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EXCESSIVE ATTACHMENTS AS ABUSE OF PROCESS IN CALIFORNIA

California now recognizes that an excessive attachment¹ is an abuse of process² rather than malicious prosecution.³ Before an action for malicious prosecution can be brought, the attachment action⁴ complained of must have terminated.⁵ A cause of action for abuse of process, however, arises immediately upon levy of attachment and can be brought by cross-claim⁶ in the attachment suit.⁷

This comment explores the pleading aspects of treating an excessive attachment as an abuse of process with particular attention focused on a potential problem in the classification of the cross-claim as either a counterclaim or a cross-complaint. The interrelationship between an award of damages for abuse of process and a recovery from the sureties on an attachment undertaking is also examined. An attempt is also made to evaluate the practical desirability of allowing the pursuit of an abuse of process cross-claim in the same suit with the underlying action.

MALICIOUS PROSECUTION OR ABUSE OF PROCESS?

In the past, actions arising out of excessive attachments have been considered as claims for malicious prosecution in California,⁸ and recovery has been allowed despite the absence of one or more of the commonly stated elements of malicious prosecution.⁹ The ele-

¹ For the purpose of this comment the following definition of excessive attachment has been employed: An excessive attachment is an attachment, for an ulterior purpose, of property in an amount greatly exceeding that required to satisfy the judgment expected. This definition employs the elements stated as essential to abuse of process expressed in terms specifically applicable to attachments. See note 2 *infra*.

² "The essential elements of abuse of process . . . have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of that process not proper in the regular conduct of the proceeding." W. PROSSER, TORTS 877 (3d ed. 1964).

³ *White Lighting Co. v. Wolfson*, 68 A.C. 347, 352, 438 P.2d 345, 348, 66 Cal. Rptr. 697, 700 (1968).

⁴ The term "attachment action" is used throughout this comment to identify the original action in which the attachment was levied. The plaintiff in the underlying action is referred to as the "attachment plaintiff" and the defendant in the underlying action is referred to as the "attachment defendant."

⁵ *Smith v. Hill*, 237 Cal. App. 2d 374, 386, 47 Cal. Rptr. 49, 57 (1965).

⁶ The term cross-claim is used in this comment to refer to either a counterclaim authorized by CAL. CODE CIV. PROC. § 437(2) (West 1954) or a cross-complaint authorized by CAL. CODE CIV. PROC. § 442 (West 1954).

⁷ *White Lighting Co. v. Wolfson*, 68 A.C. 347, 358-62, 438 P.2d 345, 351-54, 66 Cal. Rptr. 697, 703-06 (1968).

⁸ *Clark v. Nordholt*, 121 Cal. 26, 53 P. 400 (1898); *Weaver v. Page*, 6 Cal. 681 (1856).

⁹ *White Lighting Co. v. Wolfson*, 68 A.C. 347, 358-62, 438 P.2d 345, 351-54, 66

ments usually listed for the tort of malicious prosecution are: (1) a judicial proceeding terminated in favor of the defendant; (2) malice; and (3) a lack of probable cause to institute the action.¹⁰ However, when the foundation of the action is an excessive attachment, the attachment plaintiff usually has probable cause for bringing the attachment action¹¹ and for levying, although in a lesser amount, an attachment. By including claims of this nature within the purview of malicious prosecution, the California courts have implicitly accepted the concept that the excessiveness of the attachment itself is equivalent to a want of probable cause. This policy of the California courts is directly traceable¹² to the policy statement set forth in the Massachusetts case of *Savage v. Brewer*.¹³

It seems to be a well established principle, that if one causes another to be arrested, and held to bail, for a debt not due, or *for more than is due*, and this is done knowingly, an action of the case lies for this abuse of legal process; for the plaintiff knowing that there is no probable cause, and having no expectation to recover the sum demanded, is presumed to have acted maliciously. The want of probable cause is decisive on this point. And whether there be no debt due, or a sum much less than the sum demanded, and this be known is the same.¹⁴ (The court then extended the principle to include attachments.)

Furthermore, when the claim for excessive attachment was asserted in a separate action apart from the attachment suit, the California courts largely ignored the defendant's usual failure to prevail totally in the underlying action.¹⁵ On the other hand, where the defendant attempted to assert his claim by way of cross-demand in the attachment suit itself, the courts avoided confrontation with the requirement of "successful termination" by striking down those demands on other grounds. For example, the courts have sustained demurrers to such pleadings on the basis that a sufficient transactional relationship, then required for both a counterclaim or a cross-complaint, had not been alleged or established.¹⁶

Cal. Rptr. 697, 703-06 (1968) specifically cites two cases as illustrating such recovery: *Harris v. Harter*, 79 Cal. App. 190, 247 P. 39 (1926), and *Clark v. Nordholt*, 121 Cal. 26, 53 P. 400 (1898).

