The Expansion of Joinder in Cross-Complaints by the Erroneous Interpretation of Section 442 of the California Code of Civil Procedure†

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IN 1957 the California Legislature amended section 442 of the California Code of Civil Procedure with respect to joinder of parties.[1] Recent interpretations of the amendment by the California courts are subject to the criticism of not falling within the intended consequences of the amendment and of being, in some respects, unwise.

I

THE PURPOSE OF THE AMENDMENT TO SECTION 442

Section 442 provides:

> 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 on 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. (Emphasis added.)

Prior to 1957 the section allowed a cross-complaint to be brought against "any party."[2] This language had consistently been held to mean that a cross-complaint could be brought only against an existing party, that

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[1] CAL. CODE CIV. PROC. § 442 (Supp. 1962).

[2] Cal. Stat. 1955, ch. 1452, p. 2640, § 4.

is a plaintiff or a co-defendant, not against an outsider.[3] The one exception to this rule permitted an outsider to be joined under section 389 of the California Code of Civil Procedure if he were indispensable to a cross-claim among the original parties.[4]

The 1957 amendment was recommended by the California Law Revision Commission,[5] which had been authorized by the legislature to study the problem of joinder under sections 389 and 442. A primary purpose of the study was to modernize section 389 to bring it into line with developments in the California case law relating to indispensable parties.[6] The objective of this study was to determine when outside persons *had* to be brought into an existing action in order to perfect the court's jurisdiction. With respect to section 442, however, the inquiry was extended to include the problem of when outsiders *could* be joined in a cross-complaint situation.

It is apparent that a far reaching alteration of the section 442 joinder provision was not intended or even seriously contemplated. The Commission was concerned only with the right of the cross-plaintiff, who had brought a cross-complaint against an existing party, to join as a co-cross-defendant an outsider who, although not indispensable, would nevertheless have been a proper party had the cross-plaintiff instituted his claim as an independent action.[7] It was felt that the law, in preventing a cross-plaintiff from joining such an outsider, unfairly forced the cross-plaintiff either to forego his cross-complaint and bring a separate action against all potential defendants or to bring a separate action against non-joinable persons while still maintaining the cross-complaint. According to the Commission, the cross-plaintiff should be allowed the same choice of cross-defendants as would be allowed in a separate action.[8]

To accomplish this result, section 442 was changed to its present form, permitting a cross-complaint "against any person, whether or not a party

[3] *E.g.*, Alpers v. Bliss, 145 Cal. 565, 570, 79 Pac. 171, 173 (1904); Argonaut Ins. Exchange v. San Diego Gas & Elec. Co., 139 Cal. App. 2d 157, 293 P.2d 118 (1956); Supermatic Products Corp. v. Hegberg, 131 Cal. App. 2d 168, 280 P.2d 152 (1955); Metropolitan Casualty Ins. Co. v. Margulis, 38 Cal. App. 2d 711, 102 P.2d 459 (1940).

[4] See Tonini v. Ericcsen, 218 Cal. 43, 47, 21 P.2d 566, 568 (1933); Alpers v. Bliss, 145 Cal. 565, 570–71, 79 Pac. 171, 173–74 (1904) (dictum); Newhall v. Bank of Livermore, 136 Cal. 533, 535–37, 69 Pac. 248, 249 (1902); Argonaut Ins. Exchange v. San Diego Gas & Elec. Co., 139 Cal. App. 2d 157, 159–60, 293 P.2d 118, 120 (1956) (dictum).

[5] CALIFORNIA LAW REVISION COMM'N, RECOMMENDATION AND STUDY RELATING TO BRINGING NEW PARTIES INTO CIVIL ACTIONS 5–7 (1957). For a discussion of the prior history of section 442 with respect to persons subject to cross-complaints, see *id.* at 10–11.

[6] See *id.* at 5–6, 11–14. The 1957 amendment to section 389 was designed to encompass the rules relating to indispensable parties set out by the California Supreme Court in Bank of California Nat'l Ass'n v. Superior Court, 16 Cal. 2d 516, 106 P.2d 879 (1940).

[7] See note 18 *infra* and accompanying text.

