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Civil Procedure

by *Jack H. Friedenthal**

> No one of my honest opinions, in fact, is adapted to my popularity in Glathion, because I am a monstrous clever fellow who does justice to things as they are.
>
> Therefore, I must remember always, in justice to myself, that I very probably hold traffic with madmen. Yet Rome was a fine town, and it was geese who saved it. These people may be right; and certainly I cannot go so far as to say they are wrong: but still, at the same time—! Yes, that is how I feel about it.
>
> James Branch Cabell, *Jurgen*

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New Trial—Specification of Grounds and Reasons

In 1965 the legislature amended Code of Civil Procedure[1] section 657, which concerns the procedure for granting a new trial. In *Mercer v. Perez*[2] and *Treber v. Superior Court*[3] the supreme court interpreted the new provisions and attempted to clarify them.[4] Subsequently, a number of related cases were decided in the courts of appeal. Together these cases involve important changes in the practice regarding new trials.

The major alteration of section 657 was the addition of a requirement that the court specify its *reasons* for granting a

1. All further statutory references, unless otherwise specified, are to Cal. Code of Civ. Pro.

2. 68 Cal.2d 104, 65 Cal. Rptr. 315, 436 P.2d 315 (1968).

3. 68 Cal.2d 128, 65 Cal. Rptr. 330, 436 P.2d 330 (1968).

4. The amended provisions of CCP § 657 read as follows:

"When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated.

"A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, *nor upon the ground of excessive or inadequate damages,* unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision.

"The order passing upon and determining the motion must be made and entered as provided in Section 660 and if the motion is granted must state the ground or grounds relied upon by the court, and may contain the specification of reasons. If an order granting such motion does not contain such specification of reasons, the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk. The court shall not direct the attorney for a party to prepare either or both said order and said specification of reasons.

"On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons * * *, *except that (a)* the order shall not be affirmed upon the ground of insufficiency of the evidence to justify the verdict or other decision, *or upon the ground of excessive or inadequate damages,* unless such ground is stated in the order granting the motion * * * *and (b)* on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive * * * or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any such reasons."

(As amended Cal. Stats. 1965, ch. 1749, § 1; Cal. Stats. 1967, ch. 72, § 1.)

new trial. This raised the primary question: What are sufficient specifications within the meaning of the statute? In pursuing this inquiry, it is necessary to consider what has been held to satisfy an already existing requirement, that of specifying the *grounds* on which a new trial order is based.

The Requirement of Stating the Grounds on which the Grant of a New Trial is Based

In 1919 section 657 was amended to add a provision requiring that whenever a trial court granted a new trial based on the insufficiency of the evidence to sustain the verdict the court had to specify, in its order, that ground as the one upon which the new trial was granted. While the requirement appears to be clear, trial courts often failed to make the necessary specifications. The statute provided further than unless such ground was specified it would be "conclusively presumed" that the granting of the new trial was not based on such ground. The courts were liberal, however, in finding sufficient specification in the language of the new trial order. If the language was susceptible of an interpretation showing an intent to include insufficiency of the evidence as one of the grounds, it was generally so interpreted. Finally, in *Aced v. Hobbs-Sesack Plumbing Co.*[5] the supreme court held that this liberal position was improper; the specification must be made directly or be directly inferable.

The *Aced* decision was not as harsh as it might appear. The court expressly did not disapprove those decisions upholding specifications in the following situations: when the trial court said no more than that it based its decision on "all the grounds stated in the motion," and insufficiency was one of the grounds stated; when no specification was made, but the moving party put only the ground of insufficiency of the evidence in his motion; or when the court could directly infer from the language of the motion that the ground was insufficiency of the evidence (for example, when held to be based on the inadequacy of damages). In 1966, five years after *Aced,* the

5. 55 Cal.2d 573, 12 Cal. Rptr. 257, 360 P.2d 897 (1961).

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court, faced with another apparently inadequate order for new trial, held that the specification of grounds would be inadequate only when no legitimate direct inference is possible.[6]

The 1965 amendment to section 657 continues the requirement that the grounds be specified, but extends it to all grounds upon which the motion is granted.[7] In *Mercer v. Perez*[8] the plaintiff's motion for a new trial was granted after a jury verdict had been rendered for defendants:

> "The motion for a new trial is granted. The court is of the definite opinion, after analyzing the evidence in this case, that there has been a definite miscarriage of justice. The court is of the opinion that the jury trying this case should have rendered a verdict for the plaintiffs and against the defendants."[9]

On appeal from the judgment defendants claimed that the order failed to specify the grounds for the decision. Citing *Malkasian v. Irwin*[10] and *Ice-Kist Packing Co. v. J. F. Sloan Co..*,[11] the court held that, since the motion itself was predicated solely upon insufficiency of the evidence and since the motion could be granted only upon a ground alleged in the motion, an inference satisfying the specification requirement could be drawn that the insufficiency of the evidence was the ground upon which the court had acted.

The Requirement of Specifying the Reasons for Granting a New Trial on the Grounds Stated

Defendants in *Mercer* also claimed that the new requirement of the specification of reasons for the grant of a new trial had not been complied with. This claim raised the questions of how far the court would go in inferring the

6. Frantz v. McLaughlin, 64 Cal.2d 622, 51 Cal. Rptr. 282, 414 P.2d 410 (1966). But cf. Malkasian v. Irwin, 61 Cal.2d 738, 40 Cal. Rptr. 78, 394 P.2d 822 (1964).

7. As amended Cal. Stats. 1965, ch. 1749, § 1; Cal. Stats. 1967, ch. 72, § 1. See footnote 4, page 192.

8. 68 Cal.2d 104, 65 Cal. Rptr. 315, 436 P.2d 315 (1968).

9. 68 Cal.2d at 108, 65 Cal. Rptr. at 317, 436 P.2d at 317.

10. 61 Cal.2d 738, 40 Cal. Rptr. 78, 394 P.2d 822 (1964).

11. 157 Cal. App.2d 695, 321 P.2d 840 (1958).

reasons for the grant of a new trial and would it take the same approach it had taken on specification of grounds.[12]

The court pointed out that there are two reasons for the new provision. The first is to require trial judges, rarely overruled when they grant new trials, to reflect seriously before making their decisions. The second is to assist the appellate court in reviewing the propriety of the grant of a new trial, particularly when based on the insufficiency of evidence. Prior to the amendment, an appellant challenging the grant of a new trial was required to show that the whole record did not justify a new trial. A court of appeal was usually put in the position of searching the entire record for evidence upon which it could justify the decision below. If it found such evidence it would have to uphold the grant of the new trial, though it might be relying on evidentiary matters the trial court had not relied on and, indeed, had not found sufficient to warrant a new trial. The appellate court could not devote its attention, as it should, to those items upon which the trial court had based its decision.

In effectuating the purposes of the new provision, the supreme court in *Mercer* took what may be considered a "hard line," stating that it would not infer from the record the reasons for the decision. Plaintiff, the respondent, argued that since defendants pleaded no affirmative defenses, the only issues decided by the jury were that the defendants were negligent and that their negligence was the proximate cause of plaintiff's injuries. Since those were the only issues, he contended, it must be inferred that the lower court reasoned that the evidence showed defendants to be negligent and that their negligence was the proximate cause of the injuries. In refusing to accept this argument, the court cited the *Aced* case and proposed that, since *Aced* had disapproved of a similar inference with regard to the specification of grounds, it

12. It should be made clear that at this point we are dealing primarily with the ground of insufficiency of the evidence and the reasons therefor. Insufficiency is the only ground which if not stated results in a presumption that it is not the ground relied on. Furthermore, with respect to such ground, it is presumed that the only reasons relied upon are those specified in the order. See last paragraph CCP § 657.

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was "not disposed to adopt a contrary rule with respect to the reasons for those grounds."[13] There is no question that the court was taking a "harder line" with reasons than it had with grounds, considering the limitations and concessions in the *Aced* decision.[14] In light of the purposes of the new provision, the decision to take a "harder line" regarding reasons seems appropriate. It is possible that the trial judge based his decision on a reason totally outside those which plaintiff claimed were the only ones that could be inferred. Thus, the trial court may have been totally incorrect in granting a new trial; the assumption that the judge must have made a decision on appropriate reasons is not warranted.[15]

After deciding that direct specification is required, the court had to determine just how detailed the specification must be. It attempted to lay down standards in the following language:

> No hard and fast rule can be laid down as to the content of such a specification, and it will necessarily vary according to the facts and circumstances of each case. For example, if the *ground* is "irregularity in the proceedings" caused by counsel's referring to insurance, the judge should state that the *reason* for his ruling was the misconduct of counsel in making such reference; if the *ground* is "misconduct of the jury" through their resorting to chance, the judge should specify this improper method of deliberation as the basis of his action; if the *ground* is that the decision is "against the law" because of a failure to find on a material issue, the judge should so state and should identify that issue. And to give full effect to the new scope of review provided in the fourth paragraph of the 1965 amendments, discussed hereinabove, we hold that if the *ground* relied upon is "insufficiency of the evidence" the judge must briefly recite the respects in which he finds the evidence to be legally

13. 68 Cal.2d at 117, 65 Cal. Rptr. at 323, 436 P.2d at 323.

14. Indeed, the decision in Mercer itself, holding the ground but not the reasons to be sufficiently specified, illustrates this point.

15. Of course, neither is the assumption made in the Mercer case as to grounds warranted; it is possible the judge erroneously went off on an error of law not mentioned in the motion.

> inadequate; no other construction is consonant with the conclusive presumption on appeal that the order was made "only for the *reasons* specified" . . . such an order must briefly identify the portion of the record which convinces the judge "that the court or jury clearly should have reached a different verdict or decision."[16] (Emphasis added.)

That this language did not solve all interpretation problems may be inferred from the number of cases arising in the courts of appeal attempting to ascertain the sufficiency of the trial court's specification of reasons. The element of the *Mercer* opinion causing difficulty was the requirement that the court "briefly identify the portion of the record" showing that the evidence is insufficient to justify the verdict. In *Kincaid v. Sears Roebuck & Co.*[17] the court of appeal held that the language of *Mercer* did not require the trial judge to "cite page and line of the record, or discuss the testimony of particular witnesses, but instead he need only point out the particular 'deficiency' of the prevailing parties' case which convinces him the judgment should not stand. This accomplishes the purpose of the statute by enabling a reviewing court to 'determine if there is a substantial basis for finding such a deficiency.' "[18] *Funderburk v. General Telephone Co.*[19] and *Matlock v. Farmers Mercantile Co.*[20] contain similar language. These cases further held that if the trial judge states his reasons for granting a new trial in terms of ultimate facts, he satisfies the requirements of the statute. Thus, if he states that the evidence is insufficient to justify a finding of negligence, insufficient to justify a finding of damages, or insufficient to permit a finding of contributory negligence, he satisfies the requirements of the statute.[1]

16. 68 Cal.2d at 115–116, 65 Cal. Rptr. at 322, 436 P.2d at 322.

17. 259 Cal. App.2d 733, 66 Cal. Rptr. 915 (1968).

18. 259 Cal. App.2d 733 at 738, 66 Cal. Rptr. 915 at 918 (1968).

19. 262 Cal. App.2d 869, 69 Cal. Rptr. 275 (1968).

20. 258 Cal. App.2d 362, 65 Cal. Rptr. 723 (1968).