¹⁰ *Jaffe v. Stone*, 18 Cal. 2d 146, 149, 114 P.2d 335, 337 (1941).

¹¹ *White Lighting Co. v. Wolfson*, 68 A.C. 347, 358-62, 438 P.2d 345, 351-54, 66 Cal. Rptr. 697, 703-06 (1968).

¹² See *Clark v. Nordholt*, 121 Cal. 26, 53 P. 400 (1898); *Weaver v. Page*, 6 Cal. 681 (1856).

¹³ 33 Mass. 453 (1835).

¹⁴ *Id.* at 455-56 (emphasis added).

¹⁵ *Clark v. Nordholt*, 121 Cal. 26, 53 P. 400 (1898).

¹⁶ *Jeffreys v. Hancock*, 57 Cal. 646 (1881). The action for damages from excessive attachment in the same suit was not allowed because not qualified as a cross-complaint or as a counterclaim under then existing rules which required a transactional relationship. The opinion did not indicate whether the court would have found a cause of action stated without prior termination of the attachment suit.

Recognizing that claims based on excessive attachments fit poorly, if at all, the elements recognized as essential to malicious prosecution, the California Supreme Court, in *White Lighting Company v. Wolfson*¹⁷ held that an excessive attachment should be treated as giving rise to a cause of action for abuse of process rather than for malicious prosecution. The court further ruled that the attachment defendant could assert his claim immediately in the attachment action itself.

WHITE LIGHTING COMPANY V. WOLFSON

White Lighting presented a clear-cut case in which a claim for allegedly excessive attachments was pleaded as an abuse of process and recovery was sought by means of a cross-complaint in the attachment action. During the course of the attachment action for recovery of commissions advanced in the amount of \$850, White Lighting levied attachments against property alleged by Wolfson to be worth more than \$19,000. Wolfson alleged that the attachments were made for the ulterior purpose of coercing him to abandon other cross-demands against White Lighting. The trial court and the court of appeal ruled against Wolfson on the pleadings, holding that his action was one for malicious prosecution and, as such, was prematurely brought.¹⁸ The California Supreme Court, however, decided that an excessive attachment gives rise to a cause of action for abuse of process rather than for malicious prosecution.¹⁹ The court further ruled, without specifically identifying the appropriate pleading to be employed, that such a claim could be brought in the attachment suit.²⁰

In the course of its opinion the court analyzed various attachment wrongs and set forth four different categories into which such wrongs could be sorted:²¹ (1) Attachments levied in pursuing an action which itself constitutes malicious prosecution; (2) use of a regularly issued attachment for an improper purpose; (3) maliciously procured attachments in properly instituted actions in which the creditor, however, is not entitled to the writ; and (4) attachments of property either exempt from attachment or possessing value greatly in excess of the amount of the legitimate claim. The court observed that the first two categories have been correctly treated by California courts as giving rise to causes of action for

¹⁷ 68 A.C. 347, 438 P.2d 345, 66 Cal. Rptr. 697 (1968).

¹⁸ *White Lighting Co. v. Wolfson*, 59 Cal. Rptr. 598 (1967), *vacated*.

¹⁹ *White Lighting Co. v. Wolfson*, 68 A.C. 347, 352, 438 P.2d 345, 348, 66 Cal. Rptr. 697, 700 (1968).

²⁰ *Id.*

²¹ *Id.* at 360, 438 P.2d at 352-53, 66 Cal. Rptr. at 704-05 (1968).

malicious prosecution and abuse of process respectively.²² The third category was not specifically discussed but appears to have been considered as abuse of process along with the fourth category.²³

In discussing excessive attachments the court declared that the established practice of calling such an action malicious prosecution rather than abuse of process employed a misnomer; that courts had long allowed recovery in spite of failure to establish either lack of probable cause or termination of the proceeding in the attachment defendant's favor.²⁴ In supporting its conclusion in favor of the abuse of process theory, the court was also concerned with a matter of simple justice. It felt that the victim of an excessive attachment should not have to await the termination of the attachment action to seek redress.²⁵

EXCESSIVE ATTACHMENT: CROSS-COMPLAINT OR COUNTERCLAIM?

