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Civil Procedure

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During the 1966–1967 period under scrutiny, California appellate courts rendered a multitude of decisions in the field of civil procedure, the most significant of which are discussed below by topics.

Forum Non Conveniens

The forum non conveniens doctrine enables a court to decline to exercise jurisdiction concededly existing, on the ground that the action should more appropriately be brought in another forum. The availability of the doctrine in California was initially proclaimed by the California Supreme Court in a 1954 opinion, *Price v. The Atchison, Topeka & Santa Fe Ry.*,[1] which held that a California court should not exercise jurisdiction over a Federal Employers' Liability Act

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1. 42 Cal.2d 577, 268 P.2d 457, 43 A.L.R.2d 756 (1954) cert. denied 348 U.S. 839, 99 L.ed. 661, 75 S.Ct. 44.

claim. Plaintiff was a citizen and resident of New Mexico, defendant was a Kansas corporation doing business in both New Mexico and California, the accident occurred in New Mexico, and all witnesses to the accident, and defendant's medical witnesses, resided in that state. In casting the sole dissenting vote, Justice Carter lamented: "The holding of the majority in this case injects into the law of this state for the first time in its entire judicial history the most monstrous weapon for obstructing the administration of justice ever conceived by any court or judicial tribunal."[2]

In *Thomson v. Continental Ins. Co.*,[3] decided in 1967, the California Supreme Court again dealt with the forum non conveniens doctrine, holding that it "has only an extremely limited application to a case where . . . the plaintiff is a bona fide resident of the forum state."[4] Plaintiff, a California resident, owned real property in Houston, Texas, which he insured with defendants. After the property sustained damage, a dispute developed as to the amount to be paid under the insurance policies. Plaintiff commenced an action in the federal district court in Los Angeles. Acting pursuant to 28 U.S.C. section 1404(a), which authorizes a change of venue "for the convenience of parties and witnesses, in the interest of justice," defendants obtained a transfer of the action to the federal district court in Houston. In that court, plaintiff filed an amended complaint, which defendants answered.

Thereupon, plaintiff filed a new action in the Superior Court for Los Angeles County, the complaint being substantially identical to that originally filed in federal court. Defendants moved to dismiss, invoking forum non conveniens. On the basis of defendants' uncontested affidavit, the trial court granted the motion, noting that , "the [insurance] contract was made in Texas, the insured property is real property

2. 42 Cal.2d at 587, 268 P.2d at 463.

3. 66 Cal.2d 738, 59 Cal. Rptr. 101, 427 P.2d 765 (1967).

4. 66 Cal.2d at 742, 59 Cal. Rptr. at 104, 427 P.2d at 768. See also Goodwine v. Superior Court, 63 Cal.2d at 485, 47 Cal. Rptr. at 204, 407 P.2d at 4 (1965).

in Texas, the alleged damage occurred in Texas, and the defendants' witnesses are in Texas."[5]

A unanimous supreme court disagreed, in view of the plaintiff's residency. The court took cognizance of "a state policy that California residents ought to be able to obtain redress for grievances in California courts, which are maintained by the state for their benefit."[6] While declining to lay down an absolute rule that forum non conveniens could never be invoked if plaintiff was a resident, the court indicated that, in such a case, mere hardship to the defendants was not a sufficient showing justifying application of the doctrine. "The instant case does not present . . . unusual circumstances. It is a typical suit on a contract—a transitory action."[7] Moreover, that the federal action had been transferred to Houston did not mean that the forum non conveniens contention had previously been decided adversely to plaintiff. A transfer pursuant to 28 U.S.C. section 1404 "may be ordered upon a lesser showing of inconvenience than is required to invoke forum non conveniens."[8]

In view of the pendency of the Houston action, the court declared that the trial judge had discretion to grant a stay, if defendants sought such relief.[9] The court noted, however, that this question might not arise on remand, since plaintiff had stated that he would endeavor to have the Houston action dismissed or stayed pending outcome of the California suit.

While overwhelmingly supported by precedent, the result in *Thomson* has its troublesome aspects. Granted that plaintiff was a resident of the forum state, it seems wastefully

5. 66 Cal.2d at 741–742, 59 Cal. Rptr. at 104, 427 P.2d at 768.

6. 66 Cal.2d at 742, 59 Cal. Rptr. at 104, 427 P.2d at 768.

7. 66 Cal.2d at 745, 59 Cal. Rptr. at 106, 427 P.2d at 770.

8. 66 Cal.2d at 745, 59 Cal. Rptr. at 106, 427 P.2d at 770. See Norwood v. Kirkpatrick, 349 U.S. at 32, 99 L.ed at 793, 75 S.Ct. at 546 (1955).

9. The *Thomson* court resolved an "apparent inconsistency" in the California Cases by holding that if an action is pending in a federal court in California, the defendant is entitled to a stay as a matter of right. However, if the action is pending in a federal court situated in a foreign jurisdiction, the granting of a stay is within the discretion of the trial judge. See 66 Cal.2d 738, 59 Cal. Rptr. 101, 427 P.2d 765 (1967).

circuitous to permit him to commence a California federal action, fall victim to a 1404 transfer, and then commence a California state action which he can prosecute to a conclusion, at least if he succeeds in dismissing the federal action. It should be noted that a federal suit can be dismissed *as of right* if defendant has not yet filed an answer or moved for summary judgment,[10] even though a motion to transfer to another district has already been granted.[11]

However, the *Thomson* defendants could have avoided litigating in California if they had promptly removed the state action to federal court,[12] and thereafter obtained a dismissal or stay, or perhaps a second 1404 transfer to Texas in accordance with the prior ruling. Indeed, in view of the possibility of removal, and the consequent opportunity for relief under the liberal provisions of section 1404, the harsh impact of *Thomson* can frequently be blunted by a nonresident defendant who is sued by a California resident in a California state court but desires to litigate in another forum. Removal will not be available in the rare case where the defendant, though not a "resident" of California, is deemed to be a citizen thereof.[13] Similarly, removal will be precluded where the amount in controversy is less than $10,000. A resident plaintiff anxious to prevent removal and a subsequent 1404 transfer may, in his complaint, claim damages less than this sum, especially when, under California law, the prayer for relief will not bar him from obtaining judgment for a greater amount, assuming defendant does not default.[14] However, this device will probably fail if in reality defendant's exposure can be shown to be at least $10,000.[15] Finally, no removal can occur if plaintiff has "properly" joined, together

10. Fed. R. Civ. P. 41(a).

11. Littman v. Bache & Co., 252 F.2d 479 (2d Cir. [1958]). Since defendants in *Thomson* had filed an answer in the Houston federal court, the suit could be dismissed only with court approval.

12. See 28 U.S.C. §§ 1441, 1446.

13. On the distinction between "residency" and "citizenship," see Southern R.R. v. Mayfield, 340 U.S. 1, 95 L.ed. 3, 71 S.Ct. 1 (1950).

14. Cal. Code Civ. Pro. § 580.

15. See 1A J. MOORE, FEDERAL PRACTICE ¶ 0.158, at 423–24 (2d ed. 1965). However, a plaintiff might be able to prevent removal by disclaiming in his complaint any recovery in excess of $9,999.00. See *id.*

with the nonresident defendant, a citizen of California.[16] If such joinder, however, is deemed fraudulent, it will not succeed in frustrating removal.[17] In the wake of the *Thomson* holding, we may expect future battles over the effectiveness of attempts to make state actions nonremovable, when they are not subject to the forum non conveniens objection but would be ripe for a 1404 transfer if successfully removed.

Venue

The California scheme for determining venue in transitory civil actions is an antiquated and complex one, causing particular difficulty when a suit entails multiple causes of action or is brought against multiple parties. One problem which has given rise to considerable litigation is the determination of the proper county for trial when both an individual and a corporation have been joined as defendants. The California Constitution (a curious place to find a venue provision) declares that "a corporation . . . may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated. . . ."[18] When an individual and a corporation are both sued, it has been held that even though venue is proper as to the corporation under the constitutional provision, it must also be proper as to the individual were he sued alone.[19] If it is not, the latter may obtain a transfer of the action to a county where venue would be proper as to him. To reconcile this result with the constitution, the courts have said that, by joining an individual

16. Under 28 U.S.C. § 1441(b), an action not based on a federal claim is removable "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." Moreover, if the plaintiff is a "citizen" of California as well as a "resident," joinder of a California citizen as defendant will destroy diversity, and make the action nonremovable for this reason as well. See 28 U.S.C. § 1441(a).