1. Actually the opinion in Kincaid went even further, stating that if would

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This standard for specificity seems clearly correct. It serves the purposes for which the requirement of specification of reasons was put into the code. If a new trial is granted on the basis of lack of evidence to support a material point, it is impossible to designate where the record shows lack of evidence. Even if the new trial is based on the weight of the evidence showing the existence of a material point obviously not accepted by the jury, it is extremely difficult to point to each item in the record bearing on the issue and to discuss its particular impact on the trial court's decision. As the court in *Kincaid* stated, "It would be unreasonable to infer a statutory intent that the court's stated reasons embrace a discussion of the weight to be given, and the inferences to be drawn from each item of evidence supporting, or impeaching, the judgment."[2] When a new trial is granted on the basis of insufficiency of the evidence to support the verdict, the court of appeal has to peruse the entire record for evidence (or the lack thereof) regarding the particular fact in question.

In *McLaughlin v. City and County of San Francisco,*[3] plaintiff, a passenger on a cable car, was injured when the car stopped suddenly. Defendant admitted liability and the case was tried solely on the issue of damages. After a jury verdict for $8,117.50, the trial court granted a new trial conditioned upon plaintiff's refusal to accept a remittitur. The order read as follows:

> This order granting a New Trial is based upon the failure of the Plaintiff to prove by a preponderance of the evidence reasonable total damages, both general and special above the said amount of Five Thousand One Hundred and Seventeen Dollars and Fifty Cents ($5,-117.50). It is further ordered that if such waiver is filed then said Motion of a New Trial shall stand Denied;

be sufficient for the trial court simply to specify that "the defendant was not negligent" or "the defendant's negligence was not the proximate cause of plaintiff's injuries."

2. 259 Cal. App.2d at 739, 66 Cal. Rptr. at 919.

3. 264 Cal. App.2d —, 70 Cal. Rptr. 782 (1968).

> otherwise said Motion shall stand granted *upon the ground hereinabove stated.*[4] (Emphasis added.)

Although the appellate court in *McLaughlin* cited with approval *Matlock, Kincaid* and *Funderburk,* it nevertheless held that the specification of reasons was inadequate. The court took the position that the trial court should have done more to show which items of special and general damages were involved in its determination. The court believed it was somehow improper that, damages being the only issue involved, both the grounds and the reasons given for the decision were the same. It failed to recognize that under the *Aced* and *Mercer* cases it is clear that the grounds may be inferred from the reasons when there is only one issue at stake. Clearly, the reasons in this case were appropriately stated, and the grounds, it would seem, could justifiably be inferred. While the trial judge could be required to state just what items of special damages he thought improper and the extent of general damages which he thought possible, such a requirement seems unnecessarily restrictive and burdensome. It is obvious that the supreme court will have to augment its opinion in *Mercer* so that trial judges will know precisely what their duties are.[5]

The Effect of Failure to Specify Reasons

The most controversial part of the *Mercer* opinion is the decision as to what happens when the specification is inadequate. The problem is complex and can be understood only after a thorough reading of the last paragraph of section 657.[6] This paragraph makes it clear that the grant of a new trial will not be sustained on appeal on the ground of insufficiency of the evidence unless such ground is stated and that it will be conclusively presumed that the only reasons for granting the new trial on that ground are those reasons stated in the order. It follows then: If no reasons are stated in the order,

4. 264 Cal. App.2d at —, 70 Cal. Rptr. at 783.

5. It is interesting to note that the supreme court denied hearings in both Kincaid and Matlock.

6. The statute is set out on page 192, at footnote 4.

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the new trial cannot be sustained on the insufficiency of the evidence. The question becomes, when no reasons are found, should the appellate court reinstate the original verdict or send the case back to the trial judge and permit him to insert his reasons for granting the new trial?

In the next to last paragraph of section 657 it is stated, "[I]f an order granting such motion does not contain such specification of reasons, the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk. The court shall not direct the attorney for a party to prepare either or both said order and said specification of reasons." The supreme court in *Mercer* interpreted these words to provide an absolute 10-day limit on the power of the trial judge to specify his reasons, thus, as a practical matter, making it impossible for him to do so after an appeal. After 10 days have run, said the supreme court, the trial court has no jurisdiction to specify reasons.

The history of section 657 gives strong support to the supreme court's conclusion. Prior to the 1965 amendments the statute provided that any required specification of grounds had to be made within 10 days after granting the order; failure to do so resulted in a conclusive presumption that the order was not based on such ground. Under this provision it was held that the trial court had no jurisdiction to make such a specification once 10 days had elapsed.[7] By imposing a 10-day limitation regarding the specification of reasons with language similar to the prior requirement for specifying grounds, the 1965 amendment clearly indicates that the legislature intended the new provision to be interpreted in the same way as the old one. Furthermore, as the court in *Mercer* pointed out, the policy of the 1965 amendments would be thwarted if the appellate court could order the case to be returned for the trial judge to add a few words to his original order. The trial court would not be disposed to take

7. Frantz v. McLaughlin, 64 Cal.2d 622, 51 Cal. Rptr. 282, 414 P.2d 410 (1966).

the same requisite care to make certain that it has specified its reasons as it would when failure to do so renders its grant of a new trial void. Moreover, a successful moving party, not wanting to lose a new trial, is given incentive to urge the judge to comply with the statute. Finally, the *Mercer* decision avoids the double appeal that would occur if, in every situation where specifications are improper, the case is remanded to the trial court for a statement of reasons, then returned to the appellate court for a decision on the merits of the new trial grant.

The problem with the *Mercer* ruling is that a litigant who has obtained a new trial is at the mercy of a trial judge who fails in his duty to make the proper specifications. The reversal of a new trial order is a serious price to pay for procedural regulation when the reversal causes the initial judgment to stand, no matter how inadequate or unfair, and when the successful moving party is helpless to make the trial judge do his proper job.

The problem is particularly acute in those cases decided by the trial judge before the *Mercer* opinion was written. In light of the liberal attitude the court had previously taken with respect to the specification of grounds, many trial judges and litigants may be caught unaware. The courts might ameliorate this situation by following the analogy of the *Aced* decision, which held that stringent rules regarding grounds should be applied prospectively. In *Aced* the court said, "While it is true that ordinarily an overruling decision is deemed to state what the law was from the beginning and is therefore generally given retroactive effect, an exception has been applied in several instances with respect to procedural matters."[8] Even though the specification of grounds in that case was clearly inadequate, the court upheld it to avoid unfairness to the party for whom the new trial had been granted. The courts in the current cases involving the 1965 amendments to section 657 could be similarly lenient in determining what is a sufficient specification of reasons, and thus avoid the

8. 55 Cal.2d at 580, 12 Cal. Rptr. at 260, 360 P.2d at 900.

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drastic effect of the ten-day rule, at least in those cases decided by the trial court prior to the *Mercer* decision.

Until now, most cases have given a sufficiently broad interpretation of the requirement of specification of reasons to hold the trial court's specification adequate. In those cases in which the trial court's specification has been held insufficient, the courts have found special means for permitting the new trial. In *Mercer*, for example, the court did not have to face the ultimate consequences of a reversal of the new trial order. Plaintiff had cross-appealed on the ground that the trial judge had erred in giving instructions. After reversing the order granting plaintiff a new trial, the supreme court went on to reverse the "reinstated" judgment on the cross-appeal.[9]

A means of avoiding the effect of the *Mercer* decision, resulting from insufficient specification, is discussed in *Treber v. Superior Court*,[10] a companion case to *Mercer*. The trial court's order stated, "Motion for new trial granted—errors in law."[11] Petitioner, who had received a jury verdict at trial, sought a writ of mandate to compel the trial court to vacate the new trial order because no reasons had been specified. The supreme court denied the writ, pointing out that the first clause of the last paragraph of section 657 reads as follows: "On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons . . . ."[12] The *Mercer* case dealt with the special exception to this rule which applies only when insufficiency of the evidence is to be considered as a ground on appeal and no reasons are given for granting the motion on

9. Ironically, the court gave "considerable weight" to the fact that the trial judge, in ruling on the motion for new trial, had stated that there had been a definite miscarriage of justice.

10. 68 Cal.2d 128, 65 Cal. Rptr. 330, 436 P.2d 330 (1968).

11. 68 Cal.2d at 130, 65 Cal. Rptr. at 332, 436 P.2d at 332.

12. The "or specification of reasons" refers to the situation where at the time of the order no reasons are specified and within 10 days such specification of reasons of filed in a document that makes no mention of grounds.

that ground.[13] Therefore, even though the appellate court must reverse a new trial granted on the basis of insufficiency of the evidence when that ground is not specified in the order (or directly inferable) or when the reasons for the grant on that ground are not specified, it not only can, but must, search the record to see whether or not the grant of a new trial should be upheld on any other ground set forth in the motion for a new trial. This is true even if the trial court did not mention the ground or contemplate it as a basis for a new trial.

Thus it was held in *Treber,* when the trial court specified no reasons at all, the writ of mandate was inappropriate since the order might be valid. As the court in *Treber* stated, "It follows that a failure of the trial judge to specify any ground—and a fortiori any reason for a ground actually stated—cannot be held to render the order void from its inception. The reviewing court remains under an express statutory duty to affirm such an order if the record will support any ground listed in the motion."[14]

In *Byers v. Board of Supervisors*[15] the trial judge granted a motion for a new trial on two grounds: (a) that the evidence was insufficient to justify the decision and (b) that the decision was against the law. Finding that the reasons for the decision were filed sixteen days after the order was granted, the court of appeal, following *Treber,* held that it could not uphold the order on the ground of insufficiency, but could and did uphold it on the ground that the decision was against the law.

There are three cases in which the courts of appeal reversed the grant of a new trial where the reasons were never specified or were specified after the ten-day limit, and the only ground that could justify a new trial was insufficiency of evidence.[16]

13. The statute is set out on page 192, at footnote 4.

14. 68 Cal.2d at 134, 65 Cal. Rptr. at 334, 436 P.2d at 334.

15. 262 Cal. App.2d 148, 68 Cal. Rptr. 549 (1968). For further discussion of this case, see McKinstry, State and Local Government, in this volume.

16. Brooks v. Harootunian, 261 Cal. App.2d 680, 68 Cal. Rptr. 374 (1968); Higson v. Montgomery Ward & Co., 263 Cal. App.2d 333, 69 Cal. Rptr. 497 (1968); McLaughlin v. City & County of San Francisco, 264 Cal. App.2d —, 70 Cal. Rptr. 782 (1968).

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In each case the court carefully reviewed the record to determine whether or not there was justification for upholding the order on grounds other than insufficiency of the evidence. Although never clearly stated, each opinion gives the impression that the appellate courts thought the original verdicts were justified.

Specification of Reasons and the "Two-Issue Rule"

Multiple issues present another problem in interpreting the specification provision of section 657 when a new trial is based on the insufficiency of the evidence. For example, in a simple automobile accident case where negligence of the defendant and contributory negligence are both in issue, a new trial granted for plaintiff after a defense verdict must presumably be based on the notion that the preponderance of the evidence showed not only that defendant was negligent but also that plaintiff was not. It would seem to follow that the court should specify its reasons on both of these issues.[17]

In two cases, *Funderburk v. General Telephone Co.*[18] and *Kramer v. Boynton,*[19] the trial court mentioned that the evidence was insufficient regarding only one of the basic issues, presumably leaving it open to interpretation whether or not the other issue justified upholding the verdict. On appeal from an order granting a new trial, the appellant in each case argued that since, under section 657, it is presumed conclusively that the order is granted only for the reasons specified, the failure to specify on all such issues was fatal. In both cases it was held that such a technical reading of the statute was improper, that it must be assumed the trial court knew the law and knew it has stated reasons with respect to only one issue. It was further assumed that the judge did not grant a new trial frivolously and thus impliedly determined that the evidence on other grounds was not sufficient to justify the

17. See e.g. Matlock v. Farmers Mercantile Co., 258 Cal. App.2d 362, 65 Cal. Rptr. 723 (1968).

18. 262 Cal. App.2d 869, 69 Cal. Rptr. 275 (1968).

