

## RES JUDICATA: UNSATISFIED JUDGMENTS IN TROVER

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In dealing with the problem as to what further remedy, if any, a plaintiff who holds an unsatisfied judgment in trover or trespass has against the defendant or his assignees,<sup>1</sup> there is quite a temptation to state the question in terms of "passage of title". This is largely so because the courts have habitually stated the problem in such language. This method of treatment seems unfortunate, however, because of the elusive character of "title".<sup>2</sup> Analytically the problem is whether the plaintiff, after having recovered a judgment in trover or trespass, has any further remedy against the defendant or the assignee of the defendant; or, stated in other words, does the plaintiff retain any legal relations (right to possession) concerning the chattel which are not divested from him until satisfaction of the judgment? There are many cases declaring that certain remedies claimed (trover, trespass, implied

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<sup>1</sup> While the problem involved in this discussion is confined to a specific situation, yet a much larger field may be opened by extending the inquiry to determine the relief generally afforded the holder of an unsatisfied judgment which demands supplementary relief if the plaintiff is to accomplish anything by his action. *Hahl v. Sugo*, 169 N. Y. 109, 62 N. E. 135 (1901); Note (1925), 34 YALE L. J. 536. If no supplementary relief is available, the question is raised whether the judgment holder, not being responsible for the situation, should be barred by the doctrine of *res judicata* from proceeding anew to obtain further relief.

<sup>2</sup> It has been pointed out that the use of "title" in discussing the present problem merely tends to obstruct rather than to aid legal analysis. ". . . . The confusion comes from the fact that title is applied to an aggregate—a 'bundle'—of legal relations, and we find the term used indiscriminately to indicate a bundle of various sizes." Note (1921) 30 YALE L. J. 742, 743. All that is necessary for decision in the present discussion is: Does the plaintiff have a right to possession of the chattel (*i. e.*, can he maintain replevin) after a judgment in trover has been entered in his favor? It is unnecessary to attempt to unravel what the courts mean by "title" when they use it in connection with the present problem, for, if we find that the plaintiff has a right to possession and can maintain replevin for the chattel, then as against the defendant and the defendant's assignees the plaintiff will reassume all the incidents of ownership. Therefore, the use of "title" will be avoided as much as possible, the term being used only when the language of the court seems to demand it.

The writer wishes to acknowledge his indebtedness to Professor W. R. Vance for many helpful suggestions in connection with the problem, although Professor Vance is not responsible for the application of the suggestions nor for the conclusions reached.

assumpsit, etc.) are barred by: (1) *res judicata*, (2) double vexation, (3) election of remedies, or (4) merger of the causes of action in the judgment (in case of joint tort-feasors). In so holding, the courts often say gratuitously that "title passed", when they really mean that the particular remedy sought is barred by a prior proceeding.<sup>3</sup> The decisions are by no means always clear as to just what principle is invoked to bar the plaintiff.

The doctrine of *res judicata* is designed for the protection of the public and the individual from repeated and useless litigation of the same cause of action. The protection of the individual against double vexation has been included as one element of policy underlying the doctrine of *res judicata*, although the primary purpose of the doctrine is said to be the protection of society, and the protection of the individual is said to be secondary.<sup>4</sup> It is clear that a person against whom a judgment has been rendered in a court of competent jurisdiction will not be allowed to re-litigate the same cause of action, and thus undoubtedly an adverse decision in a plaintiff's action of trover or trespass bars subsequent possessory actions.<sup>5</sup> While the authority is scanty, it

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<sup>3</sup> It might be mentioned here that one state, South Carolina, seems to hold that a recovery by a plaintiff in trover vests all the property rights to the chattel in the defendant, and therefore an action of replevin by the plaintiff would be denied. *Norrill v. Corley*, 2 Rich. Eq. 288 (S. C. 1828). This case relies on *Brown v. Wootton*, 3 Cro. Jac. 1, 73 Yelv. 67, Moore 762 (K. B. 1605), and interprets the dictum in that case, by Fenner, J., to be part of the decision and to declare that the plaintiff would no longer have a right to possession of the chattel. There is a dictum in *Carlisle v. Burley*, 3 Me. 250 (1825) to a like effect, but *Hopkins v. Hersey*, 20 Me. 449 (1841) adopts a different view; see also *Cleveland v. City of Bangor*, 87 Me. 259, 260, 32 Atl. 892 (1895), where the court speaks of the error in *Brown v. Wootton*. Several Pennsylvania cases present dicta to a similar effect, this idea being attributable in some instances to the English doctrine concerning merger of the causes of action in a judgment in the case of joint tort-feasors and in other instances to the idea that the doctrine of election of remedies is applicable. *Fox v. Northern Liberties*, 3 W. & S. 103 (Pa. 1841); *Floyd v. Browne*, 1 Rawle 121 (Pa. 1829); *Hyde v. Kiehl*, 183 Pa. 414, 38 Atl. 998 (1898). In a lower court in Pennsylvania the direct issue as presented in our problem came before the court, and it was held that replevin was barred, the decision being based upon dicta of former decisions. *Singer v. Yaduskie*, 11 Pa. D. R. 571 (1902).

<sup>4</sup> See *Marsh v. Pier*, 4 Rawle 272, 288 (Pa. 1833); *State Hospital v. Consolidated Water Co.*, 267 Pa. 29, 37, 110 Atl. 281, 283 (1920); *Commonwealth v. Kelly*, 287 Pa. 139, 144, 134 Atl. 514, 516 (1926); *Moschzisker, Res Judicata* (1929) 38 YALE L. J. 299.

<sup>5</sup> *Coffin v. Knott*, 2 Greene 582 (Iowa 1850); *Wells v. McCleming*, 23 Ill. 409 (1860); *Hayden v. Anderson*, 17 Iowa 158 (1864) (stresses fact that right to possession was in issue in the first action and that judgment was against plain-

would seem that a different conclusion should be reached when the plaintiff has been successful in his action of trover or trespass, but, upon finding his money judgment valueless, seeks a distinctly different remedy in replevin to regain possession of his chattel.<sup>6</sup>

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tiff); *City of Bath v. Miller*, 53 Me. 308 (1865); *Ewald v. Waterhont*, 37 Mo. 602 (1866) (holds that if plaintiff recovers judgment in replevin the defendant cannot thereafter sue the plaintiff in an action involving right to possession, as the former judgment conclusively adjudicated the right to possession); *Hardin v. Palmerlee*, 28 Minn. 450, 10 N. W. 773 (1881); *McDowell v. Gibson*, 58 Kan. 607, 50 Pac. 870 (1897); *Lowenthal v. Baca*, 10 N. M. 347, 62 Pac. 982 (1900); *Vulcan Iron Works v. Kent Lumber Co.*, 39 Wash. 435, 81 Pac. 913 (1905); *Davis v. Stukes*, 122 S. C. 539, 115 S. E. 814 (1923); see 34 C. J., tit. Judgment, §§ 1374, 1375, for collection of authorities. In those states which hold that in order to sustain replevin the plaintiff must have the "right to possession of the chattel against all the world", the plaintiff will in no instance be denied replevin when a former action against him did not adjudicate such right. *McFadden v. Ross*, 108 Ind. 512, 8 N. E. 161 (1886); *Sessler v. Donchian et al.*, 34 App. Div. 312, 118 N. Y. Supp. 1047 (1909); see 34 C. J., tit. Judgment, § 1375, for collection of authorities.

<sup>6</sup> Cases in which this point was in direct issue are very scarce, although there are dicta concerning the question. *Nickerson v. California Stage Co.*, 10 Cal. 520 (1858) is directly in point, the only difference being that replevin was the first action and trover the second. In that case the plaintiff was allowed to maintain trover after having recovered a judgment in replevin for the same taking. In *Singer v. Yaduskie*, *supra* note 3, the plaintiff, after recovering a judgment in trover, was denied an action of replevin. In *Gilbreath v. Jones*, 66 Ala. 129 (1880) it was held that detinue and trover proceeded upon different theories; that in detinue the plaintiff had to establish that the chattel was in the possession of the defendant at the commencement of the action, and had to show that he (the plaintiff) has the "right to possession against all", while in trover the plaintiff need only show that he had a right to possession when the alleged conversion took place; and that even though the plaintiff had previously brought an action in detinue and had been denied recovery he would not be prevented from bringing an action of trover, as it might have been impossible for him to show possession in the defendant when he began his action in detinue.