17. 1A J. MOORE, *supra* note 15, at § 0.161[2]. The John Doe device has not successfully prevented removal. See Grigg v. Southern Pac. Co., 246 F.2d 613 (9th Cir. [1957]).

18. Cal. Const. art. XII, § 16.

19. *E.g.*, Griffin & Skelly Co. v. Magnolia & Healdsburg Fruit Cannery Co., 107 Cal. 378, 40 P. 495 (1895).

and a corporate defendant, a plaintiff has waived his constitutional right to sue the corporation in any of the designated counties he chooses.[20] However, if the county where suit is brought is that where the corporation has its principal place of business, that is, the county of its residence, then venue has been held proper despite the presence of an individual defendant.[1] The reasoning is that, in such a case, the plaintiff has satisfied the general venue provision of the Code of Civil Procedure that "the county in which the defendants, or some of them, reside at the commencement of the action is the proper county for the trial. . . ."[2]

In *State v. Superior Court*,[3] plaintiff brought suit in the Superior Court of Los Angeles County, seeking damages for personal injuries resulting from a highway accident in Imperial County. The State of California and three corporations having their principal places of business in Los Angeles County were named as defendants. Prior to answering, the state moved for a change of venue to Imperial County. It relied upon section 955.2 of the Government Code, providing that "notwithstanding any other provision of law, where the State is named as a defendant in any action . . . for . . . injury to person . . . and the injury . . . occurred within this State, the proper court for the trial of the action is a court of competent jurisdiction in the county where the injury occurred. . . ." Disagreeing with the trial judge's conclusion that the case was governed by the constitutional provision on venue in actions against corporations, the Court of Appeal issued a writ of mandate requiring that the motion be granted. It reasoned that (1) plaintiff had waived the advantages of the constitutional provision by joining the state as a defendant along with the corporations; (2) even though the action was brought in a county where some of the defendants resided, the provision of the Government Code by its terms prevailed over the general venue provision of the Code of Civil Procedure.

20. 107 Cal. 378, 40 P. 495.

1. *E.g.*, McClung v. Watt, 190 Cal. 155, 211 P. 17 (1922).

2. Cal. Code Civ. Pro. § 395(1).

3. 252 Cal. App.2d 689, 60 Cal. Rptr. 653 (1967).

While the case highlights the internal inconsistencies in California's venue scheme, the holding seems technically correct, especially in view of the California precedents that the constitutional provision is waived if plaintiff includes a non-corporate defendant. The case does appear to mark the first occasion when a California appellate court has held venue to be improper, despite the fact that a corporation has been legitimately named as one of the defendants, and the action is brought in the county of its principal place of business.

In its opinion, the Court of Appeal also stated that the constitutional provision on venue "is entitled to no greater priority in the solution of mixed action venue problems than any applicable statutory provision."[4] This approach seems contrary to the accepted maxim that a constitutional provision takes precedence over a conflicting statutory provision. Nevertheless, it adds nothing to the results already obtained by assuming a waiver of the procedural rights conferred by the Constitution, when a plaintiff joins corporate and non-corporate defendants.

A disturbing aspect of the decision is that plaintiff opposed the change in venue by asserting that all the doctors whose testimony she would require were in Los Angeles, and that she could not afford to transport them to Imperial County. Under section 396b of the Code of Civil Procedure, a court in which venue is improperly laid may retain the action, notwithstanding a timely motion for a change of venue, if "the convenience of the witnesses or the ends of justice will thereby be promoted." This section should be held applicable to an action in which the state is a defendant, despite the venue provision of the Government Code.[5] The court did not reject this position, but stated that "that portion of plaintiff's opposi-

4. 252 Cal. App.2d at 695, 60 Cal. Rptr. at 656–57.

5. Section 955.2 of the Government Code specifically states that "the court may, on motion, change the place of the trial in the same manner and under the same circumstances as the place of trial may be changed where an action is between private parties." Although the legislature did not specifically refer to the right of a court to order retention of an action despite improper venue, it seems reasonable to assume that it did not intend to eliminate this right when the State is sued in a county other than that specified in § 955.2.

tion which related to convenience of plaintiff's witnesses was premature because the motion was made before an answer had been filed and the issues framed."[6] This result may be inevitable under section 396b, which appears to grant plaintiff the right to argue for retention only "if an answer be filed."[7]

This statutory limitation, however, is most unfortunate. Section 396b requires that a defendant move for a change of venue "at the time he answers or demurs." The motion must be accompanied by an affidavit of merits. Obviously a crafty defendant seeking such a change will refrain from answering, and will make his motion in connection with the filing of some kind of demurrer. The court will then be powerless to retain the action in the interest of convenience and justice. It is true that after the action has been transferred, and defendant has answered, plaintiff may still move in the transferee court, pursuant to section 397, for a retransfer to the original court, in order to promote "the convenience of witnesses and the ends of justice."[8] Yet, in applying this standard, a judge might well be reluctant to return the case to the very court which has just sent it to his court, so plaintiff may have less chance of success than if he could have argued in the original court for retention despite improper venue. If the transferee court is willing to retransfer the case, it seems an absurd waste of resources to have two different judges deciding where the action should be tried, resulting in the original transfer being nullified by a retransfer.

It also seems doubtful whether, in the typical case, defendant's answer will be of much assistance in deciding in what county the action should conveniently be tried. Far more informative than the pleadings would be the affidavits of the opposing parties, dealing specifically with the convenience

6. 252 Cal. App.2d at 691, n. 1, 60 Cal. Rptr. at 654 n. 1.

7. The courts have reasoned that in determining whether to grant a motion to change venue on the ground of inconvenience to witnesses, it must be shown that the testimony of the allegedly inconvenienced witness is material; and whether a witness' testimony is material can only be determined when the issues are framed; hence, the requirement that an answer be filed. See Johnson v. Superior Court, 232 Cal. App.2d at 214, 42 Cal. Rptr. at 657 (1965), and cases there cited.

8. See 1 WITKIN, CALIFORNIA PROCEDURE, *Actions*, § 266, at 788 (1954).

issue. In any event, under the existing statutory scheme, a defendant must file an affidavit of merits when the change of venue is sought and also will have filed an answer, except in those cases where he has chosen to demur.

Assuming the legislature removes the strategic advantage conferred by demurring rather than answering, one may anticipate an increase in the relative number of cases where defendant's answer is in fact filed in conjunction with his motion for a transfer. Thus the supposed advantage flowing from the availability of the answer will in fact be realized.

Substitution of Correct for Incorrect Defendant

An increasingly common phenomenom of modern business is the use of a number of distinct legal entities to carry on an integrated operation. For example, the typical publicly held company is itself the owner of a host of subsidiary corporations, which often have names confusingly similar to that of the parent. Frequently a plaintiff, confused by this similarity in the designation of related entities, names the wrong one as a defendant, and fails to discover his error until after the statute of limitations has run. If he has in fact served the right defendant, but simply called it by the wrong name, the problem is a relatively simple one of misnomer; an amendment of the complaint to correct the name is generally permitted, whether or not the statute has run. But if service has been made only on the erroneously selected defendant named in the complaint, the courts traditionally have refused to permit the maintenance of the action against the correct defendant, on the ground that plaintiff, once the statute has run, cannot bring in a new party to the action.[9] Nor has it mattered that the correct defendant, because of his relationship to the wrong defendant, in fact had prior knowledge of the commencement of the action and of plaintiff's error.

In *Mayberry v. Coca Cola Bottling Company*,[10] the Court of Appeal took a more novel approach to the problem. Plaintiff sought damages for drinking a bottle of contaminated

9. See generally, 1 CHADBOURN, GROSSMAN & VAN ALSTYNE, CALIFORNIA PLEADING §§ 686–88 (1961).

10. 244 Cal. App.2d 350, 53 Cal. Rptr. 317 (1966).