The court in *White Lighting* ruled that an action resulting from an excessive attachment could be brought by a cross-claim in the attachment suit. Nowhere in the opinion is there a definite statement that the court found a sufficient transactional relationship between the subject matter of the underlying action and the excessive attachment to qualify the cross-demand as a cross-complaint.²⁶ Although discussing a pleading labeled a cross-complaint, the court refers to "claim"²⁷ and "cross-claim".²⁸

The court noted²⁹ that an attempt to claim damages for an unjustified attachment by means of a cross-claim was defeated in *Division of Labor Law Enforcement v. Barnes*.³⁰ The *Barnes* opinion cited for authority a much earlier case, *Jeffreys v. Hancock*,³¹ which had been decided at a time when a transactional relationship was required for counterclaims as well as for cross-complaints. The court in *White Lighting* pointed out that a transactional relationship was no longer required for a counter-claim at the time of the *Barnes*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 360, 438 P.2d at 352-53, 66 Cal. Rptr. at 704-05.

²⁶ CAL. CODE CIV. PROC. § 442 (West 1954). To meet the cross-complaint transactional relationship requirement, the cause must relate to or depend on the contract, transaction, matter, happening or accident upon which the action is brought or affect the property to which the action relates.

²⁷ *White Lighting Co. v. Wolfson*, 68 A.C. 347, 352, 358, 438 P.2d 345, 348, 351, 352, 66 Cal. Rptr. 697, 700, 703, 704 (1968).

²⁸ *Id.* at 362n.10, 438 P.2d at 354n.10, 66 Cal. Rptr. at 706n.10.

²⁹ *Id.* at 362n.9, 438 P.2d at 354n.9, 66 Cal. Rptr. at 706n.9.

³⁰ 205 Cal. App. 2d 337, 23 Cal. Rptr. 55 (1962).

³¹ 57 Cal. 646 (1881).

decision and disapproved that decision to the extent it was based on *Jeffreys*. Enigmatically, the court further stated: "The 1927 amendment of section 438 eliminated the requirement as to the 'same transaction,' although, of course, *that prerequisite presently remains a requirement under section 442.*"³² Code of Civil Procedure, section 442,³³ deals, of course, with cross-complaints. Although the statement of the court is unquestionably accurate, the purpose for reiterating the transactional relationship requirement for a cross-complaint is elusive.

Since the content of the pleading, rather than the name attached, determines whether a cross-complaint or counterclaim has been asserted,³⁴ *White Lighting* may stand for the proposition that a cross-claim based on an excessive attachment, however labeled, will be entertained *if* it qualifies as a counterclaim. If so, the decision leaves room for a future challenge to the commencement of an action through a cross-complaint under circumstances that would preclude consideration of such a cross-claim as a counterclaim.³⁵ This situation could occur if cross-complainant sought to join a new party, perhaps an agent of the attachment defendant.

On the other hand, the court did not rule that the transactional relationship was insufficient to support a cross-complaint. Various factors may imply the court's approval of treatment of the cross-claim as a cross-complaint. Each of the factors is indicative; none are conclusive. First, the pleading was labeled a cross-complaint in the original action, and the court did not criticize that classification or suggest that the pleading was actually a counterclaim. Second, the court explained that recognition of the cross-claim in the same suit as the underlying action promotes the policy of avoiding circuitry and multiplicity of litigation.³⁶ Had the court intended to restrict the cross-demands to pleadings which could qualify as counterclaims, this explanation would be unnecessary. Third, in his dissenting appellate court opinion,³⁷ which foreshadowed the supreme court holding, Justice Herndon expressed some concern as to whether a sufficient transactional relationship would be found to warrant consideration of the pleading as a cross-complaint. He stated: "I am uncertain whether or not such cause of action should be considered

³² *White Lighting Co. v. Wolfson*, 68 A.C. 347, 352, 358, 438 P.2d 345, 348, 351, 352, 66 Cal. Rptr. 697, 700, 703, 704 (1968) (emphasis added).

³³ CAL. CODE CIV. PROC. § 442 (West 1954).

³⁴ *Terry Trading Corp. v. Barsky*, 210 Cal. 428, 434, 292 P. 474, 476 (1930).

³⁵ CAL. CODE CIV. PROC. § 438 (West 1954). New parties cannot be brought into a suit by means of a counterclaim.

³⁶ *White Lighting Co. v. Wolfson*, 68 A.C. at 362n.10, 438 P.2d at 354n.10, 66 Cal. Rptr. at 706n.10 (1968).

