STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

## RECOMMENDATION AND STUDY

*relating to*

## Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions

October 1970

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

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## NOTE

This pamphlet begins on page 501. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 10 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

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STATE OF CALIFORNIA

RONALD REAGAN, Governor

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October 23, 1970

*To* HIS EXCELLENCY, RONALD REAGAN
*Governor of California* and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was authorized by Resolution Chapter 224 of the Statutes of 1969 to study whether the law relating to joinder of causes of action and to counterclaims and cross-complaints should be revised.

The Commission herewith submits its recommendation and a research study relating to these two topics. The study was prepared by the Commission's consultant, Professor Jack H. Friedenthal of the Stanford Law School. It was previously published in the Stanford Law Review and is republished here with permission. Only the recommendation (as distinguished from the research study) expresses the views of the Commission.

Respectfully submitted,

THOMAS E. STANTON, JR.
Chairman

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# RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

*relating to*

## Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions

### 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 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 necessarily related matters such as joinder of parties.

[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. §§ 2016–2035. 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, p. 1397. The provisions relating to appeals in civil actions were reorganized and streamlined in 1968. Cal. Stats. 1968, Ch. 385, p. 811, 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, p. 3363, 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 at 525. 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 under way 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 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; and (3) no cause requires a different place of trial.[7]

### 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

[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 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] D. LOUISELL & G. HAZARD, PLEADING AND PROCEDURE 636–639 (2d ed. 1968).

[6] The origin and history of the section is traced in Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1–11 (1970) [hereinafter cited as Friedenthal].

[7] Section 427 also requires, subject to some significant exceptions, that each cause of action be separately stated. This requirement is discussed *infra* at 511.

settle all conflicting claims between the parties in a single action.[8] Elimination of the joinder categories and adoption of an unlimited joinder rule would yield substantial benefits. Professor Friedenthal, the Commission's research consultant, points out:[9]

> As a practical matter there will be only a small number of situations where a plaintiff will have several causes of action against a defendant that do not arise from one set of transactions or occurrences so as to permit joinder under section 427. Even then unrelated causes may be joined if all fall within another category of the statute. Thus, the adoption of an unlimited joinder rule would have little impact on the number of causes that can in fact be joined. Nevertheless, a number of benefits would accrue from such revision. Under the current provision defendants are encouraged, whenever tactically sound, to challenge the joinder of causes by arguing that no category applies. Even when unsuccessful, argument on such an issue is costly and time consuming. In those few cases where the challenge is successful, the plaintiff must file an amended complaint eliminating one or more of his original causes. If the statute of limitations has run on the various causes, plaintiff may 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 then 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 costs for filing fees, service of process, 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.[10] 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.[11]

---

[8] Virtually every writer on the subject has expressed this view. *E.g.*, see Friedenthal 4 n.14. Practicing lawyers are of the same view. A resolution was adopted by the 1970 Conference of State Bar Delegates to substitute for Section 427 an unlimited joinder provision based on the Federal Rules of Civil Procedure. The resolution was prepared by the San Francisco Bar Association. In support of its resolution, the Association stated:

> 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.

[9] Friedenthal 6.

[10] 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 has apparently been judicially resolved by permitting Section 379b to prevail. See Kraft v. Smith, 24 Cal.2d 124, 148 P.2d 23 (1944); *cf.* Peters v. Bigelow, 137 Cal. App. 135, 30 P.2d 450 (1934). Nevertheless, the respective sections remain in apparent conflict.

[11] Friedenthal 9–11.

## 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 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,[12] providing for unlimited joinder of causes of action, has been entirely satisfactory.[13] This rule has been a model for reform in a steadily increasing number of states. The California experience with the broad joinder of causes in counterclaims has been equally good.[14] 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."[15] 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 be avoided by a severance of the causes for trial.[16]

**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.[17] 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. The substance of Section 439 should be retained. Adoption of these rules would clarify the law and limit the need to rely on the uncertain rules of res judicata and collateral estoppel[18] to determine whether a cause is barred by failure

[12] 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.

[13] Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580, 586 (1952).

[14] Friedenthal 5.

[15] 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 501 at 66 n.0.1 (1961).

[16] As Professor Friedenthal points out:

> Joinder of causes, in and of itself, is never harmful. A joint trial of causes may be unjustified, however, either because the trial may become too complex for rational decision, or because evidence introduced on one cause may so tend to prejudice the trier of fact that it will be unlikely to render a fair decision on another cause. These problems, which are certainly present where joinder is permitted under the existing 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 5–6].

[17] For a discussion of the existing California law, see Friedenthal 11–14.

[18] See *id.* at 12–13.

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.

However, the requirement that a plaintiff allege all related causes of action he has against the defendant, as well as the requirement that a defendant allege by cross-demand all related causes he has against the plaintiff, should be tempered by the dictates of fairness. A party who, acting in good faith, fails to join a compulsory cause should be granted leave by the court to assert the cause at any time prior to trial unless to do so would result in substantial injustice to the opposing party. This is basically the plan of Rule 13(f) of the Federal Rules of Civil Procedure.[19] Likewise, if a party has failed to plead a related cause of action but a cross-demand is subsequently served upon him, he should be allowed to assert the unpleaded cause by way of cross-demand without obtaining leave of court since he may now be subject to added liabilities.

There are other situations which in fairness to the parties should be excepted from the broad compulsory joinder requirements. If a cause of action would require for its adjudication the presence of additional parties over whom the court cannot acquire jurisdiction, that cause should not be required to be joined.[20] If at the time an action is commenced, the related but unpleaded cause of action was the subject of another pending action, that cause should not be required to be joined.[21] And if the unpleaded cause is within the exclusive jurisdiction of federal courts, that cause should not be required to be joined in an action in the state courts.

Finally, the compulsory joinder requirements should apply only to ordinary civil litigation. Special proceedings should be excepted from the general compulsory joinder rules, for special proceedings have their own particular pleading and joinder requirements, peculiar to them. And the compulsory cross-demand and joinder requirements should be inapplicable in small claims court so that parties will have a free choice of fora rather than being forced to litigate all their claims, related or unrelated, in the small claims court.[22]

**Separate statement of causes.** Section 427, which requires that each cause of action be separately stated but provides exceptions for certain types of frequently occurring causes of action,[23] has been criticized as tending to "encourage prolixity and uncertainty in the statement

[19] Rule 13 is set out in note 3, *infra* at 519.

[20] This proposal is based on Rule 13(a) of the Federal Rules of Civil Procedure, set out *ibid.*

[21] This proposal is based on Rule 13(a)(1) of the Federal Rules of Civil Procedure, set out *ibid.*

[22] The problems resulting from the application of the compulsory counterclaim rule in the small claims court are discussed and the existing law criticized in Friedenthal, *Civil Procedure*, CAL LAW—TRENDS AND DEVELOPMENTS 191, 238–243 (1969).

[23] Section 427 provides an exception to the separate statement requirement for the husband's consequential damages in an action brought by the husband and wife for damages for injury to the wife, and an exception for causes of action for injury to person and property resulting from the same tort. See note 4, *supra*.

of the facts constituting the cause or causes of action."[24] The Commission has concluded that this defect can be corrected by providing that the party objecting to the pleading must show not only that the causes of action are not separately stated but also that the pleading is confusing as a result. This will limit the separate statement requirement to cases where it serves a useful purpose.

[24] 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 497(2) at 1486 (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.

# JOINDER OF PARTIES

## Introduction

If every case involved but one plaintiff and one defendant, the rules governing joinder of causes of action could be dealt with in isolation. However, in modern litigation, such a situation may be the exception rather than the rule. It is essential, therefore, that the rules relating to joinder of parties be considered together with those relating to joinder of causes. Two separate situations require consideration: First, the circumstances under which parties *may* be joined at the option of the plaintiff or plaintiffs, *i.e.*, permissive joinder and the effect of misjoinder; second, the circumstances under which a person should or must be joined, *i.e.*, compulsory joinder and the effect of nonjoinder.

## Permissive Joinder of Plaintiffs

Any persons may be joined as plaintiffs under Section 378 of the Code of Civil Procedure if (1) they claim a right to relief with respect to the same transaction or series of transactions, or they have an interest in the subject of the action and (2) there is a common question of law or fact which would have to be resolved if separate actions were brought.[1] Section 378 seems to have operated satisfactorily since its amendment in 1927 and needs no basic revision. However, it is already strikingly similar to Rule 20(a) of the Federal Rules of Civil Procedure which provides in part:

> All persons may join in one action as plaintiffs if they assert any right to relief . . . 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.

The Commission recommends that Section 378 be rephrased in substantial conformity with Rule 20(a) and the present California practice.

## Permissive Joinder of Defendants

Permissive joinder of defendants is governed generally by Sections 379 and 379a of the Code of Civil Procedure. These sections provide in part that any person may be joined as a defendant "who has or claims an interest in the controversy adverse to the plaintiff" (Section 379) or "against whom the right to any relief is alleged to exist" (Section 379a). Conspicuously absent are the joinder requirements for plaintiffs that the right to relief arise out of the same transaction and that common questions of law or fact be involved. These latter restrictions have,

[1] Section 378 of the Code of Civil Procedure provides:

> 378. All persons may be joined in one action as plaintiffs who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any question of law or fact would arise which are common to all the parties to the action; ***provided***, that if upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled.

however, been inserted by judicial decision.[2] Nevertheless, the existing statutory deficiency and the inherent ambiguity and overlap in Sections 379 and 379a have been justly criticized.[3]

In contrast, Rule 20(a) of the Federal Rules of Civil Procedure explicitly provides the same substantive test for joinder of defendants as for joinder of plaintiffs. It states in part:

> All persons . . . may be joined in one action as defendants if there is asserted against them . . . any right to relief 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 defendants will arise in the action.

The substitution of a test for the permissive joinder of defendants based on Federal Rule 20(a) would not change existing California practice but would provide clear and concise statutory guidelines. The Commission recommends that this be done.

## Special Statutory Provisions for Permissive Joinder

Section 378 was amended [4] and Section 379a was added [5] in 1927 to liberalize the then existing statutory rules on permissive joinder of parties. The old restrictive provisions were subject to several express statutory exceptions set out in Sections 380, 381, 383, and 384.[6] Sections 381 and 383 are now simply deadwood inasmuch as they merely authorize joinder that is permissible under Sections 378, 379, and 379a.[7] Sections 380 and 384 will be rendered superfluous by the suggested revisions. Any comprehensive revision of the statute relating to joinder of parties should include the elimination of these vestiges of an earlier day; the Commission recommends that these four sections be repealed.

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[2] See Hoag v. Superior Court, 207 Cal. App.2d 611, 24 Cal. Rptr. 659 (1962), quoting with approval a statement from Chadbourn, Grossman, and Van Alstyne that "the holdings seem to demand that there be some sort of factual 'nexus' connecting or associating the claim pleaded against the several defendants."

[3] Chadbourn, Grossman, and Van Alstyne state that, "it would seem to be desirable to amend the provisions governing joinder of defendants so that whatever requirements are intended will be express and not hidden in the implications of decisional law." 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, CALIFORNIA PLEADING § 618 at 536 (1961).

Witkin comments, "that we have liberal joinder rules [as to defendants], but too many of them and little integration." 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 93 at 1071 (1954).

More outspoken are practicing lawyers. A resolution was adopted by the 1970 Conference of State Bar Delegates which would substitute provisions for permissive joinder of parties similar to Federal Rule 20. This resolution was introduced by the San Francisco Bar Association, which stated in support of it:

> The present statutory rules are impossible for the practicing attorney to follow without unnecessary 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.

[4] Cal. Stats. 1927, Ch. 386, p. 631.

[5] Cal. Stats. 1927, Ch. 259, p. 477.

[6] For the text of these sections, see the text, *infra* at 531–533.

[7] See 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, CALIFORNIA PLEADING § 615 (1961); 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* §§ 92, 93 (1954).

Because revision of Section 379 to conform to Federal Rule 20(a) would eliminate any need for Section 379c of the Code of Civil Procedure,[8] the Commission recommends that Section 379c be repealed.[9]

## Separate Trials

The liberal rules of permissive joinder permit parties to be brought together in one action who are not interested in all of the issues to be tried. Situations can and do arise where joinder might cause undue hardship to a party or create unnecessary confusion or complexity at trial.[10] Accordingly, the provisions governing joinder of both plaintiffs [11] and defendants [12] provide for judicial control through severance where necessary.[13] Similarly where the scope of these rules has been exceeded and misjoinder occurs, the court will order severance for trial.[14] No substantive change in these rules is required or desirable, but the Commission recommends that the present provisions be consolidated and made uniformly applicable to both plaintiffs and defendants.

## Compulsory Joinder

We turn now from the question who may be joined if the plaintiff chooses to the question who must or should, if possible, be joined in an action. In California, two separate statutes deal with the question. Section 382 of the Code of Civil Procedure sets forth the old common law rule as follows: [15]

> Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants . . . .

[8] Section 379c of the Code of Civil Procedure provides:

> 379c. Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties.

[9] Federal Rule 20(a) provides that, "all persons . . . may be joined in one action as defendants if there is asserted against them . . . in the alternative, any right to relief . . . ." The latter provision for joinder in the alternative would encompass any situation now covered by California Code of Civil Procedure Section 379c. See Kraft v. Smith, 24 Cal.2d 124, 148 P.2d 23 (1944). See generally 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* §§ 96, 97 (1954).

[10] See generally 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, CALIFORNIA PLEADING § 622 (1961); 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 98 (1954).

[11] Section 378, dealing with joinder of plaintiffs, provides in part:

> [I]f upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials or make such other order as may be expedient . . . .

[12] Section 379b, dealing with joinder of defendants, provides in part:

> [T]he court may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.

[13] A similar rule with respect to discretionary severance prevails under the federal rules. Rule 20(b) provides:

> The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

[14] See Hoag v. Superior Court, 207 Cal. App.2d 611, 24 Cal. Rptr. 659 (1962).

[15] Section 382 also deals with the joining of an involuntary plaintiff and representative or class actions. These matters are not within the scope of the Commission's study and no change is made with respect to these matters in the legislation recommended by the Commission.

Section 389 attempted to restate the developing California case law as follows:

> A person is an indispensable party to an action if his absence will prevent the court from rendering any effective judgment between the parties or would seriously prejudice any party before the court or if his interest would be inequitably affected or jeopardized by a judgment rendered between the parties.
>
> A person who is not an indispensable party but whose joinder would enable the court to determine additional causes of action arising out of the transaction or occurrence involved in the action is a conditionally necessary party. . . .

Neither provision appears satisfactory. Section 382 does not even make clear that it contemplates the joinder of additional parties. More critically, Section 382 is both incomplete and unsafe as a guide. For, on the one hand, a person may be indispensable or necessary even absent a unity in interest,[16] while on the other, the presence of a unity in interest does not always render a person either indispensable or necessary.[17]

Section 389 was amended to its present form in 1957 upon the recommendation of the Law Revision Commission.[18] As indicated above, the amended section merely attempted to clarify and restate existing case law.[19] However, the section was, with some merit, critically received.[20] For example, the second paragraph directs the joinder of persons whenever it would enable the court "to determine additional causes of action arising out of the transaction or occurrence involved in the action." A broad literal reading of this language would mean that every person permitted to be joined would have to be joined. The Commission did not intend that the language be given this broad interpretation, and it has not been so interpreted.[21]

Section 389 presently attempts not only to avoid prejudice to the parties but also to promote the general convenience of the courts by preventing a multiplicity of suits. The attempt to accomplish both of these purposes presents problems of enforcement and the possibility of stimulating unnecessary litigation as well. A different approach is of-

[16] See Child v. State Personnel Board, 97 Cal. App.2d 467, 218 P.2d 52 (1950). In an action brought by an unsuccessful candidate against the members of the Personnel Board to cancel a civil service examination and eligibility lists based thereon, all the successful candidates were held to be indispensable parties. However, they do not seem to have been united in interest in the usual sense of the term with either plaintiff or defendants.

[17] See Williams v. Reed, 113 Cal. App.2d 195, 248 P.2d 147 (1952) (joint and several obligors may be sued individually). See generally 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, CALIFORNIA PLEADING § 593 (1961); 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 76 (1954).

[18] See *Recommendation and Study Relating to Bringing New Parties Into Civil Actions*, 1 CAL. L. REVISION COMM'N REPORTS at M-1 to M-24 (1957).

[19] See *id.* at M-5, M-6.

[20] See Comments, *Bringing New Parties Into Civil Actions in California*, 46 CAL. L. REV. 100 (1958); *Joinder of Parties in Civil Actions in California*, 33 So. CAL. L. REV. 428 (1960).

[21] See, *e.g.*, Duval v. Duval, 155 Cal. App.2d 627, 318 P.2d 16 (1957).

fered by Rule 19 of the Federal Rules of Civil Procedure.[22] Rule 19 limits compulsory joinder to those situations where the absence of a person may result in substantial prejudice to that person or to the parties already before the court.

It is generally recognized that Rule 19 of the Federal Rules of Civil Procedure has satisfactorily dealt with one of the most difficult problem areas of civil procedure. On balance, the approach of the federal rules appears to be the more desirable one. The Commission accordingly recommends that Section 382 be revised to delete the clause cited above and that Section 389 be revised to conform substantively to Federal Rule 19.

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[22] Rule 19 provides:

**JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION**

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

**(b) Determination by Court Whenever Joinder Not Feasible.** If a person as described in subdivision (a)(1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

**(c) Pleading Reasons for Nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)–(2) hereof who are not joined, and the reasons why they are not joined.

**(d) Exception of Class Actions.** This rule is subject to the provisions of Rule 23.

# 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 is based upon a cause "arising out of 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, as a cross-complaint under Section 442, as neither, or as both.[1] The technical distinctions created by the different provisions for counterclaims 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.[2] On one hand, the present

[1] 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 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, 984 (1933).]

[2] The California courts have attempted to meet these problems by an extremely liberal rule of construction. The court will sometimes disregard the designation

system invites confusion, which may jeopardize valid claims; on the other hand, it tends to spawn a multiplicity of pleadings, which is unnecessary.

## 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 Procedure[3] and other modern provisions,

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 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 570 (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." *Id.* at 1576 (emphasis in original).

[3] *E.g.*, Rule 13 of the Federal Rules of Civil Procedure, which provides:

**COUNTERCLAIM AND CROSS-CLAIM**

**(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.

**(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.

any cause of action which one party has against an opposing party may be brought as a counterclaim, regardless of its nature.[4]

California should adopt a single form of pleading—to be called a cross-complaint[5]—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.

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 requirements[6]—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 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). There is no justification for this distinction since a counterclaim is more likely to inject new matter into the litigation than a cross-complaint. 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.

(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[7] and should also be subject to compulsory cross-complaint rules.

(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.

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[4] See Friedenthal 12.

[5] 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.

[6] The "diminish or defeat" and "several judgment" requirements now restrict the use of a counterclaim. See Friedenthal 19–23, 29–30.

[7] The existing law is unclear. *Compare* Great Western Furniture Co. v. Porter Corp., 238 Cal. App.2d 502, 48 Cal. Rptr. 76 (1965) (counterclaim stated to be proper) (dictum), *with* Carey v. Cusack, 245 Cal. App.2d 57, 54 Cal. Rptr. 244 (1966) (court indicates counterclaim not proper).

(5) A person who files a cross-complaint should be subject to the provisions relating to mandatory joinder of causes of action. (See the discussion *supra* at 510.)

(6) Whenever a party is sued on a cause of action arising out of the same transaction or occurrence 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.[8]

(7) A statutory provision should be added to provide specifically that a third party may assert any defenses to the underlying cause of action that could be asserted by the person who seeks indemnity from him by a cross-complaint. 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] California courts have held that impleader claims meet the "transaction or occurrence" test embodied in the cross-complaint provision. Friedenthal 30–35. 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 31–33.

## 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 asserts a cause of action against another, regardless of whether they were original parties to the action, the person asserting 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 of causes, 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.

