Res Judicata: Should California Abandon Primary Rights

Robin James
RES JUDICATA: SHOULD CALIFORNIA ABANDON PRIMARY RIGHTS?

I. INTRODUCTION

An automobile accident occurs where one driver is clearly at fault. The accident victim is hospitalized for injuries, and the car is destroyed. How many of the victim's "primary rights" have been violated? If the victim sues the other driver, how many "causes of action" will the victim have? How many times will the victim be allowed to sue the other driver in order to collect all of the damages due? Should it matter that the victim suffered injuries to both person and property in the same occurrence? The answers to these questions depend on whether the jurisdiction whose laws govern the suit defines a cause of action for purposes of res judicata in terms of primary rights, or in terms of the transaction or occurrence giving rise to the plaintiff's claim.\(^1\)

California courts analyze a cause of action for purposes of res judicata.

---

1. The following chart shows how a "claim," a "cause of action," and the preclusive effect of a lawsuit differ in both types of jurisdictions for an auto accident victim who sustains bodily injury and property damage in the same accident:

<table>
<thead>
<tr>
<th>Same Transaction Jurisdiction</th>
<th>Primary Rights Jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td>An accident victim has</td>
<td>An accident victim has</td>
</tr>
<tr>
<td>—two claims: bodily injury and property damage;</td>
<td>—two claims: bodily injury and property damage;</td>
</tr>
<tr>
<td>—one cause of action because both kinds of damage arose out of the same transaction or occurrence.</td>
<td>—two causes of action because injury to person and injury to property violate different primary rights.</td>
</tr>
<tr>
<td>—Preclusive effect of first suit: If the plaintiff brings only one claim in the first suit, the second claim will be barred by res judicata.</td>
<td>—Preclusive effect of first suit: If the plaintiff brings only one claim in the first suit, the second claim will not be barred by res judicata. If the plaintiff wins the first suit, plaintiff can plead collateral estoppel regarding the issue of the defendant's negligence.</td>
</tr>
</tbody>
</table>

Throughout this Comment, "claim" generally refers to the grounds for relief asserted in the complaint, while "cause of action" generally refers to: (a) with respect to joinder, the claims that may be joined in the same lawsuit, or (b) with respect to res judicata, any claims which preclude a second suit. However, the California Code of Civil Procedure requires the plaintiff's complaint to state "the facts constituting the cause of action in ordinary and concise language." CAL. CIV. PROC. CODE § 425.10(a) (West Supp. 1989) (emphasis added). Thus, the Author has used the term "cause of action" in the discussions of California pleading and amendment so that the language in those sections is consistent with the language in California statutes and case law.

Unfortunately, the terms "claim" and "cause of action" are often used interchangeably. Even Black's Law Dictionary treats the terms as synonymous. BLACK'S LAW DICTIONARY 224 (5th ed. 1979). Generally,
cata according to "primary rights." In California and other primary rights jurisdictions, certain rights are accorded "primary" status; these rights include the right to be free from injury to person and the right to be free from injury to property. The number of primary rights violated is significant because it determines the number of causes of action a plaintiff has in California. The victim's primary rights to be free from personal injury and free from injury to property were violated in the above-described accident, and the victim therefore has two causes of action.

The number of causes of action is crucial in determining whether the victim can file two lawsuits based on the accident. An axiom of res judicata states that a plaintiff must sue on the entire cause of action at
one time and may not "split" the cause of action. The victim in this example has two distinct causes of action. Thus, the victim can proceed against the defendant in two separate suits without "splitting" the cause of action, and res judicata will not bar the second suit. According to the primary rights theory, the fact that the victim sustained both kinds of damage in the same transaction or occurrence has no bearing on the preclusive effect of the first lawsuit.

By contrast, in the majority of jurisdictions, primary rights are irrelevant. Instead, in the res judicata analysis, the cause of action is coterminal with the transaction or occurrence that caused the plaintiff's damage. In a same transaction or occurrence jurisdiction, the accident victim in the example above has a single cause of action because the damage sustained by the victim has a single cause of action. This is because the accident victim's injuries and property damage are considered to be a single transaction or occurrence.

---

8. 4 B. WITKIN, supra note 1, § 43.
9. Id. § 35, at 77.
11. RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment a (1981). The Restatement (Second) of Judgments defines a cause of action for purposes of res judicata as follows:

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

(2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Id. See also Comment, Res Judicata and the Common Automobile Accident—The Problem of Splitting the Cause of Action, 12 ALA. L. REV. 364, 367-68 (1960); Annotation, Simultaneous Injury to Person and Property as Giving Rise to Single Cause of Action—Modern Cases, 24 A.L.R. 4th 646 (1983). This annotation does not use "primary rights" or "same transaction or occurrence" language. The analysis therein is limited to lawsuits involving personal injuries and property damage; it does not discuss other combinations of injuries. However, the annotation divides jurisdictions into those finding one, as opposed to two, causes of action arising from the auto accident example presented at the beginning of this Comment.

Decisions in the following nine states "support the broad proposition that a wrongful act or wrongful conduct which causes both personal injuries and property damage to the same individual infringes different rights and vests in that individual distinct causes of action": California, Connecticut, Illinois, Indiana, Montana, New Jersey, New York, Oregon, and Virginia. Id. at 685-86.

By contrast, most jurisdictions emphasize the "causative aspects of a breach of legal duty." Id. at 650. Consequently, decisions in the following states "support the broad proposition that a single act which causes simultaneous injury to the physical person and property of one individual gives rise to only one cause of action": Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South
age resulted from the same "occurrence," even though the victim suffered injury to both person and property. A plaintiff may not relitigate a cause of action if a valid and final judicial determination was reached in a prior suit involving the same cause of action.\textsuperscript{12} Therefore, under the same transaction or occurrence definition, the defendant can prevent the plaintiff from bringing a second suit on a claim that arose out of the same transaction or occurrence that gave rise to the first claim.\textsuperscript{13}

For purposes of res judicata, the same transaction definition is superior to the primary rights definition for two reasons. First, res judicata is so closely related to pleading, amendment, and joinder that the limitations placed upon these procedures should determine whether a second suit is precluded by res judicata. Prior to 1971, the rules governing all of these procedures were based on legal categories. However, the current rules governing pleading, amendment, and joinder are based on facts, while the current rules governing res judicata are based on legal categories. Second, the concept of primary rights is inherently ambiguous. Any primary right can be defined broadly or narrowly, and no aspect of the primary rights theory limits the scope of the right. This absence of guidance has allowed some courts to define a primary right so broadly that it engulfs the entire occurrence giving rise to the plaintiff's claim. Under these circumstances, the courts may actually be defining a cause of action in terms of the same transaction definition without acknowledging that they are doing so. For these reasons, California should either require mandatory joinder of plaintiff's claims by statute if those claims arise out of the same transaction or occurrence, or join the majority of jurisdictions by adopting the same transaction definition of a cause of action.

The inconsistency described above may not, by itself, justify change. However, the changes in pleading, amendment, and joinder have developed largely in response to the demands for procedural simplicity\textsuperscript{14} and

\textsuperscript{12} M. Kane, supra note 6, \S 14.4, at 619-20; Comment, supra note 10, at 413.

\textsuperscript{13} M. Kane, supra note 6, \S 14.4, at 626.

\textsuperscript{14} The Codes of Civil Procedure were created to correct the problems caused by the rigidity and complexity of the common-law system. See J. Cound, J. Friedenthal, A. Miller, & J. Sexton, Civil Procedure, Cases and Materials ch. 4, \S D, at 426-29 (4th ed. 1985) [hereinafter J. COUND] and authorities cited therein. See also infra notes 172-318 and accompanying text.
The same transaction definition of a cause of action is easier for lawyers and judges to use, and easier for lay people to understand. Additionally, the same transaction definition is more conducive to judicial economy than the primary rights definition because the same transaction definition is usually broader, thus requiring litigation of more claims in a single lawsuit. California’s change to the same transaction definition would contribute to the completion of the task begun by reform of related procedures: simplification and streamlining of the judicial process.

This Comment first presents the basic components of primary rights in California by discussing the ideas of John Norton Pomeroy, the law professor to whom the creation of the primary rights theory is attributed, and by discussing how primary rights have been defined and applied by California courts. Second, the Comment shows how the bases of pleading, amendment, and joinder have evolved from legal categories to facts, and discusses how the continued use of the primary rights definition of a cause of action for purposes of res judicata is inconsistent with this development. Third, the Comment discusses the inherent ambiguity of the primary rights theory and the way in which the ambiguity allows California courts to in effect employ the same transaction criteria while technically adhering to the primary rights theory. The Comment concludes by suggesting that California should either (1) amend its joinder rules so that joinder of a plaintiff’s claims is mandatory when the claims arise from the same transaction or occurrence or (2) adopt the same transaction or occurrence definition of a cause of action for purposes of res judicata set forth in the Restatement (Second) of Judgments and followed by a majority of states and federal courts.

II. PRIMARY RIGHTS IN CALIFORNIA

A. Philosophical Underpinnings—The Primary Rights Theory of John Norton Pomeroy

The origin of the primary rights theory is attributed to Professor

---

18. RESTATEMENT (SECOND) OF JUDGMENTS, supra note 11, § 24.
20. 1B MOORE’S FEDERAL PRACTICE, supra note 1, ¶ 0.410[1], at 359.
John Norton Pomeroy, a nineteenth-century scholar whose work significantly influenced post-common-law pleading developments. At common law, a plaintiff was required to plead in terms of a limited number of standardized “forms of action,” and if the plaintiff chose the incorrect “form,” the case was dismissed regardless of the merits. Additionally, before the mid-1900s, the law courts and the equity courts were separate systems; thus, if the plaintiff sought both legal and equitable relief for the same wrong, the plaintiff often had to sue twice in separate courts. After 1848, the forms of action were abolished, and the law and equity courts were merged. Under the new system, the emphasis on the “form” of the action diminished; instead, the plaintiff was required to allege sufficient facts in his complaint to state a “cause of action” under any legal theory. In the context of these major changes, Pomeroy thought it imperative to define the term “cause of action” with exactitude and precision.

Pomeroy believed that before a cause of action is viable, the plaintiff must possess a “primary right,” and the defendant must owe a corresponding “primary duty.” The following passage expresses the crux of the primary rights theory:

Every judicial action must therefore involve the following elements: a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements, the primary right

22. C. Clark, supra note 16, § 15, at 78.
23. F. James & G. Hazard, supra note 6, § 1.4, at 10.
24. Id. See infra notes 172-94 and accompanying text for a discussion of the common-law forms of action.
27. C. Clark, supra note 16, § 15, at 78.
28. Id.
29. F. James & G. Hazard, supra note 6, § 3.5.
30. J. Pomeroy, Code Remedies § 346, at 527 (5th ed. 1929). “To avoid . . . tendency to confusion, it is absolutely necessary to ascertain and fix with certainty the true meaning of the term ‘cause of action.’”
31. Id. § 347, at 528.
and duty and the delict or wrong combined constitute the cause
of action in the legal sense of the term, and as it is used in the
codes of the several States. They are the legal cause or founda-
tion whence the right of action springs . . . . 32

Pomeroy developed a system of classification for the rights he
thought were “primary.” 33 According to Pomeroy, the primary rights
and corresponding primary duties fall into two divisions; the first encom-
passes persons, and the second encompasses things. 34

The division concerning persons consists of the rules that define the
status of the person, or, in Pomeroy’s words, the rules that determine the
“capacities and incapacities of persons to acquire and enjoy legal rights,
and to be subject to legal duties.” 35 Pomeroy noted that in the United
States most class distinctions have been abolished; consequently, the divi-
sion concerning persons is a relatively small part of American jurisprudence. 36

Pomeroy separated his division concerning things into two classes:
rights in rem, or “Real” rights, and rights in personam, or “Personal”
rights. 37 Real rights are “those which, from their very nature, avail to
their possessor against all mankind, and a correlative duty rests alike
upon every person not to molest, interfere with, or violate the right.” 38

32. Id. (emphasis added). The right/duty relationship described by Professor Pomeroy
was an essential component of the plaintiff’s statement of his cause of action at common law.
In a common-law Declaration (the equivalent of a modern complaint, F. JAMES & G. HAZ-
ARD, supra note 6, § 1.3, at 10), the plaintiff was required to allege: (1) the plaintiff’s right;
(2) the defendant’s wrongful act which violated that right; and (3) damages. J. KOFFLER & A.
REPPY, COMMON LAW PLEADING § 21, at 86 (1969). The emphasis on the right/duty relation-
ship changed with the advent of Code pleading. Under the Codes, the plaintiff was not
supposed to focus on allegations of rights and wrongs, for such allegations amounted to con-
cclusions of law by the plaintiff. F. JAMES & G. HAZARD, supra note 6, § 3.5. Instead, the
plaintiff was required to plead sufficient facts to state a cause of action under any legal theory,
and the court was to decide which legal theory would apply. Id. See infra notes 217-43 and
accompanying text for further discussion of code pleading.

33. 1 J. POMEROY, EQUITY JURISPRUDENCE §§ 92-95 (4th ed. 1918). Apparently, Pome-
roy did not intend that his categories be construed as a definitive list of primary rights. “Every
command or rule of private civil law creates a primary right in one individual and a primary
duty corresponding thereto . . . . These rights and duties are, of course, innumerable in their
variety, nature, and extent.” Id. § 91.

34. Id. § 92. According to Pomeroy, his divisions “fall by a natural line of separation into
two grand divisions . . . .” Id.

35. Id. Pomeroy distinguished between the rights governing an individual’s capacity to
contract with the rights governing the contract itself. Id. The right of a person to make a
contract would be controlled by the rules concerning persons, while the rights arising from the
contract itself would be controlled by the rules concerning things. Id.

36. Id.

37. Id. § 93.

38. Id.
By contrast, Personal rights "are those which avail to their possessor against a specified, particular person, or body of persons only, and the correlative duty not to infringe upon or violate the right rests alone upon such specified person or body of persons."\(^{39}\)

Pomeroy divided the class of Real rights into three categories. The first included rights of property over land and chattels.\(^{40}\) The second included the rights possessed by every person over his own life, body, and reputation.\(^{41}\) The third included the rights which certain classes of persons, (namely, husbands, parents, and masters) have over certain other persons by virtue of domestic relations, (namely, wives, children, servants and slaves).\(^{42}\) According to Pomeroy, any person who experiences a violation of a Real right is entitled to redress against any and all violators, and every member of society has a corresponding duty to refrain from interfering with the Real rights of others.\(^{43}\)

By contrast, Personal rights are not universally owned, and Personal duties are not universally owed; instead, Personal rights arise as a result of specific relationships between particular persons.\(^{44}\) Pomeroy divided the class of Personal rights into two categories. The first was comprised of rights arising from contract.\(^{45}\) The second consisted of rights that exist between particular persons by operation of law; these include quasi-contractual rights and rights that exist between husbands and wives, between parents and children, between trustees and beneficiaries, and between debtors and creditors.\(^{46}\)

In sum, every person has Real rights against the entire population, and the entire population has a corresponding duty not to interfere with those Real rights. By contrast, a Personal right is enforceable only against particular individuals, and only those individuals owe a duty not to interfere with those Personal rights.

39. Id.
40. Id. § 94. This class was quite extensive; it included "[r]ights of property of every degree and kind over lands or chattels, things real or things personal." Id.
41. Id.
42. Id. Pomeroy elaborated on the nature of intra-familial property rights:
   Thus the husband is, by virtue of this right, entitled to the society of his wife, and the father is entitled to the services of his infant children, while a duty rests upon every person not to violate these rights by enticing away, seducing, or injuring the wife or child. This latter group of rights must not be confounded with those which the husband and wife, parent and child, master and servant, hold against each other, and which resemble in their nature the rights arising from contract.
43. Id. These concepts are obviously outmoded.
44. Id.
45. Id. § 95.
46. Id.
B. Application of the Primary Rights Theory in California

According to prominent authority, California courts have accorded "flat acceptance" to Pomeroy's contention that the right/duty relationship defines a cause of action. The California courts have adhered to classification of causes of action by legal categories, and the legislature expressed California's commitment to a category-based cause of action as early as 1851. Such commitment was first reflected in California's former joinder statute, former Section 427 of the California Code of Civil Procedure. That statute set forth separate classes of causes of action which were based on separate rights.

Thus, California was committed to a category-based cause of action before Pomeroy published his writings and identified certain rights as "primary." Both Pomeroy's categories and the classes set forth in former Section 427 were designed to ensure that claims held to be violations of separate primary rights also constituted separate causes of action that could not be joined under California's former joinder statute, CAL. CIV. PROC. CODE § 427 (repealed 1971).

---

47. 4 B. WITKIN, supra note 1, § 24.
49. 1851 Cal. Stat. 51, 59-60, ch. 5, § 64 (codified as amended at CAL. CIV. PROC. CODE § 427 (repealed 1971)). Former Section 427 read as follows:

The plaintiff may unite several causes of action in the same complaint, when they all arise out of:

1st. Contracts, express or implied; or,
2d. Claims to recover specific real property, with or without damages, for the withholding thereof, or for waste committed thereon, and the rents and profits of the same; or,
3d. Claims to recover specific personal property, with or without damages, for the withholding thereof; or,
4th. Claims against a trustee, by virtue of contract, or by operation of law; or,
5th. Injuries to character; or,
6th. Injuries to person; or,
7th. Injuries to property. But the causes of action so united shall all belong to only one of these classes, and shall affect all parties to the action, and not require different places of trial, and shall be separately stated.