19. 258 Cal. App.2d 171, 65 Cal. Rptr. 669 (1968).

verdict. The decisions tend to make sense because they prevent a trap for an unwary court which might fail to specify every conceivable defense as having been insufficiently established, but they are difficult to justify in light of the technical interpretation of the statute given by *Mercer*. If the purpose is to make the trial court think through its decision carefully, it seems necessary to require the trial court to expressly deal with every issue that could determine the case.

Conclusion

As a result of the *Mercer* and *Treber* holdings, it is incumbent upon any party who is moving for a new trial to specify in his motion every conceivable ground upon which the new trial may be granted. By doing so, he maximizes his chances for upholding the order if the trial court's specifications of reasons or grounds is deemed insufficient to uphold it on the ground of insufficiency of evidence. Furthermore, the successful moving party should urge the trial judge to comply with the mandate of section 657 in giving his grounds and reasons. He might also gratuitously submit a proposed set of specifications, even though he cannot be forced to do so, since pursuant to the statutory purpose, the court must prepare its own. The danger of this gratuitous assistance is that the trial judge may come to expect it and will fail to comply with the statute in its absence.

When an appeal of a new trial order has been taken, it behooves the appellee to cross-appeal whenever he can legitimately do so. If he does, he provides the appellate court an opportunity to overturn an unjust decision, even though for technical faults it is unable to uphold an otherwise appropriate grant of a new trial motion.[20]

20. When a party's motion for a new trial has been granted on the insufficiency of the evidence and the appeal is based on the inadequacy of the specifications, it is not only important for the appellee to point out to the appellate court that the motion for new trial included grounds other than insufficiency of the evidence, he must also be sure to augment the record on appeal to permit the court of appeal to see whether or not the motion can be upheld on one of the other grounds. Thus in Tagney v. Hoy, 260 Cal. App.2d 372, 67 Cal. Rptr. 261 (1968), where appellee neither cross-appealed nor

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The supreme court needs to clarify the uncertainties of the interpretation raised by the new provisions of section 657. Indeed one might hope that the legislature will reconsider the entire section in an effort to clarify it. Why a failure of specification of reasons should be fatal when the ground is insufficiency of the evidence and not when the error is of another type is unclear. The basic policies of the new act, to force the trial judge to reflect with care on his decision and to assist the appellate court in determining what matters are significant on appeal, can best be served by making the penalties for failure to comply with the statute's requirements identical, regardless of the particular ground and reasons upon which the order for new trial is based.

Class Actions

In *Daar v. Yellow Cab Co.*[1] the Supreme Court of California once again attempted to define the limits of a permissible class action. The plaintiff, suing on behalf of himself and all others similarly situated, alleged that the defendant, Yellow Cab Company, violated a contract with the City of Los Angeles to charge rates according to amounts fixed by the Public Utilities Commission of that city. The specific claim was that the taxicab meters had been set to register rates in excess of those set by the commission, so all persons who had used the taxicabs were overcharged.[2] Plaintiff sought to recover the total amount of the overcharge for the four years prior to the suit (the four years being the applicable statute of limitations period for written contracts). Plaintiff further alleged that the exact amount of the overcharge was known to the defendant and could be ascertained at trial. The trial court held that a class action was improper; the supreme court reversed.

augmented the record, the court was forced to reverse the order granting the new trial.

1. 67 Cal.2d 695, 63 Cal. Rptr. 724, 433 P.2d 732 (1967).

2. The complaint is in two courts: the first seeking recovery on behalf of taxicab users paying for the services with script book coupons; the second seeking recovery on behalf of taxicab users paying cash for the services.

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The authority for class actions is found in section 382 of the Code of Civil Procedure, a section so broad in its terms that it would permit a class action to be maintained in practically every instance a party so denominates his case.[3] The California courts, while paying lip service to the statutory requirements, have virtually rewritten them according to their notions of what a class action should in fact accomplish. As the court in *Daar* pointed out, it has been uniformly said that two requirements must be met to sustain any class action: (1) There must be an ascertainable class and (2) there must be among the parties to be represented a well defined community of interest in the questions of law and fact involved. A thorough study of case law reveals that these two requirements are but one. The court in *Darr* recognized this:

> [W]hether there is an ascertainable class depends in turn upon the community of interest among the class members in the questions of law and fact involved. If we conclude that the instant complaint properly sets forth a class action, the judgment herein would be res judicata as to all persons to whom the common questions of law and fact pertain. We therefore proceed to examine the complaint in order to determine whether it sets forth a sufficient community of interests.

The court completely dispelled any notion that the plaintiff or the court at the outset must be able to determine precisely who are the members of the class. The court said, "If the existence of an ascertainable class has been shown, there is no need to identify its individual members in order to bind all members by the judgment. The fact that the class members

3. **§ 382. Parties in interest, when to be joined: When one or more may sue or defend for the whole.** Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

are unidentifiable at this point will not preclude a complete determination of the issues affecting the class."[4]

In several prior cases the courts seemed to indicate that the failure of a class action was due to the inability to identify in advance the members of the class with some precision. In the often quoted case of *Weaver v. Pasadena Tournament of Roses Ass'n.*,[5] in which a suit was brought on behalf of persons who allegedly had been unlawfully deprived of tickets to an athletic contest, the court said, "In the present case, there is no ascertainable class, such as the stockholders, bondholders, or creditors of an organization. Rather, there is only a large number of individuals, each of whom may or may not have, or care to assert, a claim against the operators of the 1947 Rose Bowl Game for the alleged wrongful refusal of admission thereto."[6] The court went on to state that it could find no case in which it "has been held that a representative or class suit was a proper or appropriate vehicle for the determination of alleged tort liability of defendants to numerous unnamed and unascertained persons."[7]

In the *Weaver* case the class was defined as all those persons who, in answering an advertisement offering tickets to the Rose Bowl Game, had appeared at the ticket office at the appointed time, had received a stub supposedly assuring them of the right to purchase two tickets to the Rose Bowl Game, and had been refused tickets and admission. There was, of course, no record from which the court could ascertain the exact persons to whom the stubs were given and to whom admission was refused. In the *Daar* case some persons in the class could be ascertained because they paid for their taxicab charges with script, circulated and paid for in advance by certain taxicab users. Most class members, however, were casual users of taxicabs who paid cash. An attempt to identify these persons would be as futile as an attempt to identify the people standing in line in the *Weaver* case. The *Weaver* case,

4. 67 Cal.2d at 706, 63 Cal. Rptr. at 732, 433 P.2d at 740.

5. 32 Cal.2d 833, 198 P.2d 514 (1948).

6. 32 Cal.2d at 839, 198 P.2d at 518.

7. 32 Cal.2d at 840, 198 P.2d at 518.

however, did not turn on the inability to identify class members, but on the inability of the court to provide direct relief that would encompass all the individuals within the defined class. In short, there was no so-called "community of interest," which is really at the heart of the class action problem.

Much has been said about what it a proper community of interest upon which a class action may be maintained. An analysis of the California decisions reveals clearly that a proper community of interest depends upon whether or not the court can determine if a judgment against the defendant, should he lose, would finally settle the defendant's liability, and the amount thereof, to the class as a whole. If so, then the fact that individual members of the class must come into the case to prove their share of the recovery will not bar the class action; but when no specific judgment can be rendered for the class as a whole against the defendant, the class action is not permitted. In the *Weaver* case, for example, where it was alleged that each plaintiff was entitled to actual damages plus the $100 penalty damages under section 53 of the Civil Code, the court refused to permit a class action on the ground that, under the statute, to be entitled to the $100 amount each person would have had to prove that he was neither drunk, disorderly nor guilty of lewd or immoral conduct; that he was present at the box office; that he received a stub; and that he was refused a ticket and admission to the Rose Bowl Game. Furthermore, he would have had to prove any individual damages sought over and above the statutory penalty. The total amount of liability the defendant would suffer in the event of judgment for the plaintiff was unascertainable, not only because it was unknown how many persons would come forward, but also because their individual rights against the defendant varied. Class actions have also been held inappropriate in similar circumstances where varying individual damages or defendant's personal defenses to individual claims render the total amount of the liability unascertainable.[8]

8. See, for example, Barber v. California Employment Stabilization Commission, 130 Cal. App.2d 7, 278 P.2d 762 (1964); Most Worshipful Sons of Light Grand Lodge v. Sons of Light Lodge No. 9, 118 Cal. App.2d 78, 257 P.2d 464 (1953).

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When the nature of the relief sought is equitable and involves a simple judgment against the defendant which has nothing to do with the individual rights of the members of the plaintiff class, the courts have had no difficulty in finding a class action appropriate. In *Heffernan v. Bennett & Armour*,[9] a number of defendant's creditors brought a class suit to set aside a conveyance allegedly made as a fraud upon the creditors. The court upheld the suit, noting that it was unimportant that some known creditors might not be able to prove their claims because of the statute of limitations or that other creditors might be unknown. The importance was that a judgment for all the creditors could be rendered against the defendant regarding the particular matter at interest, the setting aside of a fraudulent conveyance. A similar case, *City and County of San Francisco v. Market St. Ry.*,[10] held that a group of individuals each of whom had filed a personal injury claim against a defendant corporation, could sue as a class to enjoin that corporation from paying a liquidation dividend to its stockholders which would have rendered any of the plaintiffs' tort claims unenforceable.

Although more recent cases pose difficult factual questions, the results support the hypothesis that class actions are permitted if, but only if, the court may grant complete relief against the defendant in the actual suit before it. In *Chance v. Superior Court,*[11] suit was brought on behalf of the owners of 2,139 trust deeds, all representing security interests in separate but contiguous lots situated within a single tract of land. Suit to foreclose was brought on behalf of all the trust deed owners against the property owner who was alleged to have been in default on his obligations. The plaintiffs wanted a declaration that defendant was in default to all of them; that each deed was not a purchase money trust deed, which could be satisfied only upon sale of the particular lot which it represented; and that the entire land secured by the trust deed

9. 110 Cal. App.2d 564, 243 P.2d 846 (1952).

10. 95 Cal. App.2d 648, 213 P.2d 780. See also Jellen v. O'Brien, 89 Cal. App. 505, 264 P. 1115 (1928).

11. 58 Cal.2d 275, 23 Cal. Rptr. 761, 373 P.2d 849 (1962).

notes be sold by a commissioner as a unit under defendant's stipulation "that the land in the within tracts is more valuable as one integral unit than if the parcels are sold individually."[12]

The property owner argued that there was no community of interest among the parties because each had separately purchased his own trust deeds and would have to show that defendant was in default to him and because defendant had separate defenses against individual plaintiffs which would have to be litigated separately. In answering these arguments plaintiffs relied on another stipulation by defendant that the actions have "common questions of law and fact with all of the deeds of trust being in default and the issues to be decided by the Court and the defenses of the defendants being the same for all investors in each tract."[13] Thus it was possible in *Chance*, on a given set of facts as proved by the parties, for the court to give one relief against the defendant that would encompass the entire class.

In *Fanucchi v. Coberly-West Co.*,[14] plaintiffs brought suit on behalf of themselves and others similarly situated against a cotton ginning company. Over a period of years the plaintiffs, who were cotton growers, delivered their cotton to defendants who separated the lint from the seed, paid each grower for the actual amount of lint obtained, and without weighing the seed, paid each grower for his seed a certain amount based upon an arbitrary formula. The plaintiffs alleged that the arbitrary formula permitted the defendants to retain part of the proceeds from the seed delivered to them and that this "overage" belonged to the growers. Defendants claimed that no class action could be maintained because the rights of each owner depended upon his individual contracts with the defendant corporation. The trial court held that a class action was inappropriate; the appellate court reversed.