This consistent treatment approach 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.[9] The provisions relating to objections to complaints and to denials and defenses have been made applicable to all pleadings requesting relief.

[9] For example, the new cross-complaint should be a separate document. Similarly, since the cross-complaint is to be treated basically the same as a complaint, the relaxed pleading requirements under Code of Civil Procedure Section 437b in disputes involving less than $500 should not be continued for what formerly were counterclaims.

## SEVERANCE OR CONSOLIDATION FOR TRIAL

Section 1048 of the Code of Civil Procedure provides: "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." The Commission recommends that this section be revised to conform in substance to Rule 42 of the Federal Rules of Civil Procedure.[10] This will make clear not only that the court may sever causes of action for trial but also that the court may sever *issues* for trial.[11] Absent some specific statute dealing with the particular situation,[12] the law is now unclear whether an issue may be severed for trial.[13]

[10] Rule 42 provides:

**CONSOLIDATION; SEPARATE TRIALS**

**(a) Consolidation.** 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) Separate Trials.** 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 claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

[11] For further discussion, see Advisory Committee's Note of 1966 to Subdivision (b) of Rule 42 of the Federal Rules of Civil Procedure.

[12] The recommended revision of Section 1048 would not affect any statute that requires that a particular issue be severed for trial. *E.g.*, Code of Civil Procedure Section 597.5 (separate trial on issue whether action for negligence of person connected with healing arts barred by statute of limitations required on motion of any party). The authority to sever issues for trial under Section 1048 may duplicate similar authority given under other statutes dealing with particular issues. *E.g.*, Code of Civil Procedure Sections 597 (separate trial of special defenses not involving merits), 598 (separate trial of issue of liability before trial of other issues). These sections should be retained, however, because they include useful procedural details which should continue to apply.

[13] See 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 160 (1954) ("There is a dearth of California authority on the meaning and effect of [the "action may be severed" portion of Section 1048]; the relatively few decisions merely emphasize its discretionary character.").

## OPERATIVE DATE

The operative date of the proposed statute should be deferred until July 1, 1972, and the statute should apply to actions commenced on or after that date. This will give lawyers and judges sufficient time to become familiar with the new procedures. However, because some of the provisions of the proposed statute might appropriately be applied to actions pending on July 1, 1972, the Judicial Council should be authorized to adopt rules making such specific provisions applicable to these pending actions.

## MISCELLANEOUS REVISIONS

In addition to the major changes discussed above, the Commission recommends other technical and relatively minor changes in existing legislation. One change of note among these is the extension of time to answer an amended complaint from ten to thirty days,[14] in conformity with the general pleading requirements of the Code of Civil Procedure. Other changes are indicated in the Comments to the proposed statutory provisions that follow.

[14] The 10-day provision of Code of Civil Procedure Section 432, set out in the Appendix (*infra* at 621), is a relic of prior practice.

## 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, 378, 379, 382, 389, 396, 435, 437c, 581, 583, 626, 631.8, 666, 871.2, 871.3, 871.5, and 1048 of, to add Sections 379.5, 422.10, 422.20, 422.30, 422.40, and 471.5 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 379a, 379b, 379c, 380, 381, 383, 384, 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 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

#### § 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

### § 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~~ *If the* defendant in any such action *has a claim against the plaintiff which is for an amount within the jurisdiction of the small claims court as set forth in Section 117, he* may file ~~a verified answer~~ *an affidavit* stating ~~any new matter which shall constitute a counterclaim~~ *such claim* ; a copy of ~~such answer~~ *the affidavit* 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 are hereby made applicable to small claims courts, so far as included within their jurisdiction.~~ Such ~~answer~~ *affidavit* 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~~ *Claim* of Defendant.

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

_____, 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.

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

_____
Judge (Clerk or Notary Public.)

**Comment.** The amendment to Section 117h deletes the former references to "counterclaim" and makes other conforming changes to reflect

the fact that counterclaims have been abolished. See Code of Civil Procedure Section 428.80. There are no compulsory joinder of actions or compulsory cross-complaint requirements imposed upon either the plaintiff or defendant in small claims actions. See Code of Civil Procedure Section 426.60(b) and the Comment thereto.

### § 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 ~~to 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.

*Comment.* The amendment of Section 117r 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.

### § 378. Permissive joinder of plaintiffs

SEC. 4. Section 378 of the Code of Civil Procedure is amended to read:

378. ~~All persons may be joined in one action as plaintiffs who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons~~

~~brought separate actions any question of law or fact would arise which are common to all the parties to the action; provided, that if upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled.~~

*(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, right, or interest adverse to the defendant in the 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. Judgment may be given for one or more of the plaintiffs according to their respective right to relief.*

**Comment.** Section 378 continues the substance of former California law. See 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* §§ 90, 91 (1954). It supersedes former Code of Civil Procedure Section 381, portions of Code of Civil Procedure Section 378, and portions of former Code of Civil Procedure Sections 383 and 384.

Subdivision (a)(1) and subdivision (b) of Section 378 are phrased in substantial conformity with Rule 20(a) of the Federal Rules of Civil Procedure. The broadest sort of joinder is permitted under the transaction clause of the federal rule and of Section 378. See C. CLARK, CODE PLEADING 367 n.86, 369 n.94 (2d ed. 1947); 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 91 (1954). Paragraph (2) of subdivision (a) is derived from the "interest in the subject of the action" provision formerly found in Section 378 and expressed in principle in former Code of Civil Procedure Sections 381, 383, and 384. Paragraph (2) is not needed to expand the broad scope of permissive joinder under the transaction clause of subdivision (a)(1) but has been included to eliminate any possibility that the omission of the "interest in the subject of the action" provision formerly found in Section 378, and the deletion of other permissive joinder provisions, might be construed to preclude joinder in cases where it was formerly permitted.

The power of the court to sever causes where appropriate, formerly found in Section 378, is now dealt with separately in Section 379.5 (new).

### § 379. Permissive joinder of defendants

SEC. 5. Section 379 of the Code of Civil Procedure is amended to read:

379. ~~Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or~~

~~settlement of the question involved therein. And in an action to determine the title or right of possession to real property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant.~~

*(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, right, or interest adverse to them in the 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 relief prayed for. Judgment may be given against one or more defendants according to their respective liabilities.*

**Comment.** Section 379 is amended to provide statutory standards for joinder of defendants comparable to those governing joinder of plaintiffs. See the Comment to Section 378.

The deleted provisions of Section 379 and former Code of Civil Procedure Sections 379a, 379b, 379c, 380, and 383 provided liberal joinder rules but were criticized for their uncertainty and overlap. See 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, CALIFORNIA PLEADING § 618 (1961); 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 93 (1954). The amendment to Section 379 substitutes the more understandable "transaction" test set forth in Rule 20(a) of the Federal Rules of Civil Procedure. However, in so doing, the section probably merely makes explicit what was implicit in prior decisions. See *Hoag v. Superior Court*, 207 Cal. App.2d 611, 24 Cal. Rptr. 659 (1962). Paragraph (2) of subdivision (a) of Section 379 is included merely to make clear that Section 379 as amended permits joinder in any case where it formerly was permitted. See Comment to Section 378. Paragraph (2) is derived from the deleted provisions of Section 379 and the principle stated in former Code of Civil Procedure Sections 379a, 379b, 379c, 380, and 383.

The phrase "in the alternative" in Section 379 retains without change the prior law under former Code of Civil Procedure Sections 379a and 379c. See 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 96(b)(1954); FED. R. CIV. PROC., Rule 20(a) (permitting joinder of defendants where right to relief is asserted against them "in the alternative") and Official Form 10 ("Complaint for negligence where plaintiff is unable to determine definitely whether the person responsible is C.D. or E.F. or whether both are responsible . . ."). See *Kraft v. Smith*, 24 Cal.2d 124, 148 P.2d 23 (1944) (permitting joinder of two doctors who operated on plaintiff's leg at different times). *But see Landau v. Salam*, 10 Cal. App.3d 472, 89 Cal. Rptr. 239 (1970) (denying joinder of two defendants who allegedly injured plaintiff in accidents occurring on separate days). See generally 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* §§ 96, 97 (1954).

**§ 379a (Repealed)**

SEC. 6. Section 379a of the Code of Civil Procedure is repealed.

~~379a. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities.~~

*Comment.* Section 379a is superseded by Section 379.

**§ 379b (Repealed)**

SEC. 7. Section 379b of the Code of Civil Procedure is repealed.

~~379b. It shall not be necessary that each defendant shall be interested as to all relief prayed for, or as to every cause of action included in any proceeding against him; but the court may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.~~

*Comment.* Section 379b is superseded by subdivision (b) of Section 379 and by Section 379.5.

**§ 379c (Repealed)**

SEC. 8. Section 379c of the Code of Civil Procedure is repealed.

~~379c. Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties.~~

*Comment.* Section 379c is repealed as unnecessary. The authority granted by Section 379c to join defendants liable in the alternative is continued without change in revised Section 379. See the Comment to Section 379.

**§ 379.5. Separate trials**

SEC. 9. Section 379.5 is added to the Code of Civil Procedure, to read:

379.5. When parties have been joined under Section 378 or 379, the court may make such orders as may appear just to prevent any party from being embarrassed, delayed, or put to undue expense, and may order separate trials or make such other order as the interests of justice may require.

*Comment.* Section 379.5 continues without significant substantive change the discretion of the court to sever causes where appropriate by combining former Sections 378 and 379b and making them applicable uniformly to any party—plaintiff or defendant. See generally 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, CALIFORNIA PLEADING § 622 (1961); 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 98

(1954). The federal counterpart to Section 379.5 is Rule 20(b) of the Federal Rules of Civil Procedure.

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

### § 380 (Repealed)

SEC. 10. Section 380 of the Code of Civil Procedure is repealed.

~~380. In an action brought by a person out of possession of real property, to determine an adverse claim or an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed.~~

*Comment.* Section 380 is repealed. The section is made unnecessary by the liberal rule of permissive joinder set forth in Section 379. See 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 93 (1954); *cf.* 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, CALIFORNIA PLEADING § 621 (1961). Repeal of Section 380 does not affect the power of the court to issue a writ for possession in the type of case described in the section. See CODE CIV. PROC. §§ 681, 682(5). See also *Montgomery v. Tutt*, 11 Cal. 190 (1858) (power to issue writ is inherent in power to hear action and make decree).

### § 381 (Repealed)

SEC. 11. Section 381 of the Code of Civil Procedure is repealed.

~~381. Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or if [of] establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same.~~

*Comment.* Section 381 is repealed as unnecessary. Its express statutory authorization of joinder of certain persons as plaintiffs was eclipsed in 1927 by the revision of Section 378. See 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, CALIFORNIA PLEADING § 615 (1961); 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 92 (1954).

### § 382 (Conforming Amendment)

SEC. 12. Section 382 of the Code of Civil Procedure is amended to read:

382. ~~Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if~~ *If* the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question

is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all.

*Comment.* Section 382 is amended to delete the 1872 enactment of the old common law rule of compulsory joinder. This provision has been superseded by Section 389. See Section 389 and Comment thereto. The former rule was an incomplete and unsafe guide. One could be an indispensable or necessary party in the absence of any unity in interest. Thus, in an action brought by an unsuccessful candidate against the members of the Personnel Board to invalidate a civil service examination and void eligibility lists based thereon, all the successful candidates were held to be indispensable parties. However, they do not seem to have been united in interest in the usual sense of the term with either plaintiff or defendants. See *Child v. State Personnel Board,* 97 Cal. App.2d 467, 218 P.2d 52 (1950). On the other hand, the presence of a unity in interest did not always make one either an indispensable or necessary party. See *Williams v. Reed,* 113 Cal. App.2d 195, 204, 248 P.2d 147, 153–154 (1952) (joint and several obligors may be sued individually). See generally 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, CALIFORNIA PLEADING § 593 (1961); 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 76 (1954).

No change has been made in Section 382 insofar as it deals with joining an unwilling plaintiff as a defendant and with representative or class actions because these aspects of the section were beyond the scope of the Law Revision Commission's study. Accordingly, this portion of the section was not reviewed by the Commission. Its retention neither indicates approval of these provisions nor makes any change in this area of the law.

**§ 383 (Repealed)**

SEC. 13. Section 383 of the Code of Civil Procedure is repealed.

~~383. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff; and all or any of them join as plaintiffs in the same action, concerning or affecting the obligation or instrument upon which they are severally liable. Where the same person is insured by two or more insurers separately in respect to the same subject and interest, such person, or the payee under the policies, or the assignee of the cause of action, or other successor in interest of such assured or payee, may join all or any of such insurers in a single action for the recovery of a loss under the several policies, and in case of judgment a several judgment must be rendered against each of such insurers according as his liability shall appear.~~

*Comment.* Section 383 is repealed. The section is made unnecessary in part by the liberal rules of permissive joinder set forth in Sections

378 (plaintiffs) and 379 (defendants) and is superseded in part by the rules for compulsory joinder set forth in Section 389. See 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, CALIFORNIA PLEADING §§ 615, 621 (1961); 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* §§ 92, 93 (1954).

Section 383 provided that all or any number less than all of a number of persons who are severally liable on the same obligation, or who are sureties, or who are insurers against the same loss, may sue or be sued in the same action. This rule was in part an exception to the common law rule that one or all of such persons, but not an intermediate number, might be joined. See *People v. Love*, 25 Cal. 520, 526 (1864); *cf. Stearns v. Aguirre*, 6 Cal. 176 (1856) (dictum). Insofar as Section 383 *permitted* such persons to join or be joined as parties to an action, it has since been replaced by Sections 378 and 379. Insofar as Section 383 provided an exception to a common law rule of compulsory joinder, it has been superseded by Section 389. See Section 389 and Comment thereto. If compulsory joinder is not required pursuant to the latter section, nothing prohibits an intermediate number of such persons from joining or being joined.

**§ 384 (Repealed)**

SEC. 14. Section 384 of the Code of Civil Procedure is repealed.

~~384. All persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party.~~

*Comment.* Section 384 is repealed. The section is made unnecessary in part by the liberal rules of permissive joinder set forth in Sections 378 (plaintiffs) and 379 (defendants) and is superseded in part by the rules for compulsory joinder set forth in Section 389. See generally 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, CALIFORNIA PLEADING § 615 (1961); 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* §§ 92, 93 (1954).

At common law, in certain circumstances, all coholders of property were *required* to be joined in an action affecting such property; in other circumstances, coholders were *prohibited* from joining in one action. See *Throckmorton v. Burr*, 5 Cal. 400 (1855); *Johnson v. Sepulbeda*, 5 Cal. 149 (1855). The enactment of Section 384 in 1872 changed both these rules to a flexible one permitting either all or "any number less than all" to commence or defend actions concerning their common property. See former CAL. CODE CIV. PROC. § 384; *Merrill v. California Petroleum Corp.*, 105 Cal. App. 737, 288 P. 721 (1930). Insofar as Section 384 permitted all coholders to join or be joined, it has been eclipsed by the liberal joinder rules provided in Sections 378 and 379. Although Section 384 also permitted less than all coholders to join or be joined, prior case law recognized that, notwithstanding Section 384, under some circumstances *all* the cotenants must be joined as parties. See, *e.g., Solomon v. Redona*, 52 Cal. App. 300, 198 P. 643 (1921); *Jameson v. Chanslor-Canfield Midway Oil Co.*, 176 Cal. 1,

167 P. 369 (1917). *Cf. Woodson v. Torgerson,* 108 Cal. App. 386, 291 P. 663 (1930). See 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 79 (1954). The rules determining whether all the cotenants must be joined are now set forth in Section 389. See Section 389 and Comment thereto. If compulsory joinder is not required pursuant to those rules, nothing prohibits less than all coholders to join or be joined.

## § 389. Compulsory joinder of parties

SEC. 15. Section 389 of the Code of Civil Procedure is amended to read:

389. ~~A person is an indispensable party to an action if his absence will prevent the court from rendering any effective judgment between the parties or would seriously prejudice any party before the court or if his interest would be inequitably affected or jeopardized by a judgment rendered between the parties.~~

~~A person who is not an indispensable party but whose joinder would enable the court to determine additional causes of action arising out of the transaction or occurrence involved in the action is a conditionally necessary party.~~

~~When it appears that an indispensable party has not been joined, the court shall order the party asserting the cause of action to which he is indispensable to bring him in. If he is not then brought in, the court shall dismiss without prejudice all causes of action as to which such party is indispensable and may, in addition, dismiss without prejudice any cause of action asserted by a party whose failure to comply with the court's order is wilful or negligent.~~

~~When it appears that a conditionally necessary party has not been joined, the court shall order the party asserting the cause of action to which he is conditionally necessary to bring him in if he is subject to the jurisdiction of the court, if he can be brought in without undue delay, and if his joinder will not cause undue complexity or delay in the proceedings. If he is not then brought in, the court may dismiss without prejudice any cause of action asserted by a party whose failure to comply with the court's order is wilful or negligent.~~

~~Whenever a court makes an order that a person be brought into an action, the court may order amended or supplemental pleadings or a cross-complaint filed and summons thereon issued and served.~~

~~If, after additional conditionally necessary parties have been brought in pursuant to this section, the court finds that the trial will be unduly complicated or delayed because of the number of parties or causes of action involved, the court may order separate trials as to such parties or make such other order as may be just.~~

*(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest re-*

*lating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.*

*(b) If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder.*

*(c) A complaint or cross-complaint shall state the names, if known to the pleader, of any persons as described in paragraph (1) or (2) of subdivision (a) who are not joined, and the reasons why they are not joined.*

*(d) Nothing in this section affects the law applicable to class actions.*

**Comment.** Section 389 is revised to substitute practically in its entirety Rule 19 of the Federal Rules of Civil Procedure for former Section 389. The words "without prejudice" have been added to the language of the Federal Rule in subdivision (b) of Section 389 merely to avoid any contrary implication that might be created by the omission of the somewhat similar provision formerly found in Section 389. See *Wilson v. Frakes*, 178 Cal. App.2d 580, 3 Cal. Rptr. 434 (1960).

Basically, as amended, Section 389 requires joinder of persons materially interested in an action whenever feasible. In certain instances, joinder cannot be accomplished because it would deprive the court of subject matter jurisdiction. For example, the federal courts have exclusive jurisdiction over proceedings against foreign consuls or vice consuls (28 U.S.C.A. § 1351) and, more importantly, over suits against the United States under the Federal Tort Claims Act. See 28 U.S.C.A. §§ 1346(b), 2679(b). In other situations, joinder will be impossible because personal jurisdiction over the party cannot be obtained.

When joinder cannot be accomplished, the circumstances must be examined and a choice made between proceeding with or dismissing the action. The adequacy of the relief that may be granted in a person's absence and the possibility of prejudice to either such person or the parties before the court are factors to be considered in making this choice. However, a person is regarded as indispensable only in the conclusory sense that, in his absence, the court has decided the action should be dismissed. Where the decision is to proceed, the court has

the power to make a legally binding adjudication between the parties properly before it.

Section 389 formerly attempted not only to avoid prejudice to the parties or absent person but also to promote the general convenience of the courts by preventing a multiplicity of suits. As revised, Section 389 takes a different approach; it limits compulsory joinder to those situations where the absence of a person may result in substantial prejudice to that person or to the parties already before the court. See *Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions*, 10 CAL. L. REVISION COMM'N REPORTS 501, 515 (1971). Section 389 was widely criticized because it formerly appeared to require joinder of parties merely for the general convenience of the courts by preventing a multiplicity of suits. See Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1 (1970); Comments, *Bringing New Parties Into Civil Actions in California*, 46 CAL. L. REV. 100 (1958); *Joinder of Parties in Civil Actions in California*, 33 So. CAL. REV. 428 (1960). However, an examination of the appellate cases decided since the convenience of the courts provision was added to Section 389 in 1957 discloses that the provision was not relied upon; instead, the courts continued to apply the principles enunciated in *Bank of California v. Superior Court*, 16 Cal.2d 516, 106 P.2d 879 (1940).

