GEORGIA'S SPECIAL DAMAGE FALLACY IN SUITS MALICIOUS USE OF CIVIL PROCESS

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In a suit for malicious use of civil process,[1] the plaintiff must show (1) a culpable or malicious civil action by the defendant,[2] (2) a want of probable cause for defendant's bringing the action,[3] (3) a termination of the prior litigation in favor of the present plaintiff[4] and (4) that such action caused either (a) an arrest of the plaintiff,[5] (b) a seizure of his property[6] or (c) other special injury.[7] This comment deals solely with the advisability of the special damage[8] requirement which is presently

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1. In order to prevent a confusion in terms it should be noted that *malicious* prosecution applies only to malicious criminal actions as seen in GA. CODE ANN. § 105-8 (1956 Rev.). An action for a wrongful civil suit is known in Georgia as malicious use of process. Baldwin v. Davis, 188 Ga. 587, 4 S.E.2d 458 (1939); Woodley v. Coker, 119 Ga. 226, 46 S.E. 89 (1903); Porter v. Johnson, 96 Ga. 145, 23 S.E. 123 (1895). "Malicious use of legal process is where the plaintiff in a civil proceeding employs the court's process in order to execute the object which the law intends for such a process to subserve, but proceeds maliciously and without probable cause. In a suit for damages growing out of such malicious use of process, it must appear that the previous litigation has been finally terminated against the plaintiff therein." Baldwin v. Davis, *supra* at 588, 4 S.E.2d at 461; see also Brantley v. Rhodes-Haverty Furniture Co., 131 Ga. 276, 62 S.E. 222 (1908); King v. Yarbray, 136 Ga. 212, 71 S.E. 131 (1911); McElreath v. Gross, 23 Ga. App. 287, 98 S.E. 190 (1919). When a plaintiff in a civil proceeding wilfully misapplies the court's process in order to obtain an object which such a process is not intended to affect, an action for malicious *abuse* of process will lie and it is not necessary to show a lack of probable cause or that the former litigation has been terminated. Baldwin v. Davis, *supra,* and citations *supra.* It should be noted that there is no mention of wrongful civil proceeding in the Georgia Code.
2. Sledge v. McLaren, 29 Ga. 64 (1859); Southern Railway Co. v. O'Bryan, 119 Ga. 147, 45 S.E. 1000 (1903); Woodley v. Coker, 119 Ga. 226, 46 S.E. 89 (1903).
3. Sledge v. McLaren, 29 Ga. 64 (1859); Juchter v. Boehm, Bendheim & Company, 67 Ga. 534 (1881); Hicks v. Brantley, 102 Ga. 264, 29 S.E. 459 (1897).
4. Baldwin v. Davis, 188 Ga. 587, 4 S.E.2d 458 (1939).
5. Woodley v. Coker, 119 Ga. 226, 46 S.E. 89 (1903).
6. Wilcox v. McKenzie, 75 Ga. 73 (1885); Georgia Loan & Trust Co. v. Johnston, 116 Ga. 628, 43 S.E. 27 (1902).
7. Mitchell v. The Southwestern Railroad, 75 Ga. 398 (3) (1885); Slater v. Kimbro, 91 Ga. 217, 18 S.E. 296 (1892); Jacksonville Paper Company v. Owen, 193 Ga. 23, 17 S.E.2d 76 (1941); Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 70 S.E.2d 734 (1952).
8. Special damages are such as actually flowed from the wrongful act, and must be alleged and proved in order to recover. On the other hand the law will presume general damages to flow from any tortious act and thus they may be recovered without proof of any specific amount. GA. CODE ANN. § 105-2006 (1956 Rev.). In regard to special damages see Bass v. Postal Telegraph-Cable Company, 127 Ga. 423, 56 S.E. 465 (1907).

necessary in Georgia when there has been no arrest of the plaintiff or seizure of his property.

