, in the interest of justice, transfer the cause to another court which would have had subject jurisdiction over it had it been asserted as an independent action. The court to which the transfer is made shall deal with the matter as if it had been brought as an independent action.

Comment. Section 1048.5 is added to permit the court not only to sever matters for trial, but to sever matters into two independent actions in order that it may then transfer part of the original action to another court. The power is limited strictly to a nonimpleader cause of action alleged in a cross-complaint against a person who is a stranger to the action. Once such a cause of action is severed for trial, so that any advantages of original joinder are lost, it may be unfair for the court to retain such an action. If so, the severed cause should be sent to the most convenient court having jurisdiction over it. Thus, if the cause alleged in the cross-complaint if brought as an independent proceeding would be one cognizable in municipal court, it shall be transferred to a municipal court most convenient to the parties, even though the original action is one in a superior court.

Commercial Code Section 1201

NOTE: Commercial Code Section 1201, set out below, contains various provisions that might be conformed to reflect the revisions made in the pleading rules. However, in view of the length of the section and in recognition of the fact that it is part of a Uniform Act, the staff recommends against conforming the section. We set out the section for your examination and decision. We have noted the provisions that might be conformed.

§ 1201. General definitions

Subject to additional definitions contained in the subsequent divisions of this code which are applicable to specific divisions or chapters thereof, and unless the context otherwise requires, in this code:

NOTE →

(1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, setoff, suit in equity and any other proceedings in which rights are determined.

(2) "Aggrieved party" means a party entitled to resort to a remedy.

(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this code (Sections 1205 and 2208). Whether an agreement has legal consequences is determined by the

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provisions of this code, if applicable; otherwise by the law of contracts (Section 1103). (Compare "contract.")

(4) "Bank" means any person engaged in the business of banking.

(5) "Bearer" means the person in possession of an instrument, document of title or security payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and which, by its terms, evidences the intention of the issuer that the person entitled under the document (Section 7403(4)) has the right to receive, hold and dispose of the document and the goods it covers. Designation of a document by the issuer as a "bill of lading" is conclusive evidence of such intention. "Bill of lading" includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes a consignment note or air waybill.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.

(9) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(10) "Conspicuous." A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: **NONNEGOTIABLE BILL OF LADING**) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

(11) "Contract" means the total legal obligation which results from the parties' agreement as affected by this code and any other applicable rules of law. (Compare "agreement.")

(12) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.

NOTE → (13) "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.

(14) "Delivery" with respect to instruments, documents of title, chattel paper or securities means voluntary transfer of possession.

(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt, gin ticket, compress receipt, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person entitled under the document (Section 7403(4)) has the right to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(16) "Fault" means wrongful act, omission or breach.

(17) "Fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this code to the extent that under a particular agreement or document unlike units are treated as equivalents.

(18) "Genuine" means free of forgery or counterfeiting.

(19) "Good faith" means honesty in fact in the conduct or transaction concerned.

(20) "Holder" means a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank.

(21) To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.

(22) "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.

(23) A person is "insolvent" who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

(24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency.

(25) A person has "notice" of a fact when

(a) He has actual knowledge of it; or

(b) He has received a notice or notification of it; or

(c) From all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this code.

(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when

(a) It comes to his attention; or

(b) It is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

(27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

(28) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(29) "Party," as distinct from "third party," means a person who has engaged in a transaction or made an agreement within this division.

(30) "Person" includes an individual or an organization. (See Section 1102.)

(31) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property.

(32) "Purchaser" means a person who takes by purchase.

(33) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(34) "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.

(35) "Rights" includes remedies.

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(37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2401) is limited in effect to a reservation of a "security interest." The term also includes any interest of a buyer of accounts, chattel paper, or contract rights which is subject to Division 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 2301 is not a "security interest," but a buyer may also acquire a "security interest" by complying with Division 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (Section 2326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

(38) "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

(39) "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.

(40) "Surety" includes guarantor.

(41) "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.

(42) "Term" means that portion of an agreement which relates to a particular matter.

(43) "Unauthorized" signature or indorsement means one made without actual, implied or apparent authority and includes a forgery.

(44) "Value." Except as otherwise provided with respect to negotiable instruments and bank collections (Sections 3301, 4208 and 4209) a person gives "value" for rights if he acquires them

(a) In return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a chargeback is provided for in the event of difficulties in collection; or

(b) As security for or in total or partial satisfaction of a pre-existing claim; or

(c) By accepting delivery pursuant to a pre-existing contract for purchase; or

(d) Generally, in return for any consideration sufficient to support a simple contract.

(45) "Warehouse receipt" means a document evidencing the receipt of goods for storage issued by a warehouseman (Section 7102), and which, by its terms, evidences the intention of the issuer that the person entitled under the document (Section 7403(4)) has the right to receive, hold and dispose of the document and the goods it covers. Designation of a document by the issuer as a "warehouse receipt" is conclusive evidence of such intention.

(46) "Written" or "writing" includes printing, typewriting or any other intentional reduction to tangible form.

(As amended Stats.1987, c. 700, p. 2202, § 2.)

Government Code Section 995 (Conforming Amendment)

Sec. 44. Section 995 of the Government Code is amended to read:

995. Except as otherwise provided in Sections 995.2 and 995.4, upon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity.

For the purposes of this part, a ~~cross-action; counterclaim or~~ cross-complaint against an employee or former employee shall be deemed to be a civil action or proceeding brought against him.

Comment. The amendment of Section 995 deletes the reference to a "cross-action" or "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80. The reference to "cross-action" is unnecessary.

Revenue and Taxation Code Section 3522 (Conforming Amendment)

Sec. 45. Section 3522 of the Revenue and Taxation Code is amended to read:

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

Comment. The amendment of Section 3522 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80.

Revenue and Taxation Code Section 3810 (Conforming Amendment)

Sec. 46. Section 3810 of the Revenue and Taxation Code is amended to read:

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

Comment. The amendment of Section 3810 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80.

Water Code Section 26304 (Conforming Amendment)

Sec. 47. Section 26304 of the Water Code is amended to read:

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

Comment. The amendment of Section 26304 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80.

Water Code Section 26305 (Conforming Amendment)

Sec. 48. Section 26305 of the Water Code is amended to read:

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

Comment. The amendment of Section 26305 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80.

Water Code Section 37161 (Conforming Amendment)

Sec. 49. Section 37161 of the Water Code is amended to read:

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

Comment. The amendment of Section 37161 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80.

Water Code Section 37162 (Conforming Amendment)

Sec. 50. Section 37162 of the Water Code is amended to read:

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

Comment. The amendment of Section 37162 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80.

Water Code Section 51696 (Conforming Amendment)

Sec. 51. Section 51696 of the Water Code is amended to read:

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

Comment. The amendment of Section 51696 merely deletes the reference to a "counterclaim." Counterclaims have been abolished; claims that formerly were asserted as counterclaims are now asserted as cross-complaints. See Code of Civil Procedure Section 428.80.

Operative Date; Application to Pending Actions

Sec. 52. This act becomes operative on July 1, 1972, and applies only to actions commenced on or after that date. Any action commenced before July 1, 1972, is governed by the law as it would exist had this act not been enacted.

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