Under the former law, an indispensable party had to be joined in the action; until and unless he was, the court had no jurisdiction to proceed with the case. See, *e.g.*, *Irwin v. City of Manhattan Beach*, 227 Cal. App.2d 634, 38 Cal. Rptr. 875 (1964). This absolute rule has been changed; however, practically speaking, the change is perhaps more one of emphasis. The guidelines provided in Section 389 are substantially those that have guided the courts for years. See *Bank of California v. Superior Court*, 16 Cal.2d 516, 106 P.2d 879 (1940). These guidelines should require dismissal in the same circumstances where formerly a person was characterized as indispensable.

As noted above, Section 389 has been revised to conform substantially to Rule 19 of the Federal Rules of Civil Procedure. Accordingly, the explanatory note prepared by the Advisory Committee in conjunction with the amendment of Rule 19 in 1966 is particularly helpful in describing the nature and effect of Section 389. This explanatory note is set out below with appropriate deletions and additions:

### Advisory Committee's Note

#### *General Considerations*

> Whenever feasible, the persons materially interested in the subject of an action—see the more detailed description of these persons in the discussion of new subdivision (a) below—should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished—a situation which may be encountered . . . because of limitations on service of process [and] subject matter jurisdiction . . . —the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in

the absence of particular interested persons, and dismissing the action.

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

*Defects in the Original Rule*

The foregoing propositions were well understood in the older equity practice, see Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum.L.Rev. 1254 (1961), and Rule 19 could be and often was applied in consonance with them. But experience showed that the [original] rule was defective in its phrasing and did not point clearly to the proper basis of decision.

* * * * *

*The Amended Rule*

New *subdivision (a)* defines the persons whose joinder in the action is desirable. Clause (1) stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or "hollow" rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter. Clause (2) (i) recognizes the importance of protecting the person whose joinder is in question against the practical prejudice to him which may arise through a disposition of the action in his absence. Clause (2) (ii) recognizes the need for considering whether a party may be left, after the adjudication, in a position where a person not joined can subject him to a double or otherwise inconsistent liability. See [Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 Mich.L.Rev. 327, 330, 338 (1957); Note, *Indispensable Parties in the Federal Courts*, 65 Harv.L.Rev. 1050, 1052–57 (1952); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 Harv.L.Rev. 874, 881–85 (1958)].

The subdivision (a) definition of persons to be joined is not couched in terms of the abstract nature of their interests—"joint," "united," "separable," or the like. See . . . *Developments in the Law, supra*, at 880. It should be noted particularly, however, that the description is not at variance with the settled authorities holding that a tortfeasor with the usual "joint-and-

several" liability is merely a permissive party to an action against another with like liability. See 3 *Moore's Federal Practice*, § 2153 (2d ed. 1963); 2 Barron & Holtzoff, *Federal Practice & Procedure* § 513.8 (Wright ed. 1961). Joinder of these tortfeasors continues to be regulated by Rule 20 . . . . [CAL. CODE CIV. PROC. §§ 378, 379. Where an indemnity action would lie against a third person, the California rule appears to be that the indemnitor is not an "indispensable," but is a "conditionally necessary" party. See *De Stackelberg v. Lamb Transp. Co.*, 168 Cal. App.2d 174, 335 P.2d 522 (1959). In practice, where advantageous, a defendant-indemnitee will simply join his indemnitor by cross-complaint. See CAL. CODE CIV. PROC. §§ 428.10, 428.20.]

If a person as described in subdivision (a) (1)-(2) is amenable to service of process and his joinder would not deprive the court of jurisdiction in the sense of competence over the action, he should be joined as a party; and if he has not been joined, the court should order him to be brought into the action. . . .

*Subdivision (b).* When a person as described in subdivision (a) (1)-(2) cannot be made a party, the court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed. That this decision is to be made in the light of pragmatic considerations has often been acknowledged by the courts. See *Roos v. Texas Co.*, 23 F.2d 171 (2d Cir. 1927), *cert. denied*, 277 U.S. 587 (1928); *Niles-Bement-Pond Co. v. Iron Moulders' Union*, 254 U.S. 77, 80 (1920). The subdivision sets out four relevant considerations drawn from the experience revealed in the decided cases. The factors are to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations.

The *first factor* brings in a consideration of what a judgment in the action would mean to the absentee. Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor? The possible collateral consequences of the judgment upon the parties already joined are also to be appraised. Would any party be exposed to a fresh action by the absentee, and if so, how serious is the threat? See the elaborate discussion in Reed, *supra; cf. A.L. Smith Iron Co. v. Dickson*, 141 F.2d 3 (2d Cir. 1944); *Caldwell Mfg. Co. v. Unique Balance Co.*, 18 F.R.D. 258 (S.D.N.Y. 1955).

The *second factor* calls attention to the measures by which prejudice may be averted or lessened. The "shaping of relief" is a familiar expedient to this end. See, *e. g.*, the award of money damages in lieu of specific relief where the latter might affect an absentee adversely. *Ward v. Deavers*, 203 F.2d 72 (D.C.Cir. 1953); *Miller & Lux, Inc. v. Nickel*, 141 F.Supp. 41 (N.D.Calif.1956). On the use of "protective provisions," see *Roos v. Texas Co., supra; Atwood v. Rhode Island Hosp. Trust Co.*, 275 Fed. 513, 519 (1st Cir. 1921), *cert. denied*, 257 U.S. 661 (1922); *cf. Stumpf v. Fidelity Gas Co.*, 294 F.2d 886 (9th Cir. 1961); and the general statement in *National Licorice Co. v. Labor Board*, 309 U.S. 350, 363 (1940).

Sometimes the party is himself able to take measures to avoid prejudice. Thus a defendant faced with a prospect of a second suit by an absentee may be in a position to bring the latter into the action by defensive interpleader. See [CAL. CODE CIV. PROC. §§ 428.10, 428.20;] *Hudson v. Newell,* 172 F.2d 848, 852, *mod.,* 176 F.2d 546 (5th Cir. 1949); *Gauss v. Kirk,* 198 F.2d 83, 86 (D.C. Cir. 1952); *Abel v. Brayton Flying Service, Inc.,* 248 F.2d 713, 716 (5th Cir. 1957) (suggestion of possibility of counterclaim under Rule 13(b)); *cf. Parker Rust-Proof Co. v. Western Union Tel. Co.,* 105 F.2d 976 (2d Cir. 1939), *cert. denied,* 308 U.S. 597 (1939). So also the absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis. See *Developments in the Law, supra,* 71 Harv.L.Rev. at 882; Annot., *Intervention or Subsequent Joinder of Parties as Affecting Jurisdiction of Federal Court Based on Diversity of Citizenship,* 134 A.L.R. 335 (1941); *Johnson v. Middleton,* 175 F.2d 535 (7th Cir. 1949); *Kentucky Nat. Gas Corp. v. Duggins,* 165 F.2d 1011 (6th Cir. 1948); *McComb v. McCormack,* 159 F.2d 219 (5th Cir. 1947). The court should consider whether this, in turn, would impose undue hardship on the absentee. (For the possibility of the court's informing an absentee of the pendency of the action, see comment under subdivision (c) below.)

The *third factor*—whether an "adequate" judgment can be rendered in the absence of a given person—calls attention to the extent of the relief that can be accorded among the parties joined. It meshes with the other factors, especially the "shaping of relief" mentioned under the second factor. *Cf. Kroese v. General Steel Castings Corp.,* 179 F.2d 760 (3d Cir. 1949), *cert. denied,* 339 U.S. 983 (1950).

The *fourth factor,* looking to the practical effects of a dismissal, indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible. See *Fitzgerald v. Haynes,* 241 F.2d 417, 420 (3d Cir. 1957); *Fouke v. Schenewerk,* 197 F.2d 234, 236 (5th Cir. 1952); *cf. Warfield v. Marks,* 190 F.2d 178 (5th Cir. 1951).

The subdivision uses the word "indispensable" only in a conclusory sense, that is, a person is "regarded as indispensable" when he cannot be made a party and, upon consideration of the factors above-mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.

A person may be added as a party at any stage of the action on motion or on the court's initiative . . . ; and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his absence, may be made as late as the trial on the merits . . . . However, when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subdivision (a) (2) (ii)), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subdivision (a) (2) (i)), his

undue delay in making the motion can properly be counted against him as a reason for denying the motion. A joinder question should be decided with reasonable promptness, but decision may properly be deferred if adequate information is not available at the time. Thus the relationship of an absent person to the action, and the practical effects of an adjudication upon him and others, may not be sufficiently revealed at the pleading stage; in such a case it would be appropriate to defer decision until the action was further advanced. . . .

* * * * *

*Subdivision (c)* parallels the predecessor subdivision (c) of Rule 19. In some situations it may be desirable to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court in its discretion may itself convey this information by directing a letter or other informal notice to the absentee.

*Subdivision (d)* repeats the exception contained in the first clause of the predecessor subdivision (a).

### § 396 (Conforming Amendment)

SEC. 16. 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.

**§ 422 (Repealed)**

SEC. 17. 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. 18. 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 Section 411.10 ("A civil action is commenced by filing a complaint with the court."). The pleadings that can request affirmative relief are complaints and cross-complaints; a counterclaim is no longer permitted. See Section 428.80.

### § 422.20. Pleadings in justice courts

SEC. 19. 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 shall 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 Procedure Section 422. Subdivisions (a) and (d) continue a portion of subdivision 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 only to "complaint[s]."

### § 422.30. Caption for pleadings

SEC. 20. 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 Code of Civil Procedure 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(c) (municipal court).

### § 422.40. Names of parties in title of action

SEC. 21. 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 found in subdivision 1 of former Code of Civil Procedure 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. 22. 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. The remaining sections in Chapter 2 are superseded by the new provisions of the Code of Civil Procedure indicated below:

| *Repealed Provision* | *New Provision* |
|---|---|
| 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 text of the repealed sections is set out in the Appendix, *infra* at 621.

SEC. 23. 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. PLEADINGS DEMANDING RELIEF

Article 1. General Provisions

**§ 425.10. Content of pleading demanding relief**

425.10. 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 pleader 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 found in subdivision 2 and subdivision 3 (first portion) of former 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 "complaint[s]."

**§ 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 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 497 at 1486 (1954). See *Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes, and Related Provisions,* 10 CAL. L. REVISION COMM'N REPORTS 501, 511 (1971). Section 425.20, on the other hand, requires that the party objecting to the pleading must show not only that causes of action are not separately stated, but also that the failure to separately state the causes of action creates confusion. This new requirement is intended to avoid the prolixity and uncertainty that sometimes resulted under the former rule.

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

#### § 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 a complaint or cross-complaint.

(c) "Related cause of action" means a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences 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. Subdivision (c) follows prior law (former Code of Civil Procedure Section 439) which was judicially interpreted to include a series of related acts or conduct. *Brunswig Drug Co. v. Springer*, 55 Cal. App.2d 444, 130 P.2d 758 (1942) ("transaction" embraces the entire series of acts and mutual conduct of the parties); *Sylvester v. Soulsburg*, 252 Cal. App.2d 185, 60 Cal. Rptr. 218 (1967) (a continuous sequence of acts by vendors of real and personal property—including suit to terminate sale contracts, entry upon the real property, taking possession of the personal property, and remaining in possession for a time—constituted a single transaction giving rise to purchasers' claim for damages for trespass).

#### § 426.20. Compulsory joinder of related causes of action

426.20. Except as otherwise provided by statute, if the plaintiff fails to allege in his complaint a related cause of action which (at the time his complaint is filed) he has against any party who is served or who appears in the action, all his rights against such party on the related cause of action not pleaded shall be deemed waived and extinguished.

*Comment.* Section 426.20 requires a party to join all causes of action arising from the transaction or occurrence pleaded in his complaint or cross-complaint. (See Section 426.10 defining "complaint," "plaintiff," and "related cause of action.")

This requirement results normally under the rule in those jurisdictions which follow the so-called operative facts theory of a cause of action for res judicata purposes. However, California has followed the "primary right 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 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 11 (1954); 3 *id. Judgment* §§ 59–60. Nevertheless, even where different primary rights are injured, collateral estoppel would bar an unpleaded cause of action if precisely the same factual issues are involved in both actions. See 3 B. WITKIN, CALIFORNIA PROCEDURE *Judgment* §§ 62–64 (1954). The rule provided by Section 426.20 is consistent with the former California practice relating to counterclaims under repealed Code of Civil Procedure Section 439. For further discussion, see Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions,* 23 STAN. L. REV. 1, 12–14 (1970).

Only related causes of action that exist at the time the party files his complaint or cross-complaint must be joined. Thus, for example, although Section 426.20 may operate to bar an unpleaded related cause of action for damages accrued at the time of filing a complaint, it does not bar a later action for recovery of damages accruing thereafter for which the party did not have a cause of action existing at the time the complaint was filed. *Cf. Chavez v. Carter,* 256 Cal. App.2d 577, 64 Cal. Rptr. 350 (1967) (compulsory counterclaims).

Service on or appearance of a particular party determines whether a related cause of action against that party is required by Section 426.20 to be alleged in the complaint or cross-complaint. Thus, if a particular party is not served at all and makes no appearance, Section 426.20 does not bar a related cause of action against him. Moreover, Section 426.20 does not apply under certain circumstances because of jurisdictional considerations. See Section 426.40.

Section 426.20 is inapplicable to special proceedings and actions in small claims court. See Section 426.60. See also, *e.g.,* Civil Code Section 4001 (Judicial Council rule governing proceedings under Family Law Act). Specific statutes may allow the splitting of causes, and these statutes prevail over Section 426.20. See, *e.g.,* Civil Code Section 1951.4. Section 426.20 has no effect on the independent application, if any, of the rules of res judicata (including the rule against splitting a cause of action) and collateral estoppel.

It is important to note that a court must grant a party who acted in good faith leave to assert a related cause of action not pleaded unless the grant of such leave will result in substantial injustice to the opposing party. See Section 426.50.

### § 426.30. Compulsory cross-complaints

426.30. (a) Except as otherwise provided by statute, 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.* Section 426.30 continues the substance of the former compulsory counterclaim rule (former Code of Civil Procedure Section 439). However, since the scope of a cross-complaint is expanded to include claims which would not have met the "defeat or diminish" or "several judgment" requirements of the former counterclaim statute, the scope of the former rule is expanded by Section 426.30 to include some causes of action that formerly were not compulsory. See discussion in Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions,* 23 STAN. L. REV. 1, 17–27 (1970). As to the limitations under former law, *compare Hill v. Snidow,* 100 Cal. App.2d 37, 222 P.2d 962 (1950) (later action by purchaser to recover money paid under land sale contract barred for failure to assert it by counterclaim in prior quiet title action), *with Hanes v. Coffee,* 212 Cal. 777, 780, 300 P. 963, 964 (1931) ("The complaint seeks to quiet title; the counterclaim is for damages. The granting of the recovery prayed for in the counterclaim would not diminish or defeat the plaintiff's recovery; it would not affect the relief demanded in the complaint in the slightest degree.").

Only related causes of action that exist at the time of service of the answer to the complaint on the particular plaintiff are affected by Section 426.30.

A court must grant to a party who acted in good faith leave to assert a related cause of action he failed to allege in a cross-complaint if, prior to trial, the party applies for leave to assert the cause unless the granting of such leave will result in substantial injustice to the opposing party. See Section 426.50.

Subdivision (b) is new. It is designed to prevent unjust forfeiture of a cause of action. Paragraph (1) treats the situation where a party is not subject to a personal judgment, jurisdiction having been obtained only over property owned by him. In this situation, although the party against whom the complaint (or cross-complaint) is filed is not required to plead his related cause of action in a cross-complaint, he may do so at his election. If he elects to file a cross-complaint, he is required to assert all related causes of action in his cross-complaint. Paragraph (1) is similar to Rule 13(a)(2) of the Federal Rules of Civil Procedure. See Section 426.10(a) (defining complaints to include cross-complaints).

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

Note that, although Section 426.30 may not apply to a particular case, independent application of the rules of res judicata or collateral estoppel, if any, is not affected. See the discussion in the Comment to Section 426.20.

§ 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) Both the court in which the action is pending and any other court to which the action is transferrable pursuant to Section 396 are prohibited by the federal or state constitution or by a statute from entertaining the cause of action not pleaded.

(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).* Subdivision (a) uses language taken from Rule 13(a) of the Federal Rules of Civil Procedure. See also Code of Civil Procedure Section 389 (joinder of persons needed for just adjudication).

*Subdivision (b).* Subdivision (b) of Section 426.40 is designed to meet problems that may arise when the federal courts have jurisdiction to enforce a cause of action created by federal statute. In some cases, state courts have concurrent jurisdiction with the federal courts to enforce a particular cause of action. For example, such concurrent jurisdiction exists by express statutory provision in actions under the Federal Employers' Liability Act. 45 U.S.C.A. § 56. Moreover, even though the federal statute does not contain an express grant of concurrent jurisdiction, the general rule is that state courts have concurrent jurisdiction to determine rights and obligations thereunder where nothing appears in the federal statute to indicate an intent to make federal jurisdiction exclusive. *Gerry of California v. Superior Court*, 32 Cal.2d 119, 122, 194 P.2d 689, 692 (1948). In cases where the state and federal courts have concurrent jurisdiction, if the cause of action created by the federal statute arises out of the same transaction or occurrence, Section 426.30 requires joinder in the state court proceeding, and subdivision (b) of Section 426.40 is not applicable.

In some cases, the federal courts have exclusive jurisdiction of the federal cause of action. See 1 B. 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 requirements.

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

his cause of action under the Sherman Anti-Trust Act is one over which the federal courts have exclusive jurisdiction). Thus, in this instance, defendant's state action must be brought as a cross-complaint and his federal action must be brought as an independent action in the federal courts. Subdivision (b) makes clear that his inability to assert his federal cause of action in the state court does not preclude him from bringing a later action in the federal court to obtain relief under the federal statute.

*Subdivision (c).* Subdivision (c), which makes clear the rule regarding pending actions, is the same in substance as Rule 13(a)(1) of the Federal Rules of Civil Procedure.

### § 426.50. Permission to assert unpleaded cause

426.50. (a) 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, neglect, or other cause, 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.

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

*Comment.* Subdivision (a) of Section 426.50 makes clear that leave should be freely granted to plead a compulsory cause prior to trial: The court must 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. If the party failed to plead the related cause of action because he did not know he had such cause, for example, the court should grant leave to assert the cause except in very extreme circumstances. The rule provided by subdivision (a) is similar to, but more liberal than, Rule 13(f) of the Federal Rules of Civil Procedure.

Subdivision (b) integrates the operation of Sections 426.20 and 426.30. For example, a plaintiff may either inadvertently or by design fail to plead a related cause of action pursuant to Section 426.20 (compulsory joinder of related causes of action). If a cross-complaint is subsequently filed against him, he may then plead by way of cross-complaint the cause of action that he earlier failed to plead in his original complaint. Ordinarily, the same result could be accomplished by obtaining leave of court under subdivision (a) to amend the original complaint. Subdivision (b) provides an alternate procedure without need to pursue an application to the court.

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 which the party may be entitled to obtain under Section 473 of the Code of Civil Procedure.

**§ 426.60. Special proceedings and small claims actions excepted**

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

(b) This article does not apply to actions in the small claims court.

*Comment.* Section 426.60 limits the application of compulsory joinder of causes to ordinary civil actions.

*Subdivision (a).* Subdivision (a) makes the provisions for compulsory joinder of causes inapplicable to special proceedings. The statute governing a particular special proceeding may, of course, provide compulsory joinder rules for that proceeding, and Sections 426.60 has no effect on those rules. Likewise, the fact that this article is not applicable in special proceedings does not preclude the independent application, if any, of res judicata or collateral estoppel.