History of the Special Damage Rule

Prior to the Statute of Marlbridge[9] a separate action on the case would lie where one could show that he had been made a defendant to an action by one, who had no probable cause to bring the suit and had done so by a malicious contrivance. With the passage of this statute, the defendant in the malicious suit could get his costs and damages *per falsum clamorem* in the same action. As a result of the aforesaid remedy, the bringing of a civil suit maliciously and without probable cause was not sufficient grounds alone for the maintenance of a separate action. In order to bring a separate suit for such wrongful civil proceedings, the plaintiff (the defendant in the prior litigation) had to show in addition to malice and lack of probable cause, that either his person had been arrested, his property attached or some special grievance, to wit, special damages, had resulted from the malicious suit.[10] When Georgia passed its adopting statute in 1784,[11] the special damage requirement became a part of Georgia law in a suit for malicious use of civil process where there had been no attachment or arrest.[12] However, Georgia has not allowed a cross-action by the defendant in a malicious suit to recover damages that have resulted therefrom.[13] As pointed out by Dean Charles J. Hilkey, it would seem that Georgia has recognized the effect of the Statute of Marlbridge insofar as it changed the common law but has not allowed the cross-action remedy for which it provided. He submits, and rightly so, that Georgia should have accepted or rejected the Statute *in toto*.[14] If Georgia did not choose to recognize the cross-action remedy as provided by the statute, it should not have accepted the special damage limitation placed upon a separate suit for a wrongful civil proceeding.

The Georgia legislature has not sought to expand or limit the common law in regard to malicious civil suits. Ga. Code Ann. § 105-8 (1956 Rev.) relates to malicious crimnal prosecutions but the Code is slent

9. 52 Hen. III (1267).
10. Mitchell v. The Southwestern Railroad, 75 Ga. 398 (1885), citing Lord Holt in Savil v. Roberts [1698], Salkeld R., 13, 91 Eng. Rep. 14.
11. Act of 1784, Cobb, 721; Prince, 570; Code of 1863 §1, par. 6; Ga. Code Ann. § 2-8003 (1948 Rev.).
12. Mitchell v. The Southwestern Railroad, 75 Ga. 398 (1885).
13. Fender v. Ramsey & Phillips, 131 Ga. 440 (2), 62 S.E. 527 (1908); relating to abuse of process see Purdy v. Dunn Machinery Co., 142 Ga. 309, 82 S.E. 888 (1914); as dictum see Marshall v. Armour Fertilizer Works, 24 Ga. App. 402, 100 S.E. 766 (1919).
14. Hilkey, *Torts*, 4 Mercer L. Rev. 172, 182 (1952-53).

in regard to malicious civil suits. There are those who have argued that the same criteria as to damages should apply to both actions for malicious civil and criminal litigation,[15] but such a view has not been accepted by the Georgi aSupreme Court. Hence, it would seem that an action for malicious use of legal process, distinguished from one for malicious prosecution,[16] finds its basis in the common law as declared by the Georgia Eupreme Court.

The Full Bench Problem

A full bench decision of the Georgia Supreme Court is almost tantamount to a legislative enactment[17] since such a decision can only be reversed by a full bench.[18] In fact in *Dixie Broadcasting Corp. v. Rivers,*[19] Justice Candler, who wrote both the majority and minority opinions, cited in the majority opinion, *Mitchell v. Southwestern Railroad Co.*[20] and *Jacksonville Paper Co. v. Owen,*[21] as authority for the special injury restriction in a suit for malicious use of civil process where there had been no arrest or attachment. He said as these two cases were unanimous decisions of the supreme court, ". . . they had the same force and effect as an act of the legislature." However, the *Rivers* case was a four to three decision. Hence this case standing alone could be reversed by a simple majority of the court.

In *Davis v. Paulk,*[22] which was a suit for malicious use of process where no special damages were shown, the court of appeals affirmed the sustaining of a general demurrer relying on the *Mitchell, Owen,* and *Rivers* cases, *Woodley v. Coker*[23] and *Slater v. Kimbro.*[24] All these were full bench decisions with the exception of the *Rivers* case which as previously mentioned was as close as a reversal decision could be (4-3). In the *Davis* case it was held that ". . . the prosecution of a civil action maliciously and without probable cause gives rise to a cause of action for malicious use of process only when 'the person of the defendant was arrested or his property attached, or some special damage was done

15. See Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 110, 70 S.E.2d 734, 743 (1952) (Candler, J., dissenting).
16. Ga. Code Ann. §105-801 (1956 Rev.).
17. Ga. Code §6-1611 (1933).
18. Weaver v. Carter, 101 Ga. 206, 28 S.E. 869 (1897); McWhorter v. Ford, 142 Ga. 554, 83 S.E. 134 (1914); Jasper County Bank v. Rainey Brothers, 144 Ga. 542 (1), 87 S.E. 661 (1916).
19. 209 Ga. 98, 1082 (2)(b), 70 S.E.2d 734, 736 (1955).
20. 75 Ga. 398 (1885).
21. 193 Ga. 23, 17 S.E.2d 76 (1941).
22. 99 Ga. App. 607, 109 S.E.2d 316 (1959) (*cert. denied* by the Ga. Supreme Court).
23. 119 Ga. 226, 46 S.E. 89 (1903).
24. 91 Ga. 217, 18 S.E. 296 (1892).

