STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

Bringing New Parties Into Civil Actions

February 21, 1957

LETTER OF TRANSMITTAL

To HIS EXCELLENCY GOODWIN J. KNIGHT
Governor of California
and to the Members of the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 207 of the Statutes of 1955 to make a study to determine whether Sections 389 and 442 of the Code of Civil Procedure should be revised to permit a defendant to bring into a civil action by cross-complaint a person who is not an "indispensable" party. The commission herewith submits its recommendation relating to this subject and the study prepared by its research consultant, Professor Stanley Howell of the School of Law, University of Southern California, Los Angeles.

THOMAS E. STANTON, JR., *Chairman*
JOHN D. BABBAGE, *Vice Chairman*
JESS R. DORSEY, *Member of the Senate*
CLARK L. BRADLEY, *Member of the Assembly*
JOSEPH A. BALL
BERT W. LEVIT
STANFORD C. SHAW
JOHN HAROLD SWAN
SAMUEL D. THURMAN
RALPH N. KLEPS, *Legislative Counsel, ex officio*

JOHN R. MCDONOUGH, JR.
Executive Secretary

February 21, 1957

TABLE OF CONTENTS

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to Bringing New Parties Into Civil Actions

Section 442 of the Code of Civil Procedure authorizes a defendant to file a cross-complaint whenever he seeks affirmative relief relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought or affecting the property to which it relates. Section 442 could be interpreted to authorize a defendant to bring new parties into an action as cross-defendants in order to dispose completely of the claims made in his cross-complaint. As is pointed out in the research consultant's report, this interpretation is supported by the legislative history of the section. The courts have held, however, that Section 442 does not authorize the bringing in of new parties on a cross-complaint and that this matter is controlled by Section 389 of the Code of Civil Procedure, which provides that when a complete determination of a controversy cannot be had without the presence of other parties the court must order them to be brought in. Thus, a defendant cannot bring new parties into an action as cross-defendants except in the limited circumstances specified in Section 389 and then only by obtaining a court order authorizing him to do so.

The commission has concluded that this rule is too restrictive and is out of harmony with the modern principle, embodied in the Federal Rules of Civil Procedure and in legislation of other states, that as many related claims as possible should be disposed of in a single proceeding. To this end, a cross-complainant should have the same freedom to name cross-defendants in his pleadings that a plaintiff has to name defendants in his complaint, subject only to the restriction already stated in Section 442 that the relief sought must relate to or depend upon the contract, transaction, matter, happening or accident upon which the action is brought or affecting the property to which it relates. In this way piecemeal litigation will be avoided and the time of the court, counsel, parties, and witnesses will be conserved. The commission recommends, therefore, that Code of Civil Procedure Section 442 be amended to provide expressly that the defendant may name as cross-defendants persons other than the parties to the original action. If through this procedure so many additional parties are brought in that the proceeding becomes unwieldy, the court has the power under Code of Civil Procedure Section 1048 to order a severance in the interest of justice.

The commission has also concluded that Code of Civil Procedure Section 389 should be revised. This section is not limited to bringing in new parties as cross-defendants but applies as well to other situations in which the court or a party to an action wishes to have other persons made parties thereto. Some cases interpreting and applying Section 389 contain language which suggests that it is to be applied restrictively and that new parties will be ordered in only when they fall in the category which the courts have labelled "indispensable," *i.e.*, when the action would otherwise have to be dismissed because a judgment in the action would prejudice their rights. In other cases, however, new parties have been ordered in under Section 389 when they were not "indispensable" but fell into the category which the courts have called "necessary" or "conditionally necessary," *i.e.*, when the action could proceed without them, but bringing them in would make it possible to dispose of additional claims and defenses and thus settle in a single proceeding all or at least a larger part of the total controversy underlying the litigation.

The commission believes that a court should be authorized to bring in new parties not only when the action cannot proceed without them but also whenever economy of litigation can be achieved without prejudicing the rights of the parties before the court. While the better reasoned decisions have held that our courts already have this authority under Section 389, the matter is not entirely clear because of the restrictive language in some of the cases referred to above. The commission recommends, therefore, that Section 389 be revised as follows:

1. Section 389 should identify as an *indispensable party* any person whose absence will prevent the court from rendering any effective judgment between the parties or whose interest would be inequitably affected or jeopardized by a judgment rendered between the parties, and should provide that such a person must be made a party if this can be done or else the action or the claims therein to which he is indispensable must be dismissed.

2. Section 389 should identify as a *conditionally necessary party* any person whose joinder would make it possible to determine additional claims arising out of the transaction or occurrence involved, and should provide that such a person must be made a party to the action 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.

These proposed revisions of Section 389 would enable our courts in appropriate cases to dispose of a larger number of claims in a single proceeding, thus effecting a desirable economy of litigation. A safeguard against prejudice to any party arising out of the multiparty proceedings authorized by the proposed revision should be provided by a cross-reference in Section 389 to Section 1048 of the Code of Civil Procedure to make it clear that any claim may, in the interest of justice, be severed from the others for trial.

The commission also recommends that a new Section 389.5 be added to the Code of Civil Procedure, to consist of the last sentence of present Section 389. Since this sentence deals with the right of a person to intervene in an action under certain circumstances—a different subject than bringing new parties in—it seems desirable to place it in a separate code section.

The commission's recommendation would be effectuated by the enactment of the following measure: *

An act to amend Sections 389 and 442 of, and to add Section 389.5 to, the Code of Civil Procedure, relating to parties to civil actions.