If the theory of this case is adopted, the same reasoning would apply to the actions of trover and replevin, for, while it is only necessary in trover to show a right to possession of the chattel when the conversion took place, it is necessary in replevin to show that the plaintiff has the right to possession, and in some states the "right to possession against all", at the commencement of the action. *Infra* note 66. Under such a theory the issue would not be the same in the action of replevin as it was in the action of trover, and the doctrine of *res judicata* would not be applicable. This theory seems logical, and it would be reasonable to say that *res judicata* has no application when a plaintiff under our factual situation seeks an action of replevin.

It might be suggested that it is unnecessary to allow replevin when the plaintiff discovers the chattel in the possession of the defendant after the plaintiff has recovered a judgment in trover, because the plaintiff could levy on the chattel to satisfy the judgment. If, however, the view is adopted that the plaintiff no longer has a right to possession of the chattel, then under the exemption statutes the defendant could exempt the chattel so as to preclude the plaintiff from levying on it. *Bernheim v. Andrews*, 65 Miss. 28, 3 So. 75 (1887); *Nuzman v. Schooley*, 36 Kan. 177, 12 Pac. 829 (1887); *Tetrault v. Ingraham*, 54 Mont. 524, 171 Pac. 1148 (1918). In the absence of a statute to the contrary,

The principle of double vexation, as a doctrine independent of *res judicata*, seems to apply when a similar remedy is sought on a cause of action that is already pending in a suit between the parties.<sup>7</sup> The rule does not apply, however, where a distinctive remedy is sought in the second suit, even though the original cause of action be the same as in the former suit still pending.<sup>8</sup> It would appear, then, that the doctrine of double vexation, either as a separate principle from *res judicata* or as a part thereof, should not bar replevin by one who has an unsatisfied judgment in trover or trespass, since replevin is a remedy distinct from trover and trespass.<sup>9</sup> On the other hand, an attempt to bring successive actions in trover, trespass or other damage actions would violate the principle of double vexation, as the same remedy would be sought on the same cause of action. If the successful plaintiff in trover or trespass does not violate the doctrine of double vexation when he seeks replevin, it would hardly seem that the public policy element of *res judicata* should bar him.

The doctrine of election of remedies is applicable in a situation in which a person, having two or more concurrent but inconsistent remedies, elects one of them and proceeds to suit; having thus made a choice from inconsistent remedies, he is precluded

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such exemption immunities may be transferred to those in privity with the defendant; *i. e.*, mortgagees, pledgees, vendees, and donees. *O'Donnell v. Segar*, 25 Mich. 366 (1872); *Perkins v. Johnson*, 77 Ind. App. 13, 133 N. E. 15 (1921); *In re Brogan's Estate*, 177 Iowa 423, 157 N. W. 952 (1916).

In those states which hold that a judgment is a lien on personal property, a prior judgment holder would take priority over the plaintiff who has a judgment in trover. *Birmingham News Co. v. Barron G. Collier, Inc.*, 212 Ala. 655, 103 So. 839 (1925); *Manchuria S. S. Co. v. Harry G. G. Donald & Co.*, 200 Ala. 638, 77 So. 12 (1917); *Walden v. Yates*, 111 Miss. 631, 71 So. 897 (1916); *Simpson v. Smith Sons' Gin Co.*, 75 Miss. 505, 22 So. 805 (1897). Other complications such as insolvency and bankruptcy would prevent an effective levy, while if the plaintiff is said to have the right to possession of the chattel such complications would be avoided.

<sup>7</sup> "To furnish ground for a plea in abatement on account of the pendency of a prior suit, it is indispensable that both suits be of the same character, between the same parties, and brought to attain the same end or object. In other words, it must appear that the second suit is oppressive and vexatious because there is no necessity for it." *La Croix v. County Commissioners*, 50 Conn. 321, 326 (1882). For similar decisions see *Hatch v. Spofford*, 22 Conn. 485 (1853); *Quinebaug Bank v. Tarbox*, 20 Conn. 510 (1850).

<sup>8</sup> *Moss v. Marks*, 70 Neb. 701, 97 N. W. 1031 (1904); *Farley-Harvey Co. v. Madden*, 136 Atl. 586 (Conn. 1927). See *supra* note 7.

<sup>9</sup> *Nickerson v. California Stage Co.*, *supra* note 6; *Moss v. Marks*, *supra* note 8; *Largilliere Co., Bankers, v. Kunz*, 244 Pac. 404 (Idaho 1925).

from abandoning the one elected and beginning another.<sup>10</sup> This doctrine has no application to the present problem, for trespass, trover, and replevin are quite generally considered to be consistent as well as concurrent remedies, and a person may select one of these and later abandon it and begin one of the others.<sup>11</sup>

The doctrine of the merger of causes of action in a judgment ("merger of remedies") has found expression in the English cases dealing with actions against joint tort-feasors.<sup>12</sup> This doctrine prevents a party who has an action against more than one person for an original wrong from suing another of the tort-feasors after he has recovered a judgment against one of them, the theory being that all causes of action arising out of the original wrong are merged in the first judgment recovered. Most American courts have rejected this doctrine.<sup>13</sup> In discussing the cases relevant to our problem, a careful differentiation must be made between it and the principles which are invoked to bar certain actions following an entry of judgment in trover or trespass.

It has been stated by some writers that the English and American cases hold that the plaintiff, after a judgment has been entered in his favor for the value of a chattel in an action of trover or trespass, no longer has a right to the possession of the chattel. This is said to be so because of the doctrine of double vexation which bars, it is stated, trover, trespass, implied assump-

<sup>10</sup> *Watson v. Perkins*, 88 Miss. 64, 40 So. 643 (1906); *Turner v. Grimes*, 75 Neb. 412, 106 N. W. 465 (1906); *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1 (1905); *Elliott v. Collins*, 6 Idaho 266, 55 Pac. 301 (1898); see COOK, CASES ON EQUITY (one vol. ed. 1926) 862-883 for other cases.

<sup>11</sup> *Moss v. Marks*, *supra* note 8; *Cramer v. Brownell*, 166 App. Div. 456, 151 N. Y. Supp. 1001 (1918). The rule is different when the plaintiff has elected assumpsit and then attempts to bring trespass, trover or replevin; as assumpsit and these actions are inconsistent. *Moss v. Marks*, *supra* note 8; *McDonald v. Young*, 198 Mich. 620, 165 N. W. 678 (1917).

<sup>12</sup> *Brown v. Wootton*, *supra* note 3; *Adams v. Broughton*, 2 Strange 1078 (Eng. 1708); *Brinsmead v. Harrison*, L. R. 6 C. P. 583 (1871), *aff'd*, L. R. 7 C. P. 547 (1872).

