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The Vexatious Litigant

Edmund R. Manwell

THE VEXATIOUS LITIGANT

> A man with a poor case is as much entitled to have it judicially determined by usual legal processes as the man with a good case.†
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> Delay causes hardship. Delay brings our courts into disrepute. Delay results in deterioration of evidence through loss of witnesses, forgetful memories and death of parties and makes it less likely that justice will be done when a case is reached for trial.‡

The problem of congested courts and the delay they produce is nationwide and well-known.[1] Too many actions require too much time for too few judges.[2] One of the causes of this overcrowding in the courts, both trial and appellate, is the vexatious litigant—the litigant who advances[3] or re-advances[4] a claim that has no merit, or brings a multi-

† Bartholomew v. Bartholomew, 56 Cal. App. 2d 216, 224, 132 P.2d 297, 302 (1942).

‡ O'Donnell v. Watson Bros. Transp. Co., 183 F. Supp. 577, 581 (N.D. Ill. 1960) (Miner, J.). See also Miner, *Court Congestion: A New Approach*, 45 A.B.A.J. 1265 (1959).

[1] See, *e.g.*, Halpin, *Delay on Appeal*, 38 CAL. S.B.J. 279 (1963); Warren, *The Problem of Delay: A Task for Bench and Bar Alike*, 44 A.B.A.J. 1043 (1958); Zeisel, *Delay by the Parties and Delay by the Courts*, 15 J. LEGAL ED. 27 (1962).

[2] The recent report of the Administrative Office of the California Courts shows, for example, that in fiscal 1964-65 California municipal courts received 4.3 million filings, superior courts received 416,292 filings, the district courts of appeal received 4,302 filings, and the supreme court received 2,569 filings. Delay in civil jury trials was shown to range from five to thirteen months in the metropolitan counties. JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS 11-44 (1966).

[3] See, *e.g.*, Lapique v. Agoure, 170 Cal. 79, 148 Pac. 517 (1915), where plaintiff attempted to sue for wrongful death the only persons in whose behalf such an action could have been maintained. His theory was that he was the last surviving partner of a firm to which deceased belonged, but he had never been a member of any such partnership. The court, in upholding dismissal by the trial court on its own motion, found the claim to be the most preposterous ever presented in any court.

[4] See, *e.g.*, Stafford v. Russell, 201 Cal. App. 2d 719, 20 Cal. Rptr. 112 (1962), where appellant Stafford's "incurable litigation complex" had rendered him an "insufferable nuisance," inasmuch as the point raised with regard to the validity of a 1952 judgment had already been declared without merit at least ten times on appeal. *Id.* at 719-20, 20 Cal. Rptr. at 112-13.

For the complete history of Stafford's litigation, see the following cases: Stafford v. State, 239 A.C.A. 49, 48 Cal. Rptr. 415 (1965); Stafford v. Russell, *supra;* People v. Ashby, 161 Cal. App. 2d 33, 325 P.2d 1009 (1958); People v. Ashby, 161 Cal. App. 2d 31, 325 P.2d 1008 (1958); *In re* Stafford, 160 Cal. App. 2d 110, 324 P.2d 967 (1958); Stafford v. General Petroleum Corp., 151 Cal. App. 2d 316, 311 P.2d 197 (1957); Stafford v. Yerge, 139 Cal. App. 2d 851, 294 P.2d 721 (1956); Sanders v. Howard Park Co., 136 Cal. App. 2d 917, 288 P.2d 308 (1955); Howard v. General Petroleum Corp., 136 Cal. App. 2d 168, 288 P.2d 308 (1955); Coburg Oil Co. v. Russell, 136 Cal. App. 2d 165, 288 P.2d 305 (1955); Coburg Oil Co. v. Russell, 129 Cal. App. 2d 214, 276 P.2d 637 (1954); Stafford v. Yerge, 129 Cal. App. 2d 165, 276 P.2d 649 (1954); Stafford v. Russell, 128 Cal. App. 2d 794, 276 P.2d 41 (1954); Stafford v. Russell, 117 Cal. App. 2d 326, 255 P.2d 814 (1953); Stafford v. Russell, 117 Cal. App. 2d 319, 255 P.2d 872 (1953); Howard v. General Petroleum Corp., 114 Cal. App. 2d 91, 249 P.2d 585 (1952); Howard v. General Petroleum Corp., 108 Cal.

plicity of actions where one is sufficient.[5] The motive of the vexatious litigant may be to harass the other party, to postpone a result he considers unfair, or simply to satisfy some urge to engage in litigation.[6] Whatever the motive, the courts are overburdened today even without such actions. The administrative cost of the vexatious litigant's claims is high—to the system as a whole, to the adverse party faced with the burden of responding to them, and to the litigant with a valid claim who must wait for his day in court.[7] On the other hand, it has long been considered axiomatic in our system of justice that every man is entitled to his "day in court."[8] However, the guarantee that every litigant will have his "day in court" implies that a litigant is not entitled to two days.[9]

App. 2d 25, 238 P.2d 145 (1951); Coburg Oil Co. v. Russell, 100 Cal. App. 2d 200, 233 P.2d 305 (1950); Sanders v. Howard Park Co., 86 Cal. App. 2d 721, 195 P.2d 898 (1948). Stafford has also engaged in other attempts to relitigate issues decided against him. *E.g.*, Stafford v. County of Los Angeles, 219 Cal. App. 2d 770, 33 Cal. Rptr. 475 (1963).

[5] See, *e.g.*, Southern Pac. Co. v. Robinson, 132 Cal. 408, 64 Pac. 572 (1901), where defendants held some 3000 alleged causes of action against plaintiff for violation of the same code section.

[6] One judge feels that "vexatious litigants can be, and frequently are, mentally unbalanced on the subject they are concerned with and that no procedure which does not recognize the mental aspect of the situation can solve the problem of dealing with such litigants." Letter From Judge Edmund Moor to Edmund R. Manwell, November 23, 1965; on file, California Law Review.

[7] The statement of the court in Vickter v. Pan Pac. Sales Corp., 108 Cal. App. 2d 601, 239 P.2d 463 (1952), is appropriate to both meritless claims at the trial level and frivolous appeals. "The volume of appellate work in the Second District is extremely heavy, requiring at times the assistance of pro tempore judges. The courts have the constant problem of balancing the prompt dispatch of business with unhurried consideration of the merits of each appeal. When an appeal is taken for the purpose of delay it not only works an injustice upon the respondent in withholding from him the benefits of his judgment, but also upon those who have pending meritorious appeals and who must wait their turn." *Id.* at 604, 239 P.2d at 465.

[8] This principle of justice was recognized as early as the Magna Carta—"To none will we sell, to none will we deny, or delay, right or justice." MAGNA CARTA § 40 (1215). While not explicitly stated in either the United States or California Constitutions, the principle is considered implicit in both. *E.g.*, *In re* Oliver, 333 U.S. 257, 273 (1947): "A person's right to . . . an opportunity to be heard . . . a right to his day in court . . . are basic in our system of jurisprudence . . . ." O'Connell v. Judnich, 71 Cal. App. 386, 235 Pac. 664 (1925). See also Chambers v. Baltimore & O.R.R., 207 U.S. 142 (1907) (right to sue and defend in state courts comprehended in privileges and immunities clause).

It is a maxim of California jurisprudence that every legal wrong has its corresponding remedy and no person may be denied the right to pursue this remedy. CAL. CIV. CODE § 3523; Painter v. Berglund, 31 Cal. App. 2d 63, 87 P.2d 360 (1939); O'Connell v. Judnich, *supra*. The right to a day in court includes the right to a day in the appropriate reviewing court. People v. Becker, 108 Cal. App. 2d 764, 239 P.2d 898 (1952).

[9] "'A party plaintiff or defendant is entitled to his day in court; if he raises a question as to the respective rights of another person and himself he deserves, and will get, his answer; but once having secured a final determination of his right, he cannot again ask the court to redecide the same question on its merits.'" Sterling v. Galen, 242 A.C.A. 172, 179, 51 Cal. Rptr. 312, 317 (1966). The policy underlying the doctrine of res judicata also supports this implication. See notes 92-93 *infra* and accompanying text.

Once a valid determination has been made, the litigant may not be heard to complain because the courts refuse to reconsider their earlier ruling.

In seeking to solve the problem of the vexatious litigant, the desire to expedite the administration of justice and reduce abuses of the judicial process must be balanced against the right of every litigant to an adjudication of the merits of his claim. However, speedy disposition of a claim after due consideration of the merits, as by affidavit on a motion for summary judgment, is not a denial of the right to a "day in court." Refusal to rehear a claim once adjudicated abridges no guarantees.[10] Because the legislature has the power to determine the procedure by which claims may be raised and adjudicated,[11] it is possible to solve the problem of the vexatious litigant. Procedural devices are available which promote maximum economy for both the courts and adverse parties by disposing of vexatious claims rapidly and deterring such claims for the future; these procedures retain due regard for the right of the possibly vexatious litigant to have his claim determined on its merits.[12]

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[10] See notes 92-93 *infra* and accompanying text (res judicata). The same policy is applicable to appellate review. *E.g.*, Griffin v. Illinois, 351 U.S. 12, 18 (1955), where the Court noted that "it is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all."

[11] "In general, it may be said that the legislative discretion as to the different modes of procedure or rules of practice to be prescribed for the numerous and various actions and proceedings allowed in courts of justice is very wide, and that its judgment on the question whether or not a particular provision shall be made for any class of cases, and as to the classification thereof, is not to be interfered with except for very grave causes and where it is clear beyond reasonable doubt that no sound reason for the legislative classification, and for the different provisions regarding the same, exists." Cohen v. City of Alameda, 168 Cal. 265, 267, 142 Pac. 885, 886 (1914). The expansion of the equal protection clause in the area of personal liberties probably does not qualify this early statement. See, *e.g.*, Morey v. Doud, 354 U.S. 457, 463-64 (1957): " 'The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. . . . A classification having some reasonable basis does not offend against that clause merely . . . because in practice it results in some inequality. . . . [I]f any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. . . .' "

[12] Maurice Rosenberg proposes four tests applicable to suggested antidotes for delay. "First, the measure should not often or materially warp the results of the litigation process for the parties; or, if it does, the probability of changed results should be known and acceptable as a price for added efficiency. Second, the measure ought to operate simply as an administrative matter and inexpensively as a financial matter, in comparison to the saving that it produces. All relevant costs, both to the litigants and to the public at large, should be included in the balance. Third, the remedy should not involve the custodians of justice in subterfuge or hypocrisy. That is, it should not do by indirection what the courts are unable or unwilling to do directly. Finally, the remedy should not breed disrespect for the courts by giving the public an unsatisfactory impression of their fairness or good faith." Rosenberg, *Court Congestion: Status, Causes and Proposed Remedies*, in AMERICAN ASSEMBLY, THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 58 (Jones ed. 1965).

This Comment will examine the procedural devices available to the California courts to dispose of vexatious claims.[13] The California Legislature recently enacted the "Vexatious Litigant Statute"[14] in an effort to meet the problem of vexatious litigation. It is the contention of this Comment that this statute adds nothing of value, either in terms of saving court time or in terms of convenience or compensation for the vexed defendant. This will be demonstrated by an examination of the "Vexatious Litigant Statute" and other existing procedures. At the trial level, these procedures include summary judgment,[15] abatement and injunction. At the appellate level, the procedures include the inherent power of the court summarily to affirm or dismiss and the statutory power to impose penalties for frivolous appeals. The Comment will conclude with a brief examination of possible improvements.

I

THE TRIAL COURT

A. The "Vexatious Litigant Statute": Code of Civil Procedure Sections 391-391.6

Attorneys and judges have long sought solutions to the problem of groundless litigation.[16] Early in this decade those concerned[17] with this

[13] Space available here does not permit a detailed study of all possible solutions to the problem of delay; nor does it permit full analysis of the constitutional and policy questions which limit the power of the courts to restrict access or remedies, particularly in the area of criminal justice. For related material, see generally Douglas v. California, 372 U.S. 353 (1963); AMERICAN ASSEMBLY, THE COURTS, THE PUBLIC AND THE LAW EXPLOSION (1965); CONTINUING EDUCATION OF THE BAR, CALIFORNIA PRETRIAL AND SETTLEMENT PROCEDURES (1963); LOUISELL, MODERN CALIFORNIA DISCOVERY (1963); Miner, *Court Congestion: A New Approach*, 45 A.B.A.J. 1265 (1959); Sturges, *"Compulsory Arbitration"—What Is It?* 30 FORDHAM L. REV. 1 (1961); note 1 *supra*.

[14] CAL. CODE OF CIV. PROC. §§ 391-391.6.

[15] A procedure closely related to summary judgment is the motion to dismiss under the court's inherent power, now embodied in the statutory motion to strike. CAL. CODE OF CIV. PROC. § 435. Because this procedure is so closely related to summary judgment, it will not be discussed fully in the text. See note 62 *infra*.

[16] See, *e.g.*, McCabe, *Summary Judgment*, 11 So. CAL. L. REV. 436 (1938).

[17] For example, the State Bar of California took an active interest in the problem of groundless litigation. At the 1961 Conference of State Bar Delegates, the Los Angeles County Bar Association presented Resolution No. Eight, "Vexatious Civil Litigation." 37 CAL. S.B.J. 356-57 (1962). This resolution approved "in principle" Assembly Bill 2684, then pending, which provided that if, on application by the Attorney General, the Supreme Court was satisfied that any person had habitually, persistently and without any reasonable ground instituted vexatious civil litigation in any court or courts of the state, whether against the same or different persons, the court, after hearing or opportunity for hearing according to rules adopted by the Judicial Council, might order that no civil litigation be instituted by him in any court of the state. The court could also forbid any person to continue any action instituted before the making of the order, unless he first obtained Supreme Court permission. The court was not to grant such permission unless it was satisfied that the litigation

problem, apparently feeling that existing remedies were inadequate, began to propose new statutory solutions. The solution finally adopted[18] was the so-called "Vexatious Litigant Statute," sections 391-391.6 of the Code of Civil Procedure.