[8] See CALIFORNIA LAW REVISION COMM'N, *supra* note 5, at 5, 9–10.

to the action." The language of the amendment, however, was unfortunate. Taken at face value, it would seem to go far beyond the result intended by the Commission by permitting a cross-complaint to be brought against an outsider alone, rather than as a co-cross-defendant with an existing party.[9] The correspondence during the course of the Commission's consideration of the proposed amendment makes it clear that this result was not intended. The consultant who made the initial study, Professor Stanley Howell, recommended that no changes be made in section 442 until a full scale study of California's cross-claim, counterclaim, and joinder rules could be made.[10] He felt that any piecemeal approach would be undesirable. Nevertheless, he did recommend[11] that the legislature enact a new statute, section 442a, which would provide California with a third-party practice rule nearly identical to Rule 14 of the Federal Rules of Civil Procedure. The proposed statute would have 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.[12]

This provision would have allowed a special "impleader claim" against an outsider alone, but only when that outsider allegedly would be liable to indemnify the defendant for amounts recovered by the plaintiff.

The Law Revision Commission did not recommend,[13] and the legislature did not enact, section 442a. As has been indicated, however, the alteration of section 442 that was recommended and adopted would seem on its face to encompass, *inter alia,* all situations that would have been covered by section 442a.[14]

Shortly after the Commission's recommendations were published a number of California lawyers, who did not believe that section 442, as

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[9] See Comment, 46 CALIF. L. REV. 100, 104–05 (1958).

[10] CALIFORNIA LAW REVISION COMM'N, *supra* note 5, at 23–24.

[11] *Id.* at 24.

[12] *Id.* at 20–21.

[13] See *id.* at 5–8.

altered, was intended to establish such a third-party practice, wrote the Commission objecting to the elimination of section 442a.[15] Both the Northern and Southern sections of the Committee on the Administration of Justice of the State Bar made studies of the recommendation. Members of those sections wrote memoranda expressing regret that the alteration of section 442 was to proceed without a full scale study of the advisability of adopting a third-party practice as proposed in section 442a.[16] One of these memoranda specifically noted that the new language of section 442 could possibly be read to encompass a third-party practice and recommended that the language be clarified.[17]

The Commission, in response to these objections, took the position that the recommended alteration was not ambiguous and explained that a study of a proposal to institute a third-party practice was beyond the authority given the Commission by the legislature. This position was firmly stated in a memorandum to the Board of Governors of the State Bar as follows:

> 6. We believe that our proposed amendment of Section 442 is not ambiguous as to persons who may be brought in as cross-defendants. Under the revised section a party may be brought in if the cross-complainant seeks affirmative relief against him "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." This is the sole criterion to be applied in determining whether a party was properly joined. It will not be necessary to determine whether the party joined as a cross-defendant is either "indispensable" or "conditionally necessary." . . .
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> 7. The Commission believes that the recommendation of its research consultant, Professor Howell, that a third party practice statute be enacted is sound. We also believe, however, that this goes beyond the authority given to the Commission by the Legislature in this matter and that the Commission should not recommend the enactment of a third party practice statute at this time.[18]

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[14] See Comment, *supra* note 9, at 103–05.

[15] Letter from Herm Selvin to the Commission Chairman, Thomas E. Stanton, Jr., dated March 8, 1957; Letter from Stanley Howell to Commission Executive Secretary, John R. McDonough, Jr., dated April 10, 1957. (These letters are on file at the office of the California Law Revision Commission at Stanford, California.)

[16] Memorandum of John B. Lounibos to Members of the Northern Section of the Committee on Administration of Justice Re Senate Bill 34, dated March 27, 1957; Memorandum of Samuel O. Pruitt, Jr., to Members of the Southern Section of the Committee on Administration of Justice Re Senate Bill 34, dated March 11, 1957. (These memoranda are on file at the office of the California Law Revision Commission at Stanford, California.)

[17] Memorandum of Samuel O. Pruitt, Jr., *supra* note 16.

[18] Memorandum to the Board of Governors of the State Bar on Senate Bill 34, attached to a letter from John R. McDonough, Jr., Executive Secretary of the Commission, to the Chairman, Thomas E. Stanton, Jr., dated April 4, 1957.