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

SECTION 1. Section 442 of the Code of Civil Procedure is amended to read:

442. Whenever the defendant seeks affirmative relief against any *person, whether or not a party to the original action* ~~party~~, 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.

SEC. 2. Section 389 of said code is amended to read:

389. ~~The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy can not be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served. And when, in an action for the recovery of real or personal property, or to determine conflicting claims thereto, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, by the proper amendment.~~

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 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 claims 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 a party to the action to bring him in. If he is not then brought in, the court shall dismiss without prejudice all claims as to which such party is indispensable and may, in addition, dismiss without prejudice any claim made in the action by a party whose failure to comply with the court's order is wilful or negligent.

* Matter in italics would be added to the present law; matter in "strikeout" type would be omitted.

When it appears that a conditionally necessary party has not been joined, the court shall order a party to the action 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 claim made in the action 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.

When additional parties are brought into an action, the court may order a severance of any claim made therein in accordance with Section 1048 of this code.

SEC. 3. Section 389.5 is added to said code, to read:

389.5. When, in an action for the recovery of real or personal property, or to determine conflicting claims thereto, a person not a party to the action but having an interest in the subject thereof makes application to the court to be made a party, it may order him to be brought in by the proper amendment.

A STUDY OF THE CALIFORNIA LAW RELATING TO BRINGING IN NEW PARTIES IN CIVIL ACTIONS *

The purpose of this study is to discuss whether more liberal rules should be adopted with respect to bringing new parties into a civil action in the interest of a greater economy of litigation than can be achieved under Sections 389 and 442 of the California Code of Civil Procedure as presently interpreted and applied.

REQUIREMENT OF A COURT ORDER

Section 442 of the Code of Civil Procedure provides:

> § 442. Whenever the defendant seeks affirmative relief against any party, 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.

A reasonable construction of this section would seem to indicate that the terms "any party" include new parties brought in by cross-complaint as well as those already before the court and therefore that it authorizes a defendant to bring into the action any person against whom he has a claim for affirmative relief "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" and that he would need the permission of the court to do so only when he filed such a cross-complaint subsequent to filing his answer.

Under such a construction of Section 442 a defendant would be afforded the same benefits as to permissive joinder of defendants on a cross-complaint that a plaintiff enjoys in filing his complaint [1] if the cross-complaint otherwise met the requirements of the section. From the standpoint of avoiding two or more lawsuits to settle a number of related claims which could thus be litigated in a single proceeding,

* This study was made at the direction of the Law Revision Commission by Professor Stanley Howell of the School of Law, University of Southern California, Los Angeles.

[1] See CAL. CODE CIV. PROC. §§ 379, 379a, 379b, 379c.

such an interpretation of Section 442 would seem desirable.[2] Our courts do not, however, so construe Section 442, even though such a construction is supported by both the language of the section and its legislative history.

As originally adopted in 1873, Section 442 provided, *inter alia,* "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction," etc. "he may, in addition to his answer, file at the same time, or by permission of the Court subsequently, a cross-complaint." [3]

Despite the breadth and liberality of this language in the section our courts traditionally have hesitated to permit a new party to be brought into an action after the commencement thereof without a court order authorizing the same. Early in its history Section 442 was interpreted to conform to this policy. For example, in the case of *Alpers* v. *Bliss,*[4] decided in 1904, our Supreme Court stated:

> The provision of section 442 of the Code of Civil Procedure, giving to a defendant who may seek affirmative relief "against any party" the right to file a cross-complaint at the same time that he files his answer, is limited to cases in which he seeks affirmative relief against a "party" to the action. This section does not give him a right to file a cross-complaint for affirmative relief against one who is not already a party to the action, or to bring new or additional parties into the action by including them in his cross-complaint as defendants thereto. He cannot bring a new party into the action without an order of the court therefor.[5]

In 1907 Section 442 of the Code of Civil Procedure was amended [6] to conform to this interpretation thereof, to read in part: "Whenever the defendant seeks affirmative relief against any party *to the action*" [emphasis added], thus in terms limiting this provision of the section to parties to the action.

In *Merchants' Trust Co.* v. *Bentel* [7] the court, in discussing the effect of this amendment, stated it was intended to remove all doubt as to the practice in such cases. The leading and frequently quoted case of *Reed* v. *Wing* [8] also was decided while this 1907 amendment to Section 442 was in effect. However, in 1915 the section again was amended and the words "*to the action*" following the words "any party" were deleted and this provision of the section again broadened in its terms to read as it originally did and as it does today.[9] Despite this rather convincing evidence of legislative intent to adopt a broader and more liberal provision, the California courts have continued to construe and apply Section 442 as was done prior to 1907 and in rather complete disregard of the 1915 amendment to the section, often citing and relying upon *Reed* v.

[2] The California courts frequently have stated that these code provisions "are to receive a liberal construction to the end that controversies between the same parties and concerning the same subject matter may be adjusted in one proceeding * * *." Merchants' Trust Co. v. Bentel, 10 Cal. App. 75, 77, 101 Pac. 31, 32 (1909). See also, Thorpe v. Story, 10 Cal.2d 104, 73 P.2d 1194 (1937) ; Lowe v. Superior Court, 165 Cal. 708, 134 Pac. 190 (1913) ; Sullivan v. California Realty Co., 142 Cal. 201, 75 Pac. 767 (1904) ; County of Humboldt v. Kay, 57 Cal. App.2d 115, 134 P.2d 501 (1943).

[3] Cal. Code Am. 1873-74, c. 383, § 54, p. 300.