Id.

Often, claims held to be violations of separate primary rights also constituted separate causes of action that could not be joined under California's former joinder statute, CAL. CIV. PROC. CODE § 427 (repealed 1971). See Comment, supra note 3, at 158.
52. Pomeroy studied the code extensively. See generally J. POMEROY, CODE REMEDIES, supra note 30. Former Section 427 was enacted in 1851, 1851 Cal. Stat. 51, 59-60, ch. 5, § 64,
mer Section 427 can be traced to the common-law forms of action. Thus, Section 427's classes and Pomeroy's categories were very similar, although not identical. Eventually former Section 427 was assumed to embody the primary rights perhaps because many courts cited Pomeroy's definition of a cause of action, thereby adopting the name he gave to basic rights. Over time, some California courts departed from the joinder statute categories and made independent decisions regarding which rights were "primary."

Under the primary rights theory, a plaintiff may bring multiple suits for injuries suffered in a single event if those injuries violate separate primary rights. By contrast, if the injuries violate the same primary right, only one suit is allowed. The courts have identified separate primary rights, distinguished primary rights from theories of...
Recognized separate rights

The initial step in the primary rights analysis is the identification of rights which are "primary." Separate primary rights recognized in California include the right to be secure in one's person, the right to be secure in one's property, the right to recover real property, the right to recover personal property, the right to equal opportunity for education, and others.

a. Bodily injury and property damage

California courts recognize violations of separate primary rights when an accident victim suffers simultaneous injury to his person and to his property. Consequently, the plaintiff is allowed to sue for bodily injury and property damage in separate lawsuits without incurring the penalty of res judicata.

For example, in Schermerhorn v. Los Angeles Pac. R.R. Co., the plaintiff suffered both bodily injury and property damage when the automobile in which he was a passenger collided with defendant's railroad car. The plaintiff brought the first suit for property damage and obtained a judgment for $700. His second suit for personal injuries was

---

61. See, e.g., Slater v. Blackwood, 15 Cal. 3d 791, 795, 543 P.2d 593, 594-95, 126 Cal. Rptr. 225, 226-27 (1975) (statutory violation and negligence are separate theories of recovery through which plaintiff can enforce single primary right to be free from injury to person); Ford Motor Co. v. Superior Court, 35 Cal. App. 3d 676, 679, 110 Cal. Rptr. 59, 61 (1973) (violation of state and federal anti-trust statutes constitutes violation of single primary right to be free from unfair competition); see infra notes 124-35 and accompanying text for a discussion of Slater and notes 137-48 and accompanying text for a discussion of Ford.

62. See, e.g., Verdier v. Verdier, 203 Cal. App. 2d 724, 737-38, 22 Cal. Rptr. 93, 102 (1962) (spouse who alleged adultery and extreme cruelty as separate grounds for divorce had two causes of action even though he sought only one divorce); see infra notes 160-70 and accompanying text for a discussion of Verdier.

63. Holmes, 70 Cal. 2d at 788-89, 452 P.2d at 649, 76 Cal. Rptr. at 433.

64. Id.


66. Id.

67. NAACP, 750 F.2d at 738.

68. Presenting an exhaustive list of the primary rights recognized in California is beyond the scope of this Comment. See generally 4 B. Witkin, supra note 1, §§ 23-53, at 66-93 for a collection of cases dealing with primary rights issues.

69. Schermerhorn, 18 Cal. App. at 456, 123 P. at 352.

70. Id.; Comment, supra note 10, at 414-45.

71. 18 Cal. App. 454, 123 P. 351 (1912).

72. Id. at 455, 123 P. at 352.

73. Id.
tried after judgment had been rendered in the first suit, and the jury awarded the plaintiff $600 in the second suit. On appeal, the defendant argued that a plaintiff could not bring separate suits to recover damages to person and property resulting from the “same tortious act.” However, the court recognized that the separate injuries to the plaintiff’s person and property gave rise to separate causes of action.

b. recovery of real property and recovery of personal property

California also recognizes that the primary right to recover real property is distinct from the primary right to recover personal property. Thus, an original suit grounded in wrongful possession of real property will not preclude a second suit alleging wrongful possession of personal property even though: (1) the personal property is located on the real property that was the subject of the first suit; and (2) the wrongful detention of the real and the personal property arises out of the same event.

The distinction between personal and real property rights was illustrated in McNulty v. Copp. The McNulty case involved a will contest between two daughters. The father willed his real property to one daughter, Eldridge. After he died, the other daughter, Ahern, filed an action (the original action) contesting the will. Eldridge asserted fraud as a defense, and cross-complained for cancellation of the deed and to quiet title. The trial court entered judgment for Eldridge.

74. Id.
75. Id.
76. Id. at 456, 123 P. at 352. The Schermerhorn court did not use “primary rights” language to justify its refusal to apply res judicata. Rather, the court relied on the separate classes of causes of action, set forth in the former joinder statute, to show that the plaintiff had separate causes of action. Id. See infra notes 255-99 and accompanying text for a discussion of California’s former joinder statute, CAL. CIV. PROC. CODE § 427 (repealed 1971). Nevertheless, Schermerhorn has been cited to show that injuries to person and injuries to property constitute violations of separate primary rights. See, e.g., Comment, supra note 10, at 416 n.32.
77. McNulty, 125 Cal. App. 2d at 707-08, 271 P. at 97.
78. Id.
80. Id. at 700, 271 P.2d at 93.
81. Id.
82. Id. Within hours of her father’s death, Ahern recorded an earlier deed that purportedly conveyed the real property to herself. Id. The trial court found that Ahern fraudulently obtained her father’s signature on the deed; her father was nearly blind and depended on Ahern to read to him. Id.
83. Id.
84. Id.
Eldridge filed two subsequent suits against Ahern. In the first of these actions (the real property action), Eldridge sought an accounting and damages for Ahern’s use and possession of the real property that was the subject of the original action. In the second action, Eldridge sought to recover personal property inside the residence and damages for the wrongful detention of personal property. Ahem pleaded res judicata to both of Eldridge’s actions, but her res judicata defense succeeded only in the real property action.

In the real property action, the court held that Eldridge could not treat wrongful possession of real property and withholding of possession of the same real property “as two separate acts or as a violation of two primary rights.” Rather, possession of the real property under a false claim of right gave rise to both the original action and the second real property action. Thus, allowing the second suit would amount to allowing Eldridge to split her cause of action, and the second real property action was barred by res judicata.

By contrast, the court held that res judicata did not bar the personal property action. The court found that the wrongful possession of real property violated a different primary right than the right violated when personal property is wrongfully detained. The court stated that the doctrine of res judicata would be “needless[ly] and unsound[ly]” extended if a plaintiff were required to unite actions involving separate primary rights.

85. Id. at 701, 271 P.2d at 93.
86. Id. at 699, 271 P.2d at 92.
87. Id. at 699-700, 271 P.2d at 92.
88. Id. at 701, 271 P.2d at 93.
89. Id. at 707, 271 P.2d at 97.
90. Id. at 704, 271 P.2d at 95.
91. Id. at 705, 271 P.2d at 96. The court found that the “essential deliction alleged” was the wrongful possession of real property. Id.
92. Id. at 707, 271 P.2d at 97.
93. Id. at 709, 271 P.2d at 98.
94. Id. at 708, 271 P.2d at 98.
95. Id. at 708-09, 271 P.2d at 98. While the McNulty case illustrates judicial recognition of separate rights to personal and real property, it contains analytical flaws. The court stated:

[T]here is no question that an action for the return and the value of possession of the personal property could have been joined with the original action [involving real property], but [the personal property action] is not so inherently connected with the original action as to require the application of the doctrine of res judicata when it is not so joined.

Id. at 708, 271 P.2d at 98 (emphasis added).

The court erroneously implied that the test for applying res judicata was whether the two actions were “so inherently connected.” Id. Additionally, the court may have erred in its assertion that Eldridge could have joined her cross-complaint for quiet title and her action for damages for withholding of personal property. Under California Code of Civil Procedure sec-
c. other primary rights

As stated above, the right to be secure in one's person, the right to be secure in one's property, the right to recover real property, and the right to recover personal property are each distinct primary rights in California. These rights correspond to four of the separate classes of causes of action set forth in California's former joinder statute. Due to the relationship between the joinder statute classes and recognized primary rights, the primary rights recognized most often in California have been those expressed in the former joinder statute.

New primary rights have been created on occasion. For example, in *Los Angeles Branch NAACP v. Los Angeles Unified School District*, a case involving public school desegregation, the NAACP argued that the primary right to be free from de jure segregation was separate from the primary right to be free from de facto segregation. The court disagreed, holding that the primary right involved was the right to be free from segregation regardless of the source. In stating that children have a primary right to equal opportunity for education, the court created a "new" primary right by recognizing a primary right distinct from those expressed in the former joinder statute.

The joinder statute in effect when *McNulty* was decided, the plaintiff could join causes of actions in the same lawsuit only if the causes fell within certain categories. *Cal. Civ. Proc. Code § 427* (repealed 1971); see supra note 49 for the text of former Section 427. Actions to recover real property and actions to recover personal property fell into different categories of causes of action. *Id.* The courts could not have applied res judicata to a claim that the plaintiff would not have been permitted to join under former Section 427. Thus, "inherent connection" was irrelevant both to joinder and to res judicata.

96. See supra notes 63-95 and accompanying text.

99. 750 F.2d 731 (9th Cir. 1984).
100. *Id.* at 737.
101. *Id.* at 738.
However, courts are not always willing to recognize a new primary right. In *R & A Vending Services, Inc. v. City of Los Angeles*, a vendor submitted a bid to operate concession stands in a Los Angeles park, but the city chose a different vendor. R & A sued, arguing unsuccessfully that since R & A had promised more rent to the city than its competitors, it had a "primary right to be chosen as the highest responsible bidder." The court found that R & A did not possess a primary right to operate its stand because provisions of the Los Angeles City Charter allowed the city discretion in selecting vendors. The *R & A* case illustrates two points: First, the primary rights concept is flexible enough to generate arguments in favor of new primary rights; second, even though these arguments are quite plausible, they may not withstand attack as well as more traditionally recognized rights.

In sum, the decisions regarding which rights are "primary" have been guided most often by whether the right corresponded to a separate class of cause of action under California's former joinder statute. Those rights included the right to be free from bodily injury, the right to be free from injury to property, the right to recover real property, and the right to recover personal property. However, some courts have been willing to accord "primary" status to rights other than those expressed in the joinder statute.

A plaintiff may only bring one suit to enforce a single primary

104. *Id.* at 1191, 218 Cal. Rptr. at 668.
105. *Id.* at 1194, 218 Cal. Rptr. at 670.
106. *Id.* at 1192-93, 218 Cal. Rptr. at 669.
107. See *infra* notes 332-490 and accompanying text for a discussion of the ambiguity of the primary rights theory.
108. The general reluctance to expand the number of recognized primary rights might be explained by two factors. First, the courts' desire for certainty causes continued reference to firmly established principles, and the legitimacy of most primary rights was established because they were set forth in former Section 427 of the California Code of Civil Procedure. *Holmes*, 70 Cal. 2d at 788, 452 P.2d at 648, 76 Cal. Rptr. at 433; Comment, *supra* note 3, at 158. Second, allowing the plaintiff to bring successive suits under several causes of action defeats one goal of res judicata—to bring an end to litigation. M. KANE, *supra* note 6, § 14.3, at 615. If a plaintiff is allowed to bring multiple suits under several causes of action, this goal is defeated.
110. *Id.*, subsection 6.
111. *Id.*, subsection 7.
112. *Id.*, subsection 2.
113. *Id.*, subsection 3.
114. See, e.g., *NAACP*, 750 F.2d at 739 (applying California law) (court found primary right to attend integrated schools); see *supra* notes 99-102 and accompanying text for a discussion of *NAACP*. 
right. Thus, courts must identify and legitimize particular rights as "primary." At the same time, courts must also distinguish between a primary right and a theory of recovery, and between a primary right and the remedy or relief sought.

2. Primary rights distinguished from theories of recovery

Primary rights are categories of rights whose violation causes injury to a plaintiff. By contrast, theories of recovery are the legal theories that enable a plaintiff to establish the defendant's liability. A plaintiff may employ several theories of recovery in order to establish the defendant's liability and thereby enforce the plaintiff's primary right.

For example, suppose a carpenter purchases a new power saw which malfunctions during the warranty period and cuts off a finger. The carpenter has suffered only one injury—njury to the person. Therefore, only one primary right was violated in the accident—the right to personal security. Consequently, the carpenter has only one cause of action, and he may bring only one lawsuit to recover for this injury. However, the carpenter has three theories of recovery that may be asserted against the defendant in order to enforce the single primary right: negligence in tort, strict liability in tort, and strict liability for breach of warranty. Which theory or combination of theories the carpenter chooses to assert is largely a matter of strategy, depending on the particular facts of the case and what the plaintiff expects to be able to prove. However, since only one primary right is at issue, the carpenter must

---

115. Panos, 21 Cal. 2d at 638, 134 P.2d at 244.
116. See, e.g., Slater, 15 Cal. 3d at 795, 543 P.2d at 594-95, 126 Cal. Rptr. at 226-27 (statutory violation and negligence are separate theories of recovery through which plaintiff can enforce single primary right to be free from injury to person); Ford, 35 Cal. App. 3d at 679, 110 Cal. Rptr. at 61 (violation of state and federal anti-trust statutes constitutes violation of single primary right to be free from unfair competition). See infra notes 124-35 and accompanying text for a discussion of Slater and notes 137-48 and accompanying text for a discussion of Ford.
117. See, e.g., Verdier, 203 Cal. App. 2d at 737-38, 22 Cal. Rptr. at 102 (spouse who alleged adultery and extreme cruelty as separate grounds for divorce had two causes of action even though he sought only one divorce). See infra notes 160-70 and accompanying text for a discussion of Verdier.
118. See 1 J. Pomeroy, Equity Jurisprudence, supra note 33, §§ 91-95.
119. See Comment, supra note 3, at 158.
120. Id.
122. The carpenter probably could not have observed either the manufacturer's or the seller's handling of the saw because it was purchased new. Therefore, it would be difficult for the carpenter to prove that either the manufacturer or the seller was negligent, since the carpenter most likely has no evidence of a breach of duty. However, under either a theory of
assert all of the theories in the same lawsuit in order to avoid a res judicata bar.\textsuperscript{123}

California courts distinguish primary rights and theories of recovery in several contexts. For example, in \textit{Slater v. Blackwood},\textsuperscript{124} the plaintiff was prohibited from bringing separate suits based on statutory violations and common-law negligence because both suits sought recovery for the same personal injuries.\textsuperscript{125} In \textit{Slater}, the plaintiff, Slater, was injured while she was a passenger in a car driven by the defendant, Blackwood.\textsuperscript{126} Slater's complaint for damages was framed in terms of California's former guest statute, which precluded a non-paying passenger's recovery unless the driver's conduct was either willful or the result of intoxication.\textsuperscript{127} The judge granted Blackwood's motion for nonsuit on the ground that the evidence did not support recovery under the guest statute.\textsuperscript{128}

A few years later, in a different case, the California Supreme Court held that the guest statute was unconstitutional as applied to an "injured nonowner guest."\textsuperscript{129} Shortly after the guest statute was held unconstitutional, Slater filed a second action seeking recovery on the ground of negligence.\textsuperscript{130} She argued that her cause of action for negligence was separate from her cause of action under the guest statute.\textsuperscript{131} The court denied recovery, stating that Slater had "misconstrue[d] the meaning of the term "cause of action."\textsuperscript{132} The court acknowledged that the two suits sought relief under two different legal theories—the first was stric-
tory, and the second was common-law negligence. However, the court emphasized that a plaintiff's cause of action "is based upon the harm suffered, as opposed to the particular theory asserted by the litigant." Thus, the first judgment in the driver's favor was a bar to the second suit, since both suits were based on a violation of the same primary right.

Similarly, separate state and federal statutes do not create separate primary rights if both statutes seek to protect the plaintiff from the same kind of harm. In Ford Motor Co. v. Superior Court, plaintiff Cartrade, Inc. (Cartrade) brought its first suit in federal court against Ford Motor Company (Ford) and a dealers' advertising association. Cartrade alleged that the two defendants had conspired to put Cartrade out of business in violation of the Sherman Act. Both defendants obtained a directed verdict. Cartrade filed its second suit in state court. The complaint al-

133. *Id.* at 794-95, 543 P.2d at 594-95, 126 Cal. Rptr. at 226-27.
134. *Id.* at 795, 543 P.2d at 594, 126 Cal. Rptr. at 226.
135. *Id.*, 543 P.2d at 594-95, 126 Cal. Rptr. at 227. A few other aspects of the *Slater* case are worthy of note. One is that its result is quite harsh, considering that while the guest statute was in effect, the statute prohibited Slater's negligence action. She argued that for this reason, her second suit should not be barred by res judicata. *Id.* at 796, 543 P.2d at 595, 126 Cal. Rptr. at 227. The court rejected this argument, stating: "Our Courts have repeatedly refused to treat the self-evident hardship occasioned by a change in the law as a reason to revive dead actions." *Id.* at 796, 543 P.2d at 595-96, 126 Cal. Rptr. at 227-28 (emphasis omitted) (quoting Zeppi v. State of California, 203 Cal. App. 2d 386, 388-89, 21 Cal. Rptr. 534, 536 (1962)).

