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THE COURTS OF OHIO have said that there is no difference between an action for abuse of process and one for malicious prosecution.[1] Other jurisdictions likewise have had trouble distinguishing the two torts.[2] Apparently, this is because the term has been used to describe a variety of dissimilar situations which are alike only in that there has been actionable injury as a result of the improper use of a legal process.[3] To a lesser extent, the confusion may also have resulted from the varying terms used to describe the two actions,[4] coupled with the imprecise use of the terms by some courts.[5]

Distinction from Malicious Prosecution

In spite of the difficulty courts have had in distinguishing the two actions, the authorities everywhere are in agreement that the tort *abuse of process* is clearly distinguishable from *malicious prosecution.*[6] Malicious prosecution is wrongfully commencing an action or causing process to issue, whereas the gist of an action for abuse of process is using a legal process for an improper purpose after the process has been issued.[7] Process in the strict sense refers to writs, warrants, mandates, or

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1 Detwilder Co. v. Holly, 3 Ohio L. Abs. 121 (Ct. of App. 1925); Delk v. Colonial Finance Co., 118 Ohio App. 451, 194 N.E.2d 885 (1963), dismissed for want of debatable question, 175 Ohio St. 248, 193 N.E.2d 153 (1963).

2 Italian Star Line v. U.S. Shipping Board Emergency Fleet Corp., 53 F.2d 359, 361 (2d Cir. 1931), 80 A.L.R. 576, 579.

3 *Id.*

4 In denomination of abuse of process, some courts have used the term malicious abuse of process; other courts have used the term malicious use of process to describe an action for the wrongful initiation of a civil suit.

5 Chamberlin Co. of America v. Mays, 96 Ga. App. 755, 101 S.E.2d 728 (1957) (both lack of probable cause and malice are essential elements of an action for malicious abuse of process); Tapley v. Youmans, 95 Ga. App. 161, 97 S.E.2d 365 (1957) (a prior termination in favor of the plaintiff is not required in order to maintain an action for malicious abuse of legal process).

6 Dean v. Kochendorfer, 237 N.Y.384, 143 N.E. 229 (1924); Brantley v. Rhodes-Haverty Furniture Co., 131 Ga. 276, 62 S.E. 222 (1908); Ash v. Cohn, 119 N.J.L. 54, 194 A. 174 (Ct. of Err. and App. 1937); Glidewell v. Murray-Lacy and Co., 124 Va. 563, 98 S.E. 665 (1919); Prosser, Handbook of the Law of Torts 876 (West Publ. Co., St. Paul, 1964 3d ed.); 1 Cooley, A Treatise on the Law of Torts 438 (Callaghan and Co., Chicago, 1932 4th ed.); 2 Encyc. of Negligence §§ 415, 416 (1962); *see* 3 Restatement of Torts, §§ 653-682 (1938); An examination of West's American Digest System from the current edition back through the Century edition under abuse of process, reveals that no other court is reported to have said that there is no difference between abuse of process and malicious prosecution.

7 Hauser v. Bartow, 273 N.Y. 370, 7 N.E.2d 268 (1937); Ash v. Cohn, *supra,* n. 6; Prosser, *supra,* n. 6.

other processes issued by a court.[8] Actions for abuse of process are most commonly found in situations where writs of attachment or execution or warrants of arrest are misused.[9]

The elements of an action for malicious prosecution are (1) commencing an action (a) without probable cause and (b) with malice and (2) a termination of the original action in favor of the defendant.[10] In contrast, the elements for abuse of process are (1) an ulterior motive and (2) an act not proper or within the scope of the process.[11]

