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Jus Terth as a Defense to Conversion Suits in Indiana – Toward a More Rational Approach

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NOTES

JUS TERTII AS A DEFENSE TO CONVERSION SUITS IN INDIANA—TOWARD A MORE RATIONAL APPROACH

INTRODUCTION

Conversion is the primary civil remedy available today for serious interferences with personal property.[1] Though conversion is largely a modern tort action, its complex rules and principles are deeply rooted in the early English common law.[2] This lasting historical influence has made it virtually impossible for the courts to agree on a common definition of the tort.[3] Thus, many questions relating to the nature and operation of conversion have been left open for legal debate.[4] The purpose of this note is to explore one of those questions.

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1. There are two primary actions available to a plaintiff seeking civil redress for interferences with personal property. Conversion, while largely limited to serious interferences, is the preferred remedy. When the interference caused by the defendant's act does not justify forcing the defendant to pay the full value of the property in damages, a plaintiff is limited to a trespass action. In the trespass action, the defendant would only reimburse the plaintiff for the actual damages caused to the chattels. F. HARPER, A TREATISE ON THE LAW OF TORTS § 25 (1933).

2. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 15 at 79 (4th ed. 1971).

3. Dean Prosser has pointed out that the attempts made at defining conversion have been ineffectual at best. *Id.* at 79 n.73. Some of the more common attempts include: "[w]hat is a conversion, but an assuming upon one's self the property and right of disposing of another's goods?" Baldwin v. Cole, 6 Mod. 212, 87 Eng. Rep. 964 (1704). Conversion is "an act of willful interference with a chattel, done without lawful justification, by which the person is deprived of its use and possession." Note, *A New Found Haliday: The Conversion of Intangible Property—Re-Examination of the Action of Trover and Tort of Conversion*, 1972 UTAH L. REV. 511, 519 [hereinafter cited as Note, *A New Found Haliday*]. "Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." RESTATEMENT (SECOND) OF TORTS § 222 A(1) (1965).

4. Most of the legal scholarship has concentrated on the question of what a party must show to qualify as a plaintiff in a conversion action. *See, e.g.*, E. WARREN, TROVER AND CONVERSION (1936); Philbrick, *Seisen and Possession as the Basis of Legal Title*, 24 IOWA L. REV. 268 (1939); Note, *Trover and Conversion—Respective Rights of Owner and Possessor When the Property is Converted by a Third Party*, 22 MINN. L. REV. 863 (1938) [hereinafter cited as Note, *Respective Rights of Owner and Possessor*]. The more recent treatments of conversion have delved into questions relating to what may be converted. *See, e.g.*, Note, *A New Found Haliday*, *supra* note 3, at 525-33.

The most appropriate method in which to introduce this question is to posit it in a realistic hypothetical fact situation.[5] Assume that Jones has possession of certain valuable paintings. However, for one of a variety of possible reasons, he does not have an absolute title to them. At some point during the course of Jones' possession, Smith commits an act which seriously interferes with the paintings.[6] Consequently, Jones sues Smith for the conversion of the paintings praying for their full value in damages. In defense of this suit, may Smith escape liability by alleging that title to the paintings is in one other than Jones? In other words, may Smith plead the *jus tertii* defense?

Recently, the Indiana Court of Appeals for the fourth district was confronted with the same question in a unique context.[7] Pursuant to a valid search warrant, several Indianapolis police officers seized items of allegedly stolen personal property from a garage and home owned by the plaintiff.[8] No criminal charges relating to the seized property were filed. The police,however, refused to return some of the seized property to the plaintiff.[9] Subsequently, the plaintiff sued the City of Indianapolis, the police officers involved in the seizure, and the owner of the garage in which the police department stored seized property for conversion.[10] Thus, the question clearly presented was whether the defendants could defend against the conversion suit

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5. This hypothetical is based upon the facts in Ardisco Financial Corp. v. De Margoulies, 21 A.D.2d 295, 250 N.Y.S.2d 77 (1964).

6. One of the most difficult determinations that must be made in a conversion suit is whether the defendant's acts were serious enough to amount to a conversion of the plaintiff's chattels. The RESTATEMENT OF TORTS sets out one comprehensive approach.

> (2) In determining the seriousness of the interference and the justice of requiring the actor to pay the full value, the following factors are important:
>
> (a) the extent and duration of the actor's exercise of dominion or control;
>
> (b) the actor's intent to assert a right in fact inconsistent with the other's right of control;
>
> (c) the actor's good faith;
>
> (d) the extent and duration of the resulting interference with the other's right of control;
>
> (e) the harm done to the chattel;
>
> (f) the inconvenience and expense caused to the other.

RESTATEMENT (SECOND) OF TORTS § 222 A(2) (1965).

7. Noble v. Moistner, ____Ind. App.____, 388 N.E.2d 620 (1979).

8. Brief for Appellant at 10, *Noble*, ____Ind. App. ____, 388 N.E.2d 620.

9. The plaintiff argued that because no criminal charges were filed, the police had no right to detain the seized property. *Id.* at 3.

10. *Noble*, ____Ind. App. at ____, 388 N.E.2d at 620.

by alleging that title to the seized property was in a third party.[11] This note endeavors to provide a rational response to this question.

In responding to the question posed, the origins of the tort of conversion are first explored in an attempt to explain the historical foundations on which the courts have based their answers to the questions posed above. Courts have traditionally followed one of two approaches in determining whether a defendant should be allowed to plead the *jus tertii* defense. Both of these approaches are based on jurisprudential and scholarly analysis of the original common law decisions. Thus, an examination of the early English case law on conversion is vital to any discussion of the *jus tertii* defense. Second, a comprehensive description and analysis of the two traditional approaches to the *jus tertii* defense will be undertaken, including an examination of the approach clearly preferred by the Indiana courts. This analysis will also cover practical applications of the traditional approaches in an effort to further illustrate their effect on a plaintiff's conversion suit. Finally, it will be shown that neither traditional approach effectively protects all of the interests in the converted property. Each approach protects only one of the parties to the conversion action. However, neither approach fully protects a third party who has an interest in the converted property. Thus, a more rational approach, one which attempts to protect all of the interests in the property in a single efficient judicial determination, will be suggested and tested.

HISTORICAL ORIGINS OF CONVERSION

The common law forms of action are largely alien to modern proceedings.[12] However, the old forms of actions are valuable in the analysis of today's legal process. Many of the elements and theories developed during the days of formalistic pleading requirements continue to influence the shape and content of the law.[13] Few areas of

11. *Id.* at ____, 388 N.E.2d at 622; Brief for Appellee at 20, *Noble*, ____ *Ind. App.* ____, *388 N.E.2d 620*. The appellate court set out the Indiana approach to the *jus tertii* defense and remanded for further fact finding. *Noble*, ____ Ind. App. at ____, 388 N.E.2d at 622. No further disposition of the case has been reported.

12. Salmond, *Observations on Trover and Conversion*, 21 L.Q. REV. 43 (1905). The common law forms of action went out of existence in large part because of their complexity, confusing nature and undue formalism. By the conclusion of the thirteenth century, the formulary system had become so rigid and closed that only a few fixed forms of action existed. It was only after the English civil wars of the fourteenth century that the ancient forms of action were expanded to reach situations that were historically not susceptible to remedy in the King's courts. *See generally*, J. FLEMING AND G. HAZARD, CIVIL PROCEDURE § 1.3 (2d ed. 1977).