to him.' "[25] The court of appeals in *Swain v. American Surety Co.* said,

> Expenses incurred by the defendant in making preparation to defend the suit [for malicious use of process], . . . and damages for embarrassment, mortification, humiliation, and being "held up to public scorn and ridicule," are expenses and damages resulting from the institution of all suits prosecuted to recover for like causes of action, and do not constitute any special damage or injury not necessarily resulting from the prosecution of the suit for like causes of action.[26]

The aforesaid was adopted by the supreme court in the *Owen* case[27] and quoted in the *Davis* case.[28] Relying on the *Rivers* case, Judge Townsend, in the *Davis* case said,

> . . . an action for malicious use of process where neither the person of the defendant was arrested nor his property attached, allegations relating to libelous averments injurious to reputation would not constitute such special damages as would support the prosecution of the action.[29] It follows that in this case a suit for malicious use of process in a civil case where the person of the defendant was not arrested or his property attached, and where the only damages sought are damages to the credit reputation of the plaintiff, in this action, mental anguish which "impaired his earning capacity and caused him to suffer loss of sleep" and damage to the reputation of the plaintiff, his wife and family, no special damages are alleged such as would support the action, . . .[30]

Although the *Rivers* case[31] was not an unanimous decision it was binding precedent upon the court of appeals[32] in the *Davis* case. But, the court said that there was a probability of reversal on certiorari to the supreme court as the *Rivers* case had been a close decision, *i.e.*, 4 to 3. However, certiorari was denied. It would appear that the court of appeals did not consider the unanimous decisions in the *Mitchell*,[33] the *Slater*[34] and the *Owen*[35] cases to be such binding precedent as to

25. 99 Ga. App. at 607, 109 S.E.2d at 317, quoting from Jackson Paper Co. v. Owen, 193 Ga. at 24, 17 S.E.2d at 78, which cited Mitchell v. Southern R., 75 Ga. 398 (1885).
26. 47 Ga. App. 501 (2), 171 S.E. 217 (1933).
27. 193 Ga. at 24, 17 S.E.2d at 78.
28. 99 Ga. App. at 607, 109 S.E.2d at 317.
29. All allegations made in pleadings are absolutely privileged provided they are material and relevant to the relief sought, and the court had jurisdiction to grant that relief. Wilson v. Sullivan, 81 Ga. 238, 7 S.E. 274 (1888). The Wilson decision was codified in GA. CODE ANN. §105-711 (1956 Rev.).
30. 99 Ga. App. at 608, 109 S.E.2d at 317.
31. 209 Ga. 98, 7 S.E.2d 734 (1952).
32. State Highway Dept. v. Wilson, 98 Ga. App. 619, 106 S.E.2d 544 (1958).
33. 75 Ga. 398 (3) (1885).
34. 91 Ga. 217, 18 S.E. 296 (1892).
35. 193 Ga. 23, 17 S.E.2d 76 (1941).

require a unanimous reversal pursuant to GA. CODE ANN. §8-1611 (1933). While Judge Townsend did not offer any reasoning or authority for such a proposition, the idea is not without foundation as will be discussed subsequently.

The undisputed part of the gravamen of an action for a wrongful civil proceeding is malice or culpable action in wrongfully suing out a case and lack of probable cause. This rule is followed almost universally throughout the United States, England and Canada.[36] The difference among the jurisdictions arises in regard to the special damage requirement in the absence of an attachment or an arrest. Georgia follows the minority view by adhering to this requirement.[37] It would seem that malice and lack of probable cause are also the elements of the *cause of action* in Georgia while the special damage requirement is an element of *recovery* which this writer believes would not compel a full bench supreme court decision for its reversal. None of the full bench cases, holding that there must be either an attachment, an arrest or other special injury, and which involved an arrest of plaintiff's person,[38] should be authority for the special injury restriction in cases not concerned with an arrest. Similarly those unanimous decisions which hold that an attachment will suffice in place of an arrest should not be applicable to a case where there has been no attachment.[39] Any comment, in cases involving arrest or attachment, which would limit a plaintiff's right in a case not involving such should be only dictum. Hence, these cases should not be authority for any special damage restriction. It is interesting to note that in *Woodley v. Coker*,[40] it was said that the elements of an action for malicious prosecution of a criminal case and for malicious use of civil process were essentially the same. Although statements to this effect have occurred in several opinions,[41] they could not be interpreted as meaning that the two actions require identical elements except that one involves a criminal case and the other a civil case because, as has been seen, Georgia follows the special damage doctrine where a civil action is involved. Although these opinions have been cited as authority for the abolishment of the special injury requirement[42]