Second, the *Slater* court noted the confusion between the terms "cause of action" and "count": "[T]he phrase 'cause of action' is often used indiscriminately to mean what it says and to mean *counts* which state differently the same cause of action." *Id.* at 796, 543 P.2d at 595, 126 Cal. Rptr. at 227 (quoting Eichler Homes of San Mateo, Inc. v. Superior Court, 55 Cal. 2d 845, 847, 361 P.2d 914, 916, 13 Cal. Rptr. 194, 196 (1961)).

Third, the *Slater* court used some confusing language despite its avowed adherence to the primary rights theory. The court stated that California follows the primary rights theory and emphasized that Slater suffered violation of only one primary right. *Id.* at 795, 543 P.2d at 594, 126 Cal. Rptr. at 226. However, in the same paragraph, the court stated: "It is clearly established that . . . there is but one cause of action for one personal injury [which is incurred] by reason of one wrongful act." *Id.* (emphasis added) (quoting Busick v. Workmen's Compensation Appeals Bd., 7 Cal. 3d 967, 975, 500 P.2d 1386, 1392, 104 Cal. Rptr. 42, 48 (1972)). "One wrongful act" is much closer to the same transaction definition of a cause of action than it is to the primary rights definition. Clearly, a single "wrongful act" can give rise to violation of more than one primary right, and these violations give the plaintiff more than one cause of action. 4 B. WITKIN, *supra* note 1, § 43; see also *supra* notes 64-95 and accompanying text. The *Slater* court's use of "one wrongful act" criteria may indicate the tendency of the courts to employ the same transaction definition despite primary rights constraints.

137. 35 Cal. App. 3d 676, 110 Cal. Rptr. 59 (1973).
138. *Id.* at 678, 110 Cal. Rptr. at 60.
139. *Id.*
140. *Id.*
141. *Id.*
leged the same acts that were alleged in the first suit, but this time Cartrade charged that these acts constituted violations of state unfair competition statutes. The court held that Cartrade had split its cause of action and, consequently, the second suit was barred by res judicata. The court explained that although separate state and federal remedies were available for illegal interference with business, Cartrade's two suits were based on the violation of a single primary right. Thus, Cartrade had only one cause of action.

While several courts have distinguished between primary rights and theories of recovery, other courts have faced the related problem of determining whether separate acts rendering a defendant liable under a single theory of recovery constitute violations of separate primary rights. The key to this determination is the number of plaintiff's interests injured by the defendant's conduct. If the plaintiff suffers only one injury to one interest, then only one primary right is violated, regardless of how many acts the defendant committed in the course of causing the injury.

The California Supreme Court limited the plaintiff to a single cause of action in Panos v. Great Western Packing Co., where different occurrences were actionable under a single negligence theory of recovery. Panos, the plaintiff, went to the Great Western Packing Company (Great Western) to purchase meat. While there, he was struck and injured by a large piece of meat conveyed on an overhead trolley. Panos initially sued Great Western and Wilson Lee, another customer, alleging that Lee had negligently pushed the meat, thereby causing it to strike Panos. Panos further alleged that Great Western was negligent in allowing Wilson to enter its premises, take possession of the meat, and use the trolley so as to injure Panos. Judgment was rendered in favor of Lee and Great Western.

142. Id.
143. Id. at 680, 110 Cal. Rptr. at 62.
144. Id. at 679, 110 Cal. Rptr. at 61.
145. Id. The court noted that both the state and federal claims could have been asserted in the federal action pursuant to the federal court's exercise of pendent subject matter jurisdiction. Id. at 679-80, 110 Cal. Rptr. at 61.
147. Id. at 638, 124 P.2d at 244.
148. Id.
149. 21 Cal. 2d 636, 134 P.2d 242 (1943).
150. Id. at 636-37, 134 P.2d at 243.
151. Id. at 637, 134 P.2d at 243.
152. Id.
153. Id.
154. Id.
Four months later, Panos brought a second suit against Great Western, alleging that Great Western itself had negligently operated the trolley.\footnote{Panos argued that the first and second suits were based on separate causes of action “because the negligence charged to [Great Western] in [the second] action differ[ed] from the negligence charged against it in the prior action.”} The court disagreed, finding that Panos had only one cause of action because he had suffered only one injury, and consequently only one of his primary rights had been violated.\footnote{In sum, a primary right is distinct from a theory of recovery. If only one of the plaintiff’s primary rights is violated, the plaintiff must assert all of the possible legal theories to enforce that right in the same lawsuit or risk a res judicata bar. Similarly, the plaintiff must allege all manifestations of a single theory in the same lawsuit because, in California, a cause of action for purposes of res judicata is defined in terms of the number of primary rights violated.}

In Panos, both suits alleged personal injury. \footnote{Panos, 21 Cal. 3d at 638, 134 P.2d at 244} If the second suit had alleged property damage instead, the second suit would have been allowed if the court were to use the “one injury” test. However, if the “single tort” standard were applied, it would not matter that the second suit alleged a different kind of injury or that it alleged a violation of a different primary right; a second suit for property damage would be disallowed if the damages resulted from a “single tort.” Thus, by indicating that a “single tort” gives rise to only one cause of action, the court appears to be endorsing the same transaction definition of a cause of action.

Today, the California courts may reach the same result that would be obtained under the same transaction definition despite purported adherence to the primary rights theory. This can happen because the concept of a primary right is ambiguous; thus, the right at issue can be defined so broadly that the right encompasses the entire issue that gives rise to the claim. \footnote{See, e.g., Takahashi v. Board of Trustees, 783 F.2d 848, 851 (9th Cir.), cert. denied, 476 U.S. 1182 (1986) (applying California law) (plaintiff alleged violations of contract and personal injury rights in separate suits, but court found violation of only one contractual right while personal injury, in form of emotional distress, was merely element of consequential damages). See infra notes 468-86 and accompanying text for a discussion of Takahashi.}
3. Primary right distinguished from remedy or relief sought

A plaintiff may seek several remedies for injuries sustained in a single event, or may seek a single remedy for several wrongs. However, the number of remedies a plaintiff seeks has no effect on the number of primary rights violated; therefore, the number of remedies sought does not determine the number of causes of action. This distinction was illustrated in *Verdier v. Verdier*, where a husband brought two separate suits for divorce. Verdier's first suit, filed in France, was grounded in adultery. After four years, the French action had not been resolved, so Verdier filed a second divorce action in California grounded in extreme cruelty. Approximately two and one-half years after filing the California suit, Verdier dismissed it with prejudice, but he expressly reserved the right to prosecute the French suit.

Verdier's wife sought to enjoin her husband's prosecution of the French action on the ground that her husband could obtain only one divorce. The court disagreed, stating that she had confused "the sought relief with the primary right which constitutes the cause of action." Violation of a single primary right may entitle the plaintiff to a variety of remedies, including divorce, separation, and support. However, the primary right violated, rather than the remedy sought, determines whether one or more causes of action have been asserted. Thus, although the husband had sought the same remedy in both actions, he had alleged violations of separate primary rights: "the right not to be subjected to extreme cruelty . . . [and the right] not to have one's spouse engage in adulterous conduct . . . ." Therefore, Verdier had two causes of action.

---

158. 4 B. Witkin, *supra* note 1, § 29.
161. *Id.* at 727, 22 Cal. Rptr. at 95.
162. *Id.*, 22 Cal. Rptr. at 95-96.
163. *Id.* at 729, 22 Cal. Rptr. at 96.
164. *Id.*
165. *Id.* at 737-38, 22 Cal. Rptr. at 102.
166. *Id.* at 738, 22 Cal. Rptr. at 102.
167. *Id.*
168. *Id.*
169. *Id.* at 737-38, 22 Cal. Rptr. at 102.
170. *Id.* The *Verdier* suit would proceed very differently today. In 1962, when *Verdier* was decided, California courts granted divorces on a "fault" basis. *Cal. Civ. Code* § 92 (repealed 1969). Thus, to show "fault," a spouse seeking a divorce had to base the divorce action on one of the following causes: (1) adultery; (2) extreme cruelty; (3) willful desertion; (4) willful neglect; (5) habitual intemperance; (6) conviction of a felony; or (7) incurable insanity. *Id.* In 1969, the California Legislature passed the Family Law Act, 1969 Cal. Stat. 3314, ch. 1608,
In sum, the plaintiff's primary right is distinct from the relief sought by the plaintiff. In a second suit, the defendant cannot plead res judicata on the grounds that plaintiff is seeking the same relief as he sought in the first suit if the two suits allege violations of different primary rights.

C. Summary

The identification of specific primary rights, along with the distinctions between primary rights and theories of recovery, and between primary rights and remedies, are the cornerstones of the operation of the primary rights theory. The operation of the primary rights theory has, in turn, determined how and when res judicata is applied in California.

At one time, the primary rights theory was consistent with the concepts governing the related procedures of pleading, amendment, and joinder. However, these procedures have changed substantially, and the changes have made the primary rights theory functionally obsolete.

III. DISHARMONY BETWEEN RES JUDICATA AND THE RELATED PROCEDURES OF PLEADING, AMENDMENT, AND JOINDER

A. Historical Development of Pleading, Amendment, and Joinder

1. The forms of action at common law

Until the mid-1850s, a plaintiff brought an action at law by securing a writ that most closely fit the wrong he had suffered. The writ was similar in function to the modern summons, but separate writs, or "forms of action" evolved to cover different wrongs. Thus, for example, if the plaintiff wanted to sue the defendant for trespass, debt, and nuisance, the plaintiff had to obtain three separate writs and bring three
separate suits. The common-law, or “writ” system began to evolve in England at the time of the Norman conquest. Initially, the plaintiff would apply to the Chancellor for an Original Writ, which authorized one of the king’s courts to try a specific action. Several kinds of injuries occurred frequently, and writs for these injuries were issued repeatedly. If a writ was issued often enough, it was placed on the Register of Writs and became a Writ of Course. A Writ of Course could be issued to anyone who applied for it and paid the proper fee. The writ served three functions: (1) It gave the court jurisdiction over the parties; (2) it gave the court jurisdiction over the subject matter; and (3) it limited the scope of the action to trespass, debt, nuisance, or whatever form of action that the plaintiff had selected.

After securing the desired writ, the plaintiff had to file a Declaration, the equivalent of the modern complaint, stating the facts constituting the claim. The facts had to be set forth in the context of a right/duty relationship between the litigants; the Declaration had to state the plaintiff’s right, the defendant’s violation of that right by a wrongful act, and the resulting damages. If the facts set forth in the Declaration showed that the plaintiff selected the wrong writ, the complaint was dismissed and the plaintiff had to begin again. A plaintiff could only join claims if they were both covered by the same writ or form of action; separate suits on each writ were required. An underlying premise of the common-law trial was that only one simple issue could be tried at one time.

175. F. JAMES & G. HAZARD, supra note 6, § 9.2, at 463.
176. J. COUND, supra note 14, ch. 4, § A, at 388.
177. J. KOFFLER & A. REPPY, supra note 32, § 5, at 33-34.
178. Id. at 32.
179. Id. § 13, at 59.
180. Id.
181. Id.
182. Id. § 8, at 38.
183. F. JAMES & G. HAZARD, supra note 6, § 1.3, at 10.
184. J. KOFFLER & A. REPPY, supra note 32, § 21, at 86.
185. Id. at 86-89.
186. Id. § 8, at 39.
187. Toelle, Joinder of Actions—With Special Reference to the Montana and California Practice, 18 CALIF. L. REV. 459, 460-61 (1930). There were limited exceptions to this rule: debt could be joined with detinue, and case could be joined with trover. Id. at 461.
188. Comment, supra note 174, at 102. The desire for simplicity can be traced to the modes of proof that were used before the jury became the trier of fact. Blume, A Rational Theory for Joinder of Causes of Action and Defenses, and for the Use of Counterclaims, 26 MICH. L. REV.
Thus, under the writ system, form often prevailed over substance. If the plaintiff made the technical error of choosing the improper writ, the suit was dismissed, despite the merits of the claim. Additionally, the common-law courts required the plaintiff to prosecute a separate lawsuit for each issue, even though the evidence to prove all of the contentions might be identical. The result was that the common-law system was often unfair to the litigants and burdensome to the courts. Therefore, the courts of equity became a desirable alternative.

2. Equity

The separate system of equity courts evolved as a result of the law courts' inadequacies. The forms of action in the law courts did not cover every legally cognizable injury, and, therefore, plaintiffs were sometimes left with no remedy at law. At times, the law courts' procedures were inadequate to secure necessary evidence. Additionally, some local law courts were plagued by inefficiency and corruption. For these reasons, a plaintiff was often allowed to circumvent the law courts by petitioning directly to the king and his council, who referred

1, 2-3 (1927). Under these modes of proof, the defendant was tried by oath, battle, or ordeal. "Id. at 2. If he was tried by ordeal, he could not "sink and float at the same time"; if he was tried by battle, he could not be "both the victor and the vanquished." Thus, if the defendant was tried under one of these modes, he had to be completely innocent or completely guilty. Accordingly, only one controversy could be settled at one time. If the defendant were to be tried on two issues, it was possible that he might win on one and lose on the other, and this outcome could not have been accommodated. Nevertheless, when trial by jury replaced the older modes, the single-issue tradition persisted, and later jurists rationalized its perpetuation with the notion that "the twelve men (the jury) are commonly rude and ignorant, and so, consequently, not proper to be troubled with too many things at one time." "Id. at 2-3 (quoting H. Stephen, A Treatise on the Principles of Pleading in Civil Actions 55 n.57 (S. Tyler ed. 1871)).

189. F. James & G. Hazard, supra note 6, § 1.6, at 17 ("Too often mistakes of form led to loss of a suit by the party entitled to win on the merits.").
190. M. Kane, supra note 6, § 5-4, at 246.
192. F. James & G. Hazard, supra note 6, § 1.6, at 17.
193. Since a plaintiff was usually not allowed to join two forms of action in the same suit, the plaintiff had to bring separate lawsuits on injuries arising from the same occurrence. Toelle, supra note 187, at 460-61. In this situation, the courts spent twice the judicial resources that would have been required if the plaintiff could have joined the claims. The equity courts recognized the improvidence of this system. Blume, supra note 188, at 10 ("While courts of law were condemning a multiplicity of issues, courts of equity were condemning a multiplicity of suits.").
194. F. James & G. Hazard, supra note 6, § 1.4, at 11.
195. Id. at 11-12.
196. Id.
197. Id. at 12.
198. Id.
the matter to a chancellor.  Thus, the jurisdiction of the equity courts was completely separate from that of the law courts.

The equity court system had its own body of substantive and procedural law. The procedures were quite different from those in the law courts. The "forms of action" that separated the issues in the courts of law did not exist in equity, and the absence of rigid categories affected both pleading and joinder of causes. With respect to pleading, the formation of a legal issue was not emphasized; instead, equity pleadings were sworn statements containing facts set forth in considerable detail.

With respect to joinder of causes, the equity courts were much more flexible than the law courts, because joinder in equity was based on different principles. Equity procedure was based on trial convenience, and the Chancellor (the judge in the equity courts) had discretion to permit joinder in each case.

Equity courts would try multiple issues that arose "out of the same transaction or out of transactions connected with

---

199. Id.
200. Id. at 13 ("[E]quity jurisdiction remained extraordinary and in some sense extra-legal.").
201. Id.
204. Id.
205. Id. These statements served a dual function: they set forth the parties' contentions, and they also constituted the evidence upon which the case was decided. M. KANE, supra note 6, § 5.1, at 237.

Although the equity pleading system had definite advantages, it was not without its drawbacks.

A bill in [equity] was a marvellous [sic] document, which stated the plaintiff's case at full length and three times over. There was first the part in which the story was circumstantially set forth. Then came the part which "charged" its truth against the defendant—or, in other words, which set it forth all over again in an aggrieved tone. Lastly came the interrogating part, which converted the original allegations into a chain of subtly framed inquiries addressed to the defendant, minutely dovetailed and circuitously arranged so as to surround a slippery conscience and to stop up every earth. No layman, however intelligent, could compose the "answer" without professional aid. It was inevitably so elaborate and so long, that the responsibility for the accuracy of the story shifted, during its telling, from the conscience of the defendant to that of his . . . counsel, and truth found no difficulty in disappearing during the operation.

J. COUND, supra note 14, ch. 4, § C, at 420-22 (quoting BOWEN, Progress in the Administration of Justice During the Victorian Period, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516, 524-27 (1907)).

Modern code pleading does not require the same factual detail that was required in equity. C. CLARK, supra note 16, § 5, at 16-17. One possible explanation for this difference is that under the codes, the facts alleged in the pleadings do not constitute evidence. F. JAMES & G. HAZARD, supra note 6, § 3.5.
206. Blume, supra note 188, at 10.
207. Toelle, supra note 187, at 465.
the subject of the action,"208 or if the issues presented "common questions of law or fact."209 While the law courts presumed that their juries were incapable of handling complex issues,210 this concern was inapplicable in equity because the equity courts had no jury.211 A defendant who objected to joinder in equity had to show that he would be clearly prejudiced if joinder were allowed.212

Thus, joinder was significantly different in the equity courts and the law courts. While joinder of causes at law was generally allowed only if the causes fell within the same form of action,213 equity courts aimed to resolve as much as possible in a single lawsuit.214 The equity courts' flexibility was attractive in comparison to the rigidity of the common-law courts.215 Reform came to the law courts through the Field Codes, which borrowed several practices from the equity courts.216

3. The codes

The development of the Codes of Civil Procedure began in New York.217 In 1846, New York adopted a new constitution which made two significant changes in common-law procedure.218 First, the equity court was abolished.219 Second, commissioners were appointed to revise

208. Id.
209. Id. at 464.
210. Id. at 463.
211. C. CLARK, supra note 16, § 5, at 16.
212. Toelle, supra note 187, at 464.
213. Id. at 460-61.
214. Id. at 464-65.