13. Salmond, *supra* note 12, at 43.

the law feel this influence as strongly as the tort of conversion.[14] Thus, analysis of the *jus tertii* defense necessarily begins with an examination of the origins of conversions.[15] Early common law forms of action provide the basis from which the modern tort of conversion developed.[16]

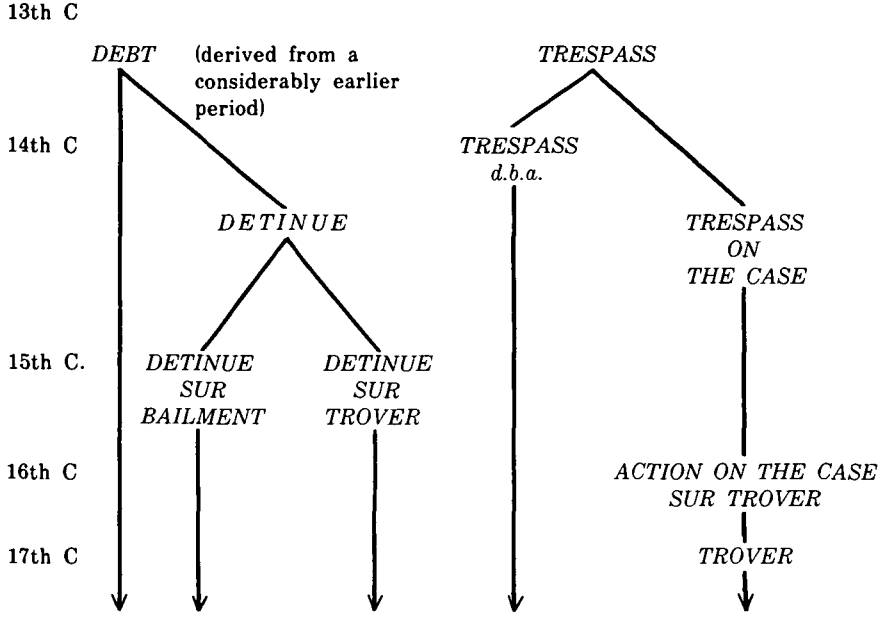
Detinue Sur Trover

Originally, the primary common law action protecting an in-

14. In no branch of the law is this more obvious than that which relates to the different classes of wrongs which may be committed with respect to chattels. In particular the law of trover and conversion is a region still darkened with the mists of legal formalism, though which no man will find his way by the light of nature or with any other guide save the old learning of writs and forms of action and the mysteries of pleading. *Id.*

15. Commentators have typically begun their discussions of the tort of conversion with an overview of the common law forms of action which preceded the modern tort. *See, e.g.*, W. PROSSER, *supra* note 2, at § 15; Note, *A New Found Haliday, supra* note 3, at 511.

16. Donahue, Kauper and Martin explain the development of the early common law forms of actions using the following chart:



Reproduced from: C. DONAHUE, T. KAUPER AND P. MARTIN, CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION 45 (1974) [hereinafter cited as DONAHUE, KAUPER AND MARTIN].

dividual's interest in personal property was the action of detinue.[17] A common situation in which an action for detinue *sur trover*[18] could be maintained arose when an individual, acting innocently, found an item of personal property. His acquisition of the chattel was not in and of itself actionable in the early common law courts. However, if the true owner of the property came forward and demanded the return of the property and the finder refused, the true owner had an action in detinue *sur trover*.[19] In his complaint the plaintiff alleged that: (1) he had possession of the chattel; (2) while being so possessed he lost it; (3) the defendant found the chattel; and (4) the defendant refused to deliver it on request and had consequently detained it.[20] If the action was successful, the property was "affirmed in the plaintiff."[21] In other words, the court would order the defendant to turn the chattel over to the plaintiff.[22]

Detinue *sur trover* was an important action for the protection of possessory interests in personal property, yet it suffered from a variety of severe procedural drawbacks.[23] The primary drawback attendant to a claim in detinue was that the defendant could, at his option, choose to *wage his law*.[24] This was a form of licensed perjury which made the outcome of the lawsuit largely dependent upon how

17. Simpson, *The Introduction Of The Action On The Case For Conversion*, 75 L.Q. REV. 364 (1959).

18. There were two branches of the action of detinue. Detinue *sur bailment* was available to a bailor who sought the return of bailed chattels wrongfully detained by a bailee. Detinue *sur trover* varied from its sister action only in that the plaintiff did not have to show any previous contractual relationship between himself and the defendant. Thus, while detinue *sur bailment* was a contractual action in nature, detinue *sur trover* was a pure tort action. C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 102 (1949). Detinue *sur trover* should not be confused with the common law action of trover which developed late in the 16th century. *See supra* text accompanying notes 50-60.

19. J. FLEMING, THE LAW OF TORTS 52 (5th ed. 1977). The phrase "true owner" is used here for convenience alone. A plaintiff in a detinue *sur trover* action merely alleged that he possessed the goods as his own. Thus, it was possible for one without an absolute title to sue in detinue. *See infra* note 20 and accompanying text.

20. C. FIFOOT, *supra* note 18, at 104.

21. *Id.* at 110.

22. *See infra* note 28 and accompanying text for a more complete discussion of the remedy available in detinue.

23. Simpson, *supra* note 17, at 365.

24. A defendant would "wage his law" by taking an oath in open court that he was not liable to the plaintiff. The defendant would also bring in eleven compurgators who would swear under oath that the defendant was telling the truth. BLACK'S LAW DICTIONARY 1416 (5th ed. 1979).

many dishonest friends the defendant could find to support this unjust claim to the plaintiff's property.[25]

A second serious obstacle which confronted detinue plaintiffs evolved around the defendant's freedom to select the remedy.[26] The logical remedy, and the only one ostensibly permitted under the common law rules of detinue, was return of the chattels.[27] However, legal historians have shown that defendants were able to elect either to return the chattel to the plaintiff or pay over the full value of the chattel in damages.[28] A defendant could exercise this option to work a great injustice on the plaintiff. For example, if a defendant seriously damaged the plaintiff's chattels, he would certainly elect to return the goods to the plaintiff rather than pay their full value to him.[29] There was no rule forbidding the defendant from unilaterally limiting his liability in this manner despite the obvious possibility that the plaintiff might not receive all of his chattel in return, but instead only a portion of the original value.[30]

Finally, a third drawback to detinue actions was one which was common to all inflexible common law forms of action.[31] Detinue addressed only a narrow class of wrongs to the plaintiff's chattels.[32] In its formalistic nature, detinue could be maintained only in those cases in which the defendant acquired possession of the property through a lawful act and then detained it despite the plaintiff's demands for its return.[33] Therefore, if the defendant wrongfully obtained possession of the plaintiff's chattels, detinue would not be maintainable.[34] Detinue was also unavailable as a remedial measure if the defendant was unable to return the plaintiff's chattels due to the actions of a third party.[35] The action of detinue, therefore, provided little true protection of the plaintiff's interests in personal property.

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25. Simpson, *supra* note 17, at 365.

26. *Id.* at 364.

27. Ames, *The History of Trover*, 11 HARV. L. REV. 374, 383 (1898).

28. Simpson, *supra* note 17, at 364.

29. This option could also be exercised to the plaintiff's disadvantage in the converse situation. Thus, if the defendant was charged with detaining a unique chattel, say an original Rembrandt painting, he may have chosen to pay its value rather than return it.

30. *See* C. FIFOOT, *supra* note 18, at 102.

31. *See supra* note 12 and accompanying text.

32. *See* Ames, *supra* note 27, at 379-83.

33. *See supra* note 20 and accompanying text.

34. The essence of detinue was the wrongful detention of the chattels and not the wrongful taking of them. DONAHUE, KAUPER AND MARTIN, *supra* note 16, at 45.

35. A defendant could successfully defend against a detinue *sur trover* action

A plaintiff seeking the return of his detained chattels could easily be frustrated by the procedural options available to a defendant in detinue. Moreover, if the damages to the plaintiff's property were caused by means other than by their detention or if they were detained by someone other than the defendant, detinue provided no protection. Thus, these "evils" of detinue forced plaintiffs, seeking to protect their interests in personal property, to pursue more favorable forms of action.[36] One alternative which was available to the plaintiff seeking to protect his interests in personal property was the action of trespass.[37]

Trespass To Chattels

The essence of the trespass action was the protection of possessory interests in personal property.[38] Accordingly, a person who was in possession of certain chattels could recover for any intentional interferences with those chattels.[39] For example, if a defendant, acting without the possessor's permission, took a plow from the possessor's farm, the possessor could maintain a trespass action against the defendant.[40] If, however, a person did not have possession of the chattels at the time of the trespass, he could not maintain the action even though he may have been the true owner.[41] Thus, an individual who had possession of an item of personal property was able to maintain a trespass action against one who took it from his possession. However, if another wrongdoer subsequently took the chattel from

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by showing that he no longer possessed the chattels. This was true even if the defendant sold the chattels, knowing that they were not his property, and pocketed the money. *Id.* at 46.

36. *See* C. FIFOOT, *supra* note 18, at 102; J. FLEMING, *supra* note 19, at 52.

37. *See* W. PROSSER, *supra* note 2, § 15 at 79; *see also* J. FLEMING, *supra* note 18, at 52.

38. W. PROSSER, *supra* note 2, § 14 at 78. This should be contrasted with the primary justification for detinue, which sought the return of goods lawfully acquired but wrongfully detained. *See supra* notes 17-22 and accompanying text.