Coca Cola. The beverage had been bottled by Coca Cola Bottling Company of Sacramento, which was a partnership. Another entity, Coca Cola Bottling Company of Sacramento, Ltd., was a corporation which supplied syrup to the partnership, but did no bottling. The three persons comprising the partnership were also officers or directors of the corporation. Both entities were housed on the same premises. Plaintiff mistakenly named as defendant the corporation rather than the partnership. A fictitious defendant, designated as Black & White Company, was also named. Process was served on the general manager of the corporation, who was also assistant general manager of the partnership, although not a partner. Thus service of process was never made on the partnership as such, since no partner was served.[11]

The corporation appeared in the action, and began litigating as though it were the correct defendant. It filed an answer, consisting of a general denial and an affirmative defense of contributory negligence. It took plaintiff's deposition. It filed a pretrial statement purporting to list the issues for decision, which made no mention of plaintiff's mistaken identification of the defendant. The pretrial order adopted defendant's statement of the issues, and dismissed the fictitious defendant. By the time the case went to trial, the one-year statute of limitations had already run. At the trial, defendant introduced testimony of the sales manager of the partnership, thereby disclosing for the first time the pitfall into which plaintiff had fallen. A motion to substitute the partnership for the corporation was granted, as was a motion for a nonsuit in favor of the corporation, thereby terminating the trial. Subsequently the partnership demurred to the complaint, on

11. See 244 Cal. App.2d at 353, 53 Cal. Rptr. at 320. Prior to its recent amendment, Cal. Code Civ. Pro. § 388 indicated that service on a partnership was made by serving at least one of the partners. See 1 WITKIN, CALIFORNIA PROCEDURE, *Actions*, § 299, at 820 (1954). In 1967 the legislature amended § 388 and added § 411.2.1, with the result that, if a partnership has designated an agent for the service of process as provided in newly enacted Cal. Corp. Code § 24003, service shall be made on such agent. If no such person has been designated, or the designated person cannot be found at his specified address, then service shall be made on a partner, and by mailing a copy of the summons to the partnership at its last known mailing address.

the ground of the statute of limitations. The demurrer was sustained without leave to amend, and a judgment of dismissal followed.

Distressed by the tactics of the corporate defendant, and impressed by the equities in plaintiff's favor, Justice Leonard Friedman found error in denying an opportunity to amend the complaint so as to allege why the statute of limitations should be deemed tolled. Writing for the court, he listed the factors which suggested that relief should be granted: the excusable nature of plaintiff's mistake in view of the striking similarity in the names of the entities, "the substantial identity of the persons involved in both firms,"[12] the obvious awareness of the real defendant that litigation had been commenced, the steps taken by the corporate defendant to perpetuate plaintiff's error beyond the point of repair. He also noted that, had plaintiff learned of his error before the fictitious defendant had unsuspectingly been dismissed, the partnership could have been substituted for the fictitious defendant, and would not have been able to invoke the bar of the statute of limitations. Although the court did not say so, presumably the acts of the corporation could fairly be imputed to the partnership because of the close relationship between the entities, and the similarity in their real principals.

While the court purported to find authority for its liberal position in prior California cases, the decision goes significantly beyond such cases. For in the precedents cited,[13] the service of process which was made was sufficient to obtain jurisdiction over the business entity intended to be sued, even though that entity was incorrectly named or described. Thus the cases could be deemed to present instances of mere misnomer, and not an attempted addition of a new party after the statute of limitations had run. In the instant case, as no member of the partnership was ever served with process, the misnomer rationale was not available.

Nevertheless, the court reached a most commendable result. Indeed, even disregarding the manner in which the corporate

12. 244 Cal. App.2d at 354, 53 Cal. Rptr. at 320.

13. See 244 Cal. App.2d at 353, 53 Cal. Rptr. at 320.

defendant misled the plaintiff, the holding seems sound. When a plaintiff has reasonably, but erroneously, sued the wrong affiliate of an integrally related enterprise, and the right affiliate knows or should know that the suit has been brought and that an obvious mistake has been made in designating the defendant, it seems unduly harsh to deprive a plaintiff of his day in court if the mistake is not discovered in time to bring a second action. Conceptually, such a case could be handled by the admittedly strained rationale that, under these circumstances, the incorrect defendant should be said to have received service of process as agent for the correct one. Alternatively, the suggestion in *Mayberry* could be followed that the statute of limitations is declared tolled to prevent injustice, a result that courts have reached in other instances where the bite of the statute is deemed too severe.[14]

Where the incorrect defendant has pretended, at the pleading and pretrial stage, to be the correct defendant, so that plaintiff loses his opportunity to take appropriate remedial action, an additional rationale is possible, namely, that the incorrect defendant is estopped to raise the identity question. Accordingly, the suit would proceed against it, and it would be liable for any judgment rendered on the basis of the conduct of its affiliate. This question was not before the court in *Mayberry,* since plaintiff had apparently not objected to the dismissal of the corporate defendant, once the error had emerged. However, the court hinted it would not be unsympathetic to such an estoppel approach.[15]

In *LeMire v. Querilo,*[16] a case that came before it shortly after *Mayberry,* the same Court of Appeal did in fact apply the estoppel theory for which it had laid the groundwork in its prior opinion. Plaintiff brought a negligence action against a person in his individual capacity, alleging that the individual was the owner of a truck involved in an accident. In his answer, his conduct of pretrial discovery, and his pretrial statement, defendant gave no clue that the suit had been

14. See, *e.g., Developments in the Law—Statutes of Limitations,* 63 HARV. L. REV 1177, 1220–24 (1950).

15. See 244 Cal. App.2d at 352 n. 1, 53 Cal. Rptr. at 319 n. 1.

16. 250 Cal. App.2d 799, 58 Cal. Rptr. 804 (1967).

brought against the wrong entity. At the trial, however, he sought to raise the defense that the owner of the truck was a family corporation. The court had no difficulty in concluding that the individual was estopped to assert corporate ownership of the vehicle in question. The decision was made easier by the conflict in the evidence whether the alleged corporate owner was in fact a bona fide entity.

Mayberry and *LeMire* may herald a general willingness by California courts to adopt the estoppel solution in cases of this kind, at least where defendant's pretrial statement, which is supposed to specify the "contentions to be made as to the issues remaining in dispute,"[17] is silent as to the identity question. Under these circumstances, the pretrial conference order will also omit reference to this question, and since, where inconsistent with the pleadings, it "controls the subsequent course of the case unless modified . . . to prevent manifest injustice,"[18] a simple waiver theory would also seem applicable.[19]

Cross-complaints and Counterclaims

When a party wishes to assert a claim against one who has sued him, he is confronted by the bewildering distinction, to which California has tenaciously clung, between a cross-complaint and a counterclaim. By a cross-complaint, a litigant seeks affirmative relief against any person, whether or not a party to the original action, relating to the transaction upon which the action is brought.[20] By a counterclaim, a

17. Cal. Ct. Rule 210(c).

18. Cal. Ct. Rule 216. It should be noted that, in view of the 1967 amendment to Cal. Ct. Rule 208, pretrial conferences will be far less common than in the past, since they are now to be held only when requested by a party or specifically ordered by the court.

19. Stephens v. Berry, 249 Cal. App. 2d 474, 57 Cal. Rptr. 505 (1967), is a third case presenting the question of suit against the wrong defendant. Plaintiff mistakenly named the driver of the car into which his car had been pushed, rather than the driver of the car which had struck plaintiff's car from the rear. The court held that the correct defendant could not be substituted for the incorrect one after the statute of limitations had run. The ruling seems sound, since, in contrast to *Mayberry* and *LeMire*, there was no business connection between the correct and incorrect defendants; indeed, there was no reason to think they even knew each other.