The "Vexatious Litigant Statute" was designed to meet the problem of the persistent and obsessive litigant, appearing without an attorney—in *propria persona*—who had a number of groundless actions constantly pending, sometimes against judges and other court officers who were concerned in the adverse decisions of previous actions.[19]

The statute sets out two alternative definitions of a vexatious litigant. The first type of vexatious litigant is any person who, during the seven year period immediately preceding the action at bar, has commenced, prosecuted or maintained in *propria persona* at least five litigations[20] (other than in small claims court) which have been finally determined against him or unjustifiably permitted to remain pending two years without having been brought to trial.[21] The second type is a person who, after a litigation has finally been determined against him, repeatedly relitigates[22] or attempts to relitigate in *propria persona*, against the same

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was not abusive of the process of the court and that there was prima facie ground for the litigation. A.B. 2684, California Legislature, General Session (1961). This resolution was referred to committee for study and the committee report provided a substitute resolution recommending different legislation. 37 CAL. S.B.J. 356-57 (1962); 38 CAL. S.B.J. 153, 489 (1963). Assembly Bill 2684 failed to pass. It is likely that it did not find favor because of the cumbersome procedures involved. The recommendation of the substitute resolution eventually ripened into the present "Vexatious Litigant Statute" which was sponsored by the State Bar of California. 38 CAL. S.B.J. 557 (1963).

[18] Cal. Stat. ch. 1471, § 1 (1963).

[19] 38 CAL. S.B.J. 489 (1963). See, *e.g.*, Stafford v. State, 239 A.C.A. 49, 48 Cal. Rptr. 415 (1965) (action against judges of the district court of appeal who failed to uphold Stafford's contentions in previous actions). A study of the Los Angeles Superior Court in 1959-1960, which showed that nine persons appearing in *propria persona* filed 159 actions that consumed 117.7 court days, was apparently the reason for limiting the operation of the "Vexatious Litigant Statute" to litigants who had appeared in *propria persona*. Since the nine litigants consumed over 3,000 times the number of days allotted to them as citizens on a proportional basis, the possibility that these individuals were simply forced by circumstances to engage in a great deal of litigation seems to be precluded. 38 CAL. S.B.J. 489 (1963). See also note 32 *infra*.

[20] "'Litigation' means any civil action or proceeding commenced, maintained, or pending in any court of this State." CAL. CODE OF CIV. PROC. § 391(a).

[21] *Cf.* CAL. CODE OF CIV. PROC. § 583. See also Geiger v. Aetna Ins. Co., 243 A.C.A. 235, 52 Cal. Rptr. 212 (1966), where plaintiff frustrated defendant's early and continuous efforts to take her deposition, did nothing to bring the suit to trial until just before the expiration of five years and had no excuse for her neglect and delay. In affirming the trial court's dismissal, with a $300 penalty for prosecuting a frivolous appeal, the court invoked the established doctrine of the state requiring the plaintiff to use diligence at every stage of the proceeding to expedite his case to a final determination.

[22] See Note, 52 CALIF. L. REV. 204 (1964).

defendant or defendants, either the validity of such determination or the cause of action, claim, controversy or any of the issues of fact or law determined or concluded by the final determination.[23]

Under the statute, a defendant may move, at any time within thirty days after service of summons or other equivalent process, that the court, after notice and hearing, order the plaintiff to furnish security.[24] The motion must be supported by a showing that (1) plaintiff is a "vexatious litigant" and (2) there is no reasonable probability that he will prevail in the litigation against the moving defendant.[25] At the hearing on this motion, the court considers any evidence, either by witnesses or by affidavits, material to the grounds of the motion. The statute states that the ruling on the motion is not a determination of any issue in the litigation or the merits thereof for any purpose.[26]

If a determination favorable to the moving party is made, the court orders plaintiff to furnish, within a specified time, security of the nature and amount set by the court. The amount may be increased or decreased at the court's discretion upon a showing that the security provided has or may become inadequate or excessive.[27] If the security is not furnished, the statute provides that the litigation shall be dismissed as to the defendant for whose benefit security was ordered.[28] Upon termination of the litigation, the defendant is given recourse to the security in an amount determined by the court.[29] The amount is designed to make defendant whole for all reasonable expenses connected with the litigation, including attorney's fees.[30]

The filing of a motion for an order to furnish security stays the litigation. The moving defendant need not plead until ten days after the motion has been denied or, if granted, until ten days after the required security has been furnished and the moving defendant given written notice thereof.[31]

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23 CAL. CODE OF CIV. PROC. § 391(b). *Cf.* text accompanying notes 3-5 *supra.*

24 "Security" for purposes of this statute is defined to include assurance of payment of reasonable expenses of the party for whose benefit security is furnished. These reasonable expenses are not limited to taxable costs and include attorneys' fees. CAL. CODE OF CIV. PROC. § 391(c).

25 CAL. CODE OF CIV. PROC. § 391.1. Note that CAL. CORP. CODE § 834 may now require a somewhat stronger showing than the "Vexatious Litigant Statute" to justify granting a motion to require security. See notes 35, 51 *infra.*

26 CAL. CODE OF CIV. PROC. § 391.2.

27 CAL. CODE OF CIV. PROC. § 391.3.

28 CAL. CODE OF CIV. PROC. § 391.4.

29 CAL. CODE OF CIV. PROC. § 391.5.

30 See note 24 *supra.*

31 CAL. CODE OF CIV. PROC. § 391.6.

1. Constitutionality of the Statute

Eugene A. Taliaferro is the principal actor in what has been described as

> the long-continued vendetta between plaintiff and his former wife . . . in which plaintiff attempts to relitigate all the issues formerly litigated, regardless of the relevancy in the particular action, and of the fact of the previous final determinations of the issues, and in which plaintiff appeals from practically every order of the trial court, whether appealable or non-appealable.[32]

In *Taliaferro v. Hoogs*,[33] the court upheld the constitutionality of the "Vexatious Litigant Statute."[34] The case concerned money held by one Landisman. Landisman interpleaded Taliaferro and his former wife, alleging that both claimed the money. Taliaferro cross-complained and named Hoogs, the attorney of record for his former wife, as one of the defendants; Taliaferro charged conspiracy to withhold sums owing him. Hoogs invoked the "Vexatious Litigant Statute" and requested 750 dollars security, which the court granted.

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[32] Taliaferro v. Davis, 220 Cal. App. 2d 793, 794 n.1, 34 Cal. Rptr. 120 n.1 (1963). The series of actions began with a divorce action brought by his wife in 1944. The following cases are related to the original divorce litigation: Taliaferro v. Hoogs, 237 Cal. App. 2d 73, 46 Cal. Rptr. 643 (1965); Taliaferro v. Hoogs, 236 Cal. App. 2d 521, 46 Cal. Rptr. 147 (1965); Taliaferro v. Davis, 220 Cal. App. 2d 793, 34 Cal. Rptr. 120 (1963); Taliaferro v. Hoogs, 219 Cal. App. 2d 559, 33 Cal. Rptr. 415 (1963); Taliaferro v. Taliaferro, 217 Cal. App. 2d 216, 31 Cal. Rptr. 774 (1963); Taliaferro v. Davis, 217 Cal. App. 2d 211, 31 Cal. Rptr. 690 (1963); Taliaferro v. Davis, 216 Cal. App. 2d 860, 31 Cal. Rptr. 443 (1963); Taliaferro v. Davis, 216 Cal. App. 2d 398, 31 Cal. Rptr. 164 (1963); Taliaferro v. Davis, 211 Cal. App. 2d 546, 27 Cal. Rptr. 650 (1963); Taliaferro v. Davis, 211 Cal. App. 2d 229, 27 Cal. Rptr. 152 (1962); Taliaferro v. Taliaferro, 203 Cal. App. 2d 652, 21 Cal. Rptr. 870 (1962); Taliaferro v. Taliaferro, 203 Cal. App. 2d 649, 21 Cal. Rptr. 868 (1962); Taliaferro v. Taliaferro, 203 Cal. App. 2d 642, 21 Cal. Rptr. 864 (1962); Taliaferro v. Taliaferro, 200 Cal. App. 2d 190, 19 Cal. Rptr. 220 (1962); Taliaferro v. Giroloni, 189 Cal. App. 2d 379, 11 Cal. Rptr. 196 (1961); Taliaferro v. Hays, 188 Cal. App. 2d 235, 10 Cal. Rptr. 429 (1961); Taliaferro v. Taliaferro, 180 Cal. App. 2d 159, 4 Cal. Rptr. 696 (1960); Taliaferro v. Taliaferro, 180 Cal. App. 2d 44, 4 Cal. Rptr. 693 (1960); Taliaferro v. Taliaferro, 179 Cal. App. 2d 787, 4 Cal. Rptr. 689 (1960); Taliaferro v. Taliaferro, 178 Cal. App. 2d 146, 2 Cal. Rptr. 719 (1960); Taliaferro v. Taliaferro, 178 Cal. App. 2d 140, 2 Cal. Rptr. 716 (1960); Taliaferro v. Taliaferro, 171 Cal. App. 2d 1, 339 P.2d 594 (1959); Taliaferro v. Taliaferro, 154 Cal. App. 2d 495, 316 P.2d 393 (1957); Taliaferro v. Taliaferro, 150 Cal. App. 2d 230, 309 P.2d 839 (1957); Taliaferro v. Taliaferro, 144 Cal. App. 2d 109, 300 P.2d 726 (1956); Taliaferro v. Taliaferro, 125 Cal. App. 2d 419, 270 P.2d 1036 (1954).

Taliaferro has engaged in other attempts to relitigate issues already decided against him. *E.g.*, Taliaferro v. Crola, 217 Cal. App. 2d 103, 31 Cal. Rptr. 442 (1963).

[33] 236 Cal. App. 2d 521, 46 Cal. Rptr. 147 (1965).

[34] In a second appeal in the same case, Taliaferro objected to the application of the statute to him. Taliaferro v. Hoogs, 237 Cal. App. 2d 73, 46 Cal. Rptr. 643 (1965). This was somewhat startling, since he seemingly personifies the "vexatious litigant" as defined by the statute. See note 32 *supra*.

On Taliaferro's failure to post security, the action was dismissed as to Hoogs. Taliaferro then appealed, objecting to the constitutionality of the statute. The court disposed rather summarily of the constitutional objections, relying for the most part on the constitutionality of section 834 of the Corporations Code,[35] the California statutory ancestor of the "Vexatious Litigant Statute." The constitutionality of section 834 was established in *Beyerbach v. Juno Oil Co.*,[36] wlhich relied on *Cohen v. Beneficial Loan Corp.*[37]

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[35] "In . . . [any corporate derivative] action, at any time within 30 days after service of summons upon the corporation or any defendant who is an officer or director of the corporation, or held such office at the time of the acts complained of, the corporation or such defendant may move the court for an order, upon notice and hearing, requiring the plaintiff to furnish security as hereinafter provided. Such motion shall be based upon one or more of the following grounds: (1) That there is no reasonable possibility [originally this was reasonable *probability:* Cal. Stat. ch. 499, § 1 (1949)] that the prosecution of the cause of action alleged in the complaint against the moving party will benefit the corporation or its security holders; . . . ." CAL. CORP. CODE § 834(b). The remaining provisions of §§ 834(h) and 834(c) are practically identical to the "Vexatious Litigant Statute." See also FED. R. CIV. P. 23.1. See generally Ballantine, *Abuses of Stockholders' Derivative Suits: How Far Is California's New "Security For Expenses" Act Sound Regulation?*, 37 CALIF. L. REV. 399 (1949); *Work of the 1949 California Legislature*, 23 So. CAL. L. REV. 1, 19 (1949).

[36] 42 Cal. 2d 11, 265 P.2d 1 (1954). *Accord*, Melancon v. Superior Court, 42 Cal. 2d 698, 268 P.2d 1050 (1954) (constitutional objections answered in *Beyerbach*).

[37] 337 U.S. 541 (1949). In Beyerhach v. Juno Oil Co., 42 Cal. 2d 11, 265 P.2d 1 (1954), plaintiff, who had been ordered to post security, objected to § 834 of the Corporations Code (see note 35 *supra*) on the grounds that it violated the equal protection clause of the federal constitution and the provisions of the state constitution against special laws, CAL. CONST. art. IV, § 25, and special privileges and immunities, CAL. CONST. art. I, § 21. Beyerbach v. Juno Oil Co., *supra* at 18, 265 P.2d at 5. In finding § 834 constitutional, the court relied heavily upon Cohen v. Beneficial Loan Corp., *supra*, in which the United States Supreme Court upheld a similar New Jersey statute. The Court stated: "[A] state may set the terms on which it will permit litigation in its courts. . . . Of course, to require security for the payment of any kind of costs, or the necessity for bearing any kind of expense of litigation, has a deterring effect. But we deal with power, not wisdom; and we think, notwithstanding this tendency, it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met." *Id.* at 552. In Beyerbach the court also noted that if the argument were accepted that § 834 unconstitutionally discriminates against poor stockholders unable to furnish the required security, such statutes as those requiring the payment of a fee or the furnishing of security as a prerequisite to the filing of a complaint, the issuance or levying of a writ, and the procurement of a record on appeal would be unconstitutional. 42 Cal. 2d at 20, 265 P.2d at 6. The *Beyerbach* decision further pointed out that the California statute provides a greater safeguard for the plaintiff's rights than did the New Jersey statute in *Cohen:* In California the defendant must show that there is no reasonahle prohability that the action will benefit the corporation. Because only reasonable expenses were involved, the court held that the due process objections were obviated. *Id.* at 24, 265 P.2d at 8-9. Finally, the court stated that a successful plaintiff can recover his expenses, thereby partially removing the discrimination between the plaintiff and the defendants. *Id.* at 19-20, 265 P.2d at 6. See also CAL. CODE OF CIV. PROC. § 1035, which allows a party who has been required to post security to recover the expense involved as part of costs if he prevails. *But see* Note, 52 CALIF. L. REV. 204, 211 (1964).