The extent to which former Code of Civil Procedure Section 439 (compulsory counterclaims) applied to special proceedings was unclear. *Cf. Bacciocco v. Curtis,* 12 Cal.2d 109, 116, 82 P.2d 385, 388 (1938) (court stated that res judicata did not bar subsequent action by lessee to recover deposit paid to lessor where lessee failed to assert his claim for return of deposit in earlier unlawful detainer proceeding). As a practical matter, the requirement that the counterclaim diminish or defeat the plaintiff's recovery probably severely limited the applicability of Section 439 in special proceedings. See discussion in Comment to Section 426.30.

*Subdivision (b).* Subdivision (b) excepts actions brought in small claims court from compulsory joinder requirements. Thus, the compulsory joinder rules do not require that a person join a related cause of action when he brings an action in the small claims court—even where the related cause is for an amount within the court's jurisdiction.

The substance of the rule that the only claim by the defendant that is permitted in the small claims court is one within the jurisdictional limit of the small claims court is continued in Code of Civil Procedure Sections 117h and 117r. However, such a claim is not compulsory under Section 426.30. This changes prior law under which counterclaims within the jurisdictional limits of the small claims court apparently were compulsory. See *Thompson v. Chew Quan,* 167 Cal. App.2d Supp. 825, 334 P.2d 1074 (1959) (dictum). For a criticism of the prior law and a discussion of the problems resulting from the application of the former compulsory counterclaim rule in the small claims court, see Friedenthal, *Civil Procedure,* CAL LAW—TRENDS AND DEVELOPMENTS 191, 238–243 (1969). As to the application of the doctrine of res judicata to small claims courts, see *Sanderson v. Niemann,* 17 Cal.2d 563, 110 P.2d 1025 (1941). See also 3 B. WITKIN, CALIFORNIA PROCEDURE *Judgments* § 46 (b) (1954).

## Article 3. Permissive Joinder of Causes of Action

**§ 427.10. Permissive joinder**

427.10. (a) A plaintiff who in a complaint, alone or with coplaintiffs, 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 any 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. Section 427.10 relates only to joinder of causes of action against persons who are properly made parties to the action; the rules governing permissive joinder of parties are stated in Sections 378, 379, and 428.20.

Under former Section 427, plaintiff could join causes unrelated to one another only when they happened to fall within one of the stated categories. The broad principle reflected in Section 427.10 (complaints) and Sections 428.10 and 428.30 (cross-complaints)—that, once a party is properly joined in an action because of his connection to a single cause of action, adverse parties may join any other causes against him—has been adopted in many other jurisdictions. See, *e.g.*, Rule 18(a) of the Federal Rules of Civil Procedure. For further discussion, see Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions,* 23 STAN. L. REV. 1 (1970).

Any undesirable effects that might result from the unlimited joinder permitted by Section 427.10 may be avoided by severance of causes or issues for trial under Section 1048 of the Code of Civil Procedure.

It should be noted that the plaintiff is subject to the *compulsory* joinder requirements of Section 426.20.

## Article 4. Cross-Complaints

### § 428.10. Permissive cross-complaint

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.

(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 reflects the fact that a cross-complaint is the only type of pleading that may be filed to request relief by a party against whom a complaint or cross-complaint has been filed. It should be noted that, if the cause arises out of the same transaction or occurrence, the cross-complaint is *compulsory*. See Section 426.30. Counterclaims have been abolished. Section 428.80.

Subdivision (a) adopts the simple rule that a party against whom a complaint or cross-complaint has been filed may bring any cause of

action he has (regardless of its nature) against the party who filed the complaint or cross-complaint. There need be no factual relationship between his cause and the cause of the other party. This is the rule under the Federal Rules of Civil Procedure and other modern provisions. *E.g.*, FED. R. CIV. PROC., Rule 13. Third persons may be joined pursuant to Section 428.20.

Subdivision (b) does not, of course, limit the right of a party against whom a cause of action has been asserted to join unrelated causes of action when filing a cross-complaint under subdivision (a) against the party who asserted the cause against him. Subdivisions (a) and (b) are completely independent provisions, and it is necessary only that the person seeking to file the cross-complaint come within the provisions of one of the subdivisions.

Subdivision (a) is generally consistent with prior law (former Code of Civil Procedure Section 438) which provided for a counterclaim; but, under prior law, some causes which a party had against an opposing party did not qualify as counterclaims because they did not satisfy the "diminish or defeat" or "several judgment" requirements. These requirements are not continued, and subdivision (a) permits unlimited scope to a cross-complaint against an opposing party. For discussion of the prior law, see the Comment to Section 426.30 and Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions,* 23 STAN. L. REV. 1, 19–23 (1970).

Subdivision (b) continues the rule (former Code of Civil Procedure Section 442) that a cross-complaint may be asserted against any person, whether or not a party to the action, if the cause of action asserted in the cross-complaint arises out of the same transaction or occurrence or involves the same property or controversy (see discussion in Comments to Sections 378, 379, and 426.10). Subdivision (b) thus permits a party to assert a cause of action against a person who is not already a party to the action if the cause has a subject matter connection with the cause already asserted in the action. For further discussion, see Friedenthal, *supra,* at 25–26.

Any undesirable effects that might result from joinder of causes under Section 428.10 may be avoided by severance of causes or issues for trial under Section 1048 of the Code of Civil Procedure.

### § 428.20. Joinder of parties

428.20. When a person files a cross-complaint as authorized by Section 428.10, he may join any person as a cross-complainant or cross-defendant, whether or not such person is already a party to the action, if, had the cross-complaint been filed as an independent action, the joinder of that party 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.

Section 428.20 retains prior law that a 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. See former Code of Civil Procedure Section 442. 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 prior law. Formerly, 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, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1, 21–23 (1970).

### § 428.30. Joinder of causes of action against cross-defendant

428.30. Where a person files a cross-complaint as authorized by Section 428.10, he may unite with the cause of action asserted in the cross-complaint any other causes of action he has against any of the cross-defendants, whether or not such cross-defendant is already a party to the action.

**Comment.** Section 428.30 provides permissive joinder rules that treat a cross-complaint the same as a complaint in an independent action. *Cf.* Section 427.10. Thus, if a party files a cross-complaint against either an original party or a stranger or both, he may assert in his cross-complaint any additional causes of action he has against any of the cross-defendants. See the Comment to Section 427.10. Any undesirable effects that might result from joinder of causes under Section 428.30 may be avoided by severance of causes or issues for trial under Section 1048.

It should be noted that both the cross-complainant and the new cross-defendant are subject to the *compulsory* joinder requirements of Sections 426.20 and 426.30.

### § 428.40. Cross-complaint to be separate document

428.40. The cross-complaint shall be a separate document.

**Comment.** Section 428.40 requires the cross-complaint to be a separate document. Under prior practice, a counterclaim could be a part of the answer. However, the counterclaim is now abolished. See Section 428.80.

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

428.50. A party shall obtain leave of court to file any cross-complaint except one filed before or at the same time as his answer to the complaint or cross-complaint. 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 mandatory language "shall . . . be granted" of Section 426.50 relating to compulsory cross-complaints.

### § 428.60. Service of cross-complaint

428.60. (a) A cross-complaint shall be served on each of the parties affected thereby in the manner provided in this section.

(b) If any party affected by the 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.

(c) If any party affected by the cross-complaint has appeared in the action, the cross-complaint shall be served upon his attorney, or upon the party if he has appeared without an attorney, in the manner provided for service of summons or in the manner provided by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 of this code.

*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 assert any defenses which the third-party plaintiff could have asserted against the party who pleaded the cause of action against the third-party plaintiff.

The special answer provided by Section 428.70 is designed primarily to meet the problem that arises where a plaintiff sues a defendant and the defendant cross-complains against a third party for indemnity. To protect himself from the defendant's failure or neglect to assert a proper defense to the plaintiff's action, through collusion or otherwise, the third-party defendant is allowed to assert any defenses available to the original defendant directly against the plaintiff.

### § 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 pleading rules. However, although conforming changes have been made in various codes, sections 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 in a manner consistent with the revised pleading provisions 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 shall 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 shall 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 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 subdivision 3 of former Section 426 of the Code of Civil Procedure, but subdivision (a) has been added to extend these provisions to cross-complaints.

SEC. 24. The heading for Chapter 3 (commencing with Section 430) of Title 6 of Part 2 of the Code of Civil Procedure is repealed.

~~CHAPTER III. DEMURRER TO THE COMPLAINT~~

**§ 430 (Repealed)**

SEC. 25. 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 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. 26. 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 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.~~

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

§ 431.5 (Repealed)

SEC. 27. Section 431.5 of the Code of Civil Procedure is repealed.

~~431.5. 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.~~

*Comment.* Section 431.5 is superseded by Section 430.70.

§ 432 (Repealed)

SEC. 28. 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 except that the time to answer has been increased from 10 to 30 days.

SEC. 29. 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 of the subject of the cause of action alleged in the pleading.

(b) The person who filed the pleading does not have the legal capacity to sue.

(c) There is another action pending between the same parties on the same cause of action.

(d) There is a defect or misjoinder of parties.

(e) Causes of action are not separately stated and separate statement is necessary to avoid confusion.

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

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

(h) 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 the grounds for objection to a complaint by demurrer (former Code of Civil Procedure Section 430) or answer (former Code of Civil Procedure Section 433), with two changes:

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

(2) The separate statement of causes provision has been revised to conform to Section 425.20.

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

### § 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 is required to 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 repealed sections of the Code of Civil Procedure except that former provisions applicable to complaints have been made applicable to cross-com-

plaints. Subdivision (a) continues the rule formerly found in Sections 430 and 444; subdivision (b) continues the rule formerly found in Section 433; and subdivision (c) continues the rule formerly found in Sections 431 and 441.

### § 430.40. Time to demur

430.40. (a) A person against whom a complaint or cross-complaint has been filed may, within 30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint.

(b) 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, 442, and 443 of the Code of Civil Procedure. See also Sections 412.20(a)(3) and 432.10.

### § 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 (which include what formerly were counterclaims) are treated the same as complaints. See former Code of Civil Procedure Sections 431 (complaints) and 441 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 shall 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.

§ 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, shall, on the trial, be deemed controverted by the opposite party.

*Comment.* Section 431.20 continues without substantive change the provisions 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 to a cross-complaint was required, 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, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1, 23–24 (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 shall refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished.

*Comment.* Subdivisions (a), (b), (d), (e), and (f) of Section 431.30 are the same in substance as former Code of Civil Procedure Section 437 except that they have been broadened to specifically include cross-complaints. See the Comment to Section 431.20. Subdivision (c) makes clear that affirmative relief may not be claimed in the answer. The former counterclaim is abolished. See 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 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 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 claims 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 be barred by the statute of limitations. If the cross-demand would otherwise be barred by the statute of limitations, the relief accorded under this section shall not exceed the value of the relief granted to the other party. The defense provided by this section is not available if the cross-demand is barred for previous failure to assert it under Section 426.20 or 426.30. Neither person can be deprived of the benefits of this section by the assignment or death of the other.

*Comment.* Section 431.70 continues the substantive effect of former Code of Civil Procedure Section 440. See *Jones v. Mortimer*, 28 Cal.2d 627, 170 P.2d 893 (1946); *Sunrise Produce Co. v. Malovich*, 101 Cal. App.2d 520, 225 P.2d 973 (1950). Section 431.70, however, is expressly limited to cross-demands *for money* and specifies the procedure for pleading the defense provided by the section. It is not necessary under

Section 431.70, as it was not necessary under Section 440, that the cross-demands be liquidated. See *Hauger v. Gates*, 42 Cal.2d 752, 269 P.2d 609 (1954). Section 431.70 ameliorates the effect of the statute of limitations; it does not revive claims which have previously been waived by failure to plead them under Section 426.30. This was implied (under former Code of Civil Procedure Section 439) in *Jones v. Mortimer, supra*. See also *Franck v. J. J. Sugarman-Rudolph Co.*, 40 Cal.2d 81, 251 P.2d 949 (1952), holding that Code of Civil Procedure Section 440 did not revive claims previously waived. The same holding would be required for claims barred by Section 426.20. It should be noted that, if defendant defaults without answering, he will not later be barred from maintaining an action on what would have been a compulsory counterclaim. See Section 426.30(b)(2). Though the statute of limitations may run on such a claim saved by prior default, it will be permitted as set-off under Section 431.70 as in other cases. Where a cause of action is one not required to be asserted in a cross-complaint under Section 426.30, there is no requirement that it be asserted by way of defense under Section 431.70.

### Article 3. Time to Respond to Cross-Complaint

**§ 432.10. Time to respond to cross-complaint**

432.10. A party served with a cross-complaint may within 30 days after service move, demur, or otherwise plead to the cross-complaint in the same manner as to an original complaint.

*Comment.* Section 432.10 is the same as the last sentence of former Code of Civil Procedure Section 442.

**§ 433 (Repealed)**

SEC. 30. 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. 31. Section 434 of the Code of Civil Procedure is repealed.

~~434. 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. 32. 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. 33. 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 on this point. *But see* CODE CIV. PROC. § 453 (striking sham or irrelevant answer).

SEC. 34. 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. 35. 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. 36. 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. 37. 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. 38. A new chapter heading is added immediately preceding Section 437c of the Code of Civil Procedure, to read:

CHAPTER 5. SUMMARY JUDGMENTS

**§ 437c. Summary Judgment**

SEC. 39. 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 any party, 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 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. 40. 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. 41. 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 liberality of Section 428.10 obviates any need to maintain the first proviso of Section 438. Section 428.10 places no restrictions on the right of a defendant to assert by way of cross-complaint either an unsecured claim where the original action is to foreclose a mortgage or a cause of action to foreclose upon his secured claim, subject to Section 726 of the Code of Civil Procedure.

**§ 439 (Repealed)**

SEC. 42. 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 426.10 and 426.30–426.60.

**§ 440 (Repealed)**

SEC. 43. 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. 44. Section 441 of the Code of Civil Procedure is repealed.

~~441. 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(g). The last sentence is superseded by Section 430.30(c).

**§ 442 (Repealed)**

SEC. 45. 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 shall be served upon each of the parties affected thereby. If any such parties have not appeared in the action, a summons upon the cross-complaint shall be issued and served upon them in the same manner as upon the commencement of an original action. If any such parties have appeared in the action, the cross-complaint shall be served upon the attorneys of such parties, or upon the party if he has appeared without an attorney in the manner provided for service of summons or in the manner provided by Chapter 5 (commencing with Section 1010) Title 14 of Part 2. A party served with a cross-~~

~~complaint may within 30 days after service move, demur, or otherwise plead to the cross-complaint in the same manner as to an original complaint.~~

*Comment.* Section 442 is superseded generally 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. The last sentence of Section 442 is continued in Section 432.10. See also Sections 430.40(a) and 435.

### §§ 443 and 444 (Repealed)

SEC. 46. Chapter 5 (commencing with Section 443) of Title 6 of Part 2 of the Code of Civil Proecdure is repealed.

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

| *Old Section* | *New Provision* |
|---|---|
| 443 | Sections 430.40, 430.50 |
| 444 | Sections 430.10–430.30 |

**Note:** The text of the repealed sections is set out in the Appendix, *infra* at 621.

### § 462 (Repealed)

SEC. 47. Section 462 of the Code of Civil Procedure is repealed.

~~462. 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 (Repealed)

SEC. 48. Section 463 of the Code of Civil Procedure is repealed.

~~463. 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. 49. 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 shall 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 shall answer the amendments, or the complaint as amended, within 30 days after service thereof, or such other time as the court may di-

rect, 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 except that the time to answer has been increased from 10 to 30 days to conform to the general rule as to the time within which the defendant must answer.

**§ 581 (Conforming Amendment)**

SEC. 50. 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 con-

sent 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 by cross-complaint. See Sections 431.30, 431.70, and the Comments to those sections.

**§ 583 (Conforming Amendment)**

SEC. 51. 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.

**§ 626 (Conforming Amendment)**

SEC. 52. Section 626 of the Code of Civil Procedure is amended to read:

626. When a verdict is found for the plaintiff in an action for the recovery of money, or for the ~~defendant, when a counter claim~~ *cross-complainant when a cross-complaint* for the recovery of money 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.

**§ 631.8 (Conforming Amendment)**

SEC. 53. 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.

**§ 666 (Conforming Amendment)**

SEC. 54. 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 *established by the party against whom the cross-complaint is asserted*, judgment for the ~~defendant~~ *party asserting the cross-complaint* must be given for the excess; or if it ~~appear~~ *appears* 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.

**§ 871.2 (Technical Amendment)**

SEC. 55. Section 871.2 of the Code of Civil Procedure is amended to read:

871.2. As used in this ~~section~~ *chapter*, "person" includes an unincorporated association.

*Comment.* The amendment of Section 871.2 corrects an obvious technical defect.

**§ 871.3 (Conforming Amendment)**

SEC. 56. 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 counterclaim~~ 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.

**§ 871.5 (Conforming Amendment)**

SEC. 57. 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. Severance or consolidation for trial

SEC. 58. 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, always preserving the right of trial by jury required by the constitution or a statute of this state or of the United States.*

*Comment.* Section 1048 is revised to conform in substance to Rule 42 of the Federal Rules of Civil Procedure. The revision makes clear not only that the court may sever causes of action for trial but also that the court may sever issues for trial. For further discussion, see the Advisory Committee's Note of 1966 to Subdivision (b) of Rule 42 of the Federal Rules of Civil Procedure. Formerly, Section 1048 provided that "an action may be severed" by the court but did not specifically authorize the severance of issues for trial. Absent some specific statute dealing with the particular situation, the law was unclear whether an

issue could be severed for trial. See 2 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* § 160 at 1138 (1954) ("There is a dearth of California authority on the meaning and effect of [the "action may be severed" portion of Section 1048]; the relatively few decisions merely emphasize its discretionary character.").

Section 1048 *permits* the court to sever issues for trial. It does not affect any statute that *requires* that a particular issue be severed for trial. *E.g.*, Code of Civil Procedure Section 597.5 (separate trial on issue whether action for negligence of person connected with healing arts barred by statute of limitations required on motion of any party). The authority to sever issues for trial under Section 1048 may duplicate similar authority given under other statutes dealing with particular issues. *E.g.*, Code of Civil Procedure Sections 597 (separate trial of special defenses not involving merits), 598 (separate trial of issue of liability before trial of other issues). These sections have been retained, however, because they include useful procedural details which continue to apply.

## Revenue and Taxation Code

### § 3522 (Conforming Amendment)

SEC. 59. 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.

### § 3810 (Conforming Amendment)

SEC. 60. 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

### § 26304 (Conforming Amendment)

SEC. 61. 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.

### § 26305 (Conforming Amendment)

SEC. 62. 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.

### § 37161 (Conforming Amendment)

SEC. 63. 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.

### § 37162 (Conforming Amendment)

SEC. 64. 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.

### § 51696 (Conforming Amendment)

SEC. 65. 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. 66. (a) This act becomes operative on July 1, 1972, and applies to actions commenced on or after July 1, 1972.

(b) Except as otherwise provided by rules adopted by the Judicial Council effective on or after July 1, 1972, this act does not apply to actions pending on 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.

*Comment.* The operative date of the act is deferred so that lawyers and judges will have sufficient time to become familiar with the new procedures. Because some of the provisions of the act might appropriately be made applicable to actions pending on July 1, 1972, subdivision (b) permits the Judicial Council to make specific provisions applicable to these pending actions. An action is "commenced" upon the filing of a complaint with the court. See Code of Civil Procedure Section 411.10.