39. Ames, *The History of Trover*, 11 HARV. L. REV. 275, 285-86 (1897).

40. Trespass would lie for almost any interference with the plaintiff's chattel. C. FIFOOT, *supra* note 18, at 110. Detinue would not lie in this situation since the wrong for which the remedy is sought is the taking and not the detention. *See supra* note 20 and accompanying text.

41. If the injury which is redressed by the action is interference with possession, then the action should afford a remedy only to those who have had their possession interrupted by the defendant's actions. The owner of personal property who is not in possession of the chattel at the time of the defendant's trespass has not had his possession interfered with. Thus, it follows that the owner should not have a trespass action against the defendant.

the first trespasser, the original possessor would not have a trespass action against the second trespasser.[42]

Possessors of personal property favored the trespass action over the older action of detinue *sur trover* for two reasons. First, a person who elected to sue in trespass could not be subjected to a defendant's wager of law.[43] Thus, a defendant could not fraudently deprive a plaintiff of a remedy as he was able to do in a detinue action.[44] Second, the wrongdoers could not manipulate the mode of the plaintiff's recovery.[45] A successful trespass action resulted in an award of damages to the plaintiff sufficient to compensate him for the injury to his possessory interest.[46]

Trespass was not, however, a perfect alternative to detinue *sur trover*. As was the case with detinue, the action of trespass had certain drawbacks. For example, the action would lie only for the wrongful taking, destruction or use of the chattels.[47] If a wrongdoer had lawfully gained possession of the chattels and subsequently detained them, the action of trespass would not be available.[48] Furthermore, even a successful plaintiff was only entitled to damages. If the defendant retained possession of the chattels, the plaintiff would be forced to bring a second action in detinue to recover them.[49]

Neither trespass nor detinue *sur trover* were ideal actions for plaintiffs seeking remedies for interferences with chattels. Detinue would lie for wrongful detention of chattels. However, the procedural rules of the action permitted a defendant to subject a plaintiff to a wager of law and an election of remedies. By bringing his action in trespass, the plaintiff avoided the procedural defects of detinue. Trespass, however, addressed only a limited range of wrongs to personal property. Thus, plaintiffs were forced to devise a new form of

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42. Ames, *supra* note 39, at 286.

43. Trespass was a form of the action on the case rather than a form of debt. *See supra* note 16. Thus, wager of law was not available to a defendant. The explanation for this distinction lies even deeper within the historical origins of the common law, and thus, is beyond the scope of this note. *See supra* notes 16, 24, 25 and accompanying text.

44. *See supra* note 24 and accompanying text.

45. *See supra* note 28 and accompanying text.

46. Ames, *supra* note 39, at 286. *See also* W. PROSSER, *supra* note 2, § 14 at 77.

47. *See* W. PROSSER, *supra* note 2, § 14 at 76.

48. *Id.* § 15 at 80.

49. The early common law did not allow the plaintiff to seek two remedies in a single action. Thus, a plaintiff could not seek damages and return of his chattels in the same suit. *See* Simpson, *supra* note 17, at 370.

action which would adequately protect their property interests without resort to the dreaded wager of law.

Trover

Trover emerged late in the Fifteenth Century as a branch of the action on the case.[50] At this time in history, few law reports were published, thus the precise origin of the action on the case for trover remains largely unknown.[51] One commentator has suggested that the first applications most likely occurred where a finder of lost goods either depleted the goods himself or passed them on to someone else.[52] In such a situation, trespass would permit the plaintiff to recover damages alone.[53] However, because of a curious gap in the law,[54] the plaintiff could not maintain detinue *sur trover* and, thus, could not recover the goods.[55] An action on the case for trover would, if successful, permit the plaintiff to recover the full value of the chattels while avoiding the possibility of a defendant's wager of law.[56]

A plaintiff pleading in trover alleged that: (1) he was possessed of certain goods; (2) he casually lost them; (3) the defendant found them; (4) the defendant had failed to return the goods to the plaintiff's possession after the plaintiff had requested him to do so; and (5) the defendant converted the goods to his own use.[57] These allegations were patterned after those employed in the older action detinue *sur trover*.[58] The plaintiff did not, however, allege that the goods were wrongfully detained as he would have in an action for detinue *sur trover*. Rather, the plaintiff in trover alleged that the defendant

50. The earliest reported use of action on the case for trover appeared in 1479. *Id.* at 364.

51. *Id.*

52. *See* W. PROSSER, *supra* note 2, § 15 at 79.

53. *See supra* note 49 and accompanying text.

54. *See* Simpson, *supra* note 17, at 371.

55. *See* Milsom, *Not Doing Is No Trespass: A View Of The Boundaries Of Case*, 1954 CAMBRIDGE L.J. 105, 114.

56. *See* Simpson, *supra* note 17, at 370; *see also supra* note 43 and accompanying text.

57. Lord Mounteagle v. The Countess of Worcester, 73 Eng. Rep. 265 (K.B. 1554). Some commentators have reported that the first allegation included an assertion that the plaintiff possessed the goods "as his own proper goods." C. FIFOOT, *supra* note 18, at 104.

58. In detinue *sur trover* the plaintiff alleged that: (1) he had possession of certain goods; (2) he lost those goods; (3) the defendant found the goods; and (4) the defendant had detained the goods after the plaintiff had requested their return. *See supra* note 20 and accompanying text.

wrongfully converted the goods to his own use and benefit.[59] In other words, the plaintiff alleged that the defendant had made the chattels his own. Changing the emphasis in the plaintiff's allegations justified the imposition of a forced judicial sale on the defendant for the full value of the converted chattels.[60]

This new action soon became the preferred action for plaintiffs seeking to protect their interests in personal property. The marked increase in the use of trover during the sixteenth and seventeenth centuries is directly attributable to two factors. First, trover developed as a branch of action on the case. Thus, a plaintiff who pleaded in trover could not be subjected to a wager of law by the defendant.[61] Anytime the plaintiff could avoid the defendant's wager of law, he would most certainly opt to do so.[62] The second major reason for the preference of trover over trespass and detinue stems from the remedy available to a plaintiff who sued in trover. A plaintiff in detinue, if he successfully avoided the wager of law, was entitled only to the return of his chattels.[63] Thus, if a defendant had damaged the chattels while they were in his possession, the plaintiff would not be fully reimbursed for the interference with his chattels.[64] A trespass action yielded only damages for the defendant's interference with the plaintiff's possession.[65] When a trover action was successful, however, the plaintiff was entitled to the full value of the converted goods.[66]

Preference for the new action lead to an expansion in the application of the action on the case for trover.[67] By the turn of the seventeenth century, the allegations of losing by the plaintiff and finding by the defendant had become nothing more than mere legal fic-

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59. Numerous acts may amount to a conversion of the chattels to the defendant's own use and benefit. *See supra* note 6.

60. In effect, the plaintiff alleged in trover that the defendant had assumed all the rights attendant to ownership of the converted chattels without compensating the plaintiff. Thus, the damage suffered by the plaintiff was the full value of the chattels. Simpson, *supra* note 17, at 371.

61. *See supra* note 43 and accompanying text.

62. Several commentators have argued that the dangers of a wager of law have been exaggerated. *See, e.g.*, C. FIFOOT, *supra* note 18, at 103.

63. *See supra* note 22 and accompanying text.

64. *See supra* notes 27-30 and accompanying text.

65. *See supra* note 49 and accompanying text.

66. Warren, *Qualifying as Plaintiff in an Action for a Conversion*, 49 HARV. L. REV. 1084, 1086 (1936).

67. "It [the trover action] was like a tool originally designed for a single purpose and given a name indicating that purpose which, although it later came to be used for a number of similar purposes, yet still was called by the old name." *Id.* at 1085.

tions which were, in fact and practice, untraversable by the defendant.[68] Consequently, the substance of the action on the case for trover became a conversion of goods that had been in the plaintiff's possession, to the use and benefit of the defendant.[69] Once the action was characterized in this manner, it became applicable to almost all interferences with personal property.[70] For example, where a defendant detained chattels, the plaintiff was historically restricted to the remedy of detinue.[71] With the advent of trover, however, the plaintiff was, in most cases, able to posit his action within the requirements of the trover action and thus avoid the dangers of detinue.[72] Trover would also lie in most situations in which only trespass had previously been available.[73] Although the action on the case for trover never fully displaced trespass and detinue at the common law, it did become the most significant action for the protection of interests in personal property.

The old action on the case for trover, from which evolved the modern tort of conversion, was a necessary development in the scheme of the early common law. Detinue, with its dangerous procedural drawbacks, was not a palatable remedy. Trespass avoided these serious drawbacks, yet it did not, in all cases, provide the plaintiff with full protection for his interests. Trover avoided both of these problems. It did, however, create some of its own problems. The *jus tertii* defense was one problem which arose.

