

September 30, 1970

<u>Time</u>	<u>Place</u>
October 8 - 7:00 p.m. - 10:00 p.m.	Law Revision Commission Office
October 9 - 9:00 a.m. - 5:00 p.m.	adjacent to Law School Stanford University

REVISED

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Stanford

October 8-9, 1970

OCTOBER 8

1. Minutes of September 3-5 meeting (sent 9/18/70)
2. 1970 Legislative Program
3. Administrative Matters

Suggested Schedule for Future Meetings

<u>Date</u>	<u>Time</u>	<u>Place</u>
October 23	9:00 a.m. - 5:00 p.m.	Bar Examiners Office
October 24	9:00 a.m. - 1:00 p.m.	540 Van Ness Avenue San Francisco 94102

NOTE: This meeting will be devoted to a presentation by Professor Riesenfeld. We understand that both Professor Riesenfeld and Professor Warren will be able to attend the meeting.

November 19	10:00 a.m. - 5:00 p.m.	State Office Building
November 20	9:00 a.m. - 5:00 p.m.	455 Golden Gate Ave., Rm. 1157 San Francisco 94102

NOTE: This meeting will be devoted to a presentation by Professor Warren. Professor Riesenfeld will be unable to attend.

December 3	7:00 p.m. - 10:00 p.m.	State Bar Building
December 4	9:00 a.m. - 5:00 p.m.	1230 W. Third Street
December 5	9:00 a.m. - 1:00 p.m.	Los Angeles 90017

NOTE: A substantial portion, if not all, of this meeting will be devoted to attachment and garnishment. Both Professor Riesenfeld and Professor Warren will be present.

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4. Study 71 - Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions

Memorandum 70-104 (sent 9/29/70)
Tentative Recommendation (attached to Memorandum)

OCTOBER 9

5. Study 36.60 - Relocation Assistance

Memorandum 70-101 (sent 9/23/70)
Tentative Recommendation (attached to Memorandum)

6. Study 52 - Sovereign Immunity (Nuisance Liability, Ultrahazardous Activity Liability, Plan or Design Immunity)

Memorandum 70-102 (sent 9/18/70)
Tentative Recommendation (attached to Memorandum)

7. Study 65.100 - Inverse Condemnation (Insurance)

Memorandum 70-103 (sent 9/22/70)
Tentative Recommendation (attached to Memorandum)

8. Annual Report - Report on Unconstitutional Statutes

Memorandum 70-105 (sent 9/22/70)
Report on Unconstitutional Statutes (attached to Memorandum)

9. New Topics

Memorandum 70-106 (sent 9/18/70)
Memorandum 70-107 (sent 9/22/70)
Memorandum 70-108 (sent 9/29/70)

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
OCTOBER 8 AND 9, 1970
STANFORD

A meeting of the California Law Revision Commission was held at Stanford on October 8 and 9, 1970.

Present: Thomas E. Stanton, Jr., Chairman
John D. Miller, Vice Chairman
G. Bruce Gourley
Noble K. Gregory
John N. McLaurin
Joseph T. Sneed

Absent: Alfred H. Song, Member of the Senate
Carlos J. Moorhead, Member of the Assembly
Marc W. Sandstrom
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Jack I. Horton, Nathaniel Sterling, and E. Craig Smay, members of the Commission's staff, also were present.

The following observers were also present on October 9:

Ralph Clark, Real Estate Counselor
Norval Fairman, State Dept. of Public Works
Donald Fillman, State Dept. of Water Resources (October 8 also)
Gideon Kanner, Fadem & Kanner
Peter Krichman, Los Angeles County Counsel
Ralph Long, Santa Clara County Counsel
John M. Morrison, State Attorney General's Office
Jon D. Smock, Judicial Council (October 8 also)

Professor Jack Friedenthal, the Commission's consultant on Study 71, was present on October 8 and 9.

ADMINISTRATIVE MATTERS

Approval of Minutes of September 3-5, 1970, Meeting. The Minutes of the September 3-5, 1970, meeting were approved as submitted.

1970 Legislative Program. The Executive Secretary gave a final report on the 1970 legislative program. Of 107 sections recommended by the Commission, 98 were enacted. The final action on the measures recommended to the 1970 Legislature is indicated below.