# A STUDY RELATING TO JOINDER OF CLAIMS, COUNTERCLAIMS, AND CROSS-COMPLAINTS: SUGGESTED REVISION OF THE CALIFORNIA PROVISIONS *

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# Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*

Jack H. Friedenthal†

California law with respect to joinder of claims, counterclaims, and cross-complaints has developed in piecemeal fashion, resulting in a proliferation of confusing, inconsistent, and sometimes meaningless provisions. The purpose of this Article is to consider the current provisions in light of principles upon which they should be based and to propose guidelines for change that will result in a new set of consistent, coherent statutes that, hopefully, will be easier to understand and to administer. Such an analysis initially requires recognition that the ultimate goals of the joinder provisions are to enable courts to deal more efficiently with cases by disposing of more actions at one time and to make the prosecution and defense of multiple actions more economical for the parties. Joinder provisions should not be permitted to increase the overall costs of litigation or to so complicate a given case that the trier of fact cannot rationally decide it.

## I. Joinder of Causes

Joinder of causes of action in California is governed by section 427 of the Code of Civil Procedure, which is based on the original provision for joinder of causes contained in the Field Code and enacted into law in New York in 1848:[1]

> The 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.

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* This Article was prepared to provide the California Law Revision Commission with background information for its study of various aspects of pleading. The author's opinions, conclusions, and recommendations contained herein do not necessarily represent the views of the commission.

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

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.[2]

The provision creates four serious problems. First, the single "class" or category requirement is ambiguous and redundant; its limitations serve no practical purpose and are, in fact, harmful. Second, the "affect all parties" requirement needlessly limits joinder. Third, the clause regarding venue is confusing and unnecessary. Fourth, there is no section that requires joinder in appropriate situations; mandatory joinder is now prescribed in special cases in other statutes that themselves are neither clear nor consistent with sound policy. These difficulties, considered in detail below, can only be resolved by substantial legislative revision.

### A. *The Single Class Requirement*

The requirement that all causes to be joined must fall within one of the designated statutory categories is a remnant from common law pleading and has aptly been described as "illogical and arbitrary."[3] Under the common law writ system, a plaintiff could join all claims he had against a defendant so long as they fell within the scope of a single writ, whether the various causes arose out of the same or different transactions or events and regardless of the nature of the injuries suffered. If the causes did not fall within the same writ, they could not be joined even though they arose out of a single event or transaction.[4] The harsh rules of the common law

2. CAL. CIV. PRO. CODE § 427 (West 1969).

3. Toelle, *supra* note 1, at 467.

4. *See* C. CLARK, CODE PLEADING § 67, at 436 (2d ed. 1947); Blume, *A Rational Theory for Joinder of Causes of Action and Defenses, and for the Use of Counterclaims*, 26 MICH. L. REV. 1, 1–10 (1927).

could be avoided, however, by resort to equity jurisdiction. Courts in equity would determine a purely legal action in order to avoid a multiplicity of suits, at least when various causes that could not be joined at common law involved common questions of law and fact.[5]

1. *The necessity for revised wording of section 427.*

When the common law and equity rules were scrapped in favor of the code, the drafters simply reaffirmed a modified common law approach by instituting categories of cases that could be joined. In some instances joinder was broader than at common law, while in other situations joinder was actually restricted.[6] In California there were originally only seven categories;[7] these still comprise, with minor modification, the first seven categories in the current statute. There was no provision whatsoever for joinder of causes of action arising out of the same transaction or occurrence, and California did not amend its statute to add such a category until 1907, after a number of decisions had rejected joinder of different causes arising from a single event.[8]

Unfortunately, the amending legislation was poorly drafted. The new eighth category provided for joinder of 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." This language is in accord with the wording of the paragraph following the listing of categories, which reads: "The causes of action so united must all belong to one only of these classes . . . ." This wording seems to preclude joinder of any claim that falls within one of the first seven categories of claims even if it arose out of the same transaction as the claim with which it is to be joined. Since the first seven categories cover almost all possible causes, the utility of the new eighth category would have been limited indeed had not the courts simply ignored the wording of the section and recognized the intent of the legislature to permit unlimited joinder of all claims arising from a single transaction.[9] Despite the fact that section 427 has since frequently been amended, the offending language in subdivision eight and in the subsequent paragraph has not been eliminated.

The precise scope and meaning of the new category was unclear from the outset. Courts now read the words "same transaction" to include causes arising out of a single tortious event, or related series of events, only because of a series of special, seemingly redundant provisions[10] that were added to

5. Blume, *supra* note 4, at 10–17.
6. *See* Toelle, *supra* note 1, at 467.
7. *Id.* at 465–67.
8. *E.g.*, Stark v. Wellman, 96 Cal. 400, 402, 31 P. 259, 260 (1892).
9. *See* 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, CALIFORNIA PLEADING § 815, at 740–41 (1961).
10. *See generally* 2 B. WITKIN, CALIFORNIA PROCEDURE § 146, at 1126 (1954).

the statute. In 1913, for example, it was provided that a husband's damages for injuries to his wife could be joined with the wife's own claim for her injuries.[11] In 1915 another amendment permitted a plaintiff to join "causes of action for injuries to persons and injuries to property growing out of the same tort." This addition was apparently in response to a 1912 decision in which the court denied such joinder without discussing the "transaction" category.[12] Finally, in 1931, a ninth category was added to section 427 providing for joinder of all claims for injuries arising out of a conspiracy. Again, this appeared to be in response to a specific decision refusing joinder despite the presence of the general "transaction" category.[13]

The result of these amendments is a statute that is confusing and repetitious and that can produce unnecessary concern and research by an attorney who is new to the California Bar or who is not well versed in California litigation practice. By itself, this might not be sufficient reason to call for an amendment, but other more weighty reasons exist.

2. *The need to abolish the categorical approach to joinder.*

More serious than the confusing language of section 427 is the fact that the entire concept behind the statute makes little sense. The section should be replaced by a provision allowing unlimited joinder of causes among persons who have been properly made parties to an action. As virtually every writer on the subject has noted, the joinder categories in the code are largely arbitrary and not based on reasons of fairness or convenience.[14] For example, plaintiff can bring suit on a contract implied in law, and join with it a claim on an unrelated written agreement to which he was not a party but which has been assigned to him for the purpose of litigation;[15] yet plaintiff cannot join a cause of action for battery with a cause of action for defamation unless he can demonstrate that the two causes arose out of a single set of transactions or were the result of a single conspiracy. In the contract action, where joinder is allowed, the witnesses, the nature of the proof, and even the legal issues regarding one cause will be totally unrelated to the other cause. In the tort case, where joinder is not permitted, the history of the relationship between plaintiff and defendant may be germane to both causes of action, so that the same evidence may have to be presented twice.

11. *See* 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, *supra* note 9, § 815, at 741.

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

13. *See* 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, *supra* note 9, § 816.

14. *See, e.g.*, C. CLARK, *supra* note 4, § 67, at 436; Blume, *supra* note 4, at 17–18; Toelle, *supra* note 1, at 467; Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580, 582 (1952).

Defense of the proposal for unlimited joinder ultimately requires a discussion of the rights of parties other than plaintiffs to join claims, but analysis of the case in which a single plaintiff wishes to assert a number of causes against a single defendant is sufficient to demonstrate the senselessness of the categorical approach.

15. *See* Frazer v. Oakdale Lumber & Water Co., 73 Cal. 187, 14 P. 829 (1887).

There is no demonstrated need for any limitations on joinder of causes of action. Every one of the five amendments to section 427 has been enacted for the purpose of expanding joinder. The fact that entirely unrelated claims may be joined if they happen to fall within a single category has not produced any suggestion that such joinder should be curtailed. In a steadily expanding number of other jurisdictions all restrictions on joinder of causes have been eliminated.[16] The Federal Rules of Civil Procedure contain a provision for unlimited joinder[17] that has been a model for reform in many states. One expert in procedure assessed the success of the unlimited joinder provision as follows: "Of all the provisions of the Federal Rules and their state counterparts dealing with joinder, this rule on joinder of claims has operated most smoothly and satisfactorily."[18]

Perhaps more significant than the experience of other jurisdictions with broad joinder of claims provisions is the California experience with broad joinder of counterclaims and cross-complaints by defendants. A defendant can not only bring as cross-complaints all claims he has against a plaintiff arising out of the same transaction as plaintiff's claim,[19] but he may also bring as counterclaims most other claims he has against plaintiff though they be totally unrelated to plaintiff's claim or to each other.[20] Despite this broad scope there has been no agitation whatsoever to cut back the scope of counterclaims or cross-complaints; indeed writers on the subject have argued that even the current limited restrictions on counterclaims should be eliminated.[21] It is certainly anomalous for California law to permit a defendant to plead a broad range of counterclaims and cross-complaints and at the same time to adhere to arbitrary categories for joinder of claims by a plaintiff. If the purpose of joinder provisions is to avoid multiple suits by allowing all conflicting claims between the parties to be settled in a single action, the current restrictions on joinder by a plaintiff are absurd.

Any undesirable effects resulting from unlimited joinder of causes can be remedied by a severance of causes for trial. Joinder of causes, in and of itself, is never harmful. A joint trial of causes may be unjustified, however, either because the trial may become too complex for rational decision, or

16. In New York, where the original code provision was first enacted, such reform was enacted in 1935. *See* C. CLARK, *supra* note 4, § 67, at 440. The current New York provision, for example, reads as follows: "The plaintiff in a complaint or the defendant in an answer setting forth a counterclaim or cross-claim may join as many claims as he may have against an adverse party. There may be like joinder of claims when there are multiple parties." N.Y. CIV. PRAC. LAW § 601 (McKinney 1963).

17. FED. R. CIV. P. 18(a).

18. Wright, *supra* note 14, at 586.

19. *See* CAL. CIV. PRO. CODE § 442 (West Supp. 1970).

20. The sole requisites of a counterclaim are that it must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment may be had. Terry Trading Corp. v. Barsky, 210 Cal. 428, 435–36, 292 P. 474, 477 (1930). These limitations in practice permit extremely broad joinder. *See* text accompanying note 87 *infra*.

21. *See, e.g.*, Comment, *California Procedure and the Federal Rules*, 1 U.C.L.A.L. REV. 547, 551–52 (1954).

because evidence introduced on one cause may so tend to prejudice the trier of fact that it will be unlikely to render a fair decision on another cause. These problems, which are certainly present where joinder is permitted under the existing categories, can be avoided by resort to Code of Civil Procedure section 1048, which permits the court, in its discretion, to sever any action.[22] In addition, a number of other California provisions permit severance where appropriate because of multiple plaintiffs,[23] multiple defendants,[24] or the insertion of counterclaims;[25] these provisions seem redundant, but do emphasize the availability of severance whenever necessary.

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

Since California's provision for consolidation of cases for trial[26] appears to give virtually unlimited discretion to the trial judge, one may ask whether it is not better to retain current joinder limitations than to provide for unlimited joinder subject to the court's power to sever the causes for trial. The answer is no. First of all, consolidation does not eliminate dupli-

22. CAL. CIV. PRO. CODE § 1048 (West 1955): "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."

23. *Id.* § 378.

24. *Id.* § 579.

25. *Id.* § 438 (West 1959).

26. *See* note 22 *supra.*

cation of filing fees and other preliminary costs of suit. Furthermore, a court is likely to reject a party's motion to consolidate if the only reason advanced for consolidation is that one trial is less costly than two, even though the causes sought to be joined are simple and, if joinder were permitted, severence would be rejected as totally inappropriate. The court would be justified in assuming that the failure of the legislature to provide for unlimited joinder at plaintiff's option indicates a policy against joinder by consolidation without a substantial showing of necessity in the particular case. Finally, if causes have been inappropriately joined, severance for trial can always be effected, but it may not be possible to consolidate actions since they may not have been instituted in the same court.[27]

### B. *Permissive Joinder of Causes in Cases Involving Multiple Parties*

Section 427 is generally phrased as if every case involved only one plaintiff and one defendant. The only significant reference to multiple parties is the requirement that each cause of action joined must affect all parties to the action. This clause appeared in the original code at the time when joinder of parties was narrowly restricted. In 1927, however, California became one of a growing number of states to liberalize its joinder of parties provisions. These new statutes provided that parties could be joined if the claims by or against them, whether joint, several, or in the alternative, arose out of one transaction or occurrence or series of transactions or occurrences, and involved a common question of law or fact.[28] In making these reforms, however, state legislatures consistently ignored the existing statutory requirement that each cause of action to be joined must affect all parties to the action. As a result, in a number of states the joinder of parties reforms were virtually nullified. For example, two persons, each of whom suffered injuries due to a single tortious act by a defendant, could satisfy the joinder of parties requirements, but this was meaningless since their causes could

27. Consider, for example, a situation in which plaintiff has two causes, one of which must be brought in superior court and the other of which, if sued on alone, would have to be instituted in municipal court. If section 427 permits plaintiff to unite them into a single case, and he does so, the California laws on jurisdiction provide that the entire action be brought in the superior court. *See* 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, *supra* note 9, § 182. The court in turn can sever the causes for trial. However, if plaintiff, at the outset, divides the causes into two separate actions, the case before the municipal court cannot subsequently be sent to the superior court for consolidation with the case there pending. *See* Cochrane v. Superior Court, 261 Cal. App. 2d 201, 67 Cal. Rptr. 675 (2d Dist. 1968). One may, of course, argue that the legislature should alter the jurisdiction statutes to permit such consolidation rather than change the rules on joinder of causes, but such a procedure would not cure the confusion engendered by section 427 as it now stands, nor would it decrease the initial costs that section 427 creates for the litigant.

28. California Code of Civil Procedure § 378 governs joinder of parties and clearly states these requirements. Joinder of defendants is governed by a series of three provisions that are loosely drawn, overlap, and give no clear picture of what was intended, CAL. CIV. PRO. CODE §§ 379(a)-(c). Most experts have taken the position that the result of these provisions is, and should be, to allow joinder of defendants if, but only if, the criteria for joinder of plaintiffs have been met. *See* 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, *supra* note 9, § 618; 2 B. WITKIN, *supra* note 10, § 93, at 1071.

not be joined; each one's action for his own injuries would affect only him individually.[29]

California courts took a somewhat different approach by holding that the modern joinder of parties provisions should be given their intended effect and that the "affect all parties" requirement of section 427 was thus superseded as to those causes of action which are so related as to permit joinder of the parties.[30] Although the California courts are to be commended for their rational approach to the problem, the decisions have had the unfortunate and unintended result of forestalling further legislative reform. In those states where a restrictive approach was taken and the modern joinder of parties legislation nullified, the need for comprehensive reform of the provisions for joinder of causes became clear. Thus New York[31] and other states scrapped the old code provision for joinder of causes in favor of a statute permitting free joinder of causes between any adverse parties to the action.

In California, however, the "affect all parties" requirement is still part of the statute and has an important effect on the scope of joinder. Assume, for example, that one person, *X*, has two causes of action against a defendant arising from two entirely separate contracts, and that another person, *Y*, has a cause of action against the same defendant arising from one of the two contracts. Both *X* and *Y* may join as plaintiffs in a single action against defendant if the only causes they allege arise from the contract that involves both of them. *X* cannot join his claim on the other contract since it does not affect *Y*, and is not a claim based on the occurrence giving rise to the joinder of *X* and *Y* as plaintiffs.[32] This puts *X* in a serious dilemma. If he wishes to join his two causes against defendant in a single action, which is possible since they are both within the contract category, *Y* cannot join in the action with him. If he teams with *Y*, *X* must either forgo his other cause or bring an entirely separate suit on it.

Such a situation makes little sense. Once a party is properly joined in an action, he should be permitted to bring any and all causes he has against all adverse parties. A new provision permitting joinder would not have a marked impact since, as already noted, in most cases the parties' potential causes of action all arise from a single transaction or occurrence or series of transactions or occurrences. In those situations where additional unrelated causes do exist, however, joinder may result in considerable savings

29. *See, e.g.*, Ryder v. Jefferson Hotel Co., 121 S.C. 72, 113 S.E. 474 (1922). *See generally* C. CLARK, *supra* note 4, at 445–47.

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

31. *See* Tanbro Fabrics Corp. v. Beaunit Mills, Inc., 4 App. Div. 2d 519, 167 N.Y.S.2d 387 (1957). The text of the current New York provision is quoted in note 16 *supra*.

32. *See* 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, *supra* note 9, § 806.

of time and money. Undue confusion and prejudice can always be handled by a severance of causes or issues for trial.[33]

Comparison of the existing provisions regarding counterclaims and cross-complaints by defendants against plaintiffs illustrates that the "affect all parties" limitation on joinder in section 427 is arbitrary, inconsistent, and unnecessary. If two plaintiffs join in one action, each requesting damages against a defendant, the defendant may plead any counterclaims or cross-complaints he has against one plaintiff even though such claims in no way affect the other plaintiff.[34] The counterclaims may involve matters totally unrelated to the complaint.[35] Furthermore, defendant may file a cross-complaint solely against a person who has not previously been a party to the action.[36] This new party should, and probably does, have the right to counterclaim against cross-complainant regarding matters totally unrelated to the other parties or causes involved in the suit.[37] Apart from historical accident, it is difficult to find any reason why a plaintiff should not have as broad a right to join causes as does a defendant, particularly as there has been no agitation to curtail defendants' powers since the current counterclaim provision was first enacted in 1927.

### C. *Joinder of Causes and Problems of Venue*

Section 427 provides that causes cannot be joined if they "require different places of trial." This clause could have resulted in severe restrictions on

33. It is interesting to note that the federal courts recently faced a problem similar to that which now exists in California. Although Federal Rule 18(a) clearly provided for unlimited joinder of causes by one plaintiff against one defendant, at least one lower federal court had held, by a strained interpretation, that, in a case involving multiple parties, a plaintiff was not entitled to join against a defendant a claim unrelated to that which had given rise to the joinder of parties. *See* Federal Housing Adm'r v. Christianson, 26 F. Supp. 419 (D. Conn. 1939). *Cf.* C. WRIGHT, LAW OF FEDERAL COURTS 344 (2d ed. 1970). In 1966, in direct response, Rule 18(a) was amended to provide: "A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party." The notes of the Advisory Committee clearly set forth the purposes of the amendment as follows: "Rule 18(a) is now amended not only to overcome the *Christianson* decision and similar authority, but also to state clearly, as a comprehensive proposition, that a party asserting a claim (an original claim, counterclaim, cross-claim, or third-party claim) may join as many claims as he has against an opposing party. . . . This permitted joinder of claims is not affected by the fact there are multiple parties in the action. The joinder of parties is governed by other rules operating independently.

"It is emphasized that amended Rule 18(a) deals only with pleading. As already indicated, a claim properly joined as a matter of pleading need not be proceeded with together with the other claims if fairness or convenience justifies separate treatment." COMMITTEE ON RULES AND PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, *Notes on Rule 18(a)*, in PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, 39 F.R.D. 73, 87 (1966). *See generally* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 591, 592–98 (1968).

34. *See* CAL. CIV. PRO. CODE §§ 441–42 (West 1954 & Supp. 1969).

35. *See, e.g.*, Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474 (1930).

36. *See* Roylance v. Doelger, 57 Cal. 2d. 255, 368 P.2d 535, 19 Cal. Rptr. 7 (1962); CAL. CIV. PRO. CODE § 442 (West Supp. 1969).

37. *See* text accompanying notes 112–13 *infra*. Two recent cases differ considerably on the question of whether a defendant in a cross-action may assert a counterclaim. *Compare* Great Western Furniture Co. v. Porter Corp., 238 Cal. App. 2d 502, 48 Cal. Rptr. 76 (1st Dist. 1965) (dictum), *with* Carey v. Cusack, 245 Cal. App. 2d 57, 54 Cal. Rptr. 244 (1st Dist. 1966).

the right of plaintiffs to join causes of action. Fortunately, however, the clause has rarely been relied upon.[38] It can and should be eliminated.

