

#36.80

7/5/73

## First Supplement to Memorandum 73-56

Subject: Study 36.80 - Condemnation (Procedural Aspects: Cross-Complaints)

Attached to this memorandum (Exhibit I-pink) are two sections relating to cross-complaints. We are presenting them separately because we have concluded that it would be more desirable to include these provisions as conforming changes in the general provisions relating to civil procedure than as special provisions in the Eminent Domain Law. Nevertheless, we hope that they can be tentatively approved at this time. They are discussed in more detail below.

Section 426.70. This is a new section to be added to the article relating to compulsory cross-complaints. Section 426.30 provides generally that, if a party against whom a complaint is filed fails to allege by cross-complaint any related cause of action, he may not thereafter assert such cause of action in any other action. Section 426.60 makes Section 426.30 inapplicable in any "special proceeding." Nevertheless, the California Supreme Court (without mentioning either provision) has held that any right to damages caused by precondemnation announcements is lost if not raised in the subsequent condemnation proceeding. Klopping v. City of Whittier, 8 Cal.3d 39 (1972). The staff believes that Klopping states a desirable policy decision but one which should be reflected in statutory form. We have accordingly provided in subdivision (a) of Section 426.70 that the provisions relating to compulsory cross-complaints do apply in an eminent domain proceeding.

Subdivision (b) of Section 426.70 is intended to implement the direction that a cross-complaint for damages against the condemnor-public entity may be asserted without the necessity of filing a prior claim with such public entity. See Comment to subdivision (b).

Section 428.10. This section is amended simply to include the proper cross-reference to the Eminent Domain Law. However, an additional Comment to this section has been written in an attempt to make clear that cross-complaints are indeed proper in an eminent domain proceeding and that their scope is intended to be broad enough to include at least all claims affecting the property which is the subject matter of the proceeding. In the last respect, we may be accused of legislating by comment. Section 428.10 was added in its present form at the recommendation of the Commission in 1971. The former provision (Section 442) actually used the phrase "affecting the property" as does the federal law upon which much of the Commission's recommendation was based. However, at the last minute, subdivision (b) of Section 428.10 was revised to conform its phrasing with Sections 378 and 379. The revision was not apparently intended to limit the scope of subdivision (b). Unfortunately, subdivision (b) could be construed to permit assertion against third persons of only claims relating to title in the property. See El Monte School Dist v. Wilkens, 177 Cal. App.2d 47 (1960)(independent regulatory activities by public entity other than the condemnor held not a basis for cross-complaint; cross-complaint must assert adverse claim of title). Such construction can be avoided only by a very liberal interpretation of the phrase "series of transactions or occurrences" or by attributing an unnatural meaning to the phrase "claim, right, or interest in the property." The ultimate solution might be to amend Section 428.10 to make clear that subdivision (b) permits joinder of any cause of action relating to the property which is the subject matter of the original action. However, such change would have to be made carefully to make sure that any necessary conforming changes in other sections are also made. In any event, the change is well beyond the scope of the eminent domain recommendation. Accordingly,

the staff with some reservations has taken the action indicated initially in the hope that, if the situation presents itself, the court will permit liberal joinder in the manner expressed in the Comment.

A final problem should also be noted here. There exists some uncertainty as to what may (or must) be raised by cross-complaint and what by answer. As a rule of thumb, it appears that, under present law, issues relating to compensation for the property taken must be raised by answer (see People v. Los Angeles County Flood etc. Dist., 254 Cal. App.2d 470, 62 Cal. Rptr. 287 (1967)); issues relating to damage to the property may (or must) be raised by cross-complaint (People v. Clausen, 248 Cal. App.2d 770, 57 Cal. Rptr. 227 (1967) (trespasses apparently occurring after the initiation of the condemnation procedure); see County of San Luis Obispo v. Ranchita Cattle Co., 16 Cal. App.3d 383, 94 Cal. Rptr. 73 (1971)(damages for precondemnation trespass not raised by answer); see also Klopping v. City of Whittier, 8 Cal.3d 39 (1972) (right to damages for precondemnation announcements barred by prior judgment in condemnation proceedings)). Perhaps the present situation needs no clarification; if the defendant is in doubt, he can assert his claim for damages by cross-complaint and, if the court determines that the claim is one that need not be separately asserted, this ruling would be adequate protection against any claim of waiver or res judicata. However, we raise the issue for your consideration.