Adopted or Enacted (14)

Bills (11)

- Ch. 41 (SB 266)(proof of foreign documents)
- Ch. 45 (AB 123)(rule against perpetuities)
- Ch. 69 (SB 129)(res ipsa loquitur)
- Ch. 89 (AB 171)(leases)
- Ch. 104 (AB 126)(public entity--statute of limitations)
- Ch. 312 (AB 124)(quasi-community property)
- Ch. 417 (AB 125)(arbitration in eminent domain)
- Ch. 618 (SB 98)(fictitious business names)
- Ch. 662 (SB 91)(entry for survey; condemnation for water carrier terminal facilities)
- Ch. 720 (SB 90)(representations as to credit)
- Ch. 1099 (SB 94)(governmental liability)(deleted from this bill were provisions dealing with nuisance liability, plan or design immunity, and ultrahazardous activity liability)

Resolutions (3)

- Res. Ch. 45 (SCR 7)(inverse condemnation study)
- Res. Ch. 46 (SCR 8)(general authority to study topics)
- Res. Ch. 54 (SCR 6)(nonprofit corporation study)

Dropped (1)

- SB 92 (plan or design immunity)

Defeated (1)

- SB 95 (general evidence bill)
This bill as introduced contained 5 sections. The bill passed the Senate after two sections (psychotherapist-patient privilege) were deleted. (However, provisions

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based on the psychotherapist-patient privilege provisions of SB 95 were included in Senate Bills 480 and 481 which were enacted.) The Assembly deleted two more sections (marital testimonial privilege), leaving only the res ipsa loquitur section which was approved in SB 129, making SB 95 unnecessary.

Schedule for Future Meetings. The Commission adopted the following schedule for future meetings:

<u>Date</u>	<u>Time</u>	<u>Place</u>
October 22	7:00 p.m. - 10:00 p.m.	Bar Examiners Office
October 23	9:00 a.m. - 5:00 p.m.	540 Van Ness Avenue
October 24	9:00 a.m. - 1:00 p.m.	San Francisco 94102

Note: Attachment and garnishment will be considered on October 22 and 23; other subjects will be considered on October 24.

November 19	10:00 a.m. - 5:00 p.m.	State Office Building
November 20	9:00 a.m. - 5:00 p.m.	455 Golden Gate Ave., Room 1157 San Francisco 94102

Note: This meeting will be devoted exclusively to attachment and garnishment.

December 3	7:00 p.m. - 10:00 p.m.	State Bar Building
December 4	9:00 a.m. - 5:00 p.m.	1230 W. Third Street
December 5	9:00 a.m. - 1:00 p.m.	Los Angeles 90017

Note: Much of this meeting will be devoted to attachment and garnishment.

Annual Report (Unconstitutional Statutes). The Commission considered Memorandum 70-105 and the attached Report on Unconstitutional Statutes. The attached report was approved for printing in the Annual Report. The staff was instructed to revise the report to indicate that appeals to the United States Supreme Court have been taken in the cases holding unconstitutional the requirement of more than a simple majority in municipal and school district bond elections.

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Research Contract with Hill, Farrer & Burrill. The Commission, noting that John N. McLaurin, a member of the law firm of Hill, Farrer & Burrill, has been appointed as a member of the Law Revision Commission, determined that Agreement Number 1969-70(8), dated June 9, 1970, with Hill, Farrer & Burrill should be terminated and that the State and Contractor be relieved of any future obligations under this contract. The Executive Secretary was directed to execute, on behalf of the Commission, the necessary documents to terminate the contract. The effective date of the termination should not be before the effective date of the filing of Mr. McLaurin's oath of office with the Office of the Secretary of State.

Research Contract with Professor Friedenthal. The Executive Secretary reported that he had received a letter from Professor Rabin that he was unable to undertake to prepare a research study for the Commission on the disposition of the lessee's property when a lease is terminated. The Commission discussed other possible consultants who might be qualified to prepare a study on this topic. The Executive Secretary was directed to determine whether Professor Jack Friedenthal of Stanford Law School was willing to undertake to prepare the necessary study. If he is, the Executive Secretary was directed to execute a contract on behalf of the Commission with Professor Friedenthal to prepare a study on the disposition of the lessee's property when a lease is terminated. The compensation is to be \$2,500 for the study, plus travel expenses limited to \$150.00. The contract is to contain the usual terms contained in the standard research contract used by the Commission.