[4] 145 Cal. 565, 79 Pac. 171 (1904).

[5] *Id.* at 570, 79 Pac. at 173.

[6] Cal. Stat. 1907, c. 372, § 6, p. 706.

[7] 10 Cal. App. 75, 101 Pac. 31 (1909).

[8] 168 Cal. 706, 144 Pac. 964 (1914).

[9] Cal. Stat. 1915, c. 141, § 1, p. 298.

Wing, decided at a time when the section contained language subsequently deleted therefrom.[10]

As a consequence, and in apparent disregard of this interesting legislative history of Section 442, the California courts throughout the years have required a court order to bring in a new party by cross-complaint and this practice is now thoroughly established.

PARTIES THAT MAY BE BROUGHT IN

Much can be said in favor of requiring a court order to bring in new parties by cross-complaint, or otherwise, during the pendency of the action, provided these new parties include not only indispensable and necessary parties but proper parties as well. Such policy considerations as avoiding too many diverse issues and unnecessary or unreasonable delay may well dictate that it is better to have the court check on the matter rather than permit this to be done by the defendant and cross-complainant subject only to the normal rules on joinder of parties.

However, the California courts have gone several steps further. First, they not only have held an order of court is necessary to bring in a new party by cross-complaint but also that the power of the court to make such an order is limited by the provisions of Section 389 of the Code of Civil Procedure,[11] which provides:

> § 389. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy can not be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served. And when, in an action for the recovery of real or personal property, or to determine conflicting claims thereto, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, by the proper amendment.

Secondly, some of the cases indicate the power of the court in making such an order under Section 389 is limited to a situation where the party to be ordered in is indispensable to a determination of the case already before the court.[12] It is doubtful, however, that the court in each of these cases meant anything more than that the party to be ordered in had to be at least a ''merely necessary'' party, that is, one which should be before the court for a more complete determination of the matter, rather than one so essential that the court could give no relief without his being brought in, and therefore indispensable.

On the other hand, there are cases clearly permitting an order under Section 389 where the party to be brought in was not indispensable but

---

[10] See, for example: Spencer Kennelly, Ltd. v. Bank of America, 19 Cal.2d 586, 122 P.2d 552 (1942); Metropolitan etc. Co. v. Margulis, 38 Cal. App.2d 711, 102 P.2d 459 (1940); Brady v. Kobey, 27 Cal. App.2d 505, 81 P.2d 263 (1938).

[11] Reed v. Wing, 168 Cal. 706, 144 Pac. 964 (1914); Alpers v. Bliss, 145 Cal. 565, 79 Pac. 171 (1904); Winter v. McMillan, 87 Cal. 256, 25 Pac. 407 (1890); Metropolitan etc. Co. v. Margulis, 38 Cal. App.2d 711, 102 P.2d 459 (1940).

[12] Reed v. Wing and Alpers v. Bliss, *supra* note 11; Banks v. Housing Authority, 120 Cal. App.2d 1, 260 P.2d 668 (1953).

merely necessary.[13] However, language in the cases relating to the power of a court to order in new parties under Section 389 often uses the terms *necessary* and *indispensable parties* interchangeably, failing to distinguish between *indispensable parties* on the one hand and *necessary parties* on the other. This may be partly due to the fact that the code sections relating to joinder of parties do not use the designation "indispensable parties" but employ the general terms "necessary parties" to cover both the indispensable and the merely necessary classes of parties.[14] For example, in *Goldsworthy* v. *Dobbins*[15] the court was dealing with an attempt to bring in new parties by court order under Section 389 who were not even "merely necessary parties" but at most were those who could have been joined under the rules of permissive joinder if the plaintiff had elected to do so. In holding that such an order would not be proper under Section 389, the court stated:

> It is only when a complete determination of the controversy cannot be had without the "presence" of a party that the court "must" order him brought in. The general rule is that the court will not order a new party defendant brought in unless the presence of the new party is *necessary* to the determination of the action. * * *
>
> A complete determination of the controversy can be had without the presence of the Griswolds. The controversy as to specific performance is solely between plaintiffs and defendants. It is only the persons whose interest in the subject matter will be affected by the decree, who are *indispensable* parties. The Griswolds are not affected or prejudiced by the decree; hence they are not indispensable parties to a determination of the issues between plaintiffs and defendants. [Emphasis added.] [16]

Undoubtedly the confusing language in the cases interpreting and applying Section 389 of the Code of Civil Procedure is due in part to the fact that this section, in terms, is mandatory. Quite understandably the courts have taken the position that this mandatory provision, *i.e.,* that the court "must" order in the additional party, whether by cross-complaint or otherwise, applies only when such a party is indispensable. Some of the cases have recognized that this section also includes the situation where the new party is not indispensable but merely necessary to a more complete determination and that in this latter situation the court has the discretionary power under Section 389 to order in the additional party or parties "in order to carry out the policy of complete determination and avoidance of multiplicity of suits." [17]

For example, in *Solomon* v. *Redona* [18] the court stated:

> It is the general rule in equity, continued in force by our Code of Civil Procedure, that all who are interested in the subject

[13] Warner v. Pacific Tel. & Tel. Co., 121 Cal. App.2d 497, 263 P.2d 465 (1953) ; Casaretto v. DeLucchi, 76 Cal. App.2d 800, 174 P.2d 328 (1946).
[14] For example, see CAL. CODE CIV. PROC. § 382, relating to necessary parties and CAL. CODE CIV. PROC. § 389, dealing with bringing in new parties by order of court. Compare, FED. R. CIV. P. 19 (b), recognizing the distinction between indispensable and merely necessary parties.
[15] 110 Cal. App.2d 802, 243 P.2d 883 (1952).
[16] *Id.* at 807, 243 P.2d at 886.
[17] Bank of California v. Superior Court, 16 Cal.2d 516, 523, 106 P.2d 879, 884 (1940).
[18] 52 Cal. App. 300, 198 Pac. 643 (1921).