The regular use of process, even though the motives are improper, is not an abuse of process.[12] To illustrate, the mere fact that a creditor procures a warrant for the arrest of his debtor, who has violated a law, for the purpose of collecting the debt does not constitute an abuse of process so long as the creditor's acts with regard to the criminal process are proper and within the scope of that process. This is so even though there is either a payment of the debt as a result of the criminal prosecution or there is a voluntary settlement of the debt and criminal prosecution is withdrawn. To do a lawful act in a lawful manner is not actionable.[13] However, the creditor goes beyond the regular scope of the criminal process if he uses that process to compel a settlement from the debtor.[14]

Since the essence of abuse of process is the improper use of process which has been issued, there is no requirement that the original action be terminated, or if it has been terminated that the termination be in favor of the plaintiff.[15] The cause of action accrues at the time of the improper use.[16] Likewise, the validity or invalidity of the issuance of the process is immaterial, and abuse of process will lie even though the process was wrongfully initiated.[17]

The leading case on abuse of process is the English case of *Grainger v. Hill*.[18] In that case, a mortgagee of a ship, knowing that the master was unable to repay the loan, had the master arrested on the debt in

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[8] Black's Law Dictionary 1370 (4th ed. 1968).

[9] The Nature and Limitations of the Remedy Available to the Victim of a Misuse of the Legal Process: The Tort of Abuse of Process, 2 Val. U. L. Rev. 129 (1967).

[10] Rogers v. Barbera, 170 Ohio St. 241, 164 N.E.2d 162 (1960); Woodruff v. Paschen, 105 Ohio St. 396, 137 N.E. 867 (1922).

[11] Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947); Restatement of Torts, § 682 (1938).

[12] Brown v. Robertson, 120 Ind. App. 434, 92 N.E.2d 856 (1950).

[13] Glidewell v. Murray-Lacy and Co., *supra* n. 6.

[14] Mullins v. Sanders, 189 Va. 624, 54 S.E.2d 116 (1949).

[15] Baldwin v. Davis, 188 Ga. 587, 4 S.E.2d 458 (1939); Malone v. Belcher, 216 Mass. 209, 103 N.E. 637 (1913); Ash v. Cohn, *supra*, n. 6.

[16] Little v. Sowers, 167 Kan. 72, 204 P.2d 605 (1949).

[17] Hoppe v. Klapperich, *supra* n. 11.

[18] 4 Bing. (N.C.) 211 (Eng. 1836).

order to compel him to give up the ship's registry. This decision was widely followed,[19] and the tort is now generally recognized throughout the United States.

In the early cases, the action was limited to those situations in which one was forced to do some collateral thing that he could not otherwise be compelled to do, in other words a form of extortion.[20] The modern action, however, has been broadened to include any act not within the scope of the process, whether such result could be obtained lawfully or otherwise.[21]

Cases in which abuse of process has been found can generally be arranged into three groups;[22] (1) seizure of the property of plaintiff,[23] (2) seizure of the plaintiff himself in a civil action,[24] and (3) improper use of criminal process.[25]

The Ohio Rule—Purposely Out of Line or a Misinterpretation of Early Cases?

The first reference in Ohio to the term abuse of process appears in the case of *Pope v. Pollock*.[26] Plaintiff had entered into a leasehold after negotiations with the defendant as agent for the owner. Subsequently, on two different occasions and before two different justices of the peace, defendant-agent brought an action for forcible entry and detainer against the plaintiff. In an action for malicious prosecution, the trial court found that the actions in forcible entry and detainer were brought maliciously and without probable cause. The Supreme Court of Ohio, in affirming judgment for plaintiff, said, "(w)here an action is brought and prosecuted maliciously, and without probable cause, *it is an abuse of legal process.*" [27] (emphasis added).

Pope v. Pollock was decided 53 years after *Grainger v. Hill.* During those years, American courts were following the *Grainger* decision, so

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[19] Gillam, Abuse of Process, 16 N.C. L. Rev. 276, 280 (1938).

[20] Lockhart v. Bear, 117 N.C. 298, 23 S.E. 484 (1895) (civil arrest used to coerce levy on exempted property); McClenny v. Inverarity, 80 Kan. 569, 103 P. 82 (1909) (threat of criminal action to extort money).