Studies on Current Agenda of Commission. The Commission reviewed the status of topics on its current agenda. The following is the status of topics.

Study Number	Research Consultant	Study Status
23	---	deferred
*26	---	Recommendation enacted
30	Bodenheimer	Study due November 1, 1970
36	Staff (major portion) Matteoni (procedure)	In progress Consultant will start work on study about Nov. 1, 1970
39	Riesenfeld & Warren	Portion of study to be completed about Oct. 15, 1970. No contract for entire study.
*44	---	Recommendation enacted
47	Staff	In progress; completion date uncertain
*50	---	Recommendation enacted
*52	---	Recommendation enacted
*63	---	Recommendation enacted
65	Van Alstyne	Five studies completed; one study ("police power") substantially completed; last study (procedure) not scheduled.
*66	---	Recommendation enacted
*67	---	Recommendation enacted
*69	---	Recommendation enacted
70	Feldman	In progress; completion date uncertain
*71	Friedenthal	Recommendation prepared for 1971 session
72	Sweet	In progress; completion date uncertain
*73	Friedenthal	Recommendation prepared for 1971 session
75	Barton	Study expected to be completed by November 1, 1970.
77	Search being made for consultant	----
78	Selecting consultant now	----

* Study continued on agenda for review of future developments on topic upon which recommendation submitted.

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Professor Sneed stated that it will be exceedingly difficult to find a qualified consultant for a study relating to the nonprofit corporation law area. It appears that no qualified person is available in California. Professor Sneed agreed to discuss with an expert at Duke Law School the possibility of having the study prepared by a team working at Duke. It was recognized that funds have not been allocated for the study and that financing the study would present a difficult problem. However, further consideration of the financing of the study was deferred until a competent consultant has been found who is willing to undertake the study.

New Topics. The Commission considered the following possible new topics:

1. Conditions, Covenants, and Restrictions Relating to Land. The Commission considered Memorandum 70-106. After discussion, it was decided not to request authority to make a study to determine whether the law of covenants and servitudes relating to land and whether the law governing nominal, remote, and obsolete covenants, conditions, and restrictions on land use should be revised.

2. Requirements for Office of Board of Trustees of Community College District. The Commission considered Memorandum 70-107 and determined not to request authority to study this topic.

3. Parol Evidence Rule. The Commission considered Memorandum 70-108 and determined to request authority to study the Parol Evidence Rule. The statement attached as Exhibit I to Memorandum 70-108 was approved for inclusion in the Annual Report after footnote 5 was deleted. The Commission directed that the background research study be prepared by an expert

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research consultant rather than by the Harvard Student Legislative Research Bureau if the topic is approved. Further, the Commission indicated that, if such a study be undertaken, it would not be directed toward a statutory statement of existing law but should be a comprehensive review of the Parol Evidence Rule with a view to possibly restoring to some extent the requirement of a writing, a requirement that apparently has been largely dispensed with under the case law interpretation of the California statutes.

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STUDY 36.60 - CONDEMNATION (RELOCATION ASSISTANCE)

The Commission considered Memorandum 70-101 and the Tentative Recommendation attached to that memorandum. After considerable discussion, the Commission decided not to submit a recommendation on relocation assistance to the 1971 legislative session. The Commission concluded that the existing statute contains many defective provisions and that it would not be desirable to attempt to clarify these provisions until the federal legislation (which the Commission is advised will be enacted early in 1971) is enacted.

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STUDY 52 - SOVEREIGN IMMUNITY (NUISANCE LIABILITY, ULTRAHAZARDOUS
ACTIVITY LIABILITY, PLAN OR DESIGN IMMUNITY)

The Commission considered Memorandum 70-102 and the attached Tentative Recommendation. After considerable discussion, the Commission decided not to submit a recommendation to the 1971 legislative session. The staff was directed to bring this recommendation to the attention of the Commission at a later time, possibly in connection with other aspects of governmental liability law that appear to be in need of revision.

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STUDY 65.100 - INVERSE CONDEMNATION (INSURANCE)

The Commission considered Memorandum 70-103 and the attached Tentative Recommendation. The Tentative Recommendation was approved for printing and for submission to the 1971 legislative session.