In *Taliaferro* appellant contended that the "Vexatious Litigant Statute" was unconstitutional on approximately the same grounds advanced by appellant in *Beyerbach* as to Corporations Code section 834.[38] The court answered the contention that sections 391-391.6 unlawfully discriminate against litigants appearing in *propria persona* by stating:

> A state may set the terms on which it will permit litigation in its courts. The restriction of § 391(b)(1)(2) to persons proceeding in propria persona is not arbitrary or unreasonable. Attorneys are governed by prescribed rules of ethics and professional conduct, and as officers of the court are subject to disbarment, suspension and other disciplinary sanctions not applicable to litigants in propria persona. There is no constitutional requirement of uniform treatment of all persons but only that there be a reasonable basis for each classification. . . . A statute which applies to all of a single class of persons equally is not a grant of special privilege or immunity in violation of § 21 of article I of the state Constitution, if the classification is not arbitrary and is based on some difference in the classes having substantial relation to the purpose of the legislation.[39]

Citing *Beyerbach* and *Cohen*, the court summarily disposed of appellant's arguments that the statute is a deprivation of due process of law and that it unconstitutionally discriminates against the poor because of their inability to afford lawyers. The court also summarily disposed of appellant's contentions that the statute is fatally vague and uncertain, and that the procedure for the hearing on the motion deprived him of his right to a jury trial.[40]

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[38] Note 37 *supra*.

[39] 236 Cal. App. 2d at 527, 46 Cal. Rptr. at 151-52. It should be noted that while the Supreme Court holds that the validity of a legislative classification must be affirmatively demonstrated when a "fundamental right" is involved, *e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court has been reluctant to invalidate a legislative classification scheme in other areas. See, *e.g.*, Morey v. Doud, 354 U.S. 457 (1957); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955). For further discussion of the question of reasonable classification, see Chicago & N.W. Ry. v. Nye, 260 U.S. 35 (1922) (provision imposing a penalty on carriers who failed to pay damage claims within 90 days); Missouri, K. & T. Ry. v. Cade, 233 U.S. 642 (1914) (provision imposing attorneys' fees on defeated corporate defendants suing on certain claims under $200); American Sugar Ref. Co. v. Louisiana, 179 U.S. 89 (1900) (license tax on sugar refiners which exempted growers refining their own product); Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963) (statute authorizing firefighters to join labor organizations); Bilyeu v. State Employees' Retirement Sys., 58 Cal. 2d 618, 375 P.2d 442, 25 Cal. Rptr. 562 (1962) (statute providing for subrogation of certain tort claims of members of State Employees' Retirement System); Note, 52 CALIF. L. REV. 204, 205-07 (1964).

[40] 236 Cal. App. 2d at 527-29, 46 Cal. Rptr. at 152-53. Analogous statutes have been declared constitutional in virtually every instance. See cases cited note 39 *supra* and the following cases upholding similar California statutory provisions: Beyerbach v. Juno Oil Co., 42 Cal. 2d 11, 265 P.2d 1 (1954) (CAL. CORP. CODE § 834); Sacramento Municipal Util. Dist. v. Pacific Gas & Elec. Co., 20 Cal. 2d 684, 128 P.2d 529 (1942) (CAL. CODE OF

The court correctly held the statute constitutional. It is not unreasonable to differentiate actions which on their face have no reasonable probability of success from those which do not. Such classification is designed both to protect parties who must respond to such actions from undue harassment by assuring them recompense for reasonable expenses, and to protect the courts from abuses of their process by discouraging litigation which has no reasonable probability of success. Under such a procedural classification, a hearing is denied if the litigant is unable to post the required security. But this objection would apply to any provision requiring payment of fees or costs.[41] The difficulty in financing an action is present in every case. In civil cases, provisions involving payment of fees or costs have consistently been upheld in the face of similar objections.[42]

The application of the security for costs provision only to vexatious litigants as defined in the statute presents a more difficult question, but this also is constitutionally valid. The vexatious litigant who attempts to relitigate actions or issues already determined against him[43] should have no ground for complaint. His claim is already barred by other established principles of law,[44] and his rights are in no way modified by the statute. It is not unreasonable, furthermore, to classify separately from other litigants those litigants with a prior history of litigiousness when they bring an action with no reasonable probability to prevail. Such a litigant is more likely to abuse the processes of the courts and to harass the adverse party than other litigants.

The most difficult constitutional question concerns the limitation of the statute to those litigants who appeared in *propria persona* in the previous actions. However, objections on this ground are no more well-

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CIV. PROC. § 526b); Superior Wheeler Cake Corp. v. Superior Court, 203 Cal. 384, 264 Pac. 488 (1928) (former CAL. CODE OF CIV. PROC. § 927j); Engebretsen v. Gay, 158 Cal. 30, 109 Pac. 880 (1910) (law allowing attorney fee in action to foreclose lien of delinquent street assessment); Vinnicombe v. State, 172 Cal. App. 2d 54, 341 P.2d 705 (1959) (CAL. GOV'T CODE § 16047 [now § 647]); City of Alturas v. Superior Court, 36 Cal. App. 2d 457, 97 P.2d 816 (1940) (CAL. CODE OF CIV. PROC. § 117j); Moore v. Indian Spring Mining Co., 37 Cal. App. 370, 174 Pac. 378 (1918) (law providing for penalties on employers failing to pay wage claims); City of Sacramento v. Swanston, 29 Cal. App. 212, 155 Pac. 101 (1915) (CAL. CODE OF CIV. PROC. § 1255a). Other similar statutes which apparently have not been attacked on constitutional grounds include CAL. CODE OF CIV. PROC. § 1030 and CAL. HARB. & NAV. CODE §§ 6578-79.

[41] See note 37 *supra* and accompanying text. It would not follow, of course, that imposition of huge fees, effectively denying access to the courts, would be valid. *Cf.* Douglas v. California, 372 U.S. 353 (1963).

[42] Note 40 *supra*.

[43] See note 23 *supra* and accompanying text.

[44] See notes 92-95 *infra* and accompanying text.

taken than those on the other grounds mentioned above. Since his attorney is subject to discipline for bringing the kind of action this statute was designed to discourage,[45] the litigant represented by an attorney is much less likely to bring actions for the purposes of harassment of other litigants or abuse of the process of the courts.[46] Moreover, a Los Angeles County study[47] affords a reasonable basis for the belief that litigants appearing in *propria persona* are indeed more likely to burden the courts and adverse parties with meritless litigation.[48] The scheme of classification set up in the statute is reasonable, considering the purpose of the statute, and objections to the statute based on the equal protection clause should fail.

The "Vexatious Litigant Statute" is analogous to section 834 of the Corporations Code with respect to arguments based on due process.[49] Since the statute demands security only for reasonable expenses and may be invoked only after the showing as to reasonable probability, the *Beyerbach* determination[50] should apply equally to the "Vexatious Litigant Statute."

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[45] CAL. BUS. & PROF. CODE § 6068: "It is the duty of an attorney: . . . (c) To counsel and maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense. . . . (g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest. . . ."; Rule 13, Rules of Professional Conduct, CAL. BUS. & PROF. CODE foll. § 6076: "A member of the State Bar shall not accept employment to prosecute or defend a case solely out of spite, or solely for the purpose of harassing or delaying another; nor shall he take or prosecute an appeal merely for delay, or for any other reason, except in good faith."; Canon 30, ABA Canons of Professional Ethics: "The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the other party or to work oppression or wrong. . . ."; see also CAL. BUS. & PROF. CODE § 6068(d), *infra* note 79; Rules 1, 17, Rules of Professional Conduct, CAL. BUS. & PROF. CODE foll. § 6076.

[46] Letters from attorneys involved in the work of local administrative committees of the State Bar of California indicate that the problem of attorney violation of Rule 13, *supra* note 45, is minimal. See, *e.g.*, Letter From Mr. James K. Barnum to Edmund R. Manwell, November 22, 1965; on file, California Law Review: "Our Committee has received no complaints of conduct in violation of Rule 13. In general I can state that groundless litigation is no problem in our jurisdiction."

[47] *Supra* note 19.

[48] An examination of cases cited notes 4 and 32 *supra* and other series of cases involving litigants appearing in *propria persona* on claims barred by res judicata or on claims obviously without merit will further indicate the reasonableness of this belief.

[49] It should be noted that the sections are not entirely analogous. Shareholders' derivative suits are peculiarly a creature of statute whereas the "Vexatious Litigant Statute" applies to actions involving the entire range of claims for redress of legal wrongs. Regulation of procedure in the latter area must take into account the policy of our system of justice to guarantee a remedy; Corporations Code section 834 in itself provides an alternate remedy for a wrong and is therefore more justifiably limited.

[50] Note 37 *supra*.

2. *Evaluation of Procedural Problems*

Most of the procedural problems likely to arise under the "Vexatious Litigant Statute" can be solved by analogy to the construction of Corporations Code section 834.[51] One important question is whether a motion

[51] One of the first questions which arises is the nature and manner of the required showing that there be no reasonable probability that plaintiff will prevail. It is clear that the courts will consider affidavits sufficient both as to who is a vexatious litigant and as to his reasonable probability of success. Taliaferro v. Hoogs, 237 Cal. App. 2d 73, 75, 46 Cal. Rptr. 643, 644 (1965) (by implication); Taliaferro v. Hoogs, 236 Cal. App. 2d 521, 529, 46 Cal. Rptr. 147, 153 (1965) (by implication). Although in these cases the court did not expressly rule as to the showing of reasonable probability but only as to the showing that plaintiff was a vexatious litigant, it undoubtedly was relying implicitly on the cases construing § 834 of the Corporations Code which have ruled on the analogous question. *E.g.*, Olson v. Basin Oil Co., 136 Cal. App. 2d 543, 288 P.2d 952 (1955); Barber v. Lewis & Kaufman, Inc., 125 Cal. App. 2d 95, 269 P.2d 929 (1954). *But cf.* Melancon v. Superior Court, 42 Cal. 2d 698, 714, 268 P.2d 1050, 1060 (1954) (Carter, J. dissenting), which terms the hearing on the motion to require security under § 834 a "little trial." Justice Carter argues that this is perhaps the only trial which will be held, implying that, despite the plain language of the code section, affidavits alone should not be a sufficient showing. Nevertheless, affidavits will undoubtedly be the customary, if not the sole, manner of presenting the conflicting contentions on these points.

Marble v. Latchford Glass Co., 205 Cal. App. 2d 171, 22 Cal. Rptr. 789 (1962), construing Corporations Code § 834, suggests the nature of the showing which will be required under the "Vexatious Litigant Statute": "The basic question on this appeal is: did the trial judge, on the record, abuse his discretion in determining that there was no 'reasonable possibility' that the prosecution of this action would benefit Latchford Glass Company or its security holders? In answering this question, this court must evaluate the possible defenses which plaintiffs would have to overcome before they could prevail at trial. *If the plaintiffs' chances of success are slight, then the lower court's decision finds support in the record." Id.* at 175, 22 Cal. Rptr. at 791 (emphasis added). The wording of the two statutes indicates that the showing required of the moving party under Corporations Code § 834 might be stronger than that required under the "Vexatious Litigant Statute." Compare CAL. CODE OF CIV. PROC. § 391.1 (reasonable probability) with CAL. CORP. CODE § 834 (reasonable possibility). However, the policy of the law favoring determination of cases on their merits, and differences in the nature of the two statutes make it probable that the converse will be true. See notes 8, 49 *supra* and accompanying text; see also Note, 52 CALIF. L. REV. 204, 211 (1964).

A further question already answered under Corporations Code § 834 is whether costs may be increased to cover costs on appeal, including attorneys' fees, if plaintiff subsequently appeals from the judgment in the action. Kaiser v. Easton, 151 Cal. App. 2d 307, 311 P.2d 108 (1957), holds that this is proper. It should be noted, however, that the section is not an authorization for the imposition of fees as part of costs where plaintiff fails to post security and the action is dismissed. Freeman v. Goldberg, 55 Cal. 2d 622, 361 P.2d 244, 12 Cal. Rptr. 668 (1961).

It is also well-settled under Corporations Code § 834 that no appeal lies from the motion to require security. Efron v. Kalmanovitz, 185 Cal. App. 2d 149, 8 Cal. Rptr. 107 (1960). Dismissal because of failure to post required security is without prejudice, since a determination as to the furnishing of the security is not a determination of the merits of any issue in the action. Ensher v. Ensher, Alexander & Barsoom, Inc., 187 Cal. App. 2d 407, 411, 9 Cal. Rptr. 732, 734 (1960).