[21] Comment, 7 Brooklyn L. Rev. 123 (1938).

[22] Gillam, *supra,* n. 19.

[23] Saliem v. Glovsky, 132 Me. 402, 172 A. 4 (1934) (excessive attachment in satisfaction of a judgment); Templeton Feed & Grain Co., v. Ralston Purina Co., 72 Cal. Rptr. 344, 446 P. 2d 152 (1968) (seizure of turkeys on Nov. 9 in order to compel the owner of the flock to pay the debt of another).

[24] Brantley v. Rhodes-Haverty Furniture Co., 131 Ga. 276, 62 S.E. 222 (1908) (plaintiff had been arrested and jailed in a bail trover action; Mrs. Brantley, after exclaiming that she would give up anything, except her honor, to be released from jail, surrendered a diamond broach and entered into a new contract with her creditor).

[25] McGann v. Allen, 105 Conn. Rpts. 177, 134 A. 810 (1926) (police officer took prisoner to a place other than that commanded by the arrest warrant).

[26] 46 Ohio St. 367, 21 N.E. 356 (1889).

[27] *Id.* at 369.

the term abuse of process had acquired a particular meaning in the United States in spite of the confusion in distinguishing the action from malicious prosecution. In the *Pope* case, however, it appears as though the court was using the term to characterize the offensiveness of that particular action, *viz.*, a malicious prosecution of successive forcible entry and detainer actions, rather than to identify the tort, abuse of process. Throughout the opinion, the court describes plaintiff's action as one for malicious prosecution, whereas there is only one place where the term abuse of process is used.

An action for forcible entry and detainer is a summary action for removal from land;[28] it would seem that this is precisely what plaintiff in the original actions intended to accomplish. The original actions were commenced maliciously and without probable cause, so an improper motive can be inferred. However, there is no evidence of any improper act in the prosecution of the forcible entry and detainer actions; on these facts, there could be no abuse of process.

After this apparently imprecise use of the term abuse of process, the next reference to the term in a tort action in Ohio is a passing one in paragraph 1 of the syllabus by the court in *Crow v. Sims*:

> A suit for damages for causing an attachment to issue as auxiliary to a civil action for debt is no exception to the general rule that in all actions at common law for malicious prosecution *or for the abuse of the processes of the court*, malice and want of probable cause must be alleged and proven.[29] (emphasis added).

This case contains neither a citation to any authority concerning malicious prosecution or abuse of process nor a discussion about either action. In this regard, the case is of limited value, although it figures in a later decision.

The next reference to the term in a tort action is the opinion in the case of *Detwilder Co. v. Holly*.[30] In this case, defendant, on a claim of $350, levied on furniture and fixtures worth $6,000. After a decision for plaintiff in the trial court, the Lucas County Court of Appeals reversed on the grounds that the action was not brought within the one year statute of limitations prescribed for malicious prosecution.[31] On application for rehearing, counsel for plaintiff argued that the court of appeals had failed to distinguish between an action for malicious prosecution and one for abuse of process. The application for rehearing was denied. The abstractor then notes that, "(t)he court held that, in this state, an abuse of process is malicious prosecution and that malicious prosecution is an abuse of process."[32] The court cited, *inter alia, Pope v. Pollock.*

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[28] Black's Law Dictionary 774 (4th ed. 1968).

[29] 88 Ohio St. 214, 102 N.E. 741 (1913).

[30] 3 Ohio L. Abs. 121 (Ct. of App. 1925).

[31] Rev. Stat. of Ohio § 4983 (as amended 1894).

[32] 3 Ohio L. Abs. 121, 122 (Ct. of App. 1925).

It is conjecture to be sure, however, it seems possible that all the court meant in saying that there was no difference between the two actions was that abuse of process was to be included within the one year statute of limitations prescribed for malicious prosecution.