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STUDY 71 - COUNTERCLAIMS AND CROSS-COMPLAINTS, JOINDER OF CAUSES
OF ACTION, AND RELATED MATTERS

The Commission considered Memorandum 70-104 and the attached Tentative Recommendation and the following materials handed out at the meeting: First Supplement to Memorandum 70-104, a revision of Code of Civil Procedure Section 384, a proposed Code of Civil Procedure Section 403 (to substitute for proposed Section 1048.5 in the tentative recommendation), and a conforming amendment to Code of Civil Procedure Section 583. The tentative recommendation was approved for printing after the changes set out below are made:

Preliminary portion of recommendation. The preliminary portion of the recommendation is to be revised to conform to the changes made in the recommended legislation.

Section 378 (page 33). Section 378 was revised to read as follows:

378. (a) All persons may join in one action as plaintiffs if:

(1) They assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action; or

(2) They have a claim or interest adverse to the defendant in the property, right in property, or controversy which is the subject of the action.

(b) It is not necessary that each plaintiff be interested as to every cause of action or as to all relief prayed for.

The Comment to Section 378 should indicate that paragraph (1) of subdivision (a) would be broad enough to cover what is described in paragraph (2) of that subdivision, but that paragraph (2) has been included merely to avoid any doubt.

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Section 379 (page 35). Section 379 was revised to read as follows:

379. (a) All persons may be joined in one action as defendants if there is asserted against them:

(1) Any right to relief, jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action; or

(2) A claim or interest adverse to them in the property, right in property, or controversy which is the subject of the action.

(b) It is not necessary that each defendant be interested as to every cause of action or as to all the relief prayed for.

The Comment to Section 379 should indicate that paragraph (1) of subdivision (a) would be broad enough to cover what is described in paragraph (2) of that subdivision, but that paragraph (2) has been included merely to avoid any doubt.

The Comment should indicate that the section, by including the language "in the alternative," codifies existing law. Compare Kraft v. Smith, 24 Cal.2d 124, 148 P.2d 23 (1944)(permitting joinder of two separate doctors who operated on the same leg of plaintiff at different times) with Landau v. Salam, 10 Cal. App.3d 472, Cal. Rptr. (1970)(denying joinder of two defendants who operated vehicles involved in accidents on separate days where plaintiff was uncertain which accident or defendant caused certain injuries).

Section 379c (page 38). The Comment to Section 379c should indicate that the substance of this section is continued in revised Section 379. The two cases referred to above in connection with Section 379 should be cited either under Section 379 or under Section 379c or under both sections.

Section 380 (Exhibit VII). The repeal of Section 380, and the Comment to the repealed section as set out in Exhibit VII, was approved.

Section 382 (pages 41-42). The substance of the note on page 42 should be incorporated into the Comment to Section 382.

Section 383 (page 43). The repeal of Section 383 was approved. However, the staff is to determine whether Section 383 (insofar as it provides that the action may be brought against less than all potential defendants by less than all of the potential plaintiffs) constitutes an exception to compulsory joinder under Section 389 which specifies the circumstances when joinder of all parties is necessary. (It was noted that research as to the meaning given Section 384 disclosed that the compulsory joinder rule of Section 389 prevailed over Section 384 insofar as that section authorizes joinder of less than all potential parties, and it was assumed that a similar construction would be given to Section 383.) Insofar as Section 383 constitutes authority to bring an action against less than all potential defendants or authorizes an action by less than all potential plaintiffs, it was considered unnecessary and, if it constitutes an exception to compulsory joinder, undesirable.

The Comment to Section 383 should be revised to state that, insofar as the section might be construed to deal with whether certain parties need not be joined, the section does not make Section 389 (compulsory joinder) not applicable. If research discloses that the courts have not so construed the section, the Comment should so indicate. In other words, the Comment should make clear the relationship of Section 383 to the compulsory joinder provision and state that Section 383 would be an undesirable exception to compulsory joinder.

Section 384. Section 384 is to be amended. The amended section and the Comment thereto is to read in substance as follows:

Sec. . Section 384 of the Code of Civil Procedure is amended to read:

384. Except as otherwise provided in Section 389, All it is not necessary that all persons holding as tenants in common, joint tenants, or coparceners, -er-any-number-less-than-all,-may-jointly-or-severally commence-or-defend join or be joined as parties in any civil action or proceeding for the enforcement or protection of the rights of such party persons .

Comment. Section 384 continues the existing law that permits less than all of several coholders of property to prosecute or defend an action. The section is revised, however, to make clear that this rule is qualified by Section 389 which specifies the circumstances when joinder of all parties is compulsory.