36. Annot., 150 A.L.R. 897 (1944).
37. *Ibid.*
38. Woodley v. Coker, 119 Ga. 226, 46 S.E. 89 (1903); Brantley v. Rhodes-Haverty Co., 131 Ga. 276, 62 S.E. 222 (1908); Coleman v. Allen, 79 Ga. 637 (1887).
39. Juchter v. Boehm, Bendheim & Co., 67 Ga. 534 (1881); Mullins v. Matthews, 122 Ga. 286, 50 S.E. 101 (1904).
40. 119 Ga. 226, 46 S.E. 89 (1903).
41. Wilcox v. McKenzie, 75 Ga. 73 (1885); Georgia Loan & Trust Co. v. Johnston, 116 Ga. 628, 43 S.E. 27 (1)(1902); Sledge v. McLaren, 29 Ga. 64 (1859).
42. Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 110, 70 S.E.2d 734, 743 (1952) (Candler, J., dissenting).

in the absence of an arrest or attachment and although this writer favors the abrogation of the restriction, such statements would appear to be only dicta. These decisions equating malicious prosecution and malicious use of civil process have involved the latter in which there was either an arrest of the plaintiff or an attachment of his property, hence should not be authority in the absence of an arrest or attachment. In another full bench decision,[43] the court held that an action for libel would not lie where the defamatory matter was in a bill in equity if it were salient to the relief prayed for and the court where the petition was filed had jurisdiction. In both this case and in *Porter v. Johnson,*[44] the special damage restriction was discussed but any holding in this regard would be no more than dictum as the former case dealt with libel and in the latter there was no showing of malice and lack of probable cause in the count for malicious use of process in the petition. Hence the court should have never been concerned with the special damage restriction as the element of malice was never satisfied.

The *Owen* case, which was cited along with the *Mitchell* case in the *Rivers* case as authority for the special injury requirement, was actually disposed of on the grounds that the defendant in this allegedly malicious civil suit sought recovery by way of a cross-action and such was an effort to set off a claim *ex delicto* against a claim *ex contractu* which is only allowed in equity.[45] The court went on to discuss the special injury requirement where there has been no showing of either arrest or attachment which would be no more than dictum. In any event no actual damages were shown, hence the dictum, however strong, should not be authority for the special damage requirement.

In the *Slader* case the court said, "One who . . . sues out a summary statutory process maliciously and without probable cause to dispossess the tenant as a tenant at will holding over, is liable to an action for malicious prosecution of a civil proceeding, if any special damage to the tenant is occasioned thereby."[46] The court held that the attempt by the lessor to evict the plaintiff from the leased boarding-house which caused her to lose certain of her sub-tenants was sufficient special damage to sustain the action. It went further by saying that if the plaintiff had incurred expenses such as attorney's fees in giving bond and security to prevent expulsion, these would also be computed as part of the

43. Wilson v. Sullivan, 81 Ga. 238, 7 S.E. 274 (1881).
44. 96 Ga. 145, 23 S.E. 123 (1895).
45. GA. CODE §§3-113, 36-308 (1933). It would seem that to allow any cross-action by the defendant in a malicious civil suit would not be in accord with Fender v. Ramsey & Phillips, 131 Ga. 440 (2), 62 S.E. 527 (1908), as Georgia has not accepted the remedy provided by the Statute of Marlbridge, 52 Hen. III (1267).
46. 91 Ga. 217 (1), 18 S.E. 296 (1892).

special injury. However, this latter remark was a supposition not involved therein, hence should be dictum. Neither should the case be authority for any limitation upon the right of a plaintiff in an action for malicious use of process as the court found special damage to be present. Also, there was no discussion of attachment or arrest. Hence, if one took the case at face value, the holding would be, in essence, that regardless of whether there has been either an arrest of the plaintiff or an attachment of his property, there must still be shown some special damage. This, of course, would not only be a gross but also an inaccurate extension of the case. A fortiori, it would be an equally gross extension to say that the case stands for the proposition that a showing of special damage is necessary where there has been no arrest or attachment. It would seem that the court in the *Slater* case has said little more than that where a lessor maliciously and without probable cause attempts to wrongfully dispossess his lessee the latter may have a cause of action where she shows that special damages have resulted therefrom and that loss of sub-tenants occasioned thereby is special damage. The opinion in this case is of little assistance except in deciding its own narrow issues and in giving an example of a special injury.