The "place of trial" clause appears to inject the varied problems of venue into the joinder statute, and there can be no question that the current California venue laws are a morass of provisions that nearly defy understanding.[39] Had defendants, from the time the code was enacted, consistently challenged the right to join causes on the ground that different places of venue were required, the situation might be quite different. Instead, when different causes were joined that would have required separate places of trial if pursued individually, defendants made the initial challenge to the venue itself.[40] This gave the courts the opportunity to assume that joinder was proper and to interpret the venue statutes on that basis. The results of such interpretations have been dramatic. An entire set of venue rules has emerged regarding so-called mixed actions, where causes of action each requiring different places of venue have been joined. Venue in these cases has been viewed as a matter determined by the entire action and not by the causes joined in it.[41]

These court-made rules have nullified any effect that the "place of trial" clause of section 427 might have had. When two causes that would require separate places of trial if sued upon separately are joined, there is now a specially prescribed venue for them as joined, and hence they do not require different places of trial. This conclusion was based on circular reasoning that proceeded as follows: There is a single place of venue for two causes because they are joined; hence, they can be joined because they do not require different places of venue. Despite this, virtually no challenges to joinder of causes have been made under the "place of trial" clause, and the courts have carefully avoided the matter.

There is no justification for retaining any statutory requirement that appears useless and has the potential for causing confusion and unnecessary cost in a future case. The courts now have had considerable experience in operating under special venue rules for joined causes, and there is no reason why joinder should be prohibited where each cause would require a different place of trial if sued upon alone.

What must be avoided is a possible situation in which joinder would destroy venue entirely. No problem exists if venue can be laid only in a county other than the one in which suit is brought, for when venue is challenged in such a case, transfer is not only available, but required.[42] But if

38. *See* 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, *supra* note 9, § 818.

39. *See* Van Alstyne, *Venue of Mixed Actions in California*, 44 CALIF. L. REV. 685, 685–87 (1956).

40. This is probably due to the fact that a challenge to venue will be determined prior to a demurrer for improper joinder of causes. *See* 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, *supra* note 9, § 818.

41. *See generally id.* §§ 375–891; Van Alstyne, *supra* note 39, at 688.

42. CAL. CIV. PRO. CODE § 396(b) (West Supp. 1969).

the complex venue provisions are interpreted to preclude venue of a given mixed action in any forum, provision should be made for severance of the action and transfer of separate parts to courts were venue is proper. At present, there do not appear to be any cases where no court would have proper venue. There is a possibility that the California Supreme Court would alter this situation, however, since venue rules for mixed actions are grounded on case holdings alone, many by the courts of appeals.[43] Furthermore, the legislature might amend venue provisions in such a way as to require such flexibility in the joinder rules.

### D. *Mandatory Joinder of Causes*

#### 1. *Actions involving one plaintiff and one defendant.*

Once it has been determined to permit broad or unlimited joinder of causes of action by a plaintiff, the question arises whether a further step should be taken to require joinder of causes in cases where it would most likely save time and expense for the court and the parties. The idea is not a new one; various commentators have from time to time advocated mandatory joinder,[44] but such a provision has rarely been adopted.[45] Just recently, a bill was introduced into the California State Senate that will, if passed, require plaintiff to join or waive all factually related causes of action.[46] There are obvious advantages in requiring one party to join all causes of action he has against another party in the case. There is always a possibility that joinder will reduce costs and avoid duplication of effort, and it is not at all clear why plaintiff should have an option to determine when the advantages of joinder should accrue. Such a choice provides a tactical weapon available, at least in the first instance, only to one party.

There are several reasons why rules of mandatory joinder have been rejected. First, the traditional and most practical method of enforcing such a rule is by declaring that any cause of action that a plaintiff improperly failed to join cannot be asserted later in a separate suit.[47] Application of

43. For example, it has been held by one court of appeal that CAL. CIV. PRO. CODE § 394, the special statutory provision for venue regarding suits against counties, applies only if the action is against the county alone. Channell v. Superior Court, 226 Cal. App. 2d 246, 38 Cal. Rptr. 13 (3d Dist. 1964). It is conceivable that the legislature, or the California Supreme Court, might adopt a contrary position; that could lead to a situation, in a suit brought against individual defendants as well as a county, where no court would be a proper place of trial for the entire action.

44. *See, e.g.*, C. CLARK, *supra* note 4, at 145–46; Blume, *Required Joinder of Claims*, 45 MICH. L. REV. 797, 811–12 (1947).

45. Michigan is the only state that appears to have such a provision. MICH. GEN. COURT RULE 203.1: "A complaint shall state as a claim every claim either legal or equitable which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject of the action and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. Failure by motion or at the pretrial conference to object to improper joinder of claims or to a failure to join claims required to be joined constitutes a waiver of the required joinder rules, and the judgment shall not merge more than the claims actually litigated."

46. Cal. S. 847 (April 1, 1970). For a discussion of the bill, see note 79 *infra*.

47. This method is used to enforce provisions requiring defendant to file compulsory counterclaims. CAL. CIV. PRO. CODE § 439 (West 1959). It is also the way in which a plaintiff is precluded

this sanction will induce most plaintiffs to join every possible cause they might have, even those that they might not otherwise be inclined to pursue.[48] At least when plaintiff's causes are unrelated, the potential advantages of mandatory joinder would be outweighed by the disadvantage of encouraging additional litigation. Second, many modern counterclaim provisions, although not California's, permit a defendant to bring all causes of action that he has against a plaintiff.[49] When such a provision is coupled with a provision for declaratory judgment, defendant can, by asking for declarations of non-liability force plaintiff to litigate all his claims in a single suit.[50] This effectively equalizes the tactical opportunities available to the parties.

The situation changes, however, when the proposed mandatory joinder relates only to causes of action arising from a single set of transactions or occurrences. In such circumstances, there is a strong likelihood that the trial of one cause will involve the same witnesses, if not identical issues, as the other causes. The danger that mandatory joinder will encourage unnecessary litigation is markedly reduced for two reasons. First, the trial of one cause will often cover most of the related causes anyway. Second, a plaintiff believing he has two closely related causes will hesitate to omit one of them for fear that the court will hold it not to be separate at all, but a part of the cause that was tried, and hence that the rules of res judicata will bar a further suit.[51] Indeed, the chief argument given against mandatory joinder is that the rules of res judicata make it unnecessary.[52] This argument is certainly true in the majority of states, which follow the so-called "operative facts" theory of a cause of action; under this theory the scope of a single cause of action is held broad enough to cover all claims arising from a single set of transactions or occurrences. The general uncertainty that invariably exists in such jurisdictions as to the precise limits of a cause

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from bringing a second action on a claim that is held, under the rules of res judicata, to have been within the scope of a cause of action litigated in a prior case. *See* 2 B. WITKIN, *supra* note 10, § 14, at 990.

Other methods of enforcement have been suggested. For example, a party could be permitted to sue on a cause not raised in a prior action only upon payment of all of his opponent's costs of litigating the second suit, including attorney's fees. *See* Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 350 (1948). The trouble with this approach is that such compensation makes up neither for a party's loss of time in preparing for and testifying in a second trial nor for the emotional stress that often accompanies a lawsuit. Furthermore, there is no remedy for the inconvenience to witnesses and to the court. The approach taken under Michigan Rule 203.1 puts the burden on defendant in the first action to require plaintiff to join his causes. *See* note 45 *supra*. If defendant does not object, then plaintiff may institute a second action. This places defendant in a serious dilemma. On the one hand, he would like to avoid a second suit; on the other hand, he does not want to suggest to plaintiff the availability of additional causes that might otherwise never be pursued. Even if this provision is thought to give sufficient protection to defendant, it certainly does not avoid the costs and inconvenience to the court and the witnesses.

48. F. JAMES, CIVIL PROCEDURE § 11.10, at 555 (1965).

49. *See, e.g.*, FED. R. CIV. P. 13(b); N.Y. CIV. PRAC. LAW § 3019(a) (McKinney 1963).

50. *See* Rose v. Bourne, Inc., 176 F. Supp. 605 (S.D.N.Y. 1959).

51. *See* C. CLARK, *supra* note 4, § 73, at 476–78.

52. *See id.* at 473–75; F. JAMES, *supra* note 48, § 11.10, at 555.

of action for res judicata purposes has sufficient *in terrorem* effect to force plaintiffs to bring all related claims at once, even if ultimately some of those claims might be considered separate causes.[53] In California and a number of other states, however, the scope of a cause of action for res judicata purposes is defined in terms of "primary rights" rather than "operative facts."[54] Although the precise lines of a cause of action are not always clear under California law,[55] they are generally both clearer and narrower than under the operative facts theory. Under the primary rights doctrine the definition of a cause of action depends upon the nature of the harm suffered. An individual has a right to be free from personal injury, a separate right to be free of injury to his realty, and another to be free of injury to his personalty.[56] A single act of a defendant may therefore give rise to a number of different causes. For example, if defendant negligently drives his auto into plaintiff's vehicle, plaintiff has one cause for any personal injury he has suffered and another for damage to his car.[57] Similarly, if a defendant wrongfully withholds from a plaintiff possession of a home, plaintiff has one cause of action for ejectment from the realty and an entirely different cause for wrongful detention of the furnishings.[58] It makes little sense to permit a plaintiff to bring two separate actions for damages arising from a single tortious act of a defendant. The courts themselves should be protected from the ensuing duplication of trials. Of course, when precisely the same factual issues are involved in both cases, their resolution in the first case will be binding in the second under the doctrine of collateral estoppel. However, collateral estoppel applies only to issues that are identical and has no effect when the issues in the second action differ, even though all of the witnesses are the same.[59]

The general policy favoring resolution of all related causes in a single action, coupled with the fact that California's narrow definition of a cause of action makes res judicata less effective than it is in most other jurisdictions as a force for compulsory joinder, requires revision of section 427 to provide specifically for mandatory joinder of claims arising out of a single set of transactions or occurrences. Once again, it is important to compare California's practice relating to counterclaims. Under section 439 of the Code of Civil Procedure,[60] any counterclaim arising from the same trans-

53. *See generally* F. JAMES, *supra* note 48, §§ 11.9–.14.

54. Holmes v. David H. Bricker, Inc., 70 Cal. 2d 786, 452 P.2d 647, 76 Cal. Rptr. 431 (1969); 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, *supra* note 9, § 761; 2 B. WITKIN, *supra* note 10, § 11, at 984.

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

56. *See* authorities cited in note 54 *supra*.

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

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

59. 3 B. WITKIN, *supra* note 10, § 62, at 1947.

60. *See* text accompanying note 115 *infra*.

action as that upon which plaintiff's claim is based is a compulsory counterclaim that must be asserted in the answer or forever waived. It certainly is no more onerous to require a plaintiff to join causes than it is to require a defendant to do so. The drawbacks, if any, are precisely the same in both cases. Enactment and retention of section 439 would seem to be a clear policy decision favoring the advantages of mandatory joinder over any possible detriments.

2. *Mandatory joinder of causes in multiparty cases.*

So far discussion has centered on the situation where one plaintiff has several related claims against one defendant. Suppose several plaintiffs each have related causes against one defendant, or one plaintiff has a number of related causes against several defendants. Such multiple parties may be joined under the current joinder of parties provisions whenever the claims by or against the parties to be joined arise from a single set of transactions or occurrences and involve a common question of law or fact.[61] The advantages of a single trial in such cases are manifest, raising the question whether joinder ought to be required in such situations.

California, in Code of Civil Procedure section 389, implicitly requires joinder of causes relating to parties who are "indispensable" or "conditionally necessary."[62] An "indispensable party" is defined as one without whom the court cannot render an effective judgment. An indispensable party must be joined in the action; until and unless he is, the court has no jurisdiction to proceed with the case.[63] A "conditionally necessary" party is "a person who is not an indispensable party but whose joinder would enable the court *to determine additional causes of action* arising out of the transaction or occurrence involved in the action."[64] The court, on its own motion, must order him to be joined "if he is subject to the jurisdiction of the court, if he can be brought in without undue delay, and if his joinder will not cause undue complexity or delay in the proceedings."[65] Failure to join a conditionally necessary party, however, is not treated as a jurisdictional defect.[66]

The language of section 389 would seem to require joinder of causes, as well as parties, whenever the cause is factually related to that before the court. Indeed, the statute appears to compel joinder of claims in a multiparty situation where, if there were but one plaintiff and one defendant, the claims would not have to be joined. The relevant text was added in 1957 as

61. *See* text accompanying note 28 *supra.*
62. CAL. CIV. PRO. CODE § 389 (West Supp. 1969).
63. Holder v. Home Sav. & Loan Ass'n, 267 Cal. App. 2d 91, 107, 72 Cal. Rptr. 704, 715 (4th Dist. 1968).
64. CAL. CIV. PRO. CODE § 389 (West Supp. 1969) (emphasis added).
65. *Id.*
66. *See* Bowles v. Superior Court, 44 Cal. 2d 574, 283 P.2d 704 (1955).

a codification of the existing law[67] as declared in the leading case of *Bank of California v. Superior Court*,[68] in which the court defined "necessary parties" as those not indispensable but who:

> might possibly be affected by the decision, or whose interests in the subject matter or transaction are such that it cannot be finally and completely settled without them; but nevertheless their interests are so separable that a decree may be rendered between the parties before the court without affecting those others.[69]

This language implies that something more than factually related causes of action is needed before absent parties are to be deemed "conditionally necessary." Had the legislature intended a broad interpretation of the amendment to section 389, its action would have rendered meaningless the sections of the code providing for permissive joinder of parties.[70] Those sections require that, for any additional parties to be joined, the causes of action by or against them must arise from the same transactions or occurrences and involve a common question of law or fact as causes already before the court.[71] A broad reading of section 389 to require joinder of factually related causes would mean that every person permitted to be joined would have to be joined. Obviously, such a result was not intended, and those courts that have dealt with the problem have refused so to hold.[72] Nevertheless, it is very difficult to formulate a precise test for determining who is a conditionally necessary party, and, therefore, what causes must be joined under the current state of the law. It has even been argued that the decision should be made on a case by case basis without formulation of a rule.[73] Because section 389 is ambiguous and imprecise with respect to mandatory joinder of claims, it is clear that the section should be amended to reflect a straightforward policy decision on the question.

Two different rationales have been offered to justify mandatory joinder of causes; one to protect individuals from prejudice and the other to aid the courts in the efficient administration of justice.

Individuals who are involved in two or more causes of action may require protection against the possibility of inconsistent verdicts that would exist if the causes were to be tried in separate suits. Nonparties must be protected from judgments that adversely affect their interests. In California, however, statutes permitting joinder of causes are usually sufficient of

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67. CAL. L. REVISION COMM'N, RECOMMENDATION AND STUDY RELATING TO BRINGING NEW PARTIES INTO CIVIL ACTIONS M–5 (1957).
68. 16 Cal. 2d 516, 106 P.2d 879 (1940).
69. *Id.* at 523, 106 P.2d at 884.
70. CAL. CIV. PRO. CODE §§ 378–79(c) (West 1954).
71. *See* text accompanying note 28 *supra*.
72. *See, e.g.*, Duval v. Duval, 155 Cal. App. 2d 627, 318 P.2d 16 (4th Dist. 1957).
73. Comment, *Bringing New Parties Into Civil Actions in California*, 46 CALIF. L. REV. 100, 102 (1958). For additional analysis and criticism of the 1957 amendment see Comment, *Joinder of Parties in Civil Actions in California*, 33 S. CAL. L. REV. 428 (1960).

themselves to guard against these potential harms. As already noted, a plaintiff who has several causes arising from a single transaction or occurrence, and involving a common question of law or fact, will be able to join not only his causes but also all of the defendants to them.[74] A defendant may, by cross-complaint, sue any party or nonparty on any cause of action arising out of the same transaction or occurrence as plaintiff's cause.[75] Even a nonparty may, by intervention, join in an action that directly affects his interests.[76] These provisions, when coupled with the statute providing for declaratory judgment,[77] provide parties and nonparties ample opportunity to protect themselves. The only possible exception might be that of the nonparty who does not hear of the suit until the trial is under way. The best solution to that problem is to require the court to order the parties to notify any nonparty with a potential interest of the pendency of the action and to give him the opportunity to intervene if he desires to do so. With that modification of the rules allowing joinder, any provision for mandatory joinder of causes by or against nonparties, including section 389, already in force, would seem unnecessary to protect individuals from prejudice. Such rules may, in fact, have a harmful effect by inducing litigation of causes that might otherwise never be pursued.

The second reason normally advanced to justify mandatory joinder of causes by or against nonparties is to save the courts the time and expense of trying several different suits, all involving the same, or some of the same, issues of law and fact. The advantages that may accrue from broad compulsory joinder based on this rationale are, however, outweighed by problems of enforcement and the dangers of unnecessary litigation. When a number of potential plaintiffs are all injured by a single tortious act of defendant, it would be extremely unfair to place a duty on the first person who files suit to locate and join, willingly or unwillingly, all possible coplaintiffs. It is difficult to see how such a duty would be enforced; the court could order plaintiff to join specified persons who might have claims related to his cause of action, but then there is the distinct danger that some of the new parties dragged into the case would not otherwise have brought suit.

The problems are less difficult when a plaintiff has related causes against different defendants since a rule of mandatory joinder could be enforced by preventing him from instituting later actions against defendants who should have been joined originally. This could prove extremely unfair if plaintiff was unaware of all possible defendants and did not learn of the existence and identity of some of them until the action was terminated.

74. *See* text accompanying note 28 *supra.*
75. *See* text accompanying note 109 *infra.*
76. CAL. CIV. PRO. CODE § 387 (West Supp. 1969).
77. *Id.* § 1060.

Even when plaintiff does know of all possible defendants, a mandatory joinder rule might entail the disadvantage of inducing him to bring in parties who might otherwise never be sued. At present a plaintiff who chooses not to sue all possible defendants will select those persons who are most likely to be held liable and who can afford to pay a judgment. If he is successful, it is very unlikely he will bring a second action; even if he loses, he must balance the costs of an additional trial against the reduced chances of ultimate success. In many cases this will result in a decision not to go forward.[78] On balance, a rule requiring joinder of related causes against all potential defendants does not appear sufficiently beneficial to outweigh the problems it would tend to create.[79]

## II. Counterclaims and Cross-Complaints

The current California law regarding counterclaims and cross-complaints, like that regarding joinder, is wholly unsatisfactory. The discussion

78. In addition, plaintiff must at least commit himself to a second action prior to the running of the statute of limitations. Especially in personal injury actions under California's one-year limitations period, Cal. Civ. Pro. Code § 340(3) (West Supp. 1969), it will usually be known before trial of the first action whether or not a second action will be brought, and consolidation of the two cases may be available.

79. The problems of drafting a mandatory joinder proposal are illustrated by the recent bill introduced into the California State Senate. That bill reads as follows:

"Section 1. Section 428 is added to the Code of Civil Procedure, to read:

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

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

"Nothing in this section shall be construed as affecting the provisions of Section 378 relating to separate trials or expedient orders, or Section 1048 relating to the severance of actions." Cal. S. 847 (April 1, 1970).

By its designation as "Section 428" to appear after section 427 dealing with joinder of causes, the proposal seems to be primarily involved with related causes of action. In fact, it would go much further by requiring joinder of all defendants who are now allowed to be joined in an action since, as previously noted, it is presently a prerequisite to joinder of defendants that the causes of action against them must arise from the same transaction or occurrence. *See* note 28 *supra*. At the very least the new proposal should also directly refer to the statutes dealing with joinder of defendants and should also reconcile section 389 regarding joinder of conditionally necessary parties.

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

There are several other problems with the language of the proposed bill. For example, it refers to causes arising out of "the same transaction or occurrence," which varies from the precise language used in section 439 regarding compulsory counterclaims. Surely the terms of the two sections should be reconciled to present a consistent policy as to mandatory joinder. Furthermore, the bill should also provide that all claims of defendant against plaintiff should be compulsory if they arise out of the same transaction as plaintiff's complaint. At present such claims which qualify as cross-complaints but not as counterclaims are not compulsory. *See* text accompanying notes 115–18 *infra*. This gap becomes even more pronounced since the proposed bill does state that, once a defendant files a cross-complaint, he is subject to the mandatory joinder proposals.