Whatever, this is probably the most unfortunate decision of all, for not only does it begin a series of cases (all discussed below) which accept without question the notion that there is no distinction between abuse of process and malicious prosecution, but here is a fact situation which appears to be an abuse of process in the sense in which other jurisdictions have used the term, *viz.*, excessive attachment.[33]

The next reference to the term abuse of process in a tort action is in *Calvin v. Martin.*[34] Defendant-landlord had obtained a certificate of eviction from the United States Housing Expediter in accordance with provisions of the Federal Housing and Rent Act in order to remodel and repair the premises. The landlord filed an action for forcible entry and detainer. Prior to the trial, however, the parties worked out a settlement whereby plaintiff-tenant could remain on the premises for another two months, then he would voluntarily leave. Several months after vacating the premises, the tenant brought an action alleging false and fraudulent representations in obtaining the certificate of eviction and that the landlord had failed to remodel and repair the premises in accordance with the representations in the certificate.

The Federal Housing and Rent Act did not provide a remedy for a tenant wrongfully evicted. Although a few states, notably New York and Massachusetts, did enact statutes providing a remedy, Ohio had not. In those states which had not provided a statutory remedy, the injured tenant was forced to rely on common law remedies, usually fraud and deceit,[35] although abuse of process was also used on the theory that the landlord exceeded the scope of the certificate of eviction.[36]

The Ohio Court of Appeals reversed the trial court and entered a final judgment for the defendant-landlord on the grounds that plaintiff had failed to establish the elements of fraud and deceit and that the action could not be considered as one for malicious prosecution or abuse of process since plaintiff did not prevail in the original action (presumably the action filed, but not prosecuted, for forcible entry and detainer). *Detwilder* is cited as authority that abuse of process is "merely another name for malicious prosecution." [37]

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[33] *Supra* n. 23.

[34] 64 Ohio L. Abs. 265, 111 N.E.2d 786 (Ct. of App. 1952).

[35] Hathaway v. Bornmann, 137 Conn. 322, 77 A.2d 91 (1950).

[36] Varga v. Pareles, 137 Conn. 663, 81 A.2d 112 (1951); Tranchina v. Arcinas, 78 Cal. App.2d 522, 178 P.2d 65 (1947).

[37] 64 Ohio L. Abs. 265, 269, 111 N.E.2d 786, 789 (Ct. of App. 1952).

Treshansky v. Northern Ohio Lumber and Timber Co.[38] and *Lewis v. Public Finance Corp. of Youngstown*[39] both consider the amount of evidence sufficient to support a finding of malicious prosecution and abuse of process. In the *Treshansky* case, plaintiff brought his action for (1) malicious prosecution, (2) slander of title, and (3) abuse of process against a defendant who had taken judgment on a cognovit note. The note had been acquired from a third party who was alleged to have stolen it from the plaintiff. The court held that in the absence of evidence showing a conspiracy between the defendant and the alleged thief, none of the actions could be maintained. In the *Lewis* case, the Ohio Court of Appeals, without discussing either the fact situation or the nature of the evidence, affirmed a judgment for plaintiff in an action for malicious prosecution and abuse of process. Neither of the cases discusses the two actions, and to that extent, they are not particularly revealing.

The last of this line of cases is *Delk v. Colonial Finance.*[40] This was an action for malicious prosecution of a civil action. The court found that there was a failure of proof in that there was no malice, no seizure of the property or arrest of the person, and that there was probable cause for commencing the original action. However, the court needlessly confuses the opinion by their dictum, "Ohio makes no distinction between malicious prosecution and abuse of process, considering them the same."[41] No authority is cited.

Latest Decision Contrary to the Previous Cases

To this point, the discussion has developed the thesis that Ohio courts have misinterpreted the cases in saying that there is no difference between malicious prosecution and abuse of process. The most recent case which discusses the two actions, *Avco Delta Corp. v. Walker,*[42] is directly contrary to the previous Ohio cases and may well indicate a trend toward recognition of the tort, abuse of process.