By contrast, some scholars think that the flaws of common-law pleading have been unduly emphasized, and that the contributions made by common-law pleading to modern jurisprudence have not received sufficient credit:

Infinite damage has been done to the cause of legitimate Legal Reform . . . by proclaiming the concept that all that has gone before in our procedural ancestry should be regarded as obsolete and worthless, and is not to be considered in terms of Modern Pleading and Practice . . . and Modern Legal Education. Those who take this limited view have clearly confused the real merits of the Common-Law System with those portions of the System which were needlessly technical, thus overlooking the salient fact that it had developed many sound and enduring principles of legal procedure. They have also overlooked the fact that there is great similarity in the essential principles underlying Pleading at Common Law, in Equity, under Modern Codes and Practice Acts, and even under the . . . Federal Rules of Civil Procedure . . . than is generally realized.

J. KOFFLER & A. REPPY, supra note 32, at 5.
216. Id. § 5, at 16-17.
217. J. COUND, supra note 14, ch. 4, § D, at 426.
218. Id.
219. Id.
and simplify civil procedure in New York’s law courts. The commissioners were directed to create a system that would: (1) eliminate the forms of action in the courts of law, (2) establish uniform procedures that would be applicable to both legal and equitable actions, and (3) eliminate “any form and proceeding not necessary to preserve the rights of the parties.”

The First Report of the Commissioners on Practice and Pleadings was issued in 1848. Later that year, the New York Legislature enacted its Code of Civil Procedure. The New York Code became the prototype for similar codes in other states and influenced the development of the Federal Rules of Civil Procedure. The codes were often called “Field Codes,” named after the influential commissioner David Dudley Field. California adopted the Code in 1851.

The Code produced three major departures from common-law procedure. First, procedural differences between actions at law and actions in equity were abolished. Second, the forms of action were abolished and only one form of action, the “civil action,” remained. Third, the emphasis in pleading shifted from issues to facts. Due to these changes, the procedures of pleading, joinder, and amendment under the Code came to be limited by facts instead of by legal categories.

a. pleading

The Code’s creators intended to eliminate “issue pleading” en-

---

220. Id.
221. Id. (quoting 1847 N.Y. Laws 66, 67-68, ch. 59, § 8).
222. Id.
224. J. COUND, supra note 14, ch. 4, § D, at 428.
225. Id.
226. Id.
228. C. CLARK, supra note 16, § 8, at 23.
229. Id. at 22-23.
230. Id. at 23. In California, “[t]here is . . . but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs.” CAL. CIV. PROC. CODE § 307 (West 1982). In federal courts, “[t]here shall be one form of action to be known as ‘civil action.”’ FED. R. CIV. P. 2.
231. C. CLARK, supra note 16, § 7, at 22-23. “Issue pleading” had been required at common law. Id. § 5, at 16. By contrast, in the equity courts, the plaintiff was required to plead facts in considerable detail. Id. See infra notes 232-43 for a discussion of code pleading.
tirely. Instead, the plaintiff was supposed to allege only the "dry, naked, actual facts" that constituted the grievance against the defendant. Conclusions of law and evidentiary matters were supposed to be excluded from the pleadings. While the plaintiff's complaint would have been dismissed at common law if the facts stated did not fit the form of action selected, under the Code, the court could consider "the whole substantive law" in deciding whether the plaintiff had alleged sufficient facts to state a cause of action. It was the province of the court, not the plaintiff, to identify and apply law to facts, and thus establish a legal relationship between the plaintiff and the defendant.

The segregation of factual allegations from conclusions of law has not continued in modern California code pleading. Rather, the current test in California is "whether the pleading as a whole apprises the adversary of the factual basis of the claim." The difficulty in practice of distinguishing among facts, conclusions of law, and evidence led to the rule that the presence of conclusions of law in a complaint does not constitute grounds for dismissal. However, the plaintiff must still allege sufficient facts in his complaint to state a cause of action, or his complaint can be dismissed on grounds of insufficiency. Thus, in California, category-based criteria for determining the sufficiency of a plead-

232. D. FIELD, PLEADING MANUAL, Second Rule, reprinted in CAL. CIV. PROC. CODE § 425.10, Code Commissioners' Note (Deering 1972); see also 4 B. WITKIN, supra note 1, § 332, at 382. "Under the common-law system the pleadings were expected to formulate the issue to be tried. The original code ideal was that the pleadings should disclose the material facts of the case." C. CLARK, supra note 16, § 11, at 54.

233. F. JAMES & G. HAZARD, supra note 6, § 3.6, at 138 (quoting J. POMEROY, Remedies and Remedial Rights § 529, at 566 (1876)).

234. D. FIELD, supra note 232; see also 4 B. WITKIN, supra note 1, § 332, at 382.


236. F. JAMES & G. HAZARD, supra note 6, § 3.5, at 136.

237. D. FIELD, supra note 232; see also 4 B. WITKIN, supra note 1, § 332, at 382.

238. 4 B. WITKIN, supra note 1, § 332, at 382-83.

239. Id. at 383 (citing Semole v. Sansoucie, 28 Cal. App. 3d 714, 721, 104 Cal. Rptr. 897, 901 (1972)) (emphasis added).

240. 4 B. WITKIN, supra note 1, § 332, at 382-83.

241. Id. at 383 (citing Krug v. Meeham, 109 Cal. App. 2d 274, 277, 240 P.2d 732, 733-34 (1952)).

242. Id.
ing have been supplanted by criteria based on facts.\textsuperscript{243}

\textit{b. amendment}

At common law, a plaintiff was allowed to correct errors and omissions in his pleadings if the corrections did not change the form of action selected.\textsuperscript{244} After the forms of action were abolished,\textsuperscript{245} this rule had no purpose.\textsuperscript{246} Still, under the California Code, the plaintiff was not allowed to amend a complaint if the amendment alleged violation of a different primary right, thereby changing the cause of action alleged in the original complaint.\textsuperscript{247} However, the amendment was allowed to change the legal theory\textsuperscript{248} or the relief sought.\textsuperscript{249} The prohibition against amendments which involved a new cause of action was justified by two reasons: (1) the defendant should not be expected to prepare for an entirely new case within the time originally allotted; and (2) the plaintiff should not be allowed to circumvent the statute of limitations by bringing a new cause of action as an amendment to the original cause of action.\textsuperscript{250} For these purposes, the scope of the cause of action was determined according to the primary rights theory.\textsuperscript{251}

Critics of this rule pointed out that it was often more difficult for the defendant to respond to a new legal theory than to a technical change in the cause of action.\textsuperscript{252} Eventually, the "same cause of action" rule was abandoned,\textsuperscript{253} and the plaintiff is now permitted to amend a complaint provided that he seeks recovery "on the same general set of facts."\textsuperscript{254} Thus, limitations on amendment became divorced from forms of action, causes of action, primary rights, or any other legal category.

\textit{c. joinder}

Vestiges of the common-law forms of action survived under the
The Code, particularly with respect to joinder. The Code joinder statutes—like the common law—divided actions at law into specific categories, and initially, actions falling within separate categories could not be joined in the same lawsuit. The permissive joinder provision of the California Practice Act of 1851, which was based on the original New York Code provision, identified the categories of claims which could be joined.

The joinder statute categories demonstrated California’s commitment to the primary rights theory. The statute clearly prohibited joinder of causes which were based on violations of separate primary rights, but the statute also implied that separate primary rights gave rise to separate causes of action. The statute was described as “arbitrary and not based on reasons of fairness and convenience.” Thus, the statute set the stage for illogical and inefficient results.

Any of the statute’s specific actions at law could be joined with an equitable action, but this leeway did not always allow the plaintiff to join all of the claims he might have arising from the same occurrence. For example, if the defendant simultaneously beat the plaintiff, ripped his clothes, and slandered him in front of his peers, the plaintiff had to bring separate suits for battery, injury to property, and defamation, because these injuries fell into three different classes.

255. See Blume, supra note 188, at 17-18; Friedenthal, supra note 15, at 3; Toelle, supra note 187, at 466-67.
256. 1848 N.Y. Laws 497, 525, ch. 379, § 143; 1851 Cal. Stat. 51, 59-60, ch. 5, § 64 (codified as amended at CAL. CIV. PROC. CODE § 427 (repealed 1971)).
257. 1851 Cal. Stat. 51, 59-60, ch. 5, § 64 (codified as amended at CAL. CIV. PROC. CODE § 427 (repealed 1971)).
258. 1848 N.Y. Laws 497, 525, ch. 379, § 143.
259. CAL. CIV. PROC. CODE § 427 (repealed 1971).
261. Id.
262. The link between the separate classes of causes of action for purposes of joinder and separate causes of action based on primary rights for purposes of res judicata has been assumed rather than explained. See 4 B. WITKIN, supra note 1, § 43; Comment, supra note 3, at 158 & n.7.
264. Id. at 2-3.
266. See, e.g., Schermerhorn v. Los Angeles Pac. R.R. Co., 18 Cal. App. 454, 123 P. 351 (1912). The appellate court in Schermerhorn confirmed that the plaintiff would have been unable to join claims for bodily injury and property damage in the same lawsuit even though the plaintiff sustained both injuries as the result of the defendant’s single act. Id. at 456, 123 P. at 352. See supra notes 71-76 for a discussion of Schermerhorn.
267. CAL. CIV. PROC. CODE § 427 (repealed 1971); Toelle, supra note 187, at 467. Under former Section 427, battery constituted injury to person (class no. 6), destruction of clothes
Yet, the plaintiff could join two unrelated actions for breach of contract.\textsuperscript{268} For example, one California plaintiff was allowed to join claims on an implied contract and on a wholly separate written contract to which he was not a party but upon which he had been assigned the right to sue.\textsuperscript{269} The contract class was so broad that it allowed joinder of totally unrelated claims,\textsuperscript{270} while the tort classes were so narrow that injuries suffered during the same occurrence often could not be joined.\textsuperscript{271}

In 1907, Section 427 was amended to add another joinder class.\textsuperscript{272} This eighth class allowed the plaintiff to:

unite several actions in the same complaint, where they all arise out of . . . the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.

The causes of action so united must all belong to only one of these classes . . . but an action for malicious arrest and prosecution, or either of them, may be united with an action for either injury to character or to the person.\textsuperscript{273}

The wording of the eighth class produced confusion.\textsuperscript{274} If the amendment were read literally, a plaintiff could not join causes of action arising out of the same transaction if those actions fell into one of the first seven categories. Since the first seven classes encompassed almost all conceivable causes, the amendment would not have had an expansive effect had it been narrowly construed.\textsuperscript{275} However, many courts believed that the legislature intended to liberalize joinder, and they carried out this intent by "simply ignoring the wording of the section."\textsuperscript{276} Indeed, a literal reading of the "same transaction" portion of the amendment appeared to be at odds with the other part of the amendment which allowed actions for malicious prosecution to be tried with actions for inju-

\begin{footnotes}
\footnote{constituted injury to property (class no. 7), and defamation constituted injury to character (class no. 5). \textit{Cal. Civ. Proc. Code} § 427 (repealed 1971).}
\footnote{268. Friedenthal, \textit{supra} note 15, at 4.}
\footnote{269. \textit{Id.} (citing Frazer v. Oakdale Lumber & Water Co., 73 Cal. 187, 14 P. 829 (1887)).}
\footnote{270. \textit{Toelle, supra} note 187, at 467.}
\footnote{271. Friedenthal, \textit{supra} note 15, at 4.}
\footnote{273. \textit{Id.} (emphasis added).}
\footnote{274. Friedenthal, \textit{supra} note 15, at 2.}
\footnote{275. \textit{Id.}}
\end{footnotes}
ries to property or to character.\textsuperscript{277}

Subsequent amendments to Section 427 bolstered the notion that the legislature wanted to expand joinder. In 1915, Section 427 was amended to allow claims for injuries to property and injuries to person "growing out of the same tort" to be joined in the same complaint.\textsuperscript{278} In 1931, a ninth category was added, so that a plaintiff could join "[a]ny and all claims for injuries arising out of a conspiracy, whether of the same or of different character, or done at the same or different times."\textsuperscript{279} However, despite these changes, the restrictive language of the eighth category was never deleted.\textsuperscript{280}

In 1970, Professor Jack H. Friedenthal published a study\textsuperscript{281} which criticized the wording of Section 427 and its amendments.\textsuperscript{282} However, Friedenthal did not believe that the confusing language was Section 427's most serious flaw.\textsuperscript{283} He stated that "the entire concept behind [Section 427 made] little sense,"\textsuperscript{284} and he saw no need to restrict joinder of causes at all.\textsuperscript{285} He pointed out that to the extent that courts read the "same transaction" category narrowly, a plaintiff was forced to bring separate tort actions for separate injuries resulting from the same event; thus, the same evidence would have to be presented twice.\textsuperscript{286} By contrast, completely unrelated claims could be joined under the contract category.\textsuperscript{287} However, this situation had "not produced any suggestion that such joinder should be curtailed."\textsuperscript{288} He noted that Federal Rule of Civil Procedure 18(a) allowed unlimited joinder of claims,\textsuperscript{289} and that Rule 18(a) had become a model joinder provision for several states.\textsuperscript{290}

\textsuperscript{277} See supra text accompanying note 273.
\textsuperscript{278} 1915 Cal. Stat. 30, ch. 28, § 1.
\textsuperscript{279} 1931 Cal. Stat. 396, ch. 224, § 1.
\textsuperscript{280} Friedenthal, supra note 15, at 2.
\textsuperscript{281} Friedenthal, supra note 15.
\textsuperscript{282} Id. at 1-4.
\textsuperscript{283} Id. at 4.
\textsuperscript{284} Id.
\textsuperscript{285} Id. at 5.
\textsuperscript{286} Id. at 4.
\textsuperscript{287} See supra notes 268-70 and accompanying text.
\textsuperscript{288} Friedenthal, supra note 15, at 5.
\textsuperscript{289} Id. Rule 18(a) of the Federal Rules of Civil Procedure states that any "party asserting a claim for relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against the opposing party." FED. R. CIV. P. 18(a).
\textsuperscript{290} Friedenthal, supra note 15, at 5. Professor Friedenthal believed "Of all the provisions of the Federal Rules of Civil Procedure and their state counterparts dealing with joinder, [Rule 18(a) governing] joinder of claims has operated most smoothly and satisfactorily." Id. (quoting Wright, Joiner of Claims and Parties Under Modern Pleading Rules, 36 MINN. L. REV. 580, 582 (1952)).
Friedenthal also examined California’s own rules regarding joinder of defendant’s counterclaims and cross-complaints.291 These rules allowed the defendant to bring a cross-complaint against a co-defendant if it arose out of the “same transaction” as the plaintiff’s claim, and allowed the defendant to counterclaim against the plaintiff regardless of whether the counterclaim arose out of the same transaction.292 Friedenthal found it anomalous that the defendant was permitted broad joinder of counterclaims and cross-claims, while joinder of plaintiff’s claims was restricted by categories.293 Further, he pointed out that if the case grew too complex due to unlimited joinder of causes, the causes could be severed for trial.294

Friedenthal’s work was utilized by the California Law Revision Commission (Commission) when it prepared its Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions (Recommendation) in 1970.295 The Recommendation echoed Friedenthal’s belief that limiting joinder by arbitrary categories was inefficient.296 The Commission recommended mandatory joinder of plaintiff’s claims when the claims arose out of “the same transaction or occurrence.”297 This proposal was consistent with the rule requiring defendants to join all counterclaims that arose from the same transaction or occurrence as the plaintiff’s claims.298

The California Legislature repealed Section 427 in 1971.299 Its re-

291. Id.
293. Friedenthal, supra note 15, at 5.
294. Id.
295. Recommendation, supra note 227. The Commission included Professor Friedenthal’s study as part of its presentation to the Governor. Friedenthal, supra note 15, reprinted in Recommendation, supra note 227, at 581-619.
296. Recommendation, supra note 227, at 508-09. The Recommendation cited a resolution prepared by the San Francisco Bar Association, which stated that the joinder statutes were “unnecessarily difficult for the practicing attorney to follow without guesswork and extensive legal research . . . [and that they were] highly unpredictable in their effect—an intolerable situation.” Id. at 509 n.8.
297. Id. at 510. The Commission also submitted proposed legislation revising the joinder statutes. See id. at 545-56. One proposed statute, Section 426.20 would have required mandatory joinder of plaintiff’s “related causes of action.” Id. at 545. The legislature did not adopt the proposed section.
298. Id. at 510.
placement, the current California statutory provision for "[j]oinder of other causes of action by plaintiff," was codified at Section 427.10(a). Section 427.10(a) states that "[a] plaintiff who in a complaint . . . alleges a cause of action against one or more defendants may unite with such cause any other causes which he has . . . against any of such defendants."