Finally, it would undoubtedly be an abuse of discretion to allow a defendant to have recourse to security when he has not prevailed, even though the statute does not specifically

to require security would stay everything connected with the litigation, including discovery. Before discovery many claims might be considered to lack reasonable probability to prevail.[52] Under Corporations Code section 834, it has been held that the motion to require security does stay everything connected with the litigation.[53] However, the somewhat different wording of Code of Civil Procedure section 391.6[54] suggests that discovery can perhaps continue, allowing plaintiff to obtain sufficient facts to avoid posting security.[55]

The "Vexatious Litigant Statute" does not seem vulnerable to attack on constitutional grounds and one can fairly authoritatively predict the details of its operation. However, the problems inherent in the statute outweigh its usefulness. The statute lends itself to use by defendants for delay in responding to meritorious actions.[56] The statutory classification is cumbersome; it requires the court to make findings with regard to previous actions (which may be unrelated to the action at bar) before

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limit recourse to security to the defendant who has prevailed. Beyerbach v. Juno Oil Co., 42 Cal. 2d 11, 21, 265 P.2d 1, 7 (1954) (dictum) (CAL. CORP. CODE § 834). See also CAL. CODE OF CIV. PROC. § 391.5.

[52] For example, in personal injury cases and other kinds of claims where the facts are peculiarly within the control of the defendant, discovery may be necessary to allow plaintiff to show reasonable probability to prevail.

[53] Melancon v. Superior Court, 42 Cal. 2d 698, 268 P.2d 1050 (1954).

[54] *Compare* CAL. CODE OF CIV. PROC. § 391.6 ("When a motion pursuant to section 391.1 is filed the litigation is stayed, and the moving defendant need not plead, until 10 days after the motion shall have been denied, or if granted, until 10 days after the required security has been furnished and the moving defendant given written notice thereof.") *with* CAL. CORP. CODE § 834(c) ("If any such motion is filed, no pleadings need be filed by the corporation or any other defendant, and the prosecution of such action shall be stayed until 10 days after such motion shall have been disposed of."). In *Melancon*, *supra* note 53, the court argues that "the term 'prosecution' is sufficiently comprehensive to include every step in an action from its commencement to its final determination." 42 Cal. 2d at 707-08, 268 P.2d at 1056. Arguably, "the litigation" is not so comprehensive as "prosecution of the action."

[55] Even if discovery may not continue, the problem may not be crucial. Plaintiff can move to decrease the posted security if discovery provides such information as to make this equitable. *Cf.* the majority and dissenting opinions in Melancon v. Superior Court, 42 Cal. 2d 698, 268 P.2d 1050 (1954). Moreover, the dismissal that results from failure to post security is no bar to another action. For this reason a plaintiff might still continue his independent search for information and use the perpetuation of testimony mechanism to obtain enough information either to obtain financial support to post required security or to avoid the security provisions if he is then able to show a reasonable probability of prevailing. CAL. CODE OF CIV. PROC. § 2017. If a reasonable showing is made as to this desired information, and the court is satisfied that the motion to perpetuate testimony is not simply further harassment and abuse, a court might well consider financial inability to bring an action sufficient ground for granting the motion. The perpetuation of testimony mechanism includes the entire range of discovery devices. CAL. CODE OF CIV. PROC. § 2017(a)(3).

[56] Note 64 *infra* and accompanying text.

the issue of reasonable probability of success can be reached.[57] Further, the statute does not reach the litigant appearing in *propria persona* unless he has previously appeared in *propria persona* at least five other times in the last seven years and it does reach the litigant appearing by counsel if the litigant has the prior history requisite to make him a "vexatious litigant" under the statute.[58] The statute, while purporting to compensate vexed defendants, will offer no compensation to the majority of those defendants for their expenses even where security is required, since the plaintiff who fails to post security can simply bring another action on the same claim;[59] the plaintiff loses nothing by his failure to post security.[60] Finally, actions subject to this statute can be reached by existing procedures.

Therefore, the "Vexatious Litigant Statute" is ill-advised, and interested parties should seek further means to solve the problem of the vexatious litigant.

B. Alternative Procedures

1. Summary Judgment

The purpose of summary judgment "is to bring to the court's attention incontrovertible facts not alleged in the complaint which show as a matter of law that plaintiff cannot prevail."[61] Code of Civil Procedure section 437c provides that the defendant may move for summary judgment where it is claimed that an action has no merit.[62] The motion must

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[57] A preliminary determination whether or not plaintiff is a "vexatious litigant" may require findings as to cases unrelated to the action in which the motion to require security is made. Notes 21 and 23 *supra* and accompanying text.

[58] Plaintiff must have the requisite prior history of litigation in *propria persona;* that the plaintiff is appearing in *propria persona* in the action in which the motion to require security is made is irrelevant. Notes 21 and 23 *supra* and accompanying text.

[59] Note 26 *supra.*

[60] Few plaintiffs will be sufficiently confident to post security after a judge has ruled that their action is without reasonable probability to prevail. It will be more advantageous to suffer dismissal and bring another action, hoping for a more favorable determination, perhaps from another judge. See notes 26 and 28 *supra* and accompanying text.

[61] Chance, *Some Practical Suggestions on Defense Motions and Other Procedures Before Trial,* 40 CALIF. L. REV. 192, 196 (1952). Summary judgment will be considered here only as it relates to the problem of the vexatious litigant. The problem of summary judgment has been considered more generally in numerous scholarly works. *E.g.,* Bauman, *Summary Judgment: A Search for a Standard,* 10 U.C.L.A.L. REV. 347 (1963); Hays, *The Use of Summary Judgment,* 28 F.R.D. 126 (1962); McCabe, *Summary Judgment,* 11 So. CAL. L. REV. 436 (1938).

[62] A procedure analogous to summary judgment is the motion to strike under Code of Civil Procedure § 435. Until 1956, California courts recognized the existence of inherent power to dismiss litigation which is clearly without merit. For example, Cunha v. Anglo-California Nat'l Bank, 34 Cal. App. 2d 383, 93 P.2d 572 (1939), noted that it was proper for the trial court to dismiss an action after a determination based on affidavits that it

be supported by affidavits of persons who would be competent to testify at trial to the facts contained in the affidavits and must show facts sufficient to entitle defendant to judgment. Unless the other party shows by affidavit that a triable issue of fact exists, the complaint may be dismissed and judgment entered at the discretion of the court.

Summary judgment will dispose of any action subject to the "Vexatious Litigant Statute." Before the court can order that security be posted under the "Vexatious Litigant Statute," he must find that plaintiff has no reasonable probability to prevail.[63] The wording of the statute indicates that the burden of making this showing is on the moving party.[64] Practice under the summary judgment statute indicates that the burden of persuasion that no triable issue of fact exists[65] is again on the moving party.[66] The policy of our system of justice is to favor determination

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was "litigation which . . . was vexatious, clearly without merit and not brought in good faith." *Id.* at 391-92, 93 P.2d at 577. See also Crowley v. Modern Faucet Mfg. Co., 44 Cal. 2d 321, 282 P.2d 33 (1955): "When it appeared without dispute in this action that plaintiff was in fact seeking to relitigate the precise issue that was finally adjudicated against him in the former action, the trial court properly exercised its power to stop vexatious litigation, clearly without merit, and burdensome to the courts as well as to defendants." *Id.* at 324-25, 282 P.2d at 35. In Pianka v. State, 46 Cal. 2d 208, 293 P.2d 458 (1956), the Supreme Court of California held that the broadened procedure for summary judgment precluded use of nonstatutory speaking motions to dismiss. "In the interests of orderly and efficient administration of justice the litigant should be required to employ the statutory remedy, and a speaking motion to dismiss should be treated as a motion for summary judgment in order to preserve the safeguards provided by the statute." *Id.* at 212, 293 P.2d at 461.

A subsequent case declared that CAL. CODE OF CIV. PROC. § 435, which authorizes a motion to strike the entire complaint without necessity of answering or demurring, "constitutes a legislative reaffirmance of the inherent right of a court to strike or dismiss a complaint when it is made to appear by extraneous evidence that it is sham and based upon false allegations, thus restoring the law as it existed in California prior to the decision in the *Pianka* case." Lincoln v. Didak, 162 Cal. App. 2d 625, 631, 328 P.2d 498, 502 (1958). It is probable that the reason for this decision was that from 1956, when the *Pianka* case was decided, until the 1957 amendment to CAL. CODE OF CIV. PROC. § 437c became effective, there was no procedure by which defendant could put an end to groundless litigation against him before answering. Since § 437c now permits a motion for summary judgment before answer, summary judgment is an adequate substitute for the speaking motion to dismiss. However, the courts have held that "the technically improper form of the motion must be deemed nonprejudicial," stating that the reviewing court should simply treat future motions to strike and hearings thereon as if the motion had been for summary judgment. Lerner v. Ehrlich, 222 Cal. App. 2d 168, 35 Cal. Rptr. 106 (1963); *accord*, Auberry Union School Dist. v. Rafferty, 226 Cal. App. 2d 599, 38 Cal. Rptr. 223 (1964). The motion to strike is, therefore, an alternative to summary judgment; it will apparently produce the same result in a particular litigation.

[63] Note 25 *supra* and accompanying text.

[64] See note 51 *supra* and accompanying text.

[65] *E.g.*, Zancaner v. Louisville & N.R.R., 220 Cal. App. 2d 836, 34 Cal. Rptr. 143 (1963).

[66] The affidavits on which the motion for summary judgment is determined are strictly

of claims on the merits after a full hearing.[67] It seems likely that if plaintiff vexatious litigant cannot show that a triable issue of fact exists, the trial judge will grant the defendant's motion to require security for expenses.[68] In practice, therefore, the showing required to obtain summary judgment and the showing required to obtain security for expenses under the "Vexatious Litigant Statute" will probably be identical.[69]

If summary judgment can dispose of any action subject to the "Vexatious Litigant Statute," summary judgment is clearly a better procedure. Summary judgment disposes of the action on the merits[70] while the "Vexatious Litigant Statute" merely affords dismissal without prejudice if plaintiff fails to post security. Unlike dismissal after failure to post security, summary judgment can have res judicata effect.[71] Res judicata is desirable because it establishes that the litigant is not entitled to a rehearing on claims arising out of the same transaction;[72] this may make it more expeditious to dispose of similar claims in the future.[73] Summary judgment procedure is available to dispose of any non-meritorious action, whatever the plaintiff's prior history of litigation has been.[74] This gives summary judgment a broader and therefore more valuable application; it removes the necessity of a finding as to previous actions possibly unrelated to the case at bar.[75] Moreover, summary judgment may be useful in deterring future vexatious claims when the judgment

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construed against the moving party. *E.g.*, Eagle Oil & Ref. Co. v. Prentice, 19 Cal. 2d 553, 122 P.2d 264 (1942).

[67] Note 8 *supra* and accompanying text.

[68] *Cf.* Note, 52 CALIF. L. REV. 204, 211 (1964). If the plaintiff alleges facts sufficient to support recovery under some theory of law, or if a question of law is raised by the affidavits, there should be reasonable grounds for denying the motion to require security. See also note 69 *infra* and accompanying text.

[69] More than half of the trial judges responding to a questionnaire concerning this problem indicated that they personally regarded the showing required to justify summary judgment identical to or less persuasive than that required to justify granting a motion to require security under the "Vexatious Litigant Statute." Letters on file, *California Law Review*.

[70] CAL. CODE OF CIV. PROC. § 437c.

[71] *E.g.*, Martens v. Winder, 191 Cal. App. 2d 143, 12 Cal. Rptr. 413 (1961).

[72] See notes 92-95 *infra* and accompanying text.

[73] Under the "Vexatious Litigant Statute" the plaintiff could continually file new actions on the same claim, and the same procedure and evaluation would be required each time. To dispose of an action barred by res judicata requires only an affidavit setting forth the defense; if plaintiff cannot allege facts sufficient to avoid the bar of res judicata, summary judgment will be granted. See note 94 *infra* and accompanying text. One court has suggested that judicial notice of related prior proceedings may be taken where justice requires; this may allow summary judgment based on the defense of res judicata even where affidavits are formally insufficient in some respect. Taliaferro v. Taliaferro, 178 Cal. App. 2d 140, 2 Cal. Rptr. 716 (1960). See also text accompanying note 76 *infra*.

[74] See notes 21-23 *supra* and accompanying text.

[75] See note 23 *supra* and accompanying text; text accompanying note 95 *infra*.

obtained affords the basis for an injunction against such future vexation.[76] Finally, summary judgment will provide no less compensation than the "Vexatious Litigant Statute." While the "Vexatious Litigant Statute" superficially appears to give the vexed defendant compensation for his harassment,[77] this will rarely happen since compensation is only provided where security is posted and the defendant ultimately prevails.[78]

Despite its advantages, summary judgment procedure has faults. First, summary judgment relies on affidavits for its effectiveness. A person, especially if appearing in *propria persona*,[79] pursuing a claim solely to vex another party will swear to anything in an affidavit. A judge unwilling to ignore the sworn statement of the affiant is powerless to end litigation brought by a litigant willing to commit perjury in an affidavit. To minimize the problem of dishonesty, perjury prosecutions should be used more frequently where a litigant's offer of proof, made to get past the summary judgment stage, is later shown to have been knowingly fabricated.[80]

Second, the use of summary judgment as a vehicle to dispose of meritless claims is hampered by the strict procedural rules governing its use. For example, even if uncontradicted, an affidavit setting forth ultimate facts or conclusions of law will not justify granting summary judgment.[81] In addition, the propriety of granting the motion depends entirely on the sufficiency of affidavits filed;[82] the affidavits of plaintiff must be liberally construed, and perforce those of the moving defendant strictly construed.[83] The facts stated in an affidavit opposing a motion for summary judgment must be accepted as true,[84] and any doubt as to the propriety

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[76] Notes 109-116 *infra*. See also note 73 *supra*.

[77] Note 26 *supra*.

[78] *Cf.* Freeman v. Goldberg, 55 Cal. 2d 622, 361 P.2d 244, 12 Cal. Rptr. 668 (1961).