20. Cal. Code Civ. Pro. § 442.

litigant asserts a claim which "must tend to diminish or defeat the plaintiff's recovery";[1] that is, he seeks a money recovery in an action in which a money recovery is sought of him.[2] A counterclaim "must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action."[3]

A claim for affirmative relief will frequently qualify as both a cross-complaint and a counterclaim, in that a claim tending to diminish or defeat a plaintiff's recovery will arise "out of the transaction set forth in the complaint." Under these circumstances—and no other—the claim will be deemed a compulsory counterclaim, and the litigant will be barred from maintaining a subsequent action thereon.[4]

In *Carey v. Cusack*,[5] the Court of Appeal wrestled with some problems posed by the foregoing modes of classification. The Cusacks had entered into an agreement with Carey and Kennan, real estate brokers, for the subdivision into lots, improvement, and sale to the public of a parcel of land which the Cusacks owned. The brokers retained an engineer to assist in the project, but after substantial work had been completed by both the brokers and the engineer, the property was sold intact by the Cusacks, through another broker, to a college. The engineer sued the Cusacks to recover for services rendered. The Cusacks in turn filed a cross-complaint against the brokers, in which the first cause of action sought a declaratory judgment that the brokers were liable for the engineer's services. The second cause of action sought "subrogation" against the brokers in the event the Cusacks were required to pay the engineer. The court held the Cusacks liable to the engineer, and ruled that the brokers were not liable.

About two months after the entry of judgment in this action, the brokers sued the Cusacks to recover for services

1. Cal. Code Civ. Pro. § 438.

2. See 2 WITKIN, CALIFORNIA PROCEDURE, *Pleading*, § 580 (1954).

3. Cal. Code Civ. Pro. § 438. An answer is required to a cross-complaint which is deemed a separate pleading, but not to a counterclaim, which is considered part of the defendant's answer. See *id.* §§ 422, 437.

4. Cal. Code Civ. Pro. § 439.

5. 245 Cal. App.2d 57, 54 Cal. Rptr. 244 (1966), hearing denied, 65 A. C. No. 16, Minutes 2 (Nov. 25, 1966).

rendered. The Cusacks argued that the brokers should have pleaded this claim as a counterclaim in their answer to the former cross-complaint, and that they were now barred from asserting it. The Court of Appeal rejected the argument on three different grounds. It first suggested that, in view of the statutory definition, a "counterclaim" could be asserted only "against a plaintiff . . . and may not be used to bring in third parties or seek relief against a codefendant."[6] The court was unsympathetic to the argument that the words "plaintiff," "defendant" and "complaint" in the statutes pertaining to counterclaims should be read to include "cross-complainant," "cross-defendant" and "cross-complaint" respectively. Accordingly, even assuming the brokers could have asserted a "cross-complaint" to the Cusacks' cross-complaint, they would not be prohibited from bringing a separate action, since a claim must qualify as both a "counterclaim" and a "cross-complaint" to be compulsory.

The court gave another reason why the brokers' claim could not have been asserted as a "counterclaim" to the cross-complaint:

> It does not tend to defeat or diminish the recovery sought by the Cusacks against the brokers. . . . [T]here were no monetary claims made by the Cusacks against the brokers. In one cause of action, the Cusacks' cross-complaint merely asked for a declaratory judgment holding . . . the brokers liable for Nolte's [the engineer's] services. In their other causes of action based on the right of subrogation, the Cusacks could have made no direct monetary recovery from the brokers unless and until they first paid Nolte the amount owed. . . . They were not demanding a monetary damage award but were, in effect, simply asking the court to declare that someone else was liable for Nolte's services.[7]

Even assuming the brokers' claim could be brought within the statutory definition of a counterclaim, the court held that it would still not be compulsory, because it did not arise out

6. 245 Cal. App.2d at 64, 54 Cal. Rptr. at 249.

7. 245 Cal. App.2d at 67, 54 Cal. Rptr. at 250–51.

of the transaction set forth in the cross-complaint. The court noted that "the term 'transaction' is not limited to a single, isolated act or occurrence, but may embrace a series of acts or occurrences logically interrelated."[8] However, it held that the dealings between the brokers and the engineer, which led to the latter's employment, and the agreement between the Cusacks and the brokers "were based on two separate and distinct transactions, and are devoid of any logical interrelation."[9]

The decision vividly illustrates the urgent need for statutory revision in this area of California procedural law. The first point to be noted is that, under the court's reasoning, the brokers would not have been *permitted* to assert their claim against the Cusacks in the prior action, even had they so desired. Their claim would not qualify as a "counterclaim." Nor would it qualify as a "cross-complaint," since it was held to be based on a different transaction than the complaint and the Cusacks' cross-complaint, and "devoid of any logical interrelation" with such claims of other parties.

Even assuming that assertion of the brokers' claim should not have been *required,* prohibiting its assertion, and compelling a separate action, is clearly unsound. Faced with the Cusacks' claim that the obligation to pay the engineer was on them, surely the brokers should have been allowed to counterattack in the same action, by seeking payment from the Cusacks for services performed on the very business deal for which the engineer was retained. Since the brokers sought a recovery in *quantum meruit,*[10] they could have argued, had they alone been held liable for paying the engineer, that reimbursement of this cost should be one of the elements in fixing the amount of their own recovery. Even if the brokers were held obligated to indemnify the Cusacks for the latters' payment to the engineer, were they entitled to a larger payment from the Cusacks for their own services, the court

8. 245 Cal. App.2d at 66, 54 Cal. Rptr. at 250.

9. 245 Cal. App.2d at 66, 54 Cal. Rptr. at 520.

10. While they had a contract with the Cusacks, it did not state what compensation, if any, would be due to the brokers if the transaction did not proceed to the sale of improved subdivided lots.

would have entered judgment for the excess in favor of the brokers.[11] The brokers should not be compelled to assume the risk of a net loss by virtue of the Cusacks' bankruptcy following a judgment requiring the brokers to indemnify the Cusacks.

Moreover, if the Cusacks had not filed a cross-complaint against the brokers, but had brought a separate action against them seeking reimbursement after the Cusacks had paid a judgment in favor of the engineer, the brokers clearly would have been permitted to counterclaim. It is difficult to see why they should be placed at a disadvantage simply because they happen to be brought into an action originally commenced by a third party.

There are also strong policy arguments why the assertion of the brokers' claim in the prior action should have been mandatory. The claim for services of both the engineer and the brokers related to the same general business deal. So did the dispute between the Cusacks and the brokers over responsibility to the engineer. It is reasonable to assume that resolution of the controversies about the engineer's fee would entail introduction of much of the same evidence as would be presented in connection with the brokers' claim. Background information, the relationship among the parties, the negotiations held—these and other matters were common to all the points at issue. Thus duplication, and the consequent waste of public and private resources, would be avoided by a single trial. Moreover, as already noted, the amount of the brokers' recovery was potentially intertwined with the disposition of the engineer's claim. In view of these factors, the court seems to have given an unduly narrow interpretation to the term "transaction."

The California scheme for categorizing claims against an opposing party is nonsensical in the modern world,[12] and should be replaced by the relevant provisions of the Federal Rules of Civil Procedure. In federal court, a pleading may

11. Cal. Code Civ. Pro. § 666.

12. The distinctions presently embraced by California have hoary historical origins. See *e.g.*, F. JAMES, CIVIL PROCEDURE 472–79 (1965).

state as a counterclaim *any* claim against any opposing party, whether or not it diminishes or defeats the recovery sought by such party, and even if it claims relief exceeding in amount, or different in kind, from that sought in the pleading of the opposing party.[13] The counterclaim is normally compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. . . ."[14] There is no such concept as a cross-complaint, all claims against an opposing party being labeled counterclaims. A party in the position of the brokers, who has been impleaded so that defendant may enforce his claim for indemnification if held liable to plaintiff, is expressly authorized to assert counterclaims against the one bringing him into the action.[15]

Thus, the federal scheme avoids the artificial restrictions on the maintenance of claims against opposing parties which are embedded in the California statutes, relying upon the power to grant separate trials to counteract any difficulties caused by unlimited permissive assertion.[16] Moreover, whether a counterclaim arises out of the transaction that is the subject matter of the opposing party's claim, and is thus compulsory, hinges upon the duplication in the presentation of evidence which would result from separate trials.[17]

Discovery

Under the present California statutory scheme, a party who desires to obtain discovery of documents in the posses-

13. Fed. R. Civ. P. 13(b), (c).

14. Fed. R. Civ. P. 13(a). If a counterclaim is not compulsory, it must be supported by an independent basis of federal jurisdiction to entitle the counterclaimant to affirmative relief. 3 J. MOORE, FEDERAL PRACTICE ¶ 13.19[1] (2d ed. 1967). It can be used defensively as a set-off without such jurisdictional grounds.