³⁷ *White Lighting Co. v. Wolfson*, 59 Cal. Rptr. 598, 601 (1967), *vacated*.

one arising out of the transaction set forth in the complaint. . . . It seems to me that modern concepts might dictate an affirmative answer.³⁸ The court may well have silently accepted Justice Herndon's thinking on the matter.

Cross-claim may be a Compulsory Counterclaim.

If a transactional relationship does exist between the underlying action and the excessive attachment cross-claim, the question whether the cross-claim is a compulsory counterclaim³⁹ must be considered. A cross-claim which qualifies as a compulsory counterclaim must be brought in the same suit as the underlying action or not at all. The key factor qualifying a cross-demand as a compulsory counterclaim is that the cause of action arises out of the transaction alleged to be the foundation of the plaintiff's claim.⁴⁰ The transactional relationship dilemma which introduces uncertainty into the classification of a cross-claim as a cross-complaint recurs when the claim is considered for classification as a compulsory counterclaim.

The California statute authorizing cross-complaints⁴¹ expresses the transactional relationship requirement in different and perhaps more encompassing words than those in the statute requiring that compulsory counterclaims be set up in the same suit as the underlying action.⁴² If there is a transactional relationship between the underlying action and the excessive attachment sufficient to support a cross-complaint, there remains the open question whether a greater degree of relationship will be required to establish a compulsory counterclaim and bar a subsequent action in a separate suit.

But the problem of classification of the cross-claim as a compulsory counterclaim is diminished in significance by the operation of the statute of limitations. An action for abuse of process is for injury to the person⁴³ and must be brought within one year of the date the cause of action accrues.⁴⁴ Since a cause of action accrues when a remedy is available⁴⁵ and since, under *White Lighting*, a

³⁸ *Id.*

³⁹ CAL. CODE CIV. PROC. § 439 (West 1954).

⁴⁰ *Id.*

⁴¹ CAL. CODE CIV. PROC. § 442 (West 1954).

⁴² CAL. CODE CIV. PROC. § 439 (West 1954) requires a counterclaim be set up when the cause arises out of the transaction set forth in the complaint as the foundation of the plaintiff's claim. CAL. CODE CIV. PROC. § 442 (West 1954) allows a cross-complaint when the cause relates to or depends upon the contract, transaction, matter, happening or accident upon which the action is brought or affects the property to which the action relates.

⁴³ *Simons v. Edouarde*, 98 Cal. App. 2d 826, 828, 221 P.2d 203, 204 (1950).

⁴⁴ CAL. CODE CIV. PROC. § 340(3) (West 1954).

remedy is available immediately,⁴⁶ the statute of limitations starts to run at the time the property is attached. Therefore, even if a subsequent action for an excessive attachment is not barred by virtue of being a compulsory counterclaim, in most instances the statute will have run and the suit will be barred nonetheless.

EXCESSIVE ATTACHMENT AND THE ATTACHMENT UNDERTAKING

Before levying an attachment a plaintiff must file an undertaking, with sureties, to the effect that, should the plaintiff not be entitled to the attachment, or should the defendant prevail in the action, the plaintiff will pay all costs and damages sustained by the defendant not exceeding the sum specified in the undertaking.⁴⁷ The sum prescribed for the undertaking is basically one-half of the principal amount specified in the attachment writ although the court may, within limits, increase or decrease the amount.⁴⁸ Should the unsuccessful attachment plaintiff fail to pay the costs and damages occasioned by the attachment, the prevailing attachment defendant becomes entitled to proceed directly against the sureties on the undertaking.⁴⁹

In the typical excessive attachment case the plaintiff prevails, but in a much smaller amount than claimed.⁵⁰ In such event, the attachment undertaking is of no benefit to the defendant, and a judgment for abuse of process is collectible solely from the plaintiff. In the less typical situation, the attachment defendant prevails both in a cross-claim for abuse of process and in the underlying action. Such a situation introduces complications. The remainder of this discussion concerning the attachment undertaking assumes this latter situation.

To the extent of the undertaking, the sureties can be held liable for payment of compensatory damages awarded in the abuse of process judgment to the prevailing defendant.⁵¹ The statute requiring attachment undertakings provides for payment of "all damages" caused by the attachment up to the limit of the undertaking.⁵² An excessive attachment could not have occurred without an

⁴⁵ *Irvine v. Bossen*, 25 Cal. 2d 652, 658, 155 P.2d 9, 13 (1944).