This view was also expressed in a letter from John R. McDonough, Jr. to Stanley Howell, dated March 15, 1957. (The Memorandum and Letter referred to are on file at the office of the California Law Revision Commission at Stanford, California.)

The Commission's position on the clear meaning of the new statute is explicable if one realizes that the Commission interpreted the term "cross-complaint" to mean a claim by one existing party against another. Thus, a claim brought solely against an outsider could in no sense be deemed a "cross-complaint" and clearly would not be within the scope of section 442.

Shortly after the amendment was enacted, the author of a comment in the *California Law Review,* obviously unaware of the correspondence concerning the amendment, took the position that the Law Revision Commission not only intended to establish a third-party "impleader" practice, as set out in Federal Rule 14 and suggested by proposed section 442a, but also intended to allow a cross-complaint against an outsider who is not alleged to be an indemnifier but merely liable for his participation in the transaction or occurrence giving rise to the original complaint.[19] No suggestion was ever made that the Commission go that far in its proposal. Such a cross-claim could not be maintained even under the liberal federal joinder rules, since only a claim which falls under Federal Rule 14 can be brought against an outsider alone.[20] Nevertheless, if the amendment is to be construed to include "impleader" cases, thus ignoring the Commission's interpretation of the term "cross-complaint," then seemingly it could be read to encompass cross-claims against any outsider, since there is nothing in the amendment to restrict it to impleader cases.

Although possible, it seems extremely unlikely that in enacting the Commission's proposed amendment to section 442 the California Legislature recognized that the language of the amendment might be interpreted to go beyond the Commission's intent and that it purposely left the language intact to effect the broader result. Had the legislature recognized that the proposed amendment might be given a broader meaning than that intended by the Commission, the proposed language presumably would have been clarified to eliminate any ambiguity as to its scope. A more specific provision, perhaps analogous to Federal Rule 14, could have been enacted to spell out the rights of the various parties.

II

THE INTERPRETATION OF AMENDED SECTION 442 BY THE CALIFORNIA COURTS

The California courts seem to have adopted the position that section 442 is to be read as broadly as possible. In 1962 the supreme court set the

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[19] Comment, 46 CALIF. L. REV. 100, 104–05 (1958).

[20] See United States v. Zashin, 160 F. Supp. 843 (E.D.N.Y. 1958); Comment, 46 CALIF. L. REV. 100, 104 & n.24 (1958).

stage for this view in *Roylance v. Doelger*.[21] *Roylance* presented a typical impleader situation. Plaintiff, a building contractor, had been forced to pay damages to a property owner whose property had been injured as a result of plaintiff's building operations on an adjacent lot. Plaintiff brought suit against its insurer to cover the loss. The insurer then cross-claimed for a declaratory judgment of indemnity against several outsiders who were alleged to have been in charge of the work and thus primarily responsible for the damages incurred. The supreme court's chief concern was not the scope of section 442, but the right of the trial court in its discretion to dismiss the cross claim on the ground that declaratory relief was not "appropriate" in the particular case. The court wished to make clear that such discretion did not exist. In passing the court stated that the cross-claim fell directly within the wording of the amendment to section 442.[22] This statement is weakened, however, in that the issue of joinder apparently was never raised by the parties, and thus any objection had long since been waived.[23]

Nonetheless, five recent District Court of Appeal cases[24] have cited *Roylance* in stating that cross-claims for indemnity can be maintained against outsiders. It appears that in none of these cases, however, was the issue of the scope of section 442 adequately presented and argued by the parties.[25] In the only other case dealing directly with the scope of the amendment, *Pearson v. Akopiantz*,[26] decided prior to *Roylance*, the primary issue was whether or not cross-plaintiff had to obtain a court order under section 389 to join the cross-defendant in an impleader situation. The court held that the cross-defendant could be joined under the amendment to section 442, which, unlike section 389, does not require a court order. Although this may be characterized as a direct holding on the scope of 442, the issue was not precisely presented or squarely met.

Thus the appellate courts are on the verge, if they have not already done so, of broadly interpreting section 442 based on a misconception of the intended purpose of the 1957 amendment. They have decided the issue on

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[21] 57 Cal. 2d 255, 368 P.2d 535, 19 Cal. Rptr. 7 (1962).