At common law, in certain circumstances, all coholders of property were required to be joined in an action affecting such property; in other circumstances, coholders were prohibited from joining in one action. See Throckmorton v. Burr, 5 Cal. 400 (1855); Johnson v. Sepulbeda, 5 Cal. 149 (1855). Section 384 changed both these rules to a flexible one permitting either all or "any number less than all" to commence or defend actions concerning their common property. See Cal. Code Civ. Proc. § 384 (1872); Merrill v. California Petroleum Corp., 105 Cal. App. 737, 288 P. 721 (1930). Insofar as Section 384 permitted all coholders to join or be joined, it has been eclipsed by the liberal joinder rules provided in Sections 378 and 379. Accordingly, this aspect of Section 384 has been deleted. Although Section 384 also permitted less than all coholders to join or be joined, prior case law recognized that, notwithstanding Section 384, under some circumstances all the cotenants must be joined as parties. See, e.g., Solomon v. Redona, 52 Cal. App. 300, 198 P. 643 (1921); Jameson v. Chanslor-Canfield Midway Oil Co., 176 Cal. 1, 167 P. 369 (1917). Cf. Woodson v. Torgerson, 108 Cal. App. 386, 291 P. 663 (1930). See 2 Witkin, California Procedure Pleading § 79. This qualification is now specifically set forth.

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Section 389 (pages 45-52). The revised Section 389 was revised to add the words "without prejudice" in the fourth line of subdivision (b) (page 47) after "dismissed,". The Comment should state that these words (which do not appear in the Federal Rule but appeared in former Section 389) have been included merely to avoid any possible contrary implication that might have been drawn had these words been omitted in the revised section.

The second paragraph of the Comment on page 48 should be revised to point out the change made by the approach of the revised rule from the rule set out in existing Section 389. See the preliminary portion of the recommendation (pages 16-17).

New section relating to adding or dropping parties (page 7 of Memorandum). The Commission discussed adding a provision based on N.Y. C.P.L.R. § 1003, but after discussion decided not to add such a section.

Section 422.10 (page 57). The word "only" was deleted in the third line from the end of the Comment.

Section 422.30 (page 59). The Commission expressed the view that the subject matter of this section probably should be a matter of court rule but that such a revision would be beyond the scope of the legislative directive for the study. Consideration will be given during the session to any amendment to this section that might be suggested by the Judicial Council, and the views of the State Bar and other persons and organizations on any proposed amendment will be considered at the same time.

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Section 422.40 (page 60). The decision with respect to Section 422.30 applies equally to Section 422.40.

Chapter heading (page 65). The heading of Chapter 2 was revised to read: "Chapter 2. Pleadings Demanding Relief."

Section 425.10 (page 65). The words "pleading which sets forth a claim for relief, whether it be a complaint or cross-complaint," were deleted and the words "complaint or cross-complaint" substituted.

Section 425.20 (page 66). After considerable discussion, the Commission revised Section 425.20 to read in substance as follows:

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Code of Civil Procedure Section 425.20. Separate statement of causes

425.20. Causes of action need not be separately stated unless separate statement is necessary to avoid confusion.

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 425.20, which requires a separate statement of causes of action only where necessary to avoid confusion, serves the same basic purpose as Rule 10(b) of the Federal Rules of Civil Procedure ("Each claim founded upon a separate transaction or occurrence . . . shall be stated in a separate count . . . whenever a separation facilitates the clear presentation of the matters set forth"). Former Section 427, which required that each cause of action be separately stated but provided exceptions for certain types of frequently occurring causes of action, was criticized as tending to "encourage prolixity and uncertainty in the statement of the facts constituting the cause or causes of action." 2 Witkin, California Procedure Pleading § 497 (1954). See Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes, and Related Provisions, 10 Cal. L. Revision Comm'n Reports 000 (1972). Section 425.20, on the other hand, requires that, in addition to the former requirement of showing that causes of action are not separately stated, the party objecting to the pleading must show that it is confusing because the causes are not separately stated. This new requirement should tend to avoid the prolixity and uncertainty that sometimes resulted from the existence of the former rule.

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Compulsory joinder of causes of action generally (pages 67-75). With respect to compulsory joinder of causes generally, the Commission made the following decisions:

1. It should be made clear in the Comments that the provisions relating to compulsory joinder of causes of action do not affect the independent application of the principles of res judicata or collateral estoppel or the rule against splitting a cause of action.