⁴⁶ *White Lighting Co. v. Wolfson*, 68 A.C. 347, 352, 438 P.2d 345, 348, 66 Cal. Rptr. 697, 700 (1968).

⁴⁷ CAL. CODE CIV. PROC. § 539 (West 1954).

⁴⁸ *Id.*

⁴⁹ *Finn v. Witherbee*, 126 Cal. App. 2d 45, 49, 271 P.2d 606, 609 (1954).

⁵⁰ *White Lighting Co. v. Wolfson*, 68 A.C. 347, 361, 438 P.2d 345, 354, 66 Cal. Rptr. 697, 706 (1968).

⁵¹ *Carter v. Agricultural Ins. Co.*, 266 A.C.A. 886, 72 Cal. Rptr. 462 (1968).

⁵² CAL. CODE CIV. PROC. § 539 (West 1954).

attachment having been levied at all, so damages resulting from the excessive attachment are reasonably considered as caused by the existence of the attachment itself. Since the amount of the attachment undertaking is determined in relation to the excessive total amount of the attachment, the measure of potential damages contemplated under section 539 of the Code of Civil Procedure can thus be assumed to include damages due to the excessiveness of the attachment.

As a result of a recent decision,⁵³ to the extent the abuse of process judgment is for punitive damages, it is collectible only from the attachment plaintiff. The statement had previously been made, as dictum, that by including the words "all damages" the statute included punitive damages.⁵⁴ In disapproving this dictum the court pointed out that the statute refers to all damages *sustained* by the attachment defendant and that punitive damages are not sustained by the attachment defendant but rather are awarded him to punish the attachment plaintiff.⁵⁵

Allowing the attachment defendant to collect his judgment for abuse of process from the sureties places the sureties in a tenuous position. The sureties have no more than a contingent interest to protect at the time the abuse of process cross-claim is filed. Unless the defendant prevails in the attachment action, the sureties are subject to no obligation. The sureties thus find themselves in the position of having to elect whether to assist the attachment plaintiff in his defense of the abuse of process cross-claim, or to forego the opportunity to contest the reasonableness of those damages sought by the attachment defendant.⁵⁶

However, the basic nature of the undertaking, essentially that of an insurance contract⁵⁷ protecting the attachment defendant, runs counter to the argument for the sureties. The nature of the proceedings against the sureties is that of collection of damages and costs, with the secondary function of resolving differences as to the amount or propriety of some items of damages claimed. One obvious solution to this dilemma facing the sureties is that of screening the attachment plaintiff's position before becoming

⁵³ Carter v. Agricultural Ins. Co., 266 A.C.A. 886, 72 Cal. Rptr. 462 (1968).

⁵⁴ Klinell v. Shirey, 223 Cal. App. 2d 239, 246, 35 Cal. Rptr. 901, 906 (1963).

⁵⁵ Carter v. Agricultural Ins. Co., 266 A.C.A. 886, 888, 72 Cal. Rptr. 462, 464 (1968).

⁵⁶ The issue of damages in an action for abuse of process meets the requirements of collateral estoppel; adjudication of the identical issue, a final judgment on the merits, and privity between the party in the prior action and the party against whom the plea is asserted; and therefore cannot be relitigated by the surety in a subsequent action. Bernhard v. Bank of America, 19 Cal. 2d 807, 813, 122 P.2d 892, 895 (1942).

⁵⁷ Klinell v. Shirey, 223 Cal. App. 2d 239, 246, 35 Cal. Rptr. 901, 906 (1963).

surety. The net result of such a screening could well be the elimination of some excessive attachments.

The prevailing attachment defendant has his own dilemma. In the absence of malice and want of probable cause in the bringing of the attachment, the prevailing attachment defendant has no action against the attachment plaintiff himself on the undertaking.⁵⁸ While the attachment defendant's judgment for abuse of process is against the plaintiff, the damages and costs incident to the attachment itself, other than for its excessiveness, arise by operation of law when the defendant prevails. Since the attachment itself might have been made with probable cause, these damages and costs may not be sufficiently tainted with tortious conduct to be the subject of an action directly against the plaintiff rather than the sureties. When such damages exceed the amount of the undertaking, the prevailing attachment defendant may find himself denied recovery to the extent of that excess.