[79] The responsibility of an attorney to employ, in prosecuting an action, only "such means as are consistent with truth" and never to seek to mislead any judicial officer by a false statement of fact or law, and the discipline to which an attorney is subject will deter most attempted perjury. See CAL. BUS. & PROF. CODE § 6068. A litigant appearing in *propria persona* may swear to facts which cannot be proved, even if he does not intentionally swear falsely.

[80] See CAL. CODE OF CIV. PROC. §§ 437c, 2003, 2015.5; CAL. PEN. CODE §§ 118, 118a.

[81] American Society of Composers, Authors and Publishers v. Superior Court, 207 Cal. App. 2d 676, 24 Cal. Rptr. 772 (1962). It should also be noted that partial summary judgment is not available to defendants. However, purported partial summary judgment may have the effect of a pre-trial disposal of sham issues. Chohon v. Farmers & Merchants Bank, 231 Cal. App. 2d 538, 41 Cal. Rptr. 888 (1964).

[82] *E.g.*, Kimber v. Jones, 122 Cal. App. 2d 914, 265 P.2d 922 (1954).

[83] Eagle Oil & Ref. Co. v. Prentice, 19 Cal. 2d 553, 122 P.2d 264 (1942).

[84] *E.g.*, Saunders v. New Capital for Small Businesses, Inc., 231 Cal. App. 2d 324, 41 Cal. Rptr. 703 (1964).

of granting summary judgment must be resolved against the moving party.[85]

To make summary judgment more effective, the procedure should be liberalized. If no counteraffidavit is filed, the trial judge should have discretion to grant a motion for summary judgment even where the moving party's affidavit fails to show every evidentiary fact necessary to support a judgment in his favor.[86] Unless failure to file a counteraffidavit is due to excusable neglect, the failure must indicate that plaintiff has nothing to offer in support of his claim.

The courts should be allowed more freedom in construing affidavits. The fear of summary judgment evidenced in appellate decisions[87] is not justified where the action has no merit;[88] in the area of civil litigation, considering the problem of delay and vexation which exists, it is not unreasonable to allow the trial court broad discretion to decide close questions in favor of the moving party. Where an action has no apparent merit, it would not pervert the judicial process to refuse to waste time on it. Trial judges are as aware of the policy favoring hearing on the merits of a claim as appellate courts, and presumably are as competent. The trial judge need not be feared; his determination that an action has no merit should not be overruled in the absence of clear abuse of discretion. On appeal from the trial court's determination, this would merely shift the burden to the plaintiff to demonstrate with clarity the error of the trial judge.

Summary judgment can reach every claim subject to the operation of the "Vexatious Litigant Statute."[89] It is a better procedure, in terms of economy and deterrence, for disposing of vexatious claims, and has none of the faults noted in connection with the "Vexatious Litigant Statute."[90] The problems of summary judgment are equally present in the "Vexa-

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[85] *E.g.*, Chilson v. P. G. Indus., 174 Cal. App. 2d 613, 344 P.2d 868 (1959).

[86] See note 81 *supra*.

[87] "Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" Poller v. Columbia Broadcasting Co., 368 U.S. 464, 473 (1961); summary judgment "is drastic and should be used with caution . . ." American Cas. Co. v. Curran Prod. Inc., 212 Cal. App. 2d 386, 390, 28 Cal. Rptr. 131, 133 (1963) (citing Eagle Oil & Ref. Co. v. Prentice, 19 Cal. 2d 553, 122 P.2d 264 (1942)). This fear is present concerning any summary procedure.

[88] In Byer v. Arguello, 94 Cal. App. 2d 110, 210 P.2d 328 (1949), the court, while recognizing the inherent power to dismiss, refused to apply it even though plaintiff admitted at deposition that the facts pleaded were false. "[I]t is better practice to dispose of issues by trial. Before a motion to dismiss may be granted the record must disclose that no relief can be granted to the plaintiff. . . . From the complaint and the affidavits here under consideration, it cannot be said that beyond peradventure of doubt no cause of action can be proven against the Kramers." *Id.* at 111, 210 P.2d at 329.

[89] Note 69 *supra*.

[90] Notes 56 and 60 *supra* and accompanying text.

tious Litigant Statute," so that there are no problems peculiar to summary judgment which counterbalance those of the "Vexatious Litigant Statute."[91] Therefore, an examination of summary judgment alone should be sufficient to show that the "Vexatious Litigant Statute" is of no value. However, other procedures exist which aid in combatting the vexatious litigant and it will be fruitful to examine them.

2. Res Judicata[92]

> The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action. . . . The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. . . . The doctrine also serves to protect persons from being twice vexed for the same cause.[93]

The "Vexatious Litigant Statute" apparently attempts to deter the claim barred by res judicata, but again adds nothing to existing procedures. One type of vexatious litigant under the statute is the litigant who, in previous actions, repeatedly attempted to avoid the bar of res judicata. While presumably the plaintiff would have no reasonable probability of success if the action in which the motion for security is made were barred by res judicata, such an action could be disposed of quickly through a number of procedures, including summary judgment.[94] If the repeated attempts to avoid the bar of res judicata were based on a claim unrelated to the action in which the motion for security is made, use of the "Vexatious Litigant Statute" would add to the delay and expense inherent in disposing of a claim without reasonable probability of success. It seems somewhat burdensome to require the trial judge to determine that the litigant attempted repeatedly to avoid the bar of res judicata in actions

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[91] The "Vexatious Litigant Statute" also relies on affidavits and will undoubtedly face the same restrictions based on fear of summary procedures. The "Vexatious Litigant Statute" offers no effective compensation feature; it provides no deterrent.

[92] See generally *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952).

[93] Bernhard v. Bank of America, 19 Cal. 2d 807, 810-11, 122 P.2d 892, 894 (1942). *But see* Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 346-48 (1948).

[94] The defense of res judicata is traditionally raised either by demurrer, where the defense is apparent from the complaint, or by answer with subsequent trial of the special defense under CAL. CODE OF CIV. PROC. § 597. See 2 WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 491, 510 (1954); *id.*, *Proceedings Without Trial* § 76. Where these two procedures are inconvenient, summary judgment is available; the issue of res judicata is a question of law which may be determined on a motion for summary judgment. *E.g.*, Dryer v. Dryer, 231 Cal. App. 2d 441, 41 Cal. Rptr. 839 (1964). *Cf.* Stafford v. Ware, 187 Cal. App. 2d 227, 9 Cal. Rptr. 706 (1960) (affidavits may be subject to careful scrutiny as to form). See also notes 62 and 73 *supra*.

possibly unrelated to the action at bar simply as a prelude to reaching the question of reasonable probability to prevail in the action at bar.[95]

3. Abatement and Injunction

This Comment has thus far discussed procedures available to the trial court which handle in a better fashion than the "Vexatious Litigant Statute" the problem of the litigant who advances or re-advances a claim without merit; these procedures have reached the same claims as the "Vexatious Litigant Statute," but in a more efficient and reasonable manner.

Another type of vexatious legal action consists of bringing a multiplicity of actions on the same matter.[96] The evil is not necessarily that the claim is meritless, although this could be so, but is usually that the litigant wishes to harass the adverse party. The "Vexatious Litigant Statute" attempts to reach this kind of vexation only where the claim is meritless.[97] However, the litigant appearing in *propria persona* is more likely to engage in this kind of vexation,[98] and this factor should be considered. The existing procedural devices useful to combat such harassment are abatement and injunction.

(*a*) *Abatement.*—The procedural device of abatement due to the pendency of another action is succinctly summarized in *Fresno Planing Mill Co. v. Manning.*[99]

> It is not the policy of the law to permit different suits to be instituted and pending between the same parties concerning the same subject matter; and hence the rule that an action abates upon a showing of the institution and pendency of a prior action between the same parties upon the same subject matter. The reason for this rule is founded upon the theory that if the first suit affords an ample remedy to the party claiming to be aggrieved, it would be not only unnecessary but vexatious to permit the prosecution of a second suit founded upon the same cause of action. An action is commenced when the complaint therein is filed. . . . It is thereafter deemed to be pending until it is finally determined upon appeal . . . ; and a plea in abatement, based upon the ground of another action pending, may be raised either by demurrer or by answer.[100]

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[95] See note 57 *supra* and accompanying text.

[96] See note 5 *supra* and accompanying text.

[97] The "Vexatious Litigant Statute" would only overlap abatement where the first claim filed is without reasonable probability of success; in this case, as indicated before, other remedies are more effective.

[98] This is so both because defending a multiplicity of actions is especially bothersome, whether the particular unadjudicated claim is meritless or not, and because lack of legal knowledge on the part of the in *propria persona* litigant prevents comprehension of procedures and policies which are meant to discourage multiplicity.

[99] 20 Cal. App. 766, 130 Pac. 196 (1912).

[100] *Id.* at 769, 130 Pac. at 197.

Abatement should effectively dispose of vexatious litigation wherein a litigant with a meritorious claim attempts to harass the adverse party by filing additional actions which would be barred by res judicata had the first action already gone to judgment. Procedurally, abatement is an economical remedy. A demurrer on this ground is the only "speaking" demurrer, according to statute. The court may take judicial notice of other actions and proceedings pending in the same court or other courts of the state, and an affidavit may be filed with the demurrer either to establish the fact or to invoke the judicial notice.[101] If the plea in abatement is made in the answer, a trial of special defenses not on the merits is available.[102] Finally, the effect of sustaining the plea in abatement is to put an end to the litigation abated;[103] no further proceedings are had until the first action results in judgment. Once judgment is obtained in the first action, the doctrine of res judicata is available to dispose of the abatable claim.[104]

However, the plea is usually considered to be dilatory and not favored.[105] Because of this attitude, strict rules are applied in application of the procedure.[106] There is no provision for abatement if the first action is pending in a court of another jurisdiction.[107] The procedure offers no compensation for the expense in obtaining it, and there is no deterrent to the continued bringing of abatable actions. Nonetheless, it remains an additional device for combatting the vexatious litigant and adds weight to the conclusion that the "Vexatious Litigant Statute" was ill-conceived.

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[101] CAL. CODE OF CIV. PROC. §§ 430(3), 433.

[102] CAL. CODE OF CIV. PROC. § 597.

[103] *E.g.*, Dodge v. Superior Court, 139 Cal. App. 178, 181, 33 P.2d 695, 696 (1934). But this does not mean an end in the sense of final judgment. The successful plea in abatement does not authorize a judgment on the merits. The judgment is simply that the action abate. Conner v. Bank of Bakersfield, 174 Cal. 400, 404, 163 Pac. 353, 355 (1917). This was confirmed in CAL. CODE OF CIV. PROC. § 597: "[W]here the defense of another action pending is sustained . . . an interlocutory judgment shall be entered in favor of the defendant pleading the same to the effect that no trial of other issues shall be had until the final determination of such other action." It should also be noted that only the second action may be abated, never the first. Kirman v. Borzage, 89 Cal. App. 2d 898, 202 P.2d 303 (1949).

[104] If the judgment is for defendant, he has the defense of the *bar* of res judicata; if for plaintiff, his claim has now *merged* into the judgment in the first action. RESTATEMENT, JUDGMENTS §§ 47, 48 (1942).

[105] Lord v. Garland, 27 Cal. 2d 840, 848, 168 P.2d 5, 10 (1946).

[106] Adolph v. Municipal Court, 181 Cal. App. 2d 198, 201, 5 Cal. Rptr. 212, 214 (1960), states the rule as follows: "To abate a subsequently filed action it must appear (1) that the causes of action and the issues in the two suits are substantially the same and (2) it is between the same parties as the former action and that these parties stand in the same relative position as plaintiff and defendant."

[107] However, it may be an abuse of discretion not to stay California proceedings until final determination of the foreign action. See Simmons v. Superior Court, 96 Cal. App. 2d 119, 214 P.2d 844 (1950).

(*b*) *Injunction.*—Another remedy available in the trial court for dealing with the vexatious litigant where he brings a multiplicity of actions is injunction. This procedure is an alternative to abatement and may be used to deal with an unadjudicated claim when second and subsequent actions would be barred by res judicata had the first action gone to judgment. Injunction may also be used to prevent a multiplicity of actions based on a claim already barred by the doctrine of res judicata; in conjunction with the procedure of consolidation of actions for trial,[108] it can prevent a multiplicity of actions involving common questions of fact or law, either threatened or pending, whether abatable or not. As the court noted in *Bartholomew v. Bartholomew*,[109] there are two general classes of cases in which injunctions are issued to prevent a multiplicity of actions: those in which many unadjudicated claims are brought into equity to be made the subject of a single trial and decree, where consolidation under Code of Civil Procedure section 1048 is not available because the actions are pending in different courts or are not all pending; and those that are enjoined because they are shown to be vexatious suits upon causes of action that have been settled by former adjudication.

In *Southern Pac. Co. v. Robinson*,[110] illustrative of the first class of cases, defendants held 3000 alleged causes of action against plaintiff for violation of the same code section; they were prosecuting some of these and threatened to prosecute all of them unless given $600,000 in "liquidated damages." The court said that in order to avoid a multiplicity of actions, equity would consolidate the three thousand alleged causes of action into one action, and thus having taken hold of the matter would dispose of it in its entirety.[111]

Stafford v. Russell[112] exemplifies the second class. Stafford repeatedly attempted to reassert a claim to certain real estate held by the defendants.[113] His action was clearly barred by the doctrine of res judicata, and the court enjoined him from instituting any further actions on the same claim. The court noted that

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[108] The applicable statute allows consolidation in the discretion of the court whenever it can be done without prejudice to a substantial right. CAL. CODE OF CIV. PROC. § 1048. The appellate courts almost invariably uphold the trial court's discretion. *E.g.*, National Elec. Supply Co. v. Mount Diablo Unified School Dist., 187 Cal. App. 2d 418, 9 Cal. Rptr. 864 (1960). See 2 WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 155 (1954). There is no procedure prescribed and the only test is whether the trial court feels that consolidation will promote economy of the court's time.