In the *Mitchell* case[47] the court discussed the effect of the Statute of Marlbridge[48] upon the common law and the fact that that effect[49] had been adopted by Georgia,[50] to wit, in a suit for malicious use of civil process, it must be shown that either the plaintiff's person had been arrested, his property seized or that he suffered some special injury thereby. The case arose out of a bill in equity by the defendant to enjoin plaintiff's reconstruction of a dam, which had been destroyed by flood. An injunction pendente lite issued against the plaintiff but at the final trial of the cause in the prior suit the bill was dismissed. Defendant's agent had given plaintiff's assignor the right to build the dam upon the defendant's property and plaintiff had obtained a similar right. The supreme court, in reversing the lower court's granting of a nonsuit, said, ". . . this action was brought to recover damages which the plaintiff had sustained from the malicious suing out of said injunction without probable cause, whereby he had sustained special damage in being deprived of the use of his property."[51] As in the *Slater* case, it would seem that since the court here found that special damage was present, any limitation as to a plaintiff's right to recover in a similar action would

47. 75 Ga. 398 (1885).
48. 52 Hen. III (1267).
49. As previously stated, the cross-action remedy in malicious civil suits as provided by the Statute was not adopted by Georgia.
50. Act of 1784, *supra*, note 11.
51. 75 Ga. at 406.

be only dictum.[52] It is also interesting to note that in these unanimous decisions under discussion which have involved neither an arrest nor an attachment, the court has found special damage. Hence one is given the impression that the full bench court has used the special damage requirement more as a basis of recovery rather than a limitation thereon. It would therefore appear that the supreme court could, without a full bench reversal of prior cases, allow a recovery in a suit for malicious use of civil process where the plaintiff shows only that the defendant acted out of malice and without probable cause with no showing of either an arrest, an attachment or some special damage. Thus a simple majority of the court could accept the holding of Justice Candler's dissent in the *Rivers* case.[53]

The plaintiff in the *Rivers* case had been the defendant in a prior action, before the Federal Communications Commission, to set aside his permit to build a radio station. The supreme court characterized his action in the present case as one for libel flowing from allegations in the pleadings of the prior action and one for malicious use of legal process. The plaintiff alleged that the libelous petition cast aspersions upon his integrity resulting in specific damage and that the malicious suit in which he ultimately prevailed, caused him much delay in construction by which he occasioned special damages. In reversing the overruling of a general demurrer to the plaintiff's petition, the court held that the pleadings were privileged[54] and that nothing in the law or the proceedings before the Commission required any postponement of construction. Hence, any delay was of the plaintiff's own making and not as a result of the prior action, thus no special damage resulted thereby. However, it would have been a very foolish act on the part of the plaintiff to have continued construction of the station where an action to set aside his radio permit was pending which, if the action had been successful, would have resulted in a useless expense on his part.[55] It is submitted that the court was mistaken in its idea of what constituted a valid choice between two reasonable alternatives. In actuality, the plaintiff had no real choice in regard to building or not building his radio station. A majority of the court felt bound to the special damage rule because of full bench decisions in the *Mitchell* and *Owen* cases. In comparing the Mitchell case with the *Rivers* case, it would seem that had the action in the latter case involved an interlocutory injunction against plaintiff's constructing the station, the court might have been able to find a special

52. Hilkey, *Torts*, 4 MERCER L. REV. 172, 182 (1952-53).
53. 209 Ga. 98, 110, 70 S.E.2d 734, 743 (1952).
54. GA. CODE ANN. §105-711 (1956 Rev.).
55. Such conduct could be analogized to a plaintiff who aggravates his damages or a defendant in equity who disenables himself.

injury occasioned by the plaintiff's being deprived of the use of his property as was found in the former case.