POSSIBLE EFFECTS ON BEHAVIOR AND POLICY

The archetype creditor who satisfied his entertainment needs by turning widows and children out into the snow might have fared poorly as plaintiff in a suit where an excessive attachment cross-complaint was tried simultaneously with the main action. To some extent any creditor having to defend a cross-action which, in essence, amounts to an accusation of unfairness, is in danger of having disapproval of his behavior translated into an unfavorable verdict in the main action. One solution to this problem is the bifurcated trial. Separate trials of counterclaims are specifically permitted by California statute,⁵⁹ and separate trials of cross-complaints are permitted under the general provision for consolidation or severance of actions in the discretion of the court when no prejudice to a substantial right results.⁶⁰

The availability of an immediate cross-action, pursuant to *White Lighting*,⁶¹ may cause a cross-complaint for abuse of process to become a standard defensive measure and result in increasing rather than decreasing the amount and complexity of litigation. This is, however, doubtful. As a tactical device, an action for abuse of process is a two-edged sword. A defendant can as easily hurt his own position with an unjustified excessive attachment claim as hurt

⁵⁸ *Finn v. Witherbee*, 126 Cal. App. 2d 45, 50, 271 P.2d 606, 610 (1954).

⁵⁹ CAL. CODE CIV. PROC. § 438 (West 1954).

⁶⁰ CAL. CODE CIV. PROC. § 1048 (West 1954).

⁶¹ *White Lighting Co. v. Wolfson*, 68 A.C. 347, 352, 438 P.2d 345, 348, 66 Cal. Rptr. 697, 700 (1968).

his adversary's position with a well-founded one. There may be some increase in the number of such actions pursued until the boundaries defining excessiveness become somewhat settled. The long-range result may be that the well advised plaintiff will be circumspect in his use of the attachment process and generally avoid the entire problem.

The attaching creditor may be in a position of not knowing the actual extent of the debtor's interest in property seized. If all the assets of a debtor are suspected of being heavily encumbered, there is a practical necessity to attach a considerable gross value in order to have sufficient net value to satisfy a judgment. A question arises as to the result when the debtor turns out to have a greater interest than suspected in the property attached and the attachment is, inadvertently, excessive. The attaching plaintiff may have a defense of sorts to impose against a cross-complaint for abuse of process. One of the elements of abuse of process is an ulterior purpose.⁶² Even though excessive attachments have long been considered inherently to have the requisite tortious nature,⁶³ it seems reasonable that a showing of lack of ulterior purpose, combined with a showing that probable cause existed for the attachment of a large total amount of property, and a showing of absence of malicious conduct in the attachment activities should refute such a conclusion. In employing such a defense, the attachment defendant could almost certainly expect to have his behavior with respect to discharging the unnecessarily levied attachments subjected to examination. Such behavior had best be exemplary.

CONCLUSIONS

*White Lighting Company v. Wolfson*⁶⁴ contributes to the definition of the relationship between abuse of process and malicious prosecution.

Classifying a cause of action resulting from an excessive attachment as abuse of process is logically sound. The remaining structure of malicious prosecution actions is strengthened by removal of those actions which required a strained interpretation of the definition and elements of the tort.⁶⁵

The objective of avoiding circuitry and multiplicity of litigation may be only partially met by allowing an immediate cross-claim

⁶² W. PROSSER, TORTS 877 (3d ed. 1964).

⁶³ *Savage v. Brewer*, 33 Mass. 453, 455-56, (1835).

⁶⁴ 68 A.C. 347, 438 P.2d 345, 66 Cal. Rptr. 697 (1968).

⁶⁵ *Id.* at 360, 438 P.2d at 353, 66 Cal. Rptr. at 705.

for an excessive attachment cause of action. In actual operation, bifurcated trials may prove generally advisable to insure substantial justice to all parties; hence some of the undesirable aspects of multiplicity may continue to exist. The total time required for the entire litigation, attachment action, and action for excessive attachment, is certain to be reduced. Both actions waiting concurrently rather than consecutively for their turn on the court calendar will undoubtedly achieve a total time compression.

The typical excessive attachment victim, the plaintiff having prevailed for an amount much less than claimed, finds himself in a position not in keeping with the apparent underlying philosophy of the statutory provision requiring attachment undertakings.⁶⁶ A defendant prevailing against an attachment brought in good conscience is protected by the undertaking, while the victim of a gross abuse of the attachment procedure has no such protection unless he prevails in the underlying action. In the interest of justice, statutory provision should be made to protect a victim of a grossly excessive attachment whether or not he prevails totally in the attachment action.

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⁶⁶ CAL. CODE CIV. PROC. § 539 (West 1954); *cf.* CAL. CODE CIV. PROC. § 830 (West 1955).