TRADITIONAL APPROACHES TO THE JUS TERTII DEFENSE

Courts have traditionally employed one of two approaches to the *jus tertii* defense. A few jurisdictions permit all defendants to raise

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68. *See* J. FLEMING, *supra* note 18, at 52; C. FIFOOT, *supra* note 18, at 104.

69. 1 T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY: THEORY AND PRINCIPLES OF TORT 232 (1906).

70. Once the common law courts recognized the losing and finding as untraversable, trover virtually displaced detinue *sur trover* and detinue *sur bailment*. Trover also became applicable in most situations of trespass. Since the only real issues in the new action were the plaintiff's possession and the defendant's conversion, trover did not concern itself with the manner of the defendant's acquisition. C. FIFOOT, *supra* note 18, at 105.

71. *See supra* notes 19-22 and accompanying text.

72. *See supra* note 57.

73. Previously, trespass would be the only action available to a plaintiff who had his personal property destroyed as the result of the defendant's actions. Once the courts fictionalized the allegations of losing and finding, a plaintiff pleading in trover could argue that the destruction of the chattels was, in effect, a conversion of the chattels to the defendant's own use.

the *jus tertii* defense in response to a plaintiff's conversion suit.[74] Most jurisdictions do not, however, permit the defendant to raise the *jus tertii* defense unless he can in some ways connect himself with the third party's title.[75] An examination of both approaches to the *jus tertii* defense will facilitate analysis of the approach utilized in the Indiana courts.

The Possession Rule Approach

One of the traditional approaches has been labeled the "possession rule."[76] Its genesis lies in the earliest common law actions on the case for trover.[77] An early application of the "possession rule" occurred in a famous nineteenth century English case.[78] That case involved a trover action initiated by a plaintiff who had purchased a number of railroad trucks from their bankrupt owner.[79] Subsequently, the owner, while he was still in possession of the trucks, made a second assignment of them to the defendant.[80] The owner then delivered the trucks to the plaintiff's possession. Believing that he, and not the plaintiff, was the rightful owner of the trucks, the defendant removed them from the plaintiff's possession.[81] In the plaintiff's suit against the defendant for conversion of the trucks, defendant's counsel sought to set up the title of the owner's creditors in defense.[82]

The court rejected the defendant's attempt to raise the *jus tertii* defense. Chief Baron Pollock's opinion merely states that a defendant could not raise the *jus tertii* defense unless there was some evidence

74. A partial catalogue of the jurisdictions which employ "the possession rule" approach may be found in Annot., 150 A.L.R. 163, 174-75 (1944).

75. A partial catalogue of the jurisdictions which allow the defendant to raise the *jus tertii* defense may be found in Annot., 150 A.L.R. at 175.

76. For convenience, this traditional approach will be referred to throughout as the "possession rule." It should be noted, however, that this designation has not been employed by all courts. Thus, the theory and not the label is important to the discussion of the *jus tertii* defense.

77. *See supra* notes 16, 50-60 and accompanying text.

78. Jeffries v. Great Western Ry. Co., 5 EL. & BL. 802, 119 Eng. Rep. 680 (1856).

79. The "trucks" referred to in the report of the case consist of a frame with two pairs of wheels supporting one end of a railroad car. RANDOM HOUSE DICTIONARY 944 (1978).

80. Prior to the first assignment to the plaintiff, the original owner of the trucks became bankrupt. *Jeffries*, 5 EL. & BL. at 802, 119 Eng. Rep. at 680.

81. Even though the defendants argued that they had not converted the trucks, the court ruled that they were in fact wrongdoers. *Id.*

82. Great Western essentially argued that because the assignor was bankrupt they were liable, not to the plaintiffs, but rather to the assignor's creditors. *Id.*

that he claimed under the authority of that third party's title.[83] No evidence was offered by the defendant that he was claiming under the title of the owner's creditor. Consequently, the defendant's *jus tertii* plea was necessarily impermissible.[84]

A number of American jurisdictions, like their English predecessors, adhere to the "possession rule" approach.[85] In one of the most frequently cited cases, the Minnesota Supreme Court applied the "possession rule" and denied to the defendant the use of the *jus tertii* defense.[86] The plaintiff in that case wrongfully obtained possession of a number of logs by trespassing on the property of another.[87] Subsequently, the defendants removed the logs from the plaintiff's possession. In the plaintiff's suit to recover possession of the logs, the defendants argued that the plaintiff's prior possession raised only a presumption of title in the plaintiff.[88] This presumption of title, contended the defendants, could be rebutted by evidence of a third party's superior title.[89] The Minnesota Supreme Court rejected this contention, and agreed with the defendant's argument that the presumption of title raised by the plaintiff's possession was rebuttable.[90] However, the court was unwilling to permit introduction

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83. *Id.*

84. *Id.*

85. *See supra* note 74.

86. Anderson v. Gouldberg, 51 Minn. 294, 53 N.W. 636 (1892).

87. At trial, there was some dispute as to which parcel the logs were actually taken from. The plaintiff claimed that he cut the logs from section 22. The defendants alleged that the logs were cut from section 26. It was determined by the jury, however, that the logs came from section 22. *Anderson*, 51 Minn. at 294 (not found in Northwestern report). This finding was crucial to the plaintiff's case because the defendants claimed to be acting under the express authority of the owners of section 26. Had the jury found that the logs were cut from section 26, the plaintiff would have been unable to maintain his action.

88. It has been argued that *Anderson*, an action in replevin, is not credible support for application of the "possession rule" to conversion suits. The Minnesota Supreme Court has ruled, however, that "in an action for conversion, title in a third person is no defense, unless the defendant can in some manner connect himself with such person, and claim under him." Brown v. Shaw, 51 Minn. 266, 267, 53 N.W. 633, 633 (1892).

89. *Anderson*, 51 Minn. at 296, 53 N.W. at 637.

90. Counsel [for the defendant] says that possession only raises a presumption of title, which, however, may be rebutted. Rightly understood, this is correct; but counsel misapplies it. One who takes property from the possession of another can only rebut this presumption by showing a superior title in himself, or in some way connecting himself with one who has.

Id.

of evidence of any third party's superior title as the defendants had urged.[91] It instead limited the scope of permissible rebuttal evidence to evidence of a superior title either in the defendant himself or in a third party to which the defendant could connect himself.[92] Therefore, when the defendants could show neither a superior title in themselves nor one in a third party to which they could connect themselves, the court was required to reject all of their *jus tertii* evidence.[93]

In a more recent case, the Massachusetts Supreme Court applied the "possession rule" approach to a defendant's attempt to raise the *jus tertii* defense in response to the plaintiff's conversion suit.[94] Plaintiff sought the full value of timber destroyed in a forest fire caused by the defendant's negligence.[95] Even though the plaintiff had possession of the timber when it was destroyed, the Commonwealth of Massachusetts had the title.[96] Thus, the issue squarely presented by this case was whether a defendant, who is a mere tortfeasor, can raise the title of a third party in defense of a conversion action.[97] The Massachusetts court resolved the issue by holding that the defendant could not introduce evidence of the Commonwealth's title.[98] Several significant justifications support adherence to this approach.

English common law courts employed numerous rationals to support their adherence to the "possession rule" approach.[99] Initially, these courts opined that, as against a mere wrongdoer, possession is title.[100]

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91. *Id.*

92. *Id.*

93. The court ultimately denied the defendant's motion for a new trial and affirmed the trial court's judgment for $153.45. *Id.*

94. New England Box Co. v. C & R Constr. Co., 313 Mass. 696, 49 N.E.2d 121 (1943).

95. For a detailed discussion of acts which can be characterized as a conversion, *see* W. PROSSER, *supra* note 2, § 15 at 83-93. Destruction of personal property through negligence does amount to a conversion of the destroyed chattels. *Id.* at 91.

96. The plaintiff received his interest in the logs through an assignment of a contract with the Commonwealth of Massachusetts. Under the contract, if the logs were not removed from the State owned land by a certain date, title to the logs would revert to the State. The plaintiff allowed the logs to remain on state land after that date. Thus, at the time of the defendant's conversion, title to the logs was clearly in the State. *New England Box*, 313 Mass. at ____, 49 N.E.2d at 128.

97. *Id.*

98. The trial court directed a verdict in favor of the defendant based on the defendant's evidence of the Commonwealth's title. In its opinion, however, the Massachusetts Supreme Court ordered a new trial. *Id.* at ____, 49 N.E.2d at 130.