15. Fed. R. Civ. P. 14(a).

16. A separate trial of a claim and counterclaim may be ordered "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy. . . ." Fed. R. Civ. P. 42(b); see also Fed. R. Civ. P. 13(i). A California court presently has this power. Cal. Code Civ. Pro. § 438.

17. "[A] counterclaim is compulsory if it bears a 'logical relationship' to an opposing party's claim," that is, "where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts." Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d at 634 (3d Cir. [1960]).

sion of an adverse party may proceed by two alternative routes. Pursuant to section 2031 of the Code of Civil Procedure, he may move, upon notice, for an order requiring the production of such documents. He is required to show "good cause," that is, "specific facts justifying discovery, and mere proof of the relevance of the information sought to the subject matter of the action shall not be sufficient."[18] A second possibility is to serve a subpoena duces tecum on the adverse party, pursuant to section 1985 of the Code of Civil Procedure. To obtain the issuance of such a subpoena, the applicant must submit an affidavit showing "good cause" and setting forth "the materiality" of the documents "to the issues involved in the case."

In *Associated Brewers Distributing Company v. Superior Court*,[19] the question arose whether the difference in statutory language compelled that different standards govern discovery under the two sections. Plaintiff sued to recover the purchase price of goods. Defendant counterclaimed, alleging that plaintiff had terminated a distribution agreement without cause. Acting pursuant to section 2031, defendant sought production of documents in plaintiff's possession relating to defendant's carrying out, or failing to carry out, plaintiff's distribution recommendations. The trial court denied the motion, but the California Supreme Court disagreed. Speaking for a unanimous court, Chief Justice Traynor held that a party, proceeding under section 2031, is not required to show that the documents sought are admissible in evidence. This ruling is clearly correct. Section 2031, which derives from Rule 34 of the Federal Rules of Civil Procedure, provides that the court may order the production of documents "which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by" section 2016(b). That section deals with depositions, and authorizes examination regarding any unprivileged matter "relevant to the subject matter" of the action. It further states that "it is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably

18. Cal. Code Civ. Pro. § 2036.

19. 65 Cal.2d 583, 55 Cal. Rptr. 772, 422 P.2d 332 (1967).

calculated to lead to the discovery of admissible evidence." Moreover, the major goal of pre-trial discovery—"to prevent surprise at trial and to allow proper preparation"[20]—would be frustrated if documents in an adversary's possession could be withheld unless admissible in evidence.

Noting that the determination of the "good cause" question "necessarily depends upon the facts and issues of the particular case,"[1] the court held that this defendant had established its right to production, since the documents might disclose that the distributorship had been terminated without cause, might reveal admissions that alleged deficiencies of defendant had been corrected, and might contain evidence that could be used to impeach plaintiff's witnesses at trial. Plaintiff did not contend that the documents would not aid defendant's case, nor had it made any showing that the request for inspection was made in bad faith.

Plaintiff argued that the standards for obtaining documents should be the same whether a party has proceeded under section 2031 or under section 1985, and that, accordingly, the more restrictive "materiality to the issues" requirement of section 1985 should be engrafted onto section 2031. The court, however, took the following position:

> Although it has been held that relevancy to the subject matter is a broader concept than materiality to the issues . . . it is unnecessary to determine the distinction between these standards in this case. [Plaintiff] has met them both. When the "subpoena power is invoked to secure discovery, the good cause and materiality requirements of Code of Civil Procedure section 1985 must be governed by discovery standards." . . . Accordingly, whether discovery is sought by motion under section 2031 or by subpoena under section 1985, it is not necessary to show that the material sought will be admissible in evidence.

20. 65 Cal.2d at 588, 55 Cal. Rptr. at 755, 422 P.2d at 335.

1. 65 Cal.2d at 587, 55 Cal. Rptr. at 774, 422 P.2d at 334.

. . . . The documents sought are thus relevant to the subject matter and material to the issues. . . .[2]

While not entirely clear, this language may be reasonably construed to say that if a party seeks discovery by subpoena under section 1985, he need only meet the tests which would be applicable to obtain discovery under section 2031. Thus, so far as discovery from a party is concerned, the court seems to have harmonized the statutory scheme by providing that the same standard shall control both sections. If this interpretation is correct, the court has implicitly overruled a 1965 decision of a District Court of Appeal, holding that, even in the discovery context, the legislature intended "not to equate 'materiality to the issues' in section 1985 with 'relevancy to the subject matter' in sections 2016, subdivision (b) and 2031."[3]

The distinction remains under *Associated Brewer*s that if a party proceeds under section 2031, he can obtain a court order only after his opponent has had an opportunity to be heard, whereas if he proceeds under section 1985, he can obtain the issuance of a subpoena *ex parte*. Nevertheless, since the opponent can move to quash the subpoena,[4] this difference does not seem very significant. It is doubtful whether utilizing section 1985 will result in a shifting of the burden of proof if the right to obtain production is challenged.[5]

2. 65 Cal.2d at 587–88, 55 Cal. Rptr. at 775, 422 P.2d at 335.

3. Flora Crane Service, Inc. v. Superior Court, 234 Cal. App.2d at 787–89, 45 Cal. Rptr. at 90–91 (1965). But see Filipoff v. Superior Court, 56 Cal. 2d 443, 15 Cal. Rptr. 139, 364 P.2d 315 (1961).

4. See Flora Crane Service, Inc. v. Superior Court, 234 Cal. App.2d 767, 45 Cal. Rptr. 79 (1965).

5. If a party refuses to respond to a subpoena duces tecum utilized for discovery purposes, his adversary's sole remedy appears to be to apply to the court for an order compelling production, which is obtainable only "if good cause is shown." Cal. Code Civ. Pro. § 2034(a). The court may order the payment of reasonable expenses if it "finds that the refusal was without substantial justification. . . ." *Id.* Presumably, the party seeking discovery would still have the burden of proof on good cause. This burden would undoubtedly be held to remain with the party seeking discovery, even if a motion to quash has been made by the party served with the subpoena. Thus, in Flora Crane Service, Inc. v. Superior Court, 234 Cal. App.2d at 791, 45 Cal. Rptr. at 93 (1965), where there was such a motion to quash, the court still stated that "the burden of showing good cause for the inspection or production

Actually, a more sensible statutory scheme than either of the present alternatives would be to provide that a party can obtain the production of documents simply by serving an appropriate notice on an adverse party, and that the opponent may move to quash if he thinks the demand improper.[6] Since, in many cases, documents will be voluntarily furnished upon formal demand, it seems wasteful to require court action in every case. The recommended procedure would be similar to that employed with respect to depositions, a party being permitted to serve a notice to take his adversary's deposition without any authorizing court order or subpoena.[7] Wilful noncompliance with a notice to produce could then be treated the same way as the Code of Civil Procedure presently handles wilful noncompliance with a notice to appear for a deposition.[8]

Associated Brewers is particularly significant as it may relate to discovery of documents in the possession of *witnesses*. Under these circumstances a party must use section 1985 of the Code of Civil Procedure, as section 2031 by its terms is applicable only to discovery of documents held by *parties*. Presumably, under the court's decision, the standard that governs production of documents of parties under section 2031 would also govern production of documents of witnesses under section 1985.[9] This result seems a sound one, in view of the aims of pretrial discovery. Also, the statute does not differentiate between parties and witnesses with respect to the scope of deposition upon oral examination.[10] It may be contended that producing documents is more burdensome for a witness than answering questions propounded orally; but this may or may not be the case, and the distinction should yield to a liberal attitude toward discovery.

of documentary evidence is on the party seeking discovery."