A Malicious Tort

As previously stated, Justice Candler in his dissent in the *Rivers* case would make the requisites, as to damages, the same in actions involving malicious criminal prosecution and those concerned with the wrongful institution of a civil suit. It would appear as also previously discussed that the authority cited[56] for this proposition is not accurate as those cases certainly did not turn on this particular point. *Porter v. Johnson*[57] was similarly considered, yet this case was disposed of on different grounds. There the plaintiff sued in the first count for abuse of process however the court found no perversion of the process as it was intended to carry out the object for which it was designed. And, in the second count for malicious use of process, the plaintiff had not alleged malice and lack of probable cause. Thus the court's comment in regard to equating the damage requisites in actions for malicious prosecution and malicious use of process should be dictum. Even though one might argue with Justice Candler's citations of authority in the first part of his dissent, this is a trivial point when compared with his subsequent logic in the opinion, to wit, "as a general rule, punitive or exemplary damages [a fortiori general damages] are recoverable in all actions for damages based upon tortious acts, which involve ingredients of malice, fraud or insult, or wanton and reckless disregard for the plaintiff's right."[58]

To return to a previous proposition, it is submitted that the real gravamen of an action for malicious use of civil process should be malice and lack of probable cause but not because of Ga. Code Ann. § 105-801 (1956 Rev.).[59] The clear meaning of the words in this statute would indicate that it should only apply to malicious criminal suits. It is submitted that an action for a wrongful civil suit, where both malice and a lack of probable cause have been shown, needs no statutory authority in order for a court of law in this state to take cognizance thereof and render appropriate relief. It is an elementary common law tort principle that a malicious act which precipitates injury gives rise to an action not only for general but also punitive damages.

56. Woodley v. Coker, 119 Ga. 226, 46 S.E. 89 (1903); Wilcox v. McKenzie, 75 Ga. 73 (1885); Georgia Loan & Trust Co. v. Johnston, 116 Ga. 628, 43 S.E. 27 (1902); Sledge v. McLaren 29 Ga. 64 (1859).
57. 96 Ga. 145, 23 S.E. 123 (1895).
58. 209 Ga. at 111, 70 S.E.2d at 744.
59. Ga. Code Ann. § 105-80 (1956 Rev.), provides: A criminal prosecution maliciously carried on, and without any probable cause, whereby damage ensues to the person prosecuted, shall give him a cause of action.

The actions of misuse of legal proceedings grew out of defamation. In Georgia, libel[60] is actionable per se without a showing of special damage where the published defamatory matter is malicious and false.[61] As libel is so akin to malicious use of process since both affect reputation, it is hard to understand the reason for the special damage requirement in the latter.[62] It is submitted that as the allegations in a petition are absolutely privileged if salient to the relief prayed for,[63] there is all the more reason for not requiring special damage. Under the present state of the law, one might maliciously and without probable cause file a fallacious and defamatory petition initiating a civil proceeding; and if the court where it is filed has jurisdiction over the subject matter and the false allegations are pertinent to the relief prayed for, then this malicious plaintiff cannot be held for libel. And if the defendant to this action cannot show special damage in the absence of an arrest or an attachment then he would have no grounds for an action for malicious use of process. The gross inequities would appear obvious. In his brief in support of an application for certiorari in the case of *Davis v. Paulk*,[64] Mr. G. Gerald Kunes, attorney for the plaintiff-in-error, most appropriately demonstrated the fallacy and inequity of the special damage rule:

> Can it be said in all sincerity that a man who suffers special damages in the amount of $5.00, and recovers a judgment for punitive damages in the amount of $10,000.00, is any more entitled to such verdict and judgment than a man who suffers no special damage but whose reputation is equally damaged. [?] In such a case, we would have both reputations being damaged to the extent of $10,000.00. The man who had $5.00 special damage could recover his $10,000.00, yet the man who had no special damage would have to sit by idly and realize that he had been attacked wrongfully and maliciously, and without probable cause yet he has no remedy in the court [s] of this state. Is this by any stretch of the imagination . . . justice! [?]

THE PUBLIC POLICY AGAINST ACTIONS FOR MALICIOUS SUITS

Suits for malicious criminal prosecution have not been favored in Georgia,[65] a fortiori, this disfavor exists in regard to actions for wrongful civil proceeding as evidenced by the additional special damage restriction. The policy considerations behind this disfavor are threefold:[66]

60. GA. CODE ANN. §105-701 (1956 Rev.).
61. Brandon v. Arkansas Fuel-Oil Company, 64 Ga. App. 139(1), 12 S.E.2d 414 (1940).
62. It would seem that libel would be more related to malicious use of process than slander.
63. GA. CODE ANN. §105-711 (1956 Rev.).
64. 9 Ga. 607, 109 S.E.2d 316 (1959).
65. Henderson v. Francis, 75 Ga. 178 (1885).
66. PROSSER, LAW OF TORTS, §99 at 662, 663 (2d ed. 1955).