99. For a general overview of the justifications favoring application of the "possession rule," *see* W. PROSSER, *supra* note 2, § 15 at 95.

100. Armory v. Delamirie, 1 Strange 505, 93 Eng. Rep. 664 (1722).

A defendant could not, therefore, challenge that title by introducing evidence of a third party's superior title to the converted goods.[101] By approaching the *jus tertii* issue in this manner, the English courts felt that they were, in fact, protecting title.[102] Early English courts also applied the "possession rule" approach because of the convenience of treating the possessor of chattel as their owner.[103] This presumption allowed the courts to avoid extensive investigation into the converted goods' chain of title.[104] Another justification, frequently put forth by the early English courts in support of the "possession rule" approach, emphasized societal interest in protection of peaceable possession.[105] The "possession rule" approach furthers this societal interest by deterring repeated thefts of chattels.[106] Finally, a few English courts drew an interesting analogy between trover and trespass.[107] These courts pointed out that the plea of *jus tertii* was never a permissible defense to an action for trespass,[108] and theorized that there was no logical reason justifying differentiation between trespass and trover in this respect.[109] American courts which adhere to the "possession rule" approach have adopted most of these rationales. In addition, there are several other arguments which support application of the "possession rule" approach.[110]

The original justification in support of the "possession rule" centers on the difficulty in determining the title to a specific item

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101. *Jeffries*, 5 EL. & BL. at 803, 119 Eng. Rep. at 680.

102. Possession and title were interchangeable concepts at the early common law. Thus, by protecting the interests of one who had possession against a wrongdoer, courts theoretically protected title. For an excellent discussion of the complex subject of seisen of chattels at the common law, see Maitland, *The Seisen of Chattels*, 1 L.Q. REV. 324 (1885). Professor Warren has suggested that the emphasis on possession over title is misplaced in modern society. Warren, *supra* note 66, at 1087.

103. W. PROSSER, *supra* note 2, § 15 at 95.

104. For a further discussion of this difficulty, *see infra* notes 111-15 and accompanying text.

105. "I think it most reasonable law, and essential for the interests of society, that peaceable possession should not be disturbed by wrongdoers." *Jeffries*, 5 EL. & BL. at 805, 119 Eng. Rep. at 681.

106. "Any other rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner." *Anderson*, 51 Minn. at 296, 53 N.W. at 637.

107. *Jeffries*, 5 EL. & BL. at 805, 119 Eng. Rep. at 681; Webb v. Fox, 7 T.R. 391, 397, 101 Eng. Rep. 1037, 1040 (1797).

108. C. FIFOOT, *supra* note 18, at 112.

109. "In this respect I see no difference between trespass and trover; for in truth the presumption of law is that the person who has possession has the property." *Jeffries*, 5 EL. & BL. at 806, 119 Eng. Rep. at 681.

110. *See supra* note 99.

of personal property.[111] If the subject of the conversion suit is, for instance, an automobile, proof of legal title would be relatively uncomplicated. Automobile titles, along with notations of interests in the auto, are generally recorded with state governmental agencies.[112] Thus, the evidence required to prove a third party's title to a converted automobile would be readily accessible.[113] However, if the converted chattels are somewhat less valuable and more readily concealable than an automobile, proof of title becomes substantially more difficult. For example, few people could prove with a high degree of certainty that they own the watch or other jewelry they wear. It may be even more difficult to prove title to more common items of personalty such as clothes, housewares, or tools.[114] Generally, no form of recorded title exists for such items. Proof of their ownership depends exclusively on sales receipts, cancelled checks, and live witness testimony. Thus, by prohibiting the defendant in a conversion suit from pleading the *jus tertii* defense, these courts relieve plaintiffs of the onerous burden inherent in any attempt to prove absolute title in personal property.[115]A second justification frequently employed in support of the "possession rule" approach stems in large part from the historical origins of the tort of conversion.[116] When the action of trover developed as a branch of the action on the case, its allegations were patterned after those used in the earlier action of detinue *sur trover*.[117] One of these allegations was that the plaintiff, while being possessed of the chattels, casually lost them. Only an individual in possession of the chattels is capable of losing them. A possessor of chattels, however, is not necessarily their owner.[118] Consequently, courts applying the "possession rule" theorize that trover, from which the tort of conversion evolved, developed as a possessory action.[119] Therefore, the conversion suit is essentially a remedial measure for substantial interferences with the peaceable possession of personal

111. *See* Warren, *supra* note 66, at 1098.

112. Indiana, for example, requires automobiles to be registered with the state. IND. CODE ANN. § 9-1-4-1 (Burns 1980).

113. The information received when an automobile is registered includes the name of the owner, his address and the car's serial number. IND. CODE ANN. § 9-1-4-2.

114. "Are we required to keep receipts for out toothbrushes, t-shirts and tires—especially when they are all non-deductible items and when it is hard enough to keep track of the deductible items." Brief for Appellant at 17, Noble v. Moistner, ____ Ind. App.____, 388 N.E.2d 620 (1979).

115. *Id.* at ____, 389 N.E.2d at 622.

116. *See supra* note 16.

117. *See supra* note 20 and accompanying text.

118. A possessor may be, for example, a lessee, bailee, thief or a finder.

119. Note, *A New Found Haliday*, *supra* note 3, at 522.

property. When the theoretical foundation of conversion is structured in this manner, evidence of a third party's title to the converted chattels is irrelevant to any material issue in the conversion suit.[120]

Various additional grounds support the application of the "possession rule" approach. American courts have frequently stated that as between the first possessor and the wrongdoer, the first possessor is the proper party to account to a third person with a superior title to the converted chattels.[121] A first possessor is more likely to have knowledge of a conversion than is a third party who is out of possession.[122] Also, the first possessor is the proper party to settle or litigate with a third party any remaining questions of ownership.[123] Application of the "possession rule" approach effectuates these policies. At least one commentator has suggested that adherence to the "possession rule" is justified on grounds of business and commercial convenience.[124] It is commercially expedient, according to this argument, to treat the possessor of chattels as their owner.[125] Therefore, since the effect of the "possession rule" is to raise a conclusive presumption of title in the possessor, it facilitates commercial transactions. Finally, the sheer weight of decisional precedent supports selection of the "possession rule" approach when dealing with the *jus tertii* defense issue.[126]

A majority of American jurisdictions and all English courts adhere to the "possession rule" approach. The essence of this approach is that the defendant in a conversion suit may not introduce evidence of a third party's title to the converted goods unless he is also able to connect himself with that title. In addition, application of this rule is not dependent upon an absolute title to the converted goods in the plaintiff. Significant justifications have been raised in support of this approach to the *jus tertii* defense. There are, however, a substantial number of jurisdictions which have found overwhelming justification for permitting the defendant to plead the *jus tertii* defense.

The Jus Tertii Approach

Application of the *jus tertii* approach can best be illustrated by

120. E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 185 (2d ed. 1972).

121. In this context, "first possessor" denominates the plaintiff or one from whom the chattels were converted. The "wrongdoer" is the defendant or converter.

122. Note, *A New Found Haliday, supra* note 3, at 522.

123. RESTATEMENT (SECOND) OF TORTS § 895 comment d (1979).

124. W. PROSSER, *supra* note 2, § 15 at 95.

125. *Id.*

126. Note, *A New Found Haliday, supra* note 3, at 522.

examination of a frequently cited North Carolina case.[127] In that case, Iowa McCoy received a grant of a certain tract of land from the state. This grant mistakenly encompassed land which the state had previously granted to a third party. Thus, Mrs. McCoy was a trespasser on this tract of land.[128] Believing that she had a valid title to the tract, Mrs. McCoy assigned the timber rights to the plaintiffs who felled the trees and trimmed them into logs. While the logs lay on a nearby river bank awaiting transfer to a local mill, the defendants acquired their possession. They later sold the logs to a lumber company.[129] In the subsequent conversion suit, the plaintiff sought a judgment against the defendants for the full value of the converted logs. The defendants introduced evidence of the prior grantee's title to the land but did not connect themselves with that title.[130]

In its opinion, the North Carolina Supreme Court applied the *jus tertii* approach to these facts.[131] Possession, the court stated, raised the strongest presumption of title.[132] In fact, the court suggested that it was possible for a plaintiff to succeed in his conversion action by showing that he was possessed of the chattels when they were converted.[133] The court promptly pointed out, however, that when a defendant is capable of showing that a third party has a superior title to the converted chattels, the presumption of title is not only rebutted, it is completely extinguished.[134] Thus, when the defendants introduced their evidence of the prior grantee's superior title to the land, the plaintiff was completely foreclosed from recovery on his conversion complaint.[135] It is important to emphasize that this court, unlike

127. Russell v. Hill, 125 N.C. 470, 34 S.E. 640 (1899).

128. *Id.* at ____, 34 S.E. at 640.