The appellate court reasoned that any one grower would have to establish the same facts as any other grower would

12. 58 Cal.2d at 283, 23 Cal. Rptr. at 765, 373 P.2d at 853.

13. 58 Cal.2d at 286, 23 Cal. Rptr. at 767, 373 P.2d at 855.

14. 151 Cal. App.2d 72, 311 P.2d 33 (1957).

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have to establish—that the seeds were never weighed and that each grower's seeds were mingled with all other seeds. Although each grower could collect only a pro rata share of the "overage," the company's records, with the aid of mere mathematical computations, enabled the pro rata shares to be ascertained.

The most difficult aspect of the *Fanucchi* decision involved the problem of individual defenses. It was alleged, for example, that certain growers would not be entitled to collect, since they had known and had consented to the method by which they had been paid for their seed. The court simply decided that such defenses could be handled individually when each grower attempted to collect for his alleged losses. At first glance this decision seems to put *Fanucchi* in a category with *Weaver*, in which a final, complete determination could not be made against the defendant. However, from the allegations of the complaint it was clear that in Fanucchi the total amount of the defendant's potential liability to all of the owners could be established. The only necessary determination was that defendant owed the plaintiff class a certain amount of money; a later determination would divide the money among the members of the plaintiffs' class. Each member would have to come in and prove his interest in the same way that creditors must come in and prove their rights to funds set aside for creditors. The actual prayer for relief in *Fanucchi* was that the defendants be declared constructive trustees of *all* the "overage" and that a receiver be appointed to take charge of the cottonseed or its reasonable value and then to distribute the same among the growers according to their interests. This remedy enabled the court to make a final determination in favor of the class as a whole, against the defendants.

The *Daar* case bears marked similarities to *Fanucchi*. In one sense, *Daar* is less difficult since there would be no individual defenses with regard to the amount of overcharge made by the taxi drivers (assuming, as was alleged, that such overcharges could be ascertained by the company). But *Daar* is more difficult than most other cases in which a class action is upheld, since in *Daar* there was no way to identify

the individual members of the class. Unlike the growers in *Fanucchi* who appeared on the records of the books, not all the taxi users in *Daar* appeared on the records.

As already noted, however, *Daar* took the position that individual members of the class do not have to be ascertained. Although the situation in *Daar* renders administration of the second phase of litigation—the proving of claims by individuals—extremely difficult, this obstacle should in no way detract from the validity of the class action. It is not as hard for an individual to prove his claims in a proceeding to determine what portion of a fund he is entitled to collect as it is for him to bring an individual suit against the Yellow Cab Company for a few dollars. Many plaintiffs would simply forego suit; among those who did sue there would be much duplication of effort (cost of filing, and the like) and, because of the inability of each individual plaintiff to gather the proper evidence to prove his case, inconsistent decisions. In the final analysis, the *Daar* case is justified simply on the basis that an overall decision of liability could be made in the class suit against the defendant for a specific sum of money. The uncertainties of ultimate liability that existed in the *Weaver* case were not present.

There are two important factors in *Daar* still to be discussed. The court did not clearly articulate the nature of a valid class action in terms of the nature of the relief sought and available. There is too much uncertainty in the law today leading to too many costly and unnecessary appeals. Perhaps most desirable would be legislation to replace the inadequate and misleading class action provision of section 382 and to adopt a provision similar to the new Federal Rule 23, which was promulgated after a long study of the class action problem. The court in *Daar* cited the new Federal Rule 23 and noted that it is in substantial agreement with the court's views on class actions. The purpose of the rule was to list those factors which the federal courts may weigh in determining whether or not a class action is appropriate. Thus a class action is permitted when:

> The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) The interest of members of the class in individually controlling the prosecution or defense of separate action; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The court in *Daar* seemed to be applying this weighing standard when it noted that the action would not be brought if it had to be brought by each individual separately for the pittance he would be entitled to collect, and when it also noted that common questions predominated over any individual questions which might arise.

Unfortunately, the reference in *Daar* to Federal Rule 23 is somewhat confusing. It is not clear if the court wished to go so far as to permit class actions in cases where the criteria of Rule 23 would be met even when no class judgment could be had against the defendant for a given amount, or a given relief, as was possible in such cases as *Chance, Fanucchi,* and *Daar* itself.

In a subsequent case, *Slakey Brothers Sacramento, Inc. v. Parker*[15] the court of appeal refused to permit a class action by persons who were suing in fraud for individual damages even though the fraud was similar if not identical with respect to each of them. The court said, "[W]hether the Federal Rule would demand judicial acceptance of the present class action is problematical. California criteria demonstrate propriety of the trial court's rejection."[16] The allegation in

15. 265 Cal. App.2d —, 71 Cal. Rptr. 269 (1968).

16. 265 Cal. App.2d at —, 71 Cal. Rptr. at 273.

Slakey was that defendants by misrepresenting their financial standing defrauded plaintiffs into forebearing to sue for collection of certain outstanding claims. The court relied primarily on the notion that each individual plaintiff would have to prove what misrepresentations were made to him, what he relied upon, and what his damages were. The court admitted that there were common issues of law and fact, including alleged identical misrepresentations which were addressed to each member of the group sought to be represented collectively. One can see then that the criteria of Federal Rule 23 might have been satisfied despite the necessity of individual recovery by each member of the class.

Certainly the California Supreme Court, if not the legislature, will have to clear up the ambiguities—not only those caused by *Daar's* reference to the Federal Rule, but also those which have existed for a long time because of the profusion of uncertain decisions.

The *Daar* case raises one other interesting point. It falls within the scope of the prior cases only because plaintiffs alleged that defendant knew or could determine the amount of overcharge that was made over the past four years. The court took the position that it had to accept this allegation as true. Defendant, on the other hand, asked the court to take judicial notice of the cab company's charging policies, which included an initial premium rate, a mileage rate, a waiting time rate, and other factors—all making the exact amount of overcharge impossible to ascertain. The court rejected judicial notice as inappropriate. Nevertheless, this problem raises this question: May the objecting parties now proceed to raise the impropriety of a class suit in their pleadings and request a hearing under section 597 of the Code of Civil Procedure[17, 18] so that the disputed issues of fact on this

17, 18. CCP § 597 provides: "When the answer . . . sets up any other defense not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution thereof, the court may, upon motion of either party, proceed to the trial of such special defense or defenses before the trial of any other issue in the case, and if the decision of the court, or the verdict of the jury upon any special defense so tried . . . is in favor of the defendant pleading the same, judgment for such defendant

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matter will be determined before any trial on the merits? If so, the class action, it would seem, is still subject to attack. All that has been accomplished is to get it past the demurrer stage.

Dismissal for Failure to Prosecute

In *Sylvestre v. King Manufacturing Co.*[19] a cleaning product of the defendant exploded, injuring the plaintiff who was working with it. In anticipation of bringing suit, plaintiff in August, 1961, had written to the defendant company at its Michigan office, but had received no reply. Upon inquiry, the California Secretary of State informed plaintiff that a California corporation by the name of King Manufacturing Company had been suspended for failure to pay taxes. Plaintiff erroneously assumed that this was the same corporation that had allegedly caused his injuries. Therefore, plaintiff brought suit in a California superior court. Although the action was filed on November 24, 1961, not until May, 1964, did plaintiff discover that the proper defendant, King Company, located in Michigan, was in fact not a corporation but a single proprietorship, had no agents for service of process in California and had no direct contacts with the state that would bring it within the jurisdiction of the California Courts. By the time plaintiff moved for service by publication on the owner of the company, more than three years had elapsed from the date the complaint was filed. Upon the defendant's motion the court dismissed the action under section 581a of the Code of Civil Procedure. The court of appeal reversed.

Section 581a requires that an action be dismissed by the court unless summons is served upon the defendant within three years after the commencement of the action. The section, however, exempts from its operation failure to serve any defendant due to "his absence from the state, or while

shall thereupon be entered and no trial of other issues in the action shall be had unless such judgment shall be reversed on appeal or otherwise set aside or vacated . . ."

19. 256 Cal. App.2d 236, 64 Cal. Rptr. 4 (1967).

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he has secreted himself within the state to prevent the service of summons on him."[20] The issue in *Sylvestre* was whether this exception refers to a non-resident who has never been in the state of California or covers only residents of the state who have left for a period of time. The Code Commissioner's note to section 581a indicates that the purpose of the exception is to cover circumstances where a defendant leaves the state to avoid being served. This purpose, of course, excludes a defendant who has never been in the state.

The court held, however, that the exceptions in the act apply to individuals who have never been residents of the state. It relied heavily on the effect of section 417, which permits a personal judgment to be rendered against persons outside the state on service by publication if the person was either a resident of the state at the time of the commencement of the

20. **CCP § 581a. When action to be dismissed: lack of prosecution: exception.**

No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have issued within one year, and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action, except where the parties have filed a stipulation in writing that the time may be extended. But all such actions may be prosecuted, if general appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served; provided, that, except in actions to partition or to recover possession of, or to enforce a lien upon, or to determine conflicting claims to, real or personal property, no dismissal shall be had under this section as to any defendant because of the failure to serve summons on him during his absence from the State, or while he has secreted himself within the State to prevent the service of summons on him.

All actions, heretofore or hereafter commenced, must be dismissed by the court in which the same may be pending, on its own motion, or on the motion of any party interested therein, if summons has been served, and no answer has been filed, if plaintiff fails, or has failed, to have judgment entered within three years after service of summons, except where the parties have filed a stipulation in writing that the time may be extended.

A motion to dismiss pursuant to the provisions of this section shall not, nor shall any extension of time to plead after such motion, constitute a general appearance. (Added Cal. Stats. 1907, ch. 376, p. 712, § 2. As amended Cal. Stats. 1933, ch. 744, p. 1869, § 89; Cal. Stats. 1949, ch. 463, p. 810, § 1; Cal. Stats. 1955, ch. 1452, p. 2640, § 5.)

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action, at the time the cause of the action arose, or at the time of service. The court said that if section 581a applies only to one-time residents, the exceptions in section 581a would not be necessary; for section 417 permits service whenever the individual has been a resident and has left the jurisdiction. Section 581a and its exceptions can apply only to non-residents who cannot be served under section 417. The court's analysis is weak since one may pose a case where the statutes would not overlap. If the defendant in this case was not a resident at the time the cause of action arose, subsequently became a resident of the state, and then left the state immediately after discovering an action would soon be brought against him, he would not be subject to section 417. He was a resident neither at the time of commencement nor at the time the cause of action arose. Presumably then, section 581a could apply. However, one need not resort to this kind of reasoning to attack the court's reliance on section 417.

Looking at the problem realistically, the legislature probably did not consider whether or not section 581a should apply to those who have never been residents. This is, particularly evident since section 417 was first enacted in 1951, long after section 581a. The purpose of 417 is to give California personal jurisdiction over defendants outside its borders; the purpose of 581a is to require plaintiffs to press their actions so that they do not remain dormant, clogging calendars and causing unnecessary confusion. Section 581a assumes that if plaintiff will only take the appropriate steps, proper jurisdiction over defendant can be obtained.