In *Avco Delta,* plaintiff took a cognovit judgment, and, after giving the statutory demand for payment,[43] proceeded to attach defendant's wages. Defendant, by way of answer, alleged that the note was obtained by fraud and filed a counterclaim for damages to credit and reputation allegedly resulting from plaintiff's actions in obtaining judgment on the note and effecting its collection. A demurrer to the counterclaim was sustained on the basis that the action was one for malicious prosecution

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[38] 7 Ohio L. Abs. 646, 30 Ohio L. Rpts. 373 (Ct. of App. 1929).

[39] 9 Ohio App.2d 215, 223 N.E.2d 828 (1967).

[40] 118 Ohio App. 451, 194 N.E.2d 885 (1963).

[41] *Id.* at 454.

[42] 22 Ohio App.2d 61, 258 N.E.2d 254 (1969).

[43] Ohio Rev. Code, § 2715.02 (as amended 1967).

and, as such, required a prior termination of the original action. There was no prior termination here since the judgment was vacated when defendant filed his answer and counterclaim.

Counsel for defendant argued that the counterclaim was not an action for malicious prosecution, but, rather, one for abuse of process. In support, he first cited *Prosser* to the effect that in abuse of process it is not necessary that the original action be terminated, as distinguished from malicious prosecution, and then he cited *Delk v. Colonial Finance* as authority for the rule that in Ohio there is no difference between the two actions. The implication seems to be that if there is no difference between the two actions in Ohio and if abuse of process does not require a prior termination of the original proceedings, then no prior termination is required here, whether the action be characterized as malicious prosecution or abuse of process.

The court examined *Delk v. Colonial Finance,* and observed that the rule was apparently based on an interpretation of the syllabus in *Crow v. Sims.* As previously noted, the court in *Delk v. Colonial Finance* cited no authority for their statement that there is no difference between the two actions, although the court did cite *Crow v. Sims* two pages later, but in a different context. Since *Crow v. Sims* did not discuss the difference between malicious prosecution and abuse of process, the court in *Avco Delta* rejected the case as authority for the rule that there is no difference between the two actions. As a consequence, the court overlooked, or ignored, the other authority for the rule and turned instead to a variety of sources (*e.g., Prosser and C.J.S.*) to substantiate their conclusion that there is in fact a difference between the two actions. Extensive quotes from *1 Am. Jur. 2d* are included in the opinion to the effect that where the complaint goes to the issuance of process, the action is for malicious prosecution, whereas abuse of process concerns the willful perversion of process which has been issued. Since defendant's counterclaim alleged that the note was obtained by fraud, the court concluded that the complaint went to the issuance of process and thus was an action for malicious prosecution. The Ohio Court of Appeals affirmed the decision of the trial court in sustaining the demurrer to the counterclaim on the grounds that an action for malicious prosecution requires a prior termination of the original action.

Avco Delta Should be Followed

Whether by design, or inadequate research, an Ohio court has said that the tort, abuse of process is distinct from malicious prosecution. The opinion is salutary and should be followed. Ohio plaintiffs should not be denied a remedy for injury as a result of the improper use of a legal process.

Although actions for abuse of process and malicious prosecution are generally not favored by the courts,[44] Ohio courts have consistently refused to permit a plaintiff to benefit from process which he has improperly used.[45] To move from that proposition to a rule allowing relief to a defendant who has been injured as a result of such improper use is not a difficult step. Ohio courts ought to take that step.

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[44] Skarbinski v. Henry H. Krause Co., 378 F.2d 656 (6th Cir. 1967).

[45] Buchanan v. Wilson, 254 F.2d 849 (6th Cir. 1958). Motion to quash service of process on an out-of-state defendant granted; inducement by artifice to come within the jurisdiction of the court is an abuse of process and the court will not enforce jurisdiction so obtained.