129. The defendants sold the converted logs for $686.84 to a local lumber company which was bankrupt at the time of trial. *Id.*

130. The defendants were unable to connect themselves with the superior title of the third party. Therefore, if the "possession rule" had been applied in this case, the defendants clearly would have been unable to raise the *jus tertii* defense. *Anderson*, 51 Minn. at 296, 53 N.W. at 637.

131. The court relied heavily on an earlier North Carolina decision, Barwick v. Barwick, 33 N.C. 67 (1850). In that case, the defendants sold slaves to the plaintiff but later resold the same slaves to another individual. Subsequently, the plaintiff brought an action of trover for the conversion of the slaves. On appeal, the *Barwick* court permitted the defendants to defeat the plaintiff's suit by introducing evidence of a third party's life estate in the slaves. *Id.* at 68.

132. *Russell*, 125 N.C. at ____, 34 S.E. at 640 (quoting Laspeyre v. McFarland, 4 N.C. 447 (1817)).

133. *Id.*

134. *Id.* at 640.

135. *Id.*

the courts which employ the "possession rule" approach, did not require the defendants to connect themselves with the superior title.[136] Jurisdictions which have adopted the *jus tertii* approach utilized by the North Carolina courts do so for several reasons.

Analysis of the modern tort of conversion as an action to try title in the first instance justifies application of the *jus tertii* approach. An early proponent of this view has suggested that the chief function of a conversion action today is to try the title to personal property.[137] When the action is framed in this manner, the primary issue in the conversion litigation becomes who was the owner of the chattels at the time of their conversion. If the defendant is able to show that a third party has a superior claim to the converted goods, then the defendant is in a position to defeat the plaintiff's conversion suit.[138] Therefore, jurisdictions which adhere to the *jus tertii* approach reason that evidence of a third party's title is relevant to material issues in the conversion suit.[139] Additional rationales which support the *jus tertii* approach derive from this characterization of conversion as a title action.[140]

Protection of defendants from the potential of multiple liability is the justification most frequently cited in support of the *jus tertii* approach.[141] A plaintiff who successfully prosecutes his conversion action is entitled to a judgment against the defendant for the full value of the converted goods.[142] If a third party subsequently initiates a second conversion suit against the defendant, payment of the prior judgment does not bar recovery by that third party.[143] Consequently, a

136. As a prerequisite to the introduction of evidence tending to show a superior title in a third party, "possession rule" courts require that the defendant connect himself to that title. In other words, the defendant must show that he is, in some manner, claiming under the authority of the third party's superior title. *See supra* text accompanying note 93.

137. *See* Warren, *supra* note 66, at 1101.

138. Once the defendant introduces evidence of a third party's superior title, the plaintiff must go forward and prove that he has the superior title to the converted goods. 2 T. COOLEY, A TREATISE ON THE LAW OF TORTS § 329, 489 (4th ed. 1932). This can be a formidable burden. *See supra* notes 111-15 and accompanying text.

139. *See supra* note 120 and accompanying text.

140. Characterization of the conversion suit as a title action should be contrasted with the view of "possession rule" jurisdictions. Those jurisdictions argue that conversion, like its predecessors detinue and trespass, is actually a possessory action. *See supra* text accompanying notes 100-02, 116-20.

141. *See, e.g.*, Clapp v. Glidden, 39 Me. 448, 450 (1855).

142. *See supra* note 66 and accompanying text.

143. The defendant may not employ the res judicata defense when the third

defendant may be placed in the position of paying for the same chattels twice.[144] In order to prevent this obvious injustice, some courts permit the defendant to plead the *jus tertii* defense in response to the plaintiff's conversion suit. When this evidence of a third party's superior title to the converted goods is introduced, the plaintiff's claim will be precluded.[145] Thus, application of the *jus tertii* approach virtually ensures that only one plaintiff, the party with a superior title, may receive a judgment against the defendant for the full value of the converted chattels.[146]

Finally, application of the *jus tertii* approach can be rationalized by closely examining the early authorities from which the "possession rule" evolved. The eighteenth century English case, *Armory v. Delamirie*,[147] is frequently cited in support of the "possession rule" approach. In that case, the finder of a jewel sued its converter in trover. The court ruled that a finder had a sufficient property interest in the chattels he found to maintain an action on the case for trover against all but the rightful owner.[148] It appears from the report of the case that the defendant did not introduce any evidence which identified the rightful owner of the jewel.[149] Had a rightful owner been known, courts applying the *jus tertii* rule suggest that his title could have been offered in defense of the finder's trover action.[150] Essentially, these courts argue that the *jus tertii* approach is not ruled out by the decision in *Armory*, but rather is consistent with it.[151]

Courts have traditionally employed two approaches to the *jus tertii* plea. A majority of the jurisdictions do not allow a defendant to raise the *jus tertii* defense unless he can connect himself to the third party's title. Courts which reject this "possession rule" approach

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party did not participate in the prior conversion action. 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449 (1981).

144. In any subsequent conversion suits against the defendant, successful plaintiffs are entitled to the full value of the converted chattels. *See supra* note 66 and accompanying text.

145. *See supra* text accompanying notes 135 and 138.

146. A plaintiff who is unsuccessful in his conversion suit may still maintain a trespass action against the defendant. *See* J. FLEMING, *supra* note 19, at 50.

147. 1 Strange. 505, 93 Eng. Rep. 664 (1722).

148. *Id.*

149. The report of the case does not specifically address this point. However, the court did not indicate that a rightful owner was known.

150. *Russell*, 125 N.C. at ___, 34 S.E. at 641.

151. If the North Carolina courts were confronted with an *Armory* situation, they too would find for the plaintiff. The courts in North Carolina would, however, permit the defendant to raise the title of the rightful owner, if one came forward. *Id.*

unconditionally permit the defendant to raise the superior title. Each alternative is supported by significant justifications. Indiana courts have, however, found the rationales in support of the *jus tertii* approach more persuasive.

The Indiana Approach To The Jus Tertii Defense

Indiana courts emphasize ownership rather than possession when defining the tort of conversion. Conversion has been defined by the Indiana courts as "an appropriation of the personal property of another to a party's own use and benefit in exclusion and defiance of the owner's rights and under an inconsistent claim of title."[152] Thus, the essence of conversion actions in Indiana is the wrongful interference with the absolute dominion over the personal property owned by the person deprived of its use.[153] This acute emphasis on title is reflected in the pleading and proof requirements demanded of plaintiffs seeking to litigate conversion actions in Indiana courts.[154]

Plaintiffs suing in conversion are required to plead three primary allegations.[155] First, a plaintiff must allege that, at the time of the conversion, he had complete title, either special or general,[156] in the converted chattels.[157] Second, it must be alleged that at the time of the conversion, plaintiff had the possession or the right to immediate possession of the converted chattels.[158] Finally, the plaintiff is required to allege that the defendant converted the personal property in controversy to his own use and benefit.[159] The plaintiff bears the burden of proof on each of these allegations.[160] A defendant may, however, defeat the plaintiff's proof by introducing evidence which contradicts the plaintiff's allegations.

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152. Hunter v. Cronkhite, 9 Ind. App. 470, 471, 36 N.E. 924, 925 (1894).

153. Fagan v. Babacz, 102 Ind. App. 558, 561, 1 N.E.2d 299, 300 (1936).

154. *See, e.g.*, Foley v. Colby, 148 Ind. App. 391, 397, 266 N.E.2d 619, 623 (1971) (Staton, J., concurring).

155. Contrast the allegations required by Indiana courts with those required in the original action of trover. *See supra* note 57 and accompanying text.

156. "General property" is defined as the "right and property in a thing enjoyed by the general owner." BLACK'S LAW DICTIONARY 1095 (5th ed. 1979). Special property is "property of a qualified, temporary, or limited nature; as distinguished from absolute, general or unconditional property." *Id.* at 1096. For example, a bailee has a special property in the bailed articles. *Id.*

157. Ax v. Schloot, 116 Ind. App. 366, 370, 64 N.E.2d 668, 669 (1946).

158. Swope v. Paul, 4 Ind. App. 463, 464, 31 N.E. 42, 43 (1892).

159. *Ax*, 116 Ind. App. at 371, 64 N.E.2d at 669-70.