The Legislative Committee Comment to Section 427.10 noted that the new statute abolished the arbitrary joinder categories. Section 427.10 reflects the principle that once a litigant is a proper party to the action, his adversaries may join any other claims that they have against him. Possible undesirable effects resulting from broad joinder can be cured by severance of causes or issues for trial.

Other changes were made in the California joinder statutes in 1971. The counterclaim was abolished and became a variety of the cross-complaint. Any claim by any party against any other party, except for the plaintiff's original claim against the defendant, may be filed as a cross-complaint. A cross-complaint is now compulsory under Section 426.30 if it arises out of the same transaction or occurrence as the claim asserted against the party filing the cross-complaint.

In sum, the principles governing joinder in California have changed markedly since the Code of Civil Procedure was enacted in 1851. Originally, the plaintiff could join claims only if they fell within the specific

---

300. Id. § 23 (codified at CAL. CIV. PROC. CODE § 427.10(a) (West 1973)).
301. Id. (emphasis added).
302. REPORT OF SENATE COMM. ON JUDICIARY ON SENATE BILL 201, SENATE JOURNAL, Apr. 1, 1971, 884, 887 [hereinafter SENATE REPORT].
303. Id.
304. Id.
305. See CAL. CIV. PROC. CODE § 428.80 (West 1973).
306. See id. § 428.10; COMMUNICATION FROM ASSEMBLY COMMITTEE ON JUDICIARY ON SENATE BILL 201, ASSEMBLY JOURNAL, 5236, 5243 (June 16, 1971).
307. CAL. CIV. PROC. CODE § 426.30 (West 1973). Compulsory cross-complaints are governed by the California Code of Civil Procedure Sections 426.10-426.60. Section 426.10 sets forth definitions used in these subsections:
   (a) "Complaint" means a complaint or cross-complaint.
   (b) "Plaintiff" means a person who files a complaint or cross-complaint.
   (c) "Related cause of action" means a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint.
Id. § 426.10 (West 1973).

Section 426.30 provides, in effect, that if X files a claim against Y, Y has a potential claim against X which is a "related cause of action" (i.e., arises out of the same transaction as X's claim), and Y fails to file a cross-complaint against X at the time Y serves his answer, then Y waives his right to assert the "related causes of action" at a later time. See id. § 426.30. This rule will not be applied if the court has no jurisdiction over Y, or if Y does not file an answer.
Id.
This rule was modified by amendments which allowed joinder of certain claims if they arose from the same transaction or occurrence as the original claim. In 1971, the Code joinder statute was repealed, and the Code categories abolished. Under the current joinder rules: (1) the plaintiff can join all claims he has against the defendant; (2) the defendant can assert any claims he has against the plaintiff by filing a cross-complaint; (3) the defendant’s cross-claims are compulsory if they arise out of the same transaction as the plaintiff’s claim; and (4) the plaintiff must assert any remaining claims he has against the defendant, or waive them, if they arise out of the same transaction or occurrence as the defendant’s cross-claim. Accordingly, joinder is no longer determined by reference to categories; any constraints making joinder compulsory are determined by whether claims arise out of the same transaction or occurrence. Tracing the source of multiple claims to the same transaction or occurrence is accomplished by evaluating facts.

B. Primary Rights and Res Judicata

Prior to the enactment of the Codes in 1848, the procedures involving pleading, amendment, joinder, and res judicata were harmonious. Subsequent to 1971, they are dissonant. California’s persistence in defining a cause of action in terms of primary rights for purposes of res judicata is out of step with developments in related areas. At common law, pleading, amendment, and joinder were restricted by reference to the legal categories established by the forms of action. At that time, a

308. CAL. CIV. PROC. CODE § 427 (repealed 1971).
311. SENATE REPORT, supra note 302, at 887.
312. CAL. CIV. PROC. CODE § 427.10 (West 1973).
313. Id. § 428.10 (West Supp. 1989).
314. Id. §§ 426.10, 426.30 (West 1973).
315. Id.
316. SENATE REPORT, supra note 302, at 887.
318. RESTATEMENT (SECOND) OF JUDGMENTS, supra note 11, § 24(2). See supra note 11 for the text of Section 24 and infra notes 568-73 and accompanying text for a discussion thereof.
320. J. KOFFLER & A. REPPY, supra note 32, § 8, at 39; B. SHIPMAN, supra note 174, § 163, at 296; Comment, supra note 174, at 102.
cause of action that was defined in terms of legal categories for res judicata purposes made more sense because related procedures were governed by the same categories.\textsuperscript{321}

However, in California today, the adequacy of a complaint is judged by whether the plaintiff has alleged sufficient \textit{facts} to state a cause of action.\textsuperscript{322} A pleading may be amended if the change arises from the "same general set of \textit{facts}" that gave rise to the original pleading.\textsuperscript{323} Joinder of the plaintiff's claims is permissive,\textsuperscript{324} and joinder of cross-complaints is compulsory if the cross-complaints arise out of the same transaction as the original claim.\textsuperscript{325} The limits of the same transaction is determined by reference to \textit{facts}.\textsuperscript{326} The legal category limitation has no current relevance to these procedures.

California's primary rights definition of a cause of action for res judicata purposes has not kept pace with these developments. The preclusive effect of a lawsuit in California is still determined by how many of the plaintiff's primary rights were violated by the defendant.\textsuperscript{327} This reasoning is reminiscent of the distinctions drawn under the common-law forms of action,\textsuperscript{328} and the differences between "forms" or "causes" of action are not factually ascertainable.\textsuperscript{329} By contrast, most jurisdictions bar a second action if it arises from the same transaction or occurrence involved in the first suit.\textsuperscript{330} In such jurisdictions, a cause of action for purposes of res judicata is defined in terms of facts.\textsuperscript{331}

\begin{itemize}
\item \textsuperscript{321} See F. James \& G. Hazard, supra note 6, § 11.2.
\item \textsuperscript{322} 4 B. Witkin, supra note 1, § 332, at 383 (citing Semole v. Sansoucie, 28 Cal. App. 3d 714, 721, 104 Cal. Rptr. 897, 901 (1972)); see supra notes 232-43 and accompanying text.
\item \textsuperscript{323} 5 B. Witkin, supra note 1, § 1162, at 579; see supra notes 244-54 and accompanying text.
\item \textsuperscript{324} Cal. Civ. Proc. Code § 427.10 (West 1973); see supra notes 255-318 and accompanying text.
\item \textsuperscript{325} Cal. Civ. Proc. Code §§ 426.10, 426.30 (West 1973); see supra note 307 and accompanying text.
\item \textsuperscript{326} Restatement (Second) of Judgments, supra note 11, § 24(2). See supra note 11 for text of Section 24 and infra notes 568-73 and accompanying text for a discussion thereof.
\item \textsuperscript{327} Agarwal v. Johnson, 25 Cal. 3d 932, 955, 603 P.2d 58, 72, 160 Cal. Rptr. 141, 155 (1979); see also 4 B. Witkin, supra note 1, § 23 and authorities cited therein.
\item \textsuperscript{328} M. Kane, supra note 6, § 14.4, at 624.
\item \textsuperscript{329} See Restatement (Second) of Judgments, supra note 11, § 24 comment a.
\item \textsuperscript{330} Comment, supra note 11, at 367-68; Restatement (Second) of Judgments, supra note 11, § 24 comment a ("The present trend is to see the claim in factual terms and to make it coterminous with the transaction . . . .").
\item \textsuperscript{331} Restatement (Second) of Judgments, supra note 11, § 24(2). See supra note 11 for the definition of a cause of action proposed in the Restatement (Second) of Judgments.

Professor Clark thought that the fact-based "same transaction" definition of a cause of action for res judicata purposes was the definition most compatible with the code pleading system.
\end{itemize}
Thus, California's definition of cause of action for purposes of res judicata is not harmonious with other aspects of California procedure. Disharmony itself is not sufficient reason for change. However, when disharmony produces confusion, change should be considered to eliminate the confusion.

IV. THE INHERENT AMBIGUITY OF THE PRIMARY RIGHTS THEORY

One factor that contributes to the confusion created by California's continued adherence to primary rights is the theory's inherent ambiguity. Although most of California's recognized primary rights can be traced to the categories set forth in the former joinder statute, courts have departed from those categories and granted "primary" status to other rights. However, nothing within the primary rights theory itself tells a judge whether a given right is indeed "primary." As a result, in cases where the existence of a particular primary right is at issue, the arguments for and against the "primary" nature of the right can be consistent with the primary rights theory.

The ambiguity of the primary rights theory can be a short-term advantage when judges are faced with conflicting obligations. Judges must adhere to the primary rights theory, but they also must respect the policy of judicial economy. The fact that a primary right can be characterized broadly or narrowly allows judges to fulfill both obligations. A broad characterization of a primary right will most likely give a plaintiff

The codifiers seem to have had in mind the cause of action as consisting of facts which should afford ground or occasion for the court to give judicial relief... This is shown by their emphasis upon "the facts" as "constituting the cause of action" and upon their attempt to get away from the legal subdivisions of the previous systems and to keep legal theories of recovery out of the pleadings proper.

C. CLARK, supra note 16, § 19, at 137.


333. See, e.g., Los Angeles Branch NAACP v. Los Angeles Unified School Dist., 750 F.2d 731, 738 (9th Cir. 1984), cert. denied, 474 U.S. 919 (1985) (applying California law) (court found primary right to attend integrated schools); see supra notes 99-102 for a discussion of NAACP.


335. C. CLARK, supra note 16, § 19, at 135-36 & n.163.

336. Wulfjen v. Dolton, 24 Cal. 2d 891, 894, 151 P.2d 846, 848 (1944); 4 B. WITKIN, supra note 1, § 34.
only one cause of action, thereby curtailing the opportunity to bring successive suits. Thus, a broad characterization decreases the number of lawsuits brought and furthers the goal of judicial economy.

By contrast, a narrow characterization of a primary right yields a greater number of causes of action, thereby increasing a plaintiff’s opportunity for multiple suits. The increased opportunities for litigation defeat the goal of judicial economy. For these reasons, if judges can characterize a primary right broadly, they further judicial economy and still remain true to the primary rights theory.

In some cases, the primary right has been interpreted so that it encompasses the entire transaction or occurrence that gave rise to the claim. Thus, the inherent ambiguity of the primary rights theory allows lawyers and judges to employ “same transaction” criteria while paying lip service to primary rights.

The malleable nature of the primary rights theory has been illustrated in several California cases. In the first case discussed below, the court had to determine whether one or several of the plaintiff’s rights were violated where the defendant’s conduct constituted a continuing wrong. In the second case, the issue was whether the plaintiffs had a broad right grounded in contract as opposed to two separate rights grounded in tort. In the third case, the court had to decide whether the plaintiff’s successive claims for breach of contract and infliction of emotional distress constituted violations of separate primary rights or whether the emotional distress was merely a consequential damage of the alleged breach of contract.

337. C. CLARK, supra note 16, § 19, at 135-36 & n.163.
338. Id.
A. Continuing Wrong

Under the primary rights theory, it is not always clear whether a defendant's continuing tortious conduct violates one or several of the plaintiff's primary rights. This issue was debated in *Tooke v. Allen.* The *Tooke* case involved delimiting a cause of action for purposes of pleading, as opposed to res judicata. Nevertheless, the *Tooke* court dealt with the scope of the plaintiff's rights, and these limits are also applicable in the res judicata context.

The *Tooke* case involved a landlord-tenant dispute. Tooke had been a tenant in an apartment house for several years when Allen purchased the building.Allen sued Tooke for the amount allegedly due from a rent increase, and the lawsuit was resolved in Tooke's favor. Tooke then filed an action against Allen for damages, alleging that Allen had embarked upon a continuous "campaign of annoyance" calculated to force her out of the apartment, thereby violating her right to peaceful possession of her home.

The trial court found that Allen performed or directed a series of acts which seriously inconvenienced Tooke. Despite a special lock that Tooke installed on her door to keep him out, Allen nevertheless broke into the apartment, removed her typewriter, clothing, and other items, and scattered her papers and unfinished manuscripts on the floor. He reduced her hot water, shut off her gas several times, and disconnected her telephone. He threatened her "with death or serious bodily harm" and pushed her outside her apartment. Allen's conduct continued for the three years immediately preceding the commencement of the suit.

Allen attempted to demur, arguing that each incident should be con-
sidered in isolation. He argued that Tooke should have pleaded the existence of separate contracts, and breaches thereof, for each of her utility services. Despite the fact that Allen customarily furnished telephone service in the apartment house, he argued that no contract existed for this service; instead, it was "a mere favor that could be discontinued at any time." Likewise, Allen minimized the importance of his failure to provide Tooke with hot water, asking what difference it made that she had to take cold baths and was unable to use her kitchen. He also insisted that shutting off the gas was trivial, since Tooke's neighbors allowed her to use their kitchens. He claimed that although he seized her clothing as a lien for allegedly unpaid rent, the production of the clothes at trial showed that they were not damaged; therefore, she suffered no damage as a result of their seizure. He argued that breaking the lock she had installed was a "trivial matter" and did not constitute an eviction. Additionally, he claimed that the commotion caused by his entries into her apartment did not interfere with her peaceful possession of the premises. He also argued that the statute of limitations had run on a cause of action for injury to and taking of personal property.

By this "painstaking procedure," Allen attempted to persuade the court that his actions caused merely separate "minor inconveniences," He argued that had she properly pleaded her causes of action, they would have been divided into several separate causes. Thus separated, the damage element of each cause was insignificant and therefore not recoverable. Further, he argued that the statute of limitations barred recovery on the claim relating to detention of her personal property. If Tooke was unable to recover on any separate cause, Allen would be "guiltless of any wrongdoing whatever."

358. Id. Allen characterized his actions as "[s]uccessive separate torts." Id. at 234, 192 P.2d at 807.
359. Id. at 235, 192 P.2d at 808.
360. Id.
361. Id.
362. Id.
363. Id. Allen did not contest the trial court's finding that Tooke owed no rent at the time Allen took her clothes. Id.
364. Id.
365. Id.
366. Id.
367. Id.
368. Id.
369. Id. According to Allen, Tooke's losses were so insignificant that they were "too inconsequential to engage the time of the court." Id.
370. Id.
371. Id. at 235-36, 192 P.2d at 808.
Under a narrow application of the primary rights theory, the court could have accepted Allen's argument.\textsuperscript{372} The court could have found that Tooke had several causes of action, including those stemming from violations of her rights to be free from injury to person, to be free from injury to property, and to recover personal property.\textsuperscript{373} However, the court decided that Allen's contention was "an untenable theory"\textsuperscript{374} because Tooke's cause of action "was not for injuries to either person or property in a strict sense."\textsuperscript{375} Instead, one right, the right to peaceful possession, had been violated.\textsuperscript{376} The right to peaceful possession was based on a property right, and "interference with personal rights would not be an unusual consequence" of violating the right to peaceful possession.\textsuperscript{377} The court stated that proof of violation of personal rights, violation of property rights, or both, would not alter the basic nature of a cause of action grounded in the right to peaceful possession.\textsuperscript{378} The court added that Allen's course of persecution was a single continuing offense.\textsuperscript{379}

In terms of justice to the parties involved in this case, most would agree that the court reached the correct result. However, in terms of the primary rights theory, the correctness of the decision is not clear.\textsuperscript{380} One commentator stated that the Tooke decision was "a substantial deviation from the primary rights theory as previously applied by the California courts."\textsuperscript{381}

The commentator believed that the Tooke decision was inconsistent with Lamb v. Harbaugh.\textsuperscript{382} In Lamb, the defendants forcibly entered the Lamb dwelling while Mrs. Lamb and her daughters were inside.\textsuperscript{383} When inside, the defendants threatened and "maltreated" the occupants,
causing them to fear for their lives, and forcing them to leave their home and seek other shelter. Lamb sued the defendants for $50,000, claiming that she had suffered disgrace, humiliation, and permanent impairment of her health. The defendants demurred on the ground that Lamb had four causes of action—injuries to property, personal injury to Lamb, personal injury to Lamb's daughters, and injury to Lamb's character. Under former Section 427, the joinder statute in effect at that time, these different causes of action could not be joined in the same lawsuit. The trial court overruled the demurrer, but the supreme court reversed. The supreme court rejected Lamb's contention that she stated only a single cause of action in trespass upon real property.

Tooke was also inconsistent with Ross v. Goins, which involved facts almost identical to those in Tooke. In Ross, a landlord broke into the premises occupied by his tenant. The tenant filed an action against the landlord for unlawful removal from the premises. The complaint alleged various acts of destruction and conversion of the tenant's personal property, as well as several acts of violence. The court stated that many of the acts alleged would constitute valid causes of action if they had been sued upon independently, but when they were "averred as a particularization of the act of removal of the plaintiff from the premises, they fail to have any meaning." Thus, the holding in Tooke was diametrically opposed to the holding in Ross.