[22] *Id.* at 261, 368 P.2d at 539, 19 Cal. Rptr. at 11.

[23] It has often been held that a failure to make timely objection to improper joinder constitutes a waiver of the defect. *E.g.*, Thorpe v. Story, 10 Cal. 2d 104, 135–36, 73 P.2d 1194, 1211 (1937). Tonini v. Ericcsen, 218 Cal. 43, 47, 21 P.2d 566, 568 (1933).

[24] J. C. Penny Co. v. Westinghouse Electric Co., Civil No. 20197, 1st Dist. Ct. App., July 8, 1963; Linday v. American President Lines, Ltd., 214 A.C.A. 158, 29 Cal. Rptr. 465 (1963); Dreybus v. Bayless Rents, 213 A.C.A. 535, 28 Cal. Rptr. 825 (1963); B.F.G. Builders v. Weisner & Coover Co., 206 Cal. App. 2d 752, 23 Cal. Rptr. 815 (1962); Simon Hardware Co. v. Pacific Tire & Rubber Co., 199 Cal. App. 2d 616, 19 Cal. Rptr. 12 (1962).

[25] In each case the basic issue was similar to that in *Roylance;* that is, the right of the trial court, in its discretion, to dismiss an otherwise valid cross-complaint.

[26] 180 Cal. App. 2d 310, 4 Cal. Rptr. 447 (1960).

what appeared to them to be the clear language of the amendment, apparently unaware of the legislative history, and without benefit of argument on the justification for substantial limitations in certain types of cases.

III

THE PRACTICAL EFFECTS OF A BROAD INTERPRETATION OF SECTION 442

The desirability of a procedure which allows cross-complaints to be brought against outsiders alone, in the absence of countervailing considerations, will be assumed for the purpose of this article.[27] The purpose here is to bring to light some practical problems of the administration of such claims which can and should be solved by further legislation.

The California courts have touched on these practical problems in a few cases in which litigants have argued that joinder would merely complicate the case and rob plaintiff of control of his action.[28] Although the courts have recognized that undue complications could occur, they have discounted them on the ground that the statutory power of the trial judge to sever claims for trial is an adequate safeguard against prejudice to any party.[29] There are some cases, however, in which severance alone cannot provide a satisfactory answer.[30]

A. The Problems of Jurisdiction and Venue

Under the current interpretation of section 442, many claims which formerly would have been maintained in the inferior trial courts now may become triable in the superior court. Two types of situations are involved. The first occurs when plaintiff brings a claim for a small amount in the municipal or justice court and defendant cross-complains against an outsider for an amount or type of relief cognizable only in the superior court.[31]

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[27] For an analysis of the merits of third-party indemnity claims, see generally, Comment, 1 U.C.L.A. L. REV. 547, 570–74 (1954).

[28] Roylance v. Doelger, 57 Cal. 2d 255, 261–62, 368 P.2d 535, 539, 19 Cal. Rptr. 7, 11 (1962) and cases cited *supra* note 24.

[29] See cases cited *supra* note 24.

[30] In those cases where the only difficulties are due to the joinder of many claims and many parties, severance would seem to provide a solution. This may not be so in practice, however. In a recent speech Superior Court Judge Leon T. David of Los Angeles County, apparently without mentioning severance, stated his concern over cases which involve a chain of claims in which each cross-defendant, in turn, files his own cross-claim for indemnity against a new party. Judge David indicated a need for an appellate court decision fixing a limit on such filings. Metropolitan News (Los Angeles), May 9, 1963, p. 1, cols. 1 & 2.

[31] A synopsis of the distribution of original civil jurisdiction among California trial courts can be found in 1 CHADBOURN, GROSSMAN, & VAN ALSTYNE, CALIFORNIA PLEADING § 54 (1961).

Under section 396 of the Code of Civil Procedure as soon as the cross-complaint is filed the entire case must automatically be transferred to the appropriate superior court.[32] Such a situation can arise even in the simplest of indemnity cases. If, as is often the case, plaintiff seeks relief in an amount close to the maximum permitted in the municipal or justice court, defendant, merely by asking for indemnity plus an amount for reasonable attorney fees can bring his cross-complaint beyond the jurisdiction of the original court and force the entire action to be tried in the superior court.