(1) Persons honestly believing that they have bona fide claims should not be discouraged from seeking relief in a court of justice by a threat of an action in return. It is the burden of every citizen in a democratic society who may be a defendant to an action to bear the expense of the same. In answer to this contention, one need only say that an action for a malicious civil proceeding is not a cause which accrues from the suing out of a bona fide claim. It is a suit against one, who, by a malicious contrivance and without probable cause, fabricated a claim against an innocent party who, by any rule of natural justice, standard of fair play or common decency, should not be expected to bear such a burden but rather should receive not only redress for actual expenses but also punitive damages. The cost of defending a malicious civil suit should be as sufficient a damage to sustain a cause of action as would be the medical expenses resulting from a wanton and wilful battery.

(2) The state has an interest in the final disposition of all litigation. It is argued that if courts are freely open to actions for malicious civil proceedings, one counter suit will lead to another and still another *ad infinitum*.[67] This is reasoning *in terrorem* and is inconsistent with the first argument, *i.e.* (1). It is very doubtful that interminable litigation would precipitate. But, it is submitted that a malicious and spiteful action for malicious use of process should be met by a similar counter suit *ad infinitum* if the occasion arises. However, the probability of this is doubtful. For every right there should be a remedy. Surely everyone has a right not to be harrassed by malicious and groundless suits. This right should result in the imposition of a duty upon everyone else not to prosecute such actions. And, when this duty is violated a higher policy should come into play to preponderate over any considerations of judicial expediency by allowing a recovery for all damages suffered be they general or special, direct or consequential. According to Dean Prosser,

> . . . surely there is no policy in favor of vexatious suits known to be groundless, which are a real and often a serious injury; and the heavy burden of proof upon the plaintiff, to establish both lack of probable cause and an improper purpose [malice], should afford sufficient protection to the bona fiide litigant and adequate safeguard against a series of actions.[68]

The apparent inconsistency between arguments (1) and (2) points out a further fallacy. In proposition (1) it is contended that the prosecution of a bona fide claim should not be discouraged and well it should not, while proposition (2) calls for finality in litigation and well there

67. Porter v. Johnson, 96 Ga. 145, 23 S.E. 123 (1895).
68. PROSSER, LAW OF TORTS, §99 at 663 (2d Ed. 1955).

should be, but not at the expense of preventing the prosecution of a bona fide tort action for malicious use of civil process.

(3) Finally it is argued that the successful party to civil litigation is awarded his costs. Hence, when the defendant prevails in a malicious civil suit as he must before a cause of action accrues in his favor,[69] he receives his costs which should compensate him for his injury and trouble. The absurdity of this argument is obvious. At one time this may have been true[70] and to some extent such is so in England where attorney's fees are included in costs. However, today court costs come nowhere near adequately compensating a successful defendant for the damage he has suffered as a result of a malicious civil suit.[71] In fact costs have never been actually equated with damages. Evidence of this is seen in the Statute of Marlbridge which, as previously mentioned, provided not only for the costs of a successful defense in a malicious suit but also for damages. It should be remembered that Georgia allows for no such remedy.[72]

When one considers the great step forward made by the Georgia Supreme Court in *Pavesich v. New York Life Ins. Company*,[73] it is hard to see why the special injury rule still survives. With this decision, Georgia recognized a cause of action for the violation of the right to privacy with no special damage requirement being considered in the opinion. Although learned commentators had discussed this type of action[74] prior to this case, it was the first time a court of last resort in the United States had based its decision squarely upon the right to privacy.[75] It would seem that such a suit is a far more nebulous tort action than one for malicious use of civil process. Both torts have grown out of defamation and while the policy reasons for disfavoring a suit for malicious use of civil process are not the same as those argued in opposition to an action for violation of a right to privacy, the latter considerations are just as strong and more reasonable than the former. The constitutional guarantees of freedom