The commentator concluded that the outcome in the Tooke case was not consistent with these California cases that had followed the primary rights theory. The commentator noted that the Tooke court could have reached the same result in a way that avoided inconsistency. A tenant has the benefit of an implied covenant of quiet enjoy-

384. Id. at 688, 39 P. at 56.
385. Id.
386. Id.
387. Id., 39 P. at 57.
388. CAL. CIV. PROC. CODE § 427 (repealed 1971).
389. Lamb, 105 Cal. at 689, 39 P. at 57.
390. Id. at 688, 39 P. at 57.
391. Id. at 689, 39 P. at 57.
392. Id.
393. 51 Cal. App. 412, 197 P. 132 (1921).
394. Id. at 413, 197 P. at 133.
395. Id.
396. Id.
397. Id.
398. Comment, supra note 3, at 159.
399. Id. at 161.
This benefit is based on the lease, which is a contract. A cause of action in contract is grounded in a primary right separate from those primary rights which give rise to tort actions. The Tooke court could have found that Tooke's single right to quiet enjoyment was based on contract. However, the court did not use a contract theory. Instead, the court treated Allen's repeated transgressions as a "continuing offense." According to the commentator, the characterization of Allen's acts as torts brings the Tooke case within the purview of the earlier cases.

However, despite this commentator's valid observations, the Tooke court's interpretation can also be reconciled with the primary rights theory because there are no standards contained in the primary rights theory which indicate how broad or narrow a primary right must be. The Tooke court characterized the "cause of action" much more broadly than earlier courts had done when deciding cases with similar facts. The court declined to find that Tooke had only the narrow rights to personal security and property security. Instead, the court found a broad right to enjoy property, and Allen's individual transgressions were merely different "consequence[s]" of his wrong. Thus, the court's interpretation is arguably consistent with the primary rights theory. However, defendant Allen's interpretation was also consistent. Perhaps the court characterized Tooke's right broadly because the court desired to reach a just result. Whatever its motivation, the court was able to "save" Tooke's cause of action by manipulating the primary rights theory.

400. Georgeous v. Lewis, 20 Cal. App. 255, 258, 128 P. 768, 769 (1912); see also Comment, supra note 3, at 161. Causes of action in contract were separate from tort actions under California's former joinder statute. CAL. CIV. PROC. CODE § 427 (repealed 1971).


401. Id.

402. Former Section 427 of the California Code of Civil Procedure categorized causes of action based on primary rights. Holmes, 70 Cal. 2d at 788, 452 P.2d at 649, 76 Cal. Rptr. at 433. Contract causes of action fell within the first category, while tort causes of action fell within the remaining six categories. CAL. CIV. PROC. CODE § 427 (repealed 1971).

403. Comment, supra note 3, at 161.

404. Tooke, 85 Cal. App. 2d at 236-37, 192 P.2d at 808-09.

405. Id.

406. Comment, supra note 3 at 161.


408. See supra notes 381-98 and accompanying text.

409. Tooke, 85 Cal. App. 2d at 236, 192 P.2d at 808.

410. Id.

411. See supra notes 372-73 and accompanying text.
B. Contract and Tort

By contrast, Justice Traynor did not "save" the plaintiffs' cause of action in *Holmes v. David Bricker, Inc.*[412] In *Holmes*, Mr. and Mrs. Holmes, purchased a used automobile from David Bricker, Inc. on August 24, 1962.[413] The contract of sale included an express warranty that the car was "in good operating condition" and would remain so for thirty days or 1000 miles.[414] During the warranty period, the car's brakes failed and caused an accident.[415] The plaintiffs were both injured, and the car was damaged.[416]

Mr. and Mrs. Holmes filed an action to recover for their personal injuries.[417] The complaint alleged breach of express warranties, breach of the implied warranty of merchantability, violation of the Vehicle Code section which required the dealer to test the brakes, negligence, and fraudulent representation.[418] The jury rendered a verdict for plaintiffs.[419]

While the personal injury action was still pending, the plaintiffs filed a second action to recover for the damage to their car,[420] alleging breach of the express warranty.[421] The trial court sustained the seller's demurrer to the property damage claim on the ground that the plaintiffs "'could and should have'" asserted the property damage claim in the first suit.[422] On appeal, Justice Traynor affirmed, stating that the claim for breach of express warranty "was identical with the [breach of express warranty claim] in the [first] personal injury complaint except for the damages alleged."[423]

The plaintiffs argued that under California's primary rights theory, conduct which simultaneously causes both personal injury and property damage gives rise to two separate causes of action: "one for violation of the right to freedom from legally impermissible interference with the integrity of the person and one for violation of the right to quiet enjoyment..."
of property." Justice Traynor acknowledged the correctness of this assertion and cited numerous supporting authorities. However, he distinguished the Holmes' situation by noting that they did not plead a cause of action for tortious injury to their automobile. Instead, they alleged breach of the express written warranty in the contract of sale. That breach was the "identical breach of warranty" that they had alleged in the first suit. Thus, the crucial question for Justice Traynor was "whether a single breach of the express warranty gave rise to two causes of action when it resulted in injury to both the persons and the property of plaintiffs." He concluded that the breach only gave rise to one cause of action because "[t]he warranty pleaded in [the Holmes'] case was essentially contractual in character." To support this position, Justice Traynor noted that the warranty "did not arise by operation of law," but was "subject to negotiation and modification" by the parties.

Justice Traynor stated that under these circumstances, all damages for a single breach of contract must be recovered in a single action. Arguably, Justice Traynor's conclusion is acceptable under the primary rights theory. Mr. and Mrs. Holmes pleaded breach of express warranty, and a warranty is part of a sales contract. Under the California joinder statute in effect when the Holmes case was decided, contract was a category of cause of action separate from torts. According to Justice Traynor, if breach of contract, or some sub-species thereof, is the only cause of action pleaded, the plaintiff must allege all injuries that arise out of that breach in one lawsuit.

Yet, due to the ambiguity of the primary rights theory, the issue can be analyzed differently: Mr. and Mrs. Holmes suffered violations of their separate primary rights to be free of injuries to person and to property, and breach of warranty was merely the theory of recovery. California courts have often recognized that in determining the number of

424. Id.
425. Id. at 788-89, 452 P.2d at 649-50, 76 Cal. Rptr. at 433-34.
426. Id. at 789, 452 P.2d at 650, 76 Cal. Rptr. at 434.
427. Id.
428. Id. at 789-90, 452 P.2d at 650, 76 Cal. Rptr. at 434.
429. Id. at 790, 452 P.2d at 650, 76 Cal. Rptr. at 434 (emphasis added).
430. Id.
431. Id.
432. Id.
433. Id. at 789-90, 452 P.2d at 650, 76 Cal. Rptr. at 434.
434. CAL. CIV. PROC. CODE § 427 (repealed 1971); see supra note 49 for the text of former Section 427.
435. Holmes, 70 Cal. 2d at 790, 452 P.2d at 650, 76 Cal. Rptr. at 434.
436. See PROSSER & KEETON, supra note 121, § 101, at 708-09; see infra notes 442-55 and accompanying text for a discussion of theories of recovery for breach of warranty.
primary rights violated, the most significant factor is the harm suffered.\textsuperscript{437} Mr. and Mrs. Holmes clearly suffered two kinds of harm—bodily injury and property damage\textsuperscript{438}—a distinction that California courts have traditionally recognized.\textsuperscript{439} Under the former California joinder statute that was in effect when the Holmes case was decided, bodily injury and property damages fell into separate classes of causes of action.\textsuperscript{440} If the number of primary rights violated is determined based upon the actual harm suffered, Justice Traynor’s decision to subsume the Holmes’ personal and property injuries under the umbrella of breach of contract was incorrect.

In reaching his conclusion, Justice Traynor posited that the Holmes’ warranty was "essentially contractual in character."\textsuperscript{441} However, the authors of \textit{Prosser and Keeton on Torts} suggest that a warranty is a hybrid between contract and tort.\textsuperscript{442} While a warranty is often part of the contract itself, and its terms can be negotiated,\textsuperscript{443} the manufacturer and seller nonetheless have a duty to act so that the product does not injure either the buyer or third persons.\textsuperscript{444} In Pomeroy’s terms, the duty is owed to “all mankind.”\textsuperscript{445} A duty thus owed sounds in tort, and it cannot be obliterated by the terms of a contract.\textsuperscript{446}

The authors of \textit{Prosser and Keeton on Torts}\textsuperscript{447} distinguish between personal injuries to purchasers of defective products, and injury to the

\textsuperscript{437} See Los Angeles Branch NAACP v. Los Angeles Unified School Dist., 750 F.2d 731, 738 (9th Cir. 1984), \textit{cert. denied}, 474 U.S. 919 (1985) (applying California law) ("[T]he single most important factor in determining whether a single course of conduct has violated more than one primary right is whether plaintiff suffered injury to more than one interest."); Agarwal v. Johnson, 25 Cal. 3d 932, 954, 603 P.2d 58, 72, 160 Cal. Rptr. 141, 155 (1979) ("[T]he significant factor is the harm suffered; that the same facts are involved in both suits is not conclusive."); Slater v. Blackwood, 15 Cal. 3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226 (1975) (plaintiff’s successive suits asserted distinct theories of recovery, but second suit was barred because plaintiff only sustained single bodily injury); Peiser v. Mettler, 50 Cal. 2d 594, 605, 328 P.2d 953, 959 (1958) ("The cause of action is based upon the injury to the plaintiff and not the particular legal theory of the defendant's wrongful act."); Lippert v. Bailey, 241 Cal. App. 2d 376, 382, 50 Cal. Rptr. 478, 481 (1966) ("A single cause of action may not be maintained . . . in separate suits as the plaintiff has suffered but one injury.") (emphasis added); Friedenthal, \textit{supra} note 15, at 13.

\textsuperscript{438} Holmes, 70 Cal. 2d at 787, 452 P.2d at 648, 76 Cal. Rptr. at 432.

\textsuperscript{439} Id. at 788-89, 452 P.2d. at 649, 76 Cal. Rptr. at 433.

\textsuperscript{440} CAL. CIV. PROC. CODE \S 427 (repealed 1971).

\textsuperscript{441} Holmes, 70 Cal. 2d at 790, 452 P.2d at 650, 76 Cal. Rptr. at 434.

\textsuperscript{442} \textit{Prosser & Keeton, supra} note 121, \S 101, at 708.

\textsuperscript{443} Holmes, 70 Cal. 2d at 790, 452 P.2d at 650, 76 Cal. Rptr. at 434.

\textsuperscript{444} \textit{Prosser & Keeton, supra} note 121, \S 101, at 708.

\textsuperscript{445} 1 J. POMEROY, \textit{EQUITY JURISPRUDENCE}, \textit{supra} note 33, \S 94, at 105. See \textit{supra} notes 21-46 and accompanying text for a discussion of Pomeroy's primary rights theory.

\textsuperscript{446} \textit{Prosser & Keeton, supra} note 121, \S 96, at 682.

\textsuperscript{447} \textit{Prosser & Keeton, supra} note 121.
defective product itself that causes economic harm to the purchaser.\textsuperscript{448} Today, if a defective product causes personal injury to a purchaser, the purchaser can recover from the seller under three theories: strict liability in tort, strict liability for breach of warranty, and negligence in tort.\textsuperscript{449} The seller's liability is "based . . . on policy considerations—and not on a manifested intent to guarantee—[and therefore it] ought not to be disclaimable by contract . . . ."\textsuperscript{450}

Different principles govern injury to the defective product itself. Although tort principles are arguably applicable to these kinds of losses,\textsuperscript{451} the authors of \textit{Prosser and Keeton on Torts} argue that parties to a sales transaction should be free to allocate the risk of loss to the product itself under the terms of the contract.\textsuperscript{452} If products are defective and do not perform as expected, purchasers may suffer economic harm because either they cannot use the product as they intended, or because they incur unanticipated extra expense to repair the product. These problems come within the purview of disappointed expectations, which are the proper subject of a breach of contract cause of action.\textsuperscript{453}

If the distinction set forth in \textit{Prosser and Keeton on Torts} is applied to the \textit{Holmes} case, the plaintiffs would have had two causes of action: one for personal injury and one for breach of contract. In \textit{Holmes}, the first action for personal injury should have been understood to be grounded in tort. The seller owed a common-law duty to the purchasers to sell them a safe car regardless of the existence of a written warranty.\textsuperscript{454} The seller also had a statutory duty under the California Vehicle Code to inspect the brakes,\textsuperscript{455} which was also independent of any express warranty. Thus, the seller's duty to Mr. and Mrs. Holmes did not arise

\textsuperscript{448} Id. \textsection 96, at 709.
\textsuperscript{449} Id. at 708. A purchaser may encounter difficulty proving negligence against a seller because the purchaser will often not have access to information regarding the seller's handling of the product prior to the sale. \textit{Id.} \textsection 98, at 692-93. For this reason, alternative strict liability theories—tort and warranty—developed to help purchasers protect themselves. See \textit{Id.} \textsection 95A & 97 for a short history of the development of the warranty theory of recovery. The theory of strict liability in tort began to develop in 1960. \textit{Id.} \textsection 96, at 689. Prior to that time, the theory of breach of warranty served as a bridge between the purchaser's harm and the seller's act when the purchaser could not prove negligence. \textit{Id.} \textsection 101, at 708. The defendant's liability was still grounded in tort as opposed to contract. \textit{Id.}

\textsuperscript{450} Id.
\textsuperscript{451} Id. at 708-09.
\textsuperscript{452} Id. at 709.
\textsuperscript{453} See generally id. \textsection 95A.
\textsuperscript{454} Prosser & Keeton, supra note 121, \textsection 96, at 708; see also supra notes 442-46 and accompanying text.
\textsuperscript{455} Holmes, 70 Cal. 2d at 787, 452 P.2d at 648-49, 76 Cal. Rptr. at 432-33.
purely out of the contract. Even though the theory of recovery pleaded was breach of warranty, the cause of action was actually in tort.

The second action for property damage to the car itself could be characterized as either a tort or a contract action. Either way, under the primary rights theory, the second suit could have stated a separate cause of action had the first suit been properly characterized as a tort action. If the second action was found to be a tort action based on injury to property, it would be distinct from the personal injury cause of action litigated in the first suit. If the second action was found to be grounded in contract, it would be distinct from the personal injury action based on tort.

As a practical matter, it probably would have been difficult for Mr. and Mrs. Holmes to prove that the seller was negligent or that he actually failed to inspect the brakes pursuant to the vehicle code statute. The Holmes opinion does not provide much litigation history, but the first action for bodily injury did allege negligence as well as breach of warranty. The first action was filed on September 6, 1963. The second action was filed on February 3, 1966, approximately two and one half years later. Conceivably, by the time Mr. and Mrs. Holmes filed the second action, they knew that they could not prove negligence against Bricker, and that a negligence theory of recovery would not succeed the second time around. Had the incident taken place at a later date, the plaintiffs may have pleaded and prevailed under the theory of strict liability in tort. However, since that theory was in its early stages of development when the action was brought, Mr. and Mrs. Holmes (and their attorney) may have believed that the breach of warranty theory was the most effective theory available. In any event, the choice of a theory of recovery is a tactical concern which does not change the fact that Mr. and Mrs. Holmes suffered two kinds of harm which, in California, give rise to two causes of action.

Thus, under the primary rights theory, the bodily injury and property damage suffered by Mr. and Mrs. Holmes could have been viewed in

---

456. Prosse & Keeton, supra note 121, § 96, at 708-09.
457. Holmes, 70 Cal. 2d at 788-89, 452 P.2d at 649, 76 Cal. Rptr. at 433.
459. Prosse & Keeton, supra note 121, § 98, at 692-93; see supra note 449.
460. Holmes, 70 Cal. 2d at 787, 452 P.2d at 648-49, 76 Cal. Rptr. at 432-33.
461. Id., 452 P.2d at 648, 76 Cal. Rptr. at 432.
462. Id. at 788, 452 P.2d at 649, 76 Cal. Rptr. at 433.
463. Prosse & Keeton, supra note 121, § 96, at 689.
464. Id.
two ways, producing opposite results for the plaintiffs. If the second suit for property damage was seen as an attempt to obtain additional damages for a single breach of contract, as the Holmes court found, the second suit would be barred. On the other hand, the second suit could be regarded as a separate cause of action grounded in the primary rights of property or contract, whereas the first suit was grounded in bodily injury. Nothing in the primary rights theory provides guidance as to which interpretation is correct.

C. Primary Rights and Consequential Damages

While Justice Traynor manipulated the primary rights theory by subsuming the right to personal security and the right to property security under a broader right grounded in contract, other courts have treated tort claims as merely elements of consequential damages of the contract.

465. See Purcell v. Colonial Ins. Co., 20 Cal. App. 3d 807, 97 Cal. Rptr. 874 (1971). In that case, plaintiff Purcell had been involved in an auto accident, and his insurance company rejected the accident victims' demand to settle their claim against Purcell within Purcell's policy limits of $20,000. Id. at 810, 97 Cal. Rptr. at 875. A jury rendered a judgment against Purcell for $35,000. Id. at 811, 97 Cal. Rptr. at 876. Purcell filed an action against the insurance company for wrongful failure to settle. Id. at 809, 97 Cal. Rptr. at 875. He assigned this cause of action to the accident victims. Id. at 810, 97 Cal. Rptr. at 875. Subsequently, Purcell brought a second action, claiming that he had experienced pain and suffering as the result of the insurance company's failure to settle. Id. at 813, 97 Cal. Rptr. at 877. He argued that the first cause of action, the one he had assigned, was for the recovery of monetary losses. Id. The second action for his own "pain and suffering" was grounded in personal injury. Id. The court held that Purcell had split his cause of action because his right to both kinds of damages were traceable to the contract between Purcell and the insurance company. Id., 97 Cal. Rptr. at 878.