The second situation occurs when the plaintiff's claim against defendant is properly pursued in the superior court but the defendant's cross-complaint against the outsider is one which, but for its character as a cross-claim, could be maintained only in a municipal or justice court. In such a case the superior court has jurisdiction over the entire action.[33]

It seems clear that prejudice may occur in the first situation to plaintiff and in the second to cross-defendant. First, the trial calendar in the superior court may often be substantially behind that in a municipal or justice court.[34] Second, the parties in the superior court must comply with pre-trial rules requiring additional expense that would not have to be incurred in an inferior court.[35] Third, the parties may be forced to travel to a distant locality for trial. This may have serious side effects in that witnesses may be reluctant to testify about small claims if they must travel 25 or 30 miles and lose considerable time from work. Finally, the costs of discovery with respect to a small claim may be considerably higher when it is consolidated with a claim involving a large sum of money and many witnesses. If only the small claim was being entertained, only major witnesses, if any, would be deposed. The cost of attending a large number of depositions would soon exceed the entire amount involved in many small claims. Thus, in a complex case a litigant on a small claim must simply forego attendance and hope that his interests will not be prejudiced by his absence.

The problems in the transfer of a small claim to the superior court are not solved but highlighted by severance of the claims for trial. The superior court is not empowered to send part of an action for trial in an inferior court.[36] It must try all aspects of the case itself, and yet the entire litiga-

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[32] Eveleth v. American Brass and Iron Foundry, 203 Cal. App. 2d 41, 21 Cal. Rptr. 95 (1962); Robertson v. Maroevich, 42 Cal. App. 2d 610, 109 P.2d 708 (1941); see Pearson v. Akopiantz, 180 Cal. App. 2d 310, 4 Cal. Rptr. 447 (1960).

[33] Emery v. Pacific Employers Ins. Co., 8 Cal. 2d 663, 667-69, 67 P.2d 1046, 1048-49 (1937); Kling v. Kimball Pump Co., 138 Cal. App. 470, 32 P.2d 659 (1934).

[34] For example, as of July 1, 1963, in San Mateo County, a case could be set for jury trial in a municipal court within eight or nine months whereas it would take approximately twenty months to obtain a jury trial in the superior court.

[35] See CAL. SUPER. CT. R. 206, 207.5, 208, 210-13, 221-22.

[36] *Cf.* 1 CHADBOURN, GROSSMAN, & VAN ALSTYNE, CALIFORNIA PLEADING § 439 (1961).

tion is not disposed of in one trial. The problem is especially acute in situations in which the courts consider severance mandatory.[37]

Whenever severance can be predicted, therefore, the joinder of a justice or municipal court claim with one cognizable only in the superior court accomplishes nothing except to give defendant a decided tactical advantage. If it is more to his advantage to try the small claim in an inferior court, he can simply file a separate action instead of a cross-complaint.

The problems of venue under section 442 are somewhat similar to those of jurisdiction. Professor Howell, in his report to the Law Revision Commission, took the position that the same venue rules should apply to all cross-defendants, whether or not they were parties to the original action. He argued that the venue statutes were designed only to govern the filing of the original complaint.[38] Obviously if cross-defendants could insist on venue rights, the purpose of joinder often would be thwarted. The policy favoring a single trial of related claims should normally take precedence over the policy underlying the venue provisions.[39]

If this is so, however, it is clear that a potential cross-complainant will have one more tactical reason for cross-complaining against outsiders. A cross-defendant, particularly in an action involving only small amounts, may take an unfavorable settlement rather than face the substantial burden of litigating the case in a distant county.

B. The Failure to Set Out in Detail the Rights of the Parties

Unlike proposed section 442a and Federal Rule 14, section 442, because it was not intended to deal with the problem, says nothing about the rights of the outsider to answer the plaintiff's claim against the defendant and to present evidence and arguments at trial in that regard. There are good arguments both for and against such a right. The question should be resolved only after careful study.