The court in *Sylvestre* supported its position further by stating that it is unfair to force a plaintiff to seek service by publication in order to satisfy the time limitations of section 581a when he cannot obtain jurisdiction over the defendant or any of his property. The court's assumption that had such worthless publication been made, the requirements of section 581a would have been satisfied, is surprising. Since the policy of 581a is to keep courts free from stale actions, it is more reasonable to hold that the statute requires not only timely service, but also effective service by which jurisdiction

is obtained. The reason for allowing a case to remain pending is not greater when jurisdiction is unobtainable for three years than when it is obtainable but plaintiff fails to take action.

As the court itself noted, if section 581a need not be met, a plaintiff, when suing an out-of-state defendant, need only file his action before the statute of limitations has run and then wait until such time as defendant might venture into the state so that valid jurisdiction could be obtained; no limitation whatsoever is applicable. The court aptly pointed out that if such jurisdiction is ever obtained, perhaps many years later, a defense might be difficult, if not impossible, to prove. But the court failed to pursue this point, thus avoiding discussion of the full impact of its decision on subsequent cases. Instead, it noted that the defendants in this particular case had actually been notified and could have come in to make a defense. As far as the court was concerned, the notification took the sting out of the notion that the service of process might ultimately be made so late as to injure the defendant's presentation of her case. The court cited *Carmichael v. Superior Court*[1] as direct authority for its holding. In that case the defendant sought dismissal on the grounds not only that section 581a[2] applied, but also that the plaintiff had not brought the action to trial within five years as required by section 583. The motion to dismiss was denied and defendant brought his case to the court of appeal. It was admitted that the defendant had been out of the state before and since the commencement of the action. The court read the cases under section 583 as not requiring dismissal after five years if special circumstances interrupted the running of the period. It further held that such circumstances exist whenever it is impractical to bring the case to trial, even though defendant

1. 55 Cal. App.2d 406, 130 P.2d 725 (1942).

2. The pertinent portions of CCP § 583 provide: "Any action heretofore or hereafter commenced *shall* be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action . . . except where it be shown that the defendant has been absent from the State . . ."

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has not been guilty of acts tending to obstruct the administration of justice. In *Carmichael*, as in *Sylvestre*, defendant continually resided outside the state, so there was no way to obtain jurisdiction over him. The court in *Carmichael*, in a single paragraph, rejected the contention that the action should be dismissed under section 581a; it merely stated that the section provides that no dismissal shall be had for failure to serve summons on a defendant during his absence from the state—presumably holding that the statute was clear on its face.[3]

The court in *Sylvestre* also cited cases interpreting section 351, which provides that a statute of limitations does not run against a person while he is out of the state.[4] In one case cited, *Cvecich v. Giardino*,[5] the court held that the statute applies even though the defendant had never been in the state at all. The defendant in *Cvecich* argued that this interpretation would even allow an out-of-state plaintiff to sue an out-of-state defendant in California at any time. In reply, the court noted that section 351 would not apply in such a situation. Instead, the case would be subject to section 361, which provides that the statute of limitations of the state where the cause of action arose applies to any action "except in favor of one who has been a citizen of this State, and who has held the cause of action from the time it accrued."[6] It is important to note that there is no comparable limitation regarding service of process under section 581a. Thus, under

3. 55 Cal. App.2d at 409, 130 P.2d at 726.

4. **CCP § 351. Exception, where defendant is out of the state.** If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

5. 37 Cal. App.2d 394, 99 P.2d 573 (1940).

6. In Bayuk v. Edson, 236 Cal. App. 2d 309 at 318, 46 Cal. Rptr. 49 at 55 (1965), the court held that the statute of limitations did not begin to run on two out-of-state architects who agreed to design and supervise the building of a house in California while they were out-of-state. The statute began to run, said the court, only after they stipulated to jurisdiction over them. The fact that no service could be made was held to be sufficient reason for the statute not to run.

Sylvestre even an out-of-state plaintiff may sue an out-of-state defendant in California, and as long as he files the action within the prescribed period of limitations, he may leave his action pending until such time as he is able to obtain jurisdiction—a time distant in the future or perhaps never.

Perhaps the most significant aspect of *Sylvestre* is that it relied on the California Supreme Court decision of *Wyoming Pacific Oil Co. v. Preston.*[7] *Wyoming Pacific* held that the seeming mandatory provisions of 581a were subject to some judicial discretion and reversed an order of dismissal. The court drew a parallel between section 581a and section 583 and then asserted that in the so-called mandatory dismissal provisions of 583, judicial discretion did exist for permitting the action to be continued under special circumstances.

The plaintiff in *Wyoming Pacific* had filed an action against several defendants in December, 1952. One defendant was served in February, 1955. About two weeks before the three year period for service and return of summons expired "feverish attempts were made" to serve defendant Bush. Plaintiff was unsuccessful until shortly after the three year period had run. Bush filed a motion to quash summons and a motion to dismiss supported by an affidavit showing that he was accessible at his home and office prior to the time plaintiff began his "feverish attempts." In denying the motions the supreme court seemed to eliminate any requirement that a plaintiff be diligent throughout the three year period.[8]

The *Wyoming Pacific* case is adversely criticized in 6 U.C.L.A. Law Review 476 (1959) on the ground that the decision subverted the purpose of 581a: to require prompt service, preventing the cumulation of stale claims and the crowding of court calendars.[9] At least, it is noted, 581a

7. 50 Cal. 2d 736, 329 P.2d 489 (1958).

8. The Wyoming case was discussed in Hill v. Superior Court, 251 Cal. App. 2d 746, 59 Cal. Rptr. 768 (1967) in which the court of appeal took the position that the discretion there should be special and that the Wyoming Pacific case should be limited to its facts. However, in the Hill case, the clear distinction that was made was between a case of impossibility or high impracticability of service and a case where service was possible but not carried out.

9. As was pointed out by the author, the court has discretionary power to

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should never be subject to discretion when the out-of-state defendant is subject to jurisdiction under section 417.[10] When prosecution of a case is possible, it is unconscionable to allow a plaintiff to delay indefinitely such prosecution until defendant may have difficulty in presenting his case.[11]

By relying on *Wyoming Pacific*, *Sylvestre* becomes part of a pattern in the courts eliminating the *mandatory* rules which require dismissal because of the failure or inability of an attorney to carry forward a case. Not long after *Sylvestre* was decided the California Supreme Court itself in *Weeks v. Roberts*[12] so construed the five-year dismissal provision in section 583 in order to permit a stale claim to be continued in the courts by expanding the special circumstances in which judicial discretion could be exercised. In *Weeks* the plaintiff failed to have his case tried before the five year period had elapsed. As the five year limit neared plaintiff prevailed on one trial judge to set a trial date some twenty-eight days ahead, just within the five year period. Defendant by a motion to the judge in charge of the master calendar obtained an order vacating that trial date, apparently on the ground that there was insufficient time to prepare. As a result, no new date could be set prior to the running of the period, and plaintiff's case was dismissed under 583. The supreme court reversed the dismissal on the ground it constituted an abuse of discretion. The majority thought twenty-eight days was a reasonable time in which to provide facilities for a trial and that the order of the master calendar judge was therefore improper.[13]

The weakness in all these cases is the unwillingness of the appellate court to press for needed procedural regularity when

dismiss a case for lack of prosecution even before the three year period under § 581a has elapsed. This is clear from § 583 which permits a court to dismiss anytime after two years from the commencement of the action.

10, 11. See 6 UCLA Law Review at 480.

12. 68 Cal.2d 802, 69 Cal. Rptr. 305, 442 P.2d 361 (1968).

13. Three judges dissented, not on the ground that § 583 did not allow the discretionary determination, but on the ground that the master calendar, particularly in Los Angeles County, where suit was brought, is extremely difficult to control and that it must be within the discretion of the calendar judge to determine just when cases can and cannot be brought to trial.

to do so may cut off the rights of individual plaintiffs. The reason is not so much that the courts disapprove of the mandatory provisions as that they fear unfairness may result. Unfortunately, the decisions rarely delve deeply enough into the problem to see undesirable long range consequences. The facts of *Sylvestre* provide a perfect example. Before plaintiff could attempt to serve process he necessarily had to file his action. Once he had filed he suddenly learned that he could not obtain jurisdiction over defendant. He was not able to proceed with the action and yet was subject to dismissal under 581a if he did not. Apparently, he faced a dilemma that could be resolved only if the court held as it did. But surely, plaintiff had a reasonable alternative: He could have filed suit in defendant's home state and voluntarily dismissed the California proceeding.

The underlying assumption of the *Sylvestre* decision is that a plaintiff should always be encouraged to file suit in his home state regardless of what is the nature of the action, where it arose or where defendant is located. But this assumption is contrary to the basic policy of the constitutional and statutory laws governing personal jurisdiction. If it is desirable to bring suits against out-of-state defendants, a proper long-arm statute should be enacted, as has been done by many states. When constitutional, the defendants may then be brought before the court promptly; the cases may be prosecuted with dispatch; service of summons need not be delayed; and any resultant difficulties to plaintiff, defendant or the court may be avoided. There is no reason then not to apply section 581a firmly. If the case is one in which the California courts do not have constitutional power to take jurisdiction over the defendant or one in which the legislature consciously determines that such jurisdiction should not be exercised, surely, the action should not be permitted to remain pending indefinitely in California courts.

Multiple Cost Bills for Testimony of an Expert Witness

May each of a number of prevailing co-parties in an action obtain as part of his costs the full statutory witness fee and

travel costs for an expert witness who testified on behalf of each of such co-parties? He may, according to *City of Downey v. Gonzales*.[14] Suit was brought by the City to condemn 15 parcels of property to make way for a municipal hospital. Only 13 separate claims were stated because some of the parcels were owned by the same persons, and claims for these parcels were lumped together. There were a total of 28 defendants since most of the parcels were owned by more than one individual.

At the close of the case, each of the 28 defendants filed a bill for costs with appropriate supporting data, and each claimed the statutory per diem witness fee of $4 plus travel costs, amounting to a total of $9 per day, for an expert appraiser who had been hired jointly by all of the defendants to testify on their behalf. The aggregate amount claimed for the eight days the expert attended trial was $2,016. The trial court allowed the defendants, in the aggregate, to collect but one fee plus mileage for each of the seven days the expert was summoned to testify, that is $63.[15]

On appeal the decision was reversed. The court held, two to one, that defendants were entitled to collect for each of the 13 separate claims a per diem fee plus mileage for each of the eight days the witness attended the trial. Justice Stephens, writing for the majority, reasoned that since the action involved 13 different cases, which plaintiff elected to consolidate rather than bring separately, the prevailing parties on each claim should be able to collect costs as if they had been sued separately. The court pointed out that, although the trial judge has discretion to tax costs in eminent domain as in other cases, the state constitutional provision requiring the payment of just compensation for condemnation required payment to condemnees of their costs "necessarily incidental to the trial of the issues."[16] The requisite necessity, according to

14. 262 Cal. App.2d 563, 69 Cal. Rptr. 34 (1968).

15. The witness was only subpoenaed for the first seven days of the trial. On the eighth day he appeared and testified voluntarily. The appellate court held that defendants were entitled to witness fees for all eight days.

16. City and County of San Francisco v. Collins, 98 Cal. 259 at 262, 33 P. 56 at 57 (1893).

the court, was conclusively established because plaintiff City had not challenged defendants' verified cost bills which constituted prima facie evidence that all items therein claimed had been necessarily incurred.[17]

Although it would seem obvious, once the witness was present in court to testify for any one defendant, there was no need for other defendants to incur any expenses to obtain his testimony, the court simply held that by calling any witness to testify on his behalf, every party obliges himself to pay that witness the statutory fees.