The Purcell case is more clearly consistent with the primary rights theory than the Holmes case. In Holmes, the seller owed a duty to Mr. and Mrs. Holmes to sell them a safe automobile, and this duty existed independently from a contract. See Prosser & Keeton, supra note 121, § 96, at 683; see also supra notes 442-46 and accompanying text. By contrast, absent a contract between Purcell and the insurance company, the insurance company would have owed no duty to Purcell. Still, one commentator has stated that Purcell is inconsistent with the primary rights theory. See Comment, Wrongful Failure to Settle an Insurance Claim: The Case of the Missing Cause of Action, 20 UCLA L. Rev. 1048 (1973).

The final irony that emerges from Holmes is that the case has been cited for the proposition that injuries to person and to property constitute invasions of separate primary rights. See Shelton v. Superior Ct., 56 Cal. App. 3d 66, 81, 128 Cal. Rptr. 454, 464 (1976); Annotation, supra note 11, at 687 (1983). Indeed, the Holmes opinion specifically states that "causes of action for injuries to person and property are separate." Holmes, 70 Cal. 2d at 789, 452 P.2d at 649, 76 Cal. Rptr. at 433. However, Justice Traynor thought that the plaintiffs' decision to describe their injuries in terms of breach of warranty, as opposed to "tortious injury to their automobile," was more important than the actual injuries suffered. Id. at 789-90, 452 P.2d at 650, 76 Cal. Rptr. at 434.

466. Holmes, 70 Cal. 2d at 790, 452 P.2d at 650, 76 Cal. Rptr. at 434.

467. See C. CLARK, supra note 16, § 19, at 135-36 & n.163 ("[The primary rights theory] is not a workable test.").
claims. In *Takahashi v. Board of Trustees of Livingston*, the plaintiff, a female teacher of Japanese ancestry, filed successive claims for breach of contract and emotional distress subsequent to dismissal from her teaching position on grounds of alleged incompetence. Takahashi instituted a mandamus proceeding to compel the Commission who dismissed her to set aside the decision. The appellate court found that she had no right to reinstatement, and petitions for further judicial review were denied. After she exhausted these channels, she filed an action in federal court, alleging that the school district had violated her rights to due process and equal protection under the fourteenth amendment to the United States Constitution. She sought both compensatory damages for lost wages and mental distress, and punitive damages. The school district pleaded res judicata.

Takahashi argued that under California's rules of res judicata, the first suit was based on the alleged violation of her "contractual right to employment by the [school district]," while the second suit involved her distinct primary right "to be treated in the same manner as a person of non-Japanese ancestry" during the processes of teacher evaluation and dismissal. The court rejected Takahashi's characterization, holding that only the contractual right to employment was at stake. The court stated that the harm suffered determines the number of primary rights violated, and that the only harm she had suffered was the termination of her teaching contract. The court did not believe that the mental distress she suffered from her dismissal constituted a separate injury. Instead, the mental distress was a "consequence" of the school district's

---

468. 783 F.2d 848 (9th Cir.), *cert. denied*, 476 U.S. 1182 (1986) (applying California law).
469. *Id.* at 849.
470. *Id.*
471. *Id.*
472. *Id.* Takahashi alleged that the school district: (1) terminated her on the basis of race; (2) terminated her pursuant to impermissibly vague standards; and (3) evaluated her according to different standards than those used to evaluate other teachers. *Id.*
473. *Id.*
474. *Id.*
475. The federal court applied California res judicata rules because a federal court must give a state court judgment the same preclusive effect that the state court would give to that judgment. *Id.* at 850 (citing Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984)).
476. *Id.* at 851.
477. *Id.*
478. *Id.* The court stated that "[c]ontractual rights are a species of primary rights." *Id.* However, the court declined to give primary status to her discrimination claim, perhaps because she "failed to alleged [sic] a new injury." *Id.*
479. *Id.*
480. *Id.*
termination of her contract, and consequitional damages did not give rise to a separate cause of action.481

As in Tooke v. Allen482 and Holmes v. David Bricker, Inc.,483 the Takahashi court’s conclusion was only arguably consistent with the primary rights theory. The court stated, in effect, that the body of the cause of action was grounded in contract, and the emotional distress claim which injured the plaintiff’s person was an appendage in the form of consequitional damages.484 However, Takahashi alleged that she had suffered economic harm from the breach of contract and injury to her person as the result of discriminatory treatment.485 The court’s interpretation of the right involved was broad, while the plaintiff’s interpretation was narrow. Both interpretations were consistent with the primary rights theory.486

D. Summary

In sum, Tooke, Holmes, and Takahashi illustrate how the primary rights theory is easily manipulated. In Tooke, separate injuries caused by the defendant’s separate acts were subsumed under a continuous course of conduct which violated the plaintiff’s primary right to peaceful possession of her apartment,487 but the decision did not follow earlier cases with similar facts.488 In Holmes, the plaintiffs’ recovery in their second suit was barred because they had pleaded breach of express warranty in both suits, despite the fact that they had sustained separate injuries for bodily injury and property damage.489 In Takahashi, the court disallowed the second suit for emotional distress because it believed that the emotional distress constituted merely consequitional damages that were part of her first claim grounded in contract, rather than a separate injury

481. Id.
484. Takahashi, 783 F.2d at 851.
485. Id.
486. See C. CLARK, supra note 16, § 19, at 135-36.
488. See, e.g., Lamb v. Harbaugh, 105 Cal. 680, 39 P. 56 (1895) (court found separate causes of action for injuries to property, person, and character, rather than one cause of action grounded in trespass); Ross v. Goins, 51 Cal. App. 412, 197 P. 132 (1921) (court dismissed tenant’s suit against landlord for unlawful removal from premises because tenant did not allege separate causes of action for bodily injury, property damage, and conversion); see also Comment, supra note 3, at 158-60. See also supra notes 380-406 and accompanying text.
Due to the malleable nature of the primary rights theory, California judges have been able to define a primary right so broadly that it encompasses the entire transaction giving rise to the plaintiff's claim. Courts can thus avoid violating the primary rights theory and simultaneously employ the same transaction criteria.

V. DOES CALIFORNIA STILL USE THE PRIMARY RIGHTS THEORY?

California may be shifting away from defining a cause of action in terms of primary rights in favor of the same transaction definition. Valid reasons justify this shift. First, the primary rights theory is inconsistent with several aspects of California's current joinder procedure. Second, the primary rights theory has been, and can be, applied in a way that conflicts with California's policy of promoting judicial economy. The shift is problematic primarily because no decision or rule has acknowledged that the transition is occurring. However, despite the absence of official notice of the change, a plaintiff would be unwise to rely on the opportunity to bring more than one suit.

A. Inconsistency with Current Joinder Provisions

Under California's compulsory cross-complaint statute, the defendant must bring all cross-complaints that arise out of the same transaction as the plaintiff's claim in the first suit, or they are forfeited. Furthermore, if the defendant files a cross-complaint against the plaintiff, the plaintiff must then assert any remaining claims he has against the defendant, or waive them, if the claims arise out of the same transaction as the defendant's cross-complaint. Yet, joinder of plaintiff's claims

492. See supra note 11 for the text of the same transaction definition proposed in the Restatement (Second) of Judgments.
494. Id.
495. Id. See supra notes 291-93 and accompanying text. "The original plaintiff may file a cross-complaint to the defendant's cross-complaint . . . and the compulsory cross-complaint rule applies." 5 B. WITKIN, supra note 1, § 1098, at 518.
remains merely permissive if no cross-complaint is filed.\textsuperscript{496} Res judicata may preclude a plaintiff from suing again, and the applicability of res judicata turns on whether the claim omitted from the first suit is derived from the same or a different primary right.\textsuperscript{497} By contrast, the test to determine whether a defendant's omitted cross-complaint is barred by res judicata is whether the claim arose from the same transaction or occurrence as the plaintiff's claim in the first suit.\textsuperscript{498}

For example, suppose drivers P and D are involved in an auto accident, and both suffer bodily injury and property damage. Under the primary rights theory, P theoretically can file successive suits for bodily injury and property damage.\textsuperscript{499} However, if D wishes to cross-complain against P, D must include both of his claims in the same suit because cross-complaints are compulsory if they arise out of the same transaction or occurrence as P's claim.\textsuperscript{500} Thus, if D's cross-complaint only alleges personal injury, D's subsequent claim for property damage will be barred by res judicata.\textsuperscript{501} However, if D files a cross-complaint that includes either a property damage claim, or a personal injury claim, or both, then P's formerly omitted property damage claim becomes compulsory because it arose out of the same transaction or occurrence as that which gave rise to D's cross-complaint.\textsuperscript{502} Thus, different res judicata tests are potentially applicable to P's two claims, and choosing the correct test depends not on how many of each party's primary rights were violated, but simply on whether D files a cross-complaint. This basis of choice does not make sense.\textsuperscript{503}

The inconsistency between the primary rights theory and California's current joinder provisions produces needless confusion, and elimination of such confusion would provide sufficient justification for California to change its definition of a cause of action. However, the continued use of the primary rights definition also conflicts with California's policy of judicial economy.\textsuperscript{504} This conflict is so significant that the primary rights definition may, in practice, be obsolete.

\textsuperscript{496} CAL. CIV. PROC. CODE § 427.10 (West 1973).
\textsuperscript{498} CAL. CIV. PROC. CODE §§ 426.10, 426.30 (West 1973).
\textsuperscript{500} CAL. CIV. PROC. CODE §§ 426.10, 426.30 (West 1973).
\textsuperscript{501} Id.
\textsuperscript{502} Id.
\textsuperscript{503} Friedenthal, supra note 15, at 5.
\textsuperscript{504} Id. at 13.
B. Conflict with Judicial Economy

California has articulated a policy favoring judicial economy through the rule against “splitting” causes of action.505 This policy is further manifested by the legislature’s revision of the joinder statutes to avoid a multiplicity of suits.506 Many benefit from the resolution of multiple claims in a single suit.507 The plaintiff is spared the expense of a second suit508 and collects all of the damages due at the close of one proceeding.509 The defendant also saves the costs that would be incurred by having to defend a second suit, and is protected from repeated or “vexatious” litigation over a single wrongful act.510 The public is interested in the prudent allocation of increasingly scarce judicial resources,511 and “[e]very dispute that is reheard means that another will be delayed.”512 Judges thus have substantial motivation to promote judicial economy.

Interpreting a primary right narrowly frustrates the goal of judicial economy.513 Suppose an auto accident victim sustains both bodily injury and property damage in the same accident. Traditionally, California has found that two of the victim’s primary rights would be violated: the right to bodily security and the right to be free from injury to property.514 Plaintiff thus has two causes of action,515 and may bring two

505. See 4 B. WITKIN, supra note 1, § 34, at 76-77, and authorities cited therein.

   The joinder categories created by [former] Section 427 are, for the most part, arbitrary, are not based on reasons of practical convenience, and operate to defeat the purpose of permitting joinder of causes in order to settle all conflicting claims between the parties in a single action. Elimination of the joinder categories and adoption of an unlimited joinder rule would yield substantial benefits.

   Recommendation, supra note 227, at 508-09. Although the California Law Revision Commission made this recommendation before the joinder rules were revised, the language contained therein indicates the probability that the legislature was motivated, at least in part, by judicial economy concerns. See supra notes 255-318 and accompanying text for a discussion of the history of joinder in California.

507. M. KANE, supra note 6, § 14.3, at 615.
508. Comment, supra note 465, at 1414 n.31.
509. Id.
510. Wuljen v. Dolton, 24 Cal. 2d 891, 894, 151 P.2d 846, 848 (1944); M. KANE, supra note 6, § 14.3, at 615.
511. Id.
512. Id.
513. Professor Friedenthal noted that a broad cause of action is more conducive to judicial economy than a narrow cause of action and that application of the primary rights definition usually produces a narrower cause of action than that which would result under the application of the same transaction definition. Friedenthal, supra note 15, at 12-13.
514. 4 B. WITKIN, supra note 1, § 43.
515. Id.
separate lawsuits for injuries sustained in the accident.\textsuperscript{516}

However, if the plaintiff is deemed to have only one primary right—the right to travel safely on the highway\textsuperscript{517}—then only one cause of action exists.\textsuperscript{518} Under this broader interpretation, the plaintiff must assert all claims arising from violation of the "right to travel safely on the highway" in a single lawsuit.\textsuperscript{519} The broad view of the primary right in this example promotes judicial economy, while a narrow interpretation does not.\textsuperscript{520} However, the primary rights definition of a cause of action is inherently ambiguous,\textsuperscript{521} and nothing within the primary rights definition requires that a right be defined broadly or narrowly.\textsuperscript{522} Thus, the scope of a cause of action, and the resulting implementation of judicial economy principles, is left to chance.

Although the benefits of judicial economy are widely recognized, some commentators have expressed concern that measures designed to promote procedural convenience may cut off substantive rights.\textsuperscript{523} Res judicata may punish the litigant for his attorney's mistakes,\textsuperscript{524} since the

\textsuperscript{516} Id. § 35, at 77.

\textsuperscript{517} The right could be broadened further: "Instead of two primary rights—a right to personal security; a right to private property—why not a single one, a right not to be caused loss by defendant's negligence?" C. CLARK, supra note 16, § 19, at 136 n.163.

See also supra notes 345-411 and accompanying text for a discussion of Tooke v. Allen, 85 Cal. App. 2d 230, 192 P.2d 804 (1948). In the Tooke case, the defendant attempted to characterize plaintiff's rights narrowly, arguing that the causes of action resulting from violation of the several rights at issue were either barred by statutes of limitations or too inconsequential to show damages. Id. at 234-36, 192 P.2d at 808. The court, apparently moved by the plaintiff's plight, found that the plaintiff had a broad right to quiet enjoyment of property which had been violated by the defendant's continuous conduct. Id. at 236, 192 P.2d at 808-09.

\textsuperscript{518} Slater v. Blackwood, 15 Cal. 3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226 (1975) (invasion of one primary right gives rise to one cause of action).

\textsuperscript{519} Id.

\textsuperscript{520} See supra note 513. Occasionally, cases are so complex that judicial efficiency is best achieved by narrowing the number of issues to be considered in a single proceeding. Under these circumstances, California Code of Civil Procedure Section 1048 gives the court discretion to sever actions. CAL. CIV. PROC. CODE § 1048 (West Supp. 1989); Friedenthal, supra note 15, at 5-6.

\textsuperscript{521} See supra notes 332-490 and accompanying text for a discussion of the ambiguity of the primary rights theory.

\textsuperscript{522} C. CLARK, supra note 16, § 19, at 135-36 & n.163.

\textsuperscript{523} See, e.g., Schopflocher, What is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?, 21 ORE. L. REV. 319, 321 (1942). Schopflocher stated:

[T]here is a strong policy not to cut off substantive rights of a litigant by a strict application of the rules of procedure. "All procedure is merely a methodical means whereby the court reaches out to restore rights and remedy wrongs; it must never become more important than the purpose which it seeks to accomplish.

\textit{Id.} (emphasis omitted) (citing Clark v. Kirby, 243 N.Y. 295, 153 N.E. 79 (1926)).

\textsuperscript{524} Comment, supra note 10, at 414.
litigant’s claims will be barred for reasons apart from the merits.\textsuperscript{525}

Thus, a narrow interpretation of a primary right might further justice because it theoretically gives a plaintiff more opportunities to assert his rights.\textsuperscript{526}

Even if the merits of this position are conceded, practical considerations reveal its obsolescence. In earlier times, plaintiffs may have been able to delay filing a second suit until the first suit was concluded, but this option is largely illusory today. It could take years for the average case to work its way through the California court system. By the time it does so, it is quite possible that the statute of limitations will have run on the omitted claims.\textsuperscript{527} Thus, although plaintiff’s right to sue on a second claim may not be cut off by res judicata, the opportunity for a second suit could be eliminated by crowded court conditions. For this reason, the advantages which may have flowed from a narrow definition of cause of action for res judicata purposes have, to a significant extent, disappeared.

**C. Other Concerns**

As stated above, the primary rights theory and current joinder procedures are logically inconsistent,\textsuperscript{528} and the primary rights theory can adversely affect judicial economy.\textsuperscript{529} However, a narrow definition of a cause of action also frustrates the general aims of res judicata. The doc-

\textsuperscript{525} M. Kane, \textit{supra} note 6, § 14.3, at 616.

\textsuperscript{526} See Schopflocher, \textit{supra} note 523, at 363, for commentary favorable to a narrowly circumscribed cause of action. According to Schopflocher, “the definition of a cause of action for the purpose of \textit{res judicata} should be somewhere within the bounds of the individualized concept of cause of action and, accordingly, should convey a more or less narrow concept.” \textit{Id.}

\textsuperscript{527} For example, in California, a written contract action must be brought within four years, a property damage action within three years, an oral contract action within two years and a personal injury action within one year. \textit{Cal. Civ. Proc. Code} §§ 337-39, 340.3 (West 1982 & Supp. 1989).


The courts, as opposed to the litigants and their attorneys, will control the pace of the suit. \textit{See generally} R. Weil \& I. Brown, \textit{Civil Procedure Before Trial}, ¶ 12:4-53 (1989).

\textsuperscript{528} See \textit{supra} notes 493-503 and accompanying text.