160. *Noble*, ___ Ind. App. at ___, 388 N.E.2d at 622.

Indiana courts permit the defendant to introduce evidence of a third party's superior title to the converted goods under a general denial of the plaintiff's conversion complaint.[161] It is incumbent upon a plaintiff to allege and prove that he had either a general or special property interest in the converted chattels.[162] When, however, a plaintiff shows that he had the possession of the chattels at the time of their conversion, a strong presumption of title is raised in favor of the plaintiff.[163] If the defendant offers no evidence to rebut this presumption, the plaintiff has satisfied his burden of proving ownership of the converted chattels.[164] However, if the defendant introduces evidence of a third party's superior title to the converted chattels, the presumption raised by the plaintiff's prior possession is rebutted.[165] Ownership of the converted chattels then becomes an issue subject to jury determination.[166] Therefore, unlike "possession rule" jurisdictions, Indiana courts do not shift the burden to the defendant to prove that he had a right to interfere with the plaintiff's possession.[167] The plaintiff retains the burden of proving his general or special property interest in the converted chattels. Consequently, a plaintiff's attempt to recover the full value of the converted chattels may be frustrated if the defendant produces evidence of a superior title.

In summary, courts have traditionally implemented one of two approaches to the *jus tertii* plea, While each approach is supported by several strong rationales, Indiana courts have long determined that the *jus tertii* approach is the more appropriate response. Both the "possession rule" and the *jus tertii* approach, however, share a common deficiency. Neither approach adequately protects all interests in the converted chattels. As will be demonstrated, a more rational approach exists which would, in a single suit, satisfy all interests in the converted goods.

TOWARD A MORE RATIONAL APPROACH

The approaches traditionally applied by the courts in response to the defendant's *jus tertii* plea do not adequately protect all poten-

161. *Swope*, 4 Ind. App. at 464, 31 N.E. at 43.
162. *See supra* note 156 and accompanying text.
163. *Noble*, ____ Ind. App. at ____, 388 N.E.2d at 622.
164. *Id.*
165. *Id.*
166. *See* 31A C.J.S. *Evidence* § 117 (1964).
167. Indiana courts argue that the effect of the "possession rule" is to shift the burden to the defendant to show that he had a right to convert the goods. *Noble*, ____ Ind. App. at ____, 388 N.E.2d at 622.

tial interests in converted chattels. Adoption of a more rational alternative approach will rectify this serious deficiency. Before this alternative approach can be developed and examined, it is necessary to analyze the specific deficiencies inherent in the traditional approaches.

Inadequate Protection Of Interests In Converted Chattels

In every conversion action at least three interests are involved.[168] The plaintiff, or first possessor, has a possessory property interest in the converted chattel.[169] The defendant's primary interest is in escaping double liability for the same conversion.[170] Finally, the true owner has his own property interest in the converted goods.[171] Both the "possession rule" and *jus tertii* approaches give full consideration to either the plaintiff's or defendant's interests.[172] Neither approach, however, protects the superior interests of the true owner.[173]

Jurisdictions which employ the "possession rule" afford the interests of a plaintiff full consideration.[174] If the plaintiff was in possession of the chattels at the time of their conversion, application of the "possession rule" raises a presumption of title in the plaintiff.[175] Unless the defendant is able to connect himself with the superior title of a third party, this presumption of title is conclusive as against the defendant.[176] The plaintiff is then entitled to the full value of the converted chattels based solely upon his prior possession.[177] Therefore, application of the "possession rule" fully protects the plaintiffs' possessory property interests in the converted chattels.[178] The interests

168. Warren, *supra* note 66 at 1097. In his article, Professor Warren deals primarily with the bailment situation. His analysis, however, is applicable to all conversion actions.

169. *See* J. CRIBBETT, PRINCIPLES OF THE LAW OF PROPERTY 12-15 (2d ed. 1975).

170. *See supra* notes 141-46 and accompanying text.

171. *See* J. CRIBBETT, *supra* note 169 at 15-16. In the context of this discussion, the terms "true owner" and "third party" have been used interchangeably. It should be noted, however, that the third party claiming a superior title in the converted chattels may not necessarily be the "true owner" of those chattels. He may, in fact, only be a prior possessor of the converted chattels. *Id.* at 12.

172. *See* Warren, *supra* note 66, at 1097.

173. For a discussion of the importance of protecting the true owner's property interests in the converted chattels, see E. WARREN, TROVER AND CONVERSION (1936).

174. *See supra* notes 111-15 and accompanying text.

175. *See, e.g., Anderson*, 51 Minn. at 295, 53 N.W. at 637.

176. 2 T. COOLEY, *supra* note 138, § 329 at 491.

177. *See supra* note 66 and accompanying text. Of course, the plaintiff must also prove that the defendant converted the chattels to his own use and benefit. *See Noble*, ___ Ind. App. at ___, 388 N.E.2d at 623.

178. The "possession rule," in practice, over-protects the plaintiff's interest

of the defendant and true owner are not, however, afforded adequate consideration by jurisdictions which employ the traditional "possession rule" approach.

When the defendant in a conversion action is subjected to an application of the "possession rule," his interest in escaping double liability is not given full consideration.[179] A defendant who fails to successfully defend the first possessor's conversion suit is required to pay him the full value of the converted chattels.[180] This judgment does not, however, prevent the true owner from bringing a second conversion suit against the defendant.[181] If the true owner successfully maintains his conversion action, he too is entitled to the full value of the converted chattels from the defendant.[182] Therefore, if the defendant is precluded from pleading the true owner's title in defense to the first possessor's conversion suit, he may be subject to double liability.

Finally, application of the "possession rule" does not adequately protect the true owner's property interest in the converted chattels.[183] The presumption raised by the plaintiff's prior possession permits the court to treat the plaintiff as the "owner" of the converted chattels.[184] Unless the defendant is able to connect himself to the third party's superior title, that presumption is conclusive and the plaintiff is entitled to the full value of the chattels.[185] If the true owner desires to satisfy his property interest in the converted chattels, he must initiate his own conversion suit against either the plaintiff or defendant.[186] Consequently, the interests of the true owner are in no manner furthered by the application of the "possession rule."

The inadequate consideration afforded the defendant's interests

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because it allows courts to treat the possessor as the owner. *See* Warren, *supra* note 66, at 1088.

179. *See supra* note 141-46 and accompanying text.

180. Warren, *supra* note 66, at 1088.

181. "[A] judgment when rendered on the merits, is an absolute bar to a subsequent action, between the same parties or those in privity with them, upon the same claim or demand. . . ." 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.405[1] (2d ed. 1982).

182. *See supra* note 66 and accompanying text.

183. *See* Warren, *supra* note 66, at 1097.

184. *See, e.g.*, Preston v. Cloquet Tie & Post Co., 114 Minn. 398, 401, 131 N.W. 474, 475 (1911).

185. *See supra* notes 93, 98 and accompanying text.

186. The true owner of the chattels is entitled to bring his own conversion action against either the plaintiff or the defendant regardless of the outcome of the original litigation. He must, of course, carry his burden of proof on each element of the conversion action. *See* C. FIFOOT, *supra* note 18, at 104-05.

by application of the "possession rule" is rectified when the *jus tertii* approach is employed.[187] Essentially, the *jus tertii* approach permits the defendant to introduce evidence of a third party's superior title without connecting himself to that title.[188] This evidence, if sufficient, will defeat the plaintiff's conversion action.[189] If it is, however, the true owner who sues for conversion, the defendant will be unable to produce evidence of a superior title.[190] Application of the *jus tertii* approach, therefore, insures that the defendant will be required to pay the full value of the converted chattels only to their true owner.

The *jus tertii* approach does not, however, give adequate consideration to the interests of either the plaintiff or the true owner. Jurisdictions which adhere to the *jus tertii* approach permit the defendant to plead the third party's title without connecting himself to it.[191] The plaintiff is then, in effect, forced to litigate the claim of a third party who is not in court.[192] This places a greater burden on the plaintiff to protect his property interest in the converted chattels, even though his interest in them is clearly superior to that of the defendant.[193] A true owner's interests are afforded no greater protection. As was the case with the "possession rule," the *jus tertii* approach ignores the true owner's property interest in the converted chattels.[194] If the true owner wishes to enforce his property interest, he must still initiate his own conversion suit.[195] Thus, while affording the defendant's interests added protection, the *jus tertii* approach ignores the concerns of the plaintiff and true owner.