Finally, the proposal refers to the election-of-remedies doctrine which is inapplicable to the compulsory joinder situation and can only confuse matters. *See* C. Clark, *supra* note 4, § 77.

of these areas of California law will be divided into two parts, one dealing with actions brought by defendant against plaintiff, and the other involving actions brought by defendant against persons other than plaintiff. A critical appraisal of the relevant provisions raises a number of major questions. First, to what extent should a defendant be permitted or required to plead causes of action against a plaintiff? Second, to what extent should a defendant be permitted or required to plead causes of action against a person other than a plaintiff? Third, what rights and obligations should a party against whom a defendant has pleaded a cause of action have to respond to defendant's pleading and to join causes of action on his own behalf against defendant and others? Finally, should California retain a special statute, long in force, that provides for the automatic set-off of claims between two potential litigants?

### A. *Claims Against Plaintiff*

In most jurisdictions a cause of action filed by defendant against a plaintiff, alone or with other persons, is denominated a "counterclaim" and is dealt with under a single set of rules.[80] Under the Federal Rules of Civil Procedure and other modern provisions, any cause of action that defendant has against plaintiff may be brought as a counterclaim, regardless of its nature.[81] If defendant's cause arises from the same transaction or occurrence as plaintiff's cause, most such jurisdictions make it a compulsory counterclaim;[82] defendant must raise it in his answer or waive it forever.

In California, however, the provisions are far more complex. A claim by defendant against plaintiff may qualify either as a counterclaim under section 438 of the Code of Civil Procedure or as a cross-complaint under section 442, or it may qualify as neither or as both. Since the procedural aspects of counterclaims are quite different from those of cross-complaints, it is important to determine into which category, if either, defendant's cause of action will be placed.

Roughly speaking, a counterclaim is any cause of action by defendant requesting money damages in a case where plaintiff has also requested

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80. *See, e.g.*, FED. R. CIV. P. 13.

81. FED. R. CIV. P. 13(b): "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."

82. *See, e.g.*, FED. R. CIV. P. 13(a): "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."

monetary relief.[83] There need be no factual relationship whatever between the two causes.[84] A cross-complaint, on the other hand, is any claim by defendant arising from the same transaction as plaintiff's cause, regardless of the nature of the relief sought.[85] A counterclaim that arises from the same transaction as plaintiff's complaint will also qualify as a cross-complaint. A claim by defendant neither seeking monetary relief nor arising from the same transaction as plaintiff's cause will not qualify as either a counterclaim or a cross-complaint; under existing California law such a claim can only be asserted in an independent lawsuit. To further complicate the situation, California law provides that defendant's cause of action is a compulsory counterclaim if it meets the counterclaim requirements and arises from the same foundation as plaintiff's cause;[86] however, there is no provision for compulsory cross-complaints.

The complexity of the counterclaim and cross-complaint provisions makes it clear that the California situation is manifestly in need of reform, and sound policy dictates that the changes be of substance as well as of form.

1. *The current provision for counterclaims.*

Section 438 provides:

> The counterclaim . . . must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action; *provided*, that the right to maintain a counterclaim shall not be affected by the fact that either plaintiff's or defendant's claim is secured by mortgage or otherwise, nor by the fact that the action is brought, or the counterclaim maintained, for the foreclosure of such security; *and provided further*, that the court may, in its discretion, order the counterclaim to be tried separately from the claim of the plaintiff.[87]

There are thus only two prerequisites to a counterclaim: It must tend to "diminish or defeat" plaintiff's claim and it must permit a several judgment between the parties to the action. There is no requirement that the counterclaim have any subject matter connection with any cause of action brought by plaintiff, and no requirement that the plaintiff's cause and the defendant's counterclaim both fall within one of the categories specified by section 427 for joinder of causes by plaintiff.

*The diminish or defeat requirement.* The "diminish or defeat" requirement is the most serious practical limitation on the right of defendant to

83. *See* 2 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, *supra* note 9, § 1686; 2 B. WITKIN, *supra* note 10, § 580, at 1591.

84. *See* Terry Trading Corp. v. Barsky, 210 Cal. 428, 435–36, 292 P. 474, 477 (1930).

85. *See* CAL. CIV. PRO. CODE § 442 (West Supp. 1969), *quoted in* text accompanying note 109 *infra*.

86. *See id.* § 439 (West 1954), *quoted in* text accompanying note 115 *infra*.

87. *Id.* § 438.

institute a counterclaim. As interpreted by the California courts, the requirement is satisfied when both plaintiff and defendant pray for damages, either alone or with other relief.[88] Thus if plaintiff seeks an injunction plus damages of ten dollars against defendant who has been running over his flowers, defendant may by counterclaim seek cancellation of a contract to deliver milk plus five dollars in damages for breakage of bottles. If plaintiff omits his prayer for damages, however, no counterclaim is permitted.

Even when both parties claim some monetary relief, however, the California courts have not clarified whether the "diminish or defeat" requirement is satisfied in a case where recovery by defendant on his proposed counterclaim would necessarily prevent recovery by plaintiff on his cause of action. Consider, for example, an automobile accident case in which plaintiff has sued for damages alleging defendant's negligence and defendant wishes to countersue for his own injuries on the basis that plaintiff's negligence was the sole cause of the accident. Obviously both parties cannot recover on their respective claims. In a number of such cases courts have assumed, without discussion, that the "diminish or defeat" requirement has been met.[89] However, in a recent contract case, *Olsen v. County of Sacramento*,[90] a court of appeals reached the opposite result. Plaintiff brought suit for damages incurred when defendant county cancelled plaintiff's exclusive franchise to collect garbage. The county defended on the ground that the plaintiff had obtained the franchise through fraud and sought to recover payments made to plaintiff under the franchise prior to the time of cancellation. The appellate court held, without citing authority, that defendant's claim did not tend to "diminish or defeat" plaintiff's claim because recovery by one party would necessarily preclude recovery by the other.

The history of section 438 lends some support to the *Olsen* decision. At common law counterclaims, as such, did not exist. Defendant could state his claims in the form of defenses to plaintiff's right to recover either when defendant had a cause of action arising from the same transaction involved in plaintiff's complaint or when defendant had a liquidated contract claim against plaintiff whose own cause was also based on a liquidated contract claim.[91] In these situations defendant could not obtain affirmative relief; he could only offset any recovery by plaintiff.[92] Obviously, when recovery

88. *See* 2 B. WITKIN, *supra* note 10, § 580, at 1591, and cases cited therein. There is one situation when the diminish or defeat requirement may be satisfied although both parties do not seek monetary relief. This occurs when one party sues to quiet title to property against which the opposing party seeks to establish a lien. *See* Hill v. Snidow, 100 Cal. App. 2d 31, 222 P.2d 958 (2d Dist. 1950).

89. *E.g.*, Schrader v. Neville, 34 Cal. 2d 112, 207 P.2d 1057 (1949); Manning v. Wymer, 273 Cal. App. 2d 519, 525–26, 78 Cal. Rptr. 600, 603–04 (1st Dist. 1969) (dictum); Datta v. Staab, 173 Cal. App. 2d 613, 343 P.2d 977 (1st Dist. 1959).

90. 274 Adv. Cal. App. 347, 354–55, 79 Cal. Rptr. 140, 144 (3d Dist. 1969).

91. *See* N.Y. JUDICIAL COUNCIL, SECOND REPORT 124–26 (1936); Howell, *Counterclaims and Cross-Complaints in California*, 10 S. CAL. L. REV. 415, 415–18 (1937).

92. *See* Loyd, *The Development of Set-Off*, 64 U. PA. L. REV. 541, 552–53 (1916).

by one party would necessarily preclude recovery by the other, the common law procedures were inoperative. In 1851 California enacted a fairly typical code provision, closely related to the common law approach, that permitted as counterclaims the following:

> 1st. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;
>
> 2d. In an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action.[93]

One important difference from the common law was the enactment, in 1872, of a separate provision permitting defendant to obtain an affirmative recovery.[94] Enactment of this provision raised the question whether thereafter the counterclaim laws should be interpreted to sweep away the common law concept that defendants' claims were defenses, thus eliminating as a prerequisite the possibility of mutual victory, or whether they should be interpreted simply to allow defendant to recover the excess of his claim over that of plaintiff if both parties should prevail on their respective causes.

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

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

*Prohibition against new parties—the several judgment requirement.* Under the express terms of section 438 a counterclaim can be brought against a plaintiff only; a third person cannot be joined. This is another

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93. Law of April 29, 1851, ch. 5, §§ 46–47, [1851] Cal. Laws 57, 58.

94. Section 666 of the Code of Civil Procedure, first enacted in 1872, currently reads as follows: "If a counterclaim, established at the trial, exceed the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief judgment must be given accordingly.

"When the amount found due to either party exceeds the sum for which the court is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue." CAL. CIV. PRO. CODE § 666 (West 1955).

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

In the face of the provisions permitting a plaintiff to join as defendants all persons against whom he has a cause of action arising from a single transaction, there seems little justification for prohibiting defendant from similar joinder in like circumstances. Any argument that the prohibition is necessary in order to avoid complicating the case is weak in light of the fact that the statute governing cross-complaints not only permits a defendant, in pursuing a cause against an existing party, to join a stranger, but also permits such an action against the stranger alone.[95]

The several judgment requirement[96] is closely related to the rule prohibiting defendant from joining third persons and stems directly from the theory that a counterclaim is a defense. For example, if plaintiff sues two defendants on a contract on which they are jointly liable, one defendant cannot counterclaim against plaintiff because his claim would not be a defense to the joint liability. If the two defendants had a joint claim against plaintiff, then it could be brought as a counterclaim because it would be a direct counter to plaintiff's right to recover. The rule is not operative where defendants are jointly and severally liable, since a several judgment is rendered against each defendant. Each can bring counterclaims individually against plaintiff.

The several judgment rule makes very little sense. In a case to which it applies, defendant should not be required to seek redress in a separate action, but should be permitted to counterclaim. Under present law any

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

96. *See generally* 2 B. WITKIN, *supra* note 10, §§ 582–83, at 1592–94, and cases cited therein.

such claim that arises out of the same transaction or occurrence as plaintiff's cause may be brought as a cross-complaint, and if undue confusion seems likely to result the causes may be severed for trial. The same would be true under a more liberal counterclaim statute eliminating the several judgment rule.

*Defendant's right to join all counterclaims against plaintiff.* Section 427, as previously noted,[97] prohibits a plaintiff from joining causes of action that do not fall within its enumerated categories. Section 438 has no similar limitation on counterclaims, and section 441 specifically permits a defendant "to set forth by answer as many defenses and counterclaims as he may have."[98] This is consistent with section 440, which provides for the automatic set-off of potential claims and counterclaims between any two parties.[99]

The only question concerning such unlimited joinder, other than the inconsistency between it and section 427, relates to section 444. The latter, which provides that plaintiff may demur to defendant's answer on the ground that "several causes of counterclaim have been improperly joined,"[100] parallels the section allowing a defendant to demur to the improper joinder of causes of action by plaintiff.[101] But whereas plaintiff may improperly join his causes, there seems to be no time when defendant can be guilty of improper joinder of counterclaims. Whatever the original reason for the reference to improper joinder in section 444, such reference should be eliminated to avoid confusion.

*Rights and duties of plaintiff against whom a counterclaim has been filed.* A counterclaim is treated procedurally in the same manner as a denial or an affirmative defense. Plaintiff, who is not permitted to file a reply to an answer, likewise never need answer the allegations of a counterclaim; they are deemed controverted.[102] As shall be seen,[103] however, a cross-complaint is treated as a separate action. If plaintiff fails to reply to a cross-complaint, a default judgment will be entered against him.[104]

When plaintiff is uncertain whether a claim against him is a counterclaim or a cross-complaint, he may be in a quandary as to how to proceed. When defendant's claim qualifies as both a counterclaim and a cross-complaint, the courts have held that for pleading purposes they will regard the claim as best suits the interests of justice.[105] In most cases the claim is held

97. *See* text accompanying notes 1–13 *supra.*
98. CAL. CIV. PRO. CODE § 441 (West 1954).
99. *See* text accompanying notes 119–22 *infra.*
100. CAL. CIV. PRO. CODE § 444 (West Supp. 1969).
101. *Id.* § 430(5).
102. *E.g.*, Luse v. Peters, 219 Cal. 625, 630, 28 P.2d 357, 359 (1933).
103. *See* text accompanying notes 112–13 *infra.*
104. *E.g.*, Wettstein v. Cameto, 61 Cal. 2d 838, 395 P.2d 665, 40 Cal. Rptr. 705 (1964).
105. *See, e.g.*, Schrader v. Neville, 34 Cal. 2d 112, 114, 207 P.2d 1057, 1058 (1949).

to be a counterclaim so that plaintiff's failure to answer does not result in a default judgment.[106] In one decision, however, where a default was taken, judgment entered, and execution ordered before plaintiff raised any objections, the supreme court treated the claim as a cross-complaint since, under the circumstances, it would have been unfair to defendant to have set aside the decision.[107] Although the result of this case, as well as other cases on point, seems proper, the costs of a case-by-case determination by the appellate courts seem excessive. Enactment of uniform pleading rules for both counterclaims and cross-complaints would be preferable.

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

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

The rule prohibiting plaintiff from counterclaiming against a counterclaim is partially alleviated by the fact that, under section 440, he may assert, as a set-off to the counterclaim against him, any cause he has that would qualify as a counterclaim to defendant's cause had it been brought as an independent action. However, set-off can be used only defensively; plaintiff cannot obtain affirmative relief if his right to recover exceeds that of defendant.[108]

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

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

108. See the discussion of § 440 in text accompanying notes 119–22 *infra*.

2. *Cross-complaints against plaintiff.*

Section 442 provides for cross-complaints:

> 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.[109]

The only requirement of a cross-complaint is that it have a subject matter connection with the plaintiff's complaint. Unlike a counterclaim, it is not imbued with a long history as a defense. Hence, a cross-complaint need not diminish nor defeat plaintiff's action; it can be brought despite the fact that a several judgment is not possible between plaintiff and defendant, and it must be answered as if it were an independent suit. Unlike a counterclaim, a cross-complaint is never compulsory.

Prior to 1957 a cross-complaint could be filed only against a party to the action.[110] Defendant could thus cross-complain against plaintiff and a co-defendant, but he could not join an outsider unless the outsider was indispensable or necessary under the provisions of section 389.[111] In 1957, section 442 was amended to provide that a cross-complaint could be brought "against any person, whether or not a party." The reason for this alteration was to permit defendant to join with an existing party all those persons whom he would have joined had he brought his cross-complaint as an independent action.[112] It was recognized as unfair to require defendant to choose either a cross-complaint against only an existing party or a separate suit against all those persons whom he wished to join. Surprisingly, this amendment has not been followed by an amendment to the counterclaim statute; defendant must still choose between a countersuit against plaintiff alone and a separate action against all persons he wishes to join.

The terms of section 442 permit the person against whom a cross-complaint is filed, whether or not a plaintiff, to "demur or answer thereto . . . as to the original complaint." This would appear to allow such person to

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109. CAL. CIV. PRO. CODE § 442 (West Supp. 1969).

110. *E.g.*, Alpers v. Bliss, 145 Cal. 565, 570, 79 P. 171, 173 (1904); Argonaut Ins. Exch. v. San Diego Gas & Elec. Co., 139 Cal. App. 2d 157, 293 P.2d 118 (4th Dist. 1956).

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

112. *See* CAL. L. REVISION COMM'N, *supra* note 67, at M-9, M-10.

file his own counterclaims and cross-complaints to the cross-complaint against him. Apparently he would be subject to the compulsory counterclaim rule. There are, however, no appellate court holdings directly in point, and discussions in two recent cases have reached opposing conclusions.[113] In the case holding that a defendant in a cross-action could not file a counterclaim, the court emphasized the language in section 438 that a counterclaim is by "a defendant against a plaintiff" and gave the phrase a literal reading;[114] presumably the court would have reached the same result in interpreting section 442, which uses similar language. Not only does this position fly in the face of the wording of sections 438 and 442, but it makes no practical sense. The responding party should at least have the right to set up a cause of action based on the same transaction as the cross-complaint. It should be noted that the full scope of the counterclaim and cross-complaint laws would apply if defendant elected to file his cross-complaint as an independent action.

3. *Compulsory counteractions.*

Section 439 of the Code of Civil Procedure, first enacted in 1872, provides: "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."[115] The purpose of the statute is clear and unmistakable, yet it is inconsistent both with the practice as to joinder of claims by plaintiff and with the cross-complaint provisions, neither of which provides for compulsory joinder of causes of action.

The situation as to joinder by a plaintiff is somewhat different since the rules of res judicata will at least force plaintiff to join all claims for relief within the scope of a single cause of action.[116] But the failure to provide for compulsory cross-complaints by defendants against plaintiffs is incomprehensible. The problem is less serious than it might be, however, because courts apply the compulsory counterclaim provision to all cross-complaints that also qualify as compulsory counterclaims,[117] and a great majority of cross-complaints against a plaintiff, which must by definition be factually related to plaintiff's complaint, also satisfy the "diminish or defeat" and "several judgment" requirements of the counterclaim statute.

Nevertheless, the current statutory scheme ought to be revised to require

113. *Compare* Great Western Furniture Co. v. Porter Corp., 238 Cal. App. 2d 502, 48 Cal. Rptr. 76 (1st Dist. 1965) (dictum) *with* Carey v. Cusack, 245 Cal. App. 2d 57, 54 Cal. Rptr. 244 (1st Dist. 1966).

114. Carey v. Cusack, 245 Cal. App. 2d 57, 54 Cal. Rptr. 244 (1st Dist. 1966).

115. CAL. CIV. PRO. CODE § 439 (West 1954).

116. *See* text accompanying notes 50–59 *supra.*

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

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

Even if the current distinction between cross-complaints and counterclaims is retained, the wording of section 439, the compulsory counterclaim provision, should be revised to reflect clearly the true scope of its operation. As it now stands, the transactional language of section 439 appears much narrower than that of section 442, the cross-complaint provision. The courts have in fact given a broad interpretation to section 439 in barring defendants' subsequent independent actions for failure to assert them as counterclaims in prior suits.[118] It would seem sensible to harmonize the transactional language of sections 439 and 442 to prevent forfeiture of a potential counterclaim by an unsuspecting litigant who, because of the current language difference, incorrectly believes the claim falls within section 442 but not within section 439.

4. *Special rules of set-off.*

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

> 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.[119]

This section, which has a fascinating history dating back to the Roman law, has been thoroughly explored in a recent scholarly comment.[120] For present purposes it need only be noted that the section has its principal impact on the operation of the statute of limitations and is a means of avoiding unfairness resulting from tactical manipulations by one of two parties, each of whom has a claim for money against the other. Obviously, if the parties agree to a cancellation of mutual debts, there is no need for section 440. Difficulty arises when the party on whose claim the statute of limitations runs last waits until the other party's claim is barred before filing suit. In such case section 440 permits the defendant to allege his otherwise untimely

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

119. CAL. CIV. PRO. CODE § 440 (West 1954).

120. Comment, *Automatic Extinction of Cross-Demands: Compensatio from Rome to California*, 53 CALIF. L. REV. 224 (1965).

counteraction but only to the extent that it cancels any recovery by plaintiff; defendant cannot obtain affirmative relief on his claim.

The value of section 440 lies in the fact that it helps avoid unnecessary litigation. A party who wishes to utilize his cause of action merely to cancel his own debt ought not to be forced to bring suit merely because the statute of limitations will otherwise run on his claim. As currently written and applied, however, section 440 does not require an individual who relies upon it to give notice to that effect. Thus an individual may refuse to pay a debt on the theory that it has been cancelled by a totally unrelated obligation to him without ever communicating to his creditor his reason for not paying.[121] The creditor may first learn of the reliance on a compensating claim after filing suit. This defeats, at least in part, the policy of section 440 to avoid unnecessary litigation. It would seem useful in revising the section to include a requirement that one who wishes to rely upon it must give timely notice to that effect, at least before the limitations period runs on his own claim.