<sup>13</sup> *Livingston v. Bishop*, 1 Johns. 289 (N. Y. 1806); *Litchfield v. Goodnow*, 123 U. S. 549, 8 Sup. Ct. 210 (1887); *Lovejoy v. Murray*, 3 Wall. 1, 19 (U. S. 1865). *Contra*: *Wilkes v. Jackson*, 2 Hen. & M. 355 (Va. 1808); *Hunt v. Bates*, 7 R. I. 217 (1862); see 2 FREEMAN, JUDGMENTS (5th ed. 1925) § 573 for a general statement and collection of authorities; also 23 Cyc., tit. Joint Tort-Feasors, 1212.

sit, detain, and replevin, or their descendants under the codes.<sup>14</sup> It is conceded that all of these actions are barred with the exception of the action of replevin, and it is the purpose of this discussion to examine such proposition with reference only to replevin; although, of course, it is well recognized that even the other actions are not barred unless the judgment entered in the first action was for the full value of the chattel and not merely for nominal damages for the taking.<sup>15</sup>

In the case of *Brown v. Wootton*<sup>16</sup> the English rule was laid down concerning the doctrine of the merger of causes of action in a judgment ("merger of remedies"). In that case the plaintiff sued the defendant as a joint converter of certain plate-ware. The defendant pleaded to the action of trover a former unsatisfied judgment which the plaintiff had recovered against one *J. S.* for taking the same plate-ware. The court sustained the plea of the defendant, stating that the cause of action against the defendant as a joint converter was merged in the judgment rendered against *J. S.* This doctrine still remains in the English law, and today a judgment against one tort-feasor will bar an action against any of the others.<sup>17</sup> It is obvious that the court was enunciating a doctrine distinct from that of *res judicata* or double vexation, and that neither of the last named doctrines was in any manner involved. It is significant to note that in *Brown v. Wootton*, as reported by Yelverton and by Moore,<sup>18</sup> no mention is made of the plaintiff's losing his right to possession of the chattel because of the entry of judgment in the first action of

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<sup>14</sup> Ames, *The Disseisin of Chattels* (1890) 3 HARV. L. REV. 313, 326; Note (1921) 30 YALE L. J. 742. The following English cases were cited as supporting this view: *Bishop v. Montague*, Cro. Eliz. 824 (C. P. 1601); *Brown v. Wootton*, *supra* note 3; *Adams v. Broughton*, *supra* note 12; *Smith v. Gibson*, 1 Cas. t. H. 317 (Eng. 1737); *Kitchen v. Campbell*, 3 Wils. 304 (Eng. 1772); *Cooper v. Shepherd*, 3 C. B. 265 (1846); *Buckland v. Johnson*, 15 C. B. 145 (1854).

<sup>15</sup> *Barb v. Fish*, 8 Blackf. 481 (Ind. 1847); *In re Scarth*, L. R. 10 Ch. App. Cas. 234 (1874). Furthermore, a tender or the actual return of the converted chattel to the plaintiff in an action of trover does not extinguish the cause of action accrued for the taking. *Hanbrich v. Heaney*, 161 Minn. 92, 200 N. W. 930 (1924).

<sup>16</sup> *Supra* note 3.

<sup>17</sup> *Brinsmead v. Harrison*, *supra* note 12.

<sup>18</sup> *Supra* note 3.

trover against *J. S.* The sole basis of the decision, according to these reporters, was the doctrine above defined. In the report of the case by Croke, however, Fenner, J., said:

“. . . after the judgment given, the property of the goods is changed, so that the plaintiff may not seize them again. . . . ”<sup>19</sup>

This statement of Fenner, J., not reported by either Yelverton or Moore, seems to be the sole authority of later English judges for dicta of like effect. Certainly there has been no basis for such statement since 1854, for in the Common Law Procedure Act of 1854<sup>20</sup> it was provided that upon application of the plaintiff, after judgment rendered in his favor for the value of the chattel, the court could order a return to the plaintiff of the chattel detained.<sup>21</sup> Clearly, then, in England the plaintiff can be said to have a right to the possession of the chattel after judgment rendered in his favor, since a writ of recovery is available to him and is as much of an instrument of societal action as replevin would be, even though such writ is in the nature of a supplementary remedy following the action of trover, trespass, or detinue.

In *Adams v. Broughton*<sup>22</sup> the plaintiff had previously recovered a judgment in trover against the captain of a ship who had failed to deliver certain yarn of the plaintiff's to him. The plaintiff was suing Broughton as a joint converter, for he had

<sup>19</sup> *Supra* note 3, at 74

<sup>20</sup> 17 & 18 VICT. c. 125 (1854) .

<sup>21</sup> This provision seems to have been designed to secure for the plaintiff his chattel after a judgment in any possessory action. *Hymans v. Ogden*, L. R. 1 K. B. 246 (1905); *Ivory v. Cruikshank*, W. N. 249 (Eng. 1875).

Sec. 78 reads: "The court or judge shall have power, upon application of the plaintiff in any action for the detention of a chattel, to order that execution shall issue for the return of the chattel detained, etc."

This section was repealed by the STATUTE LAW REVISION ACT, 46 & 47 VICT. c. 49 (1883), but it remained in the English practice in a form almost identical with that of Supreme Court Rules, Order 48, Rule 1. The rule permits the plaintiff, under a judgment for the recovery of any property other than money or land, on application to obtain an order from the court for a writ of delivery, which may be made absolute, depriving the defendant of his option to pay the assessed damages, if any. See *Trover and Detinue*, 27 HALSBURY, LAWS OF ENGLAND (1913) 917. From these provisions it seems apparent that the idea behind them is that the plaintiff still retains the right to possession of the chattel.

<sup>22</sup> *Supra* note 12.

received the yarn from the captain, and the former unsatisfied judgment against the captain was pleaded as a bar by Broughton. The court held that the former judgment was a bar to the second action. This decision followed that of *Brown v. Wootton* and was based upon the doctrine of "merger of remedies" as that doctrine was announced in the earlier case. The former decision was sufficient precedent for the latter decision in so far as "merger of remedies" was concerned, but the opinion in the latter case goes further and states that the property in the chattel vested in the captain when the judgment in the trover action was entered against him. If by "property vesting" it was meant that the plaintiff no longer had a right to the possession of the chattel, the statement was one of pure dictum, and it was so pronounced by Willes, J., in *Brinsmead v. Harrison*.<sup>23</sup>

In the case of *Smith v. Gibson* <sup>24</sup> the plaintiff was suing to recover a statutory penalty provided for instituting wrongful suits. The defendant set up as a defense a former judgment which gave the plaintiff nominal damages for the wrongfully instituted suit. The court quite properly refused to sustain the plea, saying that there were two separate causes of action, but Lord Hardwicke stated as dictum that where an action of trover is brought against one and a judgment recovered, the plaintiff is precluded from bringing an action of trespass for the same wrong. While this was dictum, it was entirely in keeping with the doctrine of "merger of remedies" as announced in *Brown v. Wootton*, but it has no weight or application in so far as a change of property rights in a converted chattel is concerned, nor does it mean that some other process for regaining possession of the chattel is excluded.<sup>25</sup>

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<sup>23</sup> *Supra* note 12. In discussing the general question of the vesting of property in the defendant, Willes, J., said, at 588: "We are of the opinion that no such change is produced by mere recovery. . . . The only way the judgment in trover can have the effect of vesting the property in the defendant is, by treating the judgment as being (that which in truth it ordinarily is) an assessment for the value of the goods, and treating the satisfaction of the damages as payment of the price as upon a sale of the goods, according to the maxim in Jenk. 4th Cent. Case 88. Any other construction would seem to be absurd."

<sup>24</sup> *Supra* note 14.

<sup>25</sup> *Supra* note 21.



The case of *Kitchen v. Campbell*<sup>26</sup> contains no reference at all to a loss of right to possession, but simply declares that where a plaintiff has failed to recover in an action against the defendant for the conversion of money he (the plaintiff) cannot thereafter sue the defendant on the same cause of action in *indebitatus assumpsit*. It is apparent that this decision rests on a different theory from the decisions in *Brown v. Wootton* and *Adams v. Broughton*, for here we have a case of a plaintiff attempting to re-litigate a cause of action which was decided adversely to him in a former action and the doctrine of *res judicata* is applicable, while in the other two cases the plaintiffs were successful in their actions and were denied further actions on the theory that the causes arising from the original wrong were merged in the first judgment recovered. The situation in *Kitchen v. Campbell* is different, also, from the one we are concerned with, for we have a plaintiff who has recovered a judgment in trover, but who, upon finding the judgment valueless, is seeking to regain possession of the chattel by using the remedy of replevin. Certainly there is no decision adverse to the plaintiff's claim which would bar him, as was the case in *Kitchen v. Campbell*, and in the majority of American courts there is no recognized doctrine of "merger of remedies" to bar the action.