2. In the Comments to Sections 426.20 and 426.30, reference should be made to the exceptions contained in Section 426.30 et seq.

The staff is to consider how, if at all, the doctrine of anticipatory breach bears on the compulsory joinder provisions. Possibly something should be included in the Comments.

Section 426.20 (page 68). Section 426.20 was revised to read:

426.20. Except as otherwise provided by statute, 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 the party served, all his rights against such party on the related cause of action not pleaded shall be deemed waived and extinguished.

Somewhere in the Comments, it should be noted that the Rules of the Judicial Council determine the scope of an action for dissolution of marriage and, hence, such actions are not governed by Section 426.20 or 426.30. See Civil Code Section 4001. See also Civil Code Section 4363 (enacted 1970). The Comment to Section 426.20 should include a statement that the section makes time of service on each particular party the determining factor as to whether a cause of action against such party must be alleged in the complaint. If a party is not served at all, Section 426.20 does not apply

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to the cause of action against that party. If there are several parties who are served at different times, the time of service of each party determines the extent to which causes of action against that party are barred by failure to allege such causes in the complaint.

Section 426.30 (page 69). The words "by statute" were inserted in place of "in this article" in the introductory portion of subdivision (a) of Section 426.30.

Section 426.40 (page 71). Subdivision (b) of Section 426.40 was revised to read:

(b) The court in which the action is pending and any other court to which the action is transferrable under Section 396 both are prohibited by the federal or state constitution or by statute from entertaining the cause of action not pleaded.

A new subdivision (d) was added to read:

(d) The action is commenced in the small claims court.

Subdivision (d) excepts actions brought in small claims court from compulsory joinder requirements. When an action is brought in the small claims court, the compulsory joinder requirement would, where one of the causes is not within the jurisdiction of the small claims court, preclude the party from litigating less than all his causes in small claims court. Subdivision (d) will avoid the need to bring an action on all the related causes of action in Superior Court or Municipal Court where the liability on the related causes may be doubtful but the party bringing the action is unwilling to waive such related causes of action. Under existing law (Section 117r of the Code of Civil Procedure), the only counterclaim permitted in small claims court are those within the jurisdictional limit

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of the small claims court, and at most the compulsory counterclaim provisions applied only to claims within the jurisdictional limits of the small claims court. (See page 29 of Recommendation--this needs revision to conform.) As to these claims, the defendant in the small claims court action should not be compelled to litigate his claim in small claims court merely because plaintiff has commenced his action in that court. The Comment to the amendment of Section 117h on pages 29-30 should note that the cross-complaint is not compulsory.

The Comment should note that Section 426.40 provides an exception both to Sections 426.20 and 426.30.

Section 426.50 (page 74). The phrase "neglect, or other cause," was inserted in place of "or neglect" in subdivision (a) of Section 426.50.

Subdivision (b) of Section 426.50 was revised to read:

(b) If a plaintiff fails to plead a cause of action that he is required to plead under Section 426.20 and a cross-complaint is filed against him, he may, without obtaining leave of court, file a cross-complaint alleging the cause of action that he failed to plead earlier.

The Comment to Section 426.50 should include a statement substantially as follows: "If the party fails to plead a cause of action subject to the requirements of this article because he did not know that he has such cause of action at the time he serves the pleading, the court should grant leave to assert the cause under subdivision (a) except in very extreme circumstances."

Section 426.60 (new section)--Special Proceedings Excepted. A new section--Section 426.60--was added to the proposed legislation to read:

426.60. This article applies only to civil actions and does not apply to special proceedings.

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The Comment to this section should make clear that this section does not affect the rules of res judicata, collateral estoppel, or splitting a cause of action. There is some authority that the compulsory joinder provisions do not apply to special proceedings and, if such authority is found in reported cases, the cases should be cited in the Comment to Section 426.60.

The staff was asked to check the various special proceedings to determine whether the compulsory joinder provisions should be made applicable to any particular types of special proceedings.

Section 428.10 (page 77). Subdivision (b) should be revised to reflect the change made in Sections 378 and 379. Thus, the phrase "or affecting the same property" should be deleted and the language added to Sections 378 and 379 added.

Section 428.40 (page 81). The last sentence of the Comment was revised to read: "However, the counterclaim is now abolished. See Section 428.80."