[109] 56 Cal. App. 2d 216, 225, 132 P.2d 297, 303 (1942).

[110] 132 Cal. 408, 64 Pac. 572 (1901).

[111] *Id.* at 413, 64 Pac. at 573. *Accord*, Aldrich v. Transcontinental Land & Water Co., 131 Cal. App. 2d 788, 281 P.2d 362 (1955); Wellborn v. Wellborn, 67 Cal. App. 2d 540, 155 P.2d 95 (1945); Lincoln v. Superior Court, 51 Cal. App. 2d 61, 124 P.2d 179 (1942). See also CAL. CODE OF CIV. PROC. § 526.

[112] 117 Cal. App. 2d 319, 255 P.2d 872 (1953).

[113] See note 4 *supra*.

> plaintiff has over a period of years in various proceedings had full and fair trials before the trier of fact, whose findings and conclusions have been affirmed in each instance. It is a salutary rule that litigation should not be protracted indefinitely. In the present case no useful purpose would be served by further litigation between the parties involving the subject matter of the present action.[114]

The judgment granting injunctive relief was affirmed. Subsequently, Stafford reasserted claims against part of the property involved. The court found him to be in contempt on each of three counts, and he was fined 1500 dollars and sentenced to fifteen days in the county jail.[115]

The sanction of fine or imprisonment or both should be effective to stop all but the most contumacious and fearless of litigants from instituting further litigation on the same claim once a court has issued an injunction.

Again, another existing remedy is more effective and more far-reaching than the remedy supplied by the "Vexatious Litigant Statute." Under that statute the litigant could continue to file claims forever without incurring a penalty. Where a litigant attempts either to relitigate the same cause repeatedly or vex another party by multiple filings of an unadjudicated claim, injunctive relief is probably the most effective means available to protect the courts and parties from harassment.

However, while this procedure has the necessary deterrent feature, a sanction not present in the other procedures discussed, it still lacks a provision for compensating the party who must seek this injunction. In addition, it is an extraordinary remedy and sometimes difficult to obtain.[116]

4. *Malicious Prosecution of Civil Proceedings*[117]

The final remedy available to the litigant who must respond to vexatious civil proceedings is recovery for the tort of malicious prosecution. The essence of this tort is the unjustifiable commencement of legal pro-

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[114] Stafford v. Russell, 117 Cal. App. 2d 319, 321, 255 P.2d 872, 874 (1953).

[115] *In re* Stafford, 160 Cal. App. 2d 110, 324 P.2d 967 (1958). As to contempt after an injunction in this context, see also Wolf v. Gall, 174 Cal. 140, 162 Pac. 115 (1916); Brewer v. King, 139 Cal. App. 2d 33, 293 P.2d 126 (1956).

[116] See, *e.g.*, Bartholomew v. Bartholomew, 132 Cal. 408, 64 Pac. 572 (1901); Helms Bakeries v. State Bd. of Equalization, 53 Cal. App. 2d 417, 422, 425, 128 P.2d 167, 169, 170-71 (1942): "[A]n injunction would not lie in the absence of evidence of irreparable injury or other ground for equitable interposition. . . . To issue an injunction is the exercise of a delicate power, requiring great caution and sound discretion, and rarely, if ever, should be exercised in a doubtful case. The right must be clear, the injury impending and threatened, so as to be averted only by the protecting preventive process of injunction. . . . [D]amage is not irreparable when it can be adequately compensated in damages." See also *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1021 (1965).

[117] See generally RESTATEMENT, TORTS §§ 674-76, 679 (1938); PROSSER, TORTS § 114 (3d ed. 1964).

ceedings for the mere purpose of vexation or injury.[118] The theory of this remedy is that when an action is brought and prosecuted maliciously, the plaintiff has no right whatever to invoke the aid of the courts; plaintiff has therefore abused the process of the courts, subjecting the defendant to damages which are not fully compensated by recoverable costs.[119] The elements of a cause of action for malicious prosecution of a civil proceeding are: (1) favorable termination of the prior proceeding,[120] (2) lack of probable cause,[121] and (3) malice.[122] The burden of proof of these elements is on the person seeking to recover damages.[123] While this may sometimes be a heavy burden,[124] since proof of the former plaintiff's state of mind is involved, recovery should not be difficult in vexatious actions of the sort discussed in this Comment.[125]

The legal damage on which the action for malicious prosecution is founded is the inconvenience or harm resulting, naturally or directly, from the original prosecution.[126] This includes all pecuniary loss, such as attorneys' fees.[127] However, the damages may also include such ele-

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[118] Hayashida v. Kakimoto, 132 Cal. App. 743, 23 P.2d 311 (1933).

[119] Eastin v. Bank of Stockton, 66 Cal. 123, 4 Pac. 1106 (1884).

[120] Verdict or final determination *upon the merits* of the malicious suit complained of is not necessary; it is sufficient to show that the former proceeding has been legally determined, as by dismissal. Hurgren v. Union Mut. Life Ins. Co., 141 Cal. 585, 75 Pac. 168 (1904).

[121] Probable cause is defined as an "honest belief, founded upon facts sufficiently strong to justify . . . [the] belief . . . that grounds exist for proceeding. . . . [or] 'a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.'" Masterson v. Pig 'n Whistle Corp., 161 Cal. App. 2d 323, 335, 326 P.2d 918, 926 (1958). Proof of reliance on the advice of counsel in good faith after full disclosure of the facts has the usual effect of establishing probable cause. Citizens State Bank v. Hoffman, 44 Cal. App. 2d 854, 113 P.2d 211 (1941).

[122] "The malice required in an action for malicious prosecution is not limited to actual hostility or ill will toward plaintiff but exists when the proceedings are instituted primarily for an improper purpose." Albertson v. Raboff, 46 Cal. 2d 375, 383, 295 P.2d 405, 410 (1956). Improper purpose as used in this connection means any purpose distinct from that of enforcement of the alleged cause of action. "It is sufficient if it appears that the former suit was commenced in bad faith to vex, annoy or wrong the adverse party." Hudson v. Zumwalt, 64 Cal. App. 2d 866, 872, 149 P.2d 457, 460 (1944). Malice may be inferred from the lack of probable cause, although the reverse is not true. Stewart v. Sonneborn, 98 U.S. 187 (1878).

[123] Hudson v. Zumwalt, *supra* note 122.

[124] Actions for malicious prosecution are not favored in the law. Sebastian v. Crowley, 38 Cal. App. 2d 194, 101 P.2d 120 (1940). Thus, the proof may have to be extremely clear and convincing.

[125] *E.g.*, Hurgren v. Union Mut. Life Ins. Co., 141 Cal. 585, 75 Pac. 168 (1904), where Union Mutual was accused of having brought three separate actions on a purported agreement by Hurgren to pay certain premiums; each action was dismissed after Hurgren appeared.

[126] Hayashida v. Kakimoto, 132 Cal. App. 743, 23 P.2d 311 (1933).

[127] *E.g.*, Peehler v. Olds, 71 Cal. App. 2d 382, 162 P.2d 953 (1945).

ments as loss of time, injury to reputation, and mental suffering.[128] Punitive damages may also be awarded.[129] Consequently, the action for malicious prosecution provides compensation for the defendant, an element lacking in the other procedures discussed in this Comment. The complete compensation for the vexed litigant which is possible through use of the action for malicious prosecution should, in turn, deter the prosecution of actions which might involve the commission of this tort.

While many defendants will be reluctant to initiate legal proceedings of their own, in the case of the vexatious litigant's victims such reluctance is unrealistic. They must either act or be continually harassed. This remedy, where appropriate, will tend to mitigate the problems of the vexed defendant and deter future abuses of the courts' processes.

II

THE APPELLATE COURT

The procedures discussed previously are available to combat the vexatious litigant in the trial court. The appellate courts face a similar problem—the vexatious appellant. Appellate courts have two procedures to eliminate and discourage the vexatious appellant: the inherent power of the appellate court to dismiss the appeal and the imposition of penalties for frivolous appeals.

A. Dismissal Pursuant to Inherent Power

The power to dismiss meritless appeals has often been recognized.[130] Dismissal is the equivalent of summary affirmance, although there is a technical distinction between the two procedures.[131] The power is rarely exercised because in most cases it would be necessary to make an early examination of the merits of the appeal; this would either cause double labor, where the motion to dismiss is denied, or advance the case to an earlier hearing than is warranted, where the motion to dismiss is granted.[132] Therefore, one firm rule is that if a decision on the motion to

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128 *E.g.*, Singleton v. Perry, 45 Cal. 2d 489, 289 P.2d 794 (1955).

129 *E.g.*, Metzenbaum v. Metzenbaum, 121 Cal. App. 2d 64, 262 P.2d 596 (1953).

130 *E.g.*, Sonoma Magnesite Co. v. National Magnesite Prods. Corp., 189 Cal. 433, 208 Pac. 962 (1922); McFadden v. Dietz, 115 Cal. 697, 47 Pac. 777 (1897). See also Lierly v. McEwen, 208 Cal. 645, 283 Pac. 943 (1930) (summary affirmance). *But see* Nevills v. Shortridge, 129 Cal. 575, 62 Pac. 120 (1900) (suggests that the exclusive remedy for frivolous appeals is the penalty).

131 *Compare* Chino Land & Water Co. v. Hamaker, 171 Cal. 689, 154 Pac. 850 (1916) *with* Casseta v. Del Frate, 113 Cal. App. 297, 298 Pac. 55 (1931).

132 See, *e.g.*, McKeon v. Sambrano, 200 Cal. 739, 255 Pac. 178 (1927); Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Serv., Inc., 118 Cal. App. 371, 5 P.2d 20 (1931). Nonetheless, the court in *McKeon* summarily affirmed because it was familiar with the issues due to previous motions in the same cause.

dismiss the appeal requires a determination on the merits, the motion to dismiss will be denied.[133] Where it is apparent from a mere examination of the judgment roll or record that appellant has no cause of action or that the appeal is frivolous, the court will dismiss.[134] The appellate court will only dismiss the rare case where the lack of merit of the appeal is apparent from a cursory examination of the documents on appeal.[135]

B. Frivolous Appeal Penalty

Because of the courts' stated policy as to dismissals and the rarity of cases for which this remedy is available, the primary tool to discourage the vexatious appellant is the frivolous appeal penalty, awarded the respondent as part of the costs on appeal.

The authority for imposition of this penalty is provided by Code of Civil Procedure section 957[136] and Rule 26, Rules on Appeal.[137] The object of the penalty is two-fold—to discourage frivolous appeals and to compensate the respondent to some extent for the loss which results from delay.[138] If this object could be fulfilled, the penalty would solve

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[133] *E.g.*, Jenks v. Lurie, 195 Cal. 582, 234 Pac. 370 (1925).

[134] *E.g.*, McKenna v. McCardle, 97 Cal. App. 2d 304, 217 P.2d 433 (1950). For example, the court will dismiss where the appeal is from an order granting a new trial on the ground of insufficiency of evidence, and an examination of the record discloses a conflict of evidence, Sternbeck v. Valinder, 36 Cal. App. 2d 346, 97 P.2d 997 (1939); where the appellate court takes judicial notice of other proceedings on substantially the same issue, Hamlin v. Hamlin, 195 Cal. App. 2d 458, 15 Cal. Rptr. 829 (1961); where there is nothing to review, Christian v. Christian, 183 Cal. App. 2d 720, 7 Cal. Rptr. 154 (1960); or where the appeal is from a non-appealable order, in which case the court may dismiss on its own motion, Cole v. Rush, 40 Cal. 2d 178, 252 P.2d 1 (1953) (order sustaining demurrer without leave to amend); Estate of Russ, 231 Cal. App. 2d 917, 42 Cal. Rptr. 471 (1965) (order granting summary judgment motion); West v. Cranmer, 220 Cal. App. 2d 265, 33 Cal. Rptr. 734 (1963) (order granting summary judgment motion).

[135] *But see* James v. James, 125 Cal. App. 2d 417, 270 P.2d 538 (1954), where the court warns that its future policy will be to dismiss meritless or delaying appeals. *But cf.* Robbins v. Sonoma County Flood Control & Water Conserv. Dist., 138 Cal. App. 2d 291, 292 P.2d 52 (1955), where the court used a motion to dismiss to avoid the delays inherent in their calendar where "grave public interest" justified the preliminary examination.

[136] "When it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just." CAL. CODE OF CIV. PROC. § 957.

[137] "Where the appeal is frivolous or taken solely for the purpose of delay or where any party shall have required in the typewritten or printed record on appeal the inclusion of any matter not reasonably material to the determination of the appeal, or has been guilty of any other unreasonable infraction of the rule governing appeals, the reviewing court may impose upon offending attorneys or parties such penalties, including the withholding or imposing of costs, as the circumstances of the case and the discouragement of like conduct in the future may require." RULES ON APPEAL R. 26(a), 50 Cal. 2d 1, 23 (1959).

[138] Huber v. Shedoudy, 180 Cal. 311, 316, 181 Pac. 63, 65 (1919) (discussion of purpose and history of frivolous appeals penalty). See also Nevills v. Shortridge, 129 Cal. 575, 577, 62 Pac. 120, 121; Vickter v. Pan Pac. Sales Corp., 108 Cal. App. 2d 601, 603-04,

the problem of the vexatious appellant without denying anyone a full hearing on the merits. The deterrent feature would aid in ending delay by reducing the number of meritless appeals, and compensation would reduce the harassment of the adverse party. However, in application, the frivolous appeal penalty fails fully to accomplish this task.