The court's analysis is not persuasive. The technical argument that defendants' unchallenged cost bills must be accepted as establishing the necessity of the claimed expenses, regardless of the facts on the record, seems woefully weak. Surely, the trial court was entitled to take judicial notice of the number of times the expert witness actually traveled to court and the number of days he attended.[18]

The court of appeal itself did not give full credence to all the unchallenged cost memoranda and refused to permit recovery by all 28 defendants. Instead, it allowed persons who were co-owners of a single property to obtain costs only once among themselves. Even a person who owned two separate properties was permitted but one recovery for costs.[19] The court made these distinctions on the basis of an 1855 case, *Rice v. Leonard*,[20] which had held in a one page opinion, giving no specific facts whatever, that the successful co-defendants were not entitled to separate awards for costs but could only recover such costs jointly. Why the *Rice* decision was not read simply as proscribing multiple recovery by *all* the successful co-defendants in *Gonzales* is unclear.[1]

17. Judge Aiso, who wrote a separate concurring opinion, placed heavy emphasis on this point.

18. See Cal. Evid. Code §§ 451, 452.

19. 262 Cal. App.2d at 567, 69 Cal. Rptr. at 38. This determination seems inconsistent with the court's idea that separate claims entitle defendants to separate fees. The expert witness was required to testify separately as to the value of the different parcels and separate actions would have been appropriate whether or not the owners of the different parcels were the same or different people.

20. 5 Cal. 61 (1855).

1. In Branhart v. Kron, 88 Cal. 447, 26 P. 210 (1891), a question arose

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If the unchallenged cost memoranda are not to be considered conclusive, each defendant who seeks costs must establish from the facts the necessity for having obligated himself to pay the costs.[2] Such showing will depend on whether or not the majority was correct in stating that each defendant who called the expert witness to testify obligated himself to pay the witness both mileage and per diem fees even though the witness was already in court. The court cited only Government Code section 68097, which provides that a witness may demand his mileage and per diem fees one day in advance and that the court shall not compel him to testify until this allowance is paid. But section 68097 in no way implies that once the witness is in court he is entitled to a duplicate fee from every litigant for whom he testifies.

There are a number of older cases in other jurisdictions upon which the court might have relied. These decisions were made when courts generally thought that a witness attended court solely for the benefit of the party or parties for whom he was called to testify. For example, in *Pearce v. Person*,[3] it was held that when both the plaintiff and defendant summoned a witness, he was entitled to collect his witness fee from both of them.[4]

The argument of Judge Kaus who dissented in *Gonzales* is based on the assumption that a witness comes into court not simply for the benefit of parties for whom he testifies, but for the entire community. Thus the statutory fee is not a personal obligation of every litigant for whom the witness testifies, but a community obligation to every knowledgeable witness who comes to court. This is true even though the law normally requires the obligation to be discharged by one

whether one defendant could obtain costs for a witness whose primary testimony had been on behalf of a co-defendant; the court, in allowing the costs, clearly implied that the only party who could collect was the one who had in fact incurred the expense.

2. Kramer v. Ferguson, 230 Cal. App.2d 237, 250, 41 Cal. Rptr. 61, 68 (1964); Jeffers v. Screen Extras Guild, Inc., 134 Cal. App.2d 622, 286 P.2d 30 (1955).

3. 5 N.C. 188 (1857).

4. See also House v. Barber, 10 Vt. 158 (1838); O'Kane v. People, 46 Ill. App. 225 (1892). But the courts were far from unanimous. See e.g. Renfro v. Kelly, 10 Ala. 338 (1846), holding contrary to Pearce v. Person.

or more of the parties (usually those who are unsuccessful). Strong support for this position appears in Wigmore on Evidence, branding as false any "impression that the witness' duty runs to the parties and not to the community and that he is rendering his services for money to the party that desires them".[5]

The few modern cases on this problem generally reject multiple recovery.[6] The most recent decision, and one of the clearest, is *Reynolds Metals Co. v. Yturbide.*[7] Three successful plaintiffs, whose actions had been consolidated for trial, each sought to collect fees for the witnesses who had testified on their behalf. The court held that to allow triple witness fees would conflict with the policy of Federal Rule 42(a), which permits the consolidation of claims in part "to avoid unnecessary costs." Surely it follows, if multiple fees are not to be permitted when the court consolidates actions originally brought as separate lawsuits, they should not be allowed when plaintiff consolidates the actions at the outset.

Logically, it makes little sense to argue that a witness should be entitled to collect 13 per diem fees each day simply because the case happens to involve 13 sets of defendants. Similarly, it would be ridiculous to allow a witness to collect 13 times for travel when he made but one trip. As Justice Kaus said, "At the very least, he should be forced to form a car pool with himself".[8]

The majority decision in *Gonzales* can be understood only in light of the fact that it dealt not with an ordinary witness in an ordinary case, but with an expert appraiser in a condemnation proceeding. There is little doubt that each property owner must, as a practical matter, employ an expert appraiser to testify on his behalf and that an expert appraiser

5. 8 Wigmore, Evidence § 2201 (2) (iii) at page 135 (McNaughton rev. 1961).

6. Vilsack v. General Commercial Securities Corp., 106 Fla. 296, 143 So. 250 (1932); Barnhart v. Jones, 9 F.R.D. 423 (S.D.W. Va. [1949]); Reynolds Metals Co. v. Yturbide, 258 F.2d 321, 335 (9th Cir. [1958]), cert. den. 358 U.S. 840, 3 L.Ed.2d 76, 79 S. Ct. 66.

7. 258 F.2d 321, 335 (9th Cir. [1958]), cert. den. 358 U.S. 840, 3 L.Ed.2d 76, 79 S.Ct. 66.

8. 262 Cal. App.2d at 573, 69 Cal. Rptr. at 42.

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charges a substantial fee for preparing himself to testify and for taking the stand. Nevertheless, California law takes the position that no matter who the witness is or how much he charges the party who calls him, all a party can collect in costs is the statutory per diem fee of $4 plus mileage. This is the rule generally applicable under section 733 of the Evidence Code. It has been applied consistently in condemnation cases.[9]

The majority decision circumvents this rule, but in so doing sets a precedent which is bound to cause confusion and may ultimately lead to serious injustice. For example, an honest but unsuccessful or partially successful litigant who sues multiple defendants in a single action may find himself charged with multiple travel and per diem fees for a large number of ordinary eyewitnesses each of whom testified for the defendants. Presumably, each witness may demand the full amount of the fees even though this amount constitutes a substantial windfall.

The court in the present case might have provided defendants with the desired relief by deciding that the current cost provisions are unconstitutional when applied in condemnation actions. Apparently the point was not raised at the trial level. But a substantial argument can be made that "just compensation" requires payment for the full cost of an expert appraiser whenever his testimony is reasonably necessary. Most of the cases in point, and there are not many, are collected in an annotation in 18 A.L.R. 2d 1229–30 (1951). Although some courts in other jurisdictions have held that their state constitutions require such payment, the California courts have not.[10] In one of the most recent cases, the Supreme Court of Arizona relied on California decisions to reject a demand for such costs.[11]

9. City of Los Angeles v. Vickers, 81 Cal. App. 737, 254 P. 687 (1927); County of Los Angeles v. Marblehead Land Co., 95 Cal. App. 799, 273 P. 138 (1928); People v. Bowman, 173 Cal. App.2d 416, 343 P.2d 267 (1959); Frustuck v. Fairfax, 230 Cal. App.2d 412, 416, 41 Cal. Rptr. 56, 59 (1964) (dictum).

10. See footnote 9, supra, for authorities.

11. State v. MacDonald, 88 Ariz. 1, 352 P.2d 343 (1960).

In light of the *Gonzales* decision and the general confusion over cost policy, it seems appropriate for the State Bar to undertake a detailed study of the problem with an eye toward a new, clearly stated, unified cost statute to guide courts and lawyers in future litigation.

Cause of Action—The Scope

A court's definition of the scope of a cause of action for res judicata and other purposes depends upon which of two basic conflicting theories it accepts. The so-called "operative facts" theory defines a cause of action in terms of the defendant's acts. All injuries suffered by a plaintiff due to a single transaction or occurrence or a related series of transactions or occurrences are held to fall within a single cause. If a defendant negligently drives his automobile into plaintiff's house, causing him personal injury, as well as damage to personal and real property, plaintiff has but a single cause of action and must claim all of his damages at once.

The so-called "primary right" theory defines a cause of action in terms of the nature of injuries suffered by the plaintiff. A plaintiff has a separate cause of action for an invasion of each of his "primary" rights, even if such invasions are caused by a single act or series of acts by defendant. There are separate primary rights for physical injury to person, injury to personalty, damage to realty, injury to character, etc. In the situation above where defendant negligently drives his vehicle into plaintiff's house, plaintiff has at least three separate causes of action which he could pursue separately in three cases.

California courts have uniformly and consistently followed the primary right theory for over one hundred years.[12] It is somewhat startling, therefore, to find the court in *Holmes v.*

12. See Comment, *Res Judicata in California,* 40 Cal. L. Rev. 412 at 419 (1952); 2 Witkin, *Calif. Proc.,* Pleading § 11 (1954); 1 Chadbourn, Grossman & Van Alstyne, *California Pleading* § 761 (1961); Wulfjen v. Dolton, 24 Cal.2d 891, 151 P.2d 846 (1944); McNulty v. Copp, 125 Cal. App.2d 697, 271 P.2d 90 (1954).

David H. Bricker, Inc.[13] holding that plaintiff was barred by res judicata from maintaining a suit for damage to his car because he had previously instituted a personal injury action based on the same facts of liability, against the same defendant.[14] The case is significant for three reasons: (1) it raises the question of whether California courts should adopt a new cause of action theory; (2) until confirmed or overruled by the supreme court or the legislature, the decision will cause considerable confusion and may prove to be a trap for unwary litigants; (3) for a case having such far reaching ramifications, the low quality of the opinion and the underlying research upon which it is based, are matters of serious concern.

The relative values of the "operative facts" and "primary rights" theories have been hotly debated and discussed in many articles and cases.[15] The advantage of the operative facts theory is its tendency to cut down litigation by requiring all relevant facts to be tried in a single action for the convenience of the court, parties, and witnesses. This apparent advantage is lessened somewhat by the fact that under the primary right theory the principles of collateral estoppel limit the efficacy of bringing separate actions based upon a single set of facts. And there may be a decided advantage in allowing separate suits in certain types of cases. For example, when a plaintiff who has been seriously injured in an automobile collision must wait for nearly two years before obtaining a trial by jury, there seems little reason why he should not be permitted to bring a separate action in small claims court to recover immediately for the damages to his automobile. Although small claims actions do have res judicata effect to bar future suits on the same cause of action, they do not have collateral estoppel effect; thus, under the primary right theory the per-

13. 265 A.C.A. 695, 71 Cal. Rptr. 562 (1968) hearing granted November 7, 1968.

14. The personal injury action previously filed had no collateral estoppel effect since the issues were never litigated.

15. See, for example, Harris, *What is a Cause of Action?* 16 Cal. L. Rev. 459 (1928); Comment, *Res Judicata in California,* 40 Cal. L. Rev. 412, 415–19 (1952); 1 Stanford Law Rev. 156 (1948); 2 Witkin, *Calif. Proc.,* Pleading § 11, pp. 984–86 (1954).

sonal injury suit could in no way be affected by the small claims court decision.[16]

Perhaps the deciding factor should be whether or not operation of the law under the primary right theory has caused sufficient difficulty to justify the confusion and uncertainty that would surely result from a switch to the operative facts theory. There is a strong argument that even if such a change is justified, the legislature, and not the courts, should make it. Then the new law would take effect prospectively only, and unsuspecting plaintiffs, such as the one before the court in *Holmes*, would not suddenly find themselves barred by past actions.