In summary, perhaps the best that can be said for these sections and the Comments thereto is that they do as much as can be done at the present time, and they do seem to improve in a modest way the existing situation. Can they be approved in this way?

Respectfully submitted,

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EXHIBIT I

CODE OF CIVIL PROCEDURE § 426.70

Staff recommendation July 1973

Code of Civil Procedure § 426.70. Application of compulsory cross-complaint  
requirement to eminent domain proceeding

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

426.70. (a) Notwithstanding subdivision (a) of Section 426.60, this article applies to an eminent domain proceeding.

(b) The related cause of action may be asserted by cross-complaint in an eminent domain proceeding whether or not the person asserting such cause of action has presented a claim in compliance with Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code to the plaintiff in the original eminent domain proceeding.

Comment. Subdivision (a) of Section 426.70 codifies the existing case law rule that a related cause of action must be asserted against the plaintiff in an eminent domain action or it is barred. Klopping v. City of Whittier, 8 Cal.3d 39, \_\_\_, \_\_\_ P.2d \_\_\_, \_\_\_, \_\_\_ Cal. Rptr. \_\_\_, \_\_\_ (1972)(damages caused by precondemnation announcements must be raised in eminent domain proceeding). Subdivision (a) also makes clear that the related cause must be asserted as a cross-complaint.

With respect to the compulsory counterclaim in an eminent domain proceeding, subdivision (b) of Section 426.70 dispenses with the requirement that a claim be presented to a public entity as a condition to bringing an action on the claim against the public entity. Compare Govt. Code §§ 905, 905.2;

CODE OF CIVIL PROCEDURE § 426.70

Staff recommendation July 1973

County of San Luis Obispo v. Ranchita Cattle Co., 16 Cal. App.3d 383, 94

Cal. Rptr. 73 (1971). Accordingly, the cause of action is not barred by mere failure to present the claim within the time specified in the public entity claims statute, and the cause may be asserted by cross-complaint in the eminent domain action whether or not a claim has been presented to the public entity. However, subdivision (b) eliminates the requirement only as against the plaintiff. Actions against third parties are not affected.

CODE OF CIVIL PROCEDURE § 428.10

Staff recommendation July 1973

Code of Civil Procedure § 428.10 (technical amendment)

Sec. . Section 428.10 of the Code of Civil Procedure is amended to read:

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

(a) Any cause of action he has against any of the parties who filed the complaint or cross-complaint against him. Nothing in this subdivision authorizes the filing of a cross-complaint against the plaintiff in an action commenced under Title 7 (commencing with Section ~~1237~~ 1230.010 ) of Part 3.

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

Comment. Section 428.10 is amended to substitute a correct reference to the Eminent Domain Law. It should be noted that only subdivision (a) is inapplicable to an eminent domain proceeding. Subdivision (b) authorizes a defendant in such a proceeding to assert by cross-complaint against the plaintiff any cause of action having any relationship to the property involved or

CODE OF CIVIL PROCEDURE § 428.10

Staff recommendation July 1973

arising out of the actions of the condemnor in connection with the acquisition of the property. See Comment to 1971 Amendment to Section 378. This authorization permitting joinder of related causes is intended to be given a liberal construction. See Klopping v. City of Whittier, 8 Cal.3d 39, \_\_\_ P.2d \_\_\_, \_\_\_ Cal. Rptr. \_\_\_ (1972)(damages caused by precondemnation announcements must be raised in condemnation proceedings). Compare People v. Clausen, 248 Cal. App.2d 770, 781 n.6, 57 Cal. Rptr. 227, \_\_\_ (1967)(construing "transaction" to permit assertion by cross-complaint of cause of action for alleged trespass occurring in connection with condemnation activities), with People v. Buellton Dev. Co., 58 Cal. App.2d 178, 183, 136 P.2d 793, \_\_\_ (1943)(narrowly construing "transaction"). This same liberal construction will also permit joinder of third parties against whom claims are asserted involving the same property; pre-1971 cases may not be authoritative in this regard. See El Monte School Dist. v. Wilkens, 177 Cal. App.2d 47, 1 Cal. Rptr. 715 (1960)(independent regulatory activities by public entity other than the condemnor held not a basis for cross-complaint).

It also should be noted that the test for compulsory cross-complaints under Section 426.70 in eminent domain proceedings is narrower than the test for a permissive cross-complaint under subdivision (b) of Section 428.10. Compare Section 426.10 (defining "related cause of action") with Section 428.10(b).