It is interesting to observe here that in an editorial note to *Holmes v. Wilson*<sup>27</sup> it is stated:

"By a recovery in trespass for taking, or trover for converting, personal chattels, followed by satisfaction, the property is altered, and vests in the defendant; for *solutio pretii emptionis loco habetur*."

The note cites a case in *Jenkins*, in which it is said:

"A, in trespass against B for taking a horse, recovers damages; by this recovery and execution done thereon the property in the horse is vested in B. *Solutio pretii emptionis loco habetur*."<sup>28</sup>

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<sup>26</sup> *Supra* note 14.

<sup>27</sup> 10 A. & E. 503, 511 (Eng. 1839).

<sup>28</sup> JENK. CENT. (3d ed. 1771) \*189, case 88.

Thus we have an editorial note interpreting this old authority as meaning that a satisfaction is required of the judgment in trover before the property rights concerning the chattel are vested in the defendant.<sup>29</sup>

Then, again, in *Cooper v. Shepherd*<sup>30</sup> we have the first English case in which the direct issue was presented as to whether a judgment in a trover action changes the right to possession of the chattel from the plaintiff to the defendant. There *W* had converted a bedstead belonging to the plaintiff. The plaintiff brought an action of trover against *W* and recovered a judgment for the full value of the bedstead, and the judgment was paid. *W* sold the bedstead to Shepherd, who is the defendant in the reported case. The plaintiff then brought an action against Shepherd. The court held that the former judgment against *W*, followed by satisfaction, vested the property rights to the bedstead in *W*, the defendant in the former action, and that the action against Shepherd could not be maintained, as the plaintiff had no right to the possession of the chattel. The court delivered its opinion through Tindal, C. J., who stressed the fact that the judgment in the former action had been satisfied, a condition which vested the property rights to the chattel in the former defendant. Tindal, C. J., seemed to think that *Adams v. Broughton* stood for the same principle; namely, that recovery of a judgment in trover followed by satisfaction divests the plaintiff's

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<sup>29</sup> See also *Morris v. Robinson*, 3 B. & C. 196, 206 (Eng. 1824), where Holroyd, J., said: "But where in trover the full value has been recovered, it has been held, that the property is changed by judgment and satisfaction of the damages. Unless the full amount is recovered, it would not bar even other actions in trover." And see *Drake v. Mitchell*, 3 East 251 (Eng. 1803), where Lord Ellenborough held that satisfaction of the judgment is required in order to divest the plaintiff of "title". Further, in *Marston v. Philips*, 9 L. T. R. 289 (1863) the plaintiff was allowed to maintain an action of trover against the defendant who purchased the chattel from one who had held it for almost two years under an unsatisfied judgment in trover. This latter case would seem to be diametrically opposed to the view that a purchaser from a defendant against whom a judgment has been rendered for the value of the chattel acquires an immunity from suit which may be likened to, and called, a "title". See Note (1921) 30 YALE L. J. 742, 746, where such a view is advocated under the immunity theory. See also *Transfer of Personal Property by Judgment* (1844) 3 AM. LAW MAG. 49, where the conclusion is reached that "title" does not pass by entry of judgment in trover or trespass, but passes when satisfaction of judgment is had. The article does say, however, that such judgment can be pleaded in bar to further actions by the plaintiff against the same defendant or his privies.

<sup>30</sup> 3 C. B. 266 (1846).

property interest. He also cited the case in *Jenkins*, using the same words laid down in the note to *Holmes v. Wilson*, where the editors likewise interpreted such statement to mean satisfaction of the judgment. *Cooper v. Shepherd*, therefore, certainly asserts the proposition that it requires a satisfaction of a judgment in trover to divest the plaintiff of his property rights. Also, it is the first case actually deciding the question of the effect of a judgment upon the property rights to the chattel as a direct issue before the court. All the other statements in former decisions are mere dicta.

In the case of *Buckland v. Johnson*,<sup>31</sup> which was decided eight years after *Cooper v. Shepherd*, the plaintiff had previously brought an action of trover, for the conversion of certain money, against the son of the defendant in the reported case. The conversion, however, had been a joint undertaking of father and son. A judgment had been recovered against the son, which remained unsatisfied because the son was bankrupt. The plaintiff, learning that the father had really received the money, brought an action of indebitatus assumpsit against the father. The court, through Jervis, C. J., relying upon *Brown v. Wootton* for authority, held that the former judgment against the son was a bar to the action against the father. The decision was merely an adherence to the doctrine of "merger of remedies" as applied to joint tort-feasors; the court simply parroted the language of *Brown v. Wootton*; and the principle of double vexation had nothing to do with the case. Chief Justice Jervis, however, took occasion to remark further that the plaintiff had lost sight of the fact that when the judgment was recovered against the son in the former action the property in the goods was changed from the plaintiff to the defendant in such action. He admitted, however, that there was some conflict as to this point, and he cited *Cooper v. Shepherd* as holding that satisfaction is required before the property rights are changed. But he said further that he was of the opinion that *Brown v. Wootton* had decided that the mere entry of a judgment divested the plaintiff of all his property rights in the chattel. We have seen in the discussion of *Brown*

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<sup>31</sup> 15 C. B. 145 (1854).

*v. Wootton* that the statement of Fenner, J., to that effect was but dictum.

We come now to the more recent cases of *Brinsmead v. Harrison*<sup>32</sup> and *Ex parte Drake*.<sup>33</sup> In *Brinsmead v. Harrison*, the plaintiff brought an action of detinue against one of two joint wrongdoers who had withheld a pianoforte from the plaintiff. In a former action the plaintiff had recovered a judgment in trover against one of the wrongdoers, but such judgment remained unsatisfied. The defendant pleaded the former judgment against the other wrongdoer as a defense to the action against himself, and alleged that the joint detention was the only one that had occurred. The plaintiff, in his replication, assigned new detentions on the part of the defendant, from the time of the former judgment down to the present action. The defendant demurred to these new assignments, alleging that the plaintiff had been divested of his property rights to the chattel by the former judgment. Thus the issue whether or not an unsatisfied judgment in trover vests the right to possession of the converted chattel in the defendant was squarely before the court. The Court of Common Pleas held that under the early precedent of *Brown v. Wootton* the former recovery against one of the two joint tort-feasors was a bar to an action against the other. The court did hold, however, that the right to possession of the pianoforte was not vested in the defendant in the former action by the mere entry of judgment for the plaintiff; and Willes, J., reviewing the authorities, declared that the statements in *Brown v. Wootton*, *Adams v. Broughton*, and *Buckland v. Johnson* to the effect that an unsatisfied judgment in trover vested the property rights to the chattel in the defendant, were mere dicta, and that such remarks in those cases were not necessary to the decision of the cases and were totally uncalled for.

The case of *Brinsmead v. Harrison* went up on writ of error to the Court of Exchequer Chamber,<sup>34</sup> and the plaintiff's new assignment of subsequent detentions was abandoned in the

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<sup>32</sup> *Supra* note 12.

<sup>33</sup> L. R. 5 Ch. Div. 866 (1877).

<sup>34</sup> L. R. 7 C. P. 547 (1872).

upper court. The Court of Exchequer Chamber, in affirming the decision of the lower court, took note of the fact that the American cases held recovery of a judgment, without satisfaction, to be no bar to an action against the other joint tort-feasors. The court stated, however, that since the doctrine of "merger of remedies" had been followed in England since *Brown v. Wootton*, and since it was a mere question of procedure, it felt bound to hold that the former recovery of a judgment against one of several joint tort-feasors operated as a bar to an action against the others. The judges approved the holding of Willes, J., to the effect that a recovery of a judgment, without satisfaction, did not divest the plaintiff of his property rights to the chattel.