On the one hand, in indemnity cases, the right of the outsider to question the plaintiff's claim seems necessary to avoid the possibility of collusion between plaintiff and defendant, or perhaps merely an indifferent attitude on the part of the defendant. On the other hand, by permitting the third party to participate in the claim between plaintiff and defendant the

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[37] Severance might be considered mandatory, for example, when the defendant's cross-complaint for indemnity in a tort case, if not severed, would apprise the jury trying the original claim that an insurance company might ultimately bear the risk. *Cf.* State Farm Mutual Automobile Ins. Co. v. Superior Court, 47 Cal. 2d 428, 432, 304 P.2d 13, 15 (1956).

Some trial judges in San Mateo and Santa Clara counties revealed during interviews that they consider severance mandatory in such cases.

[38] CALIFORNIA LAW REVISION COMM'N, *supra* note 5, at 21–22.

[39] See 3 MOORE, FEDERAL PRACTICE ¶ 14.26 at 494, ¶ 14.28 at 504–06 (2d ed. 1948).

entire character of the action may be changed. This may involve serious prejudice to the plaintiff who suddenly finds himself confronted with a much more formidable foe than the one against whom he brought suit.

While it is true that Federal Rule 14 specifically permits the third party to answer plaintiff's original complaint, it must be remembered that an action in a federal court normally will involve over $10,000[40] and thus is already of substantial magnitude. This may also be true in California with respect to cases in the superior court, which usually must involve over $5000.[41] But in regard to smaller cases in municipal and justice courts, or even in superior court when its jurisdiction extends to cases involving just over $500,[42] there is a substantial question whether plaintiff should lose his right to select the defendant. Once again it seems clear that mere severance of the claims by the trial court does not provide an adequate answer since an outsider who has been made a party to the action could still claim a right to participate in the trial on the original claim. In many such cases permission to participate would seem desirable.[43]

Section 442 is also deficient in that it does not clearly establish the rights of the plaintiff and the outsider to file against one another claims arising out of the same transaction or occurrence as plaintiff's original claim. Nor does it specifically allow the outsider to cross-complain against additional outsiders. It does seem to give the cross-defendant the necessary leeway to file such additional claims by permitting him to file an answer to the cross-complaint. These rights should be made explicit, however, and should be extended to other parties to the action. Federal Rule 14 and the proposed section 442a both set out such rights in detail.

IV

PROPOSED STATUTORY REFORMS

A. Avoidance of Prejudice Due to a Broad Interpretation of 442

Many of the practical difficulties described above could be eliminated by a provision, like that contained in Federal Rule 14 and proposed section 442a, making the filing of third-party claims subject to the discretion

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[40] See 28 U.S.C. §§ 1331, 1332 (Supp. 1959).

[41] See 1 CHADBOURN, GROSSMAN, & VAN ALSTYNE, CALIFORNIA PLEADING §§ 51–53 (1961).

[42] *Ibid.*

[43] Such participation might be desirable, for example, in a case where defendant's impleader cross-complaint against his insurer is severed from the original claim solely because the court feels that knowledge by the jury of the existence of an insurance policy will be prejudicial to the insurance company's interest. The latter might still be permitted to enter the trial on the original claim to prevent the possibility of collusion.

of the trial court.[44] Thus, if the action were one in which, for interests of convenience and to avoid the possibility of inconsistent verdicts, the claims should be tried in one action, the impleader claim would be permitted. If, on the other hand, joinder would be prejudicial, such as when it would do no more than give defendant a choice between courts, the impleader claim could be refused.

Unfortunately, the appellate courts, by erroneously stating that claims against outsiders are "cross-complaints" within the scope of section 442, have eliminated the opportunity for such control, since it is clear that under that section the trial courts have no discretion to refuse to permit cross-complaints.[45] If the courts continue to accept the broad interpretation of section 442, the enactment of a special provision giving discretionary power to trial courts to dismiss claims against outsiders would seem highly desirable.