> matter of a litigation should be made parties thereto, in order that complete justice may be done and that there may be a final determination of the rights of all parties interested in the subject matter of the controversy. It is provided by section 389 of the Code of Civil Procedure that "when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in." This provision of the statute is *mandatory*. [Emphasis added.] [19]

It is clear from the context of this statement in the case that the court was referring to an indispensable party situation and meant only that the section was mandatory when the absent party was indispensable to any relief the court could give. Unfortunately the court did not take occasion to point out that Section 389 (and the prior equity rule) had also been held to apply to a situation where the party in question was not indispensable but nevertheless necessary to a more complete determination of the matter and that in this area the court had the discretionary power to order him brought in "in order that complete justice may be done."

On the other hand, in *Syvertson* v. *Butler*,[20] the court, in referring to the provisions of Section 389, stated:

> The power to order others brought into the action is a *discretionary* one. [Emphasis added.] [21]

In this case it is clear the court was dealing not with an indispensable party but with one who was necessary to a more complete determination of the matter in order to avoid a multiplicity of suits.

In the leading case of *Bank of California* v. *Superior Court*,[22] decided in 1940, the Supreme Court recognized this confusion in the cases and proceeded to draw the necessary distinction between indispensable and merely necessary parties and to discuss the provisions of Section 389 of the Code of Civil Procedure as applied thereto. This was a proceeding in prohibition to restrain the trial court from proceeding in the action without ordering in certain parties. The Supreme Court denied the writ on the ground that the persons sought to be brought in were not indispensable to a determination of the matter, although they may well have belonged to a class to which the discretionary power of the court under Section 389 would apply. The court stated, in referring to Section 389:

> Such statutes have been interpreted as declaratory of the equity rule and practice. * * *
>
> But the equity doctrine as developed by the courts is loose and ambiguous in its expression and uncertain in its application. Sometimes it is stated as a mandatory rule, and at other times as a matter of discretion, designed to reach an equitable result if it is practicable to do so. And despite various attempts at reconciliation of conflicting expressions * * *, a great deal of confusion still remains in the cases. * * * Bearing in mind the fundamental purpose of the doctrine, we should, in dealing with "necessary" and

[19] *Id.* at 306, 198 Pac. at 645.
[20] 3 Cal. App. 345, 85 Pac. 164 (1906).
[21] *Id.* at 347, 85 Pac. at 165.
[22] 16 Cal.2d 516, 106 P.2d 879 (1940).

"indispensable" parties, be careful to avoid converting a discretionary power or a rule of fairness in procedure into an arbitrary and burdensome requirement which may thwart rather than accomplish justice. These two terms have frequently been coupled together as if they have the same meaning; but there appears to be a sound distinction, both in theory and practice, between parties deemed "indispensable" and those considered merely "necessary". As Professor Clark has remarked: "It has been objected that the terms 'necessary' and 'indispensable' convey the same idea . . . But a distinction has been drawn. While necessary parties are so interested in the controversy that they should normally be made parties in order to enable the court to do complete justice, yet if their interests are separable from the rest and particularly where their presence in the suit cannot be obtained, they are not indispensable parties. The latter are those without whom the court cannot proceed." [23]

METHODS OF CLARIFICATION

This situation calls for clarification. Assuming that underlying considerations of policy justify requiring an order of court to bring in a new party by cross-complaint and that the power of the court in this respect is delineated and controlled by Section 389 of the Code of Civil Procedure, it would be helpful if this section were amended to make it clear that it covers not only situations where the party in question is *indispensable* and the court *must* therefore order him in, but also those where he is merely *necessary* and therefore the court *may* order him in to avoid unnecessary litigation.

In this connection the statutory provisions of some other states are informative and revealing. For example, the New York Practice Act [24] provides:

> § 193. Indispensable and conditionally necessary parties.
>
> 1. A person whose absence will prevent an effective determination of the controversy or whose interests are not severable and would be inequitably affected by a judgment rendered between the parties before the court is an indispensable party. A person who is not an indispensable party, but who ought to be a party if complete relief is to be accorded between those already parties is a conditionally necessary party.
>
> 2. When it appears that an indispensable party has not been joined, the court shall order such party brought in. If a party fails or neglects to bring in an indispensable party after a reasonable period granted to him to do so, the court shall dismiss the action without prejudice. When it appears that a conditionally necessary party has not been joined, the court shall order such party to be brought in if he is subject to the jurisdiction of the court and can be brought in without undue delay. The court in its discretion may proceed in the action without a conditionally necessary party if his addition would cause undue delay or if jurisdiction can be acquired over him only by his consent or voluntary appearance. If a party fails or neglects to bring in a conditionally necessary party, after a

[23] *Id.* at 520-21, 106 P.2d at 883.
[24] N.Y. CIV. PRAC. ACT § 193.

reasonable period granted to him to do so, the court may in its discretion dismiss the action without prejudice.

3. The provisions of this section shall be applicable to all actions whether formerly denominated legal or equitable.

The Iowa Rules of Civil Procedure [25] provide:

Rule 25. Necessary parties—nonjoinder.