In the case of *Ex parte Drake*<sup>35</sup>, which was decided six years after the case of *Brinsmead v. Harrison*, the rule was settled beyond controversy in England that the recovery of a judgment in detinue by a plaintiff, without being followed by satisfaction, does not vest the right to possession of the chattel in the defendant. Drake rented a horse to Ware, who failed to return it upon request. Drake brought an action of detinue for the horse and recovered a judgment against Ware for its value. The defendant became bankrupt, and, on the same day that the liquidation petition was filed, Drake had the sheriff levy on the goods of the defendant, not including the horse; but an order was made by the Court of Bankruptcy restraining the proceedings under the execution. Drake then filed his claim in the Court of Bankruptcy, but later, discovering the horse in the possession of the defendant, had the sheriff seize it under the execution. The trustee secured an injunction from the Court of Bankruptcy restraining the sheriff and Drake from selling the horse. This injunction was made perpetual and the horse was ordered to be delivered up to the trustee, and from this ruling Drake appealed. The court held that the right to possession of the horse did not vest in Ware by the mere entry of judgment, nor by the attempted levy or claim filed in the bankruptcy proceedings, but that it required a satisfaction of the judgment to vest such right in the defendant. It allowed Drake to keep the horse, saying that he

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<sup>35</sup> *Supra* note 33.

was privileged to do so, but penalized him for costs because of his action of self-help.<sup>36</sup>

Indeed, then, this case not only holds that the plaintiff is not divested of his property rights to the chattel by a mere entry of judgment in his favor in an action of detinue, but it goes further and says that if the plaintiff after such judgment gets the chattel back into his possession he may keep it. If Drake had a right to the horse after the judgment had been entered in his favor, and if he could, by getting the horse back into his possession, keep it, then it would seem that Drake should have an action to recover the horse, as it is not the policy of the courts to encourage self-help. But to deny such action for recovery of the chattel would certainly seem to encourage self-help, if, at the same time the action is denied, the court says that the plaintiff is privileged to take and keep the chattel if he can get it into his possession by self-help.<sup>37</sup>

All of the above discussion has proceeded with a view to establishing the holding of the early English cases as to the effect of an unsatisfied judgment, in an action of trover, trespass, or detinue, upon the plaintiff's property rights in the chattel. It is believed that the cases when carefully analyzed do not hold, at any time in the development of English law, that "title" (right to possession) vested in the defendant when there had not been a satisfaction of the judgment. It is true that there is much dic-

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<sup>36</sup> If Drake had applied to the court he would have been entitled to a writ of delivery for the horse, such writ having been provided for in § 78 of the Common Law Procedure Act of 1854, *supra* note 21. So, while England would not allow an action of replevin because of its strict view of "merger of remedies", it does allow self-help and provides a writ for delivery, to enable a plaintiff holding an unsatisfied judgment in trover, trespass, or detinue to get back his chattel. In England, therefore, a defendant against whom a judgment has been rendered for a converted chattel cannot be said to enjoy an immunity from further societal action.

<sup>37</sup> Of course, under the strict English rule as to "merger of remedies" it could not be successfully argued that an English court would allow an action of replevin to secure a chattel for the conversion of which an unsatisfied judgment in trover is on record against the same defendant. But there would be no great need for such a second action in England, for the procedure of that country (*supra* note 21) would adequately care for the situation and secure for the plaintiff his chattel from the defendant by a writ of recovery as supplementary to the judgment which has not been satisfied. No such supplementary remedy is afforded in America, which is the reason for allowing a second action to secure actual recovery of the chattel.

tum in the cases, as has been shown above, to the effect that satisfaction of the judgment was not required in order to change the property in the chattel from the plaintiff to the defendant. Regardless of what was the effect of the earlier cases as to this point, the great weight of authority today, both in England and America, holds that "title" (right to possession) does not pass until there has been a satisfaction of the judgment.<sup>38</sup> In spite of the statements of the courts that "title" is not vested in the defendant until satisfaction of judgment, the position has been taken that the "title" the plaintiff is said to have is meaningless; for it is urged that if the chattel is in the possession of the defendant at the time of rendition of judgment, the defendant acquires an immunity from further actions by the plaintiff for the recovery of the chattel, and such immunity may be passed on to those in privity with the defendant.<sup>39</sup> The defendant is said to have this immunity from further suit, transferrable in nature, because

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<sup>38</sup> See *infra* note 41 for cases; also *Atwater v. Tupper*, 45 Conn. 144 (1877); *Miller v. Hyde*, 161 Mass. 472, 37 N. E. 760 (1894); *Tolman v. Waite*, 119 Mich. 341, 78 N. W. 124 (1899); *Frick v. Davis*, 80 Ga. 482, 5 S. E. 498 (1888). See cases collected in 15 Am. & Eng. Ann. Cas. 454; 26 R. C. L. 1157; 38 Cyc. 2112 (opposing cases given). Also see *supra* note 3 for opposing cases.

Unless the plaintiff is said to have "title" (right to possession) until the judgment is satisfied, we have this anomalous result under the decision of *Ex parte Drake*: the plaintiff is privileged to retake the chattel after a judgment has been entered in his favor and remains unsatisfied. The plaintiff being privileged to recapture the chattel by self-help, the defendant can certainly have no right of action against the plaintiff for retaking the chattel. If this be the case, and if the English or American law denies the plaintiff an action to recover the chattel, and at the same time denies the defendant an action for the plaintiff's retaking the chattel after judgment, then, after a judgment in trover has been entered for a conversion of the chattel and remains unsatisfied, neither the plaintiff nor the defendant has a right to possession of the chattel. That is, neither the plaintiff nor the defendant can be said to have a right which is sufficient to cause a societal agent to take action in the plaintiff's behalf to recover the chattel or to take action in the defendant's behalf if the plaintiff physically retakes the chattel. Therefore, if an action be denied the plaintiff in the first instance (*i. e.*, after judgment and before satisfaction), but he is privileged to retake and keep the chattel, then the plaintiff's status under the law would seem to be analogous to the so-called "right without a remedy" situation. It is to be noted, however, that in England such a result would be avoided under the supplementary proceeding provided by their procedural rules (*supra* note 21), whereby the plaintiff can have a writ of recovery to regain his chattel.

<sup>39</sup> Note (1921) 30 YALE L. J. 742, 746. In this comment it is pointed out that "title" is a variable term and has no fixed and definite meaning. It is suggested, however, that the defendant and his privies should have an immunity from further suit and that such immunity for practical purposes eventually results in passing all the legal interest in the chattel to the defendant or his privies. This would be admitted once the immunity is established, but the question is: Does the defendant have such an immunity?

to allow further actions against him would be double vexation for the same wrong. Likewise anyone claiming under the defendant, it is said, will be free from suit.<sup>40</sup>

Of course, if it is assumed that after a judgment is rendered against a defendant in an action of trover the plaintiff is precluded from bringing a further action of any kind, and denied the privilege of recapture, then the defendant has an immunity and the plaintiff cannot be said to have a right to possession of the chattel. But is such an assumption justified? The question next to be examined is: Do any of the rules or principles of *res judicata*, especially the principle of double vexation for the same wrong, upon which the immunity is said to be based, preclude the plaintiff from maintaining an action against the defendant when an unsatisfied trover judgment in favor of the plaintiff is on record? Further, can it be said that there is an immunity from further suit on the part of the defendant in such a case—an immunity which he may transfer to his assignees and thereby enable them to defend any action brought by the plaintiff for the chattel? On this latter question certainly there are authorities holding that a transferee acquires no such immunity.<sup>41</sup> There have been American cases cited,<sup>42</sup> for the purpose of showing that such an immunity does exist on the part of the defendant and his transferees. It becomes necessary to examine the cases which touch upon the latter proposition.<sup>43</sup>

<sup>40</sup> *Ibid.*

<sup>41</sup> *Osterhout v. Roberts*, 8 Cow. 43 (N. Y. 1827); *Goff v. Craven*, 34 Hun 150 (N. Y. 1884); *Spivey v. Morris*, 18 Ala. 254 (1850); *Ledbetter v. Embree*, 12 Ind. App. 617, 40 N. E. 928 (1895); *Largilliere Co., Bankers, v. Kunz*, *supra* note 9.