Section 440 permits a person to allege a set-off even though suit is brought by an assignee of the cause against him. In this sense section 440 overlaps with section 368, which reads:

> Assignment of thing in action not to prejudice defense. In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before maturity.[122]

In any general revision of the counterclaim and cross-complaint statutes, care should be taken to retain this set-off provision, which prevents manifest injustice resulting from tactical maneuverings of individuals who have mutual claims. For example, without sections 368 and 440, an individual who has no assets subject to execution could assign his claim against another party to a friend or relative, who could sue and collect the full amount on the assigned claim; the opposing party would be left with only a worthless cause against the assignor.

The language of section 440, however, should be changed to eliminate apparent conflicts with the counterclaim provisions of sections 438 and 439. Such a conflict occurs when a plaintiff successfully sues on a cause of action to which defendant elects not to assert a non-compulsory counterclaim. If defendant asserts his cause in an independent suit, plaintiff in the first action may argue that, since section 440 automatically deemed his claim

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121. *See id.* at 270.
122. CAL. CIV. PRO. CODE § 368 (West 1954).

extinguished to the extent of the counterclaim, any recovery he received in the first action must be presumed to have been an amount over and above any value of such counterclaim, and the principles of res judicata should bar defendant from relying on the fact that he never raised such a defense in his pleadings. This argument, if accepted, would fly in the face of section 439, which strictly limits the scope of compulsory counterclaims.

Section 440 also appears to contradict section 427 by allowing a plaintiff, when defendant files a counterclaim, to join in one action causes that could not otherwise be joined. If plaintiff sues on one cause and defendant counterclaims, plaintiff, under section 440, may allege as defenses to the counterclaim his other causes of action against defendant even though under section 427 they could not have been joined either with the original cause or with each other. Obviously, by utilizing section 440 in this manner, plaintiff is also permitted to overcome the rule that he cannot file a counterclaim to a counterclaim; at the same time his recovery is restricted to a set-off and he cannot obtain affirmative relief. To the extent that neither the statute of limitations nor assignment of causes is involved and thus the basic purposes of section 440 are not at issue, permitting plaintiff only a set-off rather than full relief is absurd. Surely if the issues are to be tried in a single action plaintiff should obtain all the relief to which he is entitled. He should not be required to prosecute an independent suit simply because he wants an affirmative recovery.

5. *The need for a new approach to counteractions by defendant against plaintiff.*

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

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

In one way, the current countersuit statutes are inconsistent with, and more restrictive than, the current joinder of causes provisions in section 427. If, for example, plaintiff has two unrelated causes of action, each based on a contract, he may join them even though he seeks monetary relief on one and injunctive relief on the other.[123] But, in response to such a complaint, defendant is not allowed to assert a counteraction based on yet a third contract on which he seeks a non-monetary remedy. If plaintiff wishes to have this third cause joined with the other two, he can do so merely by asking for a declaratory judgment of nonliability on it.[124] This further illustrates that the restrictions on countersuits are meaningless and supports the notion that defendant, as well as plaintiff, should be afforded the right to allege in a single action all claims he has against his adversary.

B. *Claims Against Persons Other Than Plaintiffs*

In most jurisdictions a cause of action filed by one party against a co-party, whether a co-plaintiff or co-defendant, and whether alone or with other persons brought into the case for the first time, is denominated a "cross-claim."[125] Under the federal rules and other modern procedural provisions, a cross-claim is proper if the cross-complainant alleges a cause of action arising from the same transaction or occurrence or affecting the same property as a plaintiff's original claim or a defendant's counterclaim. A cross-claim cannot be brought solely against persons who have not already been made parties to the action; the only claim that can be made in such case is one in impleader whereby a party to the action alleges that, if he is held liable on a pending claim, he will have a claim against a stranger to the action for all or part of such liability.[126]

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123. *See* text accompanying note 2 *supra*.

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

125. FED. R. CIV. P. 13(g): "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."

126. FED. R. CIV. P. 14: "(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make

In California, the cross-complaint provision, section 442,[127] is the sole basis for bringing causes, including impleader claims, against a co-party or a stranger to the action. Originally, the scope of section 442 was narrowly limited to actions against persons who were already parties to the suit.[128] In 1957, pursuant to a study by the California Law Revision Commission, section 442 was amended for the purpose of permitting the joinder of outsiders as co-defendants with existing parties to a cross-complaint.[129] However, the wording of the amendment, allowing a cross-complaint "against any person, whether or not a party to the original action," was unnecessarily broad. The state supreme court, ignoring the legislative history of the amendment contained in the Law Revision Commission report, gave the new language a literal construction, thereby broadening the scope of cross-complaints well beyond that intended, and even beyond that permitted in jurisdictions with the most liberal joinder rules.[130] Because of the manner in which the scope of section 442 was expanded, many important procedural matters regarding the rights and obligations of the parties to a cross-action were not spelled out. Existing law gives rise to confusion and potential injustice in many situations and should be further revised.

1. *The scope of cross-complaints against non-plaintiffs.*

In cases decided prior to 1957, it was held that the transactional requirements of section 442 were met by a claim by a defendant alleging that, if he were held liable on the original complaint, he would be entitled to indemnity from a third person.[131] At that time such a cross-complaint could

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

"(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so."

127. *See* text accompanying notes 109–14 *supra.*

128. *See* text accompanying note 110 *supra.*

129. *See* text accompanying note 112 *supra.*

130. *See* Friedenthal, *supra* note 95.

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

be pursued only against a person who was already a party to the action. After the 1957 amendment, it was held that such a cross-complaint could be brought against an outsider, thus establishing an impleader procedure as broad as that permitted in most other jurisdictions.[132] It is clear, however, that the 1957 amendment was never intended to go so far. Indeed, the Law Revision Commission, which drafted the amendment, specifically rejected a proposed separate impleader provision as being beyond the scope of its study.[133] The rejected proposal, which made the right of impleader subject to the discretion of the trial court, followed Federal Rule 14 in carefully spelling out the rights and obligations of the parties regarding such a claim once it was permitted.[134] For example, the third party was expressly treated in the same way as a defendant on an ordinary claim, with all the same rights and duties, including the power to bring his own counterclaims, cross-complaints, and impleader claims. In addition, he was given the power to challenge the right of plaintiff to collect from defendant so as to protect himself from any collusion between them as to plaintiff's initial right to recover. By misinterpreting the 1957 amendment to section 442, the California courts set up an absolute right of impleader without any provisions regarding the rights and obligations of the parties other than those that apply generally to cross-complaints and which, as already noted, are not at all clear. It would be desirable to revise section 442 at least to provide a safeguard against collusion in impleader situations.

The broad interpretation of section 442 also permits defendant to file a cross-complaint against an outsider even in a non-impleader situation. Assume, for example, that plaintiff brings suit for injuries received when his car was struck from behind by defendant's automobile and that defendant received injuries at the same time when his vehicle was struck from the side by a third car. Defendant may bring a cross-complaint against the driver of the third vehicle even though he was not made a co-defendant in the original complaint. Under Federal Rule 13(g), such a cross-claim is not permitted.[135] Presumably, the reason is that it would be unfair to a third

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

133. *See* Friedenthal, *supra* note 95, at 496–98.

134. The text of the proposal read as follows: "§ 442a. Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, may assert any defenses which he has to the third-party complaint or which the third-party plaintiff has to the plaintiff's claim and shall have the same right to file a counterclaim, cross-complaint, or third-party complaint as any other defendant. If the plaintiff desires to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant, he may do so by an appropriate pleading. When a counterclaim or cross-complaint is filed against a party, he may in like manner proceed against third parties. Service of process shall be had upon a new party in like manner as is provided for service upon a defendant." CAL. LAW REVISION COMM'N, *supra* note 67, at M-20.

135. *See* United States v. Zashin, 160 F. Supp. 843 (E.D.N.Y. 1958); Comment, *Bringing New Parties Into Civil Actions in California*, *supra* note 73, at 104 & n.24.

party to force him to try a case in a federal court where the subject matter jurisdiction or venue would normally be improper. Severance of the cross-claim for trial would not be of help in alleviating the unfairness since the cross-claim would still be heard in the court where the action was filed. Even though defendant may not file a cross-claim against the third party, defendant may, if it is otherwise proper, file a separate suit against the third party in the court where the original suit is pending and then move to consolidate the two cases. The federal rule permitting impleader is an exception to the general rule against claims against third parties alone; impleader is justified because the need to protect defendant from inconsistent liability is judged to outweigh any unfairness to the third party who may be called upon to litigate the case in a court where it could not be brought as an independent action.

California section 442 makes no allowances for potential unfairness to a third party who is sued in a court where, under the venue laws, an independent action could not be maintained against him. The problem is not as acute as it might be in the federal courts where the forum may be in a different state, but California covers a large area, and great inconvenience may result if a person is required to fight an action five or six hundred miles from his home. Furthermore, unlike actions in the federal courts that normally must involve more than $10,000,[136] California cases may involve any amount, no matter how small.[137] A third party may well default on a cross-complaint involving only a few hundred dollars rather than become involved in litigation in a distant county. The most satisfactory way to control the situation would not be enactment of strict limitations on cross-complaints; instead, the courts should be given the discretion to transfer a severed cause to another county for trial as an independent action. Where the advantages of a unified trial are outweighed by the inconvenience to a third party, the means should be available to rectify any harm not only by severance of the cause against him but also by trial of that cause in the most convenient forum.

2. *Cross-complaints and joinder of causes.*

Suppose a defendant has not only a cause of action against a co-defendant that meets the transactional requirements of section 442, but also an unrelated cause of action against him. The second cause may not be joined in the cross-complaint even though, had the cross-complainant brought his action independently, he could have joined both causes under section 427. Once again the procedural rules place a litigant in a dilemma; the

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

137. The California requirements for subject matter jurisdiction are discussed in 1 J. CHADBOURN, H. GROSSMAN & A. VAN ALSTYNE, *supra* note 9, §§ 51–54, and in 1 B. WITKIN, *supra* note 10, §§ 70–107, at 197–236.

party must decide either to pursue his cross-complaint alone in the suit at hand, knowing a separate action will be necessary later on the other cause, or to forgo the cross-complaint and bring all his causes together in one separate action. Modern procedural systems elsewhere permit any litigant, once he has filed a valid cross-claim or impleader claim, to join with it any other claim he has against the adverse party.[138] This rule does not have a substantial impact since one party rarely has more than one claim against another, particularly claims that are factually unrelated. In the few cases where this does occur, the advantages to the litigants and the court may be substantial. This is especially true of impleader situations where a defendant risks inconsistent verdicts against himself if he elects to bring his cause of action independently. The law should provide that, once a party has pleaded a valid cross-complaint against a third person, he may join all other claims he has against that person. It is important to remember that, even if a party is allowed to join all of his claims, the court may sever any claims or issues for trial when justice so requires.

3. *Rights and duties of a person against whom a cross-complaint has been filed.*

Sections 438 and 442, read literally, are limited to use by defendants. This raises the question, already discussed with respect to plaintiffs, whether a person against whom a cross-complaint has been filed may himself file a counterclaim or a cross-complaint. As noted previously, the few cases that discuss the matter give opposing views,[139] although logic would seem to dictate that such countersuits be permitted. Surely a litigant should not be denied the right to bring an impleader action, since such a denial would expose him to the possibility of inconsistent verdicts. A similar problem exists regarding a plaintiff against whom a counterclaim unrelated to his complaint has been filed. It would be extremely unfair to expose plaintiff to the possibility of double liability because he cannot allege an impleader claim.

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

138. *See, e.g.*, FED. R. CIV. P. 18(a), *quoted in* note 33 *supra*; N.Y. CIV. PRAC. LAW § 601 (McKinney 1963), *quoted in* note 16 *supra*.

139. *See* text accompanying notes 113–14 *supra*.

4. *Mandatory cross-complaints against third parties.*

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

## III. Summary and Recommendations

A number of the problems discussed in Parts I and II of this Article could be alleviated by changing the wording of the individual statutes regarding joinder of parties and causes, leaving intact the basic framework of joinder as it now stands. In light of the inconsistency, lack of coherence, and confusion among the various provisions, however, it seems clear that an overall revision of the joinder regulations based on a consistent set of principles is required.[140] These principles, developed in the foregoing discussions, are summarized below.

### A. *Uniform Procedural Treatment*

**One uniform set of procedures should be applied whenever one person files a cause of action against another so that, regardless of whether they were original parties or not, the person filing the cause and the person against whom it is filed will be treated as plaintiff and defen-**

140. For an example of how problems may arise from piecemeal revision of current provisions, see the discussion of the bill recently introduced in the California Senate regarding proposed mandatory joinder of claims, note 79 *supra*.

**dant, respectively, with all the obligations and rights that they would have had if the cause had been instituted in an independent lawsuit.**

Adherence to this basic principle would eliminate most of the practical problems of current California joinder practice regarding counterclaims and cross-complaints. Often it is fortuitous whether 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 reason to treat parties to a counterclaim or cross-complaint differently than they would have been treated in a separate suit.

Adoption of this principle would necessitate the following alterations of current practices: (1) Persons against whom a counterclaim is alleged would be required to answer. They would be permitted to file any counterclaims or cross-complaints they might have, and they would be bound by compulsory counterclaim rules. (2) Persons against whom a cross-action is filed would be allowed to file their own counterclaims and cross-actions and would, in addition, be subject to compulsory counterclaim rules. (3) Persons who file a counterclaim or cross-action would be permitted or required to join any additional persons whom they would have been permitted or required to join had their cause been alleged in an independent action. (4) Persons who file a counterclaim or cross-action would be bound by any new provisions requiring mandatory joinder of causes of action. These changes would eliminate the absurd procedural distinctions that now exist between counterclaims and cross-complaints and would permit persons against whom such causes were filed to file cross-complaints in impleader to avoid the possibility of inconsistent verdicts. They would also eliminate both the dilemma of a party who must now choose between a counterclaim against his adversary alone and an independent suit against all persons liable to him on his cause of action and the dilemma of a party who must now choose between a cross-complaint alleging only those causes of action factually connected to a cause already alleged in the suit and an independent action in which all joinable causes against the opposing party could be alleged. Finally, the changes would force factually related claims between adverse parties to be joined in a single case.

### B. *Permissive Joinder of Claims and Counterclaims*

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

This principle is intended to apply to parties to counterclaims and cross-actions as well as to parties to an original complaint. There is little reason

to require adverse parties to engage in multiple lawsuits. Under present law, plaintiff can already join many factually unrelated claims against defendant, and defendant, in turn, can countersue on many causes not related either to each other or to causes alleged by plaintiff. The rules that prohibit joinder of all causes that the parties have against one another are arbitrary and inconsistent. From a practical point of view, it is seldom that causes may not be joined, but the rules engender considerable confusion and lead to meaningless litigation on technical points. When appropriate, causes of action may always be severed for trial.

The following alterations of current practices would result: (1) The current categorical approach to joinder of causes by plaintiff would be abolished. (2) A defendant could file against a plaintiff causes that today meet neither the counterclaim nor cross-complaint requirements. (3) All claims by defendant against plaintiff would be denominated "counterclaims," thus harmonizing the nomenclature with that used in virtually every other jurisdiction.

C. *Compulsory Joinder of Claims and Counterclaims*

**When one person files a cause of action against another, any other cause of action that either party has against the other arising from the same transaction or occurrence must also be filed in the action; otherwise it should be deemed waived and all rights thereon extinguished.**

This principle, which is based on the premise that time, effort, and cost will be saved if all factually related causes between adverse parties are brought in a single proceeding, has already been implicitly adopted to the extent that the compulsory counterclaim statute applies. There is no reason why current cross-complaints by defendants against plaintiffs that do not qualify as counterclaims should not be subject to compulsory joinder rules. The major restriction on counterclaims—the "diminish or defeat" requirement—bears no relationship whatsoever to the policy underlying the compulsory joinder of factually related claims and should not govern its application.

The policy of compulsory joinder applies to plaintiff's causes as well as to those of defendant. A specific provision for compulsory joinder is required because, unlike the law in other jurisdictions that take a broad view of the scope of a cause of action, California's common law does not accomplish compulsory joinder by operation of the principles of res judicata. Adoption of this principle would entail the following alterations of current practices: (1) For the first time plaintiffs would be required to join all related causes of action. (2) Defendants would be required to join all related causes, even those that are not now mandatory because they qualify only as cross-complaints and not as counterclaims.

D. *Permissive Filing of Claims Against Co-Parties or Strangers*

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

This principle, except for the nomenclature, has been adopted in California through the courts' broad interpretation of the current cross-complaint statute. Current law would be altered only to the extent that the many statutory provisions now relating to "cross-complaints" would need revision to make their language conform to the state of the case law and to make their nomenclature consistent.

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

E. *Impleader Claims for Indemnity*

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

California courts have already held that impleader claims meet the "transaction or occurrence" test embodied in the cross-complaint provision, but they did so by misinterpreting wording that was not intended to go so far. Hence, no safeguard is provided against possible collusion. A separate section dealing specifically with impleader would seem desirable to make clear the extent to which it exists and any special procedures that it involves. Federal Rule of Civil Procedure 14 provides a model for such a separate provision. Current practice would be altered to permit a third party to claim that the person who seeks indemnity from him is himself not liable on the cause for which indemnity is sought.

F. *Severing Causes or Issues for Trial*

**Whenever a lawsuit involves multiple causes of action, the court should have broad discretion to sever causes or issues for trial. When**

**a nonimpleader cross-claim brought solely against a stranger to the action is severed, the court should have power to transfer such a claim to a more convenient forum for trial as an independent action.**

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

California law does not permit part of a case, although severed from the rest, to be transferred to a different 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. Current practice would be altered by adoption of this principle only in that, under the narrow circumstances described, a severed portion of an action could be sent to another court to be treated as an independent lawsuit. In addition, 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, could only have been filed in a county much more convenient to him. If such a cause is severed, it is only just that the court, in its discretion, be allowed to transfer the cause.

G. *Special Set-Off Provisions*

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

Sections 386 and 440 of the Code of Civil Procedure now prevent a party from avoiding counterclaims merely by assigning his own cause to a third party who files the suit in his own name. In addition, section 440 prohibits a party from taking advantage of an adversary by waiting until the statute of limitations runs on the latter's cause before filing his own. If a full-scale reform of current joinder provisions takes place, these provisions will need revision to harmonize with the mandatory joinder rules; however, their substance should be retained.

# APPENDIX

# CODE OF CIVIL PROCEDURE SECTIONS 420–444 (EXISTING LAW)

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## TITLE VI. PLEADINGS IN CIVIL ACTIONS

### CHAPTER 1. IN GENERAL

420. DEFINITION OF PLEADINGS. The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court.

421. THIS CODE PRESCRIBES THE FORM AND RULES OF PLEADINGS. 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. 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.)

### CHAPTER 2. COMPLAINT—JOINDER OF CAUSES

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.

## CHAPTER 3. DEMURRER TO COMPLAINT

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 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.

431. 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. 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. 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. 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.

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.

435. 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

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.

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.

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.

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" as used in this section shall be construed to include counterclaim and 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 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 (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 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.

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.

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.

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.

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.

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.

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 shall be served upon each of the parties affected thereby. If any such parties have not appeared in the action, a summons upon the cross-complaint shall be issued and served upon them in the same manner as upon the commencement of an original action. If any such parties have appeared in the action, the cross-complaint shall be served upon the attorneys of such parties, or upon the party if he has appeared without an attorney in the manner provided for service of summons or in the manner provided by Chapter 5 (commencing with Section 1010) Title 14 of Part 2. A party served with a cross-complaint may within 30 days after service move, demur, or otherwise plead to the cross-complaint in the same manner as to an original complaint.

### CHAPTER 5. DEMURRER TO ANSWER OR COUNTERCLAIM

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 unintelligible; 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.

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