69. Brantley v. Rhodes-Haverty Furniture Co., 131 Ga. 276, 62 S.E. 222 (1908); King v. Yarbray, 136 Ga. 212, 71 S.E. 131 (1911); Baldwin v. Davis, 188 Ga. 587, 4 S.E.2d 458 (1939); McElreath v. Gross, 23 Ga. App. 287, 98 S.E. 190 (1918).
70. McCormick, *Counsel Fees and Other Expenses as an Element of Damages*, 15 MINN. L. REV. 619 (1931), reprinted in MCCORMICK, DAMAGES, ch. 8 at 234 (1935); Goodhart, *Costs*, 38 YALE L. J. 849 (1929). "The American statutes passed at an early date have not been revised to keep pace with the fall in the value of money." PROSSER, LAW OF TORTS §99, at 662, n. 98 (2d. ed. 1955).
71. Kolka v. Jones, 6 N.D. 461, 71 N.W. 558, 66 Am.St.Rep. 615 (1897).
72. Fender v. Ramsey & Phillips, 131 Ga. 440, 62 S.E. 527 (1908).
73. 122 Ga. 190, 50 S.E. 68, 106 Am. St. Rep. 104, 2 Am.Cas. 561 (1904). See case and Annot., 69 L.R.A. 101 (1906).
74. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
75. Note, 18 HARV. L. REV. 625 (1904).

of the press and speech could have been used as the ostensible authority for preventing an action for the violation of the right to privacy in the *Pavesich* case as it involved the unauthorized publication of a private individual's photograph in a newspaper advertisement. However, the court held that the right of freedom of the press could not be used as a license to abuse a private citizen. In this case, the court required neither a showing of malice nor an allegation of any special injury. Therefore in a malicious tort like a wrongful civil proceeding, it would appear that an action should lie whether or not there was special damage.

Other Jurisdictions

From an investigation of other jurisdictions it is seen that the general weight of authority does not favor the special damage rule.[76] Of those which have considered the question a majority, including Canada, hold that an action will lie where there is no special injury shown as opposed to the minority, including the District of Columbia and England, which require such a showing. However, in Iowa, which follows the minority view, the court recognized that a wrongful civil action is capable of causing loss to reputation and ought to be compensated.[77] Of those jurisdictions which have considered the point of whether some special injury is necessary for an action predicated upon the wrongful obtaining of an injunction, a substantial majority require no such damage while a minority, in which Georgia is included,[78] does have this requirement. Certain additional states which follow the minority in regard to malicious civil actions at law hold that a wrongful injunction constitutes a species of interference with the person or property of the defendant so as to allow the action.

Conclusion

In conclusion it is advocated that, in the name of justice and the public interest, the special damage restriction on actions for malicious use of legal process, where neither the arrest of the plaintiff nor the attachment of property is shown, should be abrogated. As previously discussed, this rule tends to relieve would-be plaintiffs of the duty not to bring a malicious civil action, thus extinguishing the ability to enforce a most worthy cause of action, to wit, a suit for a wanton and wilfull tort. Such an abridgement of so important a right has resulted in an

76. Annot., 150 A.L.R. 897 (1944). The American Law Institute also does not require a showing of special damages in an action for a malicious civil proceeding. Restatement, Torts, §674 (1938).
77. Wetmore v. Mellinger, 64 Iowa 741, 18 N.W. 870, 52 Am.Rep. 465 (1884).
78. Mitchell v. The Southwestern Railroad Co., 75 Ga. 398 (1885).

unwarranted privilege accruing to a malicious plaintiff in a groundless suit. It is submitted that the supreme court's adherence to this rule has blinded it to a real social peril. Today, due to more liberal rules of court procedure and in the substantive law itself, the courts are more readily accessible thus more litigation results. It is easy to see how this situation can and has given rise to many nuisance, groundless and, if you will, malicious suits. Although the abolishment of the special damage restriction would liberalize the action for malicious use of process, its net effect would tend to deter malicious litigation. As Mr. G. Gerald Kunes said in his brief in support of his application for certiorari in the *Davis* case,[79] "If this rule [special damages requirement] continues to be followed, the rights of the public to be safe and secure in person and property will be disregarded."

It has been contended in this comment that the Georgia Supreme Court should delete this requirement. If it is not so disposed, then it is hoped that the Georgia General Assembly will pass appropriate legislation. It is suggested that there be created a statutory cause of action for a wrongful civil proceeding and require as the grounds of same the suing out of a civil action maliciously and without probable cause. Finally all damages resulting therefrom whether direct or consequential, general or special, compensatory or exemplary or punitive should be recoverable without any particular showing of a special injury.

79. 99 Ga. App. 607, 109 S.E.2d 316 (1959).