<sup>42</sup> *Supra* note 39, at 744, n. 8. The American cases there cited are: *Woolley v. Carter*, 2 Halst. 85 (N. J. 1823); *Rembert v. Halley*, 10 Humph. 513 (Tenn. 1850); *Lovejoy v. Murray*, 3 Wall. 1 (U. S. 1865); *Smith v. Clark*, 37 Utah 116, 106 Pac. 653 (1909), 26 L. R. A. (n. s.) 281 (1910); *Mead v. Mead*, 115 Minn. 524, 132 N. W. 1132 (1911); *Oliver v. Grand Ronde Grain Co.*, 72 Ore. 46, 142 Pac. 541 (1914); *Rauer v. Rynd*, 27 Cal. App. 556, 150 Pac. 780 (1915).

<sup>43</sup> *Oliver v. Grand Ronde Grain Co.* and *Woolley v. Carter*, both *supra* note 42, will not be discussed, as they do not seem to bear directly on the point. *Oliver v. Grand Ronde Grain Co.* declares that mere passage of time will not make a new issue to sustain an action for damages when one judgment for damages for the same chattel has been rendered. This, of course, would be admitted; i. e., that successive actions of trover cannot be maintained by the plaintiff against the same defendant for the same conversion. But it is believed that there is a different case presented where the plaintiff is later seeking to



In *Rembert v. Halley*<sup>44</sup> the plaintiff had interpleaded in a Louisiana case and had asked for the proceeds of certain corn, which had been sold, and also for damages. The judgment allowed the plaintiff the net proceeds of the corn but did not allow damages for the illegal seizure. The plaintiff sued again in a Tennessee court for damages arising from the illegal seizure. The court held the action could not be maintained, saying:

"In [the first] suit a claim for damages was 'set up in the pleadings' and properly formed a part of the plaintiff's action, and was allowable by the law of Louisiana, upon proper proofs of damages sustained. And whether the failure to recover such damages was owing to the negligence of the party, or to the error of the court, the judgment forms a positive bar to another suit for the recovery hereof."<sup>45</sup>

It can readily be seen that the doctrine of *res judicata* was properly applied in this case, for the plaintiff's claim to damages had been passed upon negatively by a court of competent jurisdiction, and the plaintiff cannot re-litigate a cause which has been decided adversely to him. In the present discussion it is admitted that, if a court of competent jurisdiction should adjudge that the plaintiff in a trover action was not entitled to the possession of the chattel, the question of another action involving this point would not be debatable.<sup>46</sup>

The case of *Lovejoy v. Murray*<sup>47</sup> deals with a second action of trespass against joint trespassers after judgment had been obtained against one of the wrongdoers. This case was a factor in deciding the American rule to be that an unsatisfied judgment against one joint tort-feasor is not a bar to an action against

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regain possession of the chattel itself after a judgment in trover has been entered in his favor but remains unsatisfied. See cases cited *infra* notes 59 and 61. *Woolley v. Carter*, *supra* note 42, at 88, merely presents a dictum in which the court cites language from *Brown v. Wootton*, *supra* note 3, and says that a judgment in trespass changes the property in the goods. It concerns only a situation in which an action of trespass is brought, and the court is discussing the proper form of verdict for trespass, and is not concerned with a subsequent action of replevin following a trover action.

<sup>44</sup> *Supra* note 42.

<sup>45</sup> *Ibid.* 517.

<sup>46</sup> *Supra* note 5.

<sup>47</sup> *Supra* note 42.

the others, this view being contrary to the English rule.<sup>48</sup> The plea of double vexation was made by the defendant, but Miller, J., said:

“For while this principle, as that other rule, that no man shall be twice vexed for the same cause of action may be well applied in the case of a second suit [in trespass] against the same trespasser, we do not perceive its force when applied for the first time against another trespasser in the same matter”.<sup>49</sup>

The counsel for the defense was merely trying to get the court to follow the English view, but the court, perceiving the distinction between the doctrines of “merger of remedies” and the principle of double vexation, refused to be side-tracked. It is quite easy to see that the court, in its dictum to the effect that double vexation might be a defense, was referring to a second action of trespass against the same man. It would be fruitless to sue again in trespass for damages for the same wrong after one judgment had been rendered for the plaintiff; the plaintiff would be seeking the same remedy upon the same cause of action, and the doctrine of double vexation would bar the second action. In a case, however, in which the plaintiff has recovered a judgment in trover and has found it ineffective, quite a different remedy would be sought if he then brings replevin to regain possession of the chattel. It would seem that there is a valid distinction between these two types of situations, and it appears that some courts have recognized the distinction.<sup>50</sup>

Several Pennsylvania cases present dicta to the effect that “title passes” to the defendant when a judgment is entered for the plaintiff in an action of trover.<sup>51</sup> An examination of these cases shows that the dicta were taken from the early English cases dealing with the doctrine of “merger of remedies”, the dicta in those cases being accepted as the real holding of the English courts. In fact it seems that the issue as to whether an un-

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<sup>48</sup> *Supra* note 12.

<sup>49</sup> *Lovejoy v. Murray*, *supra* note 42, at 16.

<sup>50</sup> See *supra* note 6.

<sup>51</sup> *Supra* note 3.

satisfied judgment in trover bars a subsequent action in replevin for the same taking and between the same parties has never really been presented in Pennsylvania except in a lower court. In *Singer v. Yaduskie*<sup>52</sup> an action of replevin was brought for a sewing machine, and the defendant pleaded as a defense an unsatisfied judgment in trover for the value of the machine, which judgment had been entered in favor of the plaintiff. The district court sustained the plea, seeming to base its decision upon the doctrine of election of remedies, and it referred to dicta in prior Pennsylvania cases to the effect that the judgment in trover vested "title" in the defendant. In declaring that trover and replevin are inconsistent remedies and that the doctrine of election of remedies applies to them, the court was certainly out of line with the great weight of authority in America.<sup>53</sup> The doctrine of double vexation or *res judicata* was not mentioned in *Singer v. Yaduskie*.

In *Smith v. Clark*<sup>54</sup> the plaintiff brought an action for false imprisonment and malicious prosecution. As negating the probable cause, the plaintiff alleged ownership of the bricks upon which the criminal charge of larceny was based. The defendant introduced a judgment which declared the defendant to be the owner of the bricks. The court held that this judgment was conclusive evidence between the parties as to ownership. Of course this holding was correct, but again it differs from the question with which we are concerned, for the court is merely saying that a judgment declaring a defendant to be the owner of a chattel will preclude the plaintiff from inquiring afterward into the question of ownership. Clearly, *res judicata* would be properly invoked against the plaintiff should he try to re-litigate the question of right to possession of the chattel after a court of competent jurisdiction had said that he, the plaintiff, did not have such right.<sup>55</sup>

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<sup>52</sup> *Supra* note 3.

<sup>53</sup> *Supra* note 11.

<sup>54</sup> 37 Utah 116, 106 Pac. 653 (1909).

<sup>55</sup> *Supra* note 5.

In the case of *Mead v. Mead*<sup>56</sup> the plaintiffs had recovered a judgment in trover for corn which had been converted by the defendant. The judgment had been paid, but a second action of trover was brought by the plaintiff. The court held that if it covered the same corn the former judgment would be a bar. This, of course, was a proper holding, since all property interest is vested in the defendant when the judgment in trover has been paid.

In *Rauer v. Rynd*<sup>57</sup> Rauer sued Finn and Rynd in replevin for an automobile. The right to possession was directly in issue, and the judgment was for the defendants. Rauer later brought replevin against Braden, a purchaser from Rynd, but the court held that "title" to the chattel had been adjudged to be in Rynd, and, since Braden was in privity with Rynd, the second action sounding in replevin could not be maintained against Braden. Again we have the situation in which the plaintiff has been adjudged in a former action not to have the right to possession of a chattel, and in which he is trying to re-litigate the matter and the doctrine of *res judicata* is applicable.