If the *Holmes* case properly declares the law, unwary individuals who, for one reason or another, filed and collected in separate actions for property damages, will lose their rights to later recover for serious personal injuries. This seems an intolerable price to pay for the advantages of the new rule.

Even assuming that the advantages of a change in the law justify court action, such an important decision should be made only in an opinion which clearly notes the significance of the change and which affords it maximum publicity. Moreover, the court should carefully research the case and discuss all the relevant authority with precision so that the scope and impact of the case will not be misinterpreted. Unfortunately, the opinion in *Holmes* falls far short of these goals. Reliance was placed primarily on a 1957 annotation in American Law Reports[17] which merely states that the majority rule in the United States is that there is but one cause of action for personal injury and property damage arising from the same tortious act. California cases are cited to support both the majority and the converse minority rule, although the most recent cases are claimed to support the majority position.

The court in *Holmes* failed to discuss the historical distinction between the operative facts and primary right theories of a cause of action. Had it done so, it would have found that the A.L.R. annotation clearly miscited the so-called

16. Sanderson v. Niemann, 17 Cal. 2d 563, 110 P.2d 1025 (1941).

17. 62 A.L.R.2d at 977.

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"majority" cases. In each of these cases, *Kidd v. Hillman*,[18] and *Commercial Standard Ins. Co. v. Winfield*,[19] as well as in a third case cited by the court as giving additional support, *Pacific Indemnity Group v. Dunton*,[20] plaintiffs in an original suit had sought damages for personal injuries *and* damages to personal property. In the second suit brought by plaintiff's insurer as subrogee, the claim was again for damages to personal property, but the items of personalty involved were different from those involved in the first action. In two of these cases, *Kidd* and *Dunton*, the court held that the rules of res judicata prohibited maintenance of the second action since the first suit had already been brought for both personal injury and property damage. In the third case, *Winfield*, it was held that the defense of res judicata had been waived.[1]

By asking for damages due to injury to their personal property, plaintiffs in each of the above actions shut off the right to claim damages to personalty in the later suits. When a defendant's act causes damage to several items of personal property, it is clear that a plaintiff has but one cause of action regarding the primary right as to his personalty no matter what kind of items are involved.[2] He cannot sue separately with respect to each separate item damaged, any more than a plaintiff should be permitted to sue separately for each separate bruise he received in a single accident. The holdings in these cases are clearly correct, but they can in no way support the court's proposition that had plaintiffs sought only personal injury damages in the first actions, they would have been barred in the second suits from pursuing remedies for property damage.

In addition to misreading those cases alleged to support its decisions, the court in *Holmes* failed to deal with those authori-

18. 14 Cal. App.2d 507, 58 P.2d 662 (1936).

19. 24 Cal. App.2d 477, 75 P.2d 525 (1938).

20. 243 Cal. App.2d 504, 52 Cal. Rptr. 332 (1966).

1. It should be noted that the court in Holmes, at page 699, miscited both the holding and the rationale of the Winfield decision.

2. See Sanderson v. Niemann, 17 Cal.2d at 572, 110 P.2d at 1029, discussing the Kidd case; cf. Beronio v. Southern Pacific R.R., 86 Cal. 415, 24 P. 1093 (1890).

ties taking a contrary position.[3] For example, the court made no mention whatsoever of the history of section 427 of the Code of Civil Procedure or the relevant cases under it, despite the fact that they constitute the most direct authority on the point in question.[4] Prior to 1907, section 427 *prohibited* a plaintiff from joining a claim for personal injury with a claim for damage to property. Thus in *Lamb v. Harbaugh*,[5] in which defendant allegedly broke into plaintiff's home causing injuries to character, to health and to property, the court specifically held that each of the listed injuries involved a separate cause of action which could not be claimed in a single lawsuit.

In a 1912 decision, *Schermerhorn v. Los Angeles Pac. R.R.*,[6] which is closely analogous to *Holmes*, plaintiff was permitted to collect for personal injuries from an auto accident in spite of a prior action in which he had sued for and collected damages to his automobile. The court rejected the argument that plaintiff had split a single cause of action, pointing out that under section 427 plaintiff was not even permitted to join claims for the two types of injury. The court in *Schermerhorn* failed to note or comment upon a 1907 amendment to section 427, which on its face *permitted* a plaintiff to join all causes of action arising from a single transaction or occurrence. Perhaps in response to the uncertainty caused by the apparent conflict between the statute and the statement in the case, the legislature in 1915 again amended section 427 specifically providing that "causes of action for injuries to person and injuries to property, growing out of the same tort, *may* be joined in the same complaint." (Emphasis added.) There seems little doubt, at least from a historical point of view, that both the legislature and the courts have taken the position that injuries to person and property constitute separate causes of action under California law which may or may not be joined at plaintiff's option.

3. The court confined itself to refuting several of plaintiff's citations which, as the court quite correctly analyzed, were generally irrelevant.

4. § 427 of Cal. Code of Civ. Proc. is the section entitled, "Joinder of causes of action."

5. 105 Cal. 680, 39 P. 56 (1895).

6. 18 Cal. App. 454, 123 P. 351 (1912).

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The court in *Holmes*, as its final point, contended that even if one finds that injury to person and property constitute two separate causes of action, a failure to join both types of relief in a single action will result in a res judicata disposition. The court argued that such a position is justified by the strong policy against piecemeal litigation and cited the compulsory counterclaim provision, section 439, as authority for its position. The weakness of this argument is readily apparent upon consideration of section 442, the California cross-complaint statute. Any action of defendant against plaintiff arising out of the same transaction as plaintiff's action qualifies as a cross-complaint under section 442. But unless such a claim also meets the requirements of the counterclaim statute, section 438, the compulsory provisions of section 439 do not apply. Had the legislature intended that all actions arising from a single transaction be brought in a single lawsuit, it certainly would have extended section 439 to cover all cross-complaints by defendants against plaintiffs. Surely, section 439 in its present form cannot be read to imply the drastic change in the law for which it is cited in the *Holmes* decision.

It can only be hoped that in the near future an authoritative, well reasoned decision will clarify the confusion, uncertainty, and potential harm of the *Holmes* case.

Collateral Estoppel—Effect of Settlement Before Trial

The decision of the court in *Artucovich v. Arizmendiz*[7] raises an important question as to the propriety of affording collateral estoppel effect to issues in an action which is settled by the litigants prior to trial. Plaintiff, Juan Artucovich, sought damages for personal injuries received when the car he was driving collided with another vehicle owned by defendant, Michael Arizmendiz and driven by the defendant's wife Cecilia, who was alleged to have been negligent.

Defendant successfully moved for a summary judgment on the basis of the disposition of a prior personal injury action brought by Cecilia against Artucovich, involving the same

7. 256 Cal. App.2d 130, 63 Cal. Rptr. 810 (1967).

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collision, in which it had been alleged that Artucovich was negligent. Before trial this first action had been dismissed with prejudice by plaintiff Cecilia after a settlement agreement under which Artucovich paid her $500.

Two arguments were successfully advanced on appeal in the second case in support of the summary judgment below. First, it was asserted that plaintiff, by failing to counterclaim for his injuries against Cecilia in the first action, had lost his right to claim such damages in any later action, and, second, it was claimed that the dismissal of the first suit necessarily determined that Cecilia was not negligent. Since Michael Arizmendiz's liability was based solely on a statute[8] making an owner liable for the negligence of a permittee driver, a finding that Cecilia was not negligent would completely exonerate her husband.

The argument that plaintiff's failure to counterclaim in the first action barred his present suit cannot be supported. It is true that under section 439 of the Code of Civil Procedure, a defendant who fails to file against a plaintiff a counterclaim arising out of the same transaction or occurrence as the plaintiff's claim will be barred from later instituting that claim as an independent action. But the court failed to recognize that section 439 applies only to counterclaims and not to cross-complaints. Under section 438 a counterclaim is defined as an action by a defendant against a *plaintiff*. A counterclaim cannot be brought against a third party. Thus, the only way Artucovich could have sued Michael Arizmendiz in the first action was by way of cross-complaint under section 442. There is no provision for a compulsory cross-complaint.

The second ground for upholding the summary judgment is equally insubstantial. The court of appeals, which stated that the first suit "adjudicated" the fact that Artucovich was not negligent, made a totally unwarranted assumption that a dismissal based upon a compromise is tantamount to a factual determination which can be given collateral estoppel effect.

It is manifestly against the policy of California law to permit

8. Cal. Vehicle Code § 17150.

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the use of settlements or settlement negotiations against a party except with respect to an action upon the settlement itself. One example of this policy is contained in section 997, which provides a method whereby a defendant may make a formal offer to compromise a plaintiff's claim. A 1967 amendment makes clear that a judgment based upon acceptance of such an offer cannot be used for subsequent litigation.[9] If a formal settlement under the code cannot result in a judgment having collateral estoppel effect, surely an ordinary compromise agreement leading to a dismissal should not have such effect. The policy is further supported by a provision of the Evidence Code, which specifically makes a compromise in one case inadmissible in evidence in other litigation.[10]

There are two basic reasons underlying the policy against giving collateral estoppel effect to compromise judgments.[11] First, as a general matter, out-of-court settlements are strongly favored. If a judgment based on a compromise gives rise to possible unforeseen effects detrimental to the parties, such settlements will be discouraged. The danger of such unforeseen effects has already substantially increased because of recent decisions which have extended collateral estoppel principles to cover persons not parties to the action.[12] Second, it is unjustifiable to assume that payment by one party in a settlement of a claim constitutes an admission, let alone an "adjudication," of issues constituting liability. A defendant may agree to pay a small sum merely because it would cost much more to fight the suit to a successful conclusion. In auto cases insurance companies are often in complete charge of the defense. Within the monetary limits of a policy, a company has virtual autonomy in deciding on a settlement on behalf of the defendant whom it has insured. Rarely does the company have any direct interest in any later action which its insured might himself wish to bring.

9. See Witkin, *California Proc.* 1967 Suppl., Judgment § 66A.

10. Cal. Evid. Code § 1152.

11. For a general discussion of the reasons against giving collateral estoppel effect to compromise judgments, see 108 U.Pa.L.Rev. 173 (1959).

12. See CAL LAW TRENDS AND DEVELOPMENTS 1967, *Civil Procedure*, beginning at page 250.

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Perhaps the most disturbing aspect of the present case is that it follows on the heels of another recent case which made a similar decision. Although the court in the present case failed to cite it, the opinion in *Louie Queriolo Trucking Inc. v. Superior Court*[13] is closely analagous. In that action plaintiff vehicle owner was permitted to recover for the damages to his vehicle on the basis of facts "established" in a prior suit brought by the driver of the vehicle against the same defendant. The case received considerable attention for allowing a plaintiff to use recovery by another person in a prior suit "offensively" to establish his own right to recover.[14] One important aspect of this case has received no special mention, however. In the first suit, after the driver had won a jury verdict and while defendant's appeal was pending, the parties agreed to a compromise. The appellate court in the second action assumed without comment that the settlement must have been in favor of the driver who won below and that it established the truth of his claims. It was on the basis of these assumptions that the plaintiff in the second suit was allowed to prevail. The case is somewhat distinguishable from the present case in that there had been a jury decision, but this difference was substantially weakened because the opinion clearly treats the jury decision as having been nullified by the decision to compromise.

The decisions in *Artucovich* and *Louie Queriolo Trucking Inc.* should be disapproved as soon as possible, before they begin an undesirable trend in the law. At the same time, it should be made clear that if a litigant wants a compromise decision to have effect beyond the present action, he may accomplish this by including appropriate provisions in the settlement agreement.