6. This scheme is presently in effect in New York. See N.Y. Civ. Prac. §§ 3120, 3122.

7. Cal. Code Civ. Pro. §§ 2016(a), 2019(a)(4); see also § 2019(b)(1).

8. Cal. Code Civ. Pro. § 2034(d).

9. This appears to be the interpretation given to *Associated Brewers* in Kenney v. Superior Court, 255 Cal. App.2d 126 at 129, 63 Cal. Rptr. at 87–88 (1967). There the court upheld production from a third party under § 1985, because the documents sought might be of assistance in the effective preparation for trial.

10. Cal. Code Civ. Pro. §§ 2016(a), (b).

If section 1985 is used to obtain issuance of a subpoena duces tecum in connection with a *trial,* the courts can be expected to be less liberal than if pre-trial discovery is the objective. Accordingly, the phrase "materiality to the issues" will receive a liberal or strict interpretation, depending upon the purpose for which the subpoena is sought. While it may seem strange that a single standard should be subject to this dual construction, the end result is a sensible one.[11]

Additur

As the swelling volume of personal injury litigation continues to overwhelm our courts, commentators have proposed remedial action ranging from abolition of trial by jury to substitution of a state administered compensation scheme which eliminates fault as a basis of private liability in automobile accident cases. Adoption in the near future of such far-reaching proposals seems unlikely, so less drastic ways of affording partial relief remain of major interest. Additur is a technique which may eliminate the need for a costly retrial, when a jury verdict awarding damages for personal injury is deemed by the trial judge to be inadequate. Pursuant to this technique, the trial judge grants a retrial (which may be limited solely to the damage issue) unless the defendant consents that the damage award be increased to a specified sum. A defendant will presumably accept the condition if he fears that a second jury will award an even larger sum than the judge has selected. The counterpart of additur is remittitur, pursuant to which a judge who believes a damage award to be excessive grants a retrial unless the plaintiff agrees that the award may be reduced to a specified sum.

11. Another discovery case of note decided during the period under scrutiny is Whitfield v. Superior Court, 246 Cal. App.2d 81, 54 Cal. Rptr. 505 (1966). Plaintiff's personal injury suit placed in issue her mental condition, as she allegedly was under the care of a psychiatrist for the trauma occasioned by the accident. The court upheld an order entered under Cal. Code Civ. Pro. § 2032(a), permitting defendant's psychiatrist to examine plaintiff without the presence of her attorney or a reporter. The court noted that the nature of the examination was such that, to be effective, the patient must not be distracted by the presence of other persons, or be inhibited by the knowledge that her statements are being recorded verbatim.

While remittitur has been a frequently used device in both federal and state courts, *Dimick v. Schiedt,*[12] a 1935 decision of the United States Supreme Court, held the additur technique to be an unconstitutional denial of plaintiff's federal right of trial by jury. The Court concluded that the practice was not recognized by the English common law at the time that the seventh amendment was adopted,[13] and that accordingly a plaintiff had a right to a second jury trial if the verdict of the first jury was inadequate. The Court acknowledged that its reasoning cast doubt on the constitutionality of remittitur, but held that that technique was so well established it should not now be vitiated. Four powerful dissenting voices—those of Chief Justice Hughes and Justices Stone, Brandeis, and Cardozo—saw no constitutional impediment to the use of additur.

In a 1952 decision, *Dorsey v. Barba,*[14] the California Supreme Court relied upon *Dimick* to find that additur was a denial of the state constitutional right to a jury trial. Justice Traynor vehemently dissented, but was unable to persuade any of his colleagues.

Fifteen years later, in *Jehl v. Southern Pacific Company,*[15] the California Supreme Court again considered the constitutionality of additur, and the result was a personal triumph for Chief Justice Traynor, the sole surviving member of the 1952 bench. Writing for a unanimous court, he overruled *Dorsey,* "finding its arguments unpersuasive when considered in the light of the demands of fair and efficient administration of justice."[16] Supplementing such practical considerations was the court's disclosure of a flaw in the reasoning of *Dimick,* upon which *Dorsey* had hinged. True, additur was not recognized by the English common law in the late eighteenth cen-

12. 293 U.S. 474, 79 L.ed. 603, 55 S.Ct. 296, 95 A.L.R. 1150 (1935).

13. "In order to ascertain the scope and meaning of the Seventh Amendment [preserving the right of trial by jury], resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." 293 U.S. at 476, 79 L.ed. at 606, 55 S. Ct. at 296, 95 A.L.R. at 1152.

14. 38 Cal.2d 350, 240 P.2d 604 (1952).

15. 66 Cal.2d 821, 59 Cal. Rptr. 276, 427 P.2d 988 (1967).

16. 66 Cal.2d at 828, 59 Cal. Rptr. at 280, 427 P.2d at 992.

tury, but the question of its use was never squarely presented, the reason being that, until the middle of the nineteenth century, the English courts had refused to grant new trials on the ground of an inadequate damage award by the jury. Thus the modern practice of allowing plaintiff a second trial in such a case was itself "a limitation on the former broad powers of the jury."[17] In any event, a plaintiff can hardly complain that additur violates his right of trial by jury, since the English common law as of the controlling date would have compelled him to accept the very jury award which the judge using additur is increasing for his benefit.[18]

It is difficult to quarrel with either the reasoning of *Jehl* or the result. Indeed, Chief Justice Traynor demolishes *Dimick* so effectively that it seems doubtful that decision will survive, if the United States Supreme Court ever has another opportunity to consider the additur question. At least California trial judges, dissatisfied with the amount of damages awarded by a jury, now have in their arsenal both remittitur and additur as possible means of avoiding a second round of jury litigation.[19]

An interesting facet of *Jehl* is its suggestion that the practice of granting a new trial on the ground of an inadequate damage award may well be in technical derogation of the constitutional right to jury trial of the defendant, since the English common law would have treated the verdict as conclusive. The question remains whether the court, having recognized the extent

17. 66 Cal.2d at 830, 59 Cal. Rptr. at 282, 427 P.2d at 994. See Comment, *Additur—Procedural Boon or Constitutional Calamity?*, 17 DE PAUL L. REV. 175, 179–80 (1967), and authorities there cited.

18. The court also held the additur technique permissible in a Federal Employers' Liability Act action brought in a California state court, on the ground that the state constitutional provision, and not the seventh amendment, was applicable to such an action.

19. In 1967 the California legislature enacted Cal. Code Civ. Pro. § 662.5, expressly authorizing use of additur: (a) "where the verdict of the jury on the issue of damages is supported by substantial evidence but an order granting a new trial limited to the issue of damages would nevertheless be proper," and (b) "in any other case where . . . constitutionally permissible." In *Jehl*, the Court specifically noted that, "since we overrule *Dorsey*, it is unnecessary to limit additur to those cases where the jury's verdict is supported by substantial evidence." 66 Cal.2d at 832 n. 15, 59 Cal. Rptr. at 283 n. 15, 427 P.2d at 995 n. 15.

of previous inroads on the constitutional mandate, would be willing to go so far as to uphold a judge's (as opposed to a second jury's) increasing an inadequate damage award without the *defendant's* consent. While it seems most doubtful that such a procedure would be deemed permissible, *Jehl* may herald a liberal attitude toward permitting experimentation with administratively useful techniques, notwithstanding a claimed impairment of the right to jury trial.

Collateral Estoppel

In *Louie Queriolo Trucking, Inc. v. Superior Court,*[20] plaintiff sought recovery for $16,000 of property damage caused when a vehicle owned by it, and driven by one of its employees, fell into an excavation which defendant construction company had made in a highway. Plaintiff claimed that defendant was barred from denying liability by the outcome of a prior negligence suit brought against defendant by the employee of plaintiff, who sought recovery for personal injuries incurred in the same accident. In that suit a jury, sitting at the liability portion of a bifurcated trial, decided that issue against defendant, after which defendant's motion for a new trial was denied, and an appeal filed. The case was subsequently settled and the appeal dismissed.