(a) *Remedy for nonjoinder as plaintiff.* Except as provided in this rule, all persons having a joint interest in any action shall be joined on the same side, but such persons failing to join as plaintiffs may be made defendants. * * *

(b) *Definition of indispensable party.* A party is indispensable if his interest is not severable, and his absence will prevent the court from rendering any judgment between the parties before it; or if notwithstanding his absence his interest would necessarily be inequitably affected by a judgment rendered between those before the court.

(c) *Indispensable party not before court.* If an indispensable party is not before the court, it shall order him brought in. When persons are not before the court who, although not indispensable, ought to be parties if complete relief is to be accorded between those already parties, and when necessary jurisdiction can be obtained by service of original notice in any manner provided by these rules or by statute, the court shall order their names added as parties and original notice served upon them. If such jurisdiction cannot be had except by their consent or voluntary appearance, the court may proceed with the hearing and determination of the cause, but the judgment rendered therein shall not affect their rights or liabilities.

To accomplish like clarification in our statutory provisions and to bring them more in line with the decision of the Supreme Court of California in *Bank of California* v. *Superior Court*,[26] it is suggested that Section 389 of the Code of Civil Procedure be amended, as follows:

§ 389.

(a) The court may determine any controversy between *the* parties before it, when it can be done without prejudice to the rights of others, or by saving their rights~~; but when a complete determination of the controversy can not be had without the presence of other parties, the court must then order them to be brought in,~~.

(b) Indispensable party. A party is an indispensable party if his interest is not severable, and his absence will prevent the court from rendering any judgment between the parties before it; or if notwithstanding his absence his interest would necessarily be inequitably affected by a judgment rendered between those before the court. If an indispensable party is not before the court, it shall order him brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served.

[25] IOWA RULES CIV. PROC. rule 25 (1954).
[26] 16 Cal.2d 516, 106 P.2d 879 (1940).

> *(c) When persons are not before the court who, although not indispensable, ought to be parties, and when necessary jurisdiction can be obtained by service of process, the court shall order them brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served. If such jurisdiction cannot be had except by their consent or voluntary appearance, the court may proceed with the hearing and determination of the cause, but the judgment rendered therein shall not affect their rights or liabilities.*
>
> *(d)* And when, in an action for the recovery of real or personal property, or to determine conflicting claims thereto, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, by the proper amendment.

POSSIBILITIES FOR FURTHER LIBERALIZATION

While some such amendment of Section 389 of the Code of Civil Procedure would accomplish considerable by way of clarification, the trend in most American jurisdictions is to go much further and to adopt more liberal rules relating to bringing in new parties to an action by cross-complaint or otherwise. For example, under Rule 13 of the Federal Rules of Civil Procedure a counterclaim need not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim, need not tend to diminish or defeat the same, and can be the basis for affirmative relief. Subdivision (h) of said rule then provides:

> (h) Additional Parties May Be Brought In. When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.[27]

When coupled with the very liberal provisions of Rule 13 relating to counterclaims the above-quoted rule operates as a broad, liberal one for ordering in new parties defendant on cross-demands. Experience in federal courts with this liberal rule apparently has been quite satisfactory as evidenced by the fact that a rapidly increasing number of states have adopted the same.[28]

Another example is the Wisconsin statute,[29] which provides:

> § 263.15. Cross complaint and third party actions. (1) A defendant or a person interpleaded or intervening may have affirm-

[27] FED. R. CIV. P. 13(h).

[28] These states now total thirteen, as follows: ARIZ. CODE ANN. § 21-444 (1939); COLO. REV. STAT. ANN. vol. 1, Rules Civ. Proc. rule 13(h) (1953); DEL. CODE ANN. vol. 13, Super. Ct. Rules rule 13(h) (1953); FLA. STAT. vol. 3, Rules Civ. Proc. rule 1.13(8) (1955); KY. RULES CIV. PROC. rule 13.08 (1953); MD. CODE ANN. vol. 3, Gen. Rules Prac. & Proc. rule 3, p. 4870 (Flack, 1951); MINN. RULES CIV. PROC FOR DIST. CTS. rules 13.01-09 (1954); MO. REV. STAT. § 509.470 (1949); NEV RULES CIV. PROC. rule 13(h) (1953); N.J. RULES CIV. PRAC. IN SUPER. CT. rule 4:13-7 (1953); N.M. STAT. ANN. § 21-1-1, rule 13(h) (1953); TEX. STAT. vol. 1, Rules Civ. Proc. rule 97 (Vernon, 1955); UTAH CODE ANN. vol. 9, Rules Civ. Proc. rule 13(g) (1953).

[29] WIS. STAT. c. 263, § 263.15 (1955).

ative relief against a codefendant, or a codefendant and the plaintiff, or part of the plaintiffs, or a codefendant and a person not a party, or against such person alone, upon his being brought in; but in all such cases such relief must involve or in some manner affect the contract, transaction or property which is the subject matter of the action or relates to the occurrence out of which the action arose. Such relief may be demanded by a cross complaint or counterclaim, served upon the party against whom the relief is asked or upon such person not a party, upon his being brought in.

(2) In all cases the court or the judge thereof may make such orders for the service of the pleadings, the bringing in of new parties, the proceedings in the cause, the trial of the issues and the determination of the rights of the parties as shall be just. The provisions of this chapter with respect to demurrers and answers to complaints shall apply to and govern pleadings to cross complaints. Relief from inadvertent default of answer to a cross complaint shall be granted liberally by the court.