1. Definition of Frivolous Appeal

The most difficult problem with the frivolous appeal penalty is that of definition. The court in *Crook v. Crook*,[139] apparently confusing the penalty remedy with dismissal, defined a frivolous appeal as one where the lack of merit is apparent from a glance at the record. Since the function of the penalty is to discourage groundless appeals in the future, as well as to compensate vexed respondents, this definition is too narrow. An examination of the record is often necessary to expose the frivolous nature of an appeal, as well as to avoid denying an appellant his "day in court."

The courts more often say that, where an appeal is clearly without merit or where its purpose could only be to produce delay or harass the respondents, the appeal is frivolous.[140] Yet because of the great disparity in the application of this definition in actual cases, such a simple definition is meaningless. Examination of the cases where the issue was raised discloses that there is no real consistency in the imposition of the penalty.[141] In *Utz v. Areguy*[142] no error appeared on the face of an incom-

239 P.2d 463, 465 (1952), where the court stated that a considerable amount of its time is taken up with the disposition of civil appeals without merit, and that the desirable procedure of disposition through memorandum decisions is not possible under modern rules. The court then said: "When an appeal is taken for the purpose of delay it not only works an injustice upon the respondent in withholding from him the benefits of his judgment, but also upon those who have pending meritorious appeals and who must wait their turn. Rule 26a, Rules on Appeal, recognizes the power and *implies the duty* of reviewing courts to impose penalties for frivolous appeals. . . . We deem it to be our duty in extreme situations to discourage the taking of appeals in civil cases upon frivolous grounds, or solely for delay." (Emphasis added.)

[139] 184 Cal. App. 2d 745, 7 Cal. Rptr. 892 (1960).

[140] *E.g.*, Beardsley v. Johnson, 64 Cal. App. 507, 222 Pac. 165 (1923) ($100 penalty); Solomon v. Justices' Court, 36 Cal. App. 152, 171 Pac. 817 (1918) ($50 penalty); Winkler v. Sierra Park Co., 36 Cal. App. 119, 171 Pac. 805 (1918) ($75 penalty). Where the appellant disregards the value of the court's time by failing to file a brief or otherwise conform to the rules, a frivolous appeal penalty is also proper. RULES ON APPEAL R. 26(a), 50 Cal. 2d 1, 23 (1959). See also Winkler v. Sierra Park Co., *supra* (no briefs, no appearance at oral argument); Stebbins v. Smiley, 1 Cal. Unrep. 133 (1864) (overlong transcript; 10% penalty amounting to $1,371.46).

[141] A penalty was denied in 42 of 163 cases where the issue was raised. Numerous of these cases seem identical to others where a penalty was awarded. See notes 142, 158-71 *infra* and accompanying text. See also Gunning v. Forbes, 60 Cal. App. 2d 521, 141 P.2d 30 (1943) (record incomplete).

[142] 109 Cal. App. 2d 803, 241 P.2d 639 (1952).

plete record filed by counsel for appellants. The opening brief made no points and cited no authorities, and the court had no way to determine the ground, if any, advanced for reversal. The closing brief made no apparent attempt to remedy the defects of the opening brief. While this unreasonable infraction of the rules governing appeals[143] was inherently frivolous, and obviously solely for delay, no penalty was imposed. At the other extreme is *Estate of Wempe*,[144] where the proponent of a will appealed from an order denying probate, citing five grounds of error. The supreme court, in affirming the trial court's order, said, "[I]t must be evident that there is not a semblance of merit in any of them, and that the appeal was wholly without justification."[145] The court imposed a 100 dollar penalty on the appellant. The supreme court thus implied that the district court of appeal was entirely in error, since that three-judge court had unanimously reversed when the case was before it,[146] saying that "the trial court, under the circumstances, was without jurisdiction to try the issues when it did."[147] The grounds stated for the lower court's action were that the case was not properly set for trial, and that "the testimony [of a doctor] was vital and the error in receiving it fatal."[148] If the district court of appeal can unanimously agree with contentions that have no semblance of merit, it is difficult to judge when one runs the risk of being penalized for advancing such contentions. Hopefully, this will remain the only case of its kind.

Two other standards have also been used to determine whether an appeal is frivolous. Some cases awarding penalties have used an objective or "reasonable man" standard to determine whether or not an appeal is frivolous. If no reasonable person[149] would have expected to prevail on appeal in the case at hand, the appeal is frivolous and penalty proper. In *Lemon v. Rucker*[150] the court squarely set forth the objective test after counsel for appellant moved for a rehearing on the question of damages. Counsel's good faith belief that there was sufficient ground for reversal was unquestionable. However, the belief was wholly unfounded and therefore could still be termed solely for the purpose of delay, presenting a proper case for the award of damages. More modern cases have also used the objective test:

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143 RULES ON APPEAL R. 26a, 50 Cal. 2d 1, 23 (1959).

144 185 Cal. 557, 197 Pac. 949 (1921).

145 *Id.* at 564, 197 Pac. at 951.

146 Estate of Wempe, 33 Cal. App. Dec. 206 (1920).

147 *Id.* at 208.

148 *Id.* at 209.

149 Since the determination as to when an appeal should be taken is a matter demanding legal skill, the courts must in reality be using a "reasonable lawyer" standard in these cases.

150 80 Cal. 609, 22 Pac. 471 (1889) (20% penalty).

> The problem involved in determining whether the appeal is or is not frivolous is not whether . . . [appellant's counsel] acted in the honest belief he had grounds for appeal, but whether any reasonable person would agree that the point is totally and completely devoid of merit, and, therefore frivolous.[151]

Other cases awarding penalties, however, have used a subjective or "good faith" test. The California Supreme Court set down in an early case[152] the rule that where counsel acted in bad faith by leading the trial court to believe that its technical error was not crucial, and hoped to obtain reversal on that same error, damages would be awarded to respondent. In *Union Mach. Co. v. Chicago Bonding & Surety Co.*[153] the defendant appealed, attempting to avoid payment under a written guaranty of payment for repairs made by plaintiff after plaintiff had turned over the repaired article to its owners in reliance on the guaranty. In affirming, with a fifty dollar penalty for prosecuting a frivolous appeal, the court said: "We cannot escape the conviction that the present appeal was not taken in good faith but for the purpose of delay and that the court should exercise its power of imposing a penalty upon the appellant for what it deems an abuse of the right of appeal."[154] Again, in *Moore v. Lauff*,[155] the court seemed to apply a good faith test, saying that "it would be an unjust imputation against counsel for the appellant to hold that he did not realize the utter futility of the appeal when taking it. We may, therefore, properly assume that the appeal was . . . [solely for the purpose of delay]."[156]

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[151] Estate of Walters, 99 Cal. App. 2d 552, 558, 222 P.2d 100, 104 (1950) ($100 penalty). See also Dysert v. Weaver, 46 Cal. App. 576, 189 Pac. 492 (1920) ($100 penalty). The courts have used an objective test in several common varieties of frivolous appeals. For example, a penalty will be imposed almost as a matter of course where appellants attempt to raise an issue on appeal that the courts have repeatedly asserted is not valid, Ames v. Ames, 168 Cal. App. 2d 39, 335 P.2d 135 (1959) ($100 penalty; the court pleads with bar to heed rule that appellate court determines only whether substantial evidence supports findings attacked for insufficiency of evidence); where the error on which the appeal is based is a triviality, Hester v. O'Dara, 206 Cal. 3, 272 Pac. 1057 (1928) (judgment for $26; ground of appeal insufficiency of evidence on amount of damages; held so obviously a spite appeal that a penalty is demanded); and where the appellant has a history of prior appeals on an issue already decided against him, Taliaferro v. Taliaferro, 180 Cal. App. 2d 44, 4 Cal. Rptr. 693 (1960) (history of Taliaferro's litigation set forth in note 32 *supra*).

[152] Dwyer v. California Steam Nav. Co., 1 Cal. Unrep. 442 (1868) (5% penalty).

[153] 36 Cal. App. 585, 172 Pac. 1113 (1918).

[154] *Id.* at 587, 172 Pac. at 1113.

[155] 30 Cal. App. 452, 158 Pac. 557 (1916) ($50 penalty).

[156] *Id.* at 456-57, 158 Pac. at 559. More modern cases have applied a good faith test. *E.g.*, Danziger v. Peebler, 88 Cal. App. 2d 307, 312, 198 P.2d 719, 723 (1948) ($100 penalty): "[I]t appears clear that the present appeal is frivolous and has been prosecuted in bad faith, for the purpose of delay, and to further harass the defendants. . . . The

To summarize, an appeal may be deemed frivolous if the court feels that it is meritless or was taken for the purpose of delay or harassment of the other party, regardless of the actual motives of appellant and possible good faith belief in the righteousness of his cause. On the other hand, good faith may remove an appeal from the frivolous appeal class, lack of merit notwithstanding.[157]

2. Penalty

Assuming that an appeal has been deemed "frivolous," a penalty still might not be awarded. In some cases where the appeal has been held clearly without merit, the courts seem to have used a good faith test to determine whether a penalty should be imposed. For example, in *Stowell v. Fitch*,[158] the court, after holding that the appeal was "ill advised," refused to impose a penalty, saying that "since it does not appear to have been taken for the purpose of delay, we shall assume that appellants thought it had merit."[159] In *Dunn v. Warden*,[160] the court said that "while the appeal is without merit to a degree that renders it frivolous, nevertheless we cannot say that the appellant, who acts as his own attorney, was cognizant of such fact,"[161] and denied the penalty. There are a variety of other reasons for not imposing a penalty where the appeal is clearly meritless. As one of the more candid opinions puts it: "Plaintiff contends that the appeal is frivolous and for delay merely, but this court has caught up with its work and there has been little delay. We are not

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appellants' conduct has not been wrongful merely because of lack of merit in the claims which they have asserted, but because such claims have been asserted with improper motives and with full knowledge that they were without merit."

157 *E.g.*, Schmitz v. Wetzel, 188 Cal. App. 2d 210, 213, 10 Cal. Rptr. 219, 222 (1961): "We do not find in the instant case such a lack of good faith or the necessity of discouraging like conduct in the future, as is usually present in cases where a penalty is appropriate."; First Nat'l Bank v. Hamaker, 83 Cal. App. 670, 679, 257 Pac. 454, 458 (1927) (appellant failed even to file a closing brief, but penalty denied): "[W]e do not feel that bad faith can be attributed to the appellants, although there seems to be very little merit in the appeal, either from the standpoint of the facts of the case or the law applicable thereto." See also Hall v. Murphy, 187 Cal. App. 2d 296, 9 Cal. Rptr. 547 (1960); Taliaferro v. Taliaferro, 179 Cal. App. 2d 787, 4 Cal. Rptr. 689 (1960); Alves v. Alves, 54 Cal. App. 563, 202 Pac. 157 (1921).

158 96 Cal. App. 2d 324, 215 P.2d 125 (1950).

159 *Id.* at 327, 215 P.2d at 127.

160 28 Cal. App. 202, 151 Pac. 671 (1915).

161 *Id.* at 203-04, 151 Pac. at 672. It should be noted that in many cases where good faith is recognized, it is difficult to ascertain whether the court is applying the objective test and using good faith as the reason for denying the penalty, or is applying the subjective test, which renders the appeal non-frivolous. *E.g.*, Simon v. Bemis Bros. Baggage Co., 131 Cal. App. 2d 378, 280 P.2d 528 (1955) (substantial, persuasive proof presented in a courteous and gracious manner; fervent erroneous belief of counsel in injustice felt done to clients).

in a frame of mind to assess a penalty for delay."[162] In addition, a penalty has been denied where there existed "no circumstances of peculiar hardship" to respondent;[163] where respondent had already received triple rent in an action of unlawful detainer;[164] where large attorneys' fees had already been allowed respondent in the trial court;[165] where appellant was not personally responsible for the delay and harassment of the appeal;[166] where failure to pay a former penalty indicated that a new fine would be ignored;[167] where respondent was also "grossly at fault," having failed to file a brief;[168] where one of the appellants had died and counsel was gravely ill at the time of the hearing;[169] where respondent was guilty of somewhat hasty procedure which the court did not wish to encourage;[170] and where appellant apparently was not the real party in interest and the court did not wish to enter into questions of attorney discipline.[171]

Considering the purposes of the penalty and the difficulty in administering a good faith test,[172] the objective standard is the better one and should be used; a penalty should be awarded in every case which fails to meet the standard. Appellant's good faith helps neither the respondent who should not have been burdened with the appeal nor the courts which must examine the merits of the appeal as part of their already crowded calendar. Moreover, failure to award a penalty removes the deterrent effect of the declaration that the appeal is frivolous, and encourages litigants to show fervent belief in their cause rather than to avoid bringing such appeals.

Once it has been decided that the appeal is frivolous, for delay or harassment, or that some unreasonable violation of the rules has occurred and that a penalty is to be awarded, it becomes necessary to decide the amount. The majority of penalties thus far awarded have been nominal

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[162] Spellmire v. Buttress & McClellan, Ltd., 6 Cal. App. 2d 550, 551, 44 P.2d 649 (1935).

[163] Brite v. Briggs, 6 Cal. Unrep. 922, 68 Pac. 973 (1902).

[164] Block v. Kearney, 6 Cal. Unrep. 660, 64 Pac. 267 (1901).

[165] San Francisco Bank v. National Radio Co., 95 Cal. App. 113, 272 Pac. 331 (1928).

[166] Bridgford v. McAdoo, 48 Cal. App. 305, 191 Pac. 1113 (1920).

[167] Coburg Oil Co. v. Russell, 136 Cal. App. 2d 165, 288 P.2d 305 (1955).

[168] Berry v. Miami Cycle & Mfg. Co., 51 Cal. App. 117, 196 Pac. 94 (1921).