The Court of Appeal agreed with plaintiff that the liability issue was no longer open in the second suit. Two appellate judges thought that the question presented could be easily disposed of on the basis of precedents holding that "a judgment in favor of an employee in an automobile casualty case, or other similar action based upon tort, redounds to the benefit of the employer, whose sole liability, if any, depends upon *respondeat superior.*"[1] The necessary judgment in favor of the employee was found in the judgment of dismissal with prejudice which followed the settlement, and the resulting payment of a consideration to the employee. Under these circumstances, the judgment was deemed equivalent to

20. 252 Cal. App.2d 208, 60 Cal. Rptr. 389 (1967), hearing denied, 67 A.C. No. 8, Minutes 3 (Oct. 6, 1967) (Peters and Mosk, JJ., dissenting).

1. 252 Cal. App.2d at 212, 60 Cal. Rptr. at 391–92.

one for the employee on the merits, "as to which his employer could properly take advantage."[2] A concurring judge thought that the decision was also justified by the collateral estoppel doctrine as enunciated in the famous *Bernhard*[3] and *Teitelbaum*[4] cases.

Although the court failed to realize the implications of the decision, the holding represents an unprecedented development in California law. *Queriolo* marks the first time in this state that one not a party to a prior civil action has been permitted to use the judgment in that action *offensively,* that is, to establish the liability to it of one who was a party.[5] The employer-employee cases relied upon by the court[6] relate to a quite different problem. They hold that when a plaintiff has sued an employee and lost, he cannot thereafter seek recovery from the employer, whose liability is only a vicarious one. One justification for this holding is that if the employer lost, he would be entitled to indemnity from the employee. Yet this would be a most anomalous result, since the employee has already successfully defended himself in the suit brought directly against him by the victim. Thus, the employer is permitted to use the prior judgment *defensively,* that is, to assert it as a reason why he should not be liable to one suing him who was a party to the former suit. In *Queriolo,* the employer used the prior judgment in his capacity as a plaintiff, not as a defendant. Similarly, cases like *Bernhard* and *Teitelbaum,* which throw out mutuality as a necessary component of collateral estoppel, also concern defensive use of a prior judgment by one not a party to the former action against one who was a party. Three California cases pre-

2. 252 Cal. App.2d at 213, 60 Cal. Rptr. at 393.

3. Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942).

4. Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 25 Cal. Rptr. 559, 375 P.2d 439 (1962) cert. denied 372 U.S. 966, 10 L.ed.2d 130, 83 S.Ct. 1091.

5. In Newman v. Larsen, 225 Cal. App.2d 22, 36 Cal. Rptr. 883 (1964), offensive use of a prior *criminal* judgment was permitted. Defendant was convicted of assault with a deadly weapon. The victim of the assault subsequently sued civilly for damages. It was held that defendant was estopped to deny liability by the judgment in the criminal proceeding.

6. See cases cited, 252 Cal. App.2d at —, 60 Cal. Rptr. at 392.

ceding *Queriolo* had expressly refused to permit offensive use of such a judgment.[7]

Permitting offensive use of a prior judgment raises a host of problems which are not present when defensive use is allowed. In a case like *Queriolo,* where the employer and employee both have causes of action against the defendant, they may agree among themselves that the plaintiff who will be more attractive to a jury should be the one who sues first. The less attractive plaintiff can then appropriate the fruits of the first plaintiff's victory on the liability issue. He will obviously refrain from joining as a plaintiff or intervening in the first suit, as it will be strategically sounder to await its outcome, taking advantage of defendant's defeat and not being barred by his victory (never having had his own day in court). Accordingly, a multiplicity of actions will be encouraged, placing an added burden on judicial facilities as well as on the defendant.

Other difficulties arise. The damages sought in the first suit may have been insubstantial compared to the claim in the second suit, so the defendant may not have litigated as hard as he would have if a larger sum were at stake. If, as in *Queriolo,* the defendant in the second suit was also the defendant in the first suit, he will not have had the opportunity to select the forum in which the first suit was tried, and under these circumstances it may be unfair that the second suit should automatically be decided against him if he loses the first. Where one plaintiff seeks recovery for property damage, and the other asserts a personal injury claim, the defense may be conducted by two different insurers, and it may not be just to deprive one of the insurers of its own opportunity to litigate the liability question.

7. McDougall v. Palo Alto Unified School District, 212 Cal. App.2d 422, 28 Cal. Rptr. 37 (1963); Price v. Atchison, T. & S. F. Ry., 164 Cal. App.2d 400, 330 P.2d 933 (1958); Nevarov v. Caldwell, 161 Cal. App.2d 762, 327 P.2d 111 (1958). Overruling prior cases, the New York Court of Appeals has recently permitted offensive use in a case similar to *Queriolo* (except that apparently the first suit was not terminated by a settlement). B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 278 N.Y.S.2d 596, 225 N.E.2d 195 (1967).

This is not to say that it is always imprudent to permit offensive use. But surely before such use is allowed a court must make an inquiry into fairness, which was completely absent in *Queriolo*. Perhaps offensive use should not be permitted if the second plaintiff knew of the first suit, could readily have intervened, and refrained from doing so. One fact in *Queriolo* which makes the decision particularly dubious is that the first suit was settled, defendant thereupon sacrificing his right of appeal. There is no indication in the opinion as to how favorable a settlement the employee received. In any event, it is possible that defendant had substantial grounds for urging a reversal of the jury verdict on the liability issue, which he abandoned as part of the settlement package. To give collateral estoppel effect to such a determination of liability is a most questionable result,[8] and surely will have the undesirable effect of discouraging post-verdict settlements where another plaintiff waits in the wings to assert a claim arising from the same transaction.[9] Moreover, the broad mandate *Queriolo* gives for offensive use may well have the effect of forcing a defendant to take an appeal, even when he is willing to abide by the outcome of the trial as it relates to the plaintiff whose claim has been adjudicated.

In sharp contrast to *Queriolo* is another recently decided case, *O'Connor v. O'Leary*.[10] One Dennis O'Connor, while

8. The rationale of *Queriolo* would seem to apply even if the first suit had been settled *prior to* trial. California cases have held that "a stipulated judgment of dismissal in connection with which consideration is given is equivalent as between the parties to a final judgment on the merits." Sylvester v. Soulsburg, 252 Cal. App.2d at —, 60 Cal. Rptr. at 221 (1967); see also Datta v. Staab, 173 Cal. App.2d 613, 343 P.2d 977 (1959). Accordingly, under *Queriolo* a second plaintiff could presumably use such a judgment offensively to establish defendant's liability.

9. Assuming that offensive use would be permitted of a specific judgment were it affirmed on appeal, or if defendant decided not to take an appeal, it does not always follow that such use should be denied if the appeal is dismissed pursuant to settlement. For example, a defendant who had no valid basis for taking an appeal, but who wanted to prevent the subsequent offensive use by another plaintiff of the determination of liability, might file an appeal and then dismiss it pursuant to settlement, the victorious plaintiff being paid a sum only nominally less than the amount of the judgment. Such a collusive settlement should not by itself result in the judgment's being denied offensive use. There is no indication in *Queriolo* that the settlement reached in the prior case was not a bona fide compromise.

10. 247 Cal. App.2d 646, 56 Cal. Rptr. 1 (1967).

a patron at a theatre, engaged in an argument with a theatre attendant named O'Leary, which culminated in the fatal stabbing of O'Connor by O'Leary. The latter was convicted of involuntary manslaughter after trial. O'Connor's heirs brought a wrongful death action against O'Leary and the theatre owner, alleging that O'Connor's death was caused by the negligence of O'Leary acting in the course of his employment. Defendants alleged contributory negligence and assumption of risk. Plaintiffs sought to use the judgment of conviction offensively against the defendants, alleging that the judgment conclusively established that O'Leary's conduct in stabbing O'Connor was negligence and a proximate cause of O'Connor's death.