The adoption of such a provision as it appears in Federal Rule 14 and was proposed in section 442a, however, would not be completely satisfactory. Such a provision would require the defendant to move the original trial court for permission to file a claim against an outsider. This would pose no problems if the case were already in the superior court or if the case had been brought in a justice or municipal court and all claims fell within its jurisdiction. If a cross-complaint would cause the case to be transferred to the superior court, however, it would seem appropriate for the superior court rather than the original court to determine if the joinder should be permitted. It would be the superior court, for example, that would decide whether the two claims would be severed for trial. Therefore any new statute should provide that a motion to bring a cross-complaint against an outsider is to be directed to the court where the action is pending, unless the result of granting such permission would require the case to be transferred, in which case the motion should be directed to the transferee court.[46] Another clause should provide that in the event a court has permitted joinder of a claim against an outsider and has thus obtained jurisdiction or venue over a claim that normally would be maintained elsewhere, the court,

[44] 3 MOORE, FEDERAL PRACTICE ¶ 14.05 at 414 (2d ed. 1948). In the following cases federal courts operating under Rule 14 refused defendant leave to maintain a third-party action against an outsider. Federal Deposit Ins. Corp. v. National Surety Corp., 13 F.R.D. 201 (E.D. Wis. 1950); Spaulding v. Parry Nav. Co., 10 F.R.D. 290 (S.D.N.Y. 1950).

[45] See Linday v. American President Lines, Ltd., 214 A.C.A. 158, 29 Cal. Rptr. 465 (1963).

[46] As a technical matter the statute should provide that when joinder will require a change in jurisdiction the defendant must file with the original court a copy of his motion plus an affidavit of his attorney stating that if the motion is granted, the court will lose jurisdiction of the action. The original court should then be required immediately to transfer the action to the superior court for a ruling on the motion. If in such a case no affidavit is filed, so that the motion comes before the original court for decision, that court should dismiss the motion with prejudice in the absence of a strong showing by the defendant that he should be excused.

if it later decides to sever the claims for trial, may transfer that claim to the court in which it normally would have been brought.

A separate section should provide specifically that an outsider who has an important interest in the outcome of a claim between the plaintiff and defendant may, in the discretion of the court, participate in the trial of that claim. A final provision should follow Federal Rule 14 in spelling out the rights of the various parties to file additional claims once joinder of the outsider has been permitted.

B. Expansion of Joinder Rules to Cover Counterclaims

The Law Revision Commission's consultant recommended that section 442 remain unchanged until a full study could be made of the problems of joinder with respect to counterclaims as well as cross-complaints.[47] The counterclaim and cross-complaint provisions overlap to some extent and often cause considerable confusion.[48] Normally the courts denominate the claim a cross-complaint or counterclaim depending upon which classification seems preferable under the circumstances.[49]

For present purposes it is important to note that there is no provision specifically permitting joinder of outsiders by means of a counterclaim. If the counterclaim also qualifies as a cross-complaint, presumably the court could utilize the provisions of section 442. But if a counterclaim does not satisfy the cross-complaint requirements, and yet is one in which there are a number of proper parties who would be joinable in an independent action by defendant against plaintiff, defendant is put to the choice of foregoing his counterclaim or facing two separate trials on the same issues. This was the problem that bothered the Law Revision Commission with respect to cross-complaints and led to the change in section 442. Serious consideration should be given to the proposition that the joinder provisions should be divorced from the cross-complaint statute and should be placed in a separate statute equally applicable to cross-complaints and counterclaims.

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47 CALIFORNIA LAW REVISION COMM'N, RECOMMENDATION AND STUDY RELATING TO BRINGING NEW PARTIES INTO CIVIL ACTIONS 23–24 (1957). In California, a counterclaim differs from a cross-complaint in that the counterclaim can only be brought against the plaintiff. CAL. CODE CIV. PROC. § 438; 2 WITKIN, CALIFORNIA PROCEDURE 1572 (1954). A counterclaim, unlike a cross-complaint, need not arise out of the same transaction as the original claim, but it must tend to defeat or diminish the original claim and must permit a several judgment to be entered. CAL. CODE CIV. PROC. § 438.

48 See 3 STAN. L. REV. 99 (1950).

49 2 WITKIN, CALIFORNIA PROCEDURE 157 (1954). For example, a counterclaim, unlike a cross-complaint, need not be answered by plaintiff. Thus, if plaintiff has not responded the courts will consider the claim a counterclaim in order to avoid a default. Taliaferro v. Taliaferro, 154 Cal. App. 2d 495, 499, 316 P.2d 393, 395 (1957).