\textsuperscript{529} See \textit{supra} notes 505-27 and accompanying text.
trine of res judicata has two basic goals: protecting the defendant from repeated litigation of the same matter, and bringing an end to litigation. A narrow definition of a cause of action potentially exposes the defendant to multiple suits and undermines the finality of the judgment in the first suit, thus diminishing the effectiveness of res judicata. Although California courts might interpret primary rights broadly, and thereby further the goals of res judicata, such interpretation is far from inevitable.

Furthermore, due to ambiguity and inconsistent interpretation, reliance on primary rights may be dangerous in modern practice. Although Pomeroy's theory has received "flat acceptance" in California; "the meaning of 'cause of action' remains elusive and subject to frequent dispute and misconception ...." While joinder of plaintiff's claims is theoretically permissive, "[t]he risks incurred by plaintiff in filing separate actions are so substantial that it is almost never a good idea to do so!" Even though a plaintiff may be confident that his claims constitute separate causes of action, "a law and motion judge might rule otherwise!" This could result from the judge's lack of understanding of the primary rights theory, or from the theory's inherent ambiguity.

The shortcomings of the primary rights theory are even more pronounced when examined from the point of view of the actual litigant, as opposed to the attorney. Attorneys make many decisions for their clients, and the attorneys are charged with knowing the rules. However, the plaintiff makes basic decisions such as whether or not to sue. If the rule is that the number of causes of action is based upon the harm suffered, a plaintiff who suffers personal injury and property damage caused by a malfunctioning product under warranty could properly be expected to understand that two distinct harms had been inflicted. However, to expect the plaintiff to understand that two harms exist under a tort the-

530. M. Kane, supra note 6, § 14.3, at 615.
531. See F. James & G. Hazard, supra note 6, § 11.2.
532. See supra notes 513-22 and accompanying text.
533. 4 B. Witkin, supra note 1, § 24, at 68.
535. Id., ¶ 6:149.
536. See supra notes 332-490 and accompanying text for a discussion of the ambiguity of the primary rights theory.
537. Comment, supra note 10, at 414 ("Res judicata penalizes the client for the mistakes of his attorney."). This problem is not unique to res judicata; it is generally presumed that the attorney's knowledge of the law is greater than the client's. See Prosser & Keeton, supra note 121, § 32, at 185-86. However, the accepted disparity in knowledge is not a good reason to make the law more incomprehensible to lay people.
538. Similarly, an auto accident plaintiff in a same transaction jurisdiction could be expected to understand that the accident was a single "occurrence" and that he must bring all
ory, but only one harm with two aspects of damage exists under a breach of contract theory, is asking too much from a lay plaintiff—and may also be too much to ask of most attorneys and judges.

VI. CALIFORNIA SHOULD ABANDON PRIMARY RIGHTS

The primary rights definition of a cause of action for purposes of res judicata is an anachronism. It has created confusion and inconsistency, and fails to promote judicial economy. California should adopt another method for determining whether multiple claims arising from the same event may be brought in successive lawsuits. This could be accomplished by amending the California Code of Civil Procedure to make joinder of plaintiff’s claims compulsory when they arise from the same transaction or occurrence. Alternatively, California courts could overrule precedent requiring adherence to the primary rights theory, adopting instead the same transaction definition set forth in the Restatement (Second) of Judgments and followed by the majority of jurisdictions.

A. Mandatory Joinder

The current statute governing joinder of plaintiff’s claims could be amended to be consistent with the provisions governing compulsory cross-complaints. Under the latter provisions, a party who has been served with a complaint must allege any “related cause of action” in a cross-complaint at the time the cross-complainant serves the answer. If the “related cause of action” is not thus asserted, it is deemed waived. A “related cause of action” is defined as one which “arises out of the same transaction, occurrence, or series of transactions or occurrences” as the claim to which the cross-complaint is filed in response. Under this approach, a plaintiff would be required to join all claims arising from the same “occurrence” in the same lawsuit. See infra notes 566-88 and accompanying text for a discussion of the same transaction definition of a cause of action.

540. Id. at 789-90, 452 P.2d at 650, 76 Cal. Rptr. at 434.
541. RESTATEMENT (SECOND) OF JUDGMENTS, supra note 11, § 24.
542. Id. comment a; Friedenthal, supra note 15, at 12; Comment, supra note 11, at 368. Most federal courts use the same transaction definition. 1B MOORE'S FEDERAL PRACTICE, supra note 1, ¶ 0.410[1], at 359-60.
543. CAL. CIV. PROC. CODE § 427.10 (West 1973). See supra notes 300-04 and accompanying text for a discussion of Section 427.10.
545. Id. § 426.30(a).
546. Id.
547. Id. § 426.10(c).
“related causes of action” in the original complaint.

Few jurisdictions have mandatory joinder-of-claims rules. A mandatory joinder-of-claims rule could motivate plaintiffs to litigate claims that they might not otherwise have litigated, and this would inevitably result in a more complicated lawsuit. Federal courts do not require joinder of plaintiff’s claims, perhaps due to the apprehension that flexibility will be sacrificed. California considered mandatory joinder, but the idea was rejected.

Nevertheless, several distinguished scholars favor mandatory joinder. A statute requiring mandatory joinder of plaintiff’s claims arising out of the same transaction or occurrence would eliminate the unpredictability created by the ambiguity of the primary rights theory. It would also eliminate the inconsistency that exists with respect to joinder of

---

548. Friedenthal, supra note 15, at 11 & n.45. Michigan is one jurisdiction that has a mandatory joinder-of-claims rule. In that state:
the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. MICH. GEN. CT. RULE 2.203(A).

549. Friedenthal, supra note 15, at 11-12.
551. The California Law Revision Commission studied former California joinder provisions and recommended changes. Recommendation, supra note 227. That study recommended abolishing the separate classes of causes of action in the former joinder statute, Section 427 of the California Code of Civil Procedure. Id. at 508-09. The Commission proposed “[c]ompulsory joinder of related causes of action” which would have been codified at Section 426.20 of the California Code of Civil Procedure had that section been enacted. Id. at 545. The proposed section read as follows:
Except as otherwise provided by statute, if the plaintiff fails to allege in his complaint a related cause of action which (at the time his complaint is filed) he has against any party who is served or who appears in the action, all his rights against such party on the related cause of action not pleaded shall be deemed waived and extinguished. Id. The comment following the proposed statute observes that the requirement set forth therein would produce the same results as those obtained in jurisdictions which define a cause of action according to an “operative facts” (or same transaction) theory. Id. California, following the primary rights theory, allows a second suit if the second claim arising from the same event violates a different primary right. Takahashi v. Board of Trustees, 783 F.2d 848, 851 (9th Cir.), cert. denied, 476 U.S. 1182 (1986) (applying California law); Recommendation, supra note 227, at 545-46. However, the utility of the primary rights system is diminished by the fact that “collateral estoppel [bars] an unpleaded cause of action if precisely the same factual issues are involved in both actions.” Id. at 546.
552. See, e.g., Blume, Required Joinder of Claims, 45 MICH. L. REV. 797 (1947); Friedenthal, supra note 15; Schopflocher, supra note 523; see also works cited in WRIGHT & MILLER, supra note 550, at 50 n.5.
553. The statutory approach to mandatory joinder technically would not change the primary rights definition of a cause of action to the same transaction definition. Instead, a statute would render the primary rights definition superfluous.
cross-complaints. Nor would the California Legislature have to go to the trouble of articulating which claims must be joined, since the criteria established by the compulsory cross-complaint rule are already in place.

Professor Friedenthal notes that the principal argument against mandatory joinder is that “the rules of res judicata make it unnecessary.” However, Friedenthal points out that while this rationale is valid in jurisdictions that define a cause of action for res judicata purposes in terms of a transaction or occurrence, the same rationale may not necessarily be valid in a primary rights jurisdiction. In a same transaction or occurrence jurisdiction, the definition of a cause of action is relatively broad. The broad scope of a cause of action precludes most subsequent suits, thereby forcing the plaintiff to litigate more claims in one action. By contrast, under the primary rights theory, a cause of action is generally narrower than it would be under the same transaction theory. Thus, res judicata is less effective for encouraging joinder in California than in same transaction jurisdictions.

Friedenthal favored a mandatory joinder statute for California if the claims arise out of the same transaction or occurrence. The same transaction or occurrence limitation would usually prevent a lawsuit from becoming unduly complicated, and problems resulting from such complications could be solved by severing causes for trial. Thus, the anticipated problems that might result from requiring mandatory joinder of claims which arise from the same transaction or occurrence could be overcome without difficulty. A mandatory “transaction or occurrence”

554. See supra note 493-503 and accompanying text for a discussion of the inconsistency between requirements governing permissive joinder of plaintiff's claims and requirements governing compulsory cross-complaints.
556. Friedenthal, supra note 15, at 12.
557. Id. at 12-13.
558. Id. at 12.
559. Id. at 12-13. Professor Friedenthal stated:

    The general uncertainty that invariably exists in such jurisdictions as to the precise limits of a cause of action for res judicata purposes has sufficient in terrorem effect to force plaintiffs to bring all related claims at once, even if ultimately some of those claims might be considered separate causes.

Id.
560. Id. at 13.
561. Id.
562. Id. Professor Friedenthal also noted that as a practical matter, there will be only a “small number of situations” where a plaintiff’s multiple claims do not arise out of the same transaction or occurrence. Id. at 6.
563. Id. at 12-13.
564. Id. at 5.
joinder statute would solve many of the problems that result from basing res judicata principles on primary rights.565

B. The Same Transaction or Occurrence Definition

In most jurisdictions, the scope of a cause of action is coterminous with the transaction or occurrence that produces the resulting claims.566 The trend in federal courts is to employ the same transaction definition.567 The Restatement (Second) of Judgments (Restatement)568 proposes that if a plaintiff’s claim569 is deemed barred by res judicata, the barred claim extinguishes all of the plaintiff’s rights “to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions out of which the [first] action arose.”570

The comment accompanying the Restatement definition notes that most jurisdictions characterize a cause of action as “coterminous with the transaction” and evaluate it in “factual terms.”571 Under this approach, theories of recovery, types of relief sought, and primary rights are irrelevant.572 “The transaction is the basis of the litigative unit . . . which may not be split.”573

For purposes of res judicata, the same transaction definition has several advantages over the primary rights definition. First, the same transaction definition is much easier to understand. Lay persons and lawyers alike can be expected to have a fairly good idea of what a “transaction”

565. An extensive comparison between the relative merits of a compulsory joinder statute and those of a judicial principle that would control the application of res judicata is beyond the scope of this Comment. However, a statute would arguably provide more certainty than a judge-made doctrine. See Schopflocher, supra note 523, at 364 (“[I]t seems in the interest of a clear legal analysis to know precisely where the realm of judicial discretion begins and the automatic operation of a rule of law terminates.”).
566. “[T]he majority of states . . . follow the so called ‘operative facts’ theory of a cause of action; under this theory the scope of a single cause of action is held broad enough to cover all claims arising from a single set of transactions or occurrences.” Friedenthal, supra note 15, at 12.
567. 1B MOORE’S FEDERAL PRACTICE, supra note 1, § 0.410[1], at 359.
568. RESTATEMENT (SECOND) OF JUDGMENTS, supra note 11, § 24.
569. The Restatement (Second) of Judgments and the Federal Rules of Civil Procedure avoid the term “cause of action,” and instead use the term “claim” to denote the same litigative unit that California calls a “cause of action.” 1B MOORE’S FEDERAL PRACTICE, supra note 1, at 361. The two terms have been used interchangeably. See, e.g., WRIGHT & MILLER, supra note 550, § 4407, at 48. See also supra note 1.
570. RESTATEMENT (SECOND) OF JUDGMENTS, supra note 11, § 24(1). See supra note 11 for the text of the definition of a cause of action proposed in the Restatement (Second) of Judgments.
571. RESTATEMENT (SECOND) OF JUDGMENTS, supra note 11, § 24 comment a.
572. Id.
573. Id.
or “occurrence” is,\(^{574}\) whereas it can be difficult to predict what a “primary right” will be in many cases.\(^{575}\) Although we could expect disputes over whether a series of events constitutes a single “transaction” or “occurrence,”\(^{576}\) the disputes can be resolved by employing objective criteria such as the closeness of the events in time and space.\(^{577}\) By contrast, no objective method exists to determine whether single or multiple primary rights have been violated, because the concept of primary rights is inherently ambiguous.\(^{578}\)

The second advantage of the “same transaction” definition is that it promotes judicial economy. Primary rights are frequently narrower than the transaction which gives rise to the claim.\(^{579}\) Thus, a single “occurrence” can give rise to multiple causes of action under the primary rights theory,\(^{580}\) thereby allowing the plaintiff to file successive suits.\(^{581}\) This wastes judicial resources,\(^{582}\) particularly when both actions require the same evidence, witnesses, and the like.\(^{583}\) By contrast, if the transaction is the litigation unit, the plaintiff is forced to litigate more claims in a single lawsuit, thereby reducing the number of lawsuits and promoting judicial economy.\(^{584}\)

Third, since the same transaction definition is used in federal

\(^{574}\) “[A] lay or nonlegal grouping of the facts into a single unit, as nonprofessional witnesses would naturally do, will be the most practicable [definition of a cause of action].” C. CLARK, supra note 16, § 19, at 137.

\(^{575}\) See supra notes 332-490 and accompanying text for a discussion of the inherent ambiguity of the primary rights theory.

\(^{576}\) Lasa Per L’Industria del Marmo Soc. Per Azioni of Lasa, Italy v. Alexander, 414 F.2d 143 (6th Cir. 1969) illustrated the kind of dispute that can arise over the extent of a single “transaction or occurrence.” That complex case involved an initial claim, a series of counter-claims and cross-claims, and a third-party complaint. Id. at 145. At issue was whether two of the cross-claims and the third-party claim “[arose] out of the same transaction or occurrence that [was] the subject matter of the original action” as required by Federal Rules of Civil Procedure 13(g) and (h). Id. The majority gave “‘[t]he words ‘transaction or occurrence’... a broad and liberal interpretation in order to avoid a multiplicity of suits.” Id. at 147.

By contrast, the dissenting judge thought that the cross-claims were not part of the same transaction as the original claim, since he thought that they were “not related to the original claim... and that there [was] no identity of the many factual issues involved...” Id. at 151 (McAllister, J., dissenting).

\(^{577}\) RESTATEMENT (SECOND) OF JUDGMENTS, supra note 11, § 24(2) & comment b.

\(^{578}\) See supra notes 332-490 and accompanying text.


\(^{580}\) Id.; 4 B. WITKIN, supra note 1, § 43.

\(^{581}\) Friedenthal, supra note 15, at 13.

\(^{582}\) The problem is more theoretical than actual today because the plaintiff has other reasons to bring all of his claims in one suit. See supra notes 507-12, 527, 533-36 and accompanying text.

\(^{583}\) Friedenthal, supra note 15, at 12.

\(^{584}\) 1B MOORE’S FEDERAL PRACTICE, supra note 1, ¶ 0.410[2].
RES JUDICATA AND PRIMARY RIGHTS

In the past, the primary rights definition of a cause of action for purposes of res judicata made more sense than it does today. At common law, "forms of action" determined the limitations on pleading, amendment, and joinder, and these limitations were aimed at producing a single issue for trial. Joinder limitations were particularly significant. At common law, a plaintiff could not join claims unless they fell within the same "form of action." Under the original code, the joinder statute prohibited a plaintiff from joining causes of action unless they fell within specific classes. Thus, the plaintiff was often prevented from joining all of his claims arising from the same transaction. Under these conditions, it would have been unfair to disallow separate suits on each claim.

However, California now allows unlimited joinder of plaintiff's claims without any category-based limitations. Therefore, the fairness...
considerations that formerly supported a narrow definition of a cause of action are no longer applicable.

Additionally, the combination of crowded court conditions and statutes of limitations has eliminated any advantage the plaintiff might have obtained from filing separate suits. It could take several years for a case to move through the California court system, and when the first suit is concluded, the statute of limitations has often run on the second claim. Thus, the opportunity for the plaintiff to bring more than one suit on claims arising from the same occurrence are today more theoretical than real.

The primary rights theory has other disadvantages. The concept of a "primary right" is inherently ambiguous, and, therefore, in any given case, the right at issue can be given a broad or narrow interpretation. The ambiguity causes uncertainty and confusion. Additionally, the primary rights definition is less conducive to judicial economy than the same transaction definition; unless the primary right at issue is defined broadly enough to encompass the entire occurrence that gave rise to the claims, several suits will be permitted when a single suit could resolve the entire controversy. Furthermore, most jurisdictions, including the federal courts, employ the same transaction definition of a cause of action as opposed to the primary rights definition. The minority position is not by definition the inferior position. However, the same transaction definition has the distinct advantages of being easier to understand and more conducive to judicial economy. By contrast, the advantages of the primary rights definition have become extinct or illusory.

For these reasons, California should abandon the primary rights definition of a cause of action. In its place, California should require mandatory joinder of plaintiff's claims by statute if the claims arise out of the same transaction or occurrence. Alternatively, California courts should adopt the same transaction definition by overruling the precedent that keeps the primary rights definition operative. Either way, the primary rights theory would be relegated to its rightful place in history, where it belongs.

Robin James*

* The author wishes to thank Professor Christopher May for introducing the author to the subject of primary rights and for reading a draft of this Comment, and primary editor Gregg R. Cannady for his comments, support, and enthusiasm.