In addition to the liberalized rules for bringing in new parties to a counterclaim or cross-complaint, as discussed hereinabove, an increasing number of jurisdictions provide for third-party practice to take care of the situation where a third party is or may be liable to a defendant for all or part of the plaintiff's claim against him.

Rule 14 of the Federal Rules of Civil Procedure relating to such third-party practice provides:

(a) *When Defendant May Bring in Third Party.* 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, 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. 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.

(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.[30]

Twelve states have now adopted statutory provisions substantially similar to Federal Rule 14.[31]

In addition, a number of other states have provisions for such third-party practice quite similar to those under Rule 14 of the Federal Rules of Civil Procedure. For example, the Illinois law provides:

> Rule 25. Bringing in new parties—Third-party proceedings.
>
> (1) If a complete determination of a controversy cannot be had without the presence of other parties, the court may direct them to be brought in. If a person, not a party, has an interest or title which the judgment may affect, the court, on application, shall direct him to be made a party.
>
> (2) Within the time for filing his answer or thereafter by leave of court, a defendant may by third-party complaint bring in as a defendant 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. Subsequent pleadings shall be filed as in the case of a complaint and with like designation and effect. 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 or third-party complaint as any other defendant. If the plaintiff desires to assert

---

[30] FED. R. CIV. P. 14. It should be noted that a proposed amendment of Rule 14, prepared by the Advisory Committee on Rules for Civil Procedure, has been submitted to the Supreme Court of the United States for approval as follows (matter in italics would be added to the present rule; matter enclosed in brackets would be omitted):

> "Rule 14. Third-Party Practice.
>
> (a) WHEN DEFENDANT MAY BRING IN THIRD PARTY. [Before the service of his answer] *At any time after commencement of the action* 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] *may cause to be served* a summons and complaint upon a person not a party to the action who is or may be liable to [him] *such third-party plaintiff* 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, 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 for severance, separate trial, or dismissal of the third-party claim; the court may direct a final judgment upon either the original claim or the third-party claim alone in accordance with the provisions of Rule 54(b).* 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."

However, as of May 29, 1956, the Supreme Court had not acted upon this proposed amendment. Hence, the amendment, even if adopted by the Court, cannot become effective until sometime after the first part of April 1957.

[31] ARIZ. CODE ANN. §§ 21-446, 21-447 (1939); COLO. REV. STAT. ANN. vol. 1, Rules Civ. Proc. rule 14 (1953); DEL. CODE ANN. vol. 13, Super. Ct. Rules rule 14 (1953); KY. RULES CIV. PROC. rule 14 (1953); MD. CODE ANN. vol. 3, Gen. Rules Prac. & Proc. rule 4, p. 4781 (Flack, 1951); MINN. RULES CIV. PROC. FOR DIST. CTS. rules 14.01-02 (1954); MO. REV. STAT. § 507.080 (1949); NEV. RULES CIV. PROC. rule 14 (1953); N.J. RULES CIV. PRAC. IN SUPER. CT. rule 4:14 (1953); N.M. STAT. ANN. § 21-1-1, rule 14 (1953); TEX. STAT. vol. 1, Rules Civ. Proc. rule 38 (Vernon, 1948); UTAH CODE ANN. vol. 9, Rules Civ. Proc. rule 14 (1953).

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 shall do so by an appropriate pleading. When a counterclaim is filed against a party, he may in like manner proceed against third parties. Nothing herein applies to liability insurers or creates any substantive right to contribution among tortfeasors or against any insurer or other person which has not heretofore existed.

(3) An action is commenced against a new party by the filing of an appropriate pleading or the entry of an order naming him a party. Service of process shall be had upon a new party in like manner as is provided for service on a defendant.[32]

New York has similar provisions for third-party practice. Section 193-a of the New York Civil Practice Act provides:

§ 193-a. Third-party practice; courts to which applicable.

1. After the service of his answer, a defendant may bring in 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, by serving as a third-party plaintiff upon such person a summons and copy of a verified complaint. The claim against such person, hereinafter called the third-party defendant, must be related to the main action by a question of law or fact common to both controversies, but need not rest upon the same cause of action or the same ground as the claim asserted against the third-party plaintiff.

2. The third-party defendant may answer the claim asserted against him and serve copies of his answer upon the third-party plaintiff's attorney and the plaintiff's attorney within twenty days after the service of the summons and copy of the third-party complaint, so that the claims of all parties may be determined in the action, which shall proceed to such judgment or judgments as may be proper. In his answer the third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. For the purpose of contesting plaintiff's claim against the third-party plaintiff, the third-party defendant shall have the rights of a party adverse to the plaintiff, including the right to appeal.

3. The plaintiff may amend his pleading 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. If the plaintiff amends his pleading, as provided in this subdivision, the third-party defendant may assert a counterclaim against the plaintiff.

4. The court, in its discretion, may dismiss a third-party complaint without prejudice to the bringing of another action, order a separate trial of the third-party claim or of any separate issue thereof, or make such other orders concerning the proceedings as may be necessary to further justice or convenience. In exercising its discretion the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will

[32] ILL. ANN. STAT. c. 110, § 25 (Smith-Hurd, 1956).

unduly delay the determination of the main action or prejudice any party to the action. A motion to dismiss a third-party complaint pursuant to this subdivision may be made after the third-party defendant has appeared in the action by the plaintiff or the third-party defendant upon notice to all the parties who have appeared.