None of these American cases decides that one who takes from a defendant against whom a judgment has been rendered for the conversion of a chattel, the judgment remaining unsatisfied, is immune from suit by the former plaintiff to regain possession of the chattel or damages for its conversion; nor does any case hold that such a defendant is immune. It will be noted that the above cases fall into two categories: (1) the right to possession of a chattel has been put in issue in a former suit, and adjudged to be in the defendant; (2) the plaintiff has recovered a judgment for money damages and seeks to bring another action for money damages against the same defendant for the same cause of action. The cases in both of these categories are properly explainable by the doctrine of *res judicata* and double vexation.<sup>58</sup> Our situation, however, does not fall within either of these categories. We have a plaintiff who has been successful

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<sup>56</sup> *Supra* note 42.

<sup>57</sup> *Supra* note 42.

<sup>58</sup> *Supra* notes 5 and 7.

in a former trover action, the judgment in which remains unsatisfied, seeking a distinctive remedy. A recent Connecticut case seems to recognize this distinction. In the case of *Farley-Harvey Co. v. Madden*<sup>59</sup> the plaintiff brought an action under the statute which provided for the attachment of the body of the defendant when he concealed or removed personal chattels to defeat his creditor. The defendant pleaded that there was another action pending upon the debt in another court of the state whereby the plaintiff was seeking to recover the same debt, and he pleaded such action in abatement of the present one. The court held that the other action was no bar to the present action, saying:

“It is obvious that the plaintiff in an action under the statute is not asserting the same right or complaining of the same violation of that right as he is when he brings suit simply for the collection of the debt, nor is he entitled to the same relief using that expression to include the means he may take to obtain payment for the damages he has suffered. The cause of action under the statute involves in part the same issues but it is not the same as one brought simply for the collection of the debt.”<sup>60</sup>

In other words, the court is simply saying that the pendency of an action to collect a debt is no ground for abating another action concerning the same debt, when in the second action a substantially different remedy is asked for. The mere fact that both suits arose out of the original wrong makes no difference if the remedies sought are substantially different. It would seem that the same principle is applicable where the remedy sought in the second action is the possession of the chattel by replevin, instead of the remedy previously sought in trover and found ineffective. It is believed that the principle enunciated by the Connecticut court is the one which distinguishes the case in which the plaintiff seeks a second remedy in replevin for recovery of the chattel when his trover judgment remains unsatisfied.

A California court has recognized the difference between the

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<sup>59</sup> 136 Atl. 586 (Conn. 1927).

<sup>60</sup> *Ibid.* 587.

objectives of an action in replevin and those of an action in trover. In the case of *Nickerson v. California Stage Company*<sup>61</sup> the plaintiff, bringing an action of replevin against the defendant, recovered a judgment for the restitution of the chattel, and damages for its illegal detention. The damages were paid, but the chattel was not returned to the plaintiff, who began an action against the same defendant for the value of the chattel. It was urged that the recovery in the former replevin action was a bar to the action of trover, but the court held that it was not, saying:

“The judgment in replevin constitutes no bar to this action, unless it be shown that it has been satisfied. The cause of action was in both cases the same, but the object was essentially different. In the one case, the plaintiff sought to recover a specific personal chattel, which was wrongfully detained; in the other, the value of such chattel, when, owing to the acts of the defendants, it was not in his power to procure a return.”<sup>62</sup>

The court then proceeds to show that where the *cause* and *object* of two actions are the same, a judgment in the former action is a bar to the second action. The court states that the judgment for the plaintiff in the former replevin action was conclusive evidence of the plaintiff's “title” to the chattel, and that it only remained for the court in the trover action to assess the value of the chattel.

This case seems to be directly in point with the problem under discussion, for the factual situation is just the converse of the situation where the plaintiff has recovered a trover judgment, which remains unsatisfied, and brings an action in replevin to recover the chattel.<sup>63</sup> It would seem that a stronger case is

<sup>61</sup> *Supra* note 6.

<sup>62</sup> *Ibid.* 521.

<sup>63</sup> In *Hatch v. Coddington*, 32 Minn. 92, 19 N. W. 393 (1884) the plaintiff was denied an action of replevin for certain bonds, when the defendant pleaded a former recovery by the plaintiff in a statutory action similar to trover. It does not appear, however, whether or not the first judgment was satisfied. If satisfied, of course the plaintiff could not sue the defendant again upon the same cause of action. The court based its decision on the doctrine of *res judicata* but cited no cases to illustrate the principle it followed. See *Veline v. Dahlquist*, 64 Minn. 119, 66 N. W. 141 (1896), where an action for damages was denied a plaintiff who had formerly recovered a judgment for the specific chattels and damages, when such judgment had been satisfied. Of course, this was a satis-

presented in the latter instance; for, as will be shown later, the defendant can prevent replevin in the first instance by concealing the chattel, and the remedy of replevin, when the defendant is judgment-proof, is the only efficacious remedy available for the plaintiff.

The point made by the court in *Nickerson v. California Stage Company* that the judgment for the plaintiff in the former action of replevin was conclusive evidence of his right to the chattel as against the defendant, and that in the second action brought against the defendant it only remained for the court to assess the value of the chattel, and that the "title" (right to possession) was not again to be inquired into, seems to offer a key to the solution of our problem. It seems reasonable to say that, where the plaintiff is a holder of an unsatisfied judgment in trover and brings an action in replevin to regain the chattel, he is not re-litigating nor attempting to re-litigate the "title" to the chattel. If the former action in trover had gone against the plaintiff, it certainly would be held that the judgment conclusively adjudicated the "title" to be in the defendant and that the plaintiff could not thereafter question such adjudication. Why, then, could we not say that, when the plaintiff has a judgment in trover for the conversion of the chattel and introduces it in evidence to sustain a subsequent action in replevin, the former judgment conclusively adjudicated "title" to be in the plaintiff and that the defendant cannot refute it? Clearly it would seem that this should be so, unless the defendant can show some transfer of "title" subsequent to the judgment in trover. Certainly the plaintiff is not trying to re-litigate the right to the chattel in the action in replevin, for this is the last question he would want opened. It would seem that the doctrine of *res judicata* should have no application whatsoever to the plaintiff's claim in replevin, as the court could treat his writ of replevin as corresponding to the supplementary writ of recovery provided in England, since such supplementary procedure effects the same result as an action in replevin.

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factory holding because the former judgment had been satisfied. From the whole tenor of *Hatch v. Coddington*, later cited in *Veline v. Dahlquist*, it would seem that the first judgment had been satisfied.

One of the reasons urged for recognizing the "immunity theory" is that it protects one who takes from the defendant after he has had a judgment against him, although such judgment remains unsatisfied. It may be questioned whether the courts should be eager to protect one who buys from such a defendant, either without knowledge of the judgment on record or with knowledge and reliance on such judgment. The mere fact that *A* has a chattel in his possession, in the absence of *indicia* of ownership, is not sufficient to protect *B*, who, believing that he acquires a good "title", buys from *A*. In analogous situations this seems to be well settled.<sup>64</sup> Again, if the purchaser knows that there is a judgment on record against the defendant from whom he purchases, and knows that such judgment is unsatisfied, it hardly seems that the purchaser can be said to be *bona fide*. Nor is it easy to appreciate any reason why a purchaser under such circumstances should be treated tenderly, with every protection thrown around him, at the expense of a plaintiff who holds an unsatisfied, and probably worthless, judgment.

It seems fairly clear that under the "immunity theory" any taker from the defendant, even a mere donee, would be protected from further suit by the plaintiff.<sup>65</sup> A strict adherence to this view would work some peculiar results in our present law concerning joint converters. Suppose that *A* and *B* have jointly converted a chattel belonging to *P*. *A* has the chattel in his pos-

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<sup>64</sup> It is, of course, well settled that possession alone is not sufficient to protect a buyer from one having mere possession. The purchaser takes no greater legal interest than his vendor had. *McNeil v. Tenth National Bank*, 46 N. Y. 325 (1871); *Shafer v. Lacy*, 121 Cal. 574, 54 Pac. 72 (1898); *WILLISTON, SALES* (2d ed. 1909) § 313. A situation, however, which bears a closer resemblance to ours is the one in which a person purchases from a conditional vendee, there being a recording of the conditional sale sufficient to give the purchaser constructive notice of the conditional vendee's "title". *Charles v. Valdosta Foundry Co.*, 4 Ga. App. 733, 62 S. E. 493 (1906); *Keys Co. v. First Nat. Bank*, 22 Okla. 174, 104 Pac. 346 (1909), *aff'd*, 229 U. S. 179, 33 Sup. Ct. 642 (1913). See 35 *CYC.* 350, and *WILLISTON, SALES*, § 327, for a collection of authorities.