Although a conversion suit ostensibly involves only the interests of the plaintiff and defendant, when the defendant attempts to raise the *jus tertii* defense the interests of a third party are injected directly into the litigation. The traditional approaches do not provide a con-

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187. Primarily, the defendant's interest is in avoiding the possibility of paying for the same goods twice. *See supra* text accompanying note 170.

188. *See, e.g., Russell*, 125 N.C. at ____, 34 S.E. at 640.

189. *See, e.g.*, Schermerhorn v. Van Volkenburgh, 11 Johns. 529 (N.Y. Sup. Ct. 1814).

190. By definition, the true owner has the most superior title. Thus, the *jus tertii* defense would be unavailable in this situation.

191. *See Russell*, 125 N.C. at ____, 34 S.E. at 640.

192. RESTATEMENT (SECOND) OF TORTS § 895 comment d (1979).

193. *Id.*

194. *See supra* text accompanying notes 183-86.

195. The true owner of the converted chattels is not automatically joined in the conversion action when the defendant raises the *jus tertii* defense. Thus, unless the true owner moves to join the original litigation, the true owner must initiate and prosecute his own conversion action.

ceptual framework within which each of the three pertinent interests can be adequately addressed. A rational and systematic approach to the *jus tertii* defense would enable courts to balance all relevant interests in a single cause of action.

Compulsory Joinder Of The Third Party As An Efficient Resolution

Compulsory joinder of the third party would enable a court to efficiently consider all pertinent interests in the converted chattels.[196] First, the interests of the third party are given complete protection when he is joined to the original conversion suit.[197] Once he has been joined, the third party may seek compensation for the injury he has suffered from the plaintiff, the defendant or both. Compulsory joinder, therefore, obviates the need for the third party to initiate subsequent conversion litigation.[198] Secondly, joinder of the third party to the original conversion action insures protection of the plaintiff's interests.[199] The plaintiff is no longer required to litigate his claim to the converted chattels with a party who is not in court.[200] Finally, joinder of the third party, whose superior title the defendant attempts to plead in defense, protects the interests of defendant.[201] By joining the third party, the defendant is shielded from potential double liability.[202] Therefore, when a defendant to a conversion suit attempts to plead the superior title of a third party in defense, joinder of that third party ensures that the interests ignored by application of the two traditional approaches are given full consideration.

In Indiana, Trial Rule 19 governs compulsory joinder of parties.[203] Application of this procedural device is dependent upon two

196. The analysis here is restricted to application of compulsory joinder provisions in Indiana. This approach to the *jus tertii* plea is, however, applicable as well to jurisdictions which employ the "possession rule" approach.

197. *See supra* note 171 and accompanying text.

198. Compulsory joinder of additional parties is partially justified by the "societal interest in the orderly, expeditious administration of justice." Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 330 (1957). Joinder of the third party to the original conversion suit reduces occurrences of repetitious litigation and, thus, promotes the societal interest in efficient dispute resolution.

199. *See supra* text accompanying notes 169, 192-93.

200. *See supra* note 169 and accompanying text.

201. *See supra* text accompanying note 170.

202. *See* J. MOORE & T. CURRIER, *supra* 181, at ¶ 0.405[1].

203. Joinder of Person Needed for Just Adjudication

(A) Persons to be joined if feasible. A person who is subject to service of process shall be joined as a party in the action if:

(1) in his absence complete relief cannot be accorded among those already parties; or

preliminary determinations.[204] It must first be determined whether the third party is one who ought to be joined. Second, the feasibility of joining that party must be determined.

The third party must be joined, if feasible, to the original conversion action when any one of the three "tests" set out in Trial Rule 19 is met.[205] In the context of the *jus tertii* defense to a conversion action, two of these "tests" are clearly applicable. First, failure to join the third party may hinder that party's ability to protect his interest in the converted chattels.[206] Second, continuation of the original conversion action in the absence of the third party would subject the defendant to potential double liability.[207] Consequently, Trial Rule 19 requires that the third party be joined if it is feasible to do so.

Feasibility of joinder is a function of two limitations, availability

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> (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:
>
> (a) as a practical matter impair or impede his ability to protect that interest, or
>
> (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.
>
> If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant.

IND. T. R. 19(A).

204. Professor Harvey suggests in his commentary to IND. T. R. 19 that the rule requires determination of "(1) [whether] a person should be joined in the suit as a party, and if that is not feasible, (2) how to proceed without that person." 2 W. HARVEY, INDIANA PRACTICE 263 (1970). However, the feasibility inquiry cannot be minimized and in fact constitutes a separate determination itself. Analysis of the rule, therefore, indicates that the pertinent considerations are (1) whether the party ought to be joined, and if so, (2) whether that is feasible. For a discussion of the proper procedure should it not be feasible to join the third party *see supra* note 211.

205. The three "tests" are succinctly restated in the Civil Study Commission Comments to Trial Rule 19.

> First, *if complete relief cannot be accorded among those already parties in his absence a party must be joined. . . .*
>
> Second, *a party claiming an "interest relating to the subject of the action" must be joined if disposition of the action in his absence will, as a practical matter, impede his ability to protect that interest. . . .*
>
> Third, *a party claiming an "interest" relating to the subject of the action [is] indispensible if persons already parties are left with substantial risk of incurring inconsistent obligations.*

Civil Code Study Commissions Comments to Ind. T. R. 19(A) (as quoted in 2 W. HARVEY, *supra* note 204 at 248) (emphasis in original).

206. IND. T. R. 19(A)(2)(a).

207. IND. T. R. 19(A)(2)(b).

of service of process and the extent of the court's jurisdiction.[208] The Indiana Trial Rules provide a comprehensive system for the service of process which would permit service of any third party.[209] Moreover, conversion is an in rem action.[210] A third party who claims an interest in the converted chattels, would, therefore, be subject to the court's jurisdiction.[211] Joinder, then, is not only required, it is feasible. Thus, this approach will ensure that when a third party's superior title is raised in defense of the plaintiff's conversion suit, all three relevant interests will be considered.[212]

CONCLUSION

The modern tort of conversion has become the primary action for interferences with personal property. It evolved from and was influenced by the old common law actions of detinue *sur trover* and trespass. In fact, trover, the immediate predecessor of conversion, eventually addressed almost all the injuries previously dealt with by the earlier actions. Although it solved some of the problems inherent in detinue and trespass, conversion created one lingering problem of its own.

Conversion suits require courts to determine whether the defendant is entitled to introduce evidence of a third party superior title to the converted chattels. Traditionally, courts have followed two ap-

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208. 2 W. HARVEY, *supra* note 204, at 264.

209. Service of process in Indiana is governed by IND. T. R. 4-5. *See especially* IND. T. R. 4.4, 4.9 which set forth the bases for jurisdiction.

210. *See* Hanson v. Denckla, 357 U.S. 235, 246 (1958).

211. *Id.* There may be situations in which joinder of third party will not be possible. For example, if the third party is unknown or cannot be brought within the court's jurisdiction, joinder may not be accomplished. *See* 2 W. HARVEY, *supra* note 204, at 265. In such a situation the defendant will be precluded from employing the *jus tertii* defense. This result does not, however, weaken the proposed approach. The compulsory joinder approach will still provide the necessary analytical framework from which to assess the relative strengths of the pertinent interests.

212. Earlier in this note *Noble v. Moistner*, ___ Ind. App. ___, 388 N.E.2d 620 (1979), was discussed. *See supra* text accompanying notes 7-11. In that case, the Indiana Appellate Court ruled that the defendant police officers were entitled to raise the *jus tertii* defense even though the identity of the third party was unknown. *Noble*, ___ Ind. App. at ___, 388 N.E.2d at 622. Under this approach, the plaintiffs' conversion claim is effectively defeated. *See supra* text accompanying notes 135, 138. If the compulsory joinder approach had been employed by the appellate court in *Noble*, the plaintiff would have prevailed. The proposed approach requires the defendant who raises the *jus tertii* defense to join the third party. *See supra* notes 196-202 and accompanying text. Therefore, since the third party was not known and could not be joined, the defendant could not use the *jus tertii* defense.

proaches. A majority of jurisdictions employ the "possession rule" which precludes introduction of the *jus tertii* defense unless the defendant is able to connect himself to the third party's title. The remaining jurisdictions, including Indiana, employ the *jus tertii* approach which permits the defendant to introduce any third party's superior title. Neither of these approaches adequately protects all the interests in the disputed chattels. Compulsory joinder of the third party to the original conversion litigation, however, permits the court to fully consider the three interests in the chattels. In light of the frequency of conversion suits, adoption by the Indiana courts of this approach for dealing with the problem is strongly suggested.

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