5. When a verdict in plaintiff's favor against the third-party plaintiff might be rendered upon a ground which would not support the claim asserted by the third-party plaintiff against the third-party defendant, the court, on motion of the third-party plaintiff or the third-party defendant, shall instruct the jury to make, in addition to a general verdict, appropriate special findings with respect to the ground of the third-party plaintiff's liability.

6. A third-party defendant may proceed pursuant to this section 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. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which would entitle a defendant to do so pursuant to subdivision one of this section.[33]

Louisiana,[34] Pennsylvania,[35] Tennessee,[36] Texas [37] and Wisconsin [38] also have made provision for similar third-party practice. Arkansas [39] and South Dakota [40] have third-party practice under the Uniform Contribution Among Tort Feasors Law.

The adoption of provisions for third-party practice in these numerous jurisdictions represents a definite modern trend to liberalize the rules for bringing into an action additional parties to avoid a multiplicity of suits and to save time, expense and unnecessary litigation. This trend is definitely a continuing one. Under present statutes in California no provision is made for such third-party practice. While we as yet have not adopted the Uniform Contribution Among Tort Feasors Law, many situations nevertheless do arise where some such third-party practice might well avoid a multiplicity of suits and costly and burdensome litigation.

To accomplish this result and to bring California in line with the modern trend a new section should be added to the Code of Civil Procedure, 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

[33] N.Y. CIV. PRAC. ACT § 193-a.
[34] LA. REV. STAT. tit. 13, §§ 3381-3386 (Supp. 1954).
[35] PA. STAT. ANN. tit. 12 Appendix, Rules Civ. Proc. rules 2251-2257 (Purdòn, 1951).
[36] TENN. CODE ANN. §§ 20-115, 20-120 (Supp. 1956).
[37] TEX. STAT. vol. 1, Rules Civ. Proc. rule 38 (Vernon, 1948).
[38] WIS. STAT. c. 263, §§ 263.14, 263.15 (1955).
[39] ARK. STAT. ANN. § 34-1007 (1947).
[40] S.D. CODE § 33.04A08 (Supp. 1952).

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.[41]

VENUE PROBLEMS

Liberalization of rules for bringing into an action additional parties by way of cross-demands or third-party claims gives rise to certain venue problems. Under what circumstances, if any, should such a new party to the action be able to insist upon the venue statutes being applicable to him? This problem does not arise as to a cross-demand against a plaintiff since the latter chose the forum in bringing his action and therefore should have no right to object to the venue merely because a proper cross-demand is filed against him. The rule seems to be well recognized that as to any cross-demand against him the plaintiff has no venue privilege. This is true as to both compulsory [42] and permissive [43] counterclaim under the federal rules.

Inasmuch as no new party may be made a defendant on a counterclaim in California, no venue problem arises as to them. Similarly, when a cross-complaint is against a codefendant no venue problem is presented since such a party already is a defendant in the action and his venue rights thereby are determined. But a cross-complaint may include a new party as cross-defendant under proper circumstances and this situation does present the problem whether such a cross-defendant has any venue privileges when thus brought into the action. This problem has arisen under Rule 13 of the Federal Rules of Civil Procedure where a counterclaim is against the plaintiff and also a third party.

Where such a counterclaim is a compulsory one, *i.e.,* arises out of the same transaction or occurrence which is the subject matter of the plaintiff's claim, a number of authorities have taken the position that a new party defendant on such a counterclaim has no venue privilege on the theory that such a counterclaim is ancillary and that venue privileges apply only to the original action.[44] This same reasoning ap-

[41] It is to be noted that the suggested provisions of the new section are quite similar to those of Rule 14 of the Federal Rules of Civil Procedure and the statutory provisions of many of the states having such third-party practice.

[42] General Electric Co. v. Marvel Co., 287 U.S. 430, 435 (1932); Leman v. Krentler-Arnold Co., 284 U.S. 448 (1932).

[43] Newell v. O.A. Newton & Son Co., 14 Fed. R. Serv. 180 (D. Del. 1950); Rubsam v. Harley C. Loney Co., 13 Fed. R. Serv. 185 (E.D. Mich. 1949). According to 3 MOORE, FEDERAL PRACTICE 506-07 (2d ed. 1948), the theory is that the venue statutes apply only to the institution of the action and not to counterclaims interposed by the defendant.

[44] United Artists Corp. v. Masterpiece Productions, 221 F.2d 213 (2d Cir. 1955). But see Ohlinger, *Jurisdiction, Venue and Process As To Counterclaims and Third-Party Claims; Rules 13 and 14 of the Federal Rules of Civil Procedure,* 6 FED. B.J. 420 (1945) contending that, as to such new party, the counterclaim is an original action and therefore he should be able to urge his privilege of venue. Where a new party is made a defendant on a permissive conterclaim, *i.e.,* one not arising out of the same transaction or occurrence which is the subject matter of the plaintiff's claim, it has been contended that such new party can insist on his privilege of venue. See, Ohlinger, *supra,* at 428.

plies with equal force to the situation in California where a new party is brought in by cross-complaint inasmuch as the cross-complaint must have similar subject-matter relationship to the complaint.