Proper protection for all parties could have resulted if Michael Arizmendiz had been made a party to the settlement agreement between his wife and plaintiff. Without such protection, a driver in Cecilia's position often could lose the

13. 252 Cal. App.2d 194, 60 Cal. Rptr. 389 (1967).

14. For a further discussion of this case, see CAL LAW TRENDS AND DEVELOPMENTS 1967, *Civil Procedure*, page 250.

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value of her settlement, for if a plaintiff is successful against a car owner, in many cases the owner can in turn sue the driver for indemnity.

Availability of Appeal in Small Claims Court

Section 117j of the Code of Civil Procedure provides that a defendant may appeal from a small claims court judgment. The appeal is to the superior court and results in a trial *de novo* in that court. In *Skaff v. Small Claims Court for the Los Angeles Judicial District,*[15] the California Supreme Court faced the question whether or not section 117j applies to a plaintiff with respect to a counterclaim filed against him in his small claims action.

Plaintiff in *Skaff* brought suit to collect $250, the amount of a deposit made on a rented automobile. Defendant counterclaimed for $175 which was allegedly due from the plaintiff on an entirely different transaction. The court held for defendant on both the claim and counterclaim. The plaintiff attempted to appeal the judgment on the counterclaim to the Superior Court of Los Angeles County, which refused to hear the case. The supreme court held that the plaintiff should be treated as a defendant with regard to the counterclaim and was thus entitled to appeal.

The court had to base its holding solely on considerations of policy since it recognized that the language of section 117j itself is ambiguous. The opinion listed four reasons for the decision. First, "[s]ince decisions of this court characterize a counterclaim as a separate, simultaneous action, the plaintiff in the original action becomes a defendant in the cross-action and acquires the appellate remedies of a defendant."[16] The court supported this statement merely by citing two otherwise unrelated cases, ostensibly for the proposition that, regardless of context, any cross-action should necessarily be treated as separate and distinct from the original claim.[17]

15. 68 Cal.2d 76, 65 Cal. Rptr. 65, 435 P.2d 825 (1968).

16. 68 Cal.2d at 78, 65 Cal. Rptr. at 66, 435 P.2d at 826.

17. Pacific Finance Corp. v. Superior

Friedenthal: Civil Procedure

Neither of the two cases in any way supports such a broad proposition.[18] Obviously, such a broad view is unjustified. One must look to the underlying nature and purpose of the matter in question to determine the extent to which such separate treatment makes sense.

The second ground of the court's decision was that the underlying reasons supporting the denial of an appeal to a plaintiff in his original action do not apply to a counterclaim. The court pointed out that for his own claim plaintiff could have chosen to go either to municipal or small claims court, and that by electing the latter, with its inexpensive, informal procedure, he voluntarily agreed to be bound by the decision without further recourse. On the other hand, the court argued that with respect to the counterclaim plaintiff was not voluntarily in small claims court but was there involuntarily, just as if he were a defendant; thus he should not be held to have waived any of the rights to which a defendant is entitled.

The court's second argument is also weak, for it ignores the basic purpose of permitting defendants to demand a *de novo* trial. The small claims procedure is a highly desirable method of solving minor disputes, and no ordinary type of appeal is warranted. Given the size of the disputes involved,

Court, 219 Cal. 179, 25 P.2d 983, 90 A.L.R. 384 (1933); Case v. Kadota Fig Ass'n., 35 Cal.2d 596, 220 P.2d 912 (1950).

18. The court's citation of cases is subject to severe criticism. The first case, Pacific Finance Corp. v. Superior Court, 219 Cal. 179, 25 P.2d 983, 90 A.L.R. 384 (1933), involved a cross-complaint as opposed to a counterclaim. While a cross-complaint has always been treated as a separate action by the California courts, a counterclaim has generally been treated as a defense to the plaintiff's action and not separate at all. This principle is dramatically illustrated by the second case cited in the Skaff opinion, Case v. Kadota Fig Ass'n., 35 Cal.2d 596, 220 P.2d 912 (1950). Here the court was involved with a purported cross-complaint which had been brought by an association, the defendant in the original claim. At that time an unincorporated association was unable to sue in its own name; since a cross-complaint was treated as a separate action, it was held that no cross-complaint could be brought. However, and this the court in Skaff overlooked, the Kadota Fig case went on to hold that the defendant's claim would qualify as a counterclaim and as such could be maintained. The court could have cited Tomales Bay Oyster Corp. v. Superior Court, 35 Cal.2d 389, 217 P.2d 968 (1950), which held for the purpose there involved, again totally irrelevant to the present case, that a counterclaim should be considered as a separate action.

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the costs of such appeals to the litigants and to the court is too great a price to pay. But since a defendant in small claims court is denied his rights to counsel and trial by jury, the entire small claims procedure is unconstitutional unless defendant has the power to request a *de novo* trial where those rights can be exercised. However, there is no justification for extending such reasoning to a plaintiff who has voluntarily entered small claims court under a statute which provides that a counterclaim may be filed against him. Once he selects the small claims forum, it is not unreasonable to say that by so doing he agrees to accept its decision on any valid counterclaim against him as well as his own claim. This is particularly so because to be tried in small claims court, the counterclaim must itself fall within the court's jurisdictional limitations.[19] Since plaintiff waived his constitutional rights to counsel and trial by jury by entering small claims court, he should not be given the right to demand a trial *de novo.*

The third reason for the court's decision was that denial of an appeal by plaintiff for the counterclaim would tend to discourage the use of the small claims court. The court said, "Nonappealability of the counterclaim would expose the moving party to the possibility of the conversion of his claim into a quite unexpected adverse judgment which he could neither discharge, because he lacks the funds, nor challenge on appeal."[20] This argument ignores the realities of small claims litigation. A poor plaintiff, already in court, would probably rather have defendant's counterclaim brought against him in small claims court than face the possibility of a separate action in a municipal court at another time. Also, to a poor plaintiff, the right to a trial *de novo* is hardly attractive. Such a trial is held in superior court, where the normal rules of evidence apply; witnesses must be formally called and cross-examined; a full range of trial and post-trial motions are available; and a jury may be demanded. Representation by counsel is a practical necessity. Yet the $15 statutory amount which a winning litigant is permitted to recover for counsel fees hardly

19. Cal. Code of Civ. Pro. § 117h.

20. 68 Cal.2d at 79, 65 Cal. Rptr. at 68, 435 P.2d at 827.

suffices to cover his actual outlay.[1] From a practical point of view it seems most unlikely that the *Skaff* decision will encourage poor plaintiffs, heretofore reluctant to press their cases, to file in small claims courts. The number of situations would seem few indeed where persons have decided to forego suit altogether or to select a municipal court, merely because a counterclaim *might* be filed against them—and *might* be lost under circumstances where an appeal *might* prove worthwhile. On the other hand, the *Skaff* decision will tend to strengthen the hand of the wealthy, powerful litigant who utilizes the small claims court against poor defendants. An affluent plaintiff will welcome a counterclaim by such a defendant; for it will provide him the additional advantage of threatening an expensive and lengthy trial *de novo* in order to obtain a favorable settlement on the entire case.

In a note on the California small claims court in 52 Cal. Law Review 876 (1964), the authors did an empirical study of some 386 cases in the Oakland-Piedmont-Emeryville Judicial District. Their study revealed that most plaintiffs in small claims courts are businesses and governmental agencies; they filed some 60% of the cases. Of the remaining cases, mostly filed by individuals, undoubtedly a significant portion were brought by landlords against their tenants. On the other hand, only 15% of *defendants* in small claims courts are not individuals. The result of the current case will tend to discourage individual defendants from bringing counterclaims in those cases where it would be most desirable for them to do so. For example, when a business brings suit on a conditional sales contract, defendant buyer will now hesitate before counterclaiming for a defect in the goods purchased. He will know that even if he is successful, the plaintiff will be likely to demand a *de novo* trial. In many cases a business will utilize counsel already on retainer so the added cost to it will be infinitesimal, whereas defendant may have neither money, time, nor energy to safeguard his rights.

The court's fourth reason for its decision is that the recogni-

1. Cal. Code of Civ. Pro. § 117j.

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tion of plaintiff's right of appeal on a counterclaim avoids a ruling which would pivot that right upon the fortuity of the way in which the claim is presented. In other words, if the defendant had brought his claim as a separate action, plaintiff could appeal; thus, the court reasons, plaintiff should be allowed to appeal when defendant's claim is asserted in a counterclaim. In taking this position the court once again ignores the substantial advantages of the small claims procedure and the underlying justifications for allowing defendant an appeal. The *de novo* trial on appeal is a time-consuming and wasteful maneuver, requiring a superior court judge to sit on a matter of trivial moment; it should be permitted only when the constitution so demands.

One other issue worthy of discussion was touched upon by the court. The court seemed to assume that if a claim and counterclaim are not treated as entirely separate for purposes of appeal, then defendant might not be treated as a plaintiff with regard to his own counterclaim. This means that defendant presumably would be allowed to appeal from an adverse decision on the counterclaim as well as from the decision on the claim. Obviously this is not a sound result. If a defendant files a counterclaim he should be bound by the result just as if he were the plaintiff. Thus, section 117j should be read within the policy and meaning of the statute as follows: when a party brings an action affirmatively, whether by claim or by counterclaim, he should be treated as a plaintiff and barred from appealing an adverse decision on any aspect of the case. Having subjected himself to the tribunal voluntarily, he should be required to abide by the decision of that tribunal without appeal. As already stated, the appeal provided in section 117j should be applied only to prevent the small claims procedure from being an unconstitutional restriction on defendants in cases where only a claim is filed. The above rule cannot be applied, however, where defendant's counterclaim is compulsory under section 439.[2] Section 117h states that the normal counterclaim

2. In the only case dealing with the point, Thompson v. Chew Quan, 167 Cal. App.2d Suppl. 825 at 827, 334 P.2d 1074 at 1075–1076 (1959), the

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rules apply in small claims court when the counterclaims fall within small claims jurisdiction. This would seem to mean that, as to such counterclaims, the provisions of section 439 are applicable. If the party bringing such a counterclaim does not approve of the small claims court decision on it, it seems clear that he must be free to appeal to the superior court and obtain a trial *de novo*. Otherwise, denial to him of an attorney and a right to trial by jury would be unconstitutional. His bringing a *compulsory* counterclaim can in no way be considered a waiver. It makes little sense, of course, to make counterclaims mandatory in small claims court. Since defendant may always obtain a trial *de novo* on such a counterclaim, he might as well have the option, at the outset, where to file the action. If, under the small claims statute, it were to be made clear that a counterclaim is not compulsory and thus need not be filed, a defendant who did voluntarily file in small claims court could then be held to have waived his right to appeal.

In the light of the *Skaff* decision and the general compulsory counterclaim problem in the small claims court, it would be wise for the legislature, once again, to revise the small claims court provisions. It should do so simply by stating that any party who seeks affirmative relief by way of either claim or counterclaim waives his right to appeal, and accepts the decision as final on both claims and counterclaims. The compulsory counterclaim statute should be deemed inapplicable.

court held that a counterclaim in excess of the jurisdictional limits of the small claims court was not compulsory under § 439 even though arising out of the same action as the original claim. It left open the question whether any counterclaim was mandatory, although indicating that some are by virtue of § 117h.

An argument can be made that the general language of § 117h should not be read to encompass compulsory counterclaims. The Supreme Court of California in Sanderson v. Niemann, 17 Cal.2d 563, 110 P.2d 1025 (1941), held that the rules of collateral estoppel do not apply to the decisions of small claims courts because of that court's special character. Similar reasoning may also be used to support the inapplicability of § 439 of the Cal. Code of Civ. Pro.

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