[169] Palm v. Weber, 71 Cal. App. 2d 481, 162 P.2d 863 (1945).

[170] Williams v. Gordon, 205 Cal. 590, 271 Pac. 1070 (1928).

[171] Wellborn v. Wellborn, 67 Cal. App. 2d 545, 155 P.2d 99 (1945).

[172] See Letter From Mr. J. Stanley Mullin to Edmund R. Manwell, December 7, 1965; on file, *California Law Review:* "The problem with a good faith test is the question of intent. How do you draw the line between a lawsuit brought to recover damages arising out of tortious acts of a defendant, and a lawsuit brought out of spite, alleging a tortious action by the defendant? . . . [I]t is indeed difficult, if not impossible, to state with accuracy that a person's purpose is other than that of seeking to recover a just claim."

—100 dollars or under[173]—and the amount does not seem to be important to the courts; the awards bear no relation to the avowed purpose of compensating respondent for the delay and vexation brought about by the frivolous appeal, nor to the desire to discourage such appeals in the future.[174] There is authority, however, for assessing more sizeable penalties.[175]

The existence of a penalty will in itself discourage some frivolous appeals.[176] However, the most important consideration in determining the sums to be awarded should be to compensate respondents.[177] If respondent is properly compensated, harassing appeals and appeals solely for the purpose of delay will be discouraged; the frivolous appellant gains little by bringing an appeal where the respondent is compensated for the harassment of the appeal. The court in *Huber v. Shedoudy*[178] recognized this, stating that in determining the amount of damages to be awarded in frivolous appeals cases, the court should consider the facts involved and the effect of the delay. It went on to outline some of the factors which

[173] In 65 of the 121 cases examined. See, *e.g.*, Estate of Walters, 99 Cal. App. 2d 552, 222 P.2d 100 (1950).

[174] See, *e.g.*, Danziger v. Peebler, 88 Cal. App. 2d 307, 198 P.2d 719 (1948). The court recited the history of a series of actions "that have plagued the courts for a number of years," a part of a program of malicious persecution of defendants-respondents, noted that "this long-continued imposition upon and abuse of process of the courts should not be allowed to pass unnoticed," and found that the power exists to impose a penalty where the circumstances are as aggravated as in the case at bar. The court then imposed the munificent penalty of $100 on two appellants jointly. Perhaps the compensation of vexed respondents is to be only constructive compensation. See also Estate of Wall, 183 Cal. 431, 191 Pac. 687 (1920) (estate of $75,000, delay of over one year, $200 penalty).

[175] A penalty of $1,371.46 (10% of the judgment) was awarded in Stebbins v. Smiley, 1 Cal. Unrep. 133 (1864). See also Blackmore Invest. Co. v. Johnson, 213 Cal. 148, 1 P.2d 978 (1931) ($500); Lapique v. Walsh, 191 Cal. 22, 214 Pac. 876 (1923) ($1,000); Huber v. Shedoudy, 180 Cal. 311, 181 Pac. 63 (1919) ($720; court states that a penalty of $2,600 would not have been unjust); Dewitt v. Porter, 13 Cal. 171 (1859) ($450); Clark v. Universal Underwriters Ins. Co., 233 Cal. App. 2d 746, 43 Cal. Rptr. 822 (1965) ($500); Babb v. Weimer, 225 Cal. App. 2d 546, 43 Cal. Rptr. 822 (1964) ($500); and Taliaferro v. Taliaferro, 203 Cal. App. 2d 652, 21 Cal. Rptr. 870 (1962) (five appeals disposed of at once; $200 each). In addition, many cases, particularly in early days, awarded a percentage of the judgment as a penalty, which is appropriate in money judgments where the judgment is more than nominal. See, *e.g.*, Goodcell v. Dans, 62 Cal. 617 (1882) (25%); Bateman v. Blumenthal, 61 Cal. 628 (1882) (15%); Van Slyke v. Miller, 60 Cal. 411 (1882) (50%).

[176] One incentive to appeal today is that it may cost nothing in many cases involving money judgments. The 7% legal interest awarded on such judgments may be less than appellant's money will earn while he retains it. Removing this incentive would in itself cut down the number of meritless appeals.

[177] In this context, compensation refers primarily to making respondent whole for his expenses, including attorneys' fees; it is beyond the scope of this Comment to consider nonmonetary compensation for all possible sources of damage in connection with litigation, such as stresses, mental suffering, and the like. See also notes 117-29 *supra* and accompanying text.

[178] 180 Cal. 311, 316-17, 181 Pac. 63, 65 (1919).

should be considered. These included the pecuniary loss occasioned by the delay and the attorneys' fees attendant upon responding to the appeal. This approach is eminently reasonable and consistent with the purposes of the penalty. It should be the guideline for every appellate judge who must determine the amount to be awarded as a frivolous appeal penalty.

Appellate courts have the necessary procedures at their disposal to combat vexatious litigation. An appeal meritless on its face may be dismissed, saving time for the court and respondents. If summary dismissal is not proper, but examination of the merits discloses that the appeal was frivolous, a court may impose a penalty on appellant in affirming the judgment.[179]

If the frivolous appeal penalty is used to maximum effectiveness, it is an excellent means for both discouraging such appeals in the future and compensating the vexed respondents, while at the same time granting appellants a full hearing on the merits of their appeal. To accomplish fully the stated objectives of the frivolous appeal penalty, the courts

[179] It may also be proper to award a penalty on dismissal. Several cases have suggested that an uncontradicted affidavit may be sufficient foundation for a penalty. See, *e.g.*, McFadden v. Dietz, 115 Cal. 697, 42 Pac. 777 (1897) (affidavit showed appellant's own statements that purpose was delay); Koelling v. Rutz, 108 Cal. 664, 41 Pac. 781 (1895) (affidavit set forth appellant's statements which virtually admitted that sole purpose was delay); Duncan v. Grady, 99 Cal. 552, 34 Pac. 112 (1893) (same as in *Koelling*). *Cf.* Vaughn v. Werley, 62 Cal. 181 (1882) (without transcript, no way to determine right to penalty).

An additional feature worthy of note is that the penalty may be imposed on either the party involved or his attorney. Consequently, lack of financial responsibility will not defeat the purpose of the penalty, and attorneys will be less likely to be parties to frivolous appeals. The usual practice is noted in Vickter v. Pan Pac. Sales Corp., 108 Cal. App. 2d 601, 604, 239 P.2d 463, 465 (1952): "While a penalty may be imposed either upon the party or his attorney, it will usually be unknown to the court whether the appeal was inspired by insincere or negligent advice given by the attorney or the insistence of a stubborn client. Therefore, the penalty should usually be imposed upon the party, and the matter of responsibility be left to private adjustment." However, the penalty has been imposed on counsel where he failed to heed the court's warning concerning the sufficiency of evidence to support the findings, Ames v. Ames, 168 Cal. App. 2d 39, 335 P.2d 135 (1959); where the party's financial status indicated that the normal practice would have been meaningless, Garcia v. Lucido, 191 Cal. App. 2d 302, 12 Cal. Rptr. 601 (1961) (normal costs and costs of excess material in transcript imposed jointly and severally on party and counsel); where clearly discretionary orders were attacked on appeal, Howard v. Howard, 141 Cal. App. 2d 233, 296 P.2d 592 (1956) ($300; appeal from relatively modest award of attorney's fees); and, of course, where the attorney himself appeared in *propria persona*, Babb v. Weimer, 225 Cal. App. 2d 546, 43 Cal. Rptr. 822 (1964).

When the litigant lacking financial responsibility appears in *propria persona*, the courts probably have inherent power to deny access until costs from previous actions are paid; while not affording compensation, this solution would at least prevent further vexation. *Cf.* Kotteman v. Kotteman, 150 Cal. App. 2d 483, 310 P.2d 49 (1957) (dismissal of appeal proper where appellant is in contempt of trial court order). See also Weile v. Sturtevant, 176 Cal. 767, 169 Pac. 685 (1917); Stewart v. Butler, 27 Misc. 708, 59 N.Y. Supp. 573 (Sup. Ct. 1899).

must first find a consistent answer to the question of definition. The standard should be objective—if no reasonable man would have brought the appeal, it should be declared frivolous and a penalty awarded. Second, the amount awarded, once a penalty is determined to be proper, should not be a standard nominal sum but should be the amount necessary to accomplish the purposes of the penalty.

CONCLUSION

California courts have procedural devices at their command to combat the problem of delay and harassment produced by the vexatious litigant. At the trial level, the courts can dispose of meritless claims through summary judgment and procedures raising the defense of res judicata. Abatement can prevent a multiplicity of claims, and injunction is an effective remedy and deterrent in the exceptional case justifying its use. The action for malicious prosecution of civil proceedings can lead to compensation for the damages incurred by the defendant in responding to the vexatious litigant's claims and will also act as a deterrent to future vexatious litigation. At the appellate level, the courts have an effective means, if invoked, both to discourage vexatious appeals, thereby reducing the problem of delay, and to compensate the vexed party.

The "Vexatious Litigant Statute" adds nothing to existing procedures. The statute does not compensate the responding party unless security is posted and the responding party prevails; this will rarely happen since there is no penalty for failing to post security, suffering dismissal and later bringing an action on the same claim. The statute fails to deal with the problem of deterring future vexatious claims. As one trial judge with wide experience in two of the largest counties in the state noted: "No matter how you stop [particular litigation] you do not stop the party. [He] . . . will be constantly before the court in one form or another. . . . [S]topping the individual presents the real problem."[180] Finally, the procedure established by the statute may actually add to the delay produced by the vexatious litigant.

Consideration of the problem of the vexatious litigant suggests three recommendations. First, some further device is needed at the trial level which will allow compensation to the vexed litigant without the necessity of bringing an action for malicious prosecution of civil proceedings. If the vexed litigant is compensated fully, the vexatious litigant will be effectively deterred in the majority of cases. Compensation also reduces the burden on the vexed party. A device similar to the frivolous appeal penalty would be valuable. Illinois has already adopted such a device and,

[180] Letter From Judge Edmund Moor to Edmund R. Manwell, November 23, 1965; on file, California Law Review.

while it has not been widely used, it seems a step in the right direction. Section 41 of the Illinois Civil Practice Act[181] provides that

> allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial.

Unlike awards for taxable costs only,[182] such a provision would make the vexed litigant whole for his expenses and would increase the cost of vexation sufficiently to act as a deterrent. The Illinois solution allows everyone a trial on the merits of his cause, but attempts to mitigate the harassment attendant upon meritless claims by compensating the adverse party. However, in such a procedure, an objective test, rather than a good faith test, would be more effective. Also, a provision for imposing joint and several liability on the attorney and the party would be valuable.

Second, with regard to the devices currently available, it is submitted that the trial judge, rather than being feared, could profitably be allowed more discretion in disposing of meritless or even questionable claims. As one trial judge noted, the appellate courts look with some disfavor on summary disposition of litigation. This necessarily influences the attitudes of trial court judges themselves.[183] If the action is meritless, this disfavor is unreasonable and simply adds unnecessarily to the burden of the trial court.

Third, while the in *propria persona* litigant is more likely to be a vexatious litigant, the rare attorney who countenances use of litigation to vex or harass the adverse party should be disciplined.[184] Rule 13, Rules of Professional Conduct, provides for such discipline,[185] but it is rarely used.[186] If the rare use is due to the high standards of the profession,

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[181] ILL. REV. STAT. ch. 110, § 41 (1957).

[182] See generally CAL. CODE OF CIV. PROC. §§ 1021-35.

[183] Letter From Judge Richard Harris to Edmund R. Manwell, November 29, 1965; on file, *California Law Review*.

[184] A possible example of vexatious tactics where the party was represented by an attorney is found in the history of litigation detailed in Ensher, Alexander & Barsoom, Inc. v. Ensher, 238 A.C.A. 297, 47 Cal. Rptr. 688 (1965). "The hizarre pattern of appellant's conduct in this action, the unusual procedural events here involved, and the lengths to which appellant has gone—this appeal included—to avoid any final determination of the cause" indicates that one of the motives of the plaintiff in the action was delay. Respondent's Reply Brief, pp. 1, 55, Ensher, Alexander & Barsoom, Inc. v. Ensher, 225 Cal. App. 2d 318, 37 Cal. Rptr. 327 (1964).

[185] See note 45 *supra*.

[186] A search of the records of the State Bar as of December 1965 indicated that in the preceding five years two formal disciplinary proceedings alleged violation of Rule 13, both of the proceedings also alleging other violations of the State Bar Act or Rules of Professional Conduct.

there is no problem. But if, as one attorney suggests, the problem is the use of a "good faith" test in applying this rule, perhaps a new rule applying a more objective standard is needed.[187]

Finally, even without changing any procedure, increased awareness by the courts and attorneys would help alleviate the problem. The majority of courts and attorneys are concerned about the effects of vexatious litigation on the judicial system, but those who are not concerned may add to the problem out of proportion to their numbers.[188]

The vexatious litigant is not the most serious problem which the courts must confront, but in this day of crowded courts any waste of time is damaging to the administration of justice. Any alleviation of the problems of crowded courts and use of the legal process to harass adverse parties should be useful, if only to provide added time for consideration of more serious problems.

Edmund R. Manwell

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[187] See Letter From Mr. J. Stanley Mullin, note 172 *supra*. Mr. Mullin also indicates his personal opinion that a procedure similar to the Illinois solution would be valuable in this connection.

[188] Letters from attorneys who have been involved in the work of the local administrative committees of the State Bar of California indicate that many attorneys are not concerned with the problem of delay and the vexatious litigant. See, *e.g.*, Letter From Mr. Edgar A. Luce, Jr., to Edmund R. Manwell, November 24, 1965; on file, *California Law Review*.