By analogy third-party claims should also be considered ancillary for venue purposes. This is a claim by a defendant against a third party growing out of the main claim presented by the complaint; it does not involve a plenary (original) action, and therefore the venue statutes which are designed to govern orginal actions should not be applicable. Speaking of this problem as applied to third-party claims under Federal Rule 14, Professor Moore states:

> A third party residing outside the district in which an action is brought and who is impleaded under Rule 14 suffers no greater hardship * * * in making his defenses in such district than that which must be borne by a non-resident defendant in an original action founded on diversity of citizenship jurisdiction. In the latter instance the venue, aside from any question of waiver, may be that of either the plaintiff or defendant, and the only protection afforded to the non-resident defendant is the requirement of service of process.[45]

The better reasoned cases support this view[46] although there is some authority to the contrary.[47]

Third-party claims should also be considered ancillary to the main action for subject-matter jurisdictional purposes. Since the 1946 amendment to Federal Rule 14, limiting the same to its present language,[48] it appears that the great majority of cases and other authorities have taken the position that such a third-party claim is so ancillary to the main claim that no independent jurisdictional ground need be supplied.[49]

Both upon principle and in view of the experience with third-party practice in the federal courts, the adoption of a similar procedure in California should present no serious problems either as to venue or subject-matter jurisdiction. The growing number of states adopting a third-party practice similar to that under the federal rules apparently have not experienced any serious difficulty in these respects.

---

45 3 MOORE, FEDERAL PRACTICE 504 (2d ed. 1948).

46 Morrell v. United Air Lines Transport Corp., 29 F. Supp. 757 (S.D.N.Y. 1939); see dictum in Gray v. Hartford Accident & Indemnity Co., 31 F. Supp. 299 (W.D. La. 1940).

47 Lewis v. United Air Lines Transport Corp., 29 F. Supp. 112 (D. Conn. 1939); King v. Shepherd, 26 F. Supp. 357 (W.D. Ark. 1938).

48 FED. R. CIV. P. 14, as amended Dec. 27, 1946, eff. March 19, 1948, limiting the third-party claim to one against "a person not a party to the action who is or may be liable to him [the defendant asserting the same] for all or part of the plaintiff's claim against him."

49 Sheppard v. Atlantic States Gas Co., 167 F.2d 841 (3d Cir. 1948); Metzger v. Breeze Corp., 37 F. Supp. 693 (D.N.J. 1941); Malkin v. Arundel Corp., 36 F. Supp. 948 (D. Md. 1941); Morrell v. United Airlines Transport Corp., 29 F. Supp. 757 (S.D. N.Y. 1939); Tullgren v. Jasper, 27 F. Supp. 413 (D. Md. 1939); Crum v. Appalachian Electric Power Co., 27 F. Supp. 138 (S.D. W.Va. 1939); Carbola Chemical Co. v. Trundle Engineering Co., 7 Fed. R. Serv. 269, 3 F.R.D. 500 (S.D.N.Y. 1942). See 3 MOORE, FEDERAL PRACTICE 496-97 (2d ed. 1948) citing numerous other cases. The federal cases contra to this position all appear to deal with Rule 14 prior to the 1946 amendment thereof.

POLICY QUESTIONS PRESENTED

Apparently, legislation is necessary to eliminate the confusion in California as to whether the power of the court to order in a new party on a cross-complaint, or otherwise, is limited to indispensable parties or covers necessary, although not indispensable, parties as well. The basic policy questions presented and considered are as follows:

1. Should the law be left as it is at present in this respect? It is arguable that no legislative change is necessary and that the matter should be left to the courts to clarify as the occasions arise. The following considerations may be thought to justify this clarification by legislation:

(a) Such a procedure would more readily and quickly clarify, where clarification is needed.

(b) Section 389 of the Code of Civil Procedure does not now, and never has, correctly and explicitly expressed the former equity rule although our courts frequently have stated it was intended to do so.

(c) Clarification of this section will result in a more liberal approach to the problem of bringing in new parties, even though not indispensable, where doing so will avoid a multiplicity of suits and unnecessary and expensive litigation.

2. Should Section 442 of the Code of Civil Procedure now be amended to additionally liberalize the rules on bringing in new parties by cross-complaint? The trend in this country is definitely toward the abolition of the cross-complaint as such and the adoption of more liberal rules relating to counterclaims, cross-claims and third-party claims patterned after the Federal Rules of Civil Procedure. Should not an exhaustive study be made as to the advisability of California doing likewise? If so, then any revision of Section 442 relating to cross-complaints may be inadvisable at this time. Should not any liberalization insofar as this section is concerned await the outcome of this broader project?

3. Should any adoption of third-party practice also be made a part of this broader study and await the outcome thereof? It is arguable that it should and that any adoption of third-party practice now in California would be piecemeal at best and out of proper perspective.

On the other hand, it is thought that there is definite need in California for some provision for third-party practice now and that it is sufficiently apart from any eventual liberalization as to cross-demands along the lines of Federal Rule 13 to justify its adoption without awaiting the results of the broader study.

RECOMMENDATIONS

1. That a study be inaugurated to determine the advisability of revising our statutory provisions relating both to counterclaims and cross-complaints and the possible adoption of provisions for cross-demands similar to those contained in Rule 13 of the federal rules, thus bringing California in line with other leading American jurisdictions in this respect.

2. That in the meantime Section 442 of the Code of Civil Procedure be left as at present, that we continue to require an order of court to

bring in a new party on a cross-complaint and that the provisions of Section 389 of the Code of Civil Procedure control the power of the court to issue such an order.

3. That said Section 389 be amended in the interest of clarity and to somewhat liberalize its terms, as suggested above, along the lines of the proposed draft of said amended section set forth herein.

4. That third-party practice be adopted in California substantially similar to that under Rule 14 of the Federal Rules of Civil Procedure and the statutes of many other leading jurisdictions in this country and as embodied in the draft of a proposed new Section 442a of the Code of Civil Procedure contained herein.

printed in CALIFORNIA STATE PRINTING OFFICE

48662 1-57 2M