The court of appeal agreed with the trial judge that such use of the judgment should not be permitted, but not without making a careful analysis of the relevant "policy considerations."[11] The court first noted that the judgment could not be used against the employer, because it was not a party to the criminal proceeding and could not be considered in privity with its employee. Yet, in the eyes of the jury, the employer would be prejudiced in defending the negligence charge if the prior criminal conviction were made known. As for the employee, the defenses of contributory negligence and assumption of risk, which were inapplicable to the criminal proceeding, would still be available, even if he were barred from denying his own negligence. A trial on these defenses would require the presentation of all evidence relevant to the negligence issue, so there would be no gain in judicial economy from applying the collateral estoppel doctrine. Moreover, the employee would be prejudiced in establishing his affirmative defenses by jury knowledge of the prior conviction. The court also saw the possibility of jury confusion as to the issues open for determination, if plaintiffs' position were accepted.

Factors in favor of offensive use can also be identified. It seems reasonable to assume that O'Leary, faced with criminal

11. 247 Cal. App.2d at 650, 56 Cal. Rptr. at 4.

penalties, vigorously defended the manslaughter action. He could readily have foreseen the possibility of a civil action by the victim's heirs. Moreover, the prosecution had proved guilt beyond a reasonable doubt, whereas only a civil burden of proof would have to be met in the wrongful death action. Prejudice from jury knowledge of the criminal conviction could be avoided by the judge simply informing the jury that O'Leary's negligence was conceded, without making mention of the prior proceeding. If the employer had furnished counsel for O'Leary in the criminal case, and had otherwise assisted in his defense, it would not be unfair to estop it, as well as O'Leary, on the basis of the outcome of that case.[12] If the employer would not be estopped on this ground, prejudice to it could be eliminated by severing the case against the employer, assuming that plaintiff was willing to finance two trials. Nevertheless, the court's conclusion is not unsound.[13] Of greater significance, the kind of inquiry into fairness in which it engaged—hinging upon a detailed examination of the particular circumstances presented—is the most desirable way of handling the problem of offensive use by a nonparty of a prior judgment.[14]

Of course, one drawback of this flexible technique is a sacrifice in certainty; an automatic rule that offensive use will or will not be permitted would better enable attorneys to appraise the chances of success of litigation, and to prepare

12. *Cf.* Zingheim v. Marshall, 249 Cal. App.2d 736, 57 Cal. Rptr. 809 (1967) (dealing with a civil case).

13. *O'Connor* might well be decided differently today. Cal. Evidence Code § 1300, which became effective on January 1, 1967, makes admissible evidence of a final judgment adjudging a person guilty of a felony, "when offered in a civil action to prove any fact essential to the judgment." This statute changes the California law. See CAL. LAW REVISION COMM'N, *Evidence Code with Official Comments* 1251 (1965). Thus, were the *O'Connor* case tried after January 1, 1967, plaintiffs could have introduced the criminal judgment against both O'Leary and the theatre owner as evidence (not necessarily conclusive) that O'Leary had negligently caused O'Connor's death. In view of the statute's making the judgment admissible for this limited purpose, arguments made by the court for refusing to give the judgment collateral estoppel effect against O'Leary would no longer have the same validity.

14. For another illuminating example of a commendable inquiry into the fairness of offensive use, see Berner v. British Commonwealth Pacific Airlines, Inc., 346 F.2d 532, 538–41 (2d Cir. [1965]), cert. denied 382 U.S. 983, 15 L.ed.2d 472, 86 S.Ct. 559 (1966).

for trial. Yet the price to be paid for such predictability is too high, in view of the demonstrable advantages of a case-by-case approach. As the problem can be expected to recur with some frequency, hopefully California courts will show the perceptiveness of *O'Connor,* and not the superficiality of *Queriolo,* in adjudging future claims for offensive use.

Appellate Review of Nonjury Cases

The scope of review to be accorded the determinations of a trial judge in a nonjury case is a subject which has engendered no little confusion. The problem is particularly acute when there is no conflict in the evidence as to what events have occurred or what conditions have existed. In such a case, the California decisions are in disagreement on the role of the appellate court. One line of cases advocates free review, reasoning that, since the facts are undisputed, only "questions of law" are presented.[15] Another line of cases supports limited review, on the ground that, when different conclusions can reasonably be drawn from nonconflicting evidence, only "questions of fact" arise.[16]

In *Aerojet General Corporation v. D. Zelinsky & Sons,*[17] the court took a more promising approach to this issue. Two employees of Zelinsky, an independent painting contractor, were killed in an accident occurring at the plant of Aerojet, which had employed the contractor to paint the interior of two liquid fuel storage tanks. Wrongful death actions were brought against Aerojet. It settled the cases after a California Supreme Court ruling[18] that liability could be imposed, on the ground that Aerojet had employed an independent contractor to perform hazardous work, and failed to demand or take appropriate precautions. Aerojet then sought indemnity from Zelinsky. The indemnification proceeding was tried without

15. *E.g.,* RKO Teleradio Pictures, Inc. v. Franchise Tax Bd., 246 Cal. App.2d at 815–816, 55 Cal. Rptr. at 302 (1966), and cases there cited.

16. *E.g.,* Lundgren v. Lundgren, 245 Cal. App.2d at 586, 54 Cal. Rptr. at 33 (1966); Cletro v. Valley Stores, Inc., 117 Cal. App. 2d at 711–12, 256 P.2d at 618 (1953); Industrial Indem. Co. v. Golden State Co., 117 Cal. App.2d at 537–38, 256 P.2d at 689 (1953).

17. 249 Cal. App.2d 604, 57 Cal. Rptr. 701 (1967).

18. Woolen v. Aerojet Gen. Corp., 57 Cal. 2d 407, 20 Cal. Rptr. 12, 369 P.2d 708 (1962).

a jury, the trial judge awarding relief in view of Zelinsky's own negligence in failing to provide its employees with a reasonably safe place to work, and in neglecting to furnish the necessary labor and equipment to perform the work in a reasonably safe manner. Zelinsky appealed.

Writing for the court, Justice Leonard Friedman squarely faced the question of the applicable standard of review:

> Whether the plaintiff's role in the injury precludes indemnity, according to many authorities, is a question of fact for the jury or fact finder. . . . Taken literally, that view would confine the reviewing court to an inquiry into the presence of substantial evidence to justify the award. . . . Once the physical facts are clear or established by findings, the decision for or against indemnity involves characterization of the facts rather than truth finding. Possibly, then, the determination is one of law, or of "mixed" law and fact. . . . Without entering this thorny thicket, this appellate court believes itself obligated to review the trial court's application of legal standards to the facts at hand.[19]

After a detailed consideration of the relative culpability of the parties, the court affirmed the trial judge, characterizing Aerojet's omission as "secondary and passive, while Zelinsky's was immediate and active."[20]

Aerojet may represent a significant first step toward injecting order into a chaotic field of law. Refusing to hide behind the orthodox labels, the court recognized that the question before it could not be meaningfully described as one of "law" or one of "fact";[1] rather, it fell into a third category of application of law to fact. Even if deference should be paid to a trial judge's "truth finding," that is, his reconstruction of historical facts on the basis of the evidence before him, an ap-

19. 249 Cal. App.2d at 610, 57 Cal. Rptr. at 705.

20. 249 Cal. App.2d at 610, 57 Cal. Rptr. at 705.

1. In sharp contrast to *Aerojet* are cases like Pierce v. Turner, 205 Cal. App. 2d at 268, 23 Cal. Rptr. at 118 (1962), where a judge's conclusion that indemnity was not available was described as "one of fact," and affirmed on that basis.

pellate court should not pay similar deference to a trial judge's characterization of such facts in terms of a governing legal standard. In resolving such an issue, the trial court has no advantage over the panel of individuals selected to comprise the appellate court. The theory of appellate review suggests that, under these circumstances, the collective wisdom of the appellate judges is more likely to produce a correct result than dependence upon the conclusion of a single trial judge. In sharp contrast to a jury case, no constitutionally supported policy favoring trial by jury compels respect for the determinations of the trier. If law application is granted free review, the appellate court will also be in a position to reconcile conflicting decisions, thereby achieving the advantages of uniformity.[2]

The court's conclusion in *Aerojet* that free review should prevail is therefore a sound one. Moreover, the perceptive discussion of the kind of question confronting the court constitutes a major breakthrough.

2. For a fuller discussion, see Weiner, *The Civil Nonjury Trial and the Law-Fact Distinction,* 55 CALIF. L. REV. 1020 (1967).