Section 428.60 (page 83). To conform to the 1970 change in Section 442, Section 428.60 was revised as set out in Exhibit XII of Memorandum 70-104.

Section 430.30 (page 96). A reference should be made to Section 441 at the end of the Comment.

Section 430.40 (page 97). The times specified in this section should be checked to determine whether the demurrer should be filed in 30 days in all cases (subdivision (b)). An amendment was made at the 1970 session that made a change in the times for filing demurrers that is relevant here.

Section 430.50 (page 98). A reference to Section 441 should be made in connection with the reference to Section 443 in the last sentence of the Comment.

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Section 431.70 (page 109). This section and Comment thereto were revised as set out in Exhibit XIII of Memorandum 70-104. The Comment to Section 431.70 should include a statement to make clear that, where a cause of action is not a compulsory cross-complaint, the party need not plead it as a set-off or a compulsory cross-complaint and may later assert it in a separate action.

Section 471.5 (page 131). This section should be checked in view of the amendment relating to time for answering to determine whether the 10-day period should be changed to 30 days.

Section 583 (new - conforming amendment). The following conforming amendment to Section 583 was approved:

Code of Civil Procedure Section 583 (conforming amendment)

Sec. . Section 583 of the Code of Civil Procedure is amended to read:

583. (a) The court, in its discretion, may dismiss an action for want of prosecution pursuant to this subdivision if it is not brought to trial within two years after it was filed. The procedure for obtaining such dismissal shall be in accordance with rules adopted by the Judicial Council.

(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended. When, in any action after judgment, a motion for a new trial has been made and a new trial granted, such action shall be dismissed on motion of defendant after due notice to plaintiff, or by the court of its own motion, if no appeal has been taken, unless such action is brought to trial within three years after the entry of the order granting a new trial, except when the parties have filed a stipulation in writing that the time may be extended. When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial (or when an appeal has been taken from an order granting a new trial and

such order is affirmed on appeal), the action must be dismissed by the trial court, on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court.

(c) For the purposes of this section, "action" includes an action commenced by cross-complaint . ; ~~"cross-complaint" includes a counterclaim to the extent that it seeks affirmative relief.~~

(d) The time during which the defendant was not amenable to the process of the court and the time during which the jurisdiction of the court to try the action is suspended shall not be included in computing the time period specified in this section.

Comment. The amendment to Section 583 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.

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Section 1048 (new amendment). The Commission considered the First Supplement to Memorandum 70-104 and the attached revision of Section 1048 of the Code of Civil Procedure. After discussion, a portion of the proposed amendment to Section 1048 was approved for inclusion in the proposed statute. The following was added to the proposed statute:

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Code of Civil Procedure Section 1048. Severance or consolidation for trial

Sec. . Section 1048 of the Code of Civil Procedure is amended to read:

~~1048. An action may be severed and actions may be consolidated, in the discretion of the court, whenever it can be done without prejudice to a substantial right.~~

(a) When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the constitution of this state or of the United States.

Comment. Section 1048 is revised to conform to Rule 42 of the Federal Rules of Civil Procedure. [The Comment should also note the provision on separate trial of issues, and state whether this changes existing law.]

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Section 1048.5 (pages 140-141). The Commission discussed Section 1048.5 and a substitute for this section (proposed Section 403) handed out at the meeting. The substitute section superseded Exhibit XV of the Memorandum. After considerable discussion, the Commission deleted Section 1048.5 from the proposed legislation, declined to approve proposed Section 403 for inclusion in the proposed legislation, and directed the staff to continue to work on this problem. No provision like Section 1048.5 is to be included in the legislation recommended to the 1971 Legislature, but the Commission desires to continue to work on this problem in case some provision like Section 1048.5 becomes necessary during the consideration of the Commission's proposed legislation.

Operative date (page 149). Section 64 of the proposed legislation was revised to read in substance as follows:

Sec. 64. This act becomes operative on July 1, 1972, and applies to actions commenced on or after that date. Except as otherwise provided by rules adopted by the Judicial Council, this act does not apply to actions commenced before July 1, 1972, and any action to which this act does not apply is governed by the law as it would exist had this act not been enacted.

The Comment should be adjusted to reflect this change in Section 64.

Approval for printing. The recommendation, as revised, was approved for printing and submission to the 1971 legislative session.