The only cases found in which the claims of a purchaser from a defendant in trover have been adjudicated have uniformly denied the purchaser an immunity from suit. *Ledbetter v. Embree*, 12 Ind. App. 617, 40 N. E. 928 (1895); *Goff v. Craven*, *supra* note 41; *Spivey v. Morris*, 18 Ala. 254 (1856).

<sup>65</sup> Note (1921) 30 *YALE L. J.* 742, 748, n. 20. In the only case found presenting such an issue, *Goff v. Craven*, *supra* note 41, a gratuitous bailee from the defendant in an action of trover, after the judgment, was held responsible in an action of replevin.



session, but hides it so that it cannot be replevied; consequently, *P* brings an action of trover against *A* for the conversion of the chattel, and recovers a judgment for its value. *B* then takes the chattel from *A*, paying nothing for it, and *P*, discovering the chattel in the possession of *B*, brings an action of replevin against *B*. *B* pleads that he is in privity with *A*, against whom a judgment in trover has been rendered for the value of the chattel, and that under the "immunity theory" he, *B*, is immune from further suit. So far as replevin is concerned, *B*'s contention should be successful under this theory, for in order to sustain replevin the plaintiff must have the right to possession (in some states the "right to possession against all the world") at the time of the commencement of the action.<sup>66</sup> Unlike a plaintiff in trover, a plaintiff in replevin cannot rely on his right to possession at the time the chattel was first unlawfully detained. If it is admitted that *B* has an immunity from the time of judgment against his privy *A*, then *P*, at the time of the commencement of the replevin action, would not have sufficient right to possession to sustain replevin. Under the "immunity theory" the defendant would necessarily be successful in resisting the action of the plaintiff, if we are to follow the natural results of such theory; and yet this would be contrary to the prevailing view in the United States as to the responsibility of joint wrongdoers.<sup>67</sup>

The comparatively recent Idaho case of *Largilliere Co., Bankers v. Kunz*<sup>68</sup> seems to show very clearly that the court would not recognize on the part of the defendant, who has an unsatisfied trover judgment against him, any immunity which he is capable of transferring to a purchaser. There the Freedom State Bank converted certain sheep to which the plaintiff had a right to possession, and drove them across into Wyoming. Of course they could not be replevied, so the plaintiff was forced to bring trover for their value. This the plaintiff did, and recovered

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<sup>66</sup> *Cary v. Hewitt*, 26 Mich. 228 (1872); *Moriarity v. Stofferan*, 89 Ill. 528 (1878); *Wattles v. Dubois*, 67 Mich. 313, 34 N. W. 672 (1887). See SHIPMAN, COMMON LAW PLEADING (3d ed. 1923) 127.

<sup>67</sup> *Supra* note 13.

<sup>68</sup> 244 Pac. 404 (Idaho 1925).

a judgment against the Freedom State Bank. Some time thereafter, Kunz, who purchased the sheep in Wyoming from the Freedom State Bank, drove the sheep back into Idaho. The trover judgment being unsatisfied, the plaintiff brought an action of replevin against Kunz to recover the sheep. Kunz pleaded that the former action in trover against the Freedom State Bank constituted an election of remedies, and that the plaintiff was barred from further actions for the sheep. The court held that such defense was not good, and pointed out the fallacy in supposing that trover, like assumpsit, proceeded on the theory of a sale of the chattel. The court, moreover, pointed out that there was a difference between the remedy afforded by replevin and that afforded by trover, and that the plaintiff would not have been able to bring replevin in the first instance as the sheep were outside of the state. While it does not appear at what time Kunz purchased the sheep from the Freedom State Bank (*i. e.*, whether before or after the former judgment in trover was entered), yet the court certainly made no point of the matter; thereby implying that such fact was immaterial. Clearly this case does not recognize the immunity of the transferee from further actions.

It is significant to note that the Idaho court recognized the unfairness resulting to a plaintiff who, having been prevented from instituting an action of replevin by a removal of the chattel from the jurisdiction, is denied an action of replevin upon a return of the chattel to the state. From a practical standpoint, a court is equally powerless to retake the chattel for the plaintiff when the defendant has concealed it within the jurisdiction. In order to realize that the concealment of chattels to prevent the action of replevin is not a fanciful but a realistic situation, we need only examine the equity cases which have allowed specific restitution because of the unique value of goods which a defendant conceals so that they are not subject to replevin.<sup>69</sup>

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<sup>69</sup> Farnsworth v. Whiting, 104 Me. 488, 72 Atl. 314 (1908). This case turns upon the inability to locate keys for the purpose of replevying them. The court allows specific restoration, although the keys were not of the unique value generally necessary for equity's intervention. It is significant to note that Maine provides by statute (ME. REV. STAT. (1916) c. 79, par. 9) for the specific restoration of chattels by a court of equity, when the chattels are not repleviable because they cannot be reached. Maine thus recognizes the injustice to the

It may be suggested that to allow the plaintiff an action of replevin against the same defendant would give the plaintiff an opportunity to get back the chattel and at a later date enforce the money judgment recovered in the former action of trover. This obviously could not occur, as there are cases holding that, if the chattel is recovered by a plaintiff after he has recovered a judgment for its value, the judgment for the chattel's value should be expunged from record.<sup>70</sup> Besides, such objection could be urged with equal force and logic against allowing a person an action against other joint tort-feasors after he has recovered a judgment against one of them. Such a possibility has never prevented the American courts from allowing the second action when the first judgment remained unsatisfied.

Making allowance for the English ruling as to "merger of remedies" which has no direct relation to the doctrine of *res judicata* or double vexation, and which even prevents a plaintiff from proceeding against a second joint tort-feasor, in conclusion we may say that there is no direct authority declaring that an action of replevin is barred because the plaintiff has an unsatisfied judgment in trover. Moreover, the great weight of American and English cases holds that the plaintiff still has a right to possession of the chattel after recovering a judgment in trover. England secures this right by a supplementary writ of delivery. Further, there is no sound basis for saying that the American cases which declare that such a plaintiff still has a right to possession mean nothing because of a transferable immunity from suit accruing to the defendant, for it is not established that the plaintiff is precluded from the action of replevin, and certainly there are

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plaintiff who is deprived of replevin by the concealment of chattels by the defendant. See *McGowin v. Remington*, 12 Pa. 56 (1849), where specific restoration was given because of the unique value of the articles, and see 4 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) § 1402, for general statement and collection of authorities.

<sup>70</sup> *Coombe v. Sanson*, 1 Dowl. & Ry. 201 (Eng. 1822); *Barb v. Fish*, *supra* note 15; *Largilliere Co., Bankers, v. Kunz*, *supra* note 9. See 34 C. J. tit. Judgments, §§ 1114, 1119, for cases as to satisfaction of judgment and defendant's right that the judgment be expunged from record. And see *Hanbrich v. Heaney*, *supra* note 15.

cases declaring that the defendant's assignees have no immunity.<sup>71</sup> It would seem that the plaintiff ought to have an action of replevin against the defendant, as the purpose and effect of replevin are different from those of trover. Especially is it desirable in America to allow the action of replevin, since we do not have the supplementary remedy provided in England, and to allow the action would not mean a re-litigation of the same cause of action, inasmuch as the previous judgment in trover is conclusive evidence of the plaintiff's right to the chattel and such right should not be inquired into again.

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<sup>71</sup> Spivey v. Morris; Ledbetter v. Embree, both *supra* note 64; Goff